IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20061205
Docket: S060090
Registry: Vancouver

Between:

Well-Being Seniors Services Ltd.
and
Nanaimo Seniors Village Partnership

PETITIONERS

And:

British Columbia Labour Relations Board
and
Hospital Employees Union

RESPONDENTS

Before: The Honourable Madam Justice Martinson

Oral Reasons for Judgment

In Chambers
December 5, 2006

Counsel for the Petitioners	D. T. McDonald
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Date and Place of Hearing:	October 3, 4 and 5, 2006, Vancouver, B.C.

I. INTRODUCTION

[1] This is an application for judicial review of two decisions of the Labour Relations Board of British Columbia, B.C.L.R.B. No. B221/2005 (the "Original Decision") and B.C.L.R.B. No. B297/2005 (the "Reconsideration Decision"). The application is brought by Well-Being Seniors Services Ltd. and Nanaimo Seniors Village Partnership (the "petitioners"). The petitioners request that this Court set aside the decisions of the Labour Relations Board of British Columbia ("the Board") or, in the alternative, that this Court remits the matter to the Board.

[2] The Original Decision allowed a complaint by the respondent Hospital Employees' Union ("HEU") that the Nanaimo Seniors Village Partnership (the "Partnership") had contravened the unfair labour practice provisions of the ***Labour Relations Code***, R.S.B.C. 1996, c. 244 (the "***Code***"). Specifically, the Board found that the Partnership had breached ss. 6(1), 6(3)(a), 6(3)(b), 6(3)(d), 9 and 32 of the ***Code***.

[3] In the course of finding the unfair labour practice complaints to be made out, the Board made the finding that the Partnership, and not Well-Being Seniors Services Ltd. ("Well-Being"), was the true employer of the employees on whose behalf the complaint was made. The Board made that finding based on its application of s. 6(3) of the ***Health and Social Services Delivery Improvement Act***, S.B.C. 2002, c. 2 (the "***HSSDIA***").

[4] The petitioners applied to the Board for reconsideration of the Original Decision. There were four grounds for reconsideration:

1. the Original Panel erred in law in its interpretation and application of the "true employer" test under [the ***HSSDIA***]. Specifically, the Original Panel erred in its approach to determining whether the Partnership "intended" to fully integrate and directly supervise and control Well-Being employees, as required by s. 6(3) of [the ***HSSDIA***];
2. the Original Panel erred in law and acted in a manner contrary to the principles of procedural fairness and natural justice when it failed to rule on the submission that the time bar imposed pursuant to s. 33(10) of the ***Code*** prevents a finding that the Partnership could have committed any unfair labour practices in relation to any certification efforts undertaken by the employees covered by the 10-month time bar during the relevant period;
3. the Original Panel erred in law and in fact in concluding that there was an expanding organizing drive in effect at the Facility which began before July 14, 2004; and
4. the Original Panel erred in law in its interpretation of s. 2 of the ***Code***. Specifically, the Original Panel erred in inferring that an employee's freedom to choose to be a member of a trade union overrides the Partnership's attempts to foster an economically viable business, where the same employees are currently represented by the Union.

[5] A panel of three dismissed the petitioners' application for reconsideration of the Original Decision.

[6] The parties agree that s. 58 of the ***Administrative Tribunals Act***, S.B.C. 2004, c. 45 (the "***ATA***") applies to the Original Decision and to the Reconsideration Decision and that s. 58 should be used to determine the applicable standard of review.

[7] The petitioners say that a different standard of review applies to the Board's decision on the true employer issue rather than to the Board's decision on the unfair labour practices issues. They say that an application of the pragmatic and functional approach shows that the true employer decision is outside the exclusive jurisdiction

of the Board and is therefore reviewable on a standard of correctness, whereas the applicable standard of review on the unfair labour practices issues is patent unreasonableness.

[8] The petitioners say the standard is correctness on the true employer test because s. 6(3) is a modification of the Board's exclusive jurisdiction to determine who is an employer and, as such, modifies or limits the Board's exclusive jurisdiction.

[9] They say that the Board was not correct when it found that the Partnership was the true employer because it ignored the question of subjective intent. Even if the test is patent unreasonableness, they say the decision was patently unreasonable. The petitioners also say that the Board failed to rule on their submission that there can be no interference in an organizing campaign when applications for certification are prohibited by the time bar in s. 33(10) of the ***Code***. This, they say, was a breach of natural justice and procedural fairness, and is reviewable on a standard of fairness.

[10] The respondents agree that the appropriate standard of review on the unfair labour practices issues is patent unreasonableness, but argue that the appropriate standard of review on the true employer issue is also patent unreasonableness. In each case, they say that the decisions were not patently unreasonable. Even if the standard is correctness on the true employer test, they say the decision was correct.

II. FACTUAL BACKGROUND

[11] The Partnership owns and operates the Nanaimo Seniors Village (the "Facility"), a licensed residential care facility in Nanaimo. The Partnership is expressly designated as a public health sector employer under the ***Public Sector Employers Act***, R.S.B.C. 1996, c. 384 (the "***PSEA***") and the ***Health Care Employers Regulation***, B.C. Reg. 427/94. The Partnership exists under the umbrella of Retirement Concepts Senior Services Ltd. ("Retirement Concepts").

[12] When the Facility first opened in 2001, the Partnership's predecessor company entered into a voluntary recognition agreement with BCGEU to be the bargaining agent for the Resident Care Aides ("RCAs") and the Activity Aides ("AAs"). Pursuant to s. 6 of the ***PSEA***, because of the Partnership's designation as a public sector health employer, it is required to become and remain a member of the Health Employers' Association of British Columbia (the "HEABC"). Therefore, when the care service staff was certified to BCGEU, the Facilities Subsector Collective Agreement (the "Master Agreement") applied to them.

[13] The Registered Nurses ("RNs") and Licensed Practical Nurses ("LPNs") employed at the Facility were not unionized. The terms and conditions of their employment were covered by an agreement between the Partnership and the individual nurses called the "Professional Nurses Partnership Agreement" (the "Nurses' Agreement"). The Nurses' Agreement had a term from April 1, 2001 to March 31, 2004.

[14] On January 28, 2002, the government of British Columbia enacted the ***HSSDIA***, which voided provisions of existing collective agreements and, among other things, enabled a health sector employer to contract with outside service providers to perform services previously performed by certain unionized employees. In June 2003, the Partnership began to consider contracting out the care services at the Facility.

[15] In July 2003, management informed the employees at the Facility that the Partnership was seeking proposals to contract out the care services. Following that meeting, the BCGEU met repeatedly with the Partnership but was unable to put forth a proposal that was competitive with outside contractors. The RCAs and AAs applied for decertification and effective November 14, 2003, they were decertified from the BCGEU.

[16] After decertification, the employees presented their own proposal to management. The Partnership accepted the proposal and the RCAs and AAs were given letters of employment to sign on Well-Being's letterhead. Well-Being is a corporate entity also under the Retirement Concepts umbrella.

[17] On June 22, 2004, the HEU filed an application for certification to represent the LPNs. This application for certification came on for hearing at the Board on June 30, 2004. At that hearing, counsel for Well-Being advised that Well-Being was the employer. Well-Being took the position that a bargaining unit consisting of LPNs alone was inappropriate and that the appropriate bargaining unit was one consisting of all care employees. Well-Being further advised that Well-Being's position was

that the HEU was barred from applying for all care employees by virtue of s. 33(10) of the ***Code***, which imposes a 10-month "waiting period" following decertification.

[18] Between June 24, 2004 and July 30, 2004, the HEU asserted that the LPNs alone were an appropriate bargaining unit. The HEU also maintained its position that the Partnership was the employer of the care employees, however, it filed an alternative application naming Well-Being as the employer. The applications for certification were consolidated. Well-Being and the Partnership filed responses to the LPN applications on July 16, 2004.

[19] On July 14, 2004, the Partnership advised the RCAs, AAs and LPNs that it intended to change the contractor for care services from Well-Being to another party. On July 16, 2004, the Partnership filed a s. 32(1) application with the Board, in which it maintained that it was not the employer of the care staff at the Facility and therefore the s. 32(1) application was really unnecessary. However, out of an abundance of caution, it brought the application to seek permission to terminate its existing care services contract with Well-Being as it pertained to the LPNs and re-tender that contract to another service provider. It did not seek permission to change the contractor with respect to the RCAs and AAs as the certification application did not include them.

[20] On July 30, 2004, the HEU filed new applications for certification, naming the Partnership as the employer on the primary application and Well-Being as the employer on the alternate application. The applications for certification were for the LPNs, RCAs and AAs at the Facility. On the same day, the HEU applied to withdraw

its applications for certification filed on June 22, 2004 which sought a bargaining unit of only the LPNs at the Facility. On August 3, 2004, the employer applied to withdraw its s. 32 application and the HEU did not object to its withdrawal. The applications to withdraw were granted by the Board.

[21] On August 4, 2004, a letter was sent to all employees on Well-Being's letterhead advising that the contract with Well-Being would be terminated effective September 9, 2004 and that their employment would end on that date. On August 5, 2004, a notice was put up indicating to employees that the letters were not lay-off notices. Then, on August 6, 2004, a memorandum was issued to employees specifying that the letters issued on August 4, 2004 were in fact notices of termination of their employment with Well-Being.

[22] On August 6, 2004, the HEU filed the unfair labour practice complaints that have given rise to this application for judicial review. The HEU alleged that the Partnership and Well-Being breached the ***Code*** when the care employees received notice of termination of employment. The HEU also alleged that the Partnership, and not Well-Being, was the true employer of the care employees.

III. ANALYSIS

[23] As noted at the outset, the parties disagree about which standard of review applies to the Board's decision on the true employer issue. The parties agree that the appropriate standard of review on the unfair labour practices issues is patent unreasonableness. The parties disagree about whether the Board addressed the s. 33(10) issue in its reasons.

A. True Employer Issue

1. Standard of Review

a. General Principles

[24] In British Columbia, the standard of review of a decision of the Board is determined by s. 58 of the ***ATA***, which states, in part:

> 58(1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
>
> (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
>
> (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

[25] The parties agree on the applicability of s. 58 of the ***ATA***. The ***Code*** contains a series of privative clauses (ss. 136 to 139). Moreover, by virtue of s. 115.1 of the ***Code***, ss. 58(1) and (2) of the ***ATA*** apply to decisions of the Board.

[26] The first question, therefore, is whether the interpretation and application of s. 6(3) of the ***HSSDIA*** is a matter over which the Board has exclusive jurisdiction. If it does, then s. 58(2)(a) of the ***ATA*** applies and the standard of review is patent

unreasonableness. If it is not, then s. 58(2)(c) of the ***ATA*** applies and the standard of review is correctness.

[27] In order to determine whether an issue is within the exclusive jurisdiction of the Board, this Court must apply the pragmatic and functional approach. That approach was established by the Supreme Court of Canada in ***U.E.S., Local 298 v. Bibeault***, [1988] 2 S.C.R. 1048 and gained ascendancy in ***Canada (Director of Investigation and Research) v. Southam Inc.***, [1997] 1 S.C.R. 748 and ***Pushpanathan v. Canada (Minister of Citizenship and Immigration)***, [1998] 1 S.C.R. 982. The approach requires a reviewing court to consider four factors in order to determine which standard of review is applicable to a review of a decision of an administrative body: (1) the presence or absence of a privative clause; (2) the expertise of the administrative tribunal relative to the reviewing court on the issue in question; (3) the purpose of the legislation as a whole and of the provision in particular; and (4) the nature of the problem (law, fact or mixed law and fact).

[28] By balancing these four factors, "the pragmatic and functional approach inquiries into legislative intent, but does so against the backdrop of the courts' constitutional duty to protect the rule of law." (***Dr. Q v. College of Physicians and Surgeons of British Columbia***, 2003 SCC 19 at ¶21). The overall aim is to determine whether the Legislature intended the issue be decided by the Board rather than the Court: ***Breeden v. West Vancouver (District),*** 2005 BCSC 14.

[29] Although the pragmatic and functional approach was developed by the Supreme Court of Canada as a method for determining what standard of review to

apply, the approach is also properly applied where, as here, the standard of review is dictated by legislation (the ***ATA***) but a court is called on to determine whether a particular issue was within the exclusive jurisdiction of the administrative tribunal.

[30] The Court of Appeal, in ***United Brotherhood of Carpenters and Joiners of America, Local 527 v. British Columbia (Labour Relations Board)***, 2006 BCCA 364 recently confirmed this approach. That case dealt with an application for judicial review of a Board decision. In the context of determining whether the Board's decision fell within the scope of s. 58(2)(a) of the ***ATA***, Levine J.A. stated, at ¶46, that "the pragmatic and functional approach must be applied to determine whether the Board's decision was within its exclusive jurisdiction."

b. The Petitioners' Submissions

[31] The petitioners say that s. 6(3) should be viewed as a jurisdiction-limiting provision because it confines the Board's ability to determine whether a person is an employee of a health sector employer. They say that the fully integrated test set out in s. 6(3) is not simply a codification of the existing Board case law; it is a complete modification. The Board previously had exclusive jurisdiction to determine who the true employer is and this provision limits that jurisdiction. Under s. 6(3), the Legislature has elevated the importance of "intention" in determining the true employer. The employee will not be considered an employee of the health sector employer "unless the health sector employer intended the employee to be fully integrated with the operations of the health care employer and working under its direct supervision and control." The petitioners say that by setting out the factors for

the Board to apply in determining the true employer, it is clear that the Legislature did not intend to defer to the Board on this matter. Section 6(3) is therefore jurisdictional in nature.

[32] They say that an application of the pragmatic and functional approach supports that conclusion. With respect to the first factor, the petitioners say that while the general privative clause found in s. 17 of the ***HSSDIA*** and s. 138 of the ***Code*** apply, s. 6(3) specifically limits the Board's jurisdiction and therefore the Board does not have exclusive jurisdiction with respect to the matter of true employer under the ***HSSDIA***.

[33] With respect to expertise, the petitioners acknowledge the general expert nature of labour tribunals. However, they say that when considering the question of purpose, it is the ***HSSDIA***, not the ***Code***, that is at issue and the purpose of the ***HSSDIA*** is to take certain matters out of the collective bargaining regime in order to provide flexibility in the delivery of health care services in British Columbia and to permit heath care employers to provide services in a more efficient and cost effective manner. The Board, they argue, is not in a better position than the courts to balance the competing policy issues that are at play under the ***HSSDIA***.

[34] With respect to the nature of the problem, the Board had to interpret and apply s. 6(3) of the ***HSSDIA***. When the issues before a tribunal involve concepts of statutory interpretation and general legal reasoning, matters which are ultimately within the province of the judiciary, the petitioners say the decision is subject to review on the standard of correctness. Here, the enabling statute is not the ***Code***

but rather the ***HSSDIA***. The cases the respondents rely upon with respect to the question of deference are all cases dealing with the ***Code***, not cases decided under another statute, as is the case here. This is an ***HSSDIA*** issue.

c. The Pragmatic and Functional Approach in this case

(i) *Presence or Absence of a Privative Clause*

[35] On the question of the presence or absence of a privative clause, the Court in ***Pushpanathan*** stated, at ¶30, that:

> [T]he presence of a "full" privative clause is compelling evidence that the court ought to show deference to the tribunal's decision, unless other factors strongly indicate the contrary as regards the particular determination in question. A full privative clause is "one that declares that decisions of the tribunal are final and conclusive and from which no appeal lies and all forms of judicial review are excluded" [citation omitted].

[36] There are a number of privative clauses that apply to decisions of the Board, including decisions made under the ***HSSDIA***. Subsection 17(1) of the ***HSSDIA*** adopts the provisions of the ***Code***, including the privative clauses found in ss. 136 to 139 of the ***Code***.

[37] Section 138 of the ***Code*** contains particularly strong wording. It is a "full" privative clause, as that phrase is defined in ***Pushpanathan***. Section 138 reads:

> 138 A decision or order of the board under this Code, a collective agreement or the regulations on a matter in respect of which the board has jurisdiction is final and conclusive and is not open to question or review in a court on any grounds.

[38] Section 17(2) of the ***HSSDIA*** provides that:

> 17(2) Except as specifically provided in this Act, the labour relations board has exclusive jurisdiction to determine a question arising under this Act.

[39] The true employer issue arises from an application of s. 6(3) of the ***HSSDIA*** and is a question arising under the ***Act*** for the purposes of s. 17(2).

[40] In my view, s. 6(3) of the ***HSSDIA*** is a not a jurisdiction-limiting provision. It states:

> 6(3) The labour relations board or an arbitrator appointed under the Code or under a collective agreement must not declare a person who
>
> (a) provides services under a contract between a health sector employer and an employer that is not a health sector employer, and
>
> (b) is an employee of the employer that is not a health sector employer
>
> to be an employee of the health sector employer unless the health sector employer intended the employee to be fully integrated with the operations of the health sector employer and working under its direct supervision and control.

[41] The fact that the subsection is negatively worded ("must not ... unless") does not mean that it is a jurisdiction-limiting provision. Rather, it gives the Board the exclusive jurisdiction to declare the persons listed in s. 6(3)(a) or (b) to be employees of the health sector employer. If the Legislature had not intended that the Board retain the exclusive jurisdiction to make the true employer determination, it would have omitted the latter half of the subsection ("unless ... control") from the statute. The fact that the Legislature included that wording indicates that it specifically intended that the Board have jurisdiction to declare an employee, that

meets the requirements of the subsection, to be "an employee of the health sector employer".

(ii) *Relative Expertise of the Board*

[42] The second branch of the pragmatic and functional approach asks a reviewing court to inquire into the expertise of the administrative tribunal relative to the courts. To do so, "the court must characterize the expertise of the tribunal in question; it must consider its own expertise relative to that of the tribunal; and it must identify the nature of the specific issue before the administrative decision-maker relative to this expertise" (***Pushpanathan*** at ¶33).

[43] The petitioners and respondents agree that the Board has expertise in matters of labour relations. Labour boards have traditionally been accorded a high degree of deference by the courts because of their expertise in matters of labour relations vis-à-vis the courts: see, for example, ***British Columbia (Hospital Employees' Union) v. British Columbia (Labour Relations Board)***, 2006 BCSC 1334 at ¶74; ***Carpenters*** at ¶61; ***International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514 v. Prince Rupert Grain Ltd.***, [1996] 2 S.C.R. 432 at ¶24 and cases cited at ¶25-26; ***Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corp.***, [1979] 2 S.C.R. 227 at 235-36.

(iii) *Purpose of the Statute as a Whole and of the Provision in Particular*

[44] The third branch of the pragmatic and functional approach requires an analysis of the purpose of the statute as a whole and of the provision in particular.

Generally, increased deference is called for where the purpose of the statute is to balance competing policy objectives or where the tribunal is called on to evaluate multiple sets of interests or considerations: ***Dr. Q*** at ¶30-31 and ***Pushpanathan*** at ¶36. In contrast, less deference is required where the purpose of the statute or provision is simply to determine rights as between two parties.

[45] It is not enough to say, as the petitioners do, that the ***HSSDIA*** has broad policy implications and that therefore the Board has no advantage over the courts to balance the policy issues that are at play under the ***HSSDIA***. Rather, as noted in ***Pushpanathan***, what must be asked is whether the specific issue before the administrative tribunal is one in which the tribunal has relative expertise.

[46] In this case, the specific issue arising from s. 6(3) is the question of whether a health sector employer should be found to be the true employer of employees of an ***HSSDIA*** subcontractor. That question arises in a labour relations context and its answer has labour relations consequences. It is an issue that is very much related to and connected with the central issue that all parties agree the Board has jurisdiction to deal with, namely the unfair labour practice complaints. It is an issue which engages the Board's expertise in labour relations and over which the Board should be considered to be expert vis-à-vis the courts.

[47] The function of s. 6(3) of the ***HSSDIA*** is to codify the test that the Board should apply in respect of an application to declare a health sector employer the true employer of employees of an ***HSSDIA*** contractor. More generally, the function of

the ***HSSDIA*** is to void certain collective agreement provisions that would otherwise prevent a healthcare employer from contracting out.

[48] Insofar as the ***HSSDIA*** mandates a balancing of policy objectives in the labour relations context, however, the pragmatic and functional approach requires this Court to show increased deference to the Board. On the other hand, the fact that the issue in question is the application of a specific legal test to a dispute between an employer and employees – rather than a balancing of multiple sets of interests between various parties – suggests that less deference should be accorded.

(iv) *Nature of the Problem*

[49] The application of s. 6(3) of the ***HSSDIA*** is a question of mixed fact and law. On the one hand, the determination of whether a person is a true employer involves the determination of the appropriate legal test; on the other, it requires an application of that test, including an evaluation of the facts giving rise to the dispute in question.

d. *Conclusion on True Employer Issue*

[50] The first two factors strongly support the conclusion that the Legislature intended that the Board have exclusive jurisdiction. The fact that the Board's determination under s. 6(3) is protected by strong privative clauses, both in the ***HSSDIA*** and in the ***Code***, is compelling evidence that matters decided within the scope of s. 6(3) are within the exclusive jurisdiction of the Board. The Board has considerable expertise. The last two factors do not clearly point to one conclusion or the other.

[51] In balancing the four factors, I am satisfied that the Legislature intended the issue to be decided by the Board, rather than the Court. The s. 6(3) decision is within the exclusive jurisdiction of the Board and the patent unreasonableness standard of review applies.

2. Application of the Standard

a. The Patent Unreasonableness Standard

[52] The standard of patent unreasonableness is very high. As summarized in ***Law Society of New Brunswick v. Ryan***, 2003 SCC 20, at ¶52:

> [A] patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" [citations omitted]. A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

[53] In ***Voice Construction Ltd. v. Construction & General Workers' Union, Local 92***, 2004 SCC 23, at ¶18, Major J. noted (in *obiter*) that "[a] definition of patently unreasonable is difficult, but it may be said that the result must almost border on the absurd."

[54] The Court of Appeal of this Province has stated that, when applying the patent unreasonableness standard of review, "[t]he Board is entitled to be wrong in the eyes of a court if it acts within its jurisdiction" (***Budgell v. British Columbia (Labour Relations Board)***, 2003 BCCA 605, at ¶8).

b. Application to this case

[55] The petitioners say that the Original Panel erred in finding that a health sector employer's alleged intention to fully integrate and directly supervise contractor employees is determined solely by objective factors and not by evidence of the health sector employer's subjective intention. Such an interpretation, they say, is inconsistent with the clear language of s. 6(3) and previous jurisprudence interpreting an alleged employer's intention to create an employment relationship. They say that the Legislature intended to elevate the alleged true employers' intention from one of several factors weighed together to that of a precondition. The petitioners say the Board ignored the evidence of a health sector employer's subjective intention in the face of s. 6(3) and cannot do that. The Original Panel said that intention under the section "must be determined objectively not subjectively" (¶121).

[56] The petitioners say it also failed to summarize or consider in this context the Partnership's detailed evidence about its plan for Well-Being within the industry, Well-Being's state of development and most importantly the reasons why it did not have a site manager in the Facility. A witness of the petitioners, Ms. McDougall said that the intention was to contract with other related facilities and outside facilities to provide care services pursuant to the changes in care service delivery facilitated by Bill 29 (the ***HSSDIA***). She explained why there was no manager assigned to the Facility. While the petitioners acknowledge that the relationship was unclear to many employees between January 2004 and June 2004, one union witness acknowledged that he was aware that the care work had been contracted out to

Well-Being in January 2004. The petitioners say the Reconsideration Panel did nothing but perpetuate the error of the Original Panel. While it said that the "Partnership's subjective intent is belied by the undisputed acts of the case" (¶3), it did so without an examination of the stated intention by the Partnership's witness.

[57] I have concluded that the Board's decision on the true employer issue was not patently unreasonable. The Board dealt with the s. 6(3) issue in ¶103-124 of the Original Decision. At ¶104-105, it found that the s. 6(3) test applied. In the following paragraphs, the Board extensively canvassed the evidence and reasoning which led it to this finding. At ¶115, the Board found that the evidence pointed "overwhelmingly to the Partnership remaining in the same position with respect to the care service employees after the alleged contracting out to Well-Being as it was before." At ¶121 it specifically addressed the Petitioner's submission that it was necessary to prove that the Partnership had the subjective intention to fully integrate the employees into its operation and gave reasons for rejecting that proposition.

[58] The Board summarized its findings on the true employer issue at ¶124:

> In summary, I find that Well-Being is not a separate and distinct entity from the Partnership. The totality of the evidence overwhelmingly supports the finding that the Partnership remained the true employer of the employees at the Facility and the wrapping of Well-Being around the employees did not result in the Partnership contracting out its care staff. The Partnership continued direct employment of the care services staff albeit though [*sic*] a different corporate vehicle.

[59] The Board considered the relevant statutory provisions and the evidence which would affect its conclusion as to the true employer issue.

[60] Even if the Original Panel was wrong, the issue was addressed by the Reconsideration Panel. That Panel was not required to review the evidence before it. The members obviously considered the evidence before the Original Panel and concluded that the Partnership subjectively intended the employees to be fully integrated with the operations of the health care employer and working under its direct supervision and control.

[61] In my view, even if the standard of review is correctness, the decision was correct.

B. Unfair Labour Practices Issue

1. The Board's Decisions

[62] The Original Panel's finding that the Partnership breached s. 6(1) of the ***Code*** is at ¶ 151 of the Original Decision:

> The Partnership has also breached Section 6(1) as it is clearly interference with the selection of a trade union for the Partnership to terminate all its care service employees to ensure that it was not certified.

[63] The Original Panel's finding that the Partnership breached s. 6(3)(a) and s. 6(3)(b) of the Code is found in ¶150 of the Original Decision:

> I also find that the Partnership has breached Section 6(3)(a) when it terminated the care service employees because they sought to become members of the Union. The Partnership has also breached Section 6(3)(b) because it terminated the employees without proper cause when the Union was in the process of conducting a certification campaign for its employees.

[64] The Original Panel's finding that the Partnership breached s. 6(3)(d) and s. 9 of the ***Code*** is found in ¶152 of the Original Decision:

> The Partnership has also breached Sections 6(3)(d) and 9 of the Code. The Board uses an objective test to assess the employer's conduct against the standard of a reasonable employee: ***Excell Agent Services Canada Co.***, BCLRB No. B172/2003. The employees were advised a few days prior to the date the representation vote was scheduled that they were terminated. The memoranda given to the employees clearly set out that the Partnership is opposed to being unionized. With the exception of the confirmation of the terminations, the comments in the memoranda of June 29, 2004 and August 4, 2004 concerning the Union and the certification are not a violation of Sections 6(1), 6(3)(d) and 9 as they were not coercive or intimidating. The expressing of noncoercive and non-intimidating views based on a preference to resist certification is protected by Section 8 of the Code and do [*sic*] not constitute an unfair labour practice: ***Convergys***. However, the communication of the terminations during the organization campaign while a certification is pending is a breach of Sections 6(3)(d) and 9 as it is a threat of job loss on the eve of a certification representation vote.

[65] The Original Panel's finding that the Partnership breached s. 32 of the ***Code*** is found in ¶47-149 of the Original Decision, portions of which state (¶147):

> I find the Partnership breached Section 32 of the Code with respect to LPNs. I do not accept the Respondents argument that the statutory freeze does not apply as the certification applications were dismissed as untimely due to the 10-month time-bar. At the time that the decision was made and communicated to the care service staff, there was a certification application pending for the LPNs and this is all that is required for the protection in Section 32 to come into effect.

[66] The Board, the petitioners argue, was patently unreasonable and incorrect when it declared that the Partnership had breached the above-mentioned provisions of the ***Code***. In addition, the petitioners state that the Board breached procedural fairness by failing to rule on aspects of their arguments.

[67] They say that the Reconsideration Decision sustained a patently unreasonable and incorrect decision.

2. Standard of Review

[68] The petitioners say that the Board failed to rule on their submission that there can be no interference in an organizing campaign when applications for certification are prohibited by the time bar in s. 33(10) of the ***Code***. This, they say, was a breach of natural justice and procedural fairness, and is reviewable on a standard of fairness.

[69] With respect to all other aspects of the unfair labour practices issue, the petitioners agree with the respondents that the appropriate standard of review is patent unreasonableness.

[70] The respondents agree that the appropriate standard of review on the unfair labour practices issue is patent unreasonableness. With respect to the s. 33(10) time bar, the respondent HEU says that the Board did rule on that issue; and that therefore the Board's ruling on that issue, like the rest of its decision, is subject to a standard of patent unreasonableness.

3. Application of the Standard

[71] The essence of the petitioners' argument is that the Board's finding that there was one "expanding" organizing campaign, which initially included only the LPNs and subsequently was expanded to include the RCAs and AAs, is patently unreasonable. They say that there is an absence of objective or subjective evidence of an organizing campaign that predates the July 14, 2004 announcement that Well-Being was no longer going to be the contracted service provider and that this precludes a finding that the Partnership interfered with such a campaign.

[72] Further, the petitioners say that the Board applied a prohibition on changes to terms and conditions of employment based on a "pending application for certification" during a time when the HEU was statutorily barred from applying for certification by s. 33(10) of the ***Code***. The time bar issue is not an argument that the existence of a time bar prevents organizing activity; rather, they say, it is a factor in deciding whether there was interference and the Board did not deal with that issue. Therefore, they say that the Board improperly found that the Partnership had breached ss. 6(1), 6(3)(a), 6(3)(d) and 9 of the ***Code***.

[73] The respondents say that, on a review of the Original Decision, it cannot be said that the conclusion that the Partnership breached various of the unfair labour practice provisions of the ***Code*** was patently unreasonable.

4. Decision on Unfair Labour Practices

[74] In my opinion, it cannot be said that the decisions of the Original Panel and the Reconsideration Panel were patently unreasonable. Looking at the totality of the evidence, there was a basis upon which to reach those decisions. The panels were aware of the time bar issue and I agree with the HEU that the Original Panel did in fact address that issue.

IV. CONCLUSION

The Petition is dismissed. The respondent HEU is entitled to its costs at scale 3.

Martinson J.