

## ONTARIO LABOUR RELATIONS BOARD

**1682-08-R** International Union of Painters and Allied Trades, Local 1819, Glaziers, Applicant v. **Harrison Glass & Mirror Co. Ltd.**, Trade Services Inc., TSI Canada Inc., TSI Glass & Mirror Inc., Responding Parties.

**BEFORE:** David A. McKee, Vice-Chair.

**APPEARANCES:** Elizabeth Mitchell and Dermot Lynch for the applicant; Landon P. Young, Jeremy D. Schwartz and Randy Hoffner for the responding party.

**DECISION OF THE BOARD:** August 21, 2009

1. This is an application brought pursuant to subsection 1(4) and section 69 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the “Act”). The International Union of Painters and Allied Trades, Local 1819, Glaziers (the “Union”) have bargaining rights with a company known as Harrison Glass & Mirror Co. Ltd. (“Harrison”). Harrison was owned and controlled by Jeffrey Duck, the chief officer and director of the corporation. Harrison was a company involved in glazing work, both construction and “service work” which could be either construction or maintenance, depending on the job. The company is no longer active in the glazing business, or at all. The Union alleges that the business has re-emerged in, or has been transferred to, a number of other businesses. The focus of this application is a business that carries on as TSI Canada Inc. and TSI Glass & Mirror Inc. (collectively “TSI”). All parties treated these two entities as the successive corporate vehicles for the same business, and there is no need to distinguish between them.

2. TSI is a glazing company operated by Randy Hoffner and Gary Hunt. Randy Hoffner had business dealings with Harrison, but only worked for them one summer as a truck driver when he was 16 years of age. He founded TSI and obtained its first contracts. Gary Hunt was employed by Harrison Glass when it operated. When Harrison closed, he joined Randy Hoffner in TSI as a partner or principal.

3. The remaining responding party, Trade Services Inc. (as distinct from TSI) was a company created to try to coordinate the business of a number of sub-trades. It operated under the business name of “Dial One”, a name adopted by its participating contractors. Harrison was involved in Trade Services Inc. and indeed carried the Dial One logo on its trucks and with its business for a time. It was through Trade Services Inc. that Randy Hoffner came in contact with Harrison. Eventually, the concept behind Trade Services Inc. was abandoned as unworkable and the business closed its doors. The Union did not suggest, in final argument, that either subsection 1(4) or section 69 had any application to Trade Services Inc. and the application is dismissed as against that corporation.

4. Harrison found it was experiencing a decline in business in the 1990s. At one point, it operated a non-union branch of the company known as Village Glass, although that came to an end when the Union brought an application under subsection 1(4) and section 69. Business continued to decline. Harrison shifted its focus from construction work to service work, but was

still unable to carry on in a manner sufficiently attractive to its owner, Jeffrey Duck. Jeffrey Duck closed business at the end of 1999.

5. Harrison operated out of a number of addresses, the last of which was located at 1310 Fewster Drive in Mississauga, called to the Fewster Business Centre. Jeffrey Duck, through a holding company, still owns or controls the head lease on the building and rents out space as a landlord. TSI rents space from Mr. Duck's company at that location. There was otherwise nothing left of Harrison's operations.

6. The facts surrounding the operation and closure of Harrison are as detailed as those surrounding the start-up of TSI. It is not necessary to relate them in any detail. The essence of the Union's case is that Gary Hunt exercised control and direction within the meaning of subsection 1(4) of the Act over Harrison and was what the Board has often called a "key employee". I find that he was not. He was certainly a valued senior managerial employee, but he did not have any control of the business of Harrison, nor any significant direction over the company's affairs. With respect to the sale or transfer of the business, Gary Hunt himself did not represent a significant "human asset" of the company and was not himself a key component in that business. The fact that some of Harrison's customers are now customers of TSI and the employees of TSI at one time all worked for Harrison suggests that there was a sale, but there was, in fact, no transfer of a functioning business from Harrison to TSI.

### **Analytic framework**

7. The Union relied on a number of cases that are some of the many decisions of the Board called colloquially the "key man" or "key person" cases. These are decisions, most of which deal with businesses in the construction industry, where the Board has concluded that the key person is the essence of the business. This is often used as the basis for the analysis of a related employer application. In *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 985, the Board said at paragraph 16:

16. The present case provides a classic example of the kind of business situation to which section 1(4) was intended to apply. The business of Brant Erecting, which was largely controlled and directed by Bill Munro, ran into difficulties and came to a halt in April, 1979. Munro, who, we are satisfied was the principal entrepreneurial force behind the Brant Erecting business severed his connection with that firm and immediately established a virtually identical business under the name of Provincial Steel carried on through a company incorporated by his wife. The business ability, contacts, expertise, and goodwill vested in Bill Munro himself; and some of the assets formerly used by Brant Erecting, became the assets and advantages which were the key to Provincial Steel's business success. There has been no change in the character of the business nor in the employee skills required by it. Provincial Steel is run (as was Brant Erecting) from an office in Munro's basement and serves essentially the same clientele as was served by Brant Erecting. There was no hiatus between the apparent demise of Brant Erecting and the launching of Provincial Steel as a going concern. ... In our view these transactions fall squarely within the mischief to which section 1(4) is directed, and we are satisfied on the evidence before us that Brant Erecting and Hoisting and Beverley Munro Inc. carrying on business as Provincial Steel, carry on associated or related businesses, (albeit not simultaneously) under common control or direction. Accordingly, the Board is satisfied that it should declare that these two business entities are and always have been "one employer" for the purposes of *The Labour Relations Act*, and that Beverley Munro Inc. is bound by and must recognize any collective agreements or bargaining rights held by the applicant in respect of Brant Erecting and Hoisting.

See also *Jen-Ry Utility Contracting Co. Ltd* [1984] OLRB Rep Dec 1724; *Tri-Corps Industrial Contractors* [1994] OLRB Rep. Oct. 1446 (where the Union was unsuccessful on that ground) and *Central Forming and Concrete Inc.* (Board file 3666-93-R and 3857-03-R, decision dated July 18, 1994), [1994] OLRD No. 2699.

8. The Board has also used the same analytic framework to determine whether there has been a sale of business. In *Gallant Painting*, [1991] OLRB Rep. Sept. 1051, the Board described the essential elements of a painting business it was dealing with in that case at paragraph 47 and 48:

47. What then are the essential elements of the business? What is its “total economic organization?” The evidence confirms that the maintenance painting business is a bid oriented business. In this type of business the essence of the business resides in the experience and expertise of its management personnel. To be financially successful the essential elements of the maintenance painting business are the expertise to price and bid upon union jobs, and the skill and ability of personnel who can perform the job within the limits of a successful bid (see, for example, *P. H. Grager, supra*, and *Stucor Construction Ltd., supra*). It is not the tools or physical assets which are the “essence” of the painting maintenance business. It is the skill, experience and expertise of its key management personnel.

48. We find that at Gallant Painting the essential elements of the business resided with John Gallant. At Lindsay Maintenance, for the Painting Division these essential elements continue to reside with John Gallant.

See also *Ably Concrete Floor Limited* [1991] OLRB Rep. May 579; and *Humphrey Plumbing and Electrical Service Ltd.* (Board File No. 1588-03-R, decision dated August 15, 2006), 2006 CanLII 29249.

9. The basis of both of these approaches is focussed on the role of the individual who is identified as a key person in the first business. Essentially the question is whether the business or some identifiable part of the business is entirely indistinguishable from the individual who is in control of it. In the construction industry, the physical assets of the business may be negligible, or in any event not as important as the ability of the one or more persons who can estimate jobs properly in order to successfully bid a job, perform the work satisfactorily, do it on time and on budget, and make a profit. In such cases the entrepreneurial drive and expertise found in the business constitutes the core of the business. If it is found in one person, that person becomes the key component of the business.

10. In this case, for the reasons set out below, I conclude that Gary Hunt is was not the essential core of the business of Harrison or even of the service portion of Harrison’s business. The analysis relied on by the union in these cases has no factual foundation.

### **The Related Employer Application**

11. Gary Hunt is a glazier by trade. His first job was as a driver and glass installer at an unrelated company called Oakville Glass. He left there and went to work for Harrison as an installer. He eventually became a journeyman glazier, working for Harrison. Harrison carried on its glazing business in three general areas: construction (involving new or renovated buildings),

condominium work (a specific type of construction) and service work. Service work involved responding to calls with respect to existing structures that would require repair or maintenance of the glass or small scale construction. Gary Hunt was involved in the service portion of the business only.

12. The witnesses who were called to testify described Harrison as a company tightly controlled by Jeffrey Duck, its President, and with his spouse, sole shareholder. He was described as a manager who insisted on being closely involved in any significant decision that was made. He either prepared or approved every bid that went out to a customer. The “management meetings”, which involved Gary Hunt, were largely an exercise in other employees providing information to Jeffrey Duck so that he could make the decisions necessary to carry on the business. Jeffrey Duck did all the hiring and firing of employees. On occasion, when Jeffrey Duck was out of the office, one other employee, Russ Hartley, was the person that employees of Harrison went to for a decision. Either Jeffrey Duck or Russ Hartley were always present at the business premises until Russ Hartley left the company. No witness described Gary Hunt as filling that position after Russ Hartley left, despite the fact that the business was more heavily engaged in service work at that time.

13. The Union characterized Gary Hunt as the “Manager of the Service Department”. That is fair enough, and would certainly be an appropriate way to describe his job. It does not, however, really describe his role. He was paid an hourly rate for his services. He owned no shares in the company and had no profit-sharing agreement. His legal status was that of an employee only.

14. He organized the daily work schedules for the glaziers involved in the service part of the business, although Jeffrey Duck also involved himself in that process from time to time. In addition, the aforementioned management meetings enabled Jeffrey Duck and Gary Hunt to discuss work that was coming up and how it was to be performed.

15. In the course of his duties, Gary Hunt, of course, had contact with customers who called to place orders for work or to ask for a price or bid on a particular project. Some customers who had dealt with Harrison for a long period did not require an estimate: if they were large enough to be regular customers, they would have a sense of what a job should cost and trusted Harrison to bill them appropriately. Some did require an estimate, and Jeffrey Duck sometimes prepared the estimate and sometimes Gary Hunt did so. It is impossible to quantify, but I will assume, for purposes of this decision, that Gary Hunt prepared the estimate more frequently than Jeffrey Duck. However, Mr. Hunt prepared the bid on the basis of the guidelines that Jeffrey Duck had set in terms of overhead burden and profit margins. He relied, of course, on his own sense of how long the work would take to perform, travel time, the cost of materials, and so on. This work was what any skilled estimator does, or perhaps given the guidelines about profit margin and overhead burden, somewhat less than what a skilled estimator does, and does not constitute the core activity of the business. In any event, Jeffrey Duck approved most of the bids and every invoice.

16. Gary Hunt did not hire or fire or discipline employees, although there is no evidence of any occasion on which discipline was meted out to anyone in the service side of the business. He has, of course, hired employees at TSI.

17. Gary Hunt was also involved in sales. He would follow up leads, or when time permitted, he would “work the phones” seeking business. There were also two sales representatives for Harrison, Don Layne and Bob Schneider, who did the same thing. Gary Hunt

provided estimates for them if it was necessary to secure certain work, again following the guidelines for any service work and seeking approval from Jeffrey Duck. Mr. Hunt also assigned the service work on a daily basis to each of the service employees. They reported to the shop at Harrison Glass each day, and he would lay out the work orders that he expected them to finish in a day for pick-up. Although Mr. Hunt suggested Mr. Duck had some involvement in the scheduling of employees, he was sufficiently vague on the particulars that I conclude he was solely responsible for that. That is a function which involves calculating the amount of time required for each job and identifying its location so that the work can be performed in one day and can be done efficiently. It is an important role, but hardly a core function of the business.

18. Gary Hunt testified that towards the end of the time during which Harrison was operating, he did notice a slowdown of the business, but not one that particularly affected the service portion of the business. The Union argued that after Russ Hartley left, one and a half years before the business closed down, Mr. Hunt could see the writing on the wall and was looking around for other opportunities to earn a living. In fact, Mr. Hunt testified that he believed Russ Hartley had left the company over a dispute about working with Stephen Duck, Jeffrey Duck's son, who was becoming involved in the business. He testified that he had made no plans whatsoever to look elsewhere for earning opportunities and was certainly not planning to take the business with him in any particular way. Indeed, when the business was closed, he was given very little notice. He first applied for other employment with AFG Glass, a large unionized contractor, and while he was waiting for AFG Glass to get back to him after a first interview, he met with Randy Hoffner and decided to go into business with him at TSI.

19. While the evidence points to Mr. Hunt as a senior and valuable employee, he did not exercise any fundamental control or direction over the business. He was certainly a managerial person and was responsible for some of the success of the business, but that does not constitute direction or control for the purposes of subsection 1(4).

20. In certain decisions, the Board has queried whether a person can ever be considered to be a "key person" if she or he has no ownership stake in the business. It seems to me that this suggestion is overly broad. An ownership interest in a business is often a sign of, and indeed coincident with, an individual who constitutes a key part of the business. Senior employees will often leave a business if they are denied an ownership stake in what they feel is a business to which they have significantly contributed in terms of its growth or operation. But the question is not the indicia of ownership (which may, on its simplest level, be simply a profit-sharing mechanism by which the company operates), but whether the employee really is a key person in the business. The presence or absence of an ownership interest is a significant indicator of the employee's role in the business, but is not a pre-condition to finding direction or control in that person's hands.

21. In this case, of course, Gary Hunt did not have an ownership interest, and that is, in my view, consistent with the role of a senior employee who is nonetheless an employee who performs particular functions for the company, but who is not a key element in the business. Not every senior employee whose efforts are important to the success of a business is so "key" to that business as to have direction or control over it. Otherwise, every senior estimator, sales representative, and supervisor of a large construction project would be found to be a key employee when they are important to, but not a functional part of, the business.

22. In this case, I conclude that Gary Hunt was not a key person within Harrison. He was a valuable senior employee, but he did not exercise control or direction over the business within the meaning of the Act. Therefore, the application under subsection 1(4) is dismissed.

## **Sale of Business**

23. Harrison closed down because Jeffrey Duck decided it was no longer a viable business, or not one that he wished to continue to operate. That is, it did not end in insolvency or because of the sudden demise or incapacity of the key principal of the business. Thus, Jeffrey Duck had the opportunity to take steps to realize what he could from the demise of his business.

24. He did, in fact, seek to transfer some parts of the business. He sent letters of introduction to certain customers in the construction and condominium portions of his business, advising them that Harrison was going out of business, but that work would be or could be performed by Pro Glass, a company incorporated by his son, Stephen Duck. In addition, Pro Glass would be performing the warranty work for work previously undertaken by Harrison. Jeffrey Duck also attempted to “reserve” certain customers for a business called Quicksilver, a partnership or proprietorship operated by a former employee, Darren Blakeman. To that end, he advised his son, Stephen Duck, to stay away from one or two significant customers so that Quicksilver would have a chance to obtain the work. His motive was not philanthropic. He had loaned Darren Blakeman some money and he wanted to ensure that he had an income stream to facilitate repayment. The Union brought a successful related employer/sale of business application in respect of Pro Glass. The matter was settled. Quicksilver went out of business approximately one year after it opened.

25. In contrast, Jeffrey Duck made no such arrangements with Gary Hunt. The sort of family consideration that caused him to try to steer some of his business to his son and the financial considerations that led to his indirect attempt to do so for Darren Blakeman provide a motive for that particular activity. However, nothing at all happened in respect to the service work in which Gary Hunt was involved. Indeed, Mr. Hunt sought employment with a unionized competitor of Harrison and may not have been someone Jeffrey Duck considered seeking some sort of arrangement with. He certainly did not seek financial consideration or some other return for any effort to steer the business to Mr. Hunt. It appears that he simply let the business go.

26. Stephen Duck testified that he thought there was an understanding that Harrison had been closed and that each of himself, Darren Blakeman and Gary Hunt were to pursue “their part of the business”. He did not refer to any act or statement that was the foundation of this belief, and I conclude that this was simply a conclusion he had drawn because of his father’s instructions with respect to Quicksilver’s chosen customers and the fact that he saw Gary Hunt ultimately joining a company that did service work.

27. The Union relied heavily in its argument on what it says was Gary Hunt’s control or indeed, the personification of the service part of Harrison’s business. I have indicated why I conclude that he was a valuable senior employee, but did not personally represent a significant part of the business. However, the Union points to the fact that many of the most significant customers of TSI in its first year after Mr. Hunt joined it were also customers of Harrison. This is suggestive of facts that might constitute a sale or transfer, but in the context of the facts of this case, there is no such evidence. One needs to know why they became customers of TSI, not simply the fact that they did become customers.

28. The Union asserts that the reason they became customers of TSI was due to the skill, experience, expertise and contacts of Gary Hunt. The argument appears to be one that the Union treats as self-evident. Because the former Harrison customers are now customers of TSI, it must

have been because of Gary Hunt. However, I cannot come to that conclusion in the light of all the testimony and documents filed in this case.

29. First, it should be noted that TSI was founded a year before Gary Hunt arrived, by Randy Hoffner. He had some contacts and had established some substance as a contractor, with no help from Gary Hunt. He solicited and obtained work from certain customers, including GWL Realty, Petro Canada and Morguard Trust. When Gary Hunt made a call as a new partner in TSI, he was presenting himself as a representative of a company with a history, albeit brief, and some form of business organization and structure, not as a person who had recently left a business that had closed who was looking for work. The value of a “contact” was overstated by the Union in this case. In several instances, Gary Hunt testified that his previous “contact” with a customer stemmed from his days at Oakville Glass as an installer (for example, U of T in Mississauga). In the case of Canada Trust, Gary Hunt ascribed the fact to purely fortuitous coincidence. He was making a cold call and spoke to an employee on the central help desk, who knew him slightly from a previous contact. She had no authority to make decisions generally about approved contractors or the awarding of most work. On this day, she was on the help desk alone and was just setting up the operation. She had a job that needed to be done quickly and so she gave it to him. From that first contact, the business grew, but the initial contact was a matter of pure coincidence.

30. The TD Bank was another customer which had given work to Harrison and gave work to TSI. Both Mr. Hunt and Mr. Hoffner testified that they had solicited the work from property managers at CB Richard Ellis. Gary Hunt testified that he was able to arrange that meeting to solicit work because he had known two of the people who were now at CB Richard Ellis from his days as an installer at Oakwood Glass when they worked for Canada Trust. He testified that he needed the meeting between them and himself and Mr. Hoffner to persuade them to provide them with work. That is, their ability to get on an approved list of contractors depended on persuading those individuals at that meeting of their capacity to perform the business. It did not arise out of a simple recognition of Gary Hunt as the successor replacement for his former employer.

31. In this case, the fact that Gary Hunt had a “contact” is not significant in itself. Certainly, it helps to deal with a customer representative who recognizes a face or a name. However, persons who have worked as sales representatives will often have that kind of recognition to a much greater extent than others involved in a business. There is no evidence in this case that any customer perceived Gary Hunt to be the same business that they had dealt with at Harrison Glass and could rely on the expertise, efficiency and competence of a business they had come to know and trust. There is a difference between knowing someone as a person in the industry, and knowing a contractor or a business that operates in the field in which the customer is looking for service and that possesses a reputation for quality work on which that customer can rely.

32. As noted above, the Board has on occasion identified the key element of a business may be the skill, experience and expertise of its key management personnel. Gary Hunt did not represent these elements to prospective customers of TSI. He did not embody them at Harrison and did not transfer or take with him any of the goodwill or reputation of Harrison to TSI.

33. I cannot conclude that any of the customers with whom he dealt at TSI saw in Gary Hunt the managerial skill in bidding and executing a job that was a reflection of those same elements at Harrison. Since the work is service work, it is a collection of small jobs over time, and a company such as TSI had to establish a reputation by successfully completing that work time and again. As the Board said in *Gallant Painting, above*, at paragraph 49:

49. Although it is true that Lindsay Maintenance might have started from scratch gradually building up the kind of skill, experience and expertise and knowledge enjoyed by Gallant Painting, it did not do so. Lindsay Maintenance might have hired someone with skills, know how and experience similar to those of Mr. Gallant to assist it as it slowly built up the business to the level of expertise and recognition enjoyed by John Gallant and Gallant Painting. The fact remains however, that it did not do so.

34. In this case, I conclude that TSI did build a business from the ground up. Randy Hoffner started before Gary Hunt arrived on the scene and had established some sort of business. It grew before and after Gary Hunt's arrival. The gross billings of the first 21 months of business after Mr. Hunt's arrival were not startling large, and there was no evidence to suggest how they compared to any other similar period. There was nothing of the sort of evidence that the Board found in *Gallant Painting* to suggest a sudden upsurge in a kind of business that TSI had not done before the new partner's arrival.

35. The Union also relied on the fact that all or almost all of the employees at TSI worked at one time or another for Harrison. That bald statement does indeed suggest a sale of a business. Once again, the detailed facts tell a different story. Often the Board will draw a conclusion of a sale or transfer of a business from the movement of a significant core of employees from one business to the other. The Board presumes that this group of employees represents a kind of group experience and expertise in the actual work processes and an efficiency on which a new business can rely in pricing and performing jobs. In this case, the employees did not represent that kind of group experience or efficiency. Service work is performed by one employee alone or two employees working together but isolated from anyone else. Some of the employees were apprentices at Harrison, and possessed limited skills for that reason. Two of the employees (Doug Paul and Ken) worked only occasionally for Harrison. They and two others were called the "county gang" as they were utilized only for work away from Harrison's core geographic area. Most importantly, they did not come to TSI as a group. They were hired as TSI expanded, one at a time, over a four-year period. They may have come to TSI for many reasons, but their employment at TSI does not represent a transfer of experience and expertise or collective knowledge from Harrison to TSI. Whatever the reason for TSI's hiring policies, it is not evidence of a transfer of business.

36. The one final factual matter on which the Union relied, but not heavily, was work performed by a man named Lam Bui. Lam Bui worked for many years for Harrison. He worked on particular metal fabricating equipment to produce the aluminium frames and other framing and attachment hardware that went along with the windows that Harrison installed. There were three large machines, a brake, a radial saw and a milling machine. When Harrison Glass closed down, Jeffrey Duck gifted these three pieces of equipment to Lam Bui. The only estimate of the value of that equipment came from Randy Hoffner, who priced it at approximately \$4,000 to \$5,000. Lam Bui entered into an agreement with TSI to perform work for them. The rate he is paid is a function of the work done and the fact that he owns the machinery which is used to fabricate the aluminium frames.

37. While Lam Bui could have taken his equipment and set up shop anywhere, the advantages to him of remaining and working for TSI are obvious. TSI rented space at Fewster Drive, which is where his machinery was located. If TSI used Lam Bui for all of their fabrication needs, he would not need to move the equipment and could continue performing what he had

done for many years in the same place. Further, he would not need to deal with any significant transportation issues for work for TSI.

38. Before TSI made this arrangement with Lam Bui, it had had its fabrication work performed at other shops. To have it come from a single source adjacent to its own storage and production area was obviously of considerable advantage to TSI. Work that it had contracted out to others at a distance would now be done by someone immediately adjacent to their own premises. The exact arrangement between Lam Bui and TSI was never set out in evidence, but the form of the agreement does not matter. Lam Bui's work represented a kind of service that could be purchased on the open market elsewhere. To use him was simply a matter of convenience to TSI and one of mutual profit for both of them. This does not represent a transfer of any meaningful part of a business from Harrison to TSI.

39. In dealing with a sale of business, the Board has often said that a business is not simply a collection of assets or people, but rather an economic organization that carries on as a "going concern". In *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193, at paragraph 44, the Board said:

44. For a transaction to be considered a "sale of a business" there must be more than the performance of a like function by another business entity. There must be a transfer from the predecessor of the essential elements of the business as a block or as a "going concern." A business is not synonymous with its customers or the work it performs or its employees. Rather, it is the economic organization which is used to attract customers or perform the work. The Legislature could have provided for the continuation of bargaining rights whenever there is a continuity of the work performed, but it did not do so. Bargaining rights are continued only when the employer transfers *his* business. The use of the active verb and possessive pronoun is not insignificant.

40. In this case, there was no economic organization transferred from Harrison to TSI.

### **Conclusion**

41. For the reasons set out above, I conclude that subsection 1(4) is not applicable because at no time were Harrison and TSI under common control and direction. Similarly, there was no transfer of any business or part of a business from Harrison to TSI. Therefore, this application is dismissed.

"David A. McKee"  
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for the Board