

94A288 OPSEU VS NIAGARA COLLEGE

IN THE MATTER OF AN ARBITRATION

BETWEEN:

ONTARIO PUBLIC SECTOR EMPLOYEES UNION
("Union")

AND:

NIAGARA COLLEGE
("College")

IN THE MATTER OF:

WHETHER LEAVE DAYS UNDER THE SOCIAL CONTRACT
ACT ARE IN EXCESS OF NEEDED EXPENDITURE
REDUCTION

BEFORE:

Kevin M. Burkett - Chair
Pamela Munt-Madill - Union Nominee
Rene St. Onge - Employer Nominee

APPEARANCES FOR THE EMPLOYER:

D.K. Gray - Counsel
J. Garner - Director Human Resources

APPEARANCES FOR THE UNION:

Kevin Whitaker - Counsel
Joan Hastings

A Hearing in this matter was held on January 12, 1995 in St. Catharines, Ontario.

AWARD

We have before us two grievances which claim that the College has not paid those covered by the collective agreement in accord with the rates stipulated therein. More specifically, the Union asserts that the forced taking of six unpaid leave days is not in accord with the Social Contract Act, the Sectoral Agreement or the fail-safe program under the Act, such that there is no basis for the College's failure to pay the rates stipulated in the collective agreement. The Union maintains that the unpaid leave days required under the fail-safe program of expenditure reduction are not required to meet this College's expenditure reduction target and, therefore, cannot be relied upon as a justification for breaching the salary provisions of the collective agreement. The College challenges our jurisdiction to hear and determine this matter. It was agreed between the parties that we should entertain and rule upon the jurisdictional issue at the outset.

The provincial legislature passed into law the Social Contract Act on July 8, 1993. The purpose of the Act, as stated in Section 1, is to reduce public sector expenditures by means of savings achieved through sectoral and local level agreements or, where these are not obtained, through mandated employer initiatives pertaining to compensation arrangements. The Act allows for the freezing of compensation (Section 24) and, where the freezing of compensation is insufficient to meet the expenditure reduction target set by the Minister for the employer/sector (Section 7), for the imposition of unpaid leave days (Section 25). Under Section 27 of the Act an employer is empowered to make all reasonable efforts to achieve the expenditure reduction target by means of the imposition of the unpaid leave days if the target cannot be achieved through the freezing of compensation. Section 27(1)(b) directs the employer to "develop a program setting out the manner in which these leaves are to be implemented".

Section 27(2) lists the criteria that must be met in respect of the program. For our purposes specific reference should be had to the third criteria, which reads as follows:

27(2)3 The program will assist the employer in achieving the expenditure reduction target established by the Minister for the employer.

Section 29 of the Act allows an employee or bargaining agent who objects to the Section 27 program to have it reviewed. Under Section 30 of the Act an employee or a bargaining agent who continues to object to a Section 27 program after it has been reviewed by the employer may have it referred to an adjudicator. Under Section 31(2) of the Act:

31(2) The adjudicator shall review the program and shall,

(a) confirm the program if it meets the criteria set out in section 27; or

(b) amend the program so that, in the opinion of the adjudicator, it is consistent with the criteria set out in section 27.

Sections 31(4) and (5) of the Act underscore the finality of the adjudicator's decision by stipulating that he/she "shall make only one decision on the program irrespective of the number of requests made for a review" and that "the decision of the adjudicator is final". The Act then goes on to draw a clear distinction between the review of a program by an adjudicator and a grievance/ arbitration under a collective agreement pertaining to any breach of a collective agreement caused by the implementation of a Section 27 program. In this regard, Sections 33(1) and (2) provides as follows:

33(1) An employee to whom a collective agreement applies may use the grievance or arbitration procedures under the collective agreement to decide any difference between the employee and his or her employer arising out of the interpretation, application, administration or alleged contravention of a program developed by the employer under this Part.

(2) In a grievance or arbitration under subsection (1), the arbitrator or board of arbitration shall not make any decision that an adjudicator is entitled to make under subsection 31(2).

The distinction is further drawn under Sections 34(4) and (5) as follows:

34(4) Actions of an employer taken in accordance with section 24, 25 or 26 shall not be the subject of any proceeding brought by any person against an employer.

(5) An employee has no right to grieve under the Public Service Act or any other Act or a collective agreement in respect of actions taken by his or her employer in accordance with section 24, 25 or 26.

By way of general background, which is directly relevant to the jurisdictional issue, the Minister of Finance, under Part II, Section 7(1) of the Act, established an expenditure reduction target for all of the community colleges. He did not establish expenditure reduction targets for each individual college. The Council of Regents, on behalf of all the colleges, formulated a "program" that required six unpaid leave days at each college in the first year. The Union challenged the program developed by the colleges under Section 27(2) of the Act, pursuant to its right to do so under Section 29(3) of the Act. Notwithstanding the revisions to the program, the Union referred its objection to an adjudicator under Section 30 of the Act. It is important to note that the reference to the adjudicator, dated October 26, 1993, is made in respect of all of the colleges as a single entity, as distinct from any or each individual college. It is also important to note that nowhere in the referral to adjudication is there a challenge to the Minister's failure to set expenditure reduction targets for each individual college. The first ground for the Union's objection to the program is that, as set out in the referral to adjudication, "the leave days proposed under the fail-safe program are in excess of the needed expenditure reductions".

The adjudicator, in a decision dated July 13, 1994, after examining the expenditure reduction figures, concluded that, "from the data presented, therefore, in the first year, the six (6) unpaid leave days were not an unreasonable number and did not violate the Act". "The Ontario Council

of Regents for Colleges of Applied Arts and Technology" is identified on the face page of the adjudicator's decision as the "employer".

Under the Sectoral Framework Agreement, entered into between the Government of Ontario, the Council of Regents and one bargaining agent (ASCC), which this Union did not sign, it is stipulated that "for the purposes of the Social Contract negotiations, the Council of Regents will be considered the "employer" at both the sectoral and local levels". Furthermore, it is to be noted that the Council of Regents is the employer party to the collective agreement under which the Union seeks to have this matter heard.

It is the position of the College that as an arbitrator appointed under this collective agreement I have no jurisdiction to decide if six unpaid leave days are in excess of the needed expenditure reductions and, therefore, not in accordance with the Social Contract Act. The College submits that the grievances that have been filed are barred under Sections 33(2), 34(4) and 34(5) of the Act. The College reads Section 33(1) as restricting an arbitrator to the interpretation, application, administration or alleged contravention of a program, as distinct from issues relating to the conformity of the program with the criteria set out in the Act. Specific reference is made to the prohibition in Article 33(2) against an arbitrator making ". . . any decision that an adjudicator is entitled to make under subsection 31 (2)". The College argues that the demarcation between the jurisdiction of an adjudicator and that of an arbitrator is underscored by the stipulation in Article 34(4) that "actions of an employer taken in accordance with Section 24, 25 or 26 shall not be the subject of any proceeding brought by any person against an employer" and the stipulation in Section 34(5) that "an employee has no right to grieve under ... a collective agreement in respect of actions taken by his or her employer in accordance with Section 24, 25 or 26". It is the position of the College that an adjudicator appointed under the Act determines if a program satisfies the criteria enunciated at Section 27(2) of the Act and is, thereby, in accordance with the Act whereas an arbitrator is restricted to issues arising from the interpretation or application of a program that is in accordance with the Act. The College asks us to find that the issue raised by these grievances is within the sole jurisdiction of an adjudicator and, therefore, outside the jurisdiction of an arbitrator.

The College reminds us that this Union asked an adjudicator the same question that it has put to us, thereby evidencing its understanding that this is a matter to be decided by an adjudicator. The College also reminds us that from the outset, including the referral to adjudication, the Union treated the Council of Regents as the employer, thereby evidencing its understanding that, for purposes of this Act, the Council of Regents (as distinct from any individual college) is the employer. In further support of this position we are reminded that the Minister of Finance set an expenditure reduction target for all of the colleges as a single entity, without challenge from the Union, and that the adjudicator identified the Council of Regents as the employer. The College takes the position that not only is the issue raised within the exclusive jurisdiction of an adjudicator but that it has already been determined by an adjudicator that the six unpaid leave days at each college in the first year of the program satisfy the criteria set out in Section 27(2) of the Act and, therefore, are in accordance with the Act.

The Union maintains that the fundamental issue before us is whether this college has met its obligations under Article 14 of the collective agreement; namely, its obligation to pay the wages

that are set out therein. The Union takes the position that this is an issue in respect of which we have jurisdiction. The Union concedes that the Ministerial expenditure reduction target is in respect of the colleges as a whole but maintains, consistent with its view that this college is the employer for purposes of deciding this matter, that there exists an "in-house" target that applies for purposes of deciding this matter. It is the position of the Union that the "in-house" expenditure reduction target can be met at Niagara College without resorting to any unpaid leave days. The Union asserts that the college cannot rely on Section 25 of the Act if its target can be met by means of freezing compensation under Section 24 of the Act. The position of the Union is that Sections 34(4) and (5) serve only to bar a grievance in circumstances where the employer has acted "in accordance with Section 24, 25 or 26". The Union position is that because the salary reduction caused by the imposition of the six unpaid leave days is not required to meet the expenditure reduction target at this college, the college cannot maintain that it acted in accordance with Section 25 of the Act in imposing these unpaid leave days and, therefore, there is no bar to my jurisdiction under Sections 34(4) and (5) of the Act.

Turning to the Section 33(2) bar, the Union submits that in order to decide if this bar applies reference must be had to the scope of an adjudicator's authority under the Act. The Union argues that the full extent of an adjudicator's authority is contained in Section 31 of the Act which restricts the extent of an adjudicative inquiry to the criteria set out at Section 27 of the Act. It is submitted that if the issue raised is outside of these criteria, as in this case, there is no bar to determining the matter under the arbitration provisions of a collective agreement. The Union cites Re: Trent University and CUEW Local 8 (May 16, 1994) unreported (Starkman) and Porcupine Area Ambulance Service (January 10, 1994) unreported (Dumoulin) in support of its position.

The Union argues that the issue that it has submitted to arbitration is a different issue than that submitted to the adjudicator. The Union describes the issue submitted to the adjudicator as whether the six unpaid leave days were necessary to meet the system-wide expenditure reduction target. The Union submits that the issue before us, in respect of which we have jurisdiction, is whether Niagara College, having accepted its share of the college-wide expenditure reduction target, is relieved from having breached the salary provisions of the collective agreement by reason of imposing six unpaid leave days because it acted in accordance with Section 25 of the Act. It is argued that the two issues are separate and distinct and that we have the jurisdiction to hear and determine the latter.

The College argues in reply that regardless of whether the Council of Regents or Niagara College is the employer, it is clear on a reading of Sections 33 and 34 of the Act that this issue is within the exclusive jurisdiction of an adjudicator appointed under the Act. It is submitted that, nevertheless, a compelling case can be made that for purposes of the application of the Social Contract Act the Council of Regents is the employer. The judgements of both the Divisional Court and the Court of Appeal in Re: Haldimand-Norfolk Regional Board of Commissioners of Police et al v. Ontario Nurses Association et al (1989) 36 0A C276, (1990) 41 OAC 148 are cited in support of the proposition that the identity of the employer must be ascertained having regard to the structure and purpose of the statute under which the determination is being made. In the absence of a clear definition of "employer" in the Social Contract Act; in the face of the definition of a "collective agreement" in Section 2 of the Act as

an agreement between an employer and a bargaining agent and the fact that the Council of Regents is the employer party to this agreement; in the face of the Minister establishing an expenditure reduction target for the colleges as a whole as distinct from any individual college; in the face of the Union having appealed to the adjudicator on the basis of the Council of Regents as employer; and in the face of the Sectoral Agreement entered into between the colleges, one of the bargaining agents and the Government in which the Council of Regents is recognized as the employer, it is argued that the Council of Regents and not Niagara College is the employer under the Act. It is submitted that if the Council of Regents is the employer there can be no further challenge to the imposition of six unpaid leave days at Niagara College or across the system because an adjudicator has already decided that they are necessary to achieve the Minister's expenditure reduction target.

The College also argues in reply that to give Sections 34(4) and (5) the meaning that the Union suggests deprives the sections of all meaning because it obliterates the clear demarcation between an adjudicator's jurisdiction and that of an arbitrator. The College asks how it could ever have been intended that an adjudicator have the exclusive jurisdiction under Section 31(2) to determine if a program meets the statutory criteria set out at Section 27 but that it be within the jurisdiction of an arbitrator to determine if an employer acted in accordance with Section 24, 25 or 26. The College argues that the words "in accordance with" in Sections 34(4) and (5) must be read as meaning any action taken under Section 24, 25 or 26. In response to the Union argument that this is a different issue than that put before adjudicator McKechnie the College points to the third criteria, found at Section 27(2)3, and the implied criteria in Section 27(1) that unpaid leaves are restricted in their utilization to meeting the expenditure reduction target. The College submits that the decision already made by the adjudicator under these criteria is the same decision that we are being asked to make. Finally, the College maintains that the two arbitration awards relied upon by the Union support this college's position that there is a distinction under the statute between challenges to the program (which are determined by an adjudicator) and challenges to the application of the program (which are determined by an arbitrator). The College asks us to find that we have before us a challenge to the program which is within the exclusive jurisdiction of an adjudicator and, indeed, has already been ruled upon by an adjudicator.

We start by confirming the College's contention that regardless of the identity of the employer for purposes of applying the Social Contract Act, an arbitrator lacks the jurisdiction to decide if one or more unpaid leave days imposed under Section 25 of the Act are necessary to meet the expenditure reduction target established by the Minister under Section 7 of the Act. A reading of Sections 31, 33 and 34 leaves no doubt that the legislature intended to compartmentalize the jurisdiction of an adjudicator, such that matters falling within that jurisdiction are outside the jurisdiction of an arbitrator. The parameters of an adjudicator's jurisdiction are to be found in the criteria set out in Section 27(2) of the Act and the direction to an adjudicator to confirm in Section 31(2) that a program meets these criteria or amend the program so that it does. In this regard we reject the College's submission that the "criteria" referred to in Sections 31(2)(a) and (c) extend beyond those specifically identified in Sections 27(2)1-5 and include whatever other criteria can be derived from Section 27(1). A program must meet the Section 27(2) criteria in order to be "in accordance" with the Act and in particular Sections 24, 25 or 26 of the Act. The third criteria (Section 27(2)3) stipulates that the program must "... assist the employer in achieving the expenditure reduction target established by the

Minister". Hence, regardless of who the employer is for purposes of the Act any question as to whether the unpaid leave days imposed under Section 25 of the Act as part of a program developed under Section 27(1)(b) of the Act are in accordance with the Act must be referred to an adjudicator. Under Section 31(2) an adjudicator has the jurisdiction to confirm if a program meets the criteria (including whether the unpaid leave days are necessary to assist in achieving the expenditure reduction target), which jurisdiction is made exclusive under Section 33(2). Section 33(2) stipulates that an arbitrator "... shall not make any decision that an adjudicator is entitled to make under subsection 31(2)".

We reject the Union argument that in situations where there is a doubt raised as to whether the imposition of the unpaid leave days is "in accordance" with Section 25, the Sections 34(4) and (5) restriction upon grievance rights does not apply. Whatever the interpretation of Sections 34(4) and (5), the basis for the adjudicator's exclusive jurisdiction under Sections 31 and 33 is unaffected. Under Section 33(2) we are prohibited from making any decision that an adjudicator is entitled to make. We are bound by this prohibition regardless of the extent of any limitations upon the rights of persons or employees to grieve or take other actions. In so far as Sections 34(4) and (5) restrict the rights of persons or employees (as distinct from trade unions) to grieve or take other actions, these subsections exist out of an abundance of caution and are not intended to in any way alter the clear and express compartmentalization of jurisdiction established under Sections 31 and 33. The scheme, as we read it, is that all questions pertaining to whether or not a program is in accordance with Section 24, 25 or 26 of the Act are questions that are distinct and apart from questions arising in connection with the interpretation, application or administration of a program and these questions are to be decided by an adjudicator in advance of any grievance based on the interpretation, application or administration of a program that is "in accordance" with the Act. The two arbitration awards relied upon by the Union confirm this distinction.

Although we need go no further there are narrower grounds upon which to find that we lack the jurisdiction to hear this matter. We are satisfied that for purposes of applying the Social Contract Act the Council of Regents, representing all of the colleges, is the employer. The Council of Regents is the employer party to the collective agreement. The Minister established a single expenditure reduction target under Section 7 of the Act for all of the colleges, thereby evidencing an acceptance of the Council of Regents as employer. The Sectoral Agreement entered into between the Government, the Council of Regents and one of the bargaining agents identifies the Council of Regents as employer. This Union challenged the program as it applied to all of the colleges in its Section 30(1) referral without challenging the failure of the Minister to designate expenditure reduction targets for each college or otherwise challenging the Council of Regents as employer. Finally, the adjudicator identified the Council of Regents as the employer and confirmed that the six unpaid leave days met the Section 27(2) criteria for the colleges as a whole. When reference is had to the foregoing, to the scheme of the Act and to the judgement of the Court of Appeal upholding the Divisional Court in Haldimand-Norfolk (supra), wherein it was found that different statutes may require different definitions of employer and employee, we are compelled to find that the Council of Regents is an employer within the meaning of Section 2 of the Act who is the employer for purposes of those in respect of whom the instant grievances have been filed. This finding is made specifically in the context of the provisions of the Social Contract Act and by so finding we are not suggesting that this interpretation necessarily be applied in other contexts.

This finding is determinative. The question of whether "the leave days proposed under the fail-safe program are in excess of the needed expenditure reductions" in respect of the target established for all of the colleges has been submitted to an adjudicator by this Union. The adjudicator has ruled that "... the six (6) unpaid leave days were not an unreasonable number and did not violate the Act". Accordingly, it must be found that the imposition of these leave days was "in accordance" with Section 25 of the Act. Under Section 31 (5) the decision of the adjudicator is final, under Section 33(2) we are prohibited from making any decision in this regard, and under Sections 34(4) and (5) this grievance cannot be brought.

Having regard to all of the foregoing we hereby declare that we are without jurisdiction to hear and determine this matter.

DATED at Toronto this 22nd day of March, 1995

KEVIN M. BURKETT

" Pamela Munt-Madill "
I concur / Pamela Munt-Madill

"Rene St. Onge"
I concur / RENE ST. ONGE