Dezentje v. Warchow, 2002 ABCA 249

Date: 20021029
Docket: 0003-0553-AC

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MR. JUSTICE BERGER
THE HONOURABLE MADAM JUSTICE PAPERNY
THE HONOURABLE MR. JUSTICE RITTER

BETWEEN:

JAN DEZENTJE, GORDON DOMBROSKY and DENIS ROY

Appellants

- and -

WILLIAM WARCHOW, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 424, CATALYTIC MAINTENANCE INC., GENERAL PRESIDENTS COMMITTEE FOR PLAN MAINTENANCE IN CANADA and ALBERTA LABOUR RELATIONS BOARD

Respondents

Appeal From The Order Of
THE HONOURABLE MR. JUSTICE R. P. MARCEAU
Dated the 25th Day of April, 2000 and the 26th Day of September, 2000
Filed the 5th Day of December, 2000

MEMORANDUM OF JUDGMENT

COUNSEL:

S. M. Renouf, Q.C.
For the Appellants

A. J. Landry, Q.C.
For the Respondent William Warchow

M. D. McGown, Q.C.
For the Respondent International Brotherhood
Of Electrical Workers Local 424

P. G. Ponting, Q.C. - no attendance
For Catalytic Maintenance Inc.

B. C. Chivers - present in gallery
For the Respondent General Presidents Committee
For Plant Maintenance In Canada

S. W. McLeod
For the Respondent Alberta Labour Relations Board

MEMORANDUM OF JUDGMENT

THE COURT:

[1] This appeal deals with the duty of fair representation on the part of a union to its members.

[2] The appellants were members of the International Brotherhood of Electrical Workers, Local 424 ("Local 424") and were employed by the respondent Catalytic Maintenance Inc. ("Catalytic") for the purpose of performing maintenance work at heavy oil tar sands facilities located near Ft. McMurray, Alberta. Their employment was governed by the terms of a collective agreement entered into between Local 424 and Catalytic. Outside of the collective agreement, Catalytic maintained a policy of granting leaves of absence in lieu of layoffs whenever it lacked sufficient work for all of its employees. The policy envisaged situations where it was anticipated that more work would be forthcoming shortly and laid off employees would be recalled. Rather than lay the employees off, a leave of absence was granted. This ensured that employees who had been laid off returned to work for Catalytic rather than being required to place their name at the bottom of the list maintained at the Local 424 hall.

[3] In April of 1991, when other employees of Catalytic were granted a leave of absence, the appellants were subjected to a layoff notice.

[4] The appellants sought and received assistance from Local 424 in advancing a grievance with respect to this differential treatment. However they soon became disillusioned with the aid they were receiving. When Local 424 advised that their chances of success were negligible and that Local 424 would not assist them further, they each filed a complaint with the Labour Relations Board (the "L.R.B.") alleging that Local 424 and others had breached the duty of fair representation. In their complaint, each of the appellants stated that he had been unjustly laid off, that he was displaced from his employment contrary to Article 11.500 of the Collective Agreement, and that he was discriminated against when his employer selected him for layoff. Each of the appellants requested reinstatement with full redress.

[5] The L.R.B. heard these complaints over the course of five years and on May 13th, 1999 upheld the complaints lodged by the appellants on the basis that they had established the arguable case that their layoff was a termination of their employment, or an unreasonable application of the employer's leave of absence policy: [1999] Alta. L.R.B.R. 267, [1999] A.L.R.B.D. No. 12. The L.R.B. held that an arguable case met the threshold to raise the duty of fair representation and that both Local 424 and the respondent Warchow had breached that duty.

[6] The respondents successfully sought judicial review in the Court of Queen's Bench. The chambers judge held that under s. 151 of the ***Alberta Labour Relations Code***, S.A. 1988, c. L-1.2 ("the ***Code***") any duty of fair representation on the part of Local 424 was restricted to matters

governed by the collective agreement and that the determination that the leave of absence policy was drawn into the collective agreement was patently unreasonable.

Standard of Review:

[7] The decision of the L.R.B. dealt with the interpretation of s. 151 of the ***Code,*** now s. 153 of the ***Labour Relations Code***, R.S.A. 2000, c. L-1, which states:

> s. 151(1) No trade union or person acting on behalf of a trade union shall deny an employee or former employee who is or was in the bargaining unit the right to be fairly represented by the trade union with respect to his rights under the collective agreement.

[8] This Court and the Supreme Court of Canada have previously determined that a labour relations board "operates in its own territory" when it deals with the duty of fair representation. See ***Gendron* v. *Supply & Services Union of the Public Service Alliance of Canada, Local 50057***, [1990] 1 S.C.R. 1298, [1990] 4 W.W.R. 385 and ***Gallagher* v. *Hotel Employees and Restaurant Employees International Union, Local 47*** (1994), 155 A.R. 260, 20 Alta. L.R. (3d) 41 (C.A.).

[9] The starting point for assessing the degree of deference applicable to any decision by an administrative tribunal is the pragmatic and functional test enunciated by the Supreme Court of Canada. See ***Union des employés de service, local 298* v. *Bibeault***, [1988] 2 S.C.R. 1048, 95 N.R. 161; ***Canada (Director of Investigation and Research)* v. *Southam Inc.***, [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1 and ***Pushpanathan* v. *Canada (Minister of Citizenship and Immigration)***, [1998] 1 S.C.R. 982, 160 D.L.R. (4th) 193. This approach requires the court reviewing a decision of an administrative tribunal to consider four factors:

1. A privative clause;
2. The expertise of the board in question;
3. The nature of the problem; and
4. The purpose of the Act.

[10] The ***Code*** of Alberta contains a strong privative regime as it contains both final and binding language, as well as language limiting the role of the courts. See ***Alberta Union of Provincial Employees, Branch 63* v. *Olds College***, [1982] 1 S.C.R. 923, 136 D.L.R. (3d) 1.

[11] With respect to expertise, the L.R.B. of Alberta is a dedicated board with significant expertise. Such expertise calls for curial deference.

[12] Here the problem involves the breach of the duty of fair representation and the remedy fashioned by the L.R.B. These are the types of problems that courts have recognized are properly resolved by the L.R.B. and not the courts. The main issue is whether the rights of the complainants arise under the collective agreement. This is a question that the L.R.B. is particularly suited to deal with.

[13] Finally, in dealing with the purpose of the Act, one of the purposes as stated in the preamble to the ***Code*** is to achieve "fair and equitable resolution of matters arising in respect of terms and conditions of employment".

[14] Applying the pragmatic and functional approach to the foregoing factors, we conclude that a high standard of deference is owed to the L.R.B. with respect to the questions it was dealing with arising from these complaints. Only errors which are patently unreasonable are subject to review.

Analysis:

[15] The L.R.B. determined that the grievances raised three issues:

1. The meaning and the alleged violation of article 11.500;

2. Whether the leave of absence policy was part of the collective agreement; and

3. Whether the layoff was a termination or an unreasonable application of the employer's leave of absence policy.

[16] The L.R.B. determined that the first issue lacked merit and that the second issue was not a collective agreement right. The appellants accept these determinations.

[17] On the third issue, the L.R.B. determined that there was an arguable case that arose out of the collective agreement which could found a grievance. It determined that termination was before it as the remedy sought was reinstatement and that implies termination. This determination is not patently unreasonable.

[18] When it weighed the appellants' chances of success based on a termination argument, the L.R.B. stated at para. 477 of its decision that they were "weak" and "modest". In arriving at this determination, the L.R.B. considered a representation from the respondent Warchow to the appellant Roy and at para. 444 of its decision quotes from that representation as follows:

> The evidence shows the company may have acted improperly when terminating you. Although the company legitimately reduced their number of employees substantially because of the shortage of work, I believe the company terminated you for other reasons. These reasons that go back over a period of one year were not handled properly by the company although attempts were made and cause me to rescind the layoff.

[19] The L.R.B. also referred at para. 517 to the representative of Local 424 exploring the possibility that despite appearing to be a layoff "it was tantamount to a dismissal without cause".

[20] This evidence shows that the L.R.B.'s determination that termination was arguable, with a modest chance of success, cannot be attacked as being patently unreasonable. We also note that in his supplementary reasons for judgment, the learned chambers judge described the layoff notice given only to the three appellants "as a colourable method of dismissal": (2000), 90 Alta. L.R. (3d) 180 at 184, 282 A.R. 27 at 44, additional reasons at (2000), 80 Alta L.R. (3d) 105, 282 A.R. 27 (Q.B.).

[21] Termination is specifically referenced in the collective agreement. The L.R.B. found that an arguable case was to be made grounded on termination. This established the required nexus to the collective agreement.

[22] This analysis flows in a logical stream and is not patently unreasonable.

[23] The L.R.B. also tied the issue of the layoff being an unreasonable application of Catalytic's leave of absence policy to termination. At para. 497 of its decision, it deals with both in a conjunctive manner and concludes that the case for the appellants is arguable but not really strong. At para. 499 of its decision, the L.R.B. concludes that Mr. Dombrosky and Mr. Dezentje had, at best, a one-third chance of success in arbitration. It suggests at para. 500 that Mr. Roy's chances were higher because of his long service and more particularly because Catalytic offered evidence that might be construed as it acting on complaints that had been grieved and settled.

[24] We can discern no error in this analysis and it serves to buttress the appellants' position vis-à-vis their layoff. This in turn adds to the reasonableness of the determination that a duty of fair representation arose.

[25] The next step in a duty of fair representation case is the examination of the actual behaviour complained of, to see if it breaches the duty of fair representation. The test to be followed was set out by the Supreme Court of Canada in ***Canadian Merchant Service Guild*** **v**. ***Gagnon***, [1984] 1 S.C.R. 509 at 527, 9 D.L.R. (4th) 641 at 654. The Court held that five principles are to be considered and applied at this stage. They are:

1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.

2. When, as it is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.

3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.

4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.

[26] Taking these five factors into consideration, we conclude that the L.R.B.'s decision that the duty had been breached is substantiated. The L.R.B. heard and references much evidence relating to the conduct of Mr. Warchow which indicates that he did not act in good faith, objectively and honestly. This determination is supported by many examples of his conduct and is far from being a patently unreasonable determination. Further, the L.R.B. links this conduct to Local 424. At para. 553 it suggests that at all times it was open to Local 424 to bring pressure to bear on Mr. Warchow to do what he was entrusted to do. It states that Local 424 had adequate warning through evidence of inaction and through reminders sent by the complainants that something was remiss.

[27] At paras. 568 to 572, the L.R.B. cites the information that was available to it and which led it to the conclusion that Local 424 and its international parent union jointly assumed the responsibility for the task involved in representing employees under the agreement. We conclude that the determination by the L.R.B. that Local 424, its international parent and Mr. Warchow were acting in concert is supported and is not patently unreasonable.

Remedy:

[28] At para. 602 of its decision, the L.R.B. directed that the complainants Dombrosky and Dezentje be compensated by Local 424 for a sum equal to one-third of their financial losses as a

result of their lost opportunity to arbitrate their grievances. The complainant Roy was directed to be compensated by Local 424 for a sum equal to monies he would have received had he accepted Catalytic's offer of June 26th, 1991, and returned to work as of July 15th, 1991.

[29] The direction for the appellant Roy was different than that for the appellants Dombrosky and Dezentje because the respondent Warchow had received an offer from Catalytic which would have resulted in the appellant Roy's return to work as of July 15th, 1991. As we can find no basis for interfering with the L.R.B.'s determination that Local 424 did not meet its duty of fair representation with respect to the appellant Roy, and as part of the conduct that led to this determination was the failure of the respondent Warchow to communicate the offer he received from Catalytic to Roy, we can see no reason for disturbing the award of compensation to Roy.

[30] Section 16(1), now s. 17(1), of the *Code* outlines the remedies available to the L.R.B. and in our views places the question of remedies squarely within the jurisdiction of the L.R.B. Again, to attack a determination that is squarely within the jurisdiction of the L.R.B., a determination of patent unreasonableness must be made. The remedy afforded the appellant Roy is not patently unreasonable.

[31] In dealing with the awards granted to the appellants Dombrosky and Dezentje the L.R.B. quoted from its previous decision in ***Martin* v. *Alberta Food & Commercial Workers' Union, Local 397***, [1985] A.L.R.B.D. 85-048 which in turn cited and applied case law from Saskatchewan and British Columbia establishing a remedy calculated on lost opportunity in circumstances involving solicitor's negligence. Local 424 submits that the L.R.B. made an error in law in that it adopted this method of calculating damages. It notes that the correct common law test in Alberta for establishing damages in a solicitor's negligence case is that set forth by this Court in ***Fisher* v. *Knibbe*** (1992), 125 A.R. 219, 3 Alta. L.R. (3d) 97 (C.A.), which describes a trial within the trial of the substantive action from which the negligence arises. If the plaintiff is successful at this "trial", then the lost damages are awarded against the lawyer claimed against. If the plaintiff is not successful, then only nominal damages are awarded as nothing has been lost. See also ***Alberta (Workers' Compensation Board)* v. *Riggins*** (1992), 131 A.R. 205 at 209, 5 Alta. L.R. (3d) 66 at 71 (C.A.).

[32] Again as stated earlier, the issue of remedy is squarely within the jurisdiction of the L.R.B. The practice relating to awards for solicitor's negligence in Alberta is only one way of calculating damages in such cases. It appears that Saskatchewan and British Columbia use the lost opportunity calculation which is the method the L.R.B. chose to adopt here. It cannot be said that decision is patently unreasonable.

[33] Finally, the respondent Local 424 argues that the L.R.B. decided that its personnel did not breach the duty of fair representation. It submits that the respondent Warchow is an employee of, or is associated with, the International Union but not Local 424. In this respect we have already

determined that the L.R.B. did not act in a patently unreasonable manner in linking the actions of Mr. Warchow to both the International Union and to Local 424.

Conclusion:

[34] The appeal is allowed. The decision of the L.R.B. is restored.

APPEAL HEARD on September 30th, 2002

MEMORANDUM FILED at EDMONTON, Alberta,
this 29th day of October, 2002

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BERGER J.A.

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Authorized to sign for: PAPERNY J.A.

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RITTER J.A.