1997 S.H. 143789

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: Romard v. Canadian Union of Public Employees, 2000 NSSC 91

BETWEEN:

**Robert Joseph Romard**

Plaintiff

- AND -

**Canadian Union of Public Employees, and
Canadian Union of Public Employees, Local 3264,
and Larry Power, Kelly Murray, Jason Crawford,
Dan O'Neil and John Rossiter**

Defendants

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**DECISION ON NON-SUIT MOTION**

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HEARD: At Halifax, Nova Scotia before the Honourable Justice Felix A. Cacchione

DATE: March 9TH, 2000

WRITTEN RELEASE OF DECISION: September 6th, 2000

COUNSEL: Bernadette Maxwell and Ronald A. Stockton, for the Plaintiff
Burnley A. Jones, for CUPE and Kelly Murray and Larry Power
Ronald E. Pizzo, for Dan O'Neil, John Rossiter and Jason Crawford

Date:00/00/00
Docket:S.H. 143789

**CACCHIONE, J.**

[1] This is an action against Canadian Union of Public Employees (CUPE) Local 3264 and the representatives of CUPE and some of the executive officers of Local 3264 in their personal capacities. The action alleges that the defendants, Larry Power, Kelly Murray, Dan O'Neil, Jason Crawford and John Rossiter were negligent in their personal capacities in the exercise of their duty toward the Plaintiff as a member of the Defendant unions. The action also claims that CUPE and Local 3264 breached their duty of fair representation toward the Plaintiff.

[2] The Statement of Claim does not allege fraud, malice or bad faith. The Statement of Claim names the noted Defendants and am amended Statement of Claim filed on October 21st, 1998 added as Defendants the Nova Scotia Government Employees Union. However, the action against this Defendant was settled and the action dismissed on January 31st, 2000.

[3] CUPE Local 3264 no longer exists as a result of an order of the Nova Scotia Labour Relations Board dated May 4th, 1998 naming NSGEU as the

bargaining agent for all full-time and regular part-time EMT's and ambulance attendants employed by Emergency Medical Care Incorporated. That same order of the Labour Relations Board declared that EMC was the successor employer to a number of the employees of independent ambulance services throughout Nova Scotia including the employees of the former Metro and District Ambulance Services represented by CUPE Local 3264.

[4] The Labour Relations Board order of May 4th, 1998 only made NSGEU the successor of Local 3264's bargaining rights, not the successor of the Local's legal obligations or liabilities.

[5] I have recited this chronology regarding the events before Labour Relations Board because it appears that CUPE Local 3264 no longer exists.

[6] The evidence discloses that the Plaintiff was a member of Local 3264 on May 7th, 1997 when he was dismissed from his employment as an EMT with Metro District Ambulance. On May 12th, 1997 a grievance was filed on behalf of the Plaintiff claiming an unjust dismissal and requesting a reinstatement with wages and benefits retroactive to the date of dismissal. On June 2nd, 1997 CUPE's National Representative, Larry Power, advised the employer that it wished to proceed to arbitration and suggested that a single

arbitrator be appointed. On June 6th, 1997 the employer agreed to a single arbitrator.

[7] On June 3rd, 1997 the Plaintiff met with the Vice President of his union, one of the named defendants, Dan O'Neil. The Plaintiff described him in evidence as a good friend, someone that he worked with and played with. O'Neil advised the plaintiff that the employer would not release the Plaintiff's vacation pay unless he resigned. O'Neil, however, indicated that he would speak with the employer and see what he could do. On June 4th, O'Neil advised the plaintiff that the employer's position had not changed. The Plaintiff indicated at that time that he was not resigning.

[8] It appears from the evidence that the Plaintiff's next contact with the Defendant Larry Power was on June 9th, 1997 when Larry Power telephoned the Plaintiff to tell that he had a deal for him. As a result of this conversation the Plaintiff wrote out a note which was dictated to him by Larry Power and the Plaintiff signed that note. The note which indicated that the Plaintiff would withdraw his grievance due to the employer's agreeing to change the Plaintiff's record of employment to show "shortage of work" instead of "dismissal" as the first record of employment had indicated.

[9] The Plaintiff then called the Defendant O'Neil his union's Vice President and gave him the note which he had signed. The Plaintiff and O'Neil met later on that same day June 9th when O'Neil gave to the Plaintiff his vacation pay and a new record of employment. This new record of employment did not state the reason for issuance as being "shortage of work" but rather "other". The Plaintiff asked O'Neil if this meant that he could get his employment insurance and O'Neil said "yes".

[10] The Plaintiff next met with Power, Crawford, the President of the Local, Rossiter, the Secretary of the Local and O'Neil the Vice President together with some Shop Stewards on June 30th, 1997. At this meeting O'Neil apparently said that if he had to represent the Plaintiff he would resign. Rossiter apparently said the same thing.

[11] There is no evidence regarding the period from June 30th to August 12th when the Plaintiff met with Kelly Murray who was looking after things while Larry Power was on vacation. At this meeting Kelly Murray is said to have told the Plaintiff that as far as he was concerned the grievance of May 12th, 1997 still stood despite Larry Power's letter to the employer dated August 1st, 1997.

[12] Some time after this meeting the Plaintiff was apparently told by O'Neil that as far as the executive was concerned the Plaintiff was no longer a member of the Union and that a membership meeting would be held to discuss the issue of arbitration and that the Plaintiff would be advised of the location and time of the meeting. The Plaintiff's evidence is that he was not notified of this meeting and did not attend it.

[13] The evidence shows that between May 7th and 12th, 1997 the Defendants O'Neil, Rossiter and Crawford were not involved nor were they involved in meetings with the Plaintiff Larry Power and Ian Winter, the Shop Steward, held between May 12th and June 3rd. It was during some of these meetings that Mr. Winter apparently had a list of dates when the alleged activity which caused the Plaintiff's dismissal was discussed.

[14] As a result of the Plaintiff's conversation with the Defendant O'Neil on June 3rd and 4th, no deals were made. On June 9th the Plaintiff called O'Neil and advised him that Larry Power and the employer had worked out a deal. The Plaintiff requested that the Defendant O'Neil deliver the note to the employer in return for his vacation pay and a change in his ROE status.

[15] Prior to receiving Power's letter of August 1st, 1997 the Plaintiff had informed himself through the employment insurance office that the employer could not change the ROE status to "shortage of work".

[16] The Plaintiff in August 1997 had already retained counsel. He did not file a new grievance, nor did he request that a Shop Steward do so. The Plaintiff did not attend the general meeting of September 1st, 1997. Although he testified that he had contacted O'Neil and Crawford but no one got back to him.

[17] The evidence led so far shows that CUPE National would provide the Local union with representation, advice and information on arbitrations. There is also evidence from a past executive of the Local that he could not ever recall the decision to pursue a grievance being put to a membership vote. The evidence is that the National Representatives have a voice but no vote in local meetings.

[18] The issue before me at this time is a motion for non-suit brought by all of the Defendants in this action pursuant to Civil Procedure Rule 30.08. The motion was brought at the conclusion of the Plaintiff's case but before the Defence was put to their election.

[19] The test to be applied on such a motion has consistently been held by our Court of Appeal as that which is set out in the Law of Evidence in Civil Cases, Sopinka and Lederman 1974 edition. The test has been referred to in **J.W. Cowie Engineering v. Allen, Wentzell v. Spidle** (1987), 81 N.S.R. (2d) 200**; Turner-Lienaux v. Nova Scotia (Attorney General)** (1993), 122 N.S.R. (2d) 119; **Barrett et al. v. Gaudet** (1994), 134 N.S.R. (2d) 349 and **Herman v. Woodworth,** [1998] N.S.J. No. 38.

[20] The Sopinka and Lederman text frames the test in the following words:

> ...If such a motion is launched, it is the judge's function to determine whether any facts have been established by the plaintiff from which liability, if it is in issue, may be inferred. It is the jury's duty to say whether, from those facts when submitted to it, liability ought to be inferred. The judge, in performing his function, does not decide whether in fact he believes the evidence. He has to decide whether there is enough evidence, if left uncontradicted, to satisfy a reasonable man. He must conclude whether a reasonable jury could find in the plaintiff's favour if it believed the evidence given in trial up to that point. The judge does not decide whether the jury will accept the evidence, but whether the inference that the plaintiff seeks in his

favour could be drawn from the evidence adduced, if they jury chose to accept it. This decision of the judge on the sufficiency of evidence is a question of law; he is not ruling upon the weight or the believability of the evidence which is a question of fact.

[21] Obviously because it is a question of law the matter is reviewable by an appeal court.

[22] The forgoing makes it clear that on the present motion I must determine whether any facts have been established by the Plaintiff from which liability may be inferred. I am not on this motion to consider whether I believe the evidence but rather whether there is enough evidence if left uncontradicted to satisfy a reasonable man. In other words, whether a reasonable jury could not would find in the Plaintiff's favour if it believed the evidence so far. I must ask myself whether the inference that the Plaintiff seeks in his favour could be drawn from the evidence if the jury chose to accept it.

[23] The evidence shows that National CUPE's representatives were usually involved early on in the grievance process when the issue was one of dismissal. It also shows that the Union executive in general helped to take the grievance forward. Some grievances appear to be settled by Shop Stewards and the employer whereas others go forward to arbitration.

[24] The evidence before me establishes that the acts of the Defendants O'Neil, Crawford, Rossiter, Power and Murray were done in their capacity as union representatives or union executives. A review of all of the evidence led to date fails to establish that any of these Defendants were acting in their personal capacities, but rather that they were acting in their capacities as union officials. Their actions were done within the scope of their authority as union reps and not in their personal capacities. Accordingly, I grant the motion for non-suit as it applies to the Defendants O'Neil, Crawford, Rossiter, Power and Murray personally. With respect to the action against CUPE and CUPE Local 3264 I find that there is a prima facie case against these Defendants and that case shall proceed.

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Cacchione, J.

Halifax, Nova Scotia