No. 417

August Term, 1974

STATE OF WISCONSIN : IN SUPREME COURT

Harold Mahnke,

Respondent,

v.

Wisconsin Employment Relations Commission,

Appellant,

Louis Allis Co.,

Defendant,

NOTICE

This opinion is subject to further editing and modification. The official version will appear in the bound volume of the Wisconsin Reports.

F I L E D

Feb -4 1975

Robert O. Uehling
Clerk of Supreme Court
Madison, Wisconsin

Decision No. 11017-B

APPEAL from a judgment of the circuit court for Dane county: RICHARD W. BARDWELL, Circuit Judge. Affirmed.

This is an action to review an order of the Wisconsin Employment Relations Commission (WERC) which dismissed a complaint of the plaintiff-respondent Harold Mahnke for wrongful discharge against his employer Louis Allis Company, defendant. The circuit court reversed the order and remanded the matter to the WERC for further proceedings. The WERC appeals. The defendant Louis Allis Company does not appear in this appeal.

The respondent Mahnke had been employed as an assembler for twenty years by the Louis Allis Company in Milwaukee. On August 9, 1971, Mahnke was discharged for "failure to correct poor attendance habits."

Mahnke alleged that during the two and one-half years prior to his discharge he had missed approximately 100 days of work due to health reasons, and that on other occasions he was forced by health reasons to arrive at work late or leave early, and that his absences were verified by physicians. He further alleged that his absences were justified under the terms of the collective bargaining agreement pertaining to him and that he referred the matter to his union, Local 1131, International Union of Electrical Radio and Machine Workers, AFL-CIO, for adjustment through the grievance procedure provided for in the collective bargaining agreement entered into between the union and the employer. Such provision states:

"Should differences arise between the Company and the Union or any of the employees as to the meaning and application of the provisions of this agreement, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle the differences. Time lost from work by the aggrieved employee and the departmental or divisional steward in settling such differences shall not be construed as suspension of work. Differences shall be settled by the following successive steps.

"(a) First Step. The matter shall initially be taken up with his foreman by the employee or by his steward, or by both, as the employee elects within a reasonable period of time after the incident.

"(b) Second Step. Failing adjustment the matter then becomes a grievance if placed in writing, signed by the aggrieved employee and delivered by his steward to the foreman's immediate supervisor within three (3) working days to be taken up between the departmental and/or divisional steward and the foreman's immediate supervisor and/or his designated representative within three (3) working days and answered within five (5) working days.

"(c) Third Step. In the event no satisfactory settlement is reached in the second step the grievance may be processed by the Union within three (3) working days to be taken up between the Chief Steward and/or his representative, and the Labor Relations Manager and/or his designated representative within three (3) working days and answered within five (5) working days.

"(d) Fourth Step. In the event no satisfactory settlement is reached in the third step the grievance may be processed by the Union within five (5) working days to be taken up between the Chief Steward or his representative together with two (2) additional representatives that he may designate and a higher level representative of Management of the Company, and/or his designated representative, within five (5) working days and answered within ten (10) working days.

"(e) Fifth Step. In the event the dispute has not been satisfactorily settled, the grievance may be (1) reviewed at Union request between the representative of Management of the Company who answered the grievance in the fourth step and the Union together with a professional advisor designated by the Union, and/or (2) appealed within ten (10) working days or mutually agreed extensions thereof from the date of disposition in the fourth step to an arbitrator mutually selected from a panel of at least five (5) arbitrators submitted by the Federal Mediation and Conciliation Service. Failure to mutually agree on the selection will require a specific appointment by the Federal Mediation and Conciliation Service. The decision of the arbitrator shall be final and binding on all parties. The Company and the Union shall each bear one-half the expense of arbitration. Any grievance that is not appealed within the ten (10) working days or mutually agreed extensions thereof may not be processed further."

The union took the grievance through the fourth step of the contract procedure but refused to submit it to arbitration leaving Mahnke with no further remedy under the contract. Mahnke then filed a complaint against his employer, Louis Allis Company. In the complaint filed before the WERC,[1] Mahnke alleged the above facts and contended, inter alia, that his employer committed an unfair labor practice in violation of sec. 111.06(1)(f), Stats., which provides:

"(1) It shall be an unfair labor practice for an employer individually or in concert with others:

". . .

"(f) To violate the terms of a collective bargaining agreement . . . ."

Specifically, Mahnke alleged a breach of Appendix D (1) of the contract, which provides:

"Sick leave of absence. Any employee who is known to be ill, supported by satisfactory evidence, will be granted sick leave automatically for a period of ninety (90) days or less. The Labor Relations Department will, in such case, complete the leave form and forward a copy to the employee. If the sickness or injury continues beyond ninety (90) days, sick leave shall be extended for additional periods of six (6) months or less subject to verification presented to the Labor Relations Department that the employee is unable to be, and is not gainfully employed and that his sick leave continues to be supported by proper medical authority."

The complaint seeks reinstatement with pay.

The employer answered, alleging that Mahnke was "discharged for good and just cause owing to his poor attendance record," and that since Mahnke's grievance "was not appealed to arbitration within the time limits provided by the Labor Agreement," it could "not be processed further." The employer further alleged that Mahnke was not ill at the time of discharge, that there was no occasion for granting sick leave, and that "in any event sick leave provisions of the Labor Agreement are not a guarantee of continuation of employment."

In a preliminary statement before a WERC examiner, wherein the examiner tried to obtain the parties' positions, Mahnke's attorney stated he was not alleging that the union's refusal to arbitrate was based on discrimination but rather that the union could not afford to do so for economic reasons.

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1 See sec. 111.07, Stats.

Subsequent to statements made by counsel, the employer moved for dismissal ". . . on the basis that the Complainant had failed, both by his complaint and by his statements of what he intended to prove at the hearing, to state a cause of action. . . ." The examiner granted this motion and Mahnke appealed the examiner's decision to the WERC, which affirmed the dismissal. Mahnke then commenced this action to the circuit court for Dane county to review the order of the commission.

BEILFUSS, J. The parties do not state the issue in the same terms. We believe the controlling issue to be: Where an employee alleges that his employer has discharged him in violation of a collective bargaining agreement and that his union has failed to proceed to arbitration under the terms of the collective bargaining agreement, does the employee have the burden of proof to establish a want of fair representation on the part of the union before he can proceed to the merits of his claim?

In Vaca v. Sipes (1967), 386 U.S. 171, 87 Sup. Ct. 903, 17 L. Ed. 2d 842, the court held that an employee who has failed to exhaust the exclusive grievance remedies is foreclosed from suing his employer on an arbitrable claim when his union refuses to pursue the grievance through all the steps of the grievance procedure.

The underlying assumption is that the grievance procedure is the exclusive remedy. As stated in Vaca, supra, page 184, footnote 9:

"If a grievance and arbitration procedure is included in the contract, but the parties do not intend it to be the exclusive remedy, then a suit for breach of contract will normally be heard even though such procedures have not been exhausted. See Republic Steel Corp. v. Maddox, 379 U.S. 650, 657-658. . . ."

An examination of the Republic Steel Corporation Case [(1965), 379 U.S. 650, 657, 658, 85 Sup. Ct. 614, 13 L. Ed. 2d 580], however, reveals that the assumption is more akin to a presumption:

"The federal rule would not of course preclude Maddox' court suit if the parties to the collective bargaining agreements expressly agreed that arbitration was not the exclusive remedy. . . ."

In the instant contract there is no such express provision. A fair reading of it yields the distinct impression that the procedure was intended to be exclusive.

In Vaca, supra, the court stated at pages 184, 185:

". . . if the wrongfully discharged employee himself resorts to the courts before the grievance procedures have been fully exhausted, the employer may well defend on the ground that the exclusive remedies provided by such a contract have not been exhausted. Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced. For this reason, it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement. Republic Steel Corp. v. Maddox, 379 U.S. 650. However, because these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant. The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures."

This general rule clearly embodies the intent of Congress as codified in the Labor-Management Relations Act, 29 U. S. C. A., page 37, sec. 173 (d):

"(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. . . ."

One of the situations where the employer may bring suit for enforcement of his contract right is where:

". . . the union has sole power under the contract to invoke the higher stages of the grievance procedure, and if, . . . the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's wrongful refusal to process the grievance. . . ." Vaca, supra, page 185.

The rationale behind this rule is apparent. While both the employer and the union are benefited by an agreed grievance procedure which forestalls numerous and expensive forays into court to settle grievances, it is inequitable to allow an employee's claim to go without a remedy because of the union's wrongful refusal to process his claim. The Vaca decision makes it clear that a "wrongful refusal" occurs only when the union breaches its duty of fair representation and that:

"A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Vaca, supra, page 190.

Thus a union has considerable latitude in deciding whether to pursue a grievance through arbitration. As stated in Humphrey v. Moore (1964), 375 U.S. 335, 349, 84 Sup. Ct. 363, 11 L. Ed. 2d 370:

". . . 'Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.' . . . Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. . . ."

As stated in Moore v. Sunbeam Corp. (7th Cir. 1972), 459 Fed. 2d 811, 820:

"The Supreme Court in Vaca left no doubt that a union owes its members a duty of fair representation, but that opinion also makes it clear that the union may exercise discretion in deciding whether a grievance warrants arbitration. Even if an employee claim has merit, a union may properly reject it unless its action is arbitrary or taken in bad faith. . . ."

A similar view was taken by this court in Fray v. Amalgamated Meat Cutters (1960), 9 Wis. 2d 631, 641, 101 N. W. 2d 782, a pre-Vaca case where this court held:

". . . The union has great discretion in processing the claims of its members, and only in extreme cases of abuse of discretion will courts interfere with the union's decision not to present an employee's grievance. See 44 Virginia Law Review (No. 8, 1958), 1337, 1338. In certain cases for the greater good of the members as a whole, some individual rights may have to be compromised. Whether or not a cause of action is stated depends upon the particular facts of each case. [Case cited.]."

The language in Fray, namely, "extreme cases of abuse of discretion," is probably too broad. The test is whether the action of the union was arbitrary or taken in bad faith in the performance of its duty of fair representation on behalf of its employee member.

However, while the Vaca decision recognizes that the employee has no absolute right to arbitration and that the mere fact that a union settles a grievance short of arbitration does not, without more, mean that it has breached its duty of fair representation and thus permit the employee to sue, the court does require, at page 194, that:

"In administering the grievance and arbitration machinery as statutory agent of the employees, a union must, in good faith and in a non-arbitrary manner, make decisions as to the merits of particular grievances."

If it is established that the grievance procedure provided for in the collective bargaining agreement has not been exhausted, then it must be proven that the union failed in its duty of fair representation before the employee can proceed to prosecute his claim against the employer. In Clark v. Hein-Werner Corp. (1959), 8 Wis. 2d 264, 272, 99 N. W. 2d 132, 100 N. W. 2d 317, we held that the union occupies a fiduciary relationship to its members and stated "whether the union is performing its fiduciary duty of fair representation in an arbitration proceeding presents a question of fact."

The question before us here is who has the burden to establish this fact. We believe the employer is obligated in the first instance by way of an affirmative defense to allege that the contract grievance procedure has not been exhausted. If this fact has been established by proof, admission or stipulation, the employee cannot prosecute his claim unless he proves the union breached its duty of fair representation to him.

In this case the employer did affirmatively allege in its answer that the contract grievance procedure has not been exhausted. This allegation can be taken as a verity because the employee's complaint also alleged the union refused to submit his claim to arbitration under the agreement. At this stage it became necessary for the employee to come forward with sufficient proof to establish the union breached its duty of fair representation to him before he could pursue his claim based upon a violation of the collective bargaining agreement.

Not by evidence nor pleading, but by way of a pretrial statement or a statement of position requested by the examiner, counsel for the employee stated the reason the union did not pursue his grievance was that to do so would be too costly.[2] Upon inquiry by the examiner, counsel further stated that he was not going to allege the union's determination not to pursue the grievance to arbitration was based upon discrimination or an invidious motive. However, counsel did equivocate. Later, in a colloquy between himself and the examiner, he stated, "The Union has not acted in this matter, I don't think, in good faith."

Even though counsel, in his preliminary statement, quite clearly stated he was relying only upon the cost of arbitration or justification for the union's failure to exhaust the contract grievance procedures, we do not think in this case the employee should be foreclosed from establishing a want of fair representation, if he can.

We do not believe the United States Supreme Court intended a person in the position of Mahnke to be remediless. After twenty years of employment it is difficult to understand why, federal labor policy notwithstanding, he could be discharged, arguably in violation of his contract, and then denied a remedy merely because his union does not wish to spend the money necessary to vindicate his rights. Vaca, supra, provides that suit may be brought subsequent to an arbitrary, discriminatory or bad faith refusal to arbitrate by the union. Vaca also requires the union to make decisions as to the merits of each grievance. It is submitted that such decision should take into account at least the monetary value of his claim, the affect of the breach of the employee and the likelihood of success in arbitration. Absent such a good-faith determination, a decision not to arbitrate based solely on economic considerations could be arbitrary and a breach of the union's duty of fair representation.

This is not to suggest that every grievance must go to arbitration, but at least that the union must in good faith weigh the relevant factors before making such determination.

The WERC cites Encina v. Tony Lama Co. (W. D. Texas 1970), 316 Fed. Supp. 239, affirmed (5th Cir. 1971), 448 Fed. 2d 1264, for the proposition that cost of arbitration is a legitimate consideration as to whether to arbitrate. The case clearly stands for the proposition that a union is entitled "to take into account the expense of arbitration, the requirements of the collective agreement, and the highly speculative chance of previling." Encina at page 245. Thus the case is not inconsistent with the view just expressed because factors other than costs alone entered into the decision.

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2 The contract grievance procedure provided the union and the employer would each pay one-half the cost of arbitration.

This case should be remanded to the WERC to make a determination from all of the relevant evidence before it as to whether the union failed in its duty of fair representation to Harold Mahnke, its employee member. If it finds the union failed in its duty of fair representation then the employee should be permitted to pursue his claim. If the finding is that the union did not fail in its duty of fair representation, the employee will be foreclosed from further prosecution of his claim. The burden to establish the breach of a duty of fair representation is upon the employee Harold Mahnke.

By the Court. -- Judgment affirmed with directions to remand the matter to the Wisconsin Employment Relations Commission for further proceedings not inconsistent with this opinion.