

ONTARIO LABOUR RELATIONS BOARD

3517-01-U The Crown in Right of Ontario, as represented by the Management Board of Cabinet, Applicant v. The Ontario Public Service Employees Union, Alan Donaldson, Michael Cadeau, Bruce Dunn, James Lacroix and Tom Gignac, Responding Parties.

BEFORE: Christopher J. Albertyn, Vice-Chair

APPEARANCES: Michael Failes, Carol Nielson, Christopher Thompson, Sandra Hayes, Bob Bald and George Kytayko for the applicant; Ursula Boylan, Alan Donaldson, Bruce Dunn and Rich Dagenais for the responding parties

DECISION OF THE BOARD: March 12, 2002

1. This is an application under section 100 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (“the Act”).
2. The applicant employer (“the Crown”) seeks a declaration that the responding union has called or authorized an unlawful strike at the Penetanguishene Mental Health Centre (the Oak Ridge psychiatric hospital) in Penetanguishene, Ontario. The Crown wants certain ancillary relief. It does not seek any relief against the individual respondents, who are union stewards or members of the union’s Local Executive or of the parties’ Local Essential Service committee at the facility.
3. The Oak Ridge facility is the only maximum security psychiatric hospital in Ontario. There are approximately 140 patients. They are there for one of the following reasons: they were found to be not criminally responsible for a crime they committed; they were unfit to stand trial; they are subject to an assessment order; or they are involuntarily incarcerated by order of a court. There are two bargaining units in the facility: the corrections bargaining unit and the institutional bargaining unit, consisting principally of registered nurses. This application is concerned only with the attendants, who fall within the corrections bargaining unit.
4. The corrections bargaining unit in Ontario covers 150 different worksites, among them 40 different jails. The Oak Ridge site is the only Ministry of Health facility.
5. The context of this application is the following: the Crown and the union are engaged in collective bargaining for renewal collective agreements for the two bargaining units (corrections being one) of the public service in Ontario under the *Crown Employees Collective Bargaining Act, 1993*. They will be in legal strike or lockout position at 12:01 a.m. tomorrow (March 13, 2002). The union’s local President, Mr. Donaldson, one of the responding parties, posted a notice, following an emergency union membership meeting

on February 13, 2002, recording various motions from that meeting, including a ban on overtime work and the need to resist efforts by management “in completing additional duties in order to prepare them for a labour dispute”. The overtime ban is being applied in other facilities, So, the context of this application is that the parties are gearing themselves for a strike or lockout on or after March 13, 2002.

6. There is an Essential Service Agreement for the Oak Ridge Facility. With few exceptions, if there is to be a strike or lockout, the attendants are required by the Agreement to continue to work. Their work has been deemed by the parties to be an essential service. Hence, any order made will have effect not just for the few hours which remain prior to the strike/lockout deadline on March 13, 2002, but beyond as well.

7. This application was brought on March 8, 2002. It was heard on March 11 and today (March 12). The Crown alleges there was a “sick-in” at the Oak Ridge facility on Friday, March 8: employees concertedly reported they would be absent from work by reason of illness.

8. The union’s explanation for the high level of sickness absence on March 8 is that it was a pure coincidence.

9. The attendants work three shifts: day, evening and night.

10. The sickness absence on March 8 was extraordinary. The parties accept that for the corrections bargaining unit at Oak Ridge, not more than 5 attendants are off sick each day (about 7% of those scheduled to work), over the three shifts: day, evening and night. The absence figures for the months of February and March (to March 7th) show no more than three people absent on any shift, and usually one person or no one absent. On March 8, sixteen of thirty-two attendants (50%) on day shift called in sick and were absent. Thirteen of the fifteen attendants (87%) called in sick on the evening shift. Three of the eleven attendants (27%) on the night shift called in sick.

11. The situation returned to normal the next day, and from then on. The attendants scheduled to work on March 8 were generally next scheduled to work on March 12, and they did so, within normal absence expectations.

12. The Crown relies on the remarkably high level of sickness absence on March 8 for the conclusion that the employees were engaged in concerted, unlawful strike action. It mentions some other unusual features. Typically, those scheduled to work the day shift, who are sick, call in the day before or between 5 a.m. and 6 a.m. on their work day. On March 8 those of day shift called in sick between 2:30 a.m. and 4:30 a.m. (The union’s local President and one of its representatives on the Local Essential Services Committee called in first at about 2:30 a.m.) Those assigned to work the evening shift called in during the morning, which is unusually early. Normally sickness call-ins are closer to the start of the evening shift. The sickness absence of those absent on March 8 was generally for one day only.

13. Every local union office-bearer scheduled to work on March 8 called in sick. Mr. Donaldson explains he was suddenly ill during the night and he was amazed to learn

subsequently of the extent of the sickness absence that day. He returned to the workplace on March 9 to encourage regular attendance.

14. The union points out the provincial average sickness absence of corrections officers is 19.85 days per year. This is higher than employees in other ministries. The Crown responds that, although the attendants are within the corrections bargaining unit, they are not corrections officers and their own absence statistics are part of those of the Ministry of Health, which manages the Oak Ridge facility.

15. The management of the facility coped with difficulty to deal with the high absenteeism on March 8. Correctional attendants had to stay on duty to the maximum (16 hours) permissible under the parties' agreements. Some casual employees were brought in.

16. The Board will draw reasonable inferences from statistical probabilities: *B.C.L. Canada Inc.*, [1981] OLRB Rep. July 836; *Re. Treasury Board (Agriculture Canada) and Bingham*, (1990) 18 L.A.C. (4th) 241 (PSSRB), at 251-2. In this case there is no suggestion offered as to what might have caused the sudden rash of one-day illness at the Oak Ridge facility. As stated in *B.C.L. Canada Inc.*, 841, ¶16, sick leave is an *individual* right, not a *group* right. It cannot be exercised in concert. It must be exercised individually, if it is to be used legitimately. The only reasonable inference to draw is that there was a planned concerted action by some, if not all, of those who stayed away from work on March 8. It is also reasonable to conclude that the union, through its office-bearers, was aware of the planned "sick-in" action and condoned, if not supported or encouraged, it. This is consistent with Mr. Donaldson's conduct issuing a notice to employees encouraging an overtime ban, among other resistance, at a time when to do so amounted to unlawful strike action.

17. In *Firth Bros. Limited*, [1966] OLRB Rep. Feb. 825, in circumstances similar to these, the Board found that a sudden pattern of notable increases in sickness absences leads to the unavoidable inference of concerted action, which constitutes a strike.

18. It would appear therefore that there was an illegal strike by attendants at the Oak Ridge facility on March 8, 2002. The strike appears too to have received the tacit support of the local union.

19. Should a finding of illegality or a declaration be made? The union says it is unnecessary, given that work and attendance have returned to normal and there is no evidence to suggest a resumption of any concerted action or any anticipated illegality. It suggests I follow the Board's approach in *The Crown in Right of Ontario, as represented by the Management Board of Cabinet*, unreported, a decision earlier today (March 12, 2002) in Board File 3480-01-U. In that decision the Board adjourned the hearing on condition the Crown could resume the hearing at extremely short notice to seek appropriate relief if there were any sign of unlawful action.

20. The approach of the Board in that case was influenced by the fact that the hearing would likely have been more disruptive to the operation of the Ottawa Carleton Detention Centre than any other activity.

21. That consideration does not apply here. However, the Board does not generally grant a strike declaration when the unlawful strike is over: *Acoustical Association Ontario*, [1975] OLRB Rep. July 539. As stated there, at ¶7, the Board is reluctant to give a declaration where a strike has been settled before the hearing of the application. The rationale for this reticence is set out in ¶7 as follows:

... The general thrust of these reasons is that, once the strike has disappeared, then, as a general rule, no useful purpose can be served by a determination of the legality of the activity. In other words, the declaration has been regarded as a procedure for preventing the continuation of strikes, and not as a procedure for a retrospective assessment of the legal position of one of the bargaining parties. To take this latter approach would create the danger that intervention by the Board might upset the settlement already reached. It must be recognized, moreover, that labour relations remedies should be applied selectively. If the Board were to grant the declaration as a general rule in cases where the strike has been settled, there is the very real possibility that the remedy will be far less effective in those cases where the strike is continuing. Over-usage is likely to debase the remedy, so that it will not be taken seriously in those cases where it is most needed. The Board's reluctance to grant the remedy, moreover, now serves as an incentive to end what might be an illegal strike. Once unions and employees receive notice of the application of the declaration, they know that, if there is an immediate return to work, there is a substantial likelihood that there will be no further intervention by the Board. Certainly, from an industrial relations perspective, this is a very desirable result.

See also *Bechtel Canada Ltd.*, [1977] OLRB Rep. May 269, at 273, ¶19.

22. Nor will the Board readily make a finding of illegality, if it has no intention to issue a remedy: *MacMillan Bathurst Inc.*, [1988] OLRB Rep. March 312, at 314, ¶¶6-7; *Steinberg Inc.*, [1982] OLRB Rep. 1366.

23. The circumstances here are different from those in *Acoustical Association Ontario* because there has been no settlement here. The strike appears to be over, but the dispute between the parties is not over. It is likely to enter a new, and potentially more bitter, phase. The strike/lockout deadline is within hours of writing this decision. If there is a strike or lockout, the attendants at Oak Ridge in Penetanguishene will be required to comply with the Local Essential Services Agreement. That agreement leaves less room for error than the circumstances in which the March 8 action occurred. Management's capacity to re-assign employees will be more limited than was the case then.

24. There are three circumstances in which the Board will depart from its general practice to refuse to issue a declaration or any ancillary relief. These were set out in *Bechtel Canada Ltd.*, at 273, ¶20:

20. The Board has consistently stated, however, that it will depart from this general practice of refusing to grant either a declaration or a direction in the face of the existence of any one or more of the following three circumstances: *firstly*, where the evidence establishes a past practice of unlawful strike activity, *secondly*, where the evidence indicates that the unlawful activity is likely to recur or *thirdly*, where the unlawful strike upon which the application is based has implications which extend beyond the immediate parties. Thus before addressing the merits of the work stoppage which is the subject of this application, we must decide whether, even if the stoppage were found to be illegal, we would exercise our discretion to make a declaration of illegality or issue a direction in relation to it.

25. In this case there is no past practice of strike activity. There is also no evidence that the unlawful activity is likely to recur. However, the unlawful strike on which the application is based does have implications which extend beyond the immediate parties. There is a public interest to ensure the service of the attendants at the hospital continues uninterrupted. Oak Ridge is a maximum security facility. An essential service there is necessary. The inmates of the facility, other employees who work there and the general public are potentially at risk if there is a repetition of any unlawful action. (See *Norfolk Hospital Association*, [1974] OLRB Rep. Sept. 581; *Ontario Hydro*, [1985] OLRB Rep. Apr. 577, particularly 580).

26. In the circumstances, the facts make out a case for a declaration that there has been an unlawful strike and the context of the unlawful strike gives cause for a cease and desist order. The declaration and relief sought by the applicant is broader than what it is entitled to on the facts of this case. The declaration and the remedy will be restricted to the Penetanguishene site.

27. The Board hereby:

1. declares the responding union has called or authorized an unlawful strike at the Penetanguishene Mental Health Centre on or about March 8, 2002;
2. orders the union and any other persons having knowledge of this order to desist from engaging in an unlawful strike or doing any other act which they know, or ought to know as a reasonable consequence of such act, will cause other persons to engage in an unlawful strike at the Penetanguishene Mental Health Centre;

3. orders the members of the union in the corrections bargaining unit at the Penetanguishene Mental Health Centre not to engage in an unlawful strike;
4. orders the union to communicate to its members in the corrections bargaining unit at the Penetanguishene Mental Health Centre that a concerted effort of calling in sick constitutes an unlawful strike;
5. orders the union forthwith to post copies of this decision in prominent places at the Penetanguishene Mental Health Centre where they will come to the attention of the attendants there.

28. These orders shall remain in effect until the parties have concluded a collective agreement.

“Christopher J. Albertyn”

for the Board