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[1990] Alta. L.R.B.R. 437

I.W.A. CANADA, LOCAL 1-207 V. ZEIDLER FOREST INDUSTRIES LTD. AND THE LABOUR RELATIONS BOARD FOR THE PROVINCE OF ALBERTA. GE-00180. GE-00124. September 5, 1990.

Appeal Nos. 8903-21611 and 8903-16380, Before Mr. Justice R.L. Berger

For I.W.A. Canada, Local 1-207: D.A. Stewart, Q.C. and S.C. Edge

For Zeidler Forest Industries Ltd.: M.C. Welsh

For the Labour Relations Board: J.L. Wallace

Earlier Alta.L.R.B.R. citations: [1989] Alta.L.R.B.R. 341, [1989] Alta.L.R.B.R. 397

Certiorari - Unfair Labour Practices - Remedies - Terminations tainted by anti-union animus - Board upholding terminations in absence of evidence in mitigation of penalty - Board decisions upheld - No jurisdictional error committed - Decision not patently unreasonable

Unfair Labour Practices - Remedies - s. 143 - Terminations tainted by anti-union animus - "Proper and sufficient cause" existing for terminations - Existence of proper and sufficient cause not fettering Board's authority to fashion remedy - Section 143 not applicable where disciplinary action tainted by anti-union motive

Remedies - s. 142(5) - Employees terminated for just cause but terminations tainted by anti-union motive - Employer violation of Act not dictating remedy of reinstatement - Remedies to be determined on merits of each case

In previous proceedings the Board determined that the Employer had violated s. 137(3)(a) of the Labour Relations Act by terminating 23 striking employees (see [1987] Alta. L.R.B.R. 31). That decision was ultimately upheld by the Court of Appeal (see [1989] Alta. L.R.B.R. 33). When the matter of remedies came before the Board, the Employer led evidence of cause for dismissal. No contrary evidence or evidence in mitigation of penalty was led. The Union argued that a remedy of reinstatement was automatic. The Board upheld the terminations (see [1989] Alta. L.R.B.R. 341). The Union's application for reconsideration was dismissed (see [1989] Alta. L.R.B.R. 397). The Union applied to the Court of Queen's Bench to quash both

decisions.

The applications were dismissed. Neither the fact that the employer dismissed employees out of anti-union motive in violation of the Act, nor section 143 of the Act allowing dismissal for “proper and sufficient cause”, fetters the Board’s discretion to determine the appropriate remedy. Section 143 does not immunize an employer from the consequences of its unlawful action. Nor are illegal picket line activities automatically spared from sanction by the employer’s unlawful act. Each case must be examined on its own merits to arrive at the appropriate remedy. The Board neither committed jurisdictional error nor made a patently unreasonable decision.

MR. JUSTICE R.L. BERGER: The issue here is whether termination of employment motivated, in part, by anti-union animus and constituting, accordingly, a violation of s. 137(3)(a) of the *Labour Relations Act*, compels the remedy of reinstatement pursuant to s. 142(5)(b)(i) of the Act.

The proceedings under review are a continuation of unfair labour practice proceedings commenced by the Applicant, I.W.A. Canada, Local 1-207 more than three years ago. The Union complained that the Respondent Zeidler Forest Industries Inc. had bargained in bad faith and had unlawfully terminated a large number of employees. The terminations took place during a lawful strike attended by severe picket line violence.

On the 29th of January, 1987 the Labour Relations Board concluded that two employees (Antypowich and Bellrose) who had participated in acts of violence on the picket line “were not simply taken back because of their remorse, they were taken back, at least in substantial part, because they had turned on the Union, had organized the petition and the meeting to challenge the Union leadership, and had been a party to efforts to call the Union leadership credibility into question” (at p. 57). The Board went on to observe:

“We have come to the conclusion that the Employer in principle had no real objection to continuing to hire persons who had engaged in acts of violence, and was prepared to accept the potential for mitigation. We have concluded on the basis of the treatment afforded Antypowich and Bellrose, that the Employer’s decision to absolutely terminate the 23 employees is not free of anti-union motive, was made in part because they had exercised, and chose to continue to exercise their right to participate in the strike whereas the two that returned chose to abandon that right in favour of a return to work and was discriminating on this basis. We therefore find a violation of s. 137(3)(a) to be established with respect to the terminations of the 23 employees.”

The Board then addressed the issue of an appropriate remedy, given the Employer’s breach of the Act:

“However we are not in these circumstances prepared to order that these employees be reinstated to their status as employees without more. We are convinced that, even without anti-union animus, that the Employer would have imposed, and would have been justified in imposing, some discipline as a result of this picket line misconduct. Under s. 142(5) our power is to rectify the Act giving rise to the breach of the section. We believe that the best way for the violation to be rectified is for the parties to agree upon a mechanism that requires the question of an appropriate penalty for the offenses that have been established to be reviewed by some independent third party. Only in this way can we adequately balance the interests involved so that the employer’s established right to discipline can be balanced against the employee’s right to be dealt with free of improper considerations based on their participation in the strike.

(emphasis added)

In its “Clarification Decision” at [1987] A.L.R.B.R. 300, the Board set out its directions to the panel to be established to decide the issue of penalties. The Board said this at p. 302:

“The Board’s sense of the best way to rectify the breach of the Act, and to ensure that justice was done to both sides, was to try to find a way of restoring the parties to that position they would have been in had the employer responded to the situation involving these employees in a frame of mind uncoloured by anti-union sentiment... What the Board wishes to establish is an objective decision of what an employer’s decision should have been, based solely on the cause it was faced with rather than on any extraneous anti-union sentiments. Once that is established the Board intends that the tri-partite Board’s decisions be substituted for the outright terminations of the employees in question. This is not to rule out the possibility that the decision might still involve outright termination, some lesser penalty, termination with damages in lieu of notice, or some other solution.

Our direction to the tri-partite Board is to assess the situation the employer faced in respect of each of these 21 employees, including any relevant mitigating factors free of any concerns arising out of the employees having exercised their rights to engage in a lawful strike and lawful activity related thereto, and decide what an appropriate response by the employer would have been with respect to each of the 21 employees, given any and all appropriate employer concerns over the conduct in question. It is our intention that the employees then be restored to the position they would have been in had the tri-partite Board’s decision been made rather than the employer’s decision which was to terminate each employee absolutely.”

(emphasis added)

In the result, the parties were given a time-limited opportunity to agree on a tripartite adjudication panel to perform the disciplinary evaluation in place of the Board. Absent an agreement, the Board reserved jurisdiction to determine the appropriate remedy in individual cases. No such agreement was reached.

In the interim, the Employer sought judicial review of the Board's decision. The matter was considered by the Court of Queen's Bench and by the Court of Appeal. In vacating the certiorari order of Madam Justice Trussler, Mr. Justice Bracco speaking for the Court of Appeal, observed:

“It is my view that the Board very carefully examined all of the relevant evidence and then made a finding of fact that the dismissal of the 23 was tainted by an anti-union animus. There is evidence, which was carefully considered and weighed by the Board to warrant that finding of fact, namely that the Employer by re-hiring two of the worst offenders ‘in principle had no real objection to continuing to hire persons who had engaged in acts of violence and was prepared to accept the potential for mitigation’ .”

The Court of Appeal, moreover, could find no fault in the Board's decision to encourage the Employer and the Union to seek agreement on an acceptable method of arbitrating an appropriate rectification order. Mr. Justice Bracco observed at p. 10 of the unreported decision:

“Although the Board offered to the disputing parties an opportunity of resolving the situation by agreement, the Board did not in fact divest itself of its authority and responsibility. In effect the Board, having made its findings of fact, urged the parties to attempt to resolve the matter, but reserved unto itself the right to make its decision if the parties could not agree. ... Although it has not made its decision, it has not declined to do so. ... When the Board has made its decision, then the correctness of that decision can be challenged. It is inappropriate for the Court to anticipate what the Board will decide.”

When the matter of remedies was ultimately remitted to the Board for its decision, the Board referred to its earlier directions to the tripartite panel and observed as follows:

“The quotations above set out the parameters within which the Board will assess this matter. The agreement to refer the matter to a consensual third-party board is gone. Instead the Board will proceed itself in the same way it directed the consensual board to proceed.”

(emphasis added)

The Board saw its role in the following terms:

The Board's task at this stage of the proceedings is not to reconsider its earlier decisions. The Board found a breach of the Act. We fashioned a remedy to put the employees, as best we were able, in the same position they would have been in but for that breach. In our original decision, we could have simply rescinded the discipline, as was done in *Adams Laboratories*. We expressly decided that would be inappropriate. We said, in simple terms, that a neutral third party should remake the decision, free of improper motives. This preserved the employer's legitimate rights under section 143 of the Act."

The Board elected to examine the facts pertaining to each of the terminated employees. The Board noted:

"The Board's proceedings provided, and we intended them to provide, an opportunity for these employees to offer any form of evidence or explanation that might speak in their favour. They might have offered some explanation of their involvement in the incidents in question. They might have disputed, or offered an alternative view of, the employer's evidence. They might have explained their guilty pleas. They might have alleged provocation by management or others within the Union ranks. They might have claimed others incited them. They might have admitted involvement but argued for consideration based on prior blameless employment. At least they might have apologized and expressed a desire and willingness to resume their employment once their lawful strike is over.

Not a single complainant chose to take the stand on their own behalf. There may well be reasons for this. However, these complainants have senior and experienced Counsel and have chosen to remain silent. They have done so in the face of the Board's earlier rulings and the employer's additional evidence. While their [sic] is no guarantee explanations or mitigation would be accepted, as it is now the Board has little before it to justify leniency."

The Board then reached the following conclusions:

"It is the Board's decision that the Employer had just cause to dismiss each of the twenty-two employees. In each case the conduct complained of goes well beyond normal picket line activity. In each case the conduct was such that, if unexplained or unmitigated, served to destroy the necessary relationship between employer and employee. In each case the activity was criminal and directed deliberately at the Employer, its staff and its operations. In each case the activity took place against an on-going backdrop of unacceptable violence and sabotage..."

In the Board's judgment dismissal was the appropriate response in each of these circumstances. An employer in similar circumstances, uninfluenced by anti-union motives, would have arrived at a similar conclusion on the basis of the unexplained facts before us."

The Board's power to remedy a violation of s. 137(3)(a) is set out at s. 142(5) of the Act.

142(5) When the Board is satisfied after an inquiry that an employer ... has failed to comply with any provision of this Act that is specified in a complaint, the Board may issue a directive to rectify the act in respect of which the complaint is made and without restricting the generality of the foregoing ...

(b) may issue a directive to require the employer...

(i) to reinstate any employee suspended or discharged contrary to this Act;

(ii) to pay to any employee or former employee suspended or discharged contrary to this Act compensation not exceeding a sum that, in the opinion of the Board, would have been paid by the employer to the employee, together with a sum not exceeding the amount of interest paid by the employee on money borrowed to support himself and his family during the time he was so suspended or discharged; ...

(iv) to rescind any disciplinary or pecuniary or other penalty taken or imposed contrary to this Act; ...

(vi) to pay to an employee in respect of a failure to comply with section 137 compensation not exceeding a sum that, in the opinion of the Board, is equivalent to the remuneration that would have been paid to the employee by the employer if the employer had complied with that section."

Section 143 of the Act reads:

“Nothing in this Act detracts from or interferes with the right of an employer to suspend, transfer, lay off or discharge employees for proper and sufficient cause.”

The Union has argued that a breach of s. 137(3)(a) is determinative of the result and that reinstatement must be ordered. The Employer has argued that s. 143 and the existence of proper and sufficient cause, even in the face of anti-union animus, is determinative of the result and that the ability of the Employer to terminate is unfettered. In my opinion, both submissions are in error.

Section 143 must not be read in isolation from other provisions of the Act. If just cause exists in the absence of anti-union animus, s. 143 codifies and preserves an employer’s right to terminate an employee. Section 143 does not, however, immunize an employer from the consequences that may otherwise flow from a breach of s. 137(3)(a) of the Act. On the contrary, the breach operates so as to deprive the employer of the benefit of s. 143. What might otherwise be a clear and unequivocal case of dismissal for cause is tainted when that decision is predicated, in part, upon anti-union animus. Section 143 has no application in such circumstances. To hold otherwise would be tantamount to licensing and condoning activities of the kind engaged in by the Employer in the case at Bar, activities which were found by the Board to be a clear breach of s. 137(3)(a).

It follows that the ability of the Board to fashion an appropriate remedy in the face of a breach of the Act is not, in my judgment, fettered by s. 143. Whereas the right of an employer to discharge employees for proper and sufficient cause is not detracted from nor interfered with by other provisions of the Act, the authority of the Board, in the face of a breach of the Act, to craft appropriate remedies pursuant to s. 142(5) is not circumscribed by s. 143.

Similarly, illegal activities by employees on the picket line are not spared from appropriate sanction by subsequent breaches of the Act on the part of an employer. To hold otherwise could produce an absurd result. By way of illustration only, if the Union’s argument prevailed, an employee who had engaged in acts of violence on the picket line resulting in a conviction for manslaughter would be entitled to reinstatement if his former employer had subsequently acted in contravention of the Act.

It follows that the fact that the terminated employees in the case at Bar were dismissed with just cause is not determinative of the remedial result pursuant to s. 142(5); the finding by the Board that the Employer was in breach of s. 137(3)(a) is also not determinative of the remedial result. Each case must be examined on its merits to arrive at an appropriate remedy.

The Board had clear and unequivocal evidence before it that acts of violence on the picket line did not so poison the employer-employee relationship so as to preclude reinstatement. Indeed, the Court of Appeal had noted that there was evidence which was carefully considered and weighed by the Board to warrant the

finding of fact that the Employer, by re-hiring two of the worst offenders, “in principle had no real objection to continuing to hire persons who had engaged in acts of violence and was prepared to accept the potential for mitigation.”

I have described in some detail the manner in which the Board proceeded. In doing so the Board made clear that no remedy was to be automatically ruled in or ruled out. Both reinstatement and outright termination remained a possibility. “Some lesser penalty, termination with damages in lieu of notice or some other solution” were not foreclosed. The Board properly reserved its jurisdiction to decide how rectification would apply to individual employees. The Board’s decisions necessarily contemplated that evidence relevant to each terminated employee’s situation be considered and evaluated.

The approach taken by the Board to the issue of “rectification” accords with the decision of this Court in *Re Alberta Food & Commercial Workers Union Local 401 and Labour Relations Board* (1983) 5 D.L.R. (4th) 534, where the Court upheld a Board remedial order that did not reinstate an unlawfully terminated employee. Greschuk, J. made the following observations:

“... [the] general power to rectify does not make it imperative for the Board to reinstate the employees to their former positions. The Board gave reasons why it refused to reinstate the employees to their former positions. Whether or not the general power to rectify ought to be used by the Board depends on the facts and circumstances in each case.”

Counsel for the Union was afforded every opportunity to adduce evidence that would allow the Board to exercise its discretion in a manner that would place the remaining terminated employees in the same position as Antypowich and Bellrose. Counsel chose not to do so. The Board’s hands were thereby tied. It had no alternative but to decline to order reinstatement.

I am mindful of the remaining grounds for review of the “Remedies Decision” of the Board as well as of those grounds advanced by the Union relative to the Board’s “Reconsideration Decision”. Although these grounds were not argued at length by counsel for the Applicant, they were not abandoned. Accordingly, I have considered them with care. In my opinion, they are without merit.

For the reasons given, I am unable to find that the Board misconstrued the issues before it or misdirected itself as to those issues. I am unable to find jurisdictional error, nor am I persuaded that the decisions of the Board are patently unreasonable.

In the result, the applications to quash both decisions of the Board are refused.