In the Matter of an Arbitration
Under section 48 of the *Labour Relations Act, 1995*

BETWEEN:

ROSS MEMORIAL HOSPITAL

(THE "EMPLOYER")

AND

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1909

(THE "UNION")

Re: Consolidated Voluntary Exit Grievances
(H. Nugent - ML-09-16 and W. Leishman - HN-10-16)

Before: Eli A. Gedalof, Chair
Harold Ball, Employer Nominee
Joe Herbert, Union Nominee

Appearances

For the Employer

Lisa M. Kwasek, Counsel, Hicks Morley Hamilton Stewart Storie LLP
Emma Elley, Director, Human Resources, Ross Memorial Hospital
Sharon Gilchrist, Lead, Human Resources Consultant, Ross Memorial Hospital

For the Union

Mark Wright, Counsel, Goldblatt Partners LLP
Mary-Elizabeth Dill, Counsel, Goldblatt Partners LLP
Louis Rodrigues, OCHU Vice President
Maggie Jewell, President, CUPE 1909
Melissa Lottou, Chief Steward, CUPE 1909
Heather Nugent, Grievor/Secretary CUPE 1909

Hearing held in Peterborough, Ontario, on October 16, 2017

AWARD

Introduction

1. This grievance concerns the calculation of payment for early retirement options ("ERO") or voluntary early exit options ("VEO") for part-time employees under the Combined Full-Time/Part-Time Collective Agreement between the parties. Both options are exit packages offered in alternative to layoffs. While there are differences between the ERO and VEO provisions, particularly with respect to the inclusion of a prorated amount for partial years of service under the ERO, the parties agree that those differences are not material to this grievance. There are two variables in the calculation of both options. The first is the employee's "year[s] of service". The second is the employee's "salary" or "pay". Subject to proration where applicable, employees receive "two (2) weeks' salary for each year of service, to a maximum of fifty-two (52) weeks' pay".

2. I will explain each party's position with respect to how this calculation ought to be executed for part-time employees in greater detail below. In essence, the Employer calculates years of service for part-time employees by converting their hours worked into the equivalent number of full-time years of service, based on 1725 hours per year. Thus, every 1725 hours a part-time employee works counts as one year of service. The Employer then looks at the average bi-weekly salary earned by the part-time employee over a representative period, to determine what constitutes "two (2) weeks' salary". It then multiplies the calculated years of full time service by the employee's average bi-weekly salary to determine the quantum of the allowance. In support of its position, the Employer relies on other provisions in the collective agreement where part-time hours are converted to their equivalent full-time years of service or seniority for other purposes expressly identified in those provisions, and a plain language reading of the term "salary".

3. The Union grieves that the Employer's method of calculation is illogical and improper, because it effectively double-counts the part-time status of the employee. If, argues the Union, it is proper to convert a part-time employees' service to the equivalent number of full-time years, then the corresponding bi-weekly salary must also be converted to reflect full-time hours, otherwise the benefit is disproportionately reduced. In the alternative, the Union argues that if it is appropriate to use the employee's actual earnings for the calculation of the bi-weekly salary, as the Hospital argues it must on the plain language of the provision, then a plain language reading supports also using the employee's actual years of service.

The Facts

4. The facts in this case are not in dispute and were for the most part set out in an Agreed Statement of Facts, which reads as follows:

1. In late summer of 2015, the Hospital delivered hospital-wide notice of lay-off to all Registered Practical Nurses (RPNs).

2. Between January and March 2016, the Hospital delivered either early retirement offers, pursuant to Article 9.08(b) or voluntary exit offers, pursuant to Article 9.08(c), to all affected RPNs. Heather Nugent and Wendy Leishman were among the RPNs to receive such offers.

3. Heather Nugent began her employment with the Hospital on October 4, 1999 as a part-time Registered Practical Nurse. Her status at the time of the offer was part-time. As of December 27, 2015, her seniority hours totalled 24,077.41. Pursuant to Article 9.02 (i.e. calculated on the basis of one year's seniority for each 1725 hours worked), Ms. Nugent's service date is October 14, 2002. Her rate of pay is 29.656.

4. In or around February 2016, the Hospital offered Ms. Nugent a voluntary exit package in the amount of $11,905. The hospital recorded Ms. Nugent's estimated service hours as 23,220.38.

5. Wendy Leishman began her employment with the Hospital on February 25, 2002 as a part-time Registered Practical Nurse. Her status at the time of the offer was part-time. As of December 27, 2015, her seniority hours totalled 20,884.09. Pursuant to Article 9.02 (i.e. calculated on the basis of one year's seniority for each 1725 hours worked), Ms. Leishman's service date is December 4, 2003. Her rate of pay is 29.656.

6. In or around February 2016, the Hospital offered Ms. Leishman an early retirement package in the amount of $16,705.32. The Hospital recorded Ms. Leishman's estimated service hours as 21,254.10.

7. The Hospital's calculation of these EP's is based on a two-part formula. The Hospital first calculates a part-time employee's "years of service". Unlike with full-time employees, this does not simply reflect the employee's consecutive years of service to the Hospital (i.e. the number of years since their date of hire). Rather, a part-time employee's years of service reflect how many years of full-time hours they have completed.

8. The Hospital next calculates a part-time employee's "two weeks' pay". Notwithstanding that a part-time employee's year of service have already been adjusted to reflect full-time years of service, the Hospital calculates an employee's "two weeks' pay" based on the employee's part-time hours.

9. Further, to calculate an employee's two weeks' pay, the hospital takes the average of hours worked by that employee over the 26 weeks preceding the EP offer. Because hours vary seasonally and as between departments, this is having inequitable results. For example, Heather Nugent was offered a voluntary exit package of less than $12,000, while her more junior colleague, Lorrie Finn, was offered over $17,000. Ms. Nugent's entitlement reflected the fact that her department was shut down for four weeks during the 26-week calculation period. Ms. Finn's entitlement reflected the fact that she had been covering a full-time maternity leave for part of the 26-week calculation period.

5. At the hearing, the parties also agreed that Ms. Nugent, while a part-time employee at the time she was offered the exit package, worked full time from 2007 to 2013. The Employer further noted that while Ms. Nugent's department was shut down during the period indicated in the agreed facts, she had in fact continued to work during that period, and those hours were reflected in the Hospital's calculation.

Argument and Analysis

Collective Agreement Provisions

6. Both parties argue that the collective agreement language providing for the calculation of the exit packages set out at Article 9.08 must be interpreted within the context of the collective agreement as a whole, and in light of other provisions providing for the calculation of part-time service and seniority and benefits related to service and seniority. It is therefore useful to begin by reviewing the provisions referred to by the parties.

7. The primary provisions in issue are 9.08(B) and (C) of the Collective Agreement. Article 9.08(B) reads as follows:

> 9.08(B)-RETIREMENT ALLOWANCE
>
> Prior to issuing notice of layoff pursuant to article 9.08(A)(a)(ii) in any classification(s), the Hospital will offer early retirement allowance to a sufficient number of employees eligible for early retirement under HOOP within the classification(s) in order of seniority, to the extent that the maximum number of employees within a classification who elect early retirement is equivalent to the number of employees within the classification(s) who would otherwise receive notice of layoff under article 9.08(A)(a)(ii).
>
> An employee who elects an early retirement option shall receive, following completion of the last day of work, a retirement allowance of **two (2) weeks' salary for each year of service**, plus a prorated amount for an

additional partial year of service, to a maximum ceiling of fifty-two (52) week's salary. [emphasis added]

8. Article 9.08(C) provides for the voluntary exit option in the event that there are not sufficient early retirements to avoid layoffs, and provides for a comparable calculation, but without proration:

> 9.08(C)-VOLUNTARY EXIT OPTION
>
> ...
>
> An employee who elects a voluntary early exit option shall receive, following completion of the last day of work, a separation allowance of **two (2) weeks' salary for each year of service**, to a maximum of fifty-two (52) weeks' pay. [emphasis added]

9. The parties also referred to the following provisions of the Collective Agreement:

> 9.02 – DEFINITION OF SENIORITY
>
> Full-time employees will accumulate seniority on the basis of their continuous service in the bargaining unit form the last date of hire, except as otherwise provided herein.
>
> Part-time employees, including casual employees, will accumulate seniority on the basis of one (1) year's seniority for each 1725 hours worked in the bargaining unit as of the last date of hire, expect as otherwise provided herein.
>
> Seniority will operate on a bargaining unit wide basis.
>
> A part-time employee cannot accrue more than one year's seniority in a twelve (12) month period. The twelve (12) month period shall be determine locally.
>
> 9.07(A) – TRANSFER OF SENIORITY AND SERVICE
>
> Effective (the date as set out in the Local Provisions Appendix) and for employees who transfer subsequent to (the effective date as set out in the Local Provisions Appendix):
>
> For application of seniority for purposes of promotion, demotion, transfer, layoff and recall and service (including meeting any waiting period or other entitlement requirements) for purposes of vacation entitlement,

HOODIP or equivalent, health and welfare benefit plans, and wage progression:

i an employee whose status is changed from full-time to part-time shall receive credit for his seniority and service;

ii an employee whose status is changed from part-time to full-time shall receive credit for his seniority and service on the basis of one (1) year for each 1725 hour worked.

The above-noted employee shall be allowed a trial period of up to thirty (30) days, during which the Hospital will determine if the employee can satisfactorily perform the job. Within this period the employee voluntarily return, or be returned without loss of seniority to his former duties on the same shift in the same department and at the appropriate rate of pay, subject to any changes which would have occurred had he not transferred.

…

17.01(A) - FULL-TIME VACATION ENTITLEMENT, QUALIFIERS AND CALCULATION OF PAYMENT (The following is applicable to Full-Time employees only)

An employee who has completed the following number of continuous years of service	But less than the following number of continuous years of	Is entitled to the following number of weeks of annual vacation with pay:
1	2	2
2	5	3
5	12	4
12	20	5
20	28	6
28		7

Vacation pay shall be calculated on the basis of the employee's regular straight time rate of pay times their normal weekly hours of work, subject to the application of Article 9.04, Effect of Absence.

17.01(B) – PART-TIME ENTITLEMENT, QUALIFIERS AND CALCULATION OF PAYMENT (The following clause is applicable to the part-time employees only)

An employee who has completed the following number of continuous hours of service:	But less than the following number of continuous hours of service:	Is entitled to the following percentage of vacation pay, plus the equivalent time off:
Less than 3,450		4%
3,450	8,625	6%
8,625	20,700	8%
20,700	34,500	10%
34,500	48,300	12%

48,300	14%

Progression of Vacation Schedule (Part-Time)

Part-time employees, including casual employees, shall accumulate service for the purpose of progression on the vacation scale, on the basis of one year for each 1725 hours worked.

Union's Argument

10. The Union begins its argument with the proposition that the Employer's approach to calculating the exit packages for part-time employees is illogical, unfair, results in anomalies and should be rejected for absurdity.

11. Article 9.08, argues the Union, applies equally to both part-time and full-time employees, yet on the Employer's interpretation, the benefit provided to part-time employees is discounted far beyond the amount that appropriately reflects the employee's part-time status. The Union provided several sample calculations based on employees working part-time and full-time schedules, all of which illustrate what can be described as a "double discount" of the benefit for part-time employees on the Hospital's method of calculation.

12. For example, where a full-time employee has worked for 26 years at 37.5 hours a week, with a salary of $25/hr, the exit package will be $48, 750 (26x37.5x2x25). The Union contrasted this result with that of a part time employee who works for the same 26 year period at the same salary of $25/hr, for 15 hours a week. Such a part-time employee will have worked 40% of the hours of the full-time employee. Yet on the Employer's calculation, this employee will only receive 16% of the benefit available to the full-time employee. This steep discounting of the benefit results because the Hospital first converts the hours worked to their equivalent full-time service, by dividing by 1725, and then applying that full-time equivalent service to the employee's part-time salary. In this example, the service calculation produces a result of 11.76 years, or 11 completed years of service (26x15x52)/1725). Applying 11 years of service to the part time salary of 30 hours bi-weekly at $25/hr produces a benefit of $8, 250, which is 16% of the $48, 750 benefit available to the full-time employee.

13. The Union argues that either of its alternate positions will produce a fairer and more consistent result than the Hospital's approach. In the simple example set out above, if the 11 years equivalent full-time service is applied to the full-time equivalent salary, the part time employee would receive 20, 625.00 (11x37.5x2x25), which is 42% of the benefit available to the full-time

employee (the slightly higher percentage results because part-time employees are credited with a year of service for each 1725 hours worked, whereas full-time hours are generally 1950 per year). On the Union's alternate argument, applying actual years of service, the part-time employee would receive a benefit of $19, 500 (26x15x2x25), which is 40% of the benefit received by the full-time employee.

14. While the Union acknowledges that the variability of part-time schedules means that there are circumstances where the part-time benefit may not perfectly correspond to the full-time benefit, either of the Union's methods will generally reflect the employee's relative contribution to the Hospital, whereas the Employer's calculation will generally steeply discount that contribution.

15. The anomalous result in the above example, argues the Union, is at odds with the reason for converting part-time to full time service in the first place, which is to create a level playing field or, as counsel argued, to ensure that the comparison between part-time and full-time employees in any given context is one of "apples to apples". Seniority, for example, affects the competitive rights of employees under the job posting provision at article 9.05 or bumping rights under article 9.09, and the conversion of part-time seniority to its full-time equivalent serves the function of levelling the playing field between full and part-time candidates.

16. In this case, the Union argues that either of its alternative interpretations maintain the appropriate "apples to apples" comparison between the full-time and part-time entitlement. The Union argues that if it is appropriate to convert service so too should you convert salary to its full-time equivalent. The second possible way to read Article 9.08 in a manner that is consistent with creating a level playing field between full-time and part-time employees, argues the Union, is to simply give the entirety of the clause a plain language reading, so that the part-time employee is credited with both their actual years of service and their actual weekly salary in the calculation.

17. Article 9.08 provides no direction or definition with respect to the calculation of either variable for part-time employees. What should not happen, argues the Union, is to give one variable its plain language meaning while giving the other an interpretation that is allegedly based on other provisions in the collective agreement, when the effect would be to create a result that is not only illogical and unfair, but inconsistent with the purpose underlying those other provisions in the first place.

18. In support of its primary position, the Union points to several other provisions of the Collective Argument which it argues are informative. Under Article 9.07(A)(i), "an employee whose status is changed from full-time to

part-time shall receive full credit for his seniority and service". The Union argues that where a full-time employee converts to part-time shortly before accepting an exit package, the value of that package will be dramatically reduced on the Employer's calculation due to the decreased salary calculation, and the employee will not have received "full credit for his…service". The Union's primary position provides the employee with full credit for his or her service, because he or she is paid based on a full-time salary for what was in fact full-time service. Similarly, a part-time employee who converts to full-time status will have his or her part-time service converted to its full-time equivalent, and will only be paid the full-time salary based on full-time equivalent service. In other words, the part-time employee will receive approximately the same payout as a full-time employee who worked the same number of hours but over a shorter period of time.

19. This approach, argues the union, is also preferable to the Employer's method of calculating average salary over a period of time, because it eliminates the anomalies that can arise from variability in scheduling, such as when a part-time employee happens to work an unusually small or large number of hours during the representative period. If part-time service is converted to its full-time equivalent together with using the full-time salary, the exit package will properly reflect the employee's actual service contribution to the Employer over her or his years of service. This approach eliminates both the disproportionate windfalls and discounts that can arise from either the vagaries of part-time employment or the double-discount inherent in the Employer's method of calculation.

20. In the alternative, the Union argues in favour of a plain language reading of Article 9.08, so that both years of service and salary reflect the part-time employee's actual years of service and actual (part-time) salary. The Union argues that if one accepts that the reference to wages should be given its plain language meaning, then so too should the reference to years of service be given its plain language meaning. In every instance where there is a provision in the collective agreement that converts part-time service to a full-time equivalent, there is an explicit direction to do so. Article 9.08 (B) and (C) contain no such direction, and provide no basis for differentiating between full and part-time employees at all. In support of its argument, the Union relies on the decision of Arbitrator Devlin in *Participating Hospitals (St. Mary's General Hospital & Royal Victoria Hospital) and Ontario Nurses' Association,* dated April 17, 2001 (unreported) ("*St. Mary's General Hospital*"). This decision, which predates the authorities principally relied upon by the Employer, does not appear to have been put before the arbitrator's in those cases.

Employer's Argument

21. With respect to the Union's primary argument, the Employer makes two principal submissions.

22. The first is to emphasise that while the Union is asking the board to interpret the terms "two weeks salary" as meaning two weeks of "full time" salary, the Union cannot point to a single provision in the collective agreement that supports importing the term "full time" into provision as it relates to part-time employees. Indeed, argues the Employer, reading the collective agreement as a whole leads to the opposite conclusion. In particular, the Employer refers to Article 12.02, Article 12.09 (Pre-Paid Leave Plan), 18.04 (Benefits for Part-Time Employees) and 20.01A (Job Classification). In each of these provisions, the Employer argues that references to wages for part-time employees refer to an individualized calculation based on the part-time employee's actual wages.

23. The second is that the Union's argument has already been rejected by several arbitrators. In particular, the Employer relies on the decision of arbitrator Steinberg in *Canadian Union of Public Employees, Local 1974 and Kingston General Hospital*, 2013 CanLII 33 (ON LA) ("*Kingston General Hospital*"), which decision was upheld on judicial review by the Divisional Court in *Canadian Union of Public Employees, Local 1974 and Kingston General Hospital* 2013 ONSC 6054 (CanLII). The *Kingston General Hospital* decision was followed by arbitrator Schmidt in *Cornwall Community Hospital and OPSEU, Local 402*, 2014 CarswellOnt 18869 and by Arbitrator Trachuck in *Mount Sinai Hospital and SEIU, Local 1*, 2017 CarswellOnt 2775. Each of these decisions, argues the Employer, dealt with substantially the same collective agreement language. Although some deal with separate full and part-time collective agreements, and involve different unions, the Employer argues that there is no meaningful basis upon which the decisions can be distinguished. All found that the method by which the Employer has calculated exit packages by converting part-time service to its full-time equivalent and by calculating the individual average salary of the part-time employee over a reasonable representative period, was reasonable and appropriate. While the Employer does not dispute that the principle of *starre decisis* is inapplicable, it argues that the weight of the existing authority should be compelling.

24. To the extent that the calculation may produce anomalous results in some cases, argues the Employer, this is simply a function of the varying hours worked by part-time employees, and the bargain struck by the parties. Further, the Employer notes that the calculation might also be favourable to a part time employee who works an unusually large number of hours during the representative period. In neither case is the result unfair, it is simply the

consequence of the employee having worked more or less during the relevant time frame, and the nature of the parties' agreement.

25. Further, even if one were to conclude that the result was inequitable in some instances, the employer argues that the place to address such inequities is at the bargaining table. In this regard, the Employer refers to the earlier decision of Arbitrator Devlin in *St. Mary's General Hospital, supra,* which rejects the Union's primary argument and accepts the argument put forward by the Employer in that case (but which is the Union's alternative argument in the instant case). The Employer notes that the dissent of the Union nominee in that case expressed the hope that any inequities would be addressed by the parties in bargaining, and argues that if the Union is concerned about inequities that is the appropriate venue in which to address them.

26. With respect to the Union's alternative argument, the Employer relies on the authorities cited above in support of its calculation of both variables in determining the part-time entitlement. The Employer argues that its interpretation of the years of service for part-time employees is consistent with Article 9.02 of the Collective Agreement, which defines "seniority" for part-time employees as one year of service for each 1725 hours worked. The Employer argues that its interpretation is further supported by Article 17.01, which demonstrates that formula for converting part-time hours to full-time years of service, is not restricted to seniority for the purpose of provisions like job posting, but is equally applied to the calculation of service for the provision of benefits like vacation. Where the same language is used throughout the collective agreement, argues the Employer, it ought to be given the same meaning absent some clear direction to the contrary. There is nothing in Article 9.08 that mandates that for this provision alone part-time years of service should be calculated as years from date of hire.

Union Reply

27. The Union submits that the decision in *Kingston General Hospital* is not binding and is simply wrong, and argues that the anomalous and inequitable results that the Union has illustrated here do not appear to have been argued in that case. The Union further notes that the collective agreement at issue in that case was not a combined full-time and part-time agreement, and that this appears to have been a consideration at least before the Divisional Court. Further, while the Divisional Court upheld the decision on a standard of reasonableness, there is nothing in the court's decision to suggest that the decision was correct, or that it was the only reasonable interpretation. Further, the Union argues that *Kingston General Hospital* does not, in any event, address its alternative argument or provide a justification for carrying out the conversion of part-time service in the first place, but rather focusses on how

that conversion should be done. The only decisions that squarely address the union's alternate argument are *St. Mary's General Hospital*, which essentially supports the Union's position, and *Cornwall Community Hospital*, which the Union argues simply adopts the conclusions in *Kingston General Hospital* without substantial reasoning.

Analysis

28. As in any case involving the interpretation of a collective agreement, the goal is to determine the intention of the parties from words of the agreement they have reached. The language used by the parties should be given its plain and ordinary meaning unless this would result in some absurdity or conflict with the collective agreement as a whole, or unless the context of the provision indicates that the words were used in some other sense. Where there is no ambiguity in the meaning of the words, they should be given their effect even if the result appears unfair or oppressive. These principles were reflected in each parties' argument, albeit in service of differing conclusions. Applying these principles, and having regard to all of the considerations set out below, I find that the Union's primary argument fails, but that its alternative argument is correct.

29. With respect to the Union's primary argument, the reference in Articles 9.08(B) and (C) to "two (2) weeks' salary" is a reference to the salary of "an employee" who elects an exit option. There is nothing in the provision to suggest that this is a reference to anything other than the employee's actual salary. Neither is there any other provision in the collective agreement that would suggest that when these parties refer to an employee's salary, they intend to refer to anything other than the employee's actual salary.

30. The first decision to address this issue was the Devlin award in *St. Mary's General Hospital*. Although that case dealt with an ONA collective agreement, the provision at issue was similar to the provision before this board. It involved a combined full-time and part-time agreement and the early exit provisions applied to both. The early retirement option, for example, provided for "a retirement allowance of two (2) weeks' salary for each year of service, to a maximum ceiling of fifty-two (52) weeks' salary." In that case, ONA pursued the same position that the Union has put forward as its primary position here: that part-time service should be converted to its full-time equivalent and that the salary calculation should then be based on the full-time salary. The employer in that case argued in favour of a plain language interpretation of both service and salary. In support of its argument, the Union pointed to the various provisions in the collective agreement providing for the conversion of part-time hours into full-time equivalent years of service (although in that case the conversion was based on 1500 hours per year). However, the

arbitrator noted that the early exit provisions differed from those other provisions specifically because it did not reference a conversion formula. In this light, the arbitrator concluded at p.10 that the language of the early exit provisions was simply not sufficient to conclude that a salary based on full-time hours should be attributed to a nurse who is working on a part-time basis.

31. The principal authority relied upon by the Employer in opposing the Union's arguments is the decision of arbitrator Steinberg in *Kingston General Hospital, supra,* as upheld by the Divisional Court. A careful review of this award is warranted. In so doing it is important to note at the outset that the decision deals squarely only with the Union's primary argument. This is because, as set out at paragraph 2 of the award, the parties in that case essentially agreed that in determining the number of years of service of part time employees, "1725 hours worked is the equivalent of 1 year of service". As set out at paragraphs 21-22, the arbitrator did note a latent disagreement between the parties with respect to the first variable, to the extent that the Union urged what he described as an "F.T.E.", or full-time equivalent, approach to converting part-time service to its full-time equivalent, but he also noted that the union conceded that in the case before him the 1725 hour and the F.T.E. approaches produced essentially the same result. In other words, while the parties may not have agreed on the mechanism for conversion, they agreed that conversion of part-time to equivalent full-time service was required.

32. Arbitrator Steinberg found that the Employer's approach of converting at the rate of 1725 hours was reasonable, given that the article in issue in that case gave no guidance as to how the conversion ought to be done, and given that the 1725 hour method was used in respect of a number of other provisions of the collective agreement (at para 22). I will address the interpretation of the provision as it relates to the first variable more fully in considering the Union's alternative argument, but suffice it to say that given the parties' positions before arbitrator Steinberg, I agree with his conclusion; if one accepts that a conversion of part-time service is required for the purposes of determining the first variable in calculating the exit package, in the absence of language in Article 9.08 directing how that conversion is to be done, it is a reasonable exercise of management rights to use the same method of conversion that the parties have agreed to use elsewhere.

33. The "more significant disagreement between the parties" that arbitrator Steinberg addressed was the calculation of the "two weeks' salary". In this regard, the arbitrator accepted the Employer's position as follows (at paras. 25-26):

> [25] It is obvious that the concept "years of service" as applied to part-time employees creates some challenges. The fact that a conversion of some kind is required to determine the years of service of a part-time employee does not mean that, once a conversion has been applied, a part-time employee ought to be treated as full-time employee for the purposes of the salary component of the calculation. In my view, once the conversion is made, it simply provides the answer to the question of what "years of service" will be applied in the formula.
>
> [26] When quantifying the "two (2) weeks' salary" component of the calculation, it is a number that must, on the plain language of Article 18, be related to that of the part-time employee who is receiving either the ERA or VEO. There is no doubt that, in the normal course, two weeks' salary for a part-time employee is not the same as and, in fact, is less than, two weeks' salary of a full-time employee. There is nothing in the language of Article 18 to compel a different result for the purposes of the calculation of an ERA or a VEO and, in my opinion, it would not be a reasonable interpretation of that language that two weeks' salary of a part-time employee is the very same as two weeks' salary of a full-time employee.

34. The question of whether a pro-rating of part-time service is required is a live issue in the instant case, but assuming that a pro-rating is required, as the parties agreed before arbitrator Steinberg, I agree with his reasoning and his conclusion that two (2) weeks' salary must refer to the part-time employee's salary. Simply put, the salary referred-to in Article 9.08 of the collective agreement before this board (and Article 18 of the collective agreement at issue in *Kingston General Hospital*) refers to the actual salary of the individual employee receiving an exit package. The employees at issue in the instant case are part-time employees with corresponding part-time salaries. The Union's argument begins with the proposition that reading the phrase "two (2) weeks' salary" in its plain and ordinary sense results in unfair and inequitable results, and conflicts with the purpose of converting part-time to full-time service in creating a level playing field. Even accepting that the results are inequitable (and the math certainly supports the proposition that the Employer's method of calculation disproportionately devalues the service contribution of part-time employees), in the absence of any language to support it the Union's primary argument is a conclusion in search of a premise.

35. The starting point in interpreting a collective agreement must be the language of the parties' agreement. It is of course entirely legitimate to consider the effects of competing interpretations and to consider how those outcomes fit into the scheme of the collective agreement as a whole. But the fact that a particular outcome may appear more equitable or even fit more neatly into the scheme of the collective agreement as a whole cannot justify creating a term in the agreement that is simply not there in the first place.

36. Further, to the extent that the Employer's interpretation produces anomalous results and raises questions about the tenability of the Employer's position, it does not drive one toward ignoring the plain language of the provision entirely and therefore accepting the Union's primary position. Rather, as the Union argued in the alternative, it raises questions about whether it is appropriate to depart from the plain language of the article in any manner, and whether it is proper to incorporate conversion language from elsewhere in the agreement into the voluntary exit provision as the Employer has done, when the collective agreement does not so explicitly direct.

37. Considering only the plain language in Articles 9.08(B) and (C), there could be no doubt that the reference to "years of service" for both part-time and full-time employees would refer to the individual employee's actual years of service. The question is whether there is any principled basis for incorporating the concept of service-conversion into this provision notwithstanding that it is absent from the language. The Union argues that there is not because if it is accepted that the reference to salary is a reference to the employee's actual salary, also converting part-time service results in a double discounting of the benefit for part-time employees. The Employer argues that there is nothing inherently unfair about this outcome, and that it simply reflects the parties' bargain.

38. I accept that the mere fact of the double discounting is not reason alone to reject the Employer's position, provided of course that there is a basis for concluding that the parties intended to strike that particular deal. But I also find that there is nothing inherent in the provision or the nature of the benefit alone that would cause one to imply that the parties intended it to apply so disproportionately to part-time employees. Indeed, the fact that the same language is used to provide the benefit to both part and full-time employees without distinction, would if anything suggest the opposite.

39. Nonetheless, the Employer argues that conversion is required when one reads the early exit provisions in the context of the entire agreement. Considering the terms of this particular collective agreement, I do not agree. There is no general provision for converting part-time years of service into a full-time equivalent, and there is no specific provision providing for the conversion in the context of the exit packages. Conversion is an issue that the parties explicitly addressed elsewhere in the agreement, and the parties chose to limit its application to specific provisions in the collective agreement, which do not include the conversion of service for the purpose of Articles 9.08(B) and (C).

40. Article 9.02 is a general provision providing for the conversion of part-time hours for the purposes of seniority, but not service. Article 9.07(A)

provides for the transfer of both seniority and service, but the conversion of part-time service, unlike seniority, is provided only "for purposes of vacation entitlement, HOODIP or equivalent, health and welfare benefit plans, and wage progression." The parties did not include layoff, retirement allowances or voluntary exit options in this list, or any other provision from which one could imply an intention to apply conversion to the provisions in issue. Consistent with Article 9.07(A), the vacation provision in Article 17.01 distinguishes between the part-time and full-time entitlement, and explicitly provides for the proration of part-time service for those employees who have not converted to full time status, creating a consistent and coherent scheme for crediting employees with their part-time service for the purpose of vacation, whether or not their status has changed. No such distinction between full and part-time service is found in Articles 9.08(B) or (C). In this light, I can only conclude that the parties intended the reference to years of service to mean the employee's actual years of service, just as the reference to salary is a reference to actual salary. That is the plain and obvious meaning of the words that the parties have used, and where these parties have intended part-time years of service to refer to prorated years elsewhere in the collective agreement, they have explicitly provided for the conversion, and chosen to restrict the application of the conversion language to the specific provisions which do not include the ERO or VEO provisions.

41. In reaching this conclusion, I have carefully considered the decisions relied upon by the Employer. It bears emphasising that while prior arbitration awards are not binding on this board, they are due a substantial degree of deference particularly where central language is in issue. Conflicting interpretations of the same language can be highly disruptive to the central bargaining process, and should not be adopted without good reason. But it also bears emphasising that a degree of conflict already exists in the jurisprudence in light of the Devlin award, which appears to have not been placed before the subsequent boards of arbitration. Further, a careful review of those subsequent decisions reveals that the issues placed before this board of arbitration have not been settled, either because they were not put forward by the parties to those disputes or because of differences in the language in the particular collective agreement in issue. None of those decisions provide a compelling basis for incorporating the conversion of part-time service into the early exit provisions of the collective agreement in issue in the instant case.

42. The decision of the Divisional Court in *Kingston General Hospital* is of course binding authority on this board of arbitration. It also warrants particular consideration because while the union's alternative argument was not made before arbitrator Steinberg, it was made to the Court (at para. 5). The Court reviewed the arbitrator's award on the standard of reasonableness and after

reviewing the principles underlying that standard of review, concluded that the arbitrator's award fell within the range of reasonable outcomes as follows (at paragraph 10):

> [10] Applying these principles, we conclude that the labour arbitrator's interpretation of the phrase "two weeks' salary for each year of service" used to calculate the ERA and VEO is reasonable in that he interpreted the phrase in the context of a collective agreement relating to part-time employees. The Arbitrator agreed that the calculation used by the Hospital was logical and a common sense approach to the meaning of those words in the agreement. The Arbitrator considered the Union's argument that the interpretation and calculation of the Hospital involved a "double proration", that is, prorating for years of service and prorating for two weeks' salary. He held that was not correct as the Hospital's calculation did not involve prorating for "two weeks' salary" but was based on the actual hours worked over the course of two weeks and multiplies that number of hours by salary. We are of the view that it cannot be said that the Arbitrator's interpretation was not within the range of reasonable, acceptable interpretations. That there may be an alternative interpretation of the agreement does not lead to the conclusion that the award should be set aside. The Union's argument is based on the assumption that the parties intended that part-time employees be treated in the same way as full-time employees who are covered by a different collective agreement. That assumption is not one that the Arbitrator was required to accept. The decision is in the realm of reasonable outcomes.

43. As the Union correctly notes, there is nothing in the Court's decision to suggest that the interpretation adopted by the arbitrator in *Kingston General Hospital* was correct, or that it is the only or most reasonable of the alternative interpretations. To the extent that the Court addresses the merits of the parties' respective positions, the Court notes only that "[t]he Union's argument is based on the assumption that the parties intended that part-time employees be treated in the same way as full-time employees who are covered by a different collective agreement. That assumption is not one that the Arbitrator was required to accept." It bears emphasising that neither party even argued for a plain language reading of "year of service" before arbitrator Steinberg. Further, the collective agreement in the instant case is distinguishable from the collective agreement in *Kingston General Hospital* in that it is a combined full and part-time collective agreement. In this context, the argument that a provision that does not distinguish between full and part-time employees in any manner whatsoever is intended to provide a comparable benefit to both cannot be dismissed on this basis. There is nothing in the Court's decision to suggest that it should be. Finally, I note that the Union's plain language argument here is not based primarily on an assumption of equitable treatment (unlike its primary argument, which was the issue

before arbitrator Steinberg), but on the plain language of the benefit provision, read in the context of the entire agreement.

44. In *Cornwall Community Hospital and OPSEU, Local 402,* 2014 CarswellOnt 18869, arbitrator Schmidt was not dealing with the calculation of the early exit package for part-time employees, but rather with the calculation of "two (2) weeks salary" for a full-time employee who was working reduced hours as part of an accommodation but who retained her status as a full-time employee. The calculation of grievor's years of service was not in issue. There was no dispute that the greivor should be credited with her actual years of service. Rather, the issue was whether the package should be based on the grievor's full-time salary, or instead based on her actual salary at the time of the offer. Arbitrator Schmidt adopted the reasoning in *Kingston General Hospital,* and concluded that the reference to salary pertained "personally to the individual in receipt of the salary". Again, I agree with this conclusion, but it in no way dictates that years of service should be given any particular meaning.

45. Further, to the extent that the decision in *Cornwall Community Hospital* refers in passing to the conversion of part-time hours to full-time years of service, it is noteworthy that the OPSEU collective agreement contains explicit language in the voluntary exit provision providing for that conversion. In particular, the provision includes the following clause, set out at paragraph 7 of the award:

> *The following will apply when calculating early retirement, voluntary exit and separation allowance for part-time employees:
>
> - Service-One year of service for each 1650 hours worked.
> - Weekly Salary-The employee's regular hourly rate on her last day times her normal weekly hours.
> - Normal Weekly Hours-Average hours worked over the preceding 26 weeks.

46. The voluntary exit provision at issue in the instant case contains no such provision.

47. Neither do I find that the award in *Mount Sinai Hospital* provides a compelling basis for departing from a plain language interpretation of Article 9.08. That decision dealt with the calculation of years of service for part-time employees under ERA and VEO provisions in the SEIU collective agreement, and the arbitrator concluded that it was appropriate to convert part-time service under that agreement. However, there is a very significant difference between the SEIU collective agreement at issue in *Mount Sinai Hospital,* and the CUPE collective agreement at issue here. Unlike Article 9.07(A) of the collective agreement at issue here, the SEIU collective agreement contained

a general provision for the transfer of both service and seniority, and did not restrict the conversion of service to specific provisions. The significance of this provision is that a part-time employee who transfers to a full-time position will have their service converted to its full-time equivalent at the time of transfer. The arbitrator found that this would in turn mean that an employee who commenced employment on a part-time basis and subsequently transferred to a full-time position would be credited with less service than an employee who started on the same day, but continued in a part-time position. The arbitrator concluded that the parties would not have intended this result, and this was the principal basis upon which the she found, at paragraph 45, that the parties must have intended to incorporate the conversion into the ERA and VEO provisions. There is no basis in the CUPE collective agreement for reaching the same conclusion.

48. To the extent that the arbitrator in *Mount Sinai* finds that the *Kingston General Hospital* decision also provides support for her conclusion concerning the calculation of years of service, I must respectfully disagree. Her treatment of the *Kingston General Hospital* is found at paragraph 46 and reads as follows:

> The Hospital's interpretation is also consistent with the *Kingston General Hospital* award which dealt with identical language. The original issue in that case was the two weeks salary part of the equation because the parties agreed that "year of service" was a calculation and not a natural year. The arbitrator, nevertheless, determined that the Hospital's interpretation of "year of service" was reasonable. He stated at paragraph 22:
>
> > In any event, I find that the approach used by the Employer was reasonable. There is no general provision in the part-time collective agreement that provides a definition of "years of service" for part-time employees nor does the language of Article 18 provide any guidance. As noted above, there are a number of provisions in the collective agreement which convert service or seniority on the basis of one year for each 1725 hours worked in respect of a number of provisions of the collective agreement. I do not see any reason why such a method is not acceptable for the purposes of Article 18.

49. The arbitrator notes that the primary issue in *Kingston General Hospital* was the calculation of two weeks salary. She further notes that in that case the parties agreed that a conversion was necessary and that "year of service" was not a natural year, but concludes that Arbitrator Steinberg nevertheless found that the Hospital's interpretation of "year of service" was reasonable. In my view, that characterization glosses over the context of the arbitrator's conclusion in *Kingston General Hospital*. He was not deciding whether the Hospital's decision to convert service was reasonable; that was agreed

between the parties and is not addressed in any substantial manner. Rather, he was deciding that given that conversion was necessary, it was reasonable for the hospital to use the 1725 hour method the parties had agreed to elsewhere, as opposed to the F.T.E. method the union was proposing. The question was whether, given that the early exit provisions were silent on the issue, the method of calculation adopted by the Employer was a reasonable exercise of management rights. That was not the issue before the arbitrator in *Mount Sinai Hospital* and neither is it the issue before the board in the instant case.

50. I also note that while the early exit language at issue in *Mount Sinai Hospital* is similar to the language at issue in *Kingston General Hospital* and in the instant case, it is not identical. Most significantly, the very provision upon which the arbitrator relies as the basis for her decision in *Mount Sinai Hospital* is absent in the CUPE collective agreement. Neither does one find the distinction between "years of service" and "continuous years of service" that the Employer in *Mount Sinai Hospital* relied upon in support of its interpretation.

51. For all of these reasons, I find that there is no basis for departing from the plain language meaning of Articles 9.08(A) and (B) of the Collective Agreement. I therefore declare that in Articles 9.08(A) and (B) the reference to "year of service" for part-time employees is to actual years of service without distinction between full and part-time status. I further declare that the reference to "two (2) weeks' salary" is a reference to the individual part-time employee's actual salary. The hospital is directed to offer Ms. Nugent and Ms. Leishman revised exit packages in accordance with this award, and we remain seized with respect to any issues arising from the implementation of this direction.

Dated at Toronto, Ontario, this 7th day of February, 2018

_____
Eli A. Gedalof, Chair

"I dissent"-Dissent attached.

_____
Harold Ball, Hospital Nominee

"I concur"-Addendum attached.

_____
Joe Herbert, Union Nominee

Partial Dissent of Employer Nominee

While I concur with this decision to the extent that it rejects the Union's primary argument, in my respectful opinion the Union's alternative position must fail as well.

The Devlin Decision

The majority, in upholding the Union's alternative, or "plain language" argument, relies almost exclusively on the decision of Arbitrator Devlin in Participating Hospitals (St. Mary's General Hospital & Royal Victoria Hospital) and Ontario Nurses' Association, dated April 17, 2001 (unreported).

In doing so, it rejected the decisions of Arbitrator Steinberg in *Canadian Union of Public Employees, Local 1974 and Kingston General Hospital*, 2013 CanLII 33 (ON LA) ("Kingston General Hospital"), which decision was upheld on judicial review by the Divisional Court in *Canadian Union of Public Employees, Local 1974 and Kingston General Hospital* 2013 ONSC 6054 (CanLII). The *Kingston General Hospital* decision was followed by Arbitrator Schmidt in Cornwall Community Hospital and OPSEU, Local 402, 2014 CarswellOnt 18869 and by Arbitrator Trachuk in *Mount Sinai Hospital and SEIU, Local 1*, 2017 CarswellOnt 2775, all of which found for the employer, and dealt with substantially the same collective agreement language as we have before us in this case.

Moreover, in disregarding them the majority decision does not distinguish the reasoning in these cases in any meaningful way.

In my respectful opinion, Arbitrator Devlin's decision is of no particular assistance in the matter before us, and should be given very little weight.

Needless to say, her reasoning is not fulsome, and she simply rejects the position of a conversion formula without providing any analysis or rational whatsoever.

Where the union asserts that Arbitrator Steinberg's decision in Kingston General Hospital should not be followed because he didn't provide a fulsome analysis and reasons, it is therefore unreasonable to then simply accept Arbitrator Devlin's rejection of the conversion approach when she's made no effort at identifying why this isn't consistent with the interpretation of the collective agreement as a whole.

The most compelling rationale for accepting the conversion approach is set out by Arbitrator Trachuk in Mount Sinai Hospital and SEIU, Local 1, 2017, where a plain language argument was considered and dismissed.

Moreover, the language that Arbitrator Trachuk relied upon to find that a conversion was appropriate was similar to the language in this Collective Agreement.

The language before Arbitrator Trachuk was:

9.03 Transfer of Service and Seniority

(a) Effective February 16, 2006, and for employees who transfer subsequent to February 16, 2006, an employee whose status is changed from full-time to part-time shall receive credit for his/her full service and seniority. An employee whose status is changed from part-time to full-time shall receive credit for bargaining unit seniority and Hospital service on the basis of one (1) year equals 1725 hours worked, and will be enrolled in the employee benefit plans subject to meeting any waiting period or other requirements of those plans.

She also had language before her, which stated that:

"For the purposes of accumulation of seniority, transfer of seniority and service, progression on the wage grid and progression on the vacation schedule all part-time employees' service shall be converted as at February 16, 2006 on the following basis:
Employees' hours of service ? 1725 = Converted hours of service 1950"

The language in this Collective Agreement is:

Effective November 12, 1981 and for employees who transfer subsequent to November 12, 1981.

For application of seniority for purposes of promotion, demotion, transfer, layoff and recall and service (including meeting any waiting period or other entitlement requirements) for purposes of vacation entitlement, HOODIP or equivalent, health and welfare benefit plans, and wage progression:

(i) an employee whose status is changed from full time to part-time shall receive full credit for his seniority and service;

(ii) an employee whose status is changed from part-time to full time shall receive credit for his seniority and service on the basis of one (1) year for each 1725 hours worked.

In other words, both provisions deal with the transfer/status change from part-time to full-time and assign a particular number of hours, which will be equivalent to one year of service

Both collective agreements have provisions which expressly identify that the conversion formula is to be used for certain purposes and entitlements under the collective agreement and neither has a general provision on how to equate part-time hours to full-time years of service.

While the language itself may be somewhat different in these transfer/status provisions, the intent, purpose and result is the precisely the same.

Arbitrator Trachuk came to her conclusion that the conversion formula was permissible under the provisions of the collective agreement despite the fact that she did not have any language, which expressly supported the fact that this conversion formula could be used for the purposes of the Voluntary Exit Option (VEO). And yet, she relied upon the above provisions to find that it was reasonable for the Hospital to use the conversion when calculating the VEO.

Furthermore, the Court, in the judicial review of Arbitrator Steinberg's decision, concluded that although there was no specific reference to the conversion formula in the specific articles in the collective agreement he was interpreting, his interpretation was nevertheless reasonable, "...in that he interpreted the phrase in the context of a collective agreement relating to part-time employees."

Put another way, the Court did not determine that Arbitrator Steinberg's decision was unreasonable simply as a result of not having express language permitting the conversion formula within the collective agreement.

I would respectfully submit that the employer's situation is clearly analogous.

Although the employer does not have a single provision, which comprehensively identifies when conversion is to be used, the conversion formula is set out for the purposes of transfer/status, vacation and wage grid in separate provisions. It is therefor reasonable for the conversion formula to be used for other purposes when converting part-time hours to years of service.

This collective agreement explicitly provides for conversion for the same purposes as the agreements that were in front of both Arbitrator Trachuk and Arbitrator Steinberg, and for all intents and purposes is indistinguishable from this employer's.

The application of the conversion formula for the purposes of calculating VEO is therefore the only possible interpretation that gives internal consistency and workability to Article 9.08 (A) or (B) when viewed within the context of other compensation provisions within this agreement.

Possible Inequities/Disproportionate Treatment

The union argued that the employer's use of the conversion formula could not be supported given that it would result in possible inequities and anomalies in calculations of VEOs.

While in some instances anomalies may result from the manner in which this language has been applied, it cannot be said that individuals are being subjected to inequitable or disproportionate treatment, in that these results flow from language that was introduced into the Collective Agreement prior to Arbitrator Devlin's award.

I would submit that further inequities would result from the union's interpretation as well.

For example.

Consider an employee who is part-time working 2 shifts per week for 8 years and then transitions to full-time. Following two years in the full-time role, the employee decides to accept a VEO.

They would receive a VEO calculated at two weeks' full-time salary for the full 10 years of employment, even though they worked only approximately one - half the overall hours of an employee who worked full-time for the full 10 years.

There would be no discount reflective of the fact that the employee worked only 40% of a full-time employee for a period of 8 years.

Anomalies that exist because of the nature of part-time work is not reason enough to depart from the consistent interpretation of this language as set out in Steinberg, Schmidt and Trachuk.

Interpreting Central Language

Despite Arbitrator Devlin's decision, this language, which is central language, has been interpreted and applied consistently across the entire sector in the same manner as it was applied in this case for a minimum of sixteen (16) years - which I would submit is what the parties intended when it was first negotiated into the central agreement - and in those instances where it has been challenged, consistently upheld by both arbitrators and the courts.

At paragraph 41 of this Award you state that:
"It bears emphasising that while prior arbitration awards are not binding on this board, they are due a substantial degree of deference particularly where central language is in issue. Conflicting interpretations of the same language can be highly disruptive to the central bargaining process, and should not be adopted without good reason. But it also bears emphasising that a degree of conflict already exists in the jurisprudence in light of the Devlin award…"

With respect, I disagree that any conflict exists in the jurisprudence in light of Arbitrator Devlin's award.

The union was not able to lead any evidence, which would suggest that there is any inconsistency in the application of this central language. The existing jurisprudence is clear, compelling and should have been followed in this case.

I would note that in paragraph 22, at pages 10 and 11 of your decision dated April 12, 2017 involving these very same parties, albeit on a different issue, you stated:

"The provisions in issue in this case are central language applicable to numerous hospitals across the province. They are the subject of central hospital bargaining, the results of which are likewise binding on numerous hospitals across the province. It is indisputable that in this context conflicting interpretations of the same language can be highly disruptive to the central bargaining process."

The same reasoning applies in this case.

By interpreting this language in such a narrow fashion, it produces an absurd result from a labour relations perspective which will create a great deal of confusion and uncertainty province-wide regarding how this language is to be interpreted and applied across the entire sector.

This decision will no doubt lead to further litigation, and without question prove disruptive to the central bargaining process.

This language was first incorporated into the "central" collective agreement prior to Arbitrator Devlin's award, and since that time numerous rounds of bargaining have taken place, none of which resulted in any amendments to either Article 9.08 (A) or (B).

Clearly central provisions should be accorded a high degree of deference, particularly in view of the parties' bargaining history, and it is in my respectful opinion wrong for this Board to simply reject the decisions of Arbitrators Steinberg, Schmidt, Trachuk and the Divisional Court, and give a meaning to this language that is exactly opposite to how these arbitrators and the courts have interpreted it and how the central parties have been applying it for years.

In Summary

These grievances should be denied, in that the weight of the existing authority is clearly compelling and supports the interpretation of this central language that this, and other employers have consistently applied for over sixteen (16) years.

Moreover, upon any objective analysis, I would respectfully submit that this Board erred, and was unable to distinguish the above noted cases in any meaningful way in coming to its conclusion that there was no basis for departing from what they believe is the "plain language" meaning of Articles 9.08 (A) and (B).

Both Arbitrator Trachuk in Mount Sinai Hospital and SEIU, Local 1, 2017, and the Divisional Court in "Kingston General Hospital" had the "plain language" argument before them and it had no impact on either result.

Finally, this narrow interpretation of the language is both unreasonable and produces an absurd result from a labour relations perspective, particularly in view of the parties bargaining history, and will create a great deal of confusion and uncertainty regarding how this language is to be interpreted and applied across the entire sector, which will no doubt lead to further litigation, and prove disruptive to the central bargaining process.

All of which is respectfully submitted.

ADDENDUM

I agree with the reasoning and conclusions set out in the award and wish to add only brief remarks.

The conclusion is consistent with the long line of arbitral authority which notes that arbitrators should not truncate or 'read down' provisions dealing with an employee's length of service, an example of which can be found at Sault Ste. Marie Roman Catholic Separate School Board v. O.E.C.T.A., 21 L.A.C. (3d) 107 (P. Picher).

In our case, the collective agreement clearly sets out when the pro-ration of part-time length of service is to occur. The calculation of allowances for early retirement or voluntary exit does not provide such an occasion, as the plain wording of the collective agreement makes clear. Nor would such a pro-ration (after part-time status is accounted for in calculating the weekly pay) lead to a particularly logical result.

Dated this 6th day of February 2018, in Ottawa.

Joe Herbert
Union Nominee