

**IN THE MATTER OF AN ARBITRATION BETWEEN:**

**Ross Memorial Hospital**

**(the “Hospital”)**

**-and-**

**Canadian Union of Public Employees, Local 1909**

**(the “Union” or “CUPE”)**

**And in the matter of three policy grievances and a group grievance alleging reductions in hours for of part-time employees in three classifications constitutes a layoff.**

**BEFORE:**

**BOARD OF ARBITRTATION:**

Christine Schmidt, Chair  
Harold Ball, Employer Nominee  
Joe Herbert, Union Nominee

**APPEARANCES:**

**For the Employer:** Lisa Meyer, Counsel  
Sharon Gilchrist, Lead Consultant, HR/LR CUPE, RMH

**For the Union:** Mark Wright, Counsel  
Louis Rodriguez, OCHU Vice President  
Maggie Jewell, President, Local 1909  
Melissa Cotton, Vice President, Local 1909  
Grant Darling, National Representative, CUPE

This hearing was held at Peterborough on January 10, 2019.

## AWARD

1. This award concerns three Policy grievances and one Group grievance stemming from the Hospital's decision to reduce the base hours ("hours") of work of part-time employees in three classifications: Patient Access Clerk – Cluster 3 ("PAC3"), Operating Room Assistant ("ORA") and Environmental Services 1 ("ES1"). The reduction in hours was part of a larger organizational initiative to reduce operating costs across the Hospital.
2. The three part-time ORAs each had their hours of work reduced by 2.5 hours per week (or a 10.5% decrease in hours). For the 21 part-time employees in ES1, the reduction was 0.4 of an hour per week (or a 2% reduction in hours). The three part-time PAC3s, each lost 1.9 hours per week (or a 7.2% percentage decrease in hours).
3. The Union says that the reductions in hours amounts to a layoff. The Hospital disagrees. It says that only a significant reduction in hours amounts to a layoff. The reductions at issue are not significant in the Hospital's submission.
4. The parties agree that this Board has been properly appointed under the terms of the collective agreement, and that it has the jurisdiction to determine the issue.
5. By way of remedy, CUPE seeks a declaration that there was a layoff, and the parties agree that if the Board does so, it should then remit the matter back to the parties to deal with further remedies flowing from the declaration.
6. What amounts to a layoff under this central collective agreement has been the subject of considerable arbitral deliberation. However, there has yet to be a case where a board of arbitration has been asked to determine whether or not the reduction of hours must be "significant" to constitute a layoff under this

central collective agreement language. That is essentially the Hospital's position in this matter.

## **Collective Agreement**

7. Relevant key articles are reproduced below:

### **ARTICLE 9 – SENIORITY**

#### **9.02 Definition of Seniority**

....

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, except as otherwise provided herein.

Seniority will operate on a bargaining unit wide basis.

....

...

#### **9.08 (A) Notice and Redeployment Committee**

##### **(a) Notice**

In the event of a proposed layoff at the Hospital of a permanent or long-term nature or the elimination of a position within the bargaining unit, the Hospital shall:

- (i) provide the Union with no less than five (5) months' written notice of the proposed layoff or elimination of position; and
- (ii) provide to the affected employee(s), if any, who will be laid off with no less than five (5) months' written notice of layoff, or pay in lieu thereof.

Note: Where a proposed layoff results in the subsequent displacement of any member(s) of the bargaining unit, the original notice to the Union provided in (i) above shall be considered notice to the Union of any subsequent layoff.

- (b) A layoff shall not include a reassignment of an employee from her or his classification or area of assignment who would otherwise be entitled to notice of layoff provided:
- (i) reassignments will occur in reverse order of seniority;
  - (ii) the reassignment of the employee is to an appropriate permanent position with the Employer having regard to the employee skills, abilities, qualifications and training or training requirements;
  - (iii) the reassignment of the employee does not result in a reduction of the employee's wage rate or hours of work;
  - (iv) the job to which the employee is reassigned is located at the employee's original work site or at a nearby site in terms of relative accessibility for the employee;
  - (v) the job to which the employee is reassigned is on the same or substantially similar shift or shift rotation; and
  - (vi) where more than one employee is to be reassigned in accordance with this provision, the reassigned employees shall be entitled to select from the available appropriate vacancies to which they are being reassigned in order of seniority provided no such selection causes or would cause a layoff or bumping.

The Hospital bears the onus of demonstrating that the foregoing conditions have been met in the event of a dispute. The Hospital shall also reasonably accommodate any reassigned employee who may experience a personal hardship arising from being reassigned in accordance with this provision.

- (c) Any vacancy to which an employee is reassigned pursuant to paragraph (b) need not be posted.
- (d) **Redeployment Committee**

At each Hospital a Redeployment Committee will be established not later than two (2) weeks after the notice referred to in 9.08 (A) and will meet thereafter as frequently as is necessary.

....

## **9.09 Layoff and Recall**

An employee in receipt of notice of layoff pursuant to 9.08(a)(ii) may:

- (a) accept the layoff; or
- (b) opt to receive a separation allowance as outlined in Article 9.12; or
- (c) opt to retire, if eligible under the terms of the Hospitals of Ontario Pension Plan (HOOPP) as outlined in Article 18.03(b); or
- (d) displace another employee who has lesser bargaining unit seniority in the same or a lower or an identical-paying classification in the bargaining unit if the employee originally subject to layoff has the ability to meet the normal requirements of the job. An employee so displaced shall be deemed to have been laid off and shall be entitled to notice in accordance with Article 9.08.

An employee who chooses to exercise the right to displace another employee with lesser seniority shall advise the Hospital of his or her intention to do so and the position claimed within seven (7) days after receiving the notice of layoff.

For purposes of the operation of clause (d), an identical-paying classification shall include any classification where the straight-time hourly wage rate at the level of service corresponding to that of the laid off employees is within 1% of the laid off employee's straight time hourly wage rate.

- (e) In the event that there are no employees with lesser seniority in the same or a lower or identical-paying classification, as defined in this Article, a laid-off employee shall have the right to displace another employee with lesser seniority in a higher-paying classification provided they are able to meet the normal requirements of the job, with orientation but without additional training.
- (f) In addition, in combined full-time/part-time collective agreements, a full-time employee shall also be entitled to displace another full-time employee with lesser seniority in a higher paying classification provided that they are able to meet the normal requirements of the job, with orientation but without additional training, when there are no other full time employees in the same or a lower or similar paying classification with lesser seniority prior to being required to displace a part-time employee.

- (g) An employee who is subject to layoff other than a layoff of a permanent or long-term nature including a full-time employee whose hours of work are, subject to Article 14.01, reduced, shall have the right to accept the layoff or displace another employee in accordance with (a) and (d) above.
- (h) No full-time employee within the bargaining unit shall be laid off by reason of his/her duties being assigned to one or more part-time employees.

...

## **ARTICLE 14 – HOURS OF WORK**

### **14.01 Daily & Weekly Hours of Work**

The following provisions designating the normal hours shall not be construed to be a guarantee of the hours of work to be done on any shift or during any period on the schedule.

The standard workday for all employees shall be seven and one-half (7½) hours, excluding a one half hour unpaid meal break, and the standard work week shall be thirty-seven and one-half (37 ½) hours. The meal period shall be an uninterrupted period except in cases of emergency.

...

8. In respect of its position, CUPE provides the following cases, all of which consider the specific collective agreement language at issue in this matter: *Scarborough Hospital and Canadian Union of Public Employees, Local 1487*, (January 17, 2006) (Burkett) (“*Scarborough Hospital*” or Burkett award), *Ross Memorial Hospital and C.U.P.E. Local 1909 (Displacement Grievance)*, unreported, dated April 12, 2017 (Gedalof); *Lakeridge Health Corporation and Canadian Union of Public Employees*, unreported, dated September 21, 2018, (Craven) *St. Vincent De Paul Hospital and C.U.P.E. Local 2491*, [2006] O.L.A.A. No. 615, 87 C.L.A.S. 229 (May 12, 2006) (“*St. Vincent*” or “Devlin award”) and *C.U.P.E., Local 4000 v. Ottawa Hospital*, 2012 CarswellOnt 2084 (“*TOH*” or “Schmidt award”). CUPE also provides the *Participating Hospitals and*

*Participating Local Unions of CUPE* Interest arbitration decision, which redefined what amounts to a layoff between these parties in 1999.<sup>1</sup>

9. The Hospital, in addition to the *TOH* decision, refers the Board to the following cases in support of its position that the reduction of hours must be “significant” to amount to a layoff: *Kingston General Hospital and CUPE, Local 1974...*, 2014 CarswellOnt 8534 (Goodfellow) (“*Kingston General*”); *Air-Care Ltd. v. U.S.W.A.*, 1974 CarwellQue 50 (S.C.C.); *Canada Safeway Ltd. v. Retail Wholesale and Department Store Union, Local 454*, 1998 CarswellSask 298 (S.C.C.) (“*Canada Safeway*”); *Sunnybrook Health Sciences Centre and SEIU, Local 1...*, 2010 CarswellOnt 11785 (Monteith) and *Community Living Hearst v. U.S.W., Local 1-2010*, 2012 CarswellOnt 3803 (Goodfellow).

### **CUPE’s position**

10. CUPE begins its analysis by drawing the Board’s attention to article 9.08(A)(b), dealing with reassignment, which was introduced by the Adams Board in 1999. The introduction of this article redefined the meaning of layoff under the central collective agreement, in CUPE’s submission.

11. CUPE explains that the new provision was awarded as part of a balancing act undertaken by the Adams Board when, in circumstances of reduced funding and restructuring of Hospitals, the Board rejected the Participating Hospitals’ request to provide relief to the recently awarded restrictive contracting out language. The reassignment language granted greater flexibility to Hospitals to reassign employees who would otherwise be entitled to notice of layoff - so long as certain critical job interests of employees were protected.<sup>2</sup> Two such critical employee interests are their wage rate and their hours of work as reflected in

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<sup>1</sup> *Participating Hospitals and the Participating Local Unions of the Canadian Union of Public Employees*, unreported, dated June 28, 1999 (“Adams Interest Award”)

<sup>2</sup> See page 5 of Adams Interest Award.

article 9.08 (b)(ii) (what is now article 9.08(A)(b)(iii)). CUPE highlights that there is no qualifier, such as “significant,” attached to these critical employee interests.

12. CUPE relies upon the *Scarborough Hospital* case, where a Board of Arbitration chaired by Arbitrator Burkett had occasion to determine whether circumstances in which certain employees whose hours of work were reduced temporarily, but who had not been reassigned, amounted to a layoff. As a result of the contracting out of its retail cafeteria operation, among other things, 11 employees each had their 21-hour work week reduced by 1.7 hours (an 8% reduction in hours). The Board determined the reduction of hours amounted to a layoff and referred to the requirements set out in article 9.08 (A)(b) as “bright line” requirements that had to be adhered to by the Hospital in order to avoid initiating a layoff and the prohibition in article 10.01 of the collective agreement against contracting out.

13. CUPE also directs the Board to a recent decision in *Lakeridge Health*, where that hospital essentially transported its Complex Continuing Care Unit from Ajax to Bowmanville. Arbitrator Craven observed that what is now article 9.08 (A)(b)(iv) (dealing with the location to which an employee is reassigned) must be purposively interpreted using the rationale in the Adams Interest Award. In *Lakeridge Health* that meant the critical employee interest of job location was to receive protection in accordance with the relevant clause.<sup>3</sup>

14. Further, CUPE submits, having regard to the Devlin award in the *St. Vincent* case, where that Board determined that the reduction of hours of three part-time switch board operators amounted to a layoff, there was no suggestion that the reduction of hours must be “significant” for a layoff to occur, as the

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<sup>3</sup> In reaching his conclusion, of note is that Arbitrator Craven disposes of an oft cited Hospital argument pertaining to the “circular” reasoning making the definition of layoff in 9.08 (A)(a) depend on article 9.08 (A)(b) because the former is a precondition to for the latter. The Arbitrator writes: the “seeming illogic” of the construction is an artifact of how interest arbitration awards are integrated into the structure of pre-existing collective agreement provisions.



Hospital submits in this case. In CUPE's submission, the fact that the affected part-time employees had their prescheduled (or base) hours permanently reduced by seven hours – from 12 to five hours per week, though undeniably significant, was incidental to the rationale in the Devlin Board analysis. That, CUPE says, is also the case in the *TOH* award. The Chair of this Board was the Arbitrator in *TOH*, and she referred to the reduction of hours in that matter as “significant” but that, CUPE submits, was not a determining factor in arriving at the conclusion that the employer had initiated a layoff.

15. CUPE reiterates that what triggers a layoff is any reduction of hours as per article 9.08(A)(b)(iii). That is consistent with the rationale articulated by the Devlin Board and the purpose of the layoff provisions.

16. Finally, CUPE emphasizes that in a collective agreement where seniority operates on a bargaining unit wide basis, where for part-time employees, it accumulates on the basis of one year's seniority for each 1725 hours worked, a reduction that may not seem “significant” – which is not defined – may very well become critical. Even a one-hour difference between employees can be determinative as to whether one employee is successful over another in obtaining a position or holding a position in a bumping situation (among other entitlements impacted by seniority).

### **The Hospital's Position**

17. In the Hospital's submission, the law is clear: for a reduction in hours to amount to a layoff under this collective agreement, the permanent reduction of hours to the part-time employees in each of the classifications must “significant.” Though there is nothing in the cases to suggest how many hours must be lost in order to be considered significant, the loss of weekly hours for each affected employee in these grievances does not reach the threshold of significance, in the Hospital's submission.

18. The Hospital takes no issue with the Devlin award, nor does it contend that that decision, followed by the Schmidt Board, was wrong, or that the Devlin Board's analysis was flawed as had been argued in *TOH*.

19. The Hospital submits that the Devlin award establishes that only a significant reduction in hours for part-time employees triggers a layoff. It points to the last paragraph of the award, which reads:

In this case, it would appear that the Hospital uniformly reduced the hours of work of three part-time switchboard operators in an effort to preserve their employment after it decided to reduce the hours of operation of the switchboard. However, after having carefully considered the provisions of the collective agreement and the jurisprudence referred to previously, we find that in the circumstances of this case, where there was a significant reduction the hours regularly worked by three-part time switchboard operators, the Hospital was required to follow the layoff procedures contained in Article 9 of the collective agreement. In the result, the grievance is allowed.

The Hospital asserts that the standard of significance in the Devlin award was derived from *Canada Safeway*, where the Supreme Court endorsed the notion that in certain circumstances "a significant reduction of hours" might give rise to "constructive layoff." In the Hospital's submission, where there are no guaranteed hours of work, as is the case in this collective agreement (see article 14), only a significant reduction in an employee's hours of work would constitute a layoff.

20. In the Hospital's submission, this Board should follow the reasoning in *TOH* at paragraphs 50 and 51:

50 I am not prepared to revisit the extensive jurisprudence thoroughly explored in the Devlin Award and find that it was wrong. First, TOH has been aware of the Devlin Award, which followed the Burkett Award in the *Scarborough Hospital* case, for some time. These decisions interpreted the layoff provisions after the addition of article 9.08(b) awarded by the Adams Board in 1999. The reasoning articulated by the Adams Board for awarding article 9.08(b) is set out in the *Scarborough Hospital* case. It

need not be repeated here. However, Arbitrators Samuels' and Kates' pre-Adams Board analyses of the layoff language in the *Hamilton Civic Hospital* and *Ottawa Civic Hospitals* cases are no longer relevant given the effect of the addition of article 9.08(b) to the meaning of layoff in this collective agreement.

51 Secondly, since 2006, the applicable language has remained unchanged through successive rounds of bargaining. The collective bargaining implication flowing from this is that TOH must be taken to accept the jurisprudence that stipulates the layoff provisions capture a significant permanent reduction in regularly scheduled hours of part-time employees. ... .

21. If this Board does not accept that the threshold the Hospital says has been clear since the *St. Vincent* case is not as clear as the Hospital contends, it submits that, since at least 2014, the threshold has been clear. In respect of this submission, the Hospital directs the Board to the *Kingston General* case, a 2014 decision issued by Arbitrator Goodfellow. In that case, the union itself took the position that a significant permanent reduction in hours was required for a layoff (relying on *St. Vincent*). In *Kingston General* the union's position had been that the hospital's elimination of two shifts and part of a third in the Nutritional Services Department (a total departmental loss of 14 hours per day or 196 hours over a two-week pay period) met the definitional threshold of "significant," representing a substantial body of work. At most, that hospital had mapped out the total hours eliminated from the shifts divided amongst the "40 or 45 regular part-time employees" was two hours a week.

22. In denying the grievances before him, and determining that there had been no layoff, the Arbitrator relied on *Battlefords & District Cooperative Ltd. v. R.W.D.S.U., Local 544* [1998] 1.S.C.R. 1118 ("*Battlefords*"), the cases discussed therein, and *St. Vincent* as establishing "a significant permanent reduction in hours of work can constitute a layoff."

23. Finally, in response to CUPE's reference to the *Lakeridge Health* case, the Hospital points out that Arbitrator Craven found the meaning of layoff in what is now article 9.08(A)(b)(iv) to include a "substantial" change in job location or work site. In so doing, the Arbitrator had not given effect to the precise words of the sub article and instead used language analogous to the language used in the Devlin award - a "significant" reduction of hours.

### **CUPE's Reply**

24. CUPE refers me to the paragraphs of the *TOH* award reproduced above, where, Arbitrator Schmidt referred to the extensive jurisprudence explored in the Devlin award. The Union points out that the Arbitrator specifically noted that the Devlin award had followed *Scarborough Hospital* - where a 1.7-hour reduction in hours per week for each employee was determined to amount to a layoff. Further, CUPE says that that though the *TOH* award described the reduction of hours in that case as significant, nothing in the award suggests that a layoff cannot be triggered by something less than a significant reduction of hours.

25. CUPE submits that the Hospital has misread the Devlin award. It argues that the *Canada Safeway* case speaks to whether a reduction of hours can be considered a "constructive layoff." However, in this case there is specific language about what amounts to a layoff. Therefore the concept endorsed by the Supreme Court in *Canada Safeway* does not apply, in CUPE's submission. Also, CUPE redirects the Board to the Devlin award where that Board specifically addressed the effect of article 14 in this collective agreement, after hearing the same argument as the Hospital makes before this Board.

26. As for *Kingston General*, in that case the union did not seek to identify any negatively affected employees at all as a result of an elimination of shifts, or whether their hours of work, scheduled or not, were reduced. Instead, the union sought to have the effect of the cancellation of shifts considered globally rather

than in relation to particular employees. In any event CUPE points out that neither *Scarborough Hospital* nor *TOH* were before the Arbitrator in *Kingston General*. The reference in *Kingston General* to *Battlefords* and other cases referenced therein is indicative that the analysis undertaken was approached from general principles rather than the specific language of the collective agreement, in CUPE's submission.

## **Decision**

27. Worth stating at the outset, is that the Hospital accepts the proposition determined by the Devlin award: article 9.08 (A) (and 9.09) apply to part-time employees who are required to work prescheduled normal working hours (or base hours) consistent with their commitment.

28. The only issue to be determined is whether or not the Hospital's permanent reduction of the part-time employees' base hours of work in the ORA, PAC3 and ES1 classifications amounts to a layoff under the language in the central collective agreement. The Hospital says it does not because in its view the weekly reductions of 2.5, 0.4 and 1.9 hours to the affected part-time employees are not "significant."

29. The difficulty for the Hospital in this case is that its position finds little favour in the wording of the collective agreement. Nothing in articles 9.08 or 9.09, which deal with layoff, invites an interpretation that a threshold number of reduced hours is required in order to find that a layoff has occurred. Article 9.08(A)(b)(iii) for example, which sets out a precondition for a reassignment not to be considered a layoff, requires that there be no "reduction in the employees wage rate or hours of work." This appears to be a "bright-line requirement" that leaves no room for judgment on the magnitude of the reduction of an employee's hours of work (or wage rate). Would one similarly argue for example, that a

reduction in wage rate is permissible so long as it is only a small reduction in pay? This Board thinks not.

30. The Hospital sought to address this difficulty and noted that certain conditions of article 9.08(A)(b) invite judgment as to the meaning of qualifiers attached to them. At article 9.08(A)(b)(iv) for example, a reassignment is not a layoff if the reassignment is located at “the employee’s original work site or *at a nearby site in terms of relative accessibility for the employee.*” Similarly, a reassignment is not a layoff if the reassignment of an employee is to a job on the employee’s “*same or substantially similar shift or shift rotation.*” These qualifying phrases make clear that in respect of these conditions an employee is not subject to the layoff provisions if not reassigned to the same work site or shift/rotation as the employee’s original position. Rather, with respect to these conditions, a hospital is afforded a certain degree of latitude, subject to arbitral review as to whether the threshold of “substantially similar” is met for a reassignment to a different shift/rotation or whether the work site is “nearby.”

31. The fundamental difficulty in the Hospital’s argument in this regard is that the plain wording of articles 9.08A)(b)(iv) and (v) expressly invite managerial interpretive judgment, whereas no such wording is found either at 9.08(A)(b)(ii), or elsewhere in the collective agreement. If the parties intended an arbitration board to make findings of relative similarity between an employee’s previous number of hours worked (or wages for that matter) compared to those in the reassigned position, as opposed to simply determining whether a reduction has occurred, one would expect to see language in the collective agreement to that end.

32. Similarly, article 9.09(d) (now (g)), which informed the Devlin Board’s determination that a reduction of hours constitutes a layoff under article 9.08, provides that a temporary reduction of hours for full-time employees will permit certain layoff options to become available to those employees. The language

does not identify any threshold number of reduced hours, or qualify the reduction of hours in any measurable way.

33. This Board agrees with Hospital's assertion that Arbitrator Devlin in *St. Vincent* appears to have adopted the notion of constructive layoff described in *Canada Safeway*. However, we do not agree that Arbitrator Devlin imported the definition of what amounts to a constructive layoff into this collective agreement. Rather, *Canada Safeway*, which cites its companion case - *Battlefords* – rendered the same day in 1998, was reviewed in the Devlin award as part of the general jurisprudential landscape informing what the term “layoff” means in labour law generally. In certain circumstances, and as indicated in *Canada Safeway*, a significant reduction of hours might give rise to a constructive layoff. In *St. Vincent*, Arbitrator Devlin summarized the Supreme Court cases before turning to those that had explored the concept of layoff prior to the introduction into the central collective agreement of the reassignment language by the Adams Board in 1999, as well as the *Scarborough Hospital* decision that followed in 2006. She then went on to consider specific provisions of the central collective agreement as they applied to the reduction of hours in that case.

34. It is at that point in the award that Arbitrator Devlin turned to article 14, which expressly states that the standard work day and the standard work week do not constitute a guarantee hours of work for employees in this collective agreement. She explains that while management has the right to reduce hours of work under this collective agreement, its decision to do so is not determinative of whether a layoff has occurred. Contrary to the Hospital's submission then, article 14 is neither determinative of whether the Hospital is required to follow the layoff procedures set out in the collective agreement, nor is its existence in the collective agreement inconsistent with a finding that a layoff occurs when there is a reduction in hours of work of some but not all employees in the bargaining unit, be it a significant reduction or not.

35. Arbitrator Devlin goes on to point out that, in this collective agreement seniority for part-time employees is based on hours worked, applied on a bargaining unit wide basis. She makes that point before turning to those cases that considered the central collective agreement layoff language, including the *Scarborough Hospital* award, where the Burkett Board found that the hours of certain part-time employees were reduced as a result of contracting out.<sup>4</sup> As pointed out by CUPE, each of the eleven part-time employees had their hours reduced by 1.7 hours per week (an 8% reduction in hours) as a result of the contracting out, and that, the Burkett Board found, amounted to a layoff.

36. Arbitrator Devlin thereafter suggests that the two cases which preceded the Adams Board in 1999 (*Hamilton Civic Hospitals* and *Ottawa Civic Hospital*) no longer had any application, and she expresses why the new “conditions” outlined in article 9.08A(b) dealing with reassignment must be met if the layoff provisions of the collective agreement are to be avoided. At page 20 she writes:

As noted previously, one of the conditions is that the reassignment does not result in a reduction in the employee’s hours of work. Although this Article has no direct application in this case as the three part-time switchboard operators remained in their classification, in our view, it would be anomalous if the Hospital could avoid the layoff provisions of the agreement by maintaining the hours of an employee who was reassigned and, at the same time, reduce the hours of an employee who remained in his or her classification.<sup>5</sup>

37. Keeping in mind Arbitrator Devlin’s rationale, this Board is unable to find that that she was reading in the qualifier of “significant” into article 9.08A(b)(ii) (now (iii)). She does not expressly say, or even by implication suggest, that that

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<sup>4</sup> The collective agreement language prohibited the contracting out of any work performed by a member of the bargaining unit if, as a result of it, a layoff of any employee ... results from such contracting out.

<sup>5</sup> As pointed out by CUPE, Arbitrator Devlin also explained, having regard to what is now article 9.09 (g), that it made more sense that a full-time employee whose hours of work were reduced would have certain rights under Article 9.09 on a short-term layoff and that both full and part-time employees whose hours of work were reduced would have rights under article 9.09 on a layoff of a permanent or long term nature.



is how the provision is to be construed. Since this Board does not accept that *St. Vincent* established “significant” as a requirement of article 9.08(A)(b)(ii), the argument that this Board should follow the rationale articulated at paragraph 51 of the *TOH* case has no application. Further in *TOH* the Arbitrator was concerned with addressing TOH’s attempt to revisit whether 9.08 (A)(b) even applied to part-time employees who had not been reassigned, not with whether the reduction of hours referenced in article 9.08 (A)(b)(iii) had to be significant in order to trigger the layoff provisions.

38. This Board has carefully reviewed the *Kingston Hospital* case. In that case the union filed two policy grievances, which referred to the elimination and layoff of the equivalent of two part-time positions. The union’s position was that the loss of 196 hours of work in a particular department every two weeks as a result of the elimination of certain shifts constituted a layoff. In support of its position, the union relied on the *St. Vincent* case.

39. The employer took a different view. It submitted that a layoff and the elimination of a position are two different things: a layoff happens when there is an incumbent in a position and “a need to reduce the workforce by a body” arises, whereas the elimination of a position occurs when a position becomes vacant and the hospital does not post and fill it. In *Kingston Hospital*, the hospital submitted that when divided amongst “40 or 45” regular part-time employees, the total hours reduced as a result of the elimination of the departmental shifts at issue amounted to two hours per week.

40. In determining that there had been no layoff, Arbitrator Goodfellow explained that that a layoff was something that happened to individuals, and that the purpose of layoff provisions was not to preserve any particular body of work or total hours of work. He relied on *Battlefords* and the cases discussed therein, in addition to *St. Vincent*, as establishing that “a significant permanent reduction

in hours of work can constitute a layoff” (the constructive layoff concept) and that the significant reduction must relate to a specific identifiable employee(s). However, where the union had not demonstrated nor even attempted to demonstrate that any particular individual had suffered a reduction in hours, the Arbitrator determined that he could not find that a layoff had occurred.

41. *Kingston General* is distinguishable from the case at hand. In the matter before this Board, there is no dispute that a number of identified individuals have suffered a reduction in their hours. The case has not been presented in the abstract manner it was framed in *Kingston General*. There are actual people CUPE can point to who, as a result of the Hospital’s initiative, are working fewer base hours than they used to.

42. Of note, however, is that beyond expressing the view that the layoff provisions protect individuals rather than bodies of work, Arbitrator Goodfellow also points out that one of the purposes of layoff obligations is to ensure that seniority is respected. In this collective agreement, with seniority for part-time employees accruing on an hourly basis, any reduction in their hours of work compromises their seniority rights.

43. In the final analysis, this Board circles back to what must inform the interpretation of article 9.08(A)(b)(iii): an appreciation of how the language at issue came to be added to this collective agreement in the first place. It is that appreciation that led the Burkett Board to refer to article 9.08 (b) as setting out “bright line requirements” to be met in order for the employer to avoid the triggering of seniority rights under the layoff provisions:

As is clear from the Adams award, Article 9.08(b) was intended to provide the hospitals with greater flexibility in responding to fiscal restraints and pressures – albeit within carefully defined limits. The hospital gains the flexibility to reassign without triggering seniority rights if the reassignment

does not result in a reduction of the employee's wages or hours of work; if the reassignment is within the employee's original worksite or at a nearby site in terms of relative accessibility; and if the reassignment does not result in a substantial alteration to an employee's shift or shift rotation.

44. Lastly, and having regard to the *Lakeridge Health* case, the Hospital points out that Arbitrator Craven found a layoff in article 9.08(A)(b)(iv) to include a "substantial" change in job location or work site. In so doing, the Hospital submitted that the Arbitrator did not give effect to the precise words of article 9.08(A)(b)(iv) and instead applied an adjective similar to that used by Arbitrator Devlin when she referred to a "significant" reduction of hours. In this Board's view, Arbitrator Craven had a quite different sub-clause to consider. It defined a reassignment in terms of the location of the work at the employee's original work site or "at a nearby site". Arbitrator Craven concluded that the provision prohibited a substantial change in job location or work site. In article 9.08(A)(b)(iii) there are no equivalent qualifiers in terms of employee wages or hours of work. The provision simply prohibits any reduction at all to those rights.

45. For all the foregoing reasons, and without any need to engage in a discussion about what constitutes a "significant" reduction in hours of work, this Board finds that the reduction of base hours of the part-time ORAs, ES1s and PAC3s, by 2.5, 0.4, and 1.9 hours respectively, amounts to a layoff under this collective agreement and we so declare. The matter is remitted back to the

parties to determine the matter of remedy and the Board will remain seized in this respect and for the purposes of the implementation of this award.

Dated at TORONTO this 26th day of March 2019.



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Christine Schmidt, Chair

"I dissent" (see attached)

Harold Ball, Hospital Nominee

"I concur"

Joe Herbert, CUPE Nominee

## Dissent of Hospital Nominee

I respectfully dissent for the following reasons.

The prevailing view of arbitrators since the *St. Vincent* case, has been that there must be “a significant permanent reduction in hours of work” to constitute a layoff, despite the fact that the collective agreements under consideration contained no such qualifying language.

In fact, Arbitrator Devlin in *St. Vincent*, clearly adopted the concept of a constructive layoff, as was articulated by the Supreme Court in both the *Canada Safeway* and *Battlefords* cases, and I would submit imported this concept, or definition into that collective agreement, and by extension into this collective agreement as well, because the language in the instant case is virtually identical to that which was considered by Arbitrator Devlin in all material respects.

At page 21 of the award Arbitrator Devlin concludes:

*“However, having carefully considered the provisions of the collective agreement and the jurisprudence referred to previously, we find that in the circumstances of this case, where there was a **significant reduction in the hours regularly worked** (emphasis added) by three part-time switchboard operators; the Hospital was required to follow the layoff procedures contained in Article 9 of the collective agreement.”*

Having adopted the reasoning in *St. Vincent* in *TOH* as set out at paragraphs 50 and 51 below, clearly this arbitrator, who was also the arbitrator in *TOH*, should have applied the same reasoning in the case before us.

50. I am not prepared to revisit the extensive jurisprudence thoroughly explored in the Devlin Award and find that it was wrong. First, TOH has been aware of the Devlin Award, which followed the Burkett Award in the *Scarborough Hospital* case, for some time. These decisions interpreted the layoff provisions after the addition of article 9.08(b) awarded by the Adams Board in 1999. The reasoning articulated by the Adams Board for awarding article 9.08(b) is set out in the *Scarborough Hospital* case. It need not be repeated here. However, Arbitrators Samuels’ and Kates’ pre-Adams Board analyses of the layoff language in the *Hamilton Civic Hospital* and *Ottawa Civic Hospitals* cases are no longer relevant given the effect of the addition of article 9.08(b) to the meaning of layoff in this collective agreement.

51. Secondly, since 2006, the applicable language has remained unchanged through successive rounds of bargaining. The collective bargaining implication flowing from this is that TOH must be taken to accept the jurisprudence that

stipulates the layoff provisions capture a significant permanent reduction in regularly scheduled hours of part-time employees.

In view of the foregoing, I would submit that the collective bargaining implications flowing from this is that CUPE must also be taken to accept the jurisprudence that it is a “significant permanent reduction in regularly scheduled hours,” which is the threshold that must indeed be met.

At paragraph 41, the majority states:

*“Kingston General is distinguishable from the case at hand. In the matter before this Board, there is no dispute that a number of identified individuals have suffered a reduction in their hours. The case has not been presented in the abstract manner it was framed in Kingston General. There are actual people CUPE can point to who, as a result of the Hospital’s initiative, are working fewer base hours than they used to.”*

With respect, because the Union is merely asking for a declaration, and not seeking any specific remedy on behalf of any identified individuals who may have had their hours reduced, I would submit that this is in fact tantamount to presenting their case in the abstract. As such, *Kingston General* is not distinguishable from the case at hand, and this Board should have therefore applied the reasoning in that case, which established that “*a significant permanent reduction in hours of work can constitute a layoff.*”

Regarding the reference to “*the plain wording*” in paragraph 31 of this award, as in all cases concerning the interpretation of written instruments including collective agreements, the fundamental interpretative approach of determining the true intention of the parties is a contextual or purposive one where the words used by the parties are to be given their plain and ordinary meaning unless to do so would lead to an absurdity or manifest inconsistency with the scheme and structure of the provision in question or the collective agreement when read as a whole.

There is no dispute between these parties that this collective agreement does not provide for a guarantee of hours of work, which I would submit the interpretation given to this language by this Board, that any reduction of base hours constitutes a layoff effectively amounts to.

This is not only inconsistent with the provisions of the collective agreement as a whole, but also leads to an absurd result, in that arguably a reduction in base hours of only several minutes can trigger a layoff, and all of the various complex processes, such as bumping, redeployment etc., required by this collective agreement.

Finally, by failing to adopt the clearly established jurisprudence, this decision has now introduced an element of labour relations uncertainty in circumstances where the application and the interpretation of the language in this collective agreement was clearly

understood, and accepted by the parties for a considerable period of time, and would suggest that the appropriate way in which to deal with this matter is through collective bargaining, and not the arbitration process.

For all of the foregoing reasons I would have dismissed this grievance.

All of which is respectfully submitted.

*“Harold Ball”*

Nominee for Ross Memorial Hospital