IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Frick v. International Brotherhood of Electrical Workers, Local 213,*** 2008 BCSC 115

Date: 20080131
Docket: L030151
Registry: Vancouver

Between:

Richard Frick

Plaintiff

And

International Brotherhood of Electrical Workers, Local 213

Defendant

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Before: The Honourable Madam Justice Gill

Reasons for Judgment

Counsel for Plaintiff:	R.W. Grant S.B. Horne
Counsel for Defendant:	C.J. Foy
Date and Place of Hearing:	October 25, 2007, January 16 and 17, 2008 Vancouver, B.C.

[1] Mr. Frick seeks an order that the defendant pay costs in respect of its notice of motion dated April 16, 2004, which was heard April 21 and 22, 2005. The defendant had sought orders that the Court lacked jurisdiction to entertain the plaintiff's action and that his action be dismissed. In the result, an issue was referred to the Labour Relations Board (the "Board") for determination and the present action was stayed pending that determination. Mr. Frick also seeks an order awarding him costs of the hearing before the Board. The court is asked to fix the amount to be paid. The application for costs was brought prior to the hearing of the certification application and by agreement between counsel was adjourned without prejudice to the plaintiff's claim.

[2] The relevant factual background is as follows.

[3] In his statement of claim, Mr. Frick alleged that the defendant had breached its bylaws and constitution by requiring him to pay Electrical Industry Advancement Fund dues when he was not working under the Inside Wiremen's Agreement. He alleged that the collective agreement in effect between Highway Constructors Ltd. and the British Columbia Highway and Related Construction Council (the "HCL Agreement") governed his employment at the relevant time. In its statement of defence, the defendant asserted that Mr. Frick was working under the terms of the Inside Wiremen's Agreement.

[4] On the hearing of its motion, the defendant did not dispute the meaning or effect of the bylaws or constitution and accepted that if Mr. Frick was correct, the bylaws and constitution did not permit the deduction of the dues in question. The defendant argued that the one fact in dispute which would determine whether there was merit to the claim

was whether the plaintiff was covered by the HCL Agreement, as he asserted, or the Inside Wiremen's Agreement, as the defendant alleged, and s. 139 of the ***Labour Relations Code***, R.S.B.C. 1996, c. 244, gave the Board the exclusive jurisdiction to decide which collective agreement the plaintiff was working under. It was the plaintiff's position that there was no credible evidence of a separate Inside Wiremen's Agreement, the jurisdiction of the Court was clear and the application should be dismissed. The plaintiff further argued that in any event, the proper remedy was to grant a stay of proceedings.

[5] On May 2, 2005, it was ordered that the issue of which collective agreement was in effect should be referred to the Board. The action was not dismissed. Rather, a stay was entered.

[6] The Board rendered a decision in favour of the plaintiff's position on June 23, 2006. Vice-Chair Saunders described the issues in the case as arising in a complex factual context, which I assume is why the hearing took seven days. The defendant applied for leave and reconsideration but its application was denied.

[7] Before this application for costs concluded, Mr. Frick applied to the Board for an order for costs. In his submissions to the Board, he requested that it depart from its policy, if it had the jurisdiction to do so, and award costs to him because the application arose as part of a court proceeding in which the successful party is entitled to its costs. It was argued that the circumstances of this case were very different from the typical cases before the Board. Mr. Frick was directed by the Court to obtain an order from the Board and the sole purpose of the proceedings before the Board was to further litigation

which involved a claim for union dues collected in violation of the defendant's constitution, a claim which could not have been brought through an application to the Board.

[8] The defendant's submissions to the Board included a reference to ***Kelland and Tunnel & Rock Workers' Union, Local 168***, B.C.L.R.B. No. B419/93, (1993), 21 C.L.R.B.R. (2d) 254, in which entitlement to legal costs was considered at some length. It was argued that this was not a situation where the Board should depart from its policy.

[9] The decision of the Board was given on November 28, 2007. It was stated that the ***Labour Relations Code*** gave the Board three jurisdictional grounds to award costs, the third not having been argued as a basis for an award. It was concluded at ¶10 and 11:

> 10 This brings me to the heart of Frick's application. Frick correctly concedes that his application does not meet the first and second grounds for awarding costs. He attempts to overcome that hurdle by arguing that there are good labour relations reasons to change the Board's policy to fit his circumstances. The problem with that submission is that it overlooks the necessity to first locate the Board's jurisdiction to award costs in these particular circumstances. The Board is a statutory tribunal. Its jurisdiction must be found under the Code or another statute the Board is given the jurisdiction to apply. Only then can the Board embark on the task of interpreting the Code in view of its Section 2 duties and labour relations policy considerations.
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> 11 The Board does not have the jurisdiction to award costs in the present case. Therefore, the application is dismissed.

Costs of the defendant's motion

[10] It is argued on behalf of Mr. Frick that the relief sought in the defendant's notice of motion, being a dismissal of the plaintiff's claim, was dismissed. On behalf of the defendant, it is argued that its intention was simply to obtain an order that an issue within the jurisdiction of the Board be decided by the Board. The defendant submits that if the Court is "inclined" to weigh success or failure, it should be concluded that the defendant substantially succeeded. Its position, however, is that each party should bear their own costs of the application.

[11] I agree that each party should bear their own costs. The position of the plaintiff was that there was nothing for the Board to decide. That was the central issue on the motion and on that issue, the plaintiff did not succeed. Whether the action should be dismissed or stayed was a minor point.

Costs of the proceedings before the Board

[12] The plaintiff relies, first, on Rules 57(9) and 57(15) which provide:

> (9) Subject to subrule (12), costs of and incidental to a proceeding shall follow the event unless the Court otherwise orders.
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> …
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> (15) The court may award costs that relate to some particular issue or part of the proceeding or may award costs except so far as they relate to some particular issue or part of the proceeding.

[13] Reference was also made to Rule 57(4) which provides:

> In addition to determining the fees that are to be allowed on an assessment under subrule (1) or (3), the registrar must
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> (a) determine which expenses and disbursements have been necessarily or properly incurred in the conduct of the proceeding, and
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> (b) allow a reasonable amount for those expenses and disbursements.

[14] It is argued that the hearing before the Board was clearly incidental to this proceeding. The Board's jurisdiction to conduct the hearing was derived directly from this Court's order, not its statutory mandate, and the scope of the hearing was limited to the question directed by the Court. The Board decided a question which was integral and crucial to the matter before the Court. It is further argued that there is a broad discretion to award costs and an inherent jurisdiction to do so and reliance was placed upon three authorities – ***Eilleen's Quality Catering Ltd. v. Depaoli***, [1985] B.C.J. No. 1009 (QL) (S.C.); ***Moore v. Castlegar & District Hospital*** (1998), 59 B.C.L.R. (3d) 368 (C.A.); and ***Oasis Hotel Ltd. v. Zurich Insurance Co.*** (1981), 28 B.C.L.R. 230 (C.A.).

[15] Because of the absence of direct authority, counsel for Mr. Frick also made reference to authorities dealing with mediation costs. As it is not my view that such authorities helpful, I do not intend to refer to the decisions cited.

[16] There are a number of cases in which costs have been sought in respect of proceedings before a tribunal in circumstances where an appeal was successful.

Counsel for the defendant referred the Court to ***Jory v. College of Physicians and Surgeons of British Columbia,*** [1986] B.C.J. No. 3016 (QL) (S.C.). In ***Jory***, McLachlin J. (as she then was) dealt with an application for costs, the appeal of Dr. Jory having been allowed. She was satisfied that this Court does not possess inherent jurisdiction to make an order with respect to costs in the Council hearing and that neither the ***Supreme Court Act***, R.S.B.C. 1996, c. 443, nor the Rules granted such power. She further concluded, at ¶6:

> Assuming, without deciding, that s. 62(2) empowers me to make the order sought, the next question is whether I should make it. As a general rule, a court sitting on appeal grants no greater relief than could properly have been conferred by the tribunal appealed from. Under the Medical Act, the powers of the College to award costs to a person against whom a complaint has been laid is very narrow; only where it is found that the complaint was frivolous and vexatious can it do so. Section 53(1) of the Act provides:
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> > The council may pay out of any funds at its disposal costs it believes just, to a person against whom a complaint has been made that is found to have been frivolous and vexatious.
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> The complaints in this case were not frivolous and vexatious. Accordingly, the Council could not have awarded Dr. Jory costs on the hearing below even if it had concluded that the charges against him ought to have been dismissed. That being the case, it would be inappropriate for this Court to grant such costs. To put the matter another way, the Legislature has enacted that the Council should pay costs to persons complained against only where the complaints are frivolous and vexatious. For this Court to order such costs would run counter to the intent of that legislation.

[17] The defendant argues that the same result should follow in the present case. The fact that the Board has declined to award costs for the reasons set out above should be a “stop sign” for the Court.

[18] Turning to the merits of the arguments, one cannot disagree with the submissions of counsel for Mr. Frick that the Board decided a question which was integral to this proceeding and that this proceeding has been prolonged by an issue which ultimately failed. In my view, however, the fundamental difficulty with the arguments of Mr. Frick in respect of both Rule 57 and the Court's inherent jurisdiction is that a question was referred to the Board because, by reason of s. 139 of the ***Labour Relations Code***, the Board had exclusive jurisdiction to decide the question. I cannot accept that the Court can award costs in respect of a matter that it does not have the jurisdiction to decide. In any event, I agree with the defendant that it would be inappropriate for this Court to make the order given the decision of the Board.

[19] I therefore decline to make the order sought by Mr. Frick.