Privy Council Appeal No. 1 of 1951

William Lloyd White and others - - - - - - - *Appellants*

v.

Myron Kuzych - - - - - - - - - - *Respondent*

FROM

THE COURT OF APPEAL FOR BRITISH COLUMBIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH JUNE, 1951

Present at the Hearing :

VISCOUNT SIMON
LORD PORTER
LORD MORTON OF HENRYTON
LORD REID
LORD ASQUITH OF BISHOPSTONE

[*Delivered by* VISCOUNT SIMON]

This is an appeal by the defendants in the action from a judgment of the Court of Appeal for British Columbia dated 3rd May, 1950 (O'Halloran, Robertson, and Sidney Smith, JJ.A., Sloan, C.J. and Bird, J.A. dissenting) which dismissed the appellants' appeal from a judgment of Whittaker, J. dated 22nd September, 1949, in the respondent's favour. The litigation has involved the examination of a mass of evidence and the discussion of a number of difficult questions arising therefrom, but, as will appear in the sequel, the conclusion to be reached is arrived at by an overriding consideration, which makes it unnecessary to pronounce upon some of the other issues that have been raised.

The respondent is a welder. He became a member of the Boilermakers' and Iron Shipbuilders' Union of Canada, Local No. 1 (hereinafter referred to as "the Union") in April, 1943. He has brought this action for a declaration that he has not been validly expelled from membership of the Union, but is still a member of it in good standing, and for consequential relief. The judgment of Whittaker, J., which the Court of Appeal by a majority confirmed, so declared and awarded him $5,000 as damages.

The Union had a contract with North Vancouver Ship Repairs Ltd., at whose shipyard the respondent worked, one of the terms of which was that only members of the Union would be employed. Such a contract constituted the shipyard a "closed shop". According to the witness Stewart, who had been a member of the Union since 1942 and was an ex-President, the principle of the "closed shop" was the policy of the Union since its inception. One of the objects and purposes of the Union, as stated in its By-laws dated August 8th, 1944, was "to consummate closed shop agreements in order to establish an equitable and lasting relationship with employers". The respondent was and is opposed to the principle of the closed shop and expressed himself, both before and at the trial of this action, as regarding it as "a very great evil", which he

would tolerate " as long as it is necessary but not a moment longer ". His criticisms went so far as to say that there was no trade union in Canada with whose principles he agreed, and he denounced the Union, or at any rate the control over it exercised by its Executive, as " spurious " and a " fake ".

Such an attitude, whatever its justification, was not calculated to make him generally acceptable to the Union and its officers, and in February, 1945, after much previous controversy and some abortive litigation, three charges were made against him in writing by a member of the Union of offences committed in breach of Article 26 of the By-laws of the Union, as follows,

(1) he assisted in holding an unauthorised public meeting to discuss internal business of the Union ;

(2) between October, 1942, and December, 1944, he was guilty of conduct unbecoming of a member of the Union and committed acts discreditable to it in publicly opposing established policies of the Union by campaigning against the closed shop principle ; and

(3) he violated the Oath of Obligation of a member of the Union in failing to repudiate certain radio broadcasts made in his behalf, which contained statements slanderous of one Stewart, a member and then President of the Union.

Each of these offences was included in the list of " serious offences " under Group B of the Article.

Article 26 went on to provide that, upon such a charge being laid and read out to a General Business Meeting of the Union, it should be handed to the Press and Investigating Committee " to conduct the trial ". The respondent was duly notified of the charges and of the date and place of hearing, as the By-law required. He attended the proceedings, giving evidence and being cross-examined. He alleged that he wished other members named McPheator and Mole to attend as witnesses, but this was refused him by the Committee: it turned out, however, that he wished for their presence only as observers and he did not intend to call them to testify.

The By-law prescribes that the Committee at the end of the hearing is to take a vote " to determine the guilt or innocence of the accused " and to prepare a concise Report for the next Regular General Meeting of the Union. This was done: the Report was unanimous and found the respondent guilty on all three charges. Under the By-law the steps then to be taken are as follows:

" (10) After the report is read out at a General Membership Meeting, the motion shall be put to accept or reject the Committee's report and there shall be no debate or review of the case by the meeting ; but the meeting shall first hear the views of the minority of the trial committee, if any, and shall permit one each, of the complainant's and accused's witnesses to plead for, or state their side, and shall permit statements to be made by the complainant and the defendant, or by their counsels, and by the Union's counsel if one has been appointed ; and all the said persons shall be given the right of the floor for an equal and predetermined period.

" (11) The meeting shall then vote on the motion by show-of-hands, standing or secret ballot, and if the charges are sustained by a majority of the members voting, the accused stands convicted and the meeting shall fix the penalty, also by majority vote ; but concurrence of a two-thirds majority present and voting shall be required to expel a member. If the charges are not sustained, the defendant shall automatically be declared exonerated of the alleged offence."

Then follows a provision headed " Appeals ":

" If a member has been found guilty by a General Business Meeting of any offence under Group B of this Article and feels that the decision is unfair, or the penalty too severe, he may, within sixty

days file an appeal in writing with the Executive of the Shipyard General Workers' Federation ; but no appeal shall be permitted from the imposition of a fine, or in cases where a fine was part of some other penalty, unless such fine is first paid. If expulsion has been the penalty, an appeal shall stay the order, until decision by the Appellate Tribunal, but shall not restore the accused to regular membership and his status shall be that of a charged member, as specified in Group B., Section (5) of this Article."

Article 22 of the By-laws provided in Paragraphs (5) and (6) that a person who remained a member of the Union after the By-laws came into force (as was the case with the respondent) should be deemed to have entered into a contract with the Union and with every other member therein, whereby in consideration of the benefits bestowed by such membership, such person undertakes to accept, endorse, and at all times abide by the Terms of the Oath of Obligation set forth in paragraph (7).

The part of the Oath of Obligation which is immediately relevant in the present case runs as follows:—

> " I promise that I will not become a party to any suit at law or in equity against this Union or the Federation, until I have exhausted all remedies allowed to me by said Constitution and By-laws."

It is a crucial circumstance in the present litigation that it was instituted by the respondent without first appealing to the Federation from the findings against him in the Report and the Resolution of expulsion subsequently adopted at the General Business Meeting.

The General Business Meeting (called in Paragraph (10) of the By-law the General Membership Meeting) before which the Report came was held on March 19th, 1945, the chair being taken by the appellant Nuttall. Stewart put the case for the Report and the respondent, not without considerable interruption, opposed. Then, before the vote was taken, Nuttall spoke for a few minutes, strongly denouncing the respondent as a friend of the Capitalist class—an intervention not in any way justified by the By-law. On a show of hands a resolution expelling the respondent from the Union was passed by 454 to 12. A member named Jenkins was observed to be taking down the names of those who voted in the minority, and this is relied on by the respondent as confirming his allegation that the vote was influenced by intimidation. Moreover, the trial judge accepted the evidence of McPheator, (1) that the appellant Clark, who afterwards acted on the Committee which tried the respondent, told him that the respondent would be " crucified " by the Committee—this, however, as the respondent's counsel admitted, was before Clark was elected to the Committee—and (2) that the appellant White warned McPheator to " lay off " talking to the respondent " or what they contemplated doing to him would also happen to me ". Whittaker, J. also accepted the evidence of Mole that Clark had used threatening language to him if he continued to follow and back up the respondent. The evidence as to these threats seems to indicate that White and Clark were speaking in reference to an impending election of Union officers (when the respondent stood unsuccessfully for the Presidency) which took place in December, 1944.

Whatever the correct details may be, Their Lordships are bound to conclude that there was, before and after the trial, strong and widespread resentment felt against the respondent by many in the Union and that Clark, amongst others, formed and expressed adverse views about him. If the so-called " trial " and the General Meeting which followed had to be conducted by persons previously free from all bias and prejudice, this condition was certainly not fulfilled. It would, indeed, be an error to demand from those who took part the strict impartiality of mind with which a judge should approach and decide an issue between two litigants—that " icy impartiality of a Rhadamanthus " which Bowen L.J. in *Jackson* v. *Barry Railway Co.* [1893] 1 Ch. 238 at p. 248 thought could not be expected of the engineer-arbitrator—or to regard as disqualified from acting any member who had held and expressed the view that the " closed shop " principle was essential to the policy and purpose of the Union. What

those who considered the charges against the respondent and decided whether he was guilty ought to bring to their task was a will to reach an honest conclusion after hearing what was urged on either side, and a resolve not to make up their minds beforehand on his personal guilt, however firmly they held their conviction as to Union policy and however strongly they had shared in previous adverse criticism of the respondent's conduct.

The question of the extent to which those who took part in the so-called trial, and in the General Meeting which considered the Report, were actuated or influenced, not only by preconceived views, but by a resolve to condemn the respondent, is a question of fact to be deduced or inferred from the evidence. Whittaker, J. concluded that " it cannot by any stretch of the imagination be said that the trial within the Union was one that was free from prejudice and bias ". And after referring to the evidence of McPheator and Mole, and to an article written by the Secretary of the Union in its official organ on February 2nd, 1945, which strongly denounced the respondent's previous conduct and said that if he " intends to take us to court again, he will be placing the entire trade union movement on trial as to whether a trade union has the right to discipline its members for violation of union policies and individual member's obligations ", the learned Judge added,

> " It is almost inconceivable that so determined an effort should have been made to influence the members against the Plaintiff while the charges were pending and before the Plaintiff had been tried. . . . In the light of the facts detailed above, I am of the opinion that the purported expulsion of the Plaintiff was contrary to natural justice ".

In the Court of Appeal, O'Halloran, J. A. went even further, holding that the leaders of the Union had no justification for the conclusion that the respondent was an enemy of organised labour and that the Trial Committee " was inexorably biased against the respondent ". He went on :

> " In such circumstances it was obviously impossible for the respondent to receive a fair trial on the merits. Once it was proven he was against the closed shop policy and in favour of the open shop policy (as he readily conceded he was), it was obvious the verdict would be for his expulsion from the Union. There could be in that Trial Committee as constituted no opportunity for judicial consideration of the question on its merits. The verdict for expulsion was inevitably prejudiced and virtually decided before the trial was held. In essence, there was no trial at all. The Trial Committee was simply carrying out the declared policy of the Union as announced by its leaders at the time."

This learned Judge, after dwelling on the gravity of a sentence of expulsion, in view of its effect in limiting or destroying the respondent's prospects of obtaining work elsewhere, went on to lay it down that

> " A man has a right to work at his trade. If membership in a union is a condition attached to working at his trade, then he has an indefeasible right to belong to that union. It must be so, or else the union can have no right to agitate for a closed shop. . . . Moreover, the civil liberties of the subject cannot be decided by a trial committee set up by a labour union. That is the prerogative of the constituted courts of the country. In my judgment, the question the Union Trial Committee sought to deal with in the circumstances here was bevond the competence of any union to decide."

Their Lordships, while fully alive to the considerations which weighed with this learned Judge, must not be understood to agree with these last observations, which form no part of the argument used by the other Judges who considered the case, and which are not necessary to support the view which has hitherto prevailed in this litigation. Moreover, it is right to observe that the defence that the Union was an illegal association, having objects which are in restraint of trade, was pleaded in the amended Statement of Defence, but at the trial Whittaker, J. held that the defence

of illegality was not sufficiently raised and, in any case, was not established. This finding was not challenged on appeal and is not really in issue before Their Lordships.

Robertson, J.A. agreed with the Trial Judge that the purported expulsion was contrary to natural justice and further held that the Committee was not competent to hear the charges and that Clark, a member of the Committee, was so biased against the respondent as to render him unfit to act.

Sidney Smith, J.A. thought that the phrase "natural justice" had little meaning and that it might be misleading. He quoted the words of Lord Sumner, when sitting in the Court of Appeal as Hamilton, L.J., in *Rex* v. *Local Government Board* [1914] 1 K.B. 160 at p. 199 that the phrase was "an expression sadly lacking in precision". (This case went to the Lords, and is reported in [1915] A.C. 120.) But, while accepting and applying the view of Maugham, J. in *Maclean* v. *The Workers' Union* [1929] 1 Ch. 602 that the conduct of a person charged might well be such that every other member of the union might have a strong animus against him, and agreeing that the court should not interfere merely because the Committee and the General Executive detested him, the learned judge went on to say,

> "But the plaintiff's actions by no means justified the conduct that some of the Committee and some of the main Executive had been guilty of. No resentment, however just, can excuse it."

And, after reviewing the evidence, he concluded that the expulsion was invalid and bad in law.

The two Judges who were in the minority in the Court of Appeal, the Chief Justice and Bird, J.A., do not express any dissent from the adverse view on the merits taken by their colleagues, and Their Lordships will deal with the matter on the basis that severe condemnation of the methods followed in the proceedings under review is fully justified. If these were the only relevant considerations, some difficult questions would arise. For example, is the conclusion of a judicial tribunal acting within its jurisdiction, which is arrived at in a way which amounts to a denial of natural justice, appealable, or, on the contrary, is it simply void and thus not subject to appeal at all? And the further question would then have to be considered, viz., how far the law on the subject of bias or prejudice or failure to apply natural justice extends to such a tribunal as the Trial Committee and the General Meeting which is considering the Committee's Report.

The answers to these questions would not, however, be decisive of the present case, if the view taken by the two Judges who were in the minority of the Court of Appeal prevails. The respondent, after his condemnation by the General Meeting, did not appeal to the Shipyard General Workers' Federation before invoking the court's jurisdiction, although he was contractually bound not to institute any action against the Union until he had exhausted all the remedies allowed by the Union's Constitution and By-laws. The Chief Justice and Bird, J.A. took the view that on this ground the respondent's claim must fail. This issue has been elaborately and excellently argued before Their Lordships by Counsel on either side and it remains to examine the contention.

The respondent sets up two answers to it.

> (*a*) He contends that the Trial Committee was not properly constituted. If this is proved to be so, any proceedings for hearing and deciding upon the charges were a nullity; the General Meeting had no valid report before them; the sentence of expulsion would be without authority under the By-laws: and there would be no basis for an appeal to the Federation.
>
> (*b*) Even if the Committee was properly constituted, he contends that the conclusion reached at the General Meeting should not be regarded as a "decision" on the ground that it was arrived at by methods which make it contrary to natural justice and that it is the result of bias and even intimidation.

The respondent relied on expressions in some English cases which would suggest that a conclusion reached by certain tribunals in such circumstances may depart so far from a judicial pronouncement as not to amount to a " decision " at all. However this may be, a crucial question under this second head is whether the conclusion reached by the General Committee was a " decision " within the meaning of that word in the provision headed " Appeals " above quoted.

On both of these points there is a difference of opinion among the British Columbian judges. As to (*a*) Whittaker, J. held that the Committee was not properly constituted, inasmuch as when one of the six declared to have been elected to it was found not to be qualified, the vacancy was not filled by the election of one new member, but the five who had been duly elected resigned and were renominated together with a substituted candidate, while the rest of the candidates originally nominated but not elected were treated as no longer standing. Thus the six who acted as the Committee had an unopposed return. In the Court of Appeal O'Halloran, J.A. did not pronounce on the point; Robertson, J.A. assumed that the second election produced a validly constituted Committee; Sidney Smith, J.A. was by no means satisfied that there was anything irregular in the method chosen for filling the vacancy; while Bird, J.A., with whom the Chief Justice agreed, considered that the method adopted was " a *bona fide* attempt to resolve the difficulty consequent upon the discovery of the disqualification of one member " and that the solution as a whole " constituted a reasonable and practical compliance with the spirit of the by-laws." The Secretary to the Committee was chosen by its members out of their own body, whereas by-law 18 directed that he should be " the most successful candidate ", but this adaptation was necessitated by the fact that all the members were elected without a ballot. Their Lordships, after receiving argument on issue (*a*) from both sides, intimated at the hearing that in their view the Trial Committee must be regarded as validly constituted.

As to (b) the whole difficulty is to put the proper construction upon the word " decision " when the by-law gives a right of appeal from the General Meeting to the Federation if a member found guilty or penalised by the former " feels that the decision is unfair or the penalty too severe ". The view of the Chief Justice and Bird, J.A. is that the conclusion reached by the General Meeting was a " decision " within the meaning of that expression in the by-laws even though it was tainted by bias or prejudice, or arrived at in defiance of natural justice, and even though the voting of some members may have been affected by intimidation. According to this view, these circumstances, or the allegation of them, would be matter for the consideration of the Appellate Tribunal, and would not justify the contention that no appeal was possible because there was no " decision " to appeal against.

After anxious reflection, Their Lordships have reached the conclusion that this is the correct view. The meaning of " decision " in by-law 26 must be arrived at by examining the by-laws as a whole. The scheme of them manifestly is that members of the Union design to settle disputes between a member and the Union in the domestic forum to the exclusion of the Law-courts, at any rate until the remedies provided by the Constitution and By-laws, including the opportunity for appeal to the Federation, are fully exhausted. If the question had been asked of the respondent, or of any of his fellow-members, " What was the decision of the General Committee? " it cannot be doubted that the answer would have been, not that no decision had been given, but that the decision was to condemn and expel the respondent. And this would be so, not only because it is the natural reply for members of the Union to give in the circumstances, but because it would be the right answer. " Decision " in the by-law means " Conclusion ". The refinement which lawyers may appreciate between a tribunal's " decision " and a conclusion pronounced by a tribunal which, though within the tribunal's jurisdiction, may be

treated, because of the improper way in which it was reached, as no decision at all and therefore incapable of being subject to appeal, cannot be attributed to the draftsman of these by-laws or to the trade-unionists who adopted them as their domestic code.

Their Lordships are therefore constrained to hold that the conclusion reached by the General Committee was subject to appeal. And they must respectfully repudiate both the correctness and the relevance of the view that it would have been useless for the respondent to appeal, because the Federation would be sure to decide against him. They see no reason why the Federation, if called upon to deal with the appeal, should be assumed to be incapable of giving its honest attention to a complaint of unfairness or of undue severity, and of endeavouring to arrive at the right final decision. At any rate, this is the appeal which the respondent was bound by his contract to pursue before he could issue his writ. He has not done so, and on this ground Their Lordships will advise His Majesty that the appeal must be allowed.

The respondent must bear the costs of the appeal to this Board and of the appeal to the Court of Appeal in British Columbia, but each party should bear its own costs of the trial where the point on which the appellants now succeed was not originally raised.

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In the Privy Council

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MYRON KUZYCH

[DELIVERED BY VISCOUNT SIMON]

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