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LRB ruling on fired Vale workers significant: Lawyer

Refusal to discuss strikers means employer did not make every effort to reach agreement

BY DANIELLE HARDER

AN ONTARIO LABOUR Relations Board (OLRB) ruling against mining giant Vale could impact future collective bargaining, according to at least one employment lawyer.

The OLRB ruled Vale violated provincial labour laws by refusing to provide recourse for nine workers fired during a year-long strike.

While the company said it had valid reasons for letting them go, including misconduct on the picket line, the board said that was not the issue.

The question was whether Vale caused an impasse in negotiations by refusing to let an arbitrator decide the fate of the workers.

The company argued against it on several fronts.

Vale said it was not legally obligated to extend that protection since the workers were on strike, and told the board other employees were uncomfortable with the fired workers returning.

The OLRB held that arbitration is a "common means" for resolving disputes, and ruled the company had no evidence to support its claim about other employees.

Additionally, the company said it needed to "deter bad behaviour" in future strikes given labour disputes and replacement workers were likely to become "the new reality" in negotiations.

The board found this "particularly troubling," saying it "comes perilously close to an attempt not to deter future picket line misconduct but future picket lines themselves."

Ultimately, the OLRB ruled Vale had been "patently unreasonable" in its position.

"[Vale's reasoning] comes perilously close to an attempt not to deter future picket line misconduct but future picket lines themselves."

This decision will likely change the approach employers take when firing or disciplining workers during labour disputes, says Lior Samfiru, a partner with Samfiru Tumarkin in Toronto.

"The main message is that it's okay to move from past practice (extending the right to arbitration) but you need evidence to support it," Samfiru says, adding the decision also upsets a commonly held assumption among employers: the protections afforded under the collective agreement, including this one, do not apply during a strike.

"This will come as major news to employers," he says. "You have a situation here where a union has asked an employer to do something the employer is not required to do. Now, it seems, if one party has an issue of

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Visit www.labour-reporter.com for news stories on the British Columbia teachers' strike, a strike notice by the Machinists at Air Canada, a "no-board" report for Toronto inside workers, a call for wage moderation by the Ontario premier and a lawsuit over pulp and paper pensions. Follow us on twitter @labourreporter.

UPCOMING ISSUES

Next week's issue will include summaries of agreements between Epcor Utilities and the Civic Service Union in Edmonton, Humber River Hospital and OPSEU, Huronview Home for the Aged in Clinton, Ont. and the SEIU, and Cavendish Foods and the UFCW in Prince Edward Island.
The feature article will explore the implications of a cost-saving contract at auto-parts manufacturer Lear Seating.

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Delay in reaching solution may leave firing strikers viable option for employers: Professor

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paramount importance, that's enough to require the other side to deal with it."

The decision is seen differently by Brian Shell, lawyer for the United Steelworkers.

"This protection protects and preserves the rights of unionized workers to strike," he says. "If the board had ruled differently, they would be putting their jobs at risk. It would have allowed them to be discharged for no reason at all."

Shell calls Vale's steadfast refusal "extremely unusual" but not surprising.

"Foreign employers often approach collective bargaining with the mindset of the place they are from," he says, referring to Vale's Brazilian roots. "They don't necessarily accept the restrictions of labour laws here. This decision is a very loud check on them."

While the decision may be good for unionized workers in the present, the fact that it took two years to reach this decision is a concern moving forward, according to John Peters, a political science professor at Laurentian University in Sudbury, Ont.

"The company's chief operating officer (John Pollesel) was quite open that he wanted to send a message to workers," he says. "It is now two years later and nothing has happened. Each of these cases still has to be heard by an arbitrator.

"If I'm a sharp employer I might look at this and say, I don't care because two to three years down the road I may have to pay — but I may not. Vale is setting a trend. If you have deep enough pockets you can arbitrate, grieve and collectively bargain all you want but this can go on for years."

The question now is whether Vale will abide by the ruling or keep fighting it, Peters says.

While Vale is not responding to media requests, Pollesel wrote an open letter in the *Sudbury Star* in which he said the company "will move forward with arbitration."

He also took issue with the OLRB's assertion that senior managers, including him, were unaware of what happened on the picket line, and made the decisions to fire the employees based on reports from others.

"That is untrue," he wrote. "The decisions made were informed and considered ones."

> [T]he fact that Vale tabled the position that it would refuse to agree to arbitrate disciplinary action imposed during the strike is not *per se* illegal. Nonetheless, it is an issue of particular importance… to trade unions…. Absent consensual settlements with respect to employees discharged during a strike… referral to arbitration is a common, if not standard means of resolving such disputes. Viewed objectively, Vale knew or ought to have known this. … we conclude that Vale's position was patently unreasonable. In maintaining that position to impasse Vale was not making every reasonable effort to make a collective agreement.
>
> *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers (United Steelworkers) v. Vale Inco Limited, Ontario Labour Relations Board, Feb. 24, 2012.*