

OLRB FINDS THAT A CONTRACTING OUT WAS NOT A SALE OF A BUSINESS

Multi-Professional Support Services Inc., an unreported decision of Vice-Chair Misra, dated March 20, 2000

Facts

The Ontario Public Service Employees Union ("OPSEU") filed an application under section 69 of the *Labour Relations Act, 1995* (the "*Act*") claiming that there had been a sale of business from the Huntsville District Memorial Hospital (Algonquin Health Services) Community Care Access Centre (the "CCAC") to Multi-Professional Support Services Inc. ("MPSS").

Additionally, OPSEU filed an unfair labour practice complaint alleging that MPSS had failed to recognize bargaining rights obtained by OPSEU in respect of the CCAC's nurses.

MPSS was formed in 1995 to perform private homecare services. By October 1997, MPSS had 20 homecare service providers, including RN's. In April 1998, MPSS bid on and received a contract from the CCAC to provide 30% of the nursing care work that had previously been provided directly by the CCAC. At that time, many CCAC nurses began providing home nursing services through MPSS.

OPSEU alleged that a sale of a business took place when MPSS bid on and received a three year contract in April 1999, under which MPSS would provide approximately 98% of the nursing services previously provided by the CCAC. After April 1999, the nursing services performed by MPSS under its contracts with the CCAC represented approximately 90% of the total nursing services provided by MPSS. The other 10% of nursing services were provided to private clients. Only four additional CCAC nurses began providing care through MPSS after MPSS received the 1999 contract.

The CCAC retained control over the services provided by MPSS through case coordinators, who requisitioned services from MPSS, specifying the type and frequency of services required. The nurses communicated directly with the CCAC's coordinators with respect to ongoing client needs.

Issue

Was there a sale of a business from the CCAC to MPSS?

Decision

Roy C. Filion, Q.C., successfully argued that there had not been a sale of a business from the CCAC to MPSS. Instead, what took place was a contracting out. The Board specifically noted that, "the continued employment of the predecessor's employees is only one factor to be considered, unless the employees have some combination of accumulated skills, ability, know

how or business contacts which are crucial or irreplaceable and without which the business could not continue as a going concern."

The key factors in the Board's decision included the following:

- The CCAC was by government mandate no longer permitted to provide direct services and therefore was required to seek contractors to provide nursing services.
- MPSS was a company set up long before the CCAC began to look for a nursing services contractor. MPSS had an existing infrastructure, its own clients, its own management, staff and "know how" for the provision of nursing services.
- The majority of the CCAC nurses who wished to join MPSS did so in 1998. Few additional CCAC nurses joined MPSS in April 1999.
- No management personnel from the CCAC transferred to MPSS.
- Almost half of MPSS' nursing complement was hired from outside of the CCAC.
- No evidence suggested that MPSS would not have been able to provide the CCAC with nursing services but for the hiring of some CCAC former nursing personnel. MPSS had no obligation to hire the nursing staff that were no longer needed by the CCAC.
- MPSS had its own offices, computers, and a customized computer system. It received no capital or assets from the CCAC.
- The CCAC did not commit in its contract to give MPSS 98% of the nursing services and could at any time cease referring work to MPSS.

Consequently, the Board concluded that, "MPSS was not the recipient of the CCAC's economic organization as it had a pre-existing business providing private clients with nursing services. That business has simply grown considerably as a result of MPSS successfully bidding for the CCAC work which the CCAC no longer wished to do on its own." Accordingly, there had been a subcontracting and not a transfer of a business or part of a business within the meaning of section 69 of the *Act*.