IN THE MATTER OF AN ARBITRATION PURSUANT TO THE *LABOUR RELATIONS CODE OF BRITISH COLUMBIA*, RSBC 1996, c. 244

BETWEEN:

SUNRIDGE SENIORS COMMUNITY PARTNERSHIP

(the "Employer")

AND:

HOSPITAL EMPLOYEES' UNION

(the "Union")

(Re: Contracting Out Policy Grievance)

ARBITRATOR:	Irene Holden
COUNSEL:	Delayne M. Sartison Q.C. and Danny Bernstein for the Employer
	Jim Quail and Kaity Cooper for the Union
ARBITRATION DATES:	June 21-24, 2016
DATE OF AWARD:	November 21, 2016

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INTRODUCTION

This arbitration resulted from a decision of the Labour Relations Board, BCLRB No. B215/2014. The Hospital Employees' Union (at times referred to as the "Union" or the "HEU") had filed a number of unfair labour practice complaints as a result of an employer, Park Place Seniors Living Inc. ("Park Place"), contracting out the entire Hospital Employees' Union bargaining unit at three different facilities – in and about the same time. A previous award dated June 8, 2016 (*New Horizons Care Centre Partnership v. Hospital Employees' Union*) ("*New Horizons")* addressed one of the facilities in question: New Horizons Care Centre Partnership. This award deals with another facility: Sunridge Seniors Community Partnership – and as such has to be decided on the specific merits and facts of the case.

BACKGROUND/EVIDENCE

Sunridge Seniors Community Partnership is an assisted living and residential care facility located in Duncan, B.C. One of its predecessors, Sunridge Place Limited Partnership ("Sunridge Place"), had been certified in 2009 with the Hospital Employees' Union which represented the majority of the employees at the facility. The first Collective Agreement between the parties had a term of June 1, 2010 until September 30, 2013.

The Collective Agreement included a restriction on contracting out. The restriction found in Article 46.01 reads as follows:

> The employer shall not contract out any bargaining unit work that would result in a layoff of a member of the bargaining unit during the express term of the collective agreement.
>
> The employer shall provide at least thirty (30) days' notice of the intention to contract out and shall be available to meet with the Union within

> seventy-two (72) hours of such notice to discuss alternatives to contracting out.
>
> If the parties are unable to reach an agreement, the employer may contract out. The parties may mutually agree to extend the thirty (30) day time frame.

The Union gave notice to Sunridge Place on July 2, 2013 to bargain a renewal Collective Agreement. The parties agreed to meet on November 25 and 26 and December 12, 2013 to commence collective bargaining. Laura Griffin, the Executive Director at Sunridge Place, called Bob Wilson the spokesperson for the Union's bargaining committee on November 22, 2013 to cancel the November dates. Ms. Griffin advised Mr. Wilson that Vancouver Island Health Authority ("Island Health") had made an announcement regarding funding and as a result Sunridge Place had some difficult decisions to make. On November 26, 2013, Sunridge Place's lawyer, Tim Charron informed the Union that the owner of Sunridge Place, Norm Jones, had decided to offer the facility for sale. The parties agreed to postpone negotiations until the ultimate purchaser was known. Mr. Charron stated the following in his email to Mr. Wilson:

> Following acceptance of an unconditional offer, and perhaps sooner if he is confident that a sale is imminent, Mr. Jones will provide the appropriate notice to the HEU and to each employee that he will no longer be the employer. Thereafter, the HEU will be notified of the identity of the purchaser. We are hopeful that this can occur early in the new year.

In and about the same timeframe, a realtor approached Park Place Seniors' Living informing Park Place that Norm Jones was interested in selling Sunridge Place. In early December 2013 two executive members of Park Place met with Norm Jones. The executive members were the Vice President of Finance for Park Place, Mr. Rizwan Gehlen and Al Jina, the President. Mr. Gehlen, the only Employer witness in these proceedings, testified that Park Place wanted labour stability if it were to purchase

Sunridge Place. In his view, labour stability could be acquired via a renewed Collective Agreement or contracting out. He further testified that in the initial meeting Norm Jones introduced the issue of contracting out since Park Place had experience in managing facilities in this manner.

On December 18, 2013 Park Place and Sunridge Place entered into an Asset Purchase Agreement for the sale and purchase of Sunridge Place. According to Mr. Gehlen the agreement is the first step in the purchasing process. The agreement had a number of conditions precedent: the Buyer had to be satisfied with the building and title etc.; Island Health had to agree to the transfer of funding and operating agreements; and the holder of the mortgage had to allow Park Place to assume the mortgage. According to Mr. Gehlen the assumption of the mortgage became the most difficult condition to satisfy in order to conclude the sale. The closure date was deemed to be 107 days from the date the conditions precedent were removed. That date was later extended.

At the same time that the Asset Purchase Agreement was signed in December of 2013 a separate agreement was also signed which dealt with the employment provisions of all the employees at Sunridge Place: the non-union employees and those certified with the two Unions – Hospital Employees' Union and the B.C. Nurses Union representing the nurses. Sections 4 and 5 of this Employment Provisions Agreement dealt with the employees represented by the Hospital Employees' Union. The sections read as follows:

> 4. Because the HEU Collective Agreement has expired, the parties agree as follows:
>
> (a) On the Buyer giving notice of satisfaction or waiver of the Buyer's Condition Precedent, the Seller will give:

(A) 105 days' notice of termination, being 84 days ' notice of a group termination under Section 64 of the *BC Employment Standards Act* and 3 weeks' notice of termination pursuant to the collective agreement, to each HEU unionized employee, to the HEU and to the Minister of Jobs, Tourism and Skills Training;

(B) notice to HEU that it has agreed to sell the Business to the Buyer; and

(C) at least 60 days' notice to HEU pursuant to Section 54 of the BC Labour Relations Code of the Seller's intent to "contract out".

(b) The Seller and the Buyer will jointly meet with HEU to conduct negotiations, in good faith, with respect to the possibility of renewal of the HEU collective agreement and to meet the employer's obligations pursuant to section 54 of the BC Labour Relations Code.

(c) Either:

(A) the Seller and Buyer will reach agreement with HEU for a new collective agreement with HEU;

Or:

(B) If, after conducting negotiations, in good faith, with HEU, no new collective agreement with HEU has been reached by the 75th day of the notice period under Section 4(a)(A) above, then on that 75th day the Seller will give 30 days' notice to HEU of contracting out pursuant to Article 48 [sic Article 46] of the HEU expired collective agreement (the "75th Day Notice").

(d) The Seller and the Buyer will jointly conduct negotiations with third party contractors to provide services to the Business if all employees who are members of HEU are terminated pursuant to the notices above; where, any such contract will be assumed by the Buyer on closing.

5. Deposit: The Seller agrees that if (i) the Seller and the Buyer do not reach agreement with HEU for a new collective agreement with

> HEU and (ii) the Seller does not give the 75th Day Notice to HEU, then any deposit paid by the Buyer will be fully refunded, with any interest thereon, to the Buyer.
>
> (emphasis added)

On January 16, 2014 Bob Wilson contacted Tim Charron, Sunridge Place's lawyer, to obtain an update on the sale. The parties agreed to meet on February 19, 2014 – at which point Sunridge Place felt that Park Place could be identified as the Buyer. In the interim, the acquisition process continued to progress. Certain Buyer's conditions precedent were removed from the agreement but two of the conditions remained – the transfer by Island Health and the consent of the lender for Park Place to assume the mortgage. According to Mr. Gehlen the Island Health transfer was just a matter of time (it typically took three or four months) and the last condition regarding the mortgage became the most difficult condition to remove – as mentioned earlier. As a result, the condition removal date was changed to March 31, 2014 and the closing date of the purchase was identified as June 4, 2014.

On February 17, 2014 the first addendum to the Employment Provisions Agreement eliminated any reference to Article 46 regarding contracting out in the HEU Collective Agreement. The wording of the addendum is slightly different than the initial Employment Provisions Agreement but the two concepts of either renewal of the Collective Agreement or contracting out are mentioned again in the addendum as follows:

> (e) The Seller and the Buyer will jointly meet with HEU to conduct negotiations, in good faith, with respect to the possibility of renewal of the HEU collective agreement and to meet the employer's obligations pursuant to section 54 of the BC Labour Relations Code.

(f) The Seller and the Buyer will jointly conduct negotiations with third party contractors to provide services to the Business if all employees who are members of HEU are terminated pursuant to the notices above; where, any such contract will be assumed by the Buyer on closing.

Mr. Gehlen testified that those were the two alternatives which would provide the necessary labour stability in order to continue with the purchase – a renewed Collective Agreement or contracting out.

On February 19, 2014 the first scheduled meeting between the parties took place. In attendance were Tim Charron for Sunridge Place and David Torrison, a labour relations consultant for Park Place, as well as the HEU bargaining committee, chaired by Bob Wilson. Park Place was identified as the purchaser. The Union was also advised that the transaction would conclude in June 2014. According to Bob Wilson's meeting notes, Tim Charron advised that if the sale did not go through and Norm Jones was still the Employer then Mr. Jones would contract out. There was little comment that was made by David Torrison – other than to say that Park Place was still reviewing what it would do moving forward and that he had no instructions at that point.

During the meeting on February 19, 2014 Mr. Wilson expressed concern that it was somewhat confusing as to who the Employer actually was at any given time – Sunridge Place or Park Place. Mr. Wilson proposed a one year rollover of the Collective Agreement for the sake of stability and to provide some certainty to the long term employees. Mr. Torrison stated he would take the Union's proposal to Park Place, and Mr. Charron indicated that Sunridge Place would not stand in the way of the proposal.

In early March 2014 Mr. Gehlen testified that he started to deal with the financial situation at Sunridge Place and the requirements of the lender. Mr. Gehlen's analysis showed that Sunridge Place was being run at a significant financial loss with cash flow

being insufficient to meet its debt servicing costs. He determined that Park Place would have to achieve significant cost savings in order to meet the lender's required debt service coverage. This was not relayed to the Union although Mr. Gehlen claims that Mr. Torrison was aware of Sunridge Place's financial difficulties. Mr. Gehlen further testified that Park Place determined that the magnitude of the cost savings, which he calculated amounted to a twenty-five to thirty percent reduction in wages, was not possible to achieve from bargaining a Collective Agreement.

The parties next met on March 11, 2014. At the meeting Mr. Wilson testified and his notes reveal that Mr. Torrison advised that Park Place considered it "inappropriate" to say anything about the one year rollover proposal since Park Place still did not own Sunridge Place. Mr. Torrison advised that Park Place may be interested in the one year rollover but the sale transaction had not been completed. He further explained that the expectation was that the sale would be completed by the end of March. The Union stated that given Park Place's history, the Union assumed that Park Place intended to contract out and the Union did not expect the answer to the rollover proposal to be anything different. . He would therefore assume that the decision would be to contract out and he would act accordingly.

On April 4, 2014 a second addendum was added to the Asset Purchase Agreement extending the timeframe to April 30, 2014 – at which point the Buyer could satisfy the conditions precedent such as acquiring the consent of Island Health and assuming the mortgage.

The parties met again on April 7, 2014. Sue Fisher, the then Coordinator of Organizing and Private Sector Bargaining for the Hospital Employees' Union, attended for Mr. Wilson. Ms. Fisher testified in these proceedings that the meeting lasted little more than ten minutes. Mr. Torrison advised that Park Place intended to continue with the Jones' decision to contract out the work of the Hospital Employees' Union

bargaining unit effective June 3, 2014. Mr. Torrison confirmed the decision in a letter to the Union dated April 7, 2014. He advised that Section 54 notice had already been given on February 19, 2014 when Sunridge Place indicated its intent to contract out.

On April 14, 2014 Mr. Gehlen and Al Jina, the President of Park Place, met with the lender in Toronto, Ontario. The meeting went well and on April 17, 2014 Mr. Gehlen sent a Request For Proposals ("RFP") to potential contractors on behalf of both Park Place and Sunridge Place – although Mr. Gehlen states in the covering email that he is "managing" the RFP process for Sunridge Place. The deadline for contractors to respond was April 25, 2014. A meeting with the Union for the purpose of Section 54 discussions was not requested by the Employers.

On April 24, 2014 Bob Wilson replied to the April 7th letter requesting confirmation of the actual purchase date so that Section 54 meetings could occur with both Tim Charron and David Torrison. The three settled on a meeting date of May 22, 2014. By April 30, 2014 Park Place had selected CareCorp Seniors Services ("CareCorp") as the contractor. On May 5, 2014 David Torrison notified Bob Wilson that CareCorp was the successful contractor. The staff were notified on May 7, 2014.

Also on May 7, 2014, the Union's legal counsel notified both Sunridge Place and Park Place that it considered the contracting out of the entire bargaining unit to constitute a violation of Sections 6, 11, 45, 47 and 54 of the *Labour Relations Code*. Tim Charron replied to the Union's letter indicating that both employers were willing to engage in Section 54 discussions and had repeatedly "expressed our [their] willingness to schedule and engage in Section 54 discussions with the HEU both verbally and in writing". The Charron letter dated May 12, 2014, further stated that unless the parties reached an agreement to the contrary, contracting out would proceed as planned on June 3, 2014 – as announced months ago in February.

The parties met as planned on May 22, 2014. Bob Wilson's notes were introduced into evidence and he spoke to the notes during these proceedings. The notes indicate, as did Mr. Wilson, that he asked who the Employer was and asked for a business case and reasons for the contracting out. David Torrison replied: "Can't speak for Park Place as to why, just hired to do it" (i.e. contract out). He assumed that part of the reasoning could be "cost savings or ease of running the business". Mr. Torrison suggested that the Union put forward alternatives to contracting out, but he also stated that he had "no authority to accept alternatives" since Park Place did not own Sunridge Place yet.

During the meeting the Union proposed a two year rollover of the Collective Agreement. David Torrison stated he would take the proposal back to Park Place but it was "kind of late in the day for that kind of proposal". Mr. Wilson's notes reveal that he asked the Employers if one million dollars in concessions would be accepted as an alternative to contracting out. Mr. Charron replied that cost was not an issue for the current owner.

During these proceedings, Mr. Gehlen appeared surprised to hear that such an offer had been made by the Union. Mr. Gehlen testified that Sunridge Place's financial situation was problematic and it would take approximately a thirty percent reduction in wages to make it viable. Mr. Gehlen stated that Mr. Torrison never told him about the Union's query regarding concessions during the May 22nd meeting.

Near the end of the discussion on May 22nd Mr. Torrison rejected the two year rollover offer and indicated that it was Park Place's perspective that contracting out was well along with the selection of CareCorp Seniors Services. It should be noted that Mr. Torrison did not testify during this hearing.

The entire HEU bargaining unit of approximately two hundred and sixty-five employees were laid off effective June 3, 2014.

THE TEST

In *New Horizons, supra,* I outline the "test" or standard to be met in cases of contracting out as follows:

> The general rule in arbitral jurisprudence is that an employer is free to contract out work of the bargaining unit, subject only to any express restrictions set out in the collective agreement, and provided that the contracting out is genuine, the decision is made in good faith and for valid business reasons – i.e., that the decision is not tainted by anti-union animus or is determined to be an unfair labour practice and a violation of the *Labour Relations Code* – see *Russelsteel Ltd. v. United Steelworkers of America*, [1966] O.L.A.A. No. 4, 17 L.A.C. 253 (Majority: Arthurs, Dillon; Dissent: Gargrave); and the line of reasoning which follows *Russelsteel* such as found in *Federated Co-operatives Ltd.(Re)*, [1979] B.C.L.R.B.D. No. 85 (Germaine); *Pacific Press Ltd. v. Graphic Communications International Union, Local 25-C*, [1993] B.C.C.A.A.A. No. 277 (Bird), *et al*.

As with *New Horizons, supra,* there are therefore two aspects to this dispute. There is the Collective Agreement interpretive issue and the allegations of Collective Agreement breaches and potential violations of the *Labour Relations Code* if an unfair labour practice can be substantiated.

ALLEGED COLLECTIVE AGREEMENT VIOLATIONS REGARDING CONTRACTING OUT

The only provision, and hence the only restriction, in the Collective Agreement regarding contracting out can be found in Article 46.01. Article 46.01 reads as follows:

> The employer shall not contract out any bargaining unit work that would result in a layoff of a member of the bargaining unit during the express term of the collective agreement.
>
> The employer shall provide at least thirty (30) days notice of the intention to contract out and shall be available to meet with the Union within seventy-two (72) hours of such notice to discuss alternatives to contracting out.
>
> If the parties are unable to reach an agreement, the employer may contract out. The parties may mutually agree to extend the thirty (30) day time frame.

Union

The Union submits that the Employers have breached Article 46.01 of the parties' Collective Agreement. In particular the second paragraph has been breached by failing to discuss alternatives to contracting out in a timely way and in good faith. The Union relies on Section 45(2) of the *Labour Relations Code* which preserves the terms and conditions of the parties' Collective Agreement after its expiry. This would include Article 46.01 of the Collective Agreement, asserts the Union.

The Union further submits that the object of Collective Agreement interpretation is to discover the mutual intention of the parties. In doing so, the primary resource for an arbitrator is the Collective Agreement. The Union contends that the clear and unambiguous purpose of Article 46.01 is to provide the Union with a meaningful opportunity to avoid contracting out – see *Pacific Press v. Graphic Communications Int'l Union, Local 25-C,* [1995] BCCAAA No. 637 (Bird) ("*Pacific Press v. Graphic Communications Int'l Union").* HEU submits that the Employers breached the letter and spirit of Article 46.01 by failing to engage in timely, good faith discussions regarding alternatives to contracting out.

It is a principle of interpretation that all clauses and words in a Collective Agreement should be given meaning if possible, asserts the Union. This provision would be meaningless if the Employers were not required to act in good faith in their discussion of alternatives (see *Pacific Press v. Graphic Communications Int'l Union, supra*; *Bhasin v. Hrynew*, 2014 SCC 71 and *New Horizons, supra).*

The Union likens the obligation to discuss alternatives in good faith to the differences between genuine attempts to reach a resolution during collective bargaining and surface bargaining: see *Health Services and Support Facilities Subsector Bargaining Association v. British Columbia,* 2007 SCC 27.

The Union submits that a key requirement of good faith discussion of alternatives is the Employer sharing its reasons for contracting out with the Union and explaining its needs – see *Pacific Press,* BCLRB Decision No. B374/96.

Employer

The Employer submits that its decision to contract out after the Collective Agreement expired on September 30, 2013 was not a violation of Article 46.01. The Employer repeats the general rule in arbitral jurisprudence that an employer is free to contract out work of the bargaining unit, subject only to any express restrictions set out in the Collective Agreement and provided that the contracting out is genuine, in good faith, and for valid business reasons. See *Perth Services Ltd. and CAW-Canada (Re),* [1995] MGAD No. 24 (Jamieson, Gardner and McEvoy); and *Re Alcan Smelters and Chemicals Limited and Canadian Association of Smelter and Allied Workers, Local 1,* (1987), 28 LA.C. (3d) 353 (Hope).

Given the rules of interpretation, the Employer agrees with the Union that the arbitrator's primary resource is the Collective Agreement. In its view, words should be

given their plain and ordinary meaning. Finally a very important promise is likely to be clearly and unequivocally expressed. Since contracting out is an important issue, the Union can be expected to have clearly and unequivocally expressed any restrictions on the Employer's right to contract out. See *Pacific Press v. Graphic Communications Int'l Union, supra; Fortis BC Inc. v IBEW, Loc. 213*, [2015] 250 LAC (4th) 97 (Kinzie); *Western Forest Products Inc. v USW, Local 1-1937*, [2012] BCCAAA No. 42 (McPhillips); and *Superior Propane (a Division of Superior Plus LP) v Teamsters Local 31,* [2012] BCCAAA No. 117 (Glass).

Turning to Article 46.01 the Employer submits that the evidence clearly shows that the contracting out and consequent employee layoffs commenced on June 3, 2014, well after expiry of the Collective Agreement on September 30, 2013. The thirty days' notice was issued on February 19, 2014. As a result the Employer did not contract out resulting in employee layoffs during the express term of the Collective Agreement.

Further, the Employer was available to discuss alternatives raised by the Union commencing with the February 19, 2014 meeting, stated the Employer. Park Place confirmed its decision to proceed with contracting out by April 7, 2014. The only proposals provided by the Union were a one year and a two year extension of the Collective Agreement and these proposals were rejected, submits the Employer.

As for the Union's argument that there is a restriction regarding contracting out found in Article 46.01 by virtue of Section 45 of the *Code,* the Employer submits that contracting out did not constitute a change to terms and conditions of employment. Article 46.01 specifically limited any prohibition on contracting out to the express Collective Agreement term ending September 30, 2013. The language specifically contemplated an ability to contract out immediately following expiry , subject to thirty days' notice and availability for discussions.

The Employer asserts that Section 45(2) does not operate to extend the term during bargaining. If Section 45(2) operates to extend contracting out prohibitions after September 30, 2013, then the Employer is effectively prohibited from contracting out at any time, contrary to the "express term" language bargained.

Analysis and Decision Regarding the Alleged Collective Agreement Breaches

Has there been a breach of Article 46.01 of the parties' Collective Agreement? I agree with both the Employer and the Union that in any Collective Agreement interpretive issue, the primary resource for any arbitrator is the Collective Agreement language – see *Pacific Press v. Graphic Communications Int'l Union, supra*, for the rules of interpretation. The first paragraph of Article 46.01 defines the restriction as no contracting out if it would result in the layoff of employees during the "express term" of the Collective Agreement. According to the Oxford Dictionary, the term "express" utilized in this context means "definitely stated, not merely implied" or "exact". The exact term of this particular Collective Agreement can be found in Article 45 of the Collective Agreement:

> The collective agreement will have a term of three (3) years and three months effective from June 1, 2010 to September 30, 2013.

Since no layoff occurred during the defined term of the Collective Agreement, paragraph one of Article 46.01 has not been breached. The layoffs took place in June of 2014 – eight months after the expiry of the Collective Agreement.

Nor do I accept that by virtue of Section 45 (2) of the *Labour Relations Code* the length of the Collective Agreement was extended. Section 45(2) reads:

> If notice to commence collective bargaining has been given and the term of a collective agreement that was in force between the parties has expired, the employer or the trade union must not, except with the consent of the other, alter any term or condition of employment, until
> (a) a strike or lockout has commenced,
> (b) a new collective agreement has been negotiated, or
> (c) the right of the trade union to represent the employees in the bargaining unit has been terminated

I accept the Employer's argument that Section 45(2) does not extend the term of collective agreements. The section speaks to maintaining the terms and conditions until a strike or lockout occurs; a new Collective Agreement is negotiated; or the Union is decertified. If anything Section 45(2) would maintain the provisions in Article 46.01 – resulting in the term of the Collective Agreement remaining fixed for purposes of contracting out. I therefore find that the Employer had the right to contract out after September 30, 2013.

The following paragraphs of Article 46.01 also remain in force and effect. The second paragraph talks about the notice period and the discussion of alternatives; and the third speaks to the ability of the Employer to contract out if no agreement is reached regarding the alternatives:

> The employer shall provide at least thirty (30) days notice of the intention to contract out and shall be available to meet with the Union within seventy-two (72) hours of such notice to discuss alternatives to contracting out.
>
> If the parties are unable to reach an agreement, the employer may contract out. The parties may mutually agree to extend the thirty (30) day time frame.

I agree with the Union the discussions have to be good faith discussions and a serious attempt to consider the alternatives which are put forward. There has to be a

bona fide attempt to reach agreement. The evidence reveals that that was not what occurred here. What did occur was that Sunridge Place gave notice to contract out in February of 2014. The Union proposed a one year rollover to the Collective Agreement. Legal counsel for Sunridge Place stated that they could be in agreement but the representative for the purchaser should be part of the discussion. The representative from Park Place, David Torrison, had just been retained in that capacity and stated that he had no instructions, but he would take the one year rollover back to Park Place. There was no evidence that Mr. Torrison got back to the Union regarding the one year rollover until the last meeting on May 22, 2014.

On March 11, 2014, the same representative for Park Place stated it was "inappropriate" for Park Place to engage in such discussions even though the purchase documents suggest that the agreement was that Park Place and Sunridge Place would act jointly in labour relations matters and after certain conditions precedent were removed. The Addendum Agreement #1 of the Asset Purchase Agreement read in part:

> On removal of the Buyer's Condition Precedent pursuant to the Agreement, the Buyer will take a leadership role, in conjunction with the Seller, in labour relations matters.

On April 7, 2014, the next meeting, Park Place gave notice to contract out and met the technical requirement of notice found in Article 46.01 but never mentioned alternatives or the one year rollover proposal. The meeting only lasted approximately ten minutes. In fairness to Park Place, the opportunity to discuss alternatives in all likelihood would not have been afforded Sue Fisher in that meeting. Ms. Fisher was in attendance as a representative of the HEU – in Bob Wilson's absence. The HEU did not attempt to discuss alternatives in that meeting.

On April 24, 2014, Mr. Wilson contacted Tim Charron enquiring about the purchase date because Mr. Torrison had made it clear that Park Place was not prepared to discuss alternatives until Park Place was the legal Employer. In the meantime Mr. Gehlen thinking that the purchase was finally going to go ahead issued an RFP to potential contractors "on behalf of Sunridge Place". He did not instruct Mr. Torrison to proceed with alternatives or discuss a renewal Collective Agreement which was conceivably still a possibility under the terms of the Employment Provisions Agreement. CareCorp was selected as the service provider or contractor around the end of April. Al Jina confirmed CareCorp as the successful contractor to Norm Jones on April 30th, 2014.

On May 2, 2014, Mr. Charron contacted Mr. Wilson to acquire meeting dates for "adjustment plan discussions". The three representatives, Messrs. Charron, Torrison and Wilson, exchanged dates and settled on May 22, 2014 as the next meeting. Mr. Wilson acknowledged in his email when they settled on a date that it was "getting pretty late".

When the parties met on May 22, 2014, Mr. Wilson proposed a two year rollover of the Collective Agreement, requested information regarding the reasons for the contracting out, and tried to engage the Employers in a discussion about concessions. Regarding the reasons, Mr. Torrison revealed that he had not been made privy to the reasons; he surmised about the possible reasons and then made the most telling statement of all. He acknowledged that his mandate was merely "to get the contracting out done" – i.e., he was never engaged to consider alternatives such as concessions. There was therefore no good faith discussions about possible alternatives. Mr. Torrison finally stated that it was a little late for these kinds of proposals.

May 22, 2014 was the first meeting during which the Employers gave the Union a firm answer on the Union's proposal to roll over the Collective Agreement. The 72

hour requirement for discussions found in Article 46.01 was breached. The meeting on May 22, 2014 was more than three months after Sunridge Place issued notice to contract out, almost two months after Park Place gave notice to contract out, and at least twenty-two days after the Employers entered into commitments with the contractor. These delays rendered the discussion meaningless and breached the intent of Article 46.01 of the Collective Agreement.

Bona fide discussions did not take place and there were no attempts to reach an agreement. Mr. Torrison either could not or would not provide the critical information which the Union needed to pursue the discussions further. Paragraphs two and three of Article 46.01 have been breached. The notice requirements of paragraph two have been met but the intent of the second and third paragraphs has not been met. There were no *bona fide* discussions regarding alternatives – which would entail an exchange of critical information as to the reasons for the contracting out and there were no *bona fide* attempts at reaching a resolution to the issues.

ALLEGED *LABOUR RELATIONS CODE* VIOLATIONS

Unfair Labour Practices

It is worth repeating that contracting out can only be restricted by exact language in the Collective Agreement and/or if the business decision is tainted in any way by anti-union motivation; thus causing a breach of the unfair labour practice provisions of the *Labour Relations Code*. The provisions which allegedly have been breached, Section 6(1) and 6(3)(a), are reiterated below:

> 6(1) Except as otherwise provided in section 8, an employer or a person acting on behalf of an employer must not participate in or interfere with the formation, selection or administration of a trade union or contribute financial or other support to it.

…

(3) An employer or a person acting on behalf of an employer must not

(a) discharge, suspend, transfer, lay off or otherwise discipline an employee, refuse to employ or to continue to employ a person or discriminate against a person in regard to employment or a condition of employment because the person

(i) is or proposes to become or seeks to induce another person to become a member or officer of a trade union, or

(ii) participates in the promotion, formation or administration of a trade union,

Union

The Union submits that the general rule in arbitral jurisprudence is that the employer is free to contract out work of the bargaining unit subject to any express restrictions set out in the Collective Agreement and provided that the decision is not found to be an unfair labour practice. HEU submits that in this case the contracting out was motivated in part by anti-union animus and thus amounts to a violation of subsections 6(1) and 6(3)(a) of the *Code*. Any degree of anti-union animus behind the employer's conduct is sufficient to negate any *bona fide* business considerations. See *Inglis Limited,* BCLRB No. B125/86; *Overwaitea Food Group,* BCLRB No. B222/2009; and *Buckley Valley Forest Industries Ltd. (Re),* BCLRB No. 17/76.

Section 6(1)

The Union further submits that the Employer interfered in the administration of the Union by refusing to bargain a renewal of the Collective Agreement and by

contracting out the work of the bargaining unit. By laying off the entire HEU bargaining unit and contracting out the work, the employers effectively voided the Union's certification and the employees' representational rights and thus interfered in the administration of the Union.

The Union asserts that the business reasons for contracting out are tainted by anti-union animus, specifically the desire to deprive the HEU bargaining unit of their chosen representation and bargaining rights and to avoid having to negotiate a renewal collective agreement. See *EF International Language Schools Inc.*, 1997 BCLRB No. B203/97.

Further, *VI Care Management Ltd. and International Union of Operating Engineers, Local 882*, BCLRB No. B112/93 stands for the premise that an employer will typically not admit to anti-union animus and thus the Board must be willing to draw reasonable inferences from circumstantial evidence. In this case, according to the Union, it can be inferred that one of the purposes of contracting out was to enable Park Place to acquire Sunridge Place free and clear of the bargaining unit and the collective bargaining relationship.

The Union further argues that neither employer had ever alleged cost savings as the reason for contracting out prior to the pleadings in this arbitration. In the May 22nd meeting Sunridge Place's lawyer stated that cost was not a concern for Norm Jones. The only reason Sunridge Place's lawyer, Mr. Charron, gave was that Mr. Jones wanted out of the business and did not want to jeopardize the sale with Park Place. Mr. Torrison admitted that he did not know Park Place's reasons for contracting out. In cross examination, Mr. Gehlen admitted that the financial needs and concerns were never communicated to the Union.

Section 6(3)(a)

The Union submits that pursuant to subsection 6(3)(a) of the *Code*, an employer must not lay off an employee, refuse to continue to employ a person or discriminate against a person in regard to employment or a condition of employment because the person is a member of a trade union. Contracting out can constitute an unfair labour practice if the intent is to undermine the integrity of the bargaining unit or to avoid the collective bargaining relationship. The Union contends that is the purpose of the contracting out in the case before me – see *Citizen, a Division of Thomson Newspaper Co. (Re),* BCLRB Letter Decision No. B229/94.

As the Labour Relations Board held in *Dze L K'Ant Friendship Centre Society (Re),* BCLRB Letter Decision No. B355/2002, an employer's actions need not be wholly motivated by anti-union sentiments under Section 6(3) of the *Code*. The actions need only be tainted in part for a breach of the *Code* to be declared.

According to the Union, Park Place wanted to buy Sunridge Place free and clear of HEU's bargaining unit and the collective bargaining relationship. Laying off employees to eliminate the Union's certification and bargaining rights or to avoid having to negotiate a renewal agreement amounts to a breach of subsection 6(3)(a) - citing *Dze L K'Ant Friendship Centre Society (Re), supra; EF International Language Schools Inc. (Re), supra*; and *Nanaimo Seniors Village Partnership* [2005] B.C.L.R.B.D. No. 221.

Employer

The Employer denies that its decision to contract out work or its conduct in implementation of that decision violated the *Code* as alleged or otherwise.

Section 6(1)

The Employer submits that "interference" under Section 6(1) of the *Code* does not include any conduct that impacts the Union. A breach of Section 6(1) only occurs when there is an "improper" impact on the selection, formation or administration of a Union. If an employer's decision is motivated by legitimate business reasons, and is not aimed at depriving union members of their chosen representation, the fact that the decision has a severe impact on a union will not breach Section 6(1) of the *Code.* See *Convergys Customer Management Canada Inc (Re*), [2003] BCLRBD No.62 and *Overwaitea Food Group (Re),* [2009] BCLRBD No. 222.

The Employer submits that it has not breached Section 6(1) of the *Code.* The Employer has acted in good faith and for legitimate business reasons. When balancing interests in this case, as Section 6(1) calls for, it is necessary to consider that the Collective Agreement specifically limited the Employer's right to contract out for a limited duration only – until September 30, 2013 when the Collective Agreement expired.

Further, the contracting out of bargaining unit work is not mutually exclusive from good faith bargaining. The engagement of the collective bargaining process under the *Code* does not operate to prevent an employer from exercising its express rights under a collective agreement.

The Employer was available for discussions with respect to a renewal agreement and to discuss alternatives to contracting out on four occasions. The Union did not provide any proposals other than the one year extension until the May 22nd meeting when it raised the possibility of a two year extension or some undefined concessions. The Employer refused to engage the Union because it was not the employer yet or it was too late in the day.

Section 6(3)(a)

The Union alleges that the Employer violated section 6(3)(a) of the *Code* by laying off the entire HEU bargaining unit because the employees had sought and obtained union representation, and in retaliation for their having done so. In order to establish a breach of Section 6(3)(a) it must be established that the Employer was motivated at least in part by anti-union animus.

The Employer submits that there is no evidence in this case that the employers were motivated by anti-union animus. Mr. Jones' resort to contracting out was based on his age and his health. Park Place merely decided to continue with that plan in late March or early April based on its review of the financial situation and requirements of the lender, the need for savings, and lack of additional funding, and its conclusion that the depth of savings could not be achieved through concessions while maintaining a positive workforce.

Mr. Gehlen also confirmed that the transaction terms allowed for continued negotiations with the Union after subjects were removed and that Park Place sought labour certainty in the transaction and would have been satisfied with certainty through either (a) a new Collective Agreement; or (b) contracting out. Mr. Gehlen's evidence concerning these reasons for contracting out and willingness to bargain a new agreement was unchallenged.

The Employer notes that it is not for arbitrators or the Board to assess the wisdom of this Employer strategy, only to assess whether it is a legitimate strategy satisfying the Employer's onus of demonstrating that this strategy, rather than anti-union animus, informed its decision.

Further, the facts in this case are distinguishable from those considered in *New Horizons, supra,* in which there was a finding of anti-union animus based on expressed anti-union sentiments demonstrating a desire to avoid negotiating a renewal agreement. In this case, the agreed employment terms clarify an intention to attempt to negotiate a renewal agreement, and I have before me Mr. Gehlen's unchallenged evidence of an economic justification for the decision to contract out.

The Employer's reasons for the contracting out were legitimate and *bona fide.* The Employer has not violated Section 6(3)(a) of the *Code* as alleged by the Union, submits the Employer.

Analysis and Decision Regarding Alleged Section 6 Violations

At this juncture of the award, it is necessary to reiterate that the general rule in arbitral jurisprudence is that an employer is free to contract out work subject only to any express Collective Agreement restrictions and provided that the contracting out is genuine and the decision is made in good faith and for valid business reasons and not tainted by anti-union animus. The language of the Collective Agreement has been reviewed in this award and now the unfair labour practice complaints need to be reviewed.

The Union submits that the Employer has interfered in the administration of the Union by refusing to bargain a renewal Collective Agreement and contracting out the entire bargaining unit – thus interfering with the Union's ability to represent its members in collective bargaining. The Employer submits that "interference" does not include **any** impact on the Union but only **unlawful** impact. If an employer's decision is motivated by legitimate business reasons, and is not aimed at depriving union members of their chosen representation it will not breach Section 6(1) of the *Code.*

In the case at hand the Employer submits that it was legitimate business reasons which constituted its sole motivation. The Employer says it was willing to bargain a renewal Collective Agreement and alternatives to contracting out and met with the Union on four separate occasions, but it was only in the last meeting on May 22, 2014 that the Union proposed a two year rollover and tried to engage the Employer in a discussion about Collective Agreement concessions.

The parties did meet four times but there were constant excuses as to why Park Place could not address the Union's proposals. The excuses utilized were either the representative "did not have instructions"; it was "inappropriate" to do so since Park Place was not the Employer; or it was "too late in the day" to discuss the proposals. Consequently they may have pretended to be interested in meeting but their excuses provided a much different message than their statements of interest.

There were two choices in the Asset Purchase Agreement as to how to acquire labour stability: bargain a renewal Collective Agreement or contract out. Given Park Place's propensity to contract out, it is likely that contracting out was Park Place's first choice – in spite of the language in the Asset Purchase Agreement. That choice was solidified when Mr. Gehlen determined that the financial difficulties were severe enough to necessitate a twenty-five to thirty percent reduction in employees' wages. According to Mr. Gehlen, they had never achieved such concessions in collective bargaining before. At that point, Park Place determined that the only way to achieve savings of this magnitude was via contracting out, not bargaining a renewal Collective Agreement.

Is this a breach of the *Labour Relations Code*? Only if the Employer's true motivation in contracting out is in whole or in part driven by anti-union animus. However an employer's true motivation can only be pieced together by circumstantial evidence. The Labour Relations Board has so aptly described the necessity to review

circumstantial evidence at page 14 of *Forano Limited,* BCLRB N0. 2/74, [1974] 1 Canadian LRBR 13:

> The crux of such an unfair labour practice case is the employer's motivation…something which rarely will be disclosed by admissions. Employers don't ordinarily advertise their anti-union activities. Such intention must be pieced together from a pattern of circumstantial evidence.

Following the lead in *Forano Limited, supra,* the Labour Relations Board's jurisprudence is replete with reviews of circumstantial evidence in an effort to determine the existence or the absence of any anti-union animus in the employer's decisions to contract out. In *New Horizons, supra,* the economic consideration was overshadowed by comments, both verbal and in writing, which were ripe with anti-union sentiments. Similar sentiments were not expressed in the Sunridge Place case.

Overall, there is not as much circumstantial evidence in the Sunridge Place case. In the Sunridge Place case, although the Employers' actions indicate a reluctance to engage the Union in a renewed Collective Agreement, there are sound economic justifications for its reluctance. In *New Horizons*, *supra,* the Senior Vice President of Operations clearly articulated that the Employer was contracting out to avoid negotiating a renewal Collective Agreement with the Union and there was little economic justification for it since there was no evidence of financial difficulties. This is in sharp contrast with the evidence in the case before me. In *EF International Language Schools Inc. (Re*), *supra,* the Labour Relations Board at paragraph 65 states:

> It is contrary to the Code for an employer to close down its operation if its decision is not completely free of a desire to avoid a union certification or a collective agreement…An employer is entitled to close if the successes which a union has won through collective bargaining, or if the demands made by the union in bargaining, or the actual exercise or threatened exercise of the right to strike results in the existence of legitimate and bona

> fide financial justification for the closure, and it is the sole motivation for the closure.

In that case, the Labour Relations Board goes on to find that the closure of the Employer's school was motivated in part by anti-union animus and declares a breach of Section 6(1)and 6(3)(a) of the *Code*. At paragraph 102 of the decision the Board outlines the test in determining Section 6(1) and (3) violations as follows:

> In order to avoid a finding of a violation of Section 6(3) the Employer must establish the existence of an economic justification for its decision **which is free of any desire to avoid the Union**. In order to establish a violation of Section 6(1) the Union must establish an interference with its administration which is not justified by valid economic reasons.
>
> (emphasis added)

Unlike the fact base in *New Horizons, supra*, I do not find the fact base in the case before me supports the allegations that the Employer's decision was based on, or tainted by, anti-union animus. The Employer violated the Collective Agreement by not engaging in *bona fide* discussions regarding alternatives. It had already made up its mind that the only way to meet its financial objectives was to contract out the work of the bargaining unit. It determined it needed a reduction of approximately twenty-five to thirty percent in wages and did not feel that that was achievable, except by contracting out. Mr. Gehlen was a credible witness. He introduced into evidence his calculations regarding the percentage necessary. He testified that by contracting out the work Park Place could save approximately one million dollars. He genuinely appeared surprised to hear that that was the figure Mr. Wilson had utilized in the May 22, 2014 meeting. Mr. Gehlen's testimony was not challenged. Consequently I find that Sections 6(1) and 6(3)(a) of the *Code* have not been breached.

Section 11 and Section 47 of the *Code*

The Union alleges that both Sections 11 and 47 of the *Labour Relations Code* have been breached by the Employers.

Section 11(1) of the Code reads as follows:

> (1) A trade union or employer must not fail or refuse to bargain collectively in good faith in British Columbia and to make every reasonable effort to conclude a collective agreement.

Section 47 reads as follows:

> If notice to commence collective bargaining has been given
> (a) under section 45, the trade union and the employer, or
> (b) under section 46, the parties to the collective agreement must within 10 days after the date of the notice, commence to bargain collectively in good faith, and make every reasonable effort to conclude a collective agreement or a renewal or revision of it.

Union

The Union claims that Section 11 of the *Code,* which provides that employers must not fail or refuse to bargain collectively in good faith and to make every reasonable effort to conclude a collective agreement has been breached.

According to the Union, the question of whether a party is bargaining in good faith is governed by both an objective and a subjective test. The subjective test relates to the motivation of the parties: does the evidence indicate that the parties have a genuine intent or desire to conclude an agreement. An employer who is motivated by anti-

union objectives or who is deliberately seeking to avoid reaching an agreement will fail the subjective test. See *Dze L K'Ant Friendship Centre Society (Re)*, BCLRB, *supra*.

The Union's submission further states that the duty to bargain in good faith includes an obligation to disclose information regarding closures, contracting out or major layoffs. The second duty is to provide necessary information where the Union makes a specific request for it. A union can claim entitlement to information necessary to reach an informed decision in bargaining. See *Starbucks Corp.,* BCLRB Decision No. B183/97 and *Noranda Metal Industries Ltd. (Re),* BCLRB Decision No. 151/74.

HEU submits that the Employers have violated sections 11 and 47 of the *Code* for refusing to disclose material information, such as the reasons for contracting out, for refusing to bargain with HEU for a renewal of the Collective Agreement in good faith and for failing to make every reasonable effort to conclude a collective agreement.

Employer

The Employer submits that it did not fail or refuse to participate in meaningful collective bargaining. Similarly, the Employer did not determine prior to meeting with the Union that it would not negotiate a renewal of the Collective Agreement.

Neither did the Employer refuse to provide the completion date for sale – the Union knew on February 19, 2014, that the sale would complete in June of 2014. Further, the Union only asked for financial information or reasons for contracting out on May 22 a week before the contract was to take effect. The Union made no timely requests for reasons or information.

Moreover, Park Place was not obliged to disclose its decision regarding contracting out before it was sufficiently crystallized in early April – particularly given

that the Union knew that the current owner was planning to contract out in any event – see *Comox, supra;* and *Workers Compensation Board,* [1984] BCLRBD No.311.

The Union had more than enough information to understand that contracting out was a real possibility and had already indicated on March 11 that it would proceed as though this was occurring. Notwithstanding, the Union did not request further information or propose alternatives until May 22, 2014.

Analysis and Decision Regarding Alleged Breaches of Sections 11 and 47

First of all the crux of this case is contracting out, not collective bargaining. Having said that the linkage between Section 11 and unfair labour practices would occur if the employer, based on anti-union sentiments, did not make every reasonable effort to conclude a collective agreement. In this context collective bargaining would take place in bargaining potential alternatives to contracting out – such as a renewed collective agreement with a number of concessions.

The evidence does not substantiate a willingness on the part of the employers to bargain a Collective Agreement, but one has to look at the reasons for not bargaining a renewal Collective Agreement, as opposed to contracting out. For Sunridge Place, the owner's health, age and resources were dictating the interest in contracting out. For Park Place it was more interested in contracting out in order to garner the concessions it needed to address the financial difficulties at Sunridge Place and the lender's requirement to service its debt. Mr. Gehlen testified that it was determined by Park Place that the only way to achieve cost savings was to contract out.

Further, it was Mr. Gehlen's unchallenged evidence that he did not think concessions of the magnitude he described were achievable through collective bargaining. He therefore thought any discussions would be pointless. I accept his

testimony as genuine. His assumption may be inaccurate but there was no evidence of anti-union animus in the decision and therefore not an unfair labour practice. The Labour Relations Board, under similar circumstances, addresses this very issue in *Campbell Goodell Traynor Consultants Ltd (Re),* 2003 BCLRBD No. 232 as follows:

> The Union submits that an inference of an anti-union animus is supported by the fact that although the Employer was in a position to try to bargain concessions with the Union (since the collective agreement was set to expire on June 30, 2003), it did not even attempt to. However, Hoffmann's unchallenged evidence was that the Employer judged that it had no prospect of negotiating cost savings comparable to the cost savings that could be achieved by relocating the phone room. I cannot infer an anti-union animus from the Employer's failure to engage in an exercise that it thought would be pointless.

It was obvious to Mr. Wilson that the Employer's decision had been made early on in this process. When the parties first met the Union proposed a one year rollover to the Collective Agreement. In the second meeting on March 11, 2014 the Union asked about the proposal and got little response, except for acceptance by the current employer, Sunridge Place. On April 7th Park Place gave its notice to contract out. It was only on April 24th that the Union contacted the Employer regarding the purchase date and it was only when Mr. Charron contacted Mr. Wilson on May 2nd, 2014 that the parties settled on the May 22, 2014 date. At that point contracting out was not a *fait accompli* – no one had signed the contract, but the contractor had been chosen, the Union and employees had been notified of the June 3rd layoff, and the June 3rd date was very close in time to the May 22nd, 2014 date. It was too late for *bona fide* collective bargaining to take place.

Based on the reasoning found in *Campbell Goodell Traynor Consultants Ltd., supra,* and the chronology of events, I find that Sections 11 and 47 of the *Labour Relations Code* have not been breached in these circumstances.

CONCLUSION

The grievance is granted in part. The second and third paragraphs of Article 46.01 have been breached in the manner so described in this award. The unfair labour practice complaints are dismissed. Sections 6(1), 6(3)(a), 45(2), 11 and 47 of the *Labour Relations Code* have not been breached.

I leave it to the Employer and the Union to agree upon a remedy to the Collective Agreement breaches. If unable to find a resolution, I remain seized of a final determination as to remedy.

Dated at the City of Vancouver in the Province of British Columbia this 21st day of November, 2016.

IRENE HOLDEN, Arbitrator