



Union and Disunion — Solidarity Forever?

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Introduction

The power of a labour union essentially resides in the threat and realization of collective action against an employer. As the saying goes, which could have had unions in mind, ‘we hang together or we hang alone.’ Strike-breakers crossing picket lines during a strike impede the union’s ability to bargain effectively with the employer. Accordingly, unions need to enforce solidarity among their membership in order to be effective.

Dissident employees might not be sympathetic to the unions to which they belong, or to the decisions of their union leaders and peers. When they are faced with having to choose between indefinite subsistence strike pay and remaining on the job for full pay and benefits, some workers will inevitably be inclined to continue to work. This means defying the union, crossing the picket line – the symbolic Rubicon – and breaking solidarity with their co-workers. Dissidents are ignobly labeled ‘scabs’ and they are routinely threatened, humiliated and unforgiven for their betrayal of the collective cause.

Picket lines need to be powered with strikers. If a sufficient number of employees cross the picket line, the strike itself may be prolonged or fail. Strike-breakers not only interfere with strikes, but their defiance embarrasses unions and their obedient members.

It is not enough for unions to merely hope that this collective action will materialize during strikes, those rare instances in which it is required. Unions seek to engineer *en masse* obedience by inserting in their rules union solidarity clauses backed up by occasionally harsh penalties for non-compliance.

Workers who cross picket lines hurt their striking colleagues' cause by sending the message to the employer that they find the pay, benefits and working conditions acceptable. Penalty clauses may deter members from breaking strike out of fear of the financial consequences. The revenue they generate can provide modest restitution to the union and its members who may have suffered from the counter-productive behaviour of the strike-breakers.

Are these penalties legally enforceable?

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Birch and Luberti

Two Canada Revenue Agency workers, union members Birch and Luberti, crossed the picket line during a legal strike in 2004. The union's constitution prescribed two responses to members who do this:

- a one-year suspension of membership for each day the member crossed the picket line (affiliation discipline), and
- a "fine" equal to the member's gross pay for each day worked (financial discipline).

This last assessment is especially onerous since it requires the member to pay the union more than the member has actually taken home from crossing the picket line. The amount levied against these two workers in this case by their union was \$476.75 each.

The primary issue in this case was whether the union would enforce this financial penalty. The two workers refused to pay the penalty, so the union brought an action in Ontario small claims court to collect it. The case came to the Ontario Court of Appeal in late 2008.

When one joins a union, a contractual relationship arises between the worker and the trade union. In Ontario, unlike in Saskatchewan under its *Trade Union Act*, penalties for crossing picket lines were not specifically authorized (nor prohibited) by legislation.

The majority of the Ontario Court of Appeal focused on whether the penalty clause was so unconscionable as to be unenforceable. It was not the union, but the union membership, who had suffered the damages. While the penalty sum seemed "trivial" overall, it exceeded the take-home pay of each worker and constituted excessive and substantially unfair discipline of their conduct. The affiliation penalty, a one-year suspension of membership for each day the picket line was crossed was found to be a "significant penalty in itself."

The dissenting judge concluded that the penalty clause was not unconscionable. He said the union had not taken advantage of its unequal bargaining position because the union members were not locked into the contract. Employees, said the dissenting judge, “could not choose to enjoy the benefits of membership without being subject to its obligations.”

The Supreme Court of Canada refused to grant leave to appeal.

Implications

The *Birch* case serves as a recent binding precedent in Ontario and a persuasive ruling across the rest of the country where similar union discipline clauses are in play. The union will have to address concerns that its internal discipline may be viewed as unconscionable, both the relative bargaining positions of the parties and the quantum of the fine itself. Under both prongs of the unconscionability analysis, the discipline must not be ‘substantially unfair.’ Indeed, any financial penalty in addition to membership suspension (not to mention the ostracism one faces for crossing picket lines) might be considered unreasonable. Other courts may approach these penalty clauses with a simple rule against enforcing penalty clauses.

If the financial penalty is the only sanction for crossing the picket line, the union might consider limiting the amount to the net income earned by the dissident member while defying the union. Absent other penalties, this renders strike-breaking a balanced choice for the employee, rather than a burden.

If many union members insist on crossing the picket line to work, one might question whether the pay, benefits or working conditions actually need improvement as determined by the union calling for the strike. Internal union discipline and the threat of penalties alone are not adequate practical grounds to support and enforce improvident decision-making on the part of unions.

The *Birch* decision is consistent with other earlier judicial decisions. Unions continue to struggle to financially penalize their members who cross picket lines. But all is not lost. By refusing to enforce unconscionable penalties, the courts force unions to do a better job for their members. If unions earn the compliance of their membership without resorting to onerous financial penalties, decisions such as *Birch* serve to enhance workers’ rights and, ultimately, make unions more responsive and more relevant.

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