

BRITISH COLUMBIA LABOUR RELATIONS BOARD

P.A. BUILDING MAINTENANCE

(the "Employer")

-and-

SERVICES EMPLOYEES' INTERNATIONAL UNION, LOCAL NO. 244

(the "Union")

PANEL: Rod Germaine, Vice-Chair

COUNSEL: Adam Albright, for the Employer
Arnold Berry, for the Union

CASE NOS.: 18837 and 18874

DATES OF HEARING: May 19, 24 and 27, 1994

DATE OF DECISION: June 2, 1994

DECISION OF THE BOARD

I. INTRODUCTION

These proceedings began with a complaint of an unfair labour practice but they developed into a contested certification application. The Employer disputes both the composition of the bargaining unit and the Union's membership support on the day of application.

The specifics of the dispute include a surprising number of the more esoteric issues which lurk beneath the surface of the apparently mundane questions of who is an employee and who is a trade union member for purposes of Section 23 of the *Labour Relations Code*.

II. BACKGROUND

On May 2, 1994, the Union filed a complaint alleging that the Employer had terminated Gurmail Singh Gill in contravention of Sections 5, 6 and 9 of the Code. With the assistance of the Board's staff, the complaint was settled and Gill retained his employment. The Union applied to withdraw the complaint.

On May 5, 1994, the Union applied to be certified for a unit described by the Board as "employees in the Lower Mainland in British Columbia except truck drivers, office and sales staff". On the same day, the Board also received:

1. a revocation of membership from Gill; and
2. a request by the Union to rescind its withdrawal of the unfair labour practice complaint.

The matter could not be heard until May 19 and 24, 1994. Prior to the hearing the parties were able to successfully resolve a number of issues relating to the composition of the proposed bargaining unit. The Industrial Relations Officer's report listed 90 employees. The parties agreed to delete 17 individuals, and to add two.

When the hearing commenced, the Union proposed to attack the validity of Gill's revocation of his membership. The Union alleged employer intimidation. The Employer objected on the ground that the Union had not filed any unfair labour practice complaint. The Employer argued the Union should not be given the opportunity to effectively allege a violation of Section 6(3)(c) without first being required to follow the prescribed procedures for making such a complaint. I upheld the objection and directed the Union to deliver its particulars the following day so that the matter could be conveniently consolidated with the related certification issues. By agreement, the issue was deferred. It was agreed that the issue would be addressed only if it transpired that the Union's certification application was dependent upon Gill's membership.

The hearing then proceeded. The issues in dispute at that stage concerned the employment status of 10 individuals. The Employer sought to add 5 more names to the list of employees on the date of the application, and to delete 5 others. However, during the hearing the Employer revised its position and sought the deletion of a further 7 individuals.

At the conclusion of the hearing, the Union made several concessions in response to the evidence adduced by the Employer. As a consequence, the number of individuals whose employment status remained outstanding was narrowed to nine, consisting of two disputed additions and seven disputed deletions. But, before the matter could be put to rest, a further issue emerged.

The parties were informed of my inclination to decide that all nine disputed individuals were employees on the date of application. The composition of the unit was thus established. But, when the level of membership support for the Union was calculated, it transpired that the Union enjoyed support only marginally in excess of the 55% required for 'automatic' certification pursuant to Section 23(1) of the Code. In addition, the Union's support included a membership card signed on the date of the application but sometime after the application was submitted to the Board. The operation of Section 23(1) was suspended by these circumstances; the Union's entitlement to certification without a vote depended on that card.

Counsel were notified of this feature of the membership evidence. The employer took the position that this card should not be included in the calculation of membership support. A further

hearing was convened to give counsel the opportunity to make submissions in this respect.

In the final analysis, however, it became unnecessary to decide this further question of whether to accept a card signed on the day of the application but after the application was submitted. That is because, upon further deliberation and closer consideration of the authorities cited in relation to one of the disputed additions to the unit, I found myself unable to sustain my initial inclination that the individual was an employee on the day in question. With the exclusion of this individual from the unit, the Union's entitlement to automatic certification under Section 23(1) ceased to be dependent upon the card signed late in the day of the application.

III. FACTS

The Employer business is mostly the provision of janitorial services. It bids on contracts to perform cleaning. At present its two biggest contracts involve SkyTrain stations and the Provincial Liquor Distribution Branch but it has other, smaller cleaning contracts as well. It also has a contract to retrieve and return luggage carts to the terminal at the Vancouver International Airport. In addition, the Employer operates a "trucking" business which is not affected by these proceedings.

The Employer's record keeping and employee relations are distinctly casual. This is illustrated by several aspects of the documents and other evidence in these proceedings. It would appear, for example, that the Employer depends entirely on word of mouth to recruit new employees. It puts new employees to work with a complete absence of paperwork. It does not ascertain a new employee's social insurance number until the end of the employee's first pay period. It does not deduct income tax from the pay of all of its employees. It gives oral notice of permanent layoff.

Recently the Employer has lost several cleaning contracts. Until the end of March, 1994, it had contracts to clean SkyTrain vehicles and offices. The employees who performed those contracts were laid off effective the end of March. Parkat Lahal, who manages the Employer's operations and whose wife is the Employer's sole corporate shareholder, testified that the expectation in the industry is that those employees would take jobs with the contractor replacing the Employer on those contracts.

On April 26, 1994, the Employer received notice that its proposal to extend its contract with the Liquor Distribution Branch was not accepted and, as a result, its services would not be required after May 31, 1994. The evidence of both Parkat Lahal and Dalwinder Rai, the Supervisor responsible for this contract, is that the employees were told immediately that there would not be any work for them with the Employer after the end of May.

There is at least one problem with this evidence. As the Union submits, Rai testified that he told the employees the Employer would have them back if there was work for them but in cross examination denied he had made any such statement. In spite of this contradiction, I am unable to accept the Union's invitation to find that notice was not given. The only evidence before me is that of Lahal and Rai. Whatever doubt there may be about the terms of the notice, there is no evidence to contradict their testimony that oral notice was given to the employees who perform the Liquor Distribution Branch contract.

IV. THE CODE

The statutory language which necessitates a determination of the composition of the bargaining unit, and the level of membership support for the applicant trade union among those employees, is:

- 23 (1) If the board is satisfied that *on the date it receives an application for certification not less than 55% of the employees in the unit are members in good standing* of the trade union and ..., the board shall certify the trade union...

- 24 (2) If ... the board is satisfied not less than 45% and not more than 55% of the *employees in a unit are members in good standing* of the trade union, it shall direct that a representation vote be taken.

(emphasis added)

These are, of course, key provisions of the Code. They establish the bases on which employees may exercise their right to engage in collective bargaining. The essential principle is that employees acquire a collective bargaining agent by a majority decision. The majority may be expressed by 55% membership support or, if the applicant trade union is unable to demonstrate that level of membership support, then by a majority of those who vote.

V. THE SPECIFIC DISPUTES

Jagjit S. Johal:

Johal's job is related to the Employer's cleaning contracts at the Airport. The contracts concern the South Terminal and three trailers near the airport construction site. Johal picks up garbage from these locations each night and deposits it elsewhere at the airport. It is not clear how long this takes but it is probably one to two hours. He works five nights a week. Johal was asked to take the job because his wife works for the Employer in connection with the contract to clean the trailers. Johal is able to coordinate the job with his trip to the airport to pick up his wife at the end of her shift. He started on April 1, 1994, and is paid \$450 per month.

The Union does not dispute that Johal is an employee, but says his employment is too casual to allow him to be considered in the calculation of membership support. The Union cites *Custom Gaskets Ltd.*, BCLRB No. B83/93 in which the Board excluded two temporary and casual employees from the calculation of membership support because they did not "have a sufficient continuing interest in the representation question to be counted" (p. 6). As I will explain below, I am unable to discover the Board's authority to exclude employees at work on the day of the application from this calculation. But, it is not necessary to deal with the point here.

Johal may be a casual employee but he is not temporary. There are other casual employees whose inclusion in the membership calculation is not disputed by the Union. For example, Johal's wife shares a single job with two others. The three are responsible for cleaning the three trailers at the airport. The Employer is apparently unconcerned about which one of them does the work on any particular day. The single salary of \$1650 monthly is divided among the three but the Employer makes out three cheques of \$500, \$600 and \$550 and pays each of the three directly. If there is a distinction between the nature of Johal's employment with the

Company and the employment of these three by the Company, it is one of degree only, not substance. Moreover, the degree of difference is small.

Since the Union does not dispute the inclusion of the three who share the single job, it is not possible to justify the exclusion of Johal.

Gurdeep Bhulla:

Bhulla is a janitor who works in the SkyTrain stations. The uncontradicted evidence of Rai is that Bhulla called him on the 3rd or 4th of May to inquire about the possibility of a job. As a result of this conversation, Bhulla came to the Nanaimo Street SkyTrain station at 10:00 pm on the 5th of May, the day of the Union's certification application. He was signed in by the Lead Hand. He spent the first evening observing the work and training to perform it. He was not paid for the shift. He began to perform the work on the next evening shift, starting at 10:00 pm on May 6th, and has worked regularly since then.

According to Rai, all new employees in the SkyTrain stations receive one shift of training without pay. It is Rai's evidence that many new employees leave after the training, presumably because the job does not appeal to them. But, Rai insisted that the Employer never rejects a new recruit after the training shift. If the new recruit is not yet capable of taking on the work, more training will be given.

The Employer submits Bhulla was an employee on the date of the application and must be included among the employees for purposes of determining the Union's level of support. There are two aspects to this contention. The first is the question whether Bhulla became an employee on that day. The second arises out of the sequence of events. If he did become an employee on May 5th, is it significant that it was later in the day, after the application was submitted?

Respecting the first of these issues, Counsel for the Employer argues Bhulla probably became an employee on the 3rd or 4th of May when it was agreed between Rai and Bhulla that Bhulla would take a job cleaning SkyTrain stations. At the very latest, it is submitted, Bhulla's employment commenced when he began the practical preparations of training at 10:00 pm on

May 5th. As a consequence, he was an employee on the date of the application.

The Union submits that Bhulla's employment did not commence until the evening of May 6th, when he began to work for pay. He was therefore not an employee on the date of the application.

Counsel for the Employer relies upon *Kelly May Penner*, IRC Decision No. C219/90, in which the Industrial Relations Council granted an exemption from trade union membership under Section 11 of the *Industrial Relations Act*. In order to reach that conclusion, the Council had to deal with an argument that the application must fail because the applicant was not an employee. The argument was based upon the applicant's limited and intermittent days of work, as well as the failure of the employer to conduct its usual recruiting formalities. The Council held she was an employee. Drawing heavily upon the award in Re Toronto Newspaper Guild and Toronto Star Ltd. (1972), 24 L.A.C. 289 (Weiler), the Council expressed the following views:

It may not be necessary in all cases that a person actually begin to work to achieve employee status. In some cases, a person who is interviewed, hired, signs a contract of employment, has a start date fixed but has not yet actually begun to work may for the purposes of the Act be an employee.

Counsel for the Employer places great emphasis on this approach. He cites the apparently consistent analysis in *Brinco Coal Mining Corporation*, IRC Decision No. C159/92, which actually rejected an argument that an individual was an employee because the employer had agreed to hire him some time before the date of the certification application. But, in doing so, the Industrial Relations Council stressed the individual had neither "started work, nor taken any action in accordance with an employment contract prior to" the application date.

It was on the basis of this approach that I indicated my initial inclination to treat Bhulla as an employee on May 5th. He commenced his one shift of training that evening. Although he was not paid for the training, as Counsel urged, no other preparatory step could bring him closer to actually performing the work. If the law is that actually performing the work is not essential to the establishment of employment status, then Bhulla must have achieved that status on the evening of the 5th.

On further reflection, however, I am compelled to retreat from this conclusion. I do not quarrel with the premise that there may be cases in which a person becomes an employee before commencing to provide service for pay. As the award in *Toronto Star Ltd.*, *supra*, points out (p. 293), there are a host of cases in which it has been held that the employee relationship is not necessarily severed when the individual is unable to continue to actively work and receive wages. The author of that award removed any doubt about whether the same principle applied in this province when, as Chairman of the Labour Relations Board, he wrote the decision in *Western Canada Steel*, [1976] 1 *CanLRBR* 25, *BCLRB No. 79/75*. It established the important principle that persons on lay off retain their employment status for purposes of representation issues as long as they have a sufficient continuing interest in the choice to be made. I accept the point suggested in *Toronto Star* that there is no reason why an analogous situation could not occur before the individual begins to actually work.

However, when the two critical authorities relied upon by the Employer are examined more closely, it appears neither actually finds that the employment relationship came into existence before work was performed. On the contrary, the *Toronto Star Ltd.* award turns entirely upon the finding that the individual in question in that case "did perform significant actual services pursuant to his contract of employment" (p. 296). In *Kelly May Penner*, it was held that the applicant "has actually performed services and has been paid" (p. 9). Indeed, *Toronto Star* was cited and relied upon in *Kelly May Penner* precisely because in both cases this was the decisive factor.

To repeat, while both decisions flirt with the potential for other factors to create an employment relationship without the necessity of work or wages, in the end both rely on the performance of work. Indeed, in *Kelly May Penner* the paragraph after the one quoted above appears to state the necessity of actual work:

Moreover, Weiler suggests that the most narrow definition of employee is one of "a person who performs services under the direct control of another who pays him wages in return". If any of the indicia of employment were to be determinative of employment status, the beginning of work and the receipt of pay would surely be such a criteria. It seems to us that activities such as interviews, filling out application forms, signing a contract and so on, all

merge in the actual act of working and receiving pay. (p. 10)

I am obliged to acknowledge that I find the meaning of these remarks somewhat obscure. However, if I understand the last sentence in particular, the factors which the Council considered determinative were ultimately the performance of service and the receipt of wages.

Counsel for the Union cited *Kidd Bros. Produce Ltd.*, *BCLRB Decision No. B146/93* in which an employer telephoned an individual on the date of the certification application to inform him he was hired and he was to report for work on the next working day. The Board considered *Toronto Star Ltd.* and *Kelly May Penner*, but found "In this case...the commencement of work to be a requirement to achieve employee status under the certification provisions" (pp. 8-9) of the Code.

As I have said, I do not propose to disagree with the speculation in both *Toronto Star* and *Kelly May Penner*. There may be cases in which the commencement of training pursuant to an agreement to employ is sufficient to establish an employment relationship. But, on reflection, this case does not provide the Board with the circumstances to make that finding for the first time.

On the evidence before me, Bhulla had not signed or completed any employment-related forms when he commenced his training. He had not been given any identification. Indeed, Bhulla did not even sign himself in for the shift.

Rai testified that when a new recruit begins training he obtains the individual's address, telephone number and social insurance number (if the recruit has one) on a piece of paper which Rai then gives to the Employer's accountant, usually with the "time sheet" he turns in to the accountant each pay period. But, Rai's evidence did not include any specific assertion that he obtained this information from Bhulla on the evening of the 5th.

Finally, while I must accept Rai's evidence that the Employer never rejects a new recruit following the training shift, the employment relationship involves the agreement of two parties. It is therefore significant that many trainees never return to begin work. As Rai himself said, this has occurred "so many times". And, Rai was unequivocal in his explanation for the absence of pay on the training shift; it is because the trainee does not do any work.

In these circumstances, I am compelled to conclude that the relationship between the Employer and Bhulla retained a tenuous quality on the evening of May 5th, when Bhulla commenced his training shift. On the authorities cited to me, I am unable to find that an employment relationship was established before Bhulla began to perform work for the Employer. That did not occur until May 6th. Bhulla was not an employee on the day of the application.

Before leaving this issue, it is necessary to refer to some cases not cited in argument. There are a number but they are best illustrated by *Ron Peters, IRC Decision No. C226/90*, and *Esther M.L. Finch, IRC Decision No. C33/90*. Like *Kelly May Penner*, they are religious exemption cases. In that context, the Council stated the proposition on which the Employer relies in somewhat bolder terms:

In this case, the letter of October 15, 1990, from the School Board was an offer of employment to Peters. The only condition was that he either join the Union or obtain an exemption. In other words, he was hired subject to his satisfying one condition. His application to the Council was for that very purpose. At that point he was an employee for the purposes of Section 11.

(*Peters*, p. 10)

It is unnecessary for me to express any views in respect of this reasoning. If that is the view of this Board with respect to the religious exemption procedure in Section 17 of the Code, there are two reasons why it does not deflect me from my conclusion in relation to Bhulla.

The first is that the applicant in *Peters* was working for the employer at the time he filed his application for exemption. Indeed, I am unaware of any case which finds an employment relationship has come into existence in the total absence of any work performed by the employee. In the *Finch* decision, for example, the applicant "had worked as a substitute teacher for the school board for some years and on that basis alone she satisfied the requirements of employee status" (*Peters, supra, p. 7*).

My second reason, however, is probably more important. It is abundantly clear in *Peters* that the Council regarded the meaning of "employee" to be somewhat variable, depending on the

context. As I will indicate below by reference to *Citation Industries Limited, IRC Decision No. C299/88*, I agree with this proposition. The decision in *Peters* put it in these terms:

We have referred to "some flexibility" and "a degree of flexibility" in describing the nature and process of defining the term "employee" in the context of a particular statutory provision. We wish to make it clear that merely a potential for obtaining employment would unlikely qualify an individual as an "employee" within the meaning of any provision of the Act. ...the particular circumstances of each case, the purpose of the relevant statutory provision as well as the policies of the Act, and the practices and procedures of the Council must all be kept in mind.... (p. 9)

The considerations relevant to the determination of employment status in the religious exemption context were captured in the following passage from *Finch* quoted at pages 7 and 8 of *Peters*:

A finding that the terms of a contract prohibit a person from being an employee would permit parties to a collective agreement to contract out of the act... A provision in a collective agreement which precludes a person from exercising rights under Section 11 would be void and unenforceable; requiring union membership as a precondition to a Section 11 application has that effect. Further, the language of Section 11 does not suggest the limitation on the term "employee" that is proposed by the Union was intended by the Legislature. As well, the exclusive jurisdiction of the Council ... is sufficiently broad to conclude that a person who is hired by the School Board and obliged to become a union member, is an "employee" for the purposes of Section 11... (p. 3)

Therefore, although I have not discovered a case in which it has been so decided, it is conceivable that a person who has been offered (and who has possibly signed) a contract of employment which is expressed to be subject to trade union membership is an "employee" for purposes of a religious exemption. To decide otherwise would be to deny the exemption to most of the very persons for whom it must have been intended.

That is far from the purpose for which I am asked to find Bhulla was an employee on May 5th. The context in which I am asked to so decide is an application for certification and,

more particularly, the calculation of trade union support for the application. As I think was decided in *Kidd Bros. Produce Ltd., supra*, there is nothing in that context, or the policies which surround it, which would invite the establishment of the relationship before the commencement of work. On the contrary, in this context, a strong argument could be mounted for the proposition that employee status should not come into existence until work is performed. The argument is illustrated by the facts of this case. On the evening of May 5th, Bhulla was unaware of the representation issue. But, that would be equally so if indeed he had stated working for the Employer that night instead of only training. The critical factor is that, given the tenuous character of Bhulla's connection with the Employer prior to his commencement of work on the 6th, he did not acquire any real interest in the representation issue until then.

Since Bhulla did not commence his employment on May 5th, it is unnecessary to address the second aspect of the Employer's position. But, because it is related to other issues in this case, I would record my agreement with the Employer's contention that anyone who becomes an employee on the day of the application must be included in the calculation of membership support. Counsel's submission in this regard drew on *Act One Uniform Rentals Inc., IRC Decision No. C106/90* in which the Industrial Relations Council was asked to exercise its discretion to exclude from the calculation of membership support someone who commenced employment on the date of the application for certification. The argument was that to include the individual would be unfair because the trade union does not have any opportunity to sign up someone becoming an employee on the day of the application. The argument was rejected:

Nowhere in Section 43 is the Council granted a discretion to exclude persons from the ... membership requirement notwithstanding such persons were employed in the unit on the date of the application. The Council may *only* order a representation vote where "on the date the Council received the application not less than forty-five percent of the employees in the unit were members in good standing of the trade union." ... While the date of the application may appear to be an arbitrary cut off point, the Legislature chose to define those included in the ... membership requirement by a date which is both certain and easily ascertainable. ... the Legislature did not grant the Council a residual discretion to deal with exceptional circumstances... (pp. 13-14)

The level of membership support required under Section 23(1) of the Code, and the consequences if that level is established, are very different than they were under Section 43 of the Industrial Relations Act. But, as the quotation in this passage indicates, the relevant statutory language respecting the calculation of membership support remains the same. I accept the argument of Council for the Employer that, therefore, a person who becomes a *bona fide* employee at any time on the date of application must be included in the calculation of membership support. I also accept the argument that, on the strength of *Act One Uniform Rentals*, it is no obstacle to this conclusion to say that it denies the trade union the opportunity to sign up such an employee before submitting the application.

Balhar Kaur Cheema, Avtar Kaur Atwal, Rajwany Gill, Sukhwinder Bhullar, Amarjit Atwal, Sukjit Heer, and Parkash K. Sandhu:

These seven employees comprise the workforce performing the Employer's contract with the British Columbia Liquor Distribution Branch. As I have said, the contract has been terminated effective May 31, 1994. The seven employees were told on or shortly after April 26, 1994 that there would be no more work for them after May 31, 1994.

The Employer argues that, because they will cease to be employees on May 31st, these individuals do not have a sufficient continuing interest in the employment relationship to be included in the calculation of membership support for the Union. The argument develops from the logic of *Western Canada Steel, supra*. Counsel cites *Pacific Engineered Concrete Waterproofing Ltd, IRC Decision No. C78/92*, in which the Industrial Relations Council determined that two persons who had been "permanently laid off" prior to the application date should not be included in the calculation of membership support. The decision refers *Western Canada Steel* and a number of other decisions which follow it, including *Britco Structures Ltd., (1984) 5 CanLRBR (NS) 352, BCLRB No. 62/84*, which held that lay offs not governed by a collective agreement are more likely to sever the employment relationship.

All of these cases relate to the preservation of employment during a period when someone is no longer actively working and receiving pay. Counsel says the same principle applies in reverse to exclude active employees who cannot demonstrate a sufficient continuing interest in the representation issue for which employment status must be determined. Counsel relies upon

two cases: *Fleetline Parts and Equipment Ltd.*, BCLRB Decision No. 29/80 and *Dayboy Industries Ltd.*, BCLRB Decision No. 7/87. In the former, the Board excluded someone given notice of lay off before the date of the certification application. However, Counsel concedes it is not strong authority. Although the effective date of the lay off was to be after the date of the application, the individual in question decided not to work the notice period. The Board held she had voluntarily quit upon receiving the notice, so she had ceased to be an employee on the date of application.

The *Dayboy* decision, however, does provide the Employer with strong support. In that case the Board was concerned with an employee who had been given notice of termination one day before the date of the certification application. The termination was to be effective several weeks later, but the Board held:

Even if ... [the individual in question] was ... technically still an employee on the date the representation vote was conducted, the Board concludes that it would be contrary to the policy of this Board to permit her to vote. The Board has consistently held that terminated or laid-off employees with no reasonable expectation of renewed employment are ineligible to vote... As this individual's ties with this Employer will soon be severed, she does not have a sufficient interest in the outcome of the certification application and her vote should not be counted. (pp. 2-3)

Counsel might have mentioned *Custom Gaskets Ltd.*, BCLRB Decision No. B83/93. In it the Board found that two temporary and casual employees were to be included in the unit, but excluded from consideration for purposes of an application under Section 32(1) of the Code:

Employees who are not working on the date an application is filed may be found to have a sufficient continuing interest in the bargaining unit so as to justify their inclusion in the unit for the purpose of calculating membership support: *Western Canada Steel Ltd.*... Conversely, persons who are employees on the day an application for certification is filed may be excluded from the calculation of union membership support. This occurs when an employee does not have a sufficient interest in the outcome of the representation question to justify including her or him ...

A decision to exclude an employee, working at the time a certification is filed, from the calculation of membership support, will not be made lightly. Section 4(1) of the Code guarantees to all employees the right to participate in the lawful activities of a trade union. Balanced against this is the recognition that the employees who will enjoy the advantage, and bear the cost, of union representation should determine whether a union will represent them. (p. 6)

The Employer's argument is that if this is the Board's policy, there are few cases in which exclusion would be more justified than in this. The seven employees in question have no right of recall. Since the Employer has been losing contracts lately, it will not retain any of them and is unlikely to require any of them in the future. For that matter, the Employer does not even keep a list of former employees because it can rely on word of mouth to satisfy its recruiting needs. Indeed, as I have recorded, the employees may be expected to catch on with the contractor which takes over the contract with the Liquor Distribution Branch.

I recognize the force of the logic and policy relied on by the Employer. If persons not working can retain employment status because of a sufficient continuing interest in the representation issue, then active employees should be excluded from the representation process if they are unable to demonstrate a sufficient continuing interest. But, I do not accept the argument that I should exclude these seven employees from the calculation of membership support.

It is important to recognize that the issue here is *not* the employment status of the seven who work on the Liquor Distribution Branch contract. The reason for that begins with the meaning of the employee. The relevant portion of the definition in Section 1 of the Code is "a person employed by an employer". The contextual approach of the Board (and the Council) to this 'self-defining' concept has been extensively reviewed in *Citation Industries Limited, IRC Decision No. C299/88*. But, the point here does not require an exploration of that jurisprudence. It will be sufficient to refer to the basic features of the employment relationship.

The essential indicia of an employment relationship were enumerated in *Cranbrook and District Hospital, [1975] 1 CanLRBR 42, BCLRB No. 128/74*. The most important are indisputably that an employee provides service to an employer in exchange for pay, subject to the direction and control of the employer.

The *Western Canada Steel* line of cases has established that a person who cannot demonstrate the basic indicia may nevertheless remain an employee if the person can demonstrate a sufficient continuing interest in employment with the employer. But, the *Cranbrook* decision did not mention a sufficient continuing interest in future employment as one of the indicia of an employment relationship and there is no authority of which I am aware which would suggest it is an essential requirement of the employment relationship. In other words, a person who is providing a service in exchange for pay and subject to the control and direction of the employer is an employee whether or not the person has a continuing interest.

The seven persons in question were working in exchange for pay on the day of the application and they continued to work after that day. Whether or not they have a sufficient continuing interest in the outcome of this certification application, they were employees on the date of the application and they will remain so at least until they are actually laid off. As an aside, I would add that I do not accept that they have no interest in the representation issue. One of the matters which the Union, once certified, might be asked to address in negotiations with the Employer is the lay off of these employees, and the terms on which lay offs should be administered: *British Pacific Restaurants Ltd, BCLRB Decision No. 176/87*.

The real issue is the one identified in *Custom Gaskets Ltd, supra*: should the Board exclude these employees from the representation process? On the strength of the sufficient continuing interest doctrine, the Board has excluded employees from consideration for this purpose in both *Dayboy Industries* and *Custom Gaskets*. I have acknowledged the strength of this logic. In view of *British Pacific Restaurants*, it is not irresistible. But, the more important problem with the cases is that they are founded on a discretionary power which I am unable to locate.

As the Union submits, there is nothing in the language of Section 23(1) which admits of any discretion to exclude employees from the calculations necessary to administer that section. It will be observed that it is one of the few provisions of the Code which utilizes the mandatory "shall". Doubtless that was one of the reasons the Council, in *Act One Uniform Rentals Inc., supra*, came to the conclusion that it did not enjoy any "residual discretion to deal with exceptional circumstances".

In my view, persons who are "employees in the unit" on the day of application cannot be excluded from the calculation under Section 23(1). In some cases this will appear to work a hardship for the applicant, and in some it will appear to assist. That is the regrettable but inevitable consequence of any line drawing exercise. The advantage is, as the Council said in *Act One Uniform Rentals*, a "certain and easily ascertainable", albeit somewhat "arbitrary cut off point" (pp. 13 -14).

For these reasons, I find the seven individuals in question are employees in the unit and they must be included in the calculation of the Union's membership support for purposes of Section 23(1).

I would add that I was initially concerned about the potential for manipulation of the bargaining unit if the Board were prepared to exclude from the calculation of membership any employee subject to termination at a future date. An employer learning of an organizing drive could issue lay-off or termination notices in order to exclude perceived pockets of union support in the proposed unit. But, on reflection, I do not regard this as a significant consideration. The potential will not be reduced by the view I take of the employee status of persons who are subject to termination in the future. An employer bent on frustrating an organizing drive will retain the option of expanding its workforce in advance of the application date. The relevant provisions of the Code in that event are the unfair labour practice provisions, and the inevitability that some minority of employers will run afoul of those provisions should not enter into the determination of who is an employee in circumstances which do not include any allegations of Code contraventions.

The membership obtained late on the day of application:

Given the final conclusion I have reached in respect of Bhulla, it is not necessary to deal with this issue. The Union's entitlement to automatic certification is not dependent on this card. Nevertheless, having invited argument on the point, I would be remiss if I did not at least set out my reaction to the interesting positions of the parties in relation to this possibly unique issue.

The question which it appeared I would be required to decide is this: in its calculation of

membership support under Section 23(1) should the Board include a membership obtained by the trade union after the application is filed but on the same day?

The Employer took the position that the card should not be counted. Counsel mounted a strong and skilful argument in spite of having earlier argued (successfully) that a person who becomes an employee late on the same day must be included in the calculation.

Counsel submits it is the intention of the legislation and the Board that a trade union should believe it has the necessary support at the time it submits an application for certification.

The argument has three branches. First, it would damage the integrity of the process if a trade union could claim a level of support when it applies but continue organizing afterward. The 'freeze' imposed by Section 32(1) while an application is pending confirms the intention that organizing cease upon the submission of the application. Therefore, it would be "surprising and unsettling" if a trade union could continue signing up employees. Counsel asserted it would be improper for a trade union to claim membership it did not have at the time of application, even if the organizer had an employee's promise to sign later in the day.

The second branch of this argument relies upon the form prescribed by the Board for certification applications. In a box headed "Membership Information", the form requests information respecting the "Number of employees in the proposed bargaining unit" and the "Number of employees claiming to be members in good standing of the applicant trade union". It is submitted that these questions confirm the Board's intention that the trade union have the cards signed at the time of the application. To accept cards signed later would be effectively to amend the form.

The third branch of the argument is based on Section 3 of the *Labour Relations Board Regulation*. Headed "Membership Evidence" and "Criteria for membership", the provision sets out the "minimum criteria" for "establishing membership in good standing". Clause 3(b) prescribes that every card contain these words:

In applying for a membership I understand that the union intends to apply to be certified as my exclusive bargaining agent and to represent me in collective bargaining.

Counsel emphasizes "intends to apply" and submits those words necessarily exclude any card signed after the application for certification has been submitted.

Counsel for the Employer dismisses the significance of any appearance of anomalous treatment of persons who become employees late on the day of application on the one hand, and employees who become union members late on the same day, on the other. Counting the former but not the later is a "fact of life", simply one of the imperfections of the legislative scheme governing certification.

The response of the Union to this argument was no less forceful. Counsel says if it is unfair not to count a post-application employee, it is also unfair to ignore post-application membership. Counsel submits the flaw in the Employer's argument is that it relies upon forms and regulations to overcome a legislative intention clearly expressed in the words of Section 23(1) of the Code. The language of the statute speaks of employees and members "on the date" of application, not at the time of application. The date of application, it is submitted, has always been the focus of this inquiry. Counsel cites *Phillips Cables Ltd.*, *BCLRB Decision No. 52/77*, in which the Board said cards must be dated "so that the Investigating Officer can be satisfied that the employee took out membership on or before the application for certification *date*" (emphasis added, pp. 9 - 10). But that comment, as Counsel for the Employer says, was not made with this issue in mind.

Counsel for the Union cites the decision of the Alberta Labour Relations Board in *Plains-Pacific Construction Ltd.*, (1991) 11 *CLRBR* (2d) 224. The issue there was whether persons terminated on the date of application but prior to the submission of the application were to be considered employees for purposes of the calculation of membership support. That is not the precise issue here, but Counsel submits the case illustrates the kind of language which is necessary to sustain the Employer's argument, and which is notably absent from Section 23(1) of the Code. The relevant provision of the Alberta legislation required the Alberta Board to be satisfied of the minimum level of support "at the time of the application for certification". Although essentially the same language in Ontario is interpreted to mean on the day of the application (*Bond Place Hotel*, [1982] *OLRB Rep. Aug. 1135*), the Alberta Board found that the Alberta legislation directed the Board to consider the point in time during the day at which the application was submitted.

Finally, Counsel says that if the Employer's argument were correct then Section 3 of the Regulation would stipulate that the card indicate the time of day it was signed, as well as the date. Moreover, it would be more likely that Rule 24(1) of the *Labour Relations Board Rules* would make the presentation of the cards with the application a mandatory requirement, rather than merely permit it.

As enticing as the Employer's arguments are, my reaction is that they do not overcome the Union's fundamental point. The legislative language in Section 23(1) expressly directs the Board to consider the date of application. It does not express or even imply any cut-off at the time the application is submitted on that date. The Employer's concerns about the potential for trade unions to organize after the application has been submitted are of limited practical significance. The extent of the opportunity can be measured in hours and, at the very most, could not exceed 16 hours. That being so, it does not offend any sense of logic or propriety to contemplate the possibility of the Board taking into consideration a card obtained after the application is filed. And, the benefit of accepting that possibility is manifest. Inquiries into the precise moment a card is signed are avoided. The immense advantage of a "certain and easily ascertainable ... cut off point" (*Act One, supra*) is preserved.

Therefore, were I obliged to make this determination, I would not hesitate to say that the language of the statute must prevail over the implications of forms and regulations. If any further reason were necessary to support the conclusion, I would refer to the obvious inequity of a scheme which requires consideration of after-acquired employee status but precludes consideration of after-acquired membership. Anomalous consequences of that nature may be unavoidable in some cases, but they should not be embraced unnecessarily.

VI. CONCLUSION

Jagjit S. Johal and the seven persons working in the Liquor Distribution Branch were employees in the unit on the date the Board received the application for certification. Gurdeep Bhulla was not.

On the date the Board received the application, the Union had as members in good

standing more than 55% of the employees in the unit. Therefore, pursuant to Section 23(1), the application is granted.

As a consequence of the foregoing, it is unnecessary to deal with the Union's allegations respecting the membership revocation submitted by Gurmail Singh Gill. Gill was not counted as a member in the calculation of membership support. It is also unnecessary to reach any final conclusion respecting the question of whether the Board should take into consideration memberships obtained sometime after an application is filed but on the same date. The determination of those issues would not affect the outcome of the certification application.

The unfair labour practice complaint filed by the Union on May 2, 1994 will be treated as withdrawn.

The foregoing disposes of all of the issues before the Board in these proceedings.

LABOUR RELATIONS BOARD

ROD GERMAINE
VICE-CHAIR