

BCLRB No. B23/2016

BRITISH COLUMBIA LABOUR RELATIONS BOARD

CERTAIN EMPLOYEES OF Kerdan Hotel Ltd.

("Certain Employees")

-and-

Kerdan Hotel Ltd.

(now known as: 2015Hospitality Ltd.)

("Kerdan Hotel")

-and-

2015Hospitality Ltd.

("2015Hospitality")

(together, the "Employer")

-and-

UNITE HERE, LOCAL 40

(the "Union")

PANEL: Bruce R. Wilkins, Associate Chair,
Adjudication

APPEARANCES: Brian Welz, for 2015Hospitality.
Leo McGrady, Q.C., for the Union
Certain Employees, for themselves

CASE NO.: 69028, 69071 and 69102

DATE OF DECISION: February 5, 2016

DECISION OF THE BOARD

I. NATURE OF THE APPLICATIONS

1 Certain Employees of the Kerdan Hotel apply for decertification of the Employer under Section 33(2) of the *Labour Relations Code* (the "Code"). The Union opposes the application and has filed unfair labour practice complaints. The Union later applied under Section 35 of the Code for a declaration that 2015Hospitality is the successor employer to Kerdan Hotel.

II. BACKGROUND FACTS

2 The Quinsam Hotel closed on May 24, 2015. Most Employees were laid off and paid severance. Prior to its closure, the Quinsam Hotel was owned and operated by Kerdan Hotel. Richard Gladstone had worked at the Quinsam Hotel but had quit in 2014. Just prior to the Quinsam Hotel's closure, Gladstone came back and worked as an employee for the Kerdan Hotel for a short period. He was not paid severance when the hotel closed.

3 The Union was certified to represent employees of the hotel on December 10, 1951. Kerdan Hotel was a signatory to the Master Hospitality Industrial Relations Agreement (the "Collective Agreement") and has been since that agreement was first negotiated in 1989. Article 4.01 of the Collective Agreement says the following:

All employees who are now members of the Union or who may become members, shall remain members in good standing as a condition of employment.

4 The Collective Agreement also requires employees to sign a check-off form before commencing work, and for union dues to be remitted to the Union.

5 In September of 2015 the hotel was reopened under the same name with new ownership. 2015Hospitality leased the hotel and the licence from the previous owner and operator, Kerdan Hotel. 2015Hospitality did not contact the Union when it opened the hotel. It hired new employees. It operated the hotel without regard for the collective agreement. It did not inform the Union of who the employees were, nor did it have them sign Union membership cards or remit dues to the Union as required by the Collective Agreement.

6 On September 3, 2015 Teresa South, Area Steward for the Union ("South"), wrote an e-mail to Brian Kelly, one of the managers of the hotel. She wrote as follows:

It has been brought to my attention that the Quinsam is reopening and has been leased out. Anyone who did not receive severance pay (exp. Richard Gladstone), have recall rights under the

collective agreement. Also, as it has to open union, are the lessor's in need of union cards, medical forms, etc., to have the employees sign upon hiring. I should have been informed by someone on your side that this was happening. It is unfortunate that it didn't happen. I will wait to hear back from you. Hopefully this doesn't lead to any unnecessary grievances

7 South received no reply to her e-mail.

8 Gladstone approached a manager of 2015Hospitality to ask about recall rights under the collective agreement on or about September 17, 2015 but was rebuffed. He was told 2015Hospitality would not bring back anyone from the previous employee complement where there was a union.

9 The Union's Section 35 application was sent to both 2015Hospitality and Kerdan Hotel. Neither sent a submission when invited by the Board to do so.

10 III. POSITIONS OF THE PARTIES

10 Certain Employees say they have been employees of Quinsam Hotel since September 15, 2015. They say they have never been contacted by a representative of the Union. They say had they been contacted they would have been obliged by the Union protocol for employment but this was not the case. They say they have no wish to have any representation by the Union. They ask that their application under Section 33(2) proceed.

11 The Union says the refusal to rehire Gladstone was a violation of Section 6(3) of the Code which says that an employer must not refuse to employ or to continue to employ a person because the person is a member of a trade union.

12 The Union argues that Lessees 2015Hospitality have not complied with its collective agreement obligations. It says none of the new employees have signed Union cards nor have they paid dues. It says the names of the employees have not been disclosed to the Union, contrary to the terms of the collective agreement. The Union says the Employer has not hired any member of the Union. It says the Employer has acted deliberately and is motivated in their actions by a wish to run the hotel as non-union, and that this conduct constitutes interference with the formation, selection or administration of a trade union contrary to Section 6(1) of the Code. It says the Employer was motivated by anti-union animus.

13 The Union says the Board has held it will not entertain decertification applications from employees who have failed to live up to their obligation under the collective agreement to maintain membership in the Union and to pay dues to the Union: *Janbar Enterprises Ltd.*, BCLRB No. 182/83 ("*Janbar*"). In that case, The Board held, at pages 3 and 4:

...as I have said, the employees in this case are themselves in breach of the collective agreement. They have not maintained

membership in the Union as the collective agreement requires. And it is they who seek cancellation of the certification. The Board should not exercise its discretion to grant an application under one provision of the Code at the behest of persons who, while relying on the Code to attain a right or privilege for themselves, are in breach of other provisions of the Code.

14 The Union says the Employer's conduct and violations of the Code make it unlikely that the vote will disclose the true wishes of the employees. It relies on Section 33(6)(a) and (b):

(6) If an application is made under subsection (2), the board may, despite subsections (2) and (4), cancel or refuse to cancel the certification of a trade union as bargaining agent for a unit without a representation vote being held, or without regard to the result of a representation vote, in any case where

(a) any employees in the unit are affected by an order under section 14, or

(b) the board considers that because of improper interference by any person a representation vote is unlikely to disclose the true wishes of the employees.

15 The Union submits a successorship under Section 35 of the Code occurred when 2015Hospitality Ltd. reopened the Quinsam Hotel. It seeks a declaration to that effect.

16 The Union seeks the following remedies: that the decertification application be dismissed; that the Employer be ordered to comply with the provisions of the Collective Agreement; an order that the Employer pay dues owed to the Union; an order that the Employer cease and desist from further violation of the Code; an order under Section 33(3)(b) that no further application for decertification may be filed by the employees for ten months; that a copy of this decision be filed in Court; and, an order for costs.

17 Kerdan Hotel says it closed the Quinsam Hotel on May 25th, 2015 based on poor financial performance. It says the employees were given 60 days' notice and were paid severance. It says the business was leased on July 2015 to 2015Hospitality. It says that Kerdan Hotel is merely the landlord at this time. Kerdan Hotel says they have fulfilled the obligations to the employees by paying severance and holding a Section 54 meeting. It says it advised South it had no intention of reopening the business.

18 Kerdan Hotel says they understand that Gladstone was not paid severance because he quit his job on September 30, 2014. It says Gladstone did return for a short period prior to closing but his status with the Union was unknown. It says if he was a Union member then it is willing to pay him severance.

19 2015Hospitality says that Kerdan Hotel is not involved in the ownership of 2015Hospitality or the operation of the hotel. It says it has leased the premises and licence from Kerdan Hotel. It says its understanding is that all employees were given 60

days' notice of layoff and were paid severance. It says it is unaware of any former employees asking about employment.

20 2015Hospitality says the vote should be counted and that the result should determine if the staff wish to be a part of the Union. It says it has not been avoiding the Union and has been very busy getting the hotel up and running. It says it has received a couple of letters from the Union but no representative has ever shown up at the hotel or called.

21 The Union says that neither 2015Hospitality nor Kerdan Hotel have sent in replies to its Section 35 application and that the application should be allowed.

IV. ANALYSIS AND DECISION

22 I have decided to consolidate these matters because they are related and because it is the most efficient manner to deal with them. I have before me a decertification application from Certain Employees, unfair labour practice complaints from the Union, and a Section 35 successorship application from the Union.

23 The Section 35 application went unopposed by 2015Hospitality and Kerdan Hotel; they were invited by the Board to make submissions, but the Board did not receive a submission from either. The factual assertions made by the Union with respect to the alleged successorship are not denied. It is not contested that 2015Hospitality leased the property and the licence from Kerdan Hotel. It is not denied that 2015Hospitality is running the same business with the same clientele, in the same building at the same location. The hotel has the same name.

24 Section 35 of the Code says the following:

35 (1) If a business or a part of it is sold, leased, transferred or otherwise disposed of, the purchaser, lessee or transferee is bound by all proceedings under this Code before the date of the disposition and the proceedings must continue as if no change had occurred.

(2) If a collective agreement is in force, it continues to bind the purchaser, lessee or transferee to the same extent as if it had been signed by the purchaser, lessee or transferee, as the case may be.

(3) If a question arises under this section, the board, on application by any person, must determine what rights, privileges and duties have been acquired or are retained.

(4) For the purposes of this section, the board may make inquiries or direct that representation votes be taken as it considers necessary or advisable.

(5) The board, having made an inquiry or directed a vote under this section, may

(a) determine whether the employees constitute one or more units appropriate for collective bargaining,

- (b) determine which trade union is to be the bargaining agent for the employees in each unit,
- (c) amend, to the extent it considers necessary or advisable, a certificate issued to a trade union or the description of a unit contained in a collective agreement,
- (d) modify or restrict the operation or effect of a provision of a collective agreement in order to define the seniority rights under it of employees affected by the sale, lease, transfer or other disposition, and
- (e) give directions the board considers necessary or advisable as to the interpretation and application of a collective agreement affecting the employees in a unit determined under this section to be appropriate for collective bargaining.

25 The Board's approach to Section 35 is set out in *British Columbia Ferry Services Inc.*, BCLRB No. B153/2004 ("BC Ferry"):

The purpose of Section 35 of the Code is to ensure that where a business or part of it is disposed of, the transferee receives it subject to all proceedings under the Code: *The Allan Benson Talisman Club Inc.*, BCLRB No. B404/93. The Board must give a full and liberal interpretation to the concept of successorship and the Board will not allow changes in corporate ownership to defeat hard-won collective bargaining rights: *Kelly Douglas and Company Limited*, BCLRB No. 8/74, [1974] 1 Can LRBR 77.

In considering whether there has been a sale, lease, transfer or other disposition of a business or part of it by one employer to another, the Board takes a two-step analysis. First, the Board determines the nature of the alleged predecessor employer's business and the various assets used in its operation. Second, the Board determines whether there is a discernible continuity in the business or part of it formerly carried on by the alleged predecessor employer and now being carried on by the alleged successor employer: *Frank Brown Acoustics Kamloops (1982) Ltd.*, BCLRB No. 158/84, 6 CLRBR (NS) 247; *Midas Canada Inc.*, BCLRB No. B27/2003. To assist in these determinations certain tests and principles have been developed over the years. (paras. 70-71, emphasis in the original)

* * *

There are limits, however, to the breadth of successorship. Even viewed from a labour relations perspective, the term "business" means something more than the sum of its parts. In defining "business", the Board has followed the definition set out in *Metropolitan Parking, Inc.* OLRB No. 0523-79 [1980] 1

Can. LRBR 197, that confirms that a "business" is a dynamic activity - something that serves as a functional economic vehicle:

A business is a combination of physical assets and human initiative. In a sense, it is more than the sum of its parts. It is a *dynamic* activity, a "going concern", something which is "carried on." A business is an organization about which one has a sense of life, movement and vigour. It is for this reason that one can meaningfully ascribe organic qualities to it. However intangible this dynamic quality, it is what distinguishes a "business" from an idle collection of assets.

* * *

...The vital consideration for both Widjery J. and the Board is whether the transferee has acquired from the transferor a functional economic vehicle. (pages 208 and 209)

Thus, a transfer of assets or location alone will not constitute a successorship: *Lyric Theater, supra*, p. 344; *Blackdome Mining Corp.*, BCLRB No. B419/99, para 27. Nor is a transfer of work, alone, sufficient to trigger the successorship provisions of the Code. (paras. 74-75, emphasis in the original)

26 In *Lyric Theater Ltd.*, BCLRB No. 38/80, [1980] 2 Can LRBR 331 ("*Lyric Theater*"), the Board adopted a set of factors which assist the Board in determining whether a successorship has occurred:

...the cases offer a countless variety of factors which might assist the Board in its analysis, among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete: the number of variables with potential relevance is endless. *It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own, none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of*

the business after the transfer is the same it was before i.e. whether there has been a continuation of the business. (pp. 333-334, emphasis in the original)

27 I find that a successorship has occurred. There has been a hiatus of approximately three months but the hotel has reopened in the same location in the same building under the same name. I find 2015Hospitality, through leasing of the premises and running the same business as Kerdan Hotel, acquired a functional economic vehicle in doing so. There is a discernable continuity of the business formerly carried on by the predecessor employer, Kerdan Hotel, now being carried on by 2015Hospitality. I find that a Collective Agreement was in force at the time of the lease and that 2015Hospitality is now bound by the Collective Agreement, and was bound by the terms of the Collective Agreement when it re-opened the Quinsam Hotel.

28 I find the Employer to be in violation of Section 6(1) of the Code. The Employer has failed to recognize its obligations with respect to the Collective Agreement, and has interfered with the administration of the Union by not complying with the Union security clauses in the Collective Agreement. I do not find the Employer intended to do so; the submissions of 2015Hospitality Ltd. demonstrate to me it was unaware of its legal obligations under the Code. The Employer failed to inform the Union of who its members were at the Quinsam Hotel, failed to have the employees sign Union cards, and failed to remit dues to the Union. The objective effect of the Employer's actions was interference with the administration of a trade Union.

29 I find the employment particulars with respect to Gladstone to be uncertain. The Employer says he quit in 2014 but returned to employment briefly just before the Quinsam Hotel closed in the spring of 2015. The Employer did not pay severance to Gladstone. I defer the issue of Gladstone to the parties to discuss and negotiate. If they cannot reach agreement, they must go to arbitration to determine what his rights under the collective agreement are. Given the other findings in this decision and the remedies granted, it is unnecessary to make a finding with respect to the Union's allegation under Section 6(3) of the Code.

30 Section 33(6) of the Code says the following:

If an application is made under subsection (2), the board may, despite subsections (2) and (4), cancel or refuse to cancel the certification of a trade union as bargaining agent for a unit without a representation vote being held, or without regard to the result of a representation vote, in any case where

(a) any employees in the unit are affected by an order under section 14, or

(b) the board considers that because of improper interference by any person a representation vote is unlikely to disclose the true wishes of the employees.

31 I find the reasons in the case of *Janbar* are applicable to the facts in this case. The fact that the Union had not received remittances for employees in the unit means that the Employer and the employees were in fundamental breach of the Collective Agreement at the time of the decertification application and during the time leading up to it.

32 I find the reasoning in *Certain Employees of Terrace Timber Ltd.*, BCLRB No. B3/2013, to be applicable to the facts before me:

When looking at the conduct of the Employer objectively, I find it more likely than not that the employees, having lived through and observed the effects of the Employer's conduct, would have a poor perception of the Union and of its efficacy, and would be affected by this perception in their actions. The application to decertify by Certain Employees came on the heels of the Employer's conduct.

The facts in front of me, considered together in an objective manner, lead me to the conclusion that the actions of the Employer interfered with the administration of the Union, conduct which is forbidden under Section 6(1) of the Code, and is remediable under Section 14 of the Code. I find it more likely than not there is a causal relationship between the Employer's interference and the Section 33(2) application filed by Certain Employees. (paras. 38-39)

33 Given the Employer's violation of Section 6(1) of the Code I find the poll would not represent the true wishes of the employees.

34 The Union applied for an order that the Employer be ordered to pay the Union's costs, disbursements, and expenses in this matter. They say the matter is one of "exceptional and compelling circumstances": *North American Construction Ltd.*, BCLRB No. B267/2000. I do not find an order of costs, disbursements and expenses to be called for in this matter. 2015Hospitality is a small and unsophisticated employer which is not represented by legal counsel. It is clear from the submissions that the Employer was naïve and unaware of its legal obligations. I do not find that 2015Hospitality was attempting to frustrate or defeat the Code itself.

V. DECLARATIONS AND ORDERS

35 I declare under Section 35(1) of the Code that 2015Hospitality is the successor employer to Kerdan Hotel.

36 I declare under Section 35(2) that the Collective Agreement which is in force, continues to bind 2015Hospitality, to the same extent as if it had been signed by 2015Hospitality.

37 I declare 2015Hospitality to be in breach of Section 6(1) of the Code. I order 2015Hospitality under Section 14(4)(a) of the Code to cease and desist from interfering with the administration of the Union.

38 Under Section 49(1)(a) of the Code, I order 2015Hospitality to do everything that it is required to do under the terms of the Collective Agreement retroactive to the date the employees were hired by 2015Hospitality. I order 2015Hospitality to pay interest on the union dues it owes the Union pursuant to the Collective Agreement.

39 Under Sections 33(6)(a) and (b), I refuse to cancel the certification of the Union as bargaining agent for the employees of the Employer. I have determined that it is unlikely the vote would disclose the true wishes of the employees. The ballots cast in the representation vote will not be counted.

40 Certain Employees' application under Section 33(2) is dismissed. Under Section 33(3)(b), I declare there can be no application under Section 33(2) during the 10 months immediately following the date of the issuance of this decision.

41 If the parties are unable to agree on the employment rights of Gladstone, I order the matter of his employment rights be taken to arbitration under the Collective Agreement.

42 I order that a copy of this decision be filed in the registry at the Supreme Court of British Columbia pursuant to Section 135 of the Code.

LABOUR RELATIONS BOARD



BRUCE R. WILKINS
ASSOCIATE CHAIR, ADJUDICATION