

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
SANOFEL ARANAS, NADINE BROWN,) *Kate A. Hughes for the Plaintiffs*
THERESA CARTER-TOWNSHEND and)
HARRIET LYAVALA)
)
)
Plaintiffs)
)
)
- and -)
)
)
TORONTO EAST GENERAL &) *M. Christine O'Donohue for the Defendant*
ORTHOPAEDIC HOSPITAL INC.)
) *Jasbir Parmar for the Ontario Nurses'*
Defendants) *Association*
)
)
) HEARD: January 13, 2005

Pitt J.

REASONS FOR JUDGMENT

[1] This is a motion brought by four registered nurses at respondent hospital, who currently work permanent evening and night shifts. Sanofel Aranas ("Aranas") and Harriet Lyavala ("Lyavala") work every shift between 3:30 p.m. and 11:30 p.m., and Nadine Brown ("Brown") and Theresa Carter-Townshend ("Carter-Townshend") are part-time employees who work the night shift from 11:30 p.m. to 7:30 p.m.

[2] The plaintiffs seek an interim, interlocutory injunction restraining the defendant from unilaterally changing their work schedules as of January 24, 2005 to require them to work on rotating schedules pending the disposition of the grievance they have filed under the Collective Agreement. Only the schedules of nurses in Unit B3 where the plaintiffs work are subject to be changed on January 24, 2005.

[3] All parties recognize the urgency of the matter and are, therefore, proceeding at the instance of the Ontario Nurses' Association ("ONA") under the expedited process provided under the *Labour Relations Act*. It is common ground that a resolution, even with co-operation from both sides, cannot be achieved before April 2005.

[4] It is important to note that a hearing scheduled for November 24, 2004 was adjourned to December 14, 2004 as a result of the illness of one of the defendant's witnesses. It was on that date, apparently, it became clear that April 2005 would be the earliest possible date for a resolution. The defendant agreed to delay implementation of its decision to implement what it describes as "Master Rotating Schedule" (although only in Unit B3 where the plaintiffs work will the elimination of permanent schedules be implemented) from September 4, 2004 to January 24, 2005, but has refused to consent to a further postponement.

[5] As I understand the evidence, the plaintiffs all specifically sought permanent evening or permanent night shifts and were hired on that basis by the defendant. They all sought these arrangements because of personal circumstances primarily related to the raising of young children. At least in the case of Brown and Aranas, it is clear that they are driven by what they perceive to be a need to have one of the parents at home with the young children while the other parent works.

[6] It is not disputed that the parties have Collective Agreements recognizing permanent shift schedules, as well as a longstanding practice over period of at least thirty years.

JURISDICTION

[7] There is no doubt that the resolution of this kind of dispute can fairly be characterized as a core function of the Labour Relations Board. It is difficult to justify the court's intervention in such disputes.

[8] It is this point of view that lead Benotto J. in *Ontario Nurses' Assn. v. Toronto Hospital*, [1996] O.J. No. 715 (Ont. Sup. Ct.), to decline jurisdiction in the circumstances set out in the head note:

This is an application by the Ontario Nurses' Association for an injunction against the Toronto Hospital. The purpose of the application was to suspend layoff notices given to 387 nurses to take effect on November 8, 1996. At the same time, two other labour relations proceedings were pending between the parties. These were, a complaint with the Ontario Labour Relations Board, which alleged that the notices were illegal, and grievances that alleged violations of earlier collective agreements. The issue was whether the court had jurisdiction.

HELD: Application dismissed. Labour legislation was meant to provide a complete code which governed all aspects of labour relations. The collective agreement established the relationship

which was properly regulated through arbitration. It would subvert the relationship and the statutory scheme if matters covered by the collective agreement were the subject of actions in the courts. The courts did not have concurrent jurisdiction but only residual jurisdiction if the statutory scheme did not provide an adequate alternate remedy. The residual power to grant injunctions was discretionary. There had to be a foundation of substantive rights on which to base an injunction. The court has no jurisdiction since the Labour Relations Board had the power to make its order retroactive. Thus, the timing of the layoffs was within the jurisdiction of the Board. There was also no gap in the legislative scheme of the Labour Relations Act that would give the court jurisdiction. [My emphasis.]

[9] It is, however, also clear, as the plaintiffs argue in their factum, that:

13. Under the *Labour Relations Act*, there is no power for the Arbitrator to issue interim orders except on procedural matters. An Arbitrator in Ontario does not have any power or ability to prohibit the Defendant from taking this action pending a final determination of the issue. There is also no process available under the Collective Agreement to enjoin the Defendant from changing the Plaintiffs' schedules on an interim basis pending a final determination on the legality of the Defendant's ability to change the schedule.

14. Other than through the discretion of the court in this injunction application, there is no ability for ONA to obtain an interim Order on behalf of the Plaintiffs to enjoin the Defendant from changing the status quo scheduling on January 24, 2005 prior to determination of the issue through the arbitration process.

[10] The plaintiffs rely on the decision of the Supreme Court of Canada in *B.M.W.E. v. Canadian Pacific Ltd.* (1996), 136 D.L.R. (4th) 289, where the court said at p. 292:

[5] The governing principle of this issue is that notwithstanding the existence of a comprehensive code for settling labour disputes, where "no adequate alternative remedy exists" the courts retain a residual discretionary power to grant interlocutory relief such as injunctions, a power which flows from the inherent jurisdiction of the courts over interlocutory matters: *St. Anne-Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1996] 1 S.C.R. 704, at p. 727, 28 D.L.R. (4th) 1 (S.C.C.). The "residual discretionary jurisdiction in courts of inherent jurisdiction to grant relief not available under the statutory

arbitration scheme" was most recently affirmed by this Court in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, at paras. 41, 54, 57 and 67, 125 D.L.R. (4th) 583 (S.C.C.) and *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967, at para. 3, 125 D.L.R. (4th) 609 (S.C.C.).

[11] In view of the decision in *B.M.W.E. supra*, in which the facts are strikingly similar to those in this case, it is understandable that the defendant did not vigorously contest the jurisdictional issue as it appears that at this time, at any rate, they would face an insurmountable barrier.

ANALYSIS

[12] There is clearly a serious issue to be tried, notwithstanding there are strong arguments to support the defendant's submissions that scheduling is essentially a management function; and that employees are generally required to "obey now and grieve later." The plaintiffs do have a reasonable chance of success.

As I noted earlier, the plaintiffs were hired and have worked continuously as full-time permanent shift workers and the collective agreement provides for such schedules. The grievance procedure has commenced and one hearing date was postponed at the instance of defendant. There is evidence to support the view of Greg Dillon, counsel for ONA, that the defendant's action might constitute a serious breach of the collective agreement.

IRREPARABLE HARM

[13] The claim in *B.M.W.E., supra*, was for a postponement of the employer's disputed decision to reschedule the work in such a way that the employees would lose their Sunday rest days, pending a decision on the legality of the new schedule by an arbitrator.

[14] Here at least two of the plaintiffs' positions focus on the welfare of their children, of the right of women to so arrange their work schedules (where possible) in such a way as to have one parent at home with the young children while the other works.

[15] I believe and find that there is a risk of irreparable harm from a refusal to grant the injunctive relief. Families and especially young children's lives could be drastically and irreparably affected for a substantial period of time. Such harm cannot be quantified in monetary terms or cannot be remedied adequately by the adjudicator in the final analysis. See *RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.).

[16] In *BMWE v. CP* (1993), Unreported, Vancouver, No. C933130 (B.C.S.C.), Shaw J. said:

I do not see how the loss of family days can be compensated adequately in dollars.

BALANCE OF CONVENIENCE

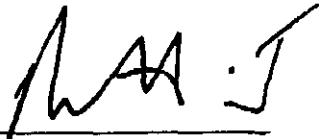
[17] There is no evidence of prejudice to the defendant except for what they perceive to be a challenge to their management right to schedule. I do not recognize in the plaintiffs' submissions any generalized challenge to the defendant's management rights. The defendant has already postponed the implementation of this new policy. There is no reason to believe that another relatively short postponement will do as much harm to the defendant, as the requirement that the implementation be immediate would cause the plaintiffs.

DISPOSITION

[18] The motion is, therefore, granted.

COSTS

[19] Subject to any agreement between the parties, brief written submissions on costs are to be made within 20 days of the release of these reasons.



Pitt J.

Released: January 19, 2005

COURT FILE NO.: 04-CV-281113CM1
DATE: 20050119

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SUPERIOR COURT OF JUSTICE

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SANOFEL ARANAS, NADINE BROWN,
THERESA CARTER-TOWNSHEND and
HARRIET LYAVALA

Plaintiffs

- and -

TORONTO EAST GENERAL &
ORTHOPAEDIC HOSPITAL INC.

Defendants

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