In the Matter of an Arbitration

Between:

EllisDon Facilities Services (ROH) Inc.

(The “Employer”)

-and-

Canadian Union of Public Employees, Local 942

(The “Union”)

Re: Grievance 2018-ED4

Board of Arbitration:

Brian Sheehan-Chair
Luc Presseau- Employer Nominee
Joe Herbert-Union Nominee

Appearances:

For the Employer: George Vuicic - Counsel

For the Union: Peter Engelmann - Counsel

Hearing conducted in Ottawa on September 30, 2019

This Award concerns a policy grievance filed by the Union asserting that the Employer has violated the collective agreement by failing to offer positions and shifts to employees in accordance with the employees' "real" seniority.

Relevant Factual Background

There was no significant dispute regarding the facts associated with this matter. In this regard, the following Statement of Agreed Facts was submitted:

> 1. The Employer and the Union are parties to a collective agreement governing the terms and conditions of employment of a bargaining unit of part-time employees who provide facilities support services at the Royal Ottawa Hospital, including housekeeping, food services and facility maintenance.
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> 2. The employer that was originally a party to the collective agreement was named Carillion Services (ROH) Inc., which was a joint venture between Carillion and EllisDon. As a result of Carillion's insolvency, in or about April of 2018, EllisDon acquired the balance of shares in Carillion Services (ROH) Inc., and changed its name to EllisDon Facilities Services (ROH) Inc.
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> 3. Article 9 of the collective agreement (central language) addresses seniority. Article 9.05 addresses job postings, and provides in paragraph 9.05(d) that "[i]n matters of promotion and staff transfer appointment shall be made of the senior applicant able to meet the normal requirements of the job."
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> 4. Appendix A to the collective agreement (local language) contains additional terms governing the employment of members of the bargaining unit. Article V.1 in Appendix A provides that "[w]hen part-time and casual employees are called into work for shifts that are not scheduled, such calls shall be done on the basis of seniority within the classification and provided the person is capable of performing the work."
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> 5. Article G of Appendix A to the collective agreement provides, in Article G.1, that "[a] revised copy of the seniority list shall be posted on each appropriate bulletin board and sent to the Union in January, April, July and October of each year."

6. Until approximately July 2019, the Employer prepared, posted and sent to the Union seniority lists in accordance with the schedule set out in Article G.1, namely, on a quarterly basis in January, April, July and October of each year.

7. As of approximately July 2019, the Employer began updating employees' seniority with each pay cycle, thus on a bi-weekly basis. Since then, the Employer has used the bi-weekly seniority data to determine any seniority-related rights under the collective agreement.

Relevant Collective Agreement Provisions

Central Agreement

ARTICLE 9 – SENIORITY

9.02 – Definition of Seniority

Part-time employees, including casual employees, will accumulate seniority on the basis of one (1) years' 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.

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 determined locally.

9.05 – Job Posting

(a) Where a permanent vacancy occurs in a classification within the bargaining unit or a new position within the bargaining unit is established by the Employer, such vacancy shall be posted for a period of seven (7) consecutive calendar days. Applications for such vacancy shall be made in writing within the seven (7) day period referred to herein.

(d) In matters of promotion and staff transfer appointment shall be made of the senior applicant able to meet the normal requirements of the job. Successful employees need not be considered for other vacancies within a six (6) month period unless an opportunity arises which allows the employee to change his or her permanent status.

(e) The Employer agrees that it shall post permanent vacant positions within 30 calendar days of the position becoming vacant, unless the Employer provides the Union notice under Article 9.08(a) of its intention to eliminate the position.

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Local Agreement

ARTICLE G – SENIORITY LISTS

G.1 A revised copy of the seniority list shall be posted on each appropriate bulletin board and sent to the Union in January, April, July and October of each year.

G.2 The Employer will provide to the Union, as requested, a confidential list containing names, addresses, phone numbers, personal email addresses if on file with the Employer, employee status, and department.

ARTICLE V – CASUAL HOURS

V.1 When part-time and casual employees are called into work for shifts that are not scheduled, such calls shall be done on the basis of seniority within the classification and provided the person is capable of performing the work.

Expanding on the facts as set out in the Statement of Agreed Facts, the Union has full-time and part-time service collective agreements with the Royal Ottawa Hospital (ROH). The evidence of the Union was that under those collective agreements, the ROH utilizes seniority data as of the end of the last bi-weekly pay cycle to assign available shifts to part-time and casual employees. In terms of a job posting competition, pursuant to Article 9.05 of the CUPE collective agreement, the ROH assesses the relevant seniority of the applicants for the position, as of their respective seniority on the closing date of the job posting.

At the time of the filing of the grievance, the Employer was relying upon the seniority information set out in the quarterly seniority list, prepared pursuant to Article G with respect to both the awarding of job postings under Article 9.05 and for assigning available unscheduled shifts to part-time and casual employees, pursuant to Article V of the collective agreement. However, as set out at Paragraph 7 of the Statement of Agreed Facts, the Employer began utilizing, as of July 2019, the end of the last bi-weekly pay cycle seniority data with respect to the assignment of available shifts.

The Union takes no issue with the Employer utilizing the end of the last bi-weekly pay cycle seniority data to assign available shifts to part-time and casual employees in accordance with Article V of the collective agreement. The Union, however, asserts that the Employer's practice of utilizing that seniority data to assess the relative seniority with respect to job postings constitutes a contravention of Article 9.05 of the collective agreement.

At the hearing, evidence was led by both parties with respect to a Bargaining Agreement reached between the parties at the outset of the last round of local collective bargaining. Amongst other things, that agreement stipulates that "all past practices and letters of understanding are null and void unless mutually agreed upon". It was the evidence of the Union that the Bargaining Agreement was prepared by the Union and that the Union expressly indicated that one practice it sought to put an end to was the Employer's reliance on the quarterly seniority lists with respect to awarding job postings and the assignment of available unscheduled shifts to part-time and casual employees.

Submissions of the Union

The Union's submissions touched upon three themes. First, it was asserted that pursuant to Article 10.02 – Contracting Out, as set out in the collective agreement, the Employer effectively stood in the shoes of the ROH on an ongoing basis. That is, the Employer was obligated to administer the relevant provisions of the collective agreement in a similar matter as to what was being followed by the ROH with respect to the collective agreements they had with the Union. Accordingly, since the ROH was adhering to a "real" seniority approach, utilizing the respective seniority of applicants as of the closing date of the job posting to award positions under Article 9.05, this Employer, in order to satisfy the requirements of Article 10.02, had to adhere to the same practice.

The second theme of the Union's submissions was that the provisions of the "central" agreement effectively "trump" or supersede the wording set out in the "local" collective agreement. Accordingly, the provision in Article G of the "local" collective agreement regarding the posting of quarterly seniority lists can and should not override the imposed obligation upon the Employer to award job postings based on the "real" seniority of the relevant employees pursuant to Article 9.05 of the "central" agreement . In furtherance of this point, the Union placed reliance on paragraph 7 of the Memorandum of Conditions for Joint Bargaining between the Participating Hospitals and CUPE which reads as follows:

> The agreement on central issues arising out of negotiations or arbitration shall not be altered in any way by either party at the local level and shall be implemented and deemed to be in affect

> notwithstanding any failure to resolve local issues, subject to satisfying the procedures required under the applicable legislation.

The third and arguably primary branch of the Union's argument asserted that the Employer's practice of relying on the seniority data as of the end of the last bi-weekly pay cycle is not in keeping with the requirement under Article 9.05 to award the posted position to the senior applicant. Mr. Engelmann, on behalf of the Union, opined the practice of the Employer fails to recognize the importance of seniority rights for the Union and the affected employees. Related to this point, it was asserted that an entrenched and fundamental principle of collective agreement interpretation is that seniority rights should only be deemed to be truncated or bridged by way of express collective agreement language, considering the importance of seniority to the employment relationship.

From a practical level, Mr. Engelmann noted in the case at hand, a review of the relevant quarterly seniority lists confirms that in a number of instances, a relatively small number of hours separated the respective seniority of employees; such that, reliance on seniority data as of the end of the last bi-weekly pay cycle gives rise to the possibility of the Employer "getting it wrong" in terms of which employee is the most senior with respect to awarding a position pursuant to the job posting provisions set out at Article 9.05 of the collective agreement.

In terms of remedy, the Union seeks a declaration that the Employer violated and continues to violate the relevant provisions of the collective agreement. In support of its submissions, the Union relied upon the following authorities: Brown and Beatty,

Canadian Labour Arbitration para; 6:0000; Tung-Sol of Canada Ltd. and United Electrical Workers, Local 512 (1964) 15 L.A.C. 161 (Reville); Nova Scotia (Department of Transportation & Communications) and Canadian Union of Public Employees, Local 1867 (1996) 58 L.A.C. (4th) 11 (Veniot); Aramark Canada Ltd. and United Here Ontario Council 2008 CanLII 22907 (ONLA) (Knopf); Lakeport Brewing Corp. and Teamsters Local Union 938 (2005) 143 L.A.C. (4th) 149 (Catzman); Chatham-Kent Children's Services and Ontario Public Service Employees' Union, Local 148 (2014) 251 L.A.C. (4th) 313 (Sheehan).

The Submissions of the Employer

The Employer asserted that the Union has failed to establish that there has been any contravention of the relevant provisions of the collective agreement with respect to the manner in which the Employer has administered the relevant provisions of the collective agreement pertaining to seniority. In this regard, it was submitted that the parties have expressly agreed at Article G of the collective agreement as to the nature of the Employer's obligation regarding seniority lists, and there is no basis to suggest, and the Union has not asserted as such, that the Employer has not complied with the stated obligation to post revised seniority lists on a quarterly basis.

Further to above point, Mr. VuicIc, on behalf of the Employer, asserted that the fundamental precept of collective agreement interpretation is that it is to be assumed that the parties' intention is reflected through the actual agreed-to wording of the collective agreement. That is, it should be presumed that the parties, through the

wording set out in the collective agreement, meant what they said and said what they meant. It was suggested that argument has particular relevance in the context of sophisticated bargaining entities such as this Employer and Union.

It was further submitted that pursuant to Article 7.12 of the collective agreement, the parties expressly provided that this Arbitration Board does not have the power to "alter, modify, add to or amend" the provisions of the collective agreement, and the position of the Union was ostensibly an attempt to amend the nature of the Employer's obligation with respect to maintaining and revising seniority lists. Mr. Vuicic posited that it is always open for the Union to alter the wording of Article G through local collective bargaining; however, it should not be able to achieve a result it did not bargain for by way of this grievance.

As to the Union's reliance on Article 10.02 – Contracting Out, the Employer asserted that provision only dictates that the contractor employer, in terms of its collective agreement obligations, stands in the shoes of the contracting Hospital at the time that the work is initially contracted out. That language, it was submitted, does not prevent this Employer through subsequent collective bargaining to alter the terms and conditions of the collective agreement; and/or to amend its practices as it deems appropriate, provided those practices do not represent a violation of the collective agreement.

Mr. Vuicic additionally submitted that there is no merit to the Union's assertion that paragraph 7 of the Memorandum of Conditions for Joint Bargaining has been contravened. Specifically, that provision should not be interpreted as necessarily dictating that "central" language always "trumps" the relevant wording of the "local" agreement. Moreover, it was suggested that in this case there is nothing inconsistent with respect to the Employer relying upon and complying with its obligations as set out at Article G of the "local" agreement as it relates to any provision of the "central" agreement.

The Employer also asserted that in light of the change of practice instituted by the Employer as of July 2019, in which they now rely upon the seniority data as of the end of the last bi-weekly pay cycle, the issue in this dispute is effectively a moot point; and accordingly, the grievance should be dismissed as there ceases to be a "live" issue between the parties.

In support of its submissions, the Employer relied upon the following authorities: Ontario Metrolinx – GO Transit and Amalgamated Transit Union, Local 1587 (2017) 284 L.A.C. (4th) 420 (Abramsky); Ontario Power Generation and The Society of Energy Professionals (2017) 283 L.A.C. (4th) 168 (Herman); SGS Canada Inc. and UNIFOR Local 672 (2017) 283 L.A.C. (4th) 221 (MacDowell); The Corporation of the City of Hamilton and Hamilton Professional Fire Fighters' Association (2016) 268 L.A.C. (4th) 321 (Sheehan); City of Winnipeg and Canadian Union of Public Employees, Local 500 (2015) 266 L.A.C. (4th) 157 (Graham); The City of Toronto and The Toronto Civic

Employees Union, Local 416 (2017) 282 L.A.C. (4th) 432 (Sheehan); Alberta Health Services and The Professional Association of Resident Physicians of Alberta (2017) 285 L.A.C. (4th) 378 (Smith); Corporation of the City of London and London Professional Fire Fighters Association (2009) 186 L.A.C. (4th) 107 (Burkett); Thames Emergency Medical Services Inc. and Ontario Public Service Employees Union, Local 147 (2006) 149 L.A.C. (4th) 431 (Knopf); Fording Coal Ltd. and United Steelworkers of America, Local 7884 (2001) 95 L.A.C. (4th) 78 (McDonald).

Decision

Given the position of the parties as outlined at the hearing, the issue to be decided is quite narrow in scope. The only issue remaining in dispute is the proper approach the Employer should adopt when assessing the respective seniority of relevant applicants for a permanent position pursuant to Article 9.05 of the collective agreement. The Employer's position is that it will utilize the respective seniority of the applicants as of the end of the last bi-weekly pay cycle. The Union asserted that the Employer's assessment should be based upon the respective seniority of the applicants as of the closing date of the job posting.

From a practical level, it is recognized that it may be a rare occurrence for the issue in dispute to actually become relevant. That is, it could be surmised that this situation would arise infrequently wherein the relative seniority ranking of the applicants for a position would be altered on account of hours worked by the relevant employees between the end of the last bi-weekly pay cycle and the closing date of the pertinent job posting. That being said, the narrowness of the issue in dispute, and the fact that it may

only be occasionally relevant, does not minimize its potential significance; as the relative seniority ranking of the applicants for a permanent position is of particular importance with respect to filling a vacant permanent position. Specifically, Article 9.05 of the collective agreement is a "sufficient ability" job posting provision; dictating that the Employer shall appoint the "senior applicant able to meet the normal requirements of the job". Without a doubt, being the successful applicant for a vacant permanent position would be vitally important to members of the bargaining unit, as it may be associated with receiving higher wages and enhanced benefits, advancement in a career path, and/or a preference for the nature of the work and working conditions related to the position in question.

It is a long-accepted principle of arbitral jurisprudence that collective agreement language should be interpreted through the prism that seniority and its application with respect to important job interests for members of the bargaining unit constitutes a fundamental achievement associated with unionization. While the application of this principle should not lead to inferring seniority interests that are not supported by the wording of the collective agreement, generally, the principle suggests that an interpretation touching upon the application of seniority rights should recognize the fundamental importance of those rights. As stated by Arbitrator Knopf in Aramark Canada Ltd.:

> Seniority rights have often been referred to as the cornerstone of a collective agreement. This arises from the articulation of the importance of seniority rights in the seminal *Tung*-Sol case, *supra*:
>
> > Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its

> members by virtue of the collective bargaining process. An employee's seniority under the terms of the collective agreement gives rise to such important rights as relief from layoff, right to recall to employment, vacations and vacation pay, and pension rights, to name only a few. It follows, therefore, that an employee's seniority should only be affected by very clear language in the collective agreement concerned and that arbitrators should construe the collective agreement with the utmost strictness wherever it is contended that an employee's seniority has been forfeited, truncated or abridged under the relevant sections of the collective agreement.
>
> Under this particular Collective Agreement, seniority rights impact contractual entitlements, such as vacations, scheduling, promotions, job postings, layoff, recall and overtime. Therefore, the exercise of seniority rights can have a significant impact on a person's working life. It affects the quality of their workday, the compensation they will receive, their job security, and their ability to move from one job to another.

In the case at hand, the definition of seniority as set out at Article 9.02 of the collective agreement, mandates that a part-time employee's seniority is calculated on the basis of the employee's accumulated hours of work with the Employer. In keeping with the view that an employee's seniority should not be deemed to be abridged or truncated absent express language, it would be the expectation that an employee should be able to rely on his/her accumulated seniority in full at the relevant time a job posting arises under Article 9.05. Further to this point, the language of Article 9.05 dictates that the Employer is obligated to award the position to the most senior applicant; therefore, it is incumbent upon the Employer to "get it right" in terms of which employee has the greatest seniority in relation to the job posting. It would only seem sensible that the appropriate point in time to make that calculation is when the job posting closes; as in, the date that applications must be received by, and the date by

which the Employer generally determines the respective qualifications and attributes of the applicants for the position.

It is recognized that the Union accepts the seniority data as of the end of the last bi-weekly pay cycle as being the appropriate demarcation point to determine the seniority of the relevant employees for the purposes of assigning non-scheduled hours to part-time and casual employees pursuant to Article V of the collective agreement. There can be little doubt, however, that the job interests of an employee regarding being assigned some additional hours of work is in no way comparable to an employee being awarded a permanent position. Moreover, from an operational perspective, utilizing the accumulated hours worked by employees at the time when available shifts are assigned pursuant to Article V of the collective agreement may inherently cause operational difficulties for the Employer. That is, the decision-maker responsible for assigning shifts may not be fully aware at the pertinent time that certain employees may have actually worked hours over the last couple of days such that a particular employee may now be senior to another employee. No such operational difficulty would arise, and the Employer did not suggest otherwise, with respect to a job competition under Article 9.05 as the Employer has more than enough time, as part of the assessment process to determine the pertinent seniority of the candidates as of the closing date for the job posting.

As to Article G of the collective agreement, that provision is not centrally germane to the issue in dispute. The issue at hand is not whether the Employer is

complying with the requirements to post the seniority list on a quarterly basis pursuant to that provision; but rather, the correct approach to adopt with respect to the calculation of the relative seniority of employees applying for a position pursuant to Article 9.05 of the collective agreement. There is no wording either in Article G or in Article 9.05 of the collective agreement expressly suggesting that the information set out therein "locks in" the listed employees' respective seniority as it pertains to job postings that occur prior to the next quarterly posting of the seniority list. Arguably more importantly, the Employer is no longer asserting that the seniority date of employees as of the quarterly posting of the seniority list should be utilized for the purposes of assessing the relative seniority of job applicants with respect to a job posting under Article 9.05 of the collective agreement.

In conclusion, the grievance is upheld in part as it has been determined that for the purposes of a job posting under Article 9.05 of the collective agreement, the relative seniority of candidates for the position should be assessed in accordance with the calculation of those employees' respective seniority as of the date of the closing of the job posting. The issued remedy is limited to a declaration that the Employer's stated approach with respect to the calculation of the relative seniority of applicants for a job posting under Article 9.05 of the collective agreement constitutes a violation of the collective agreement.

Dated at Mississauga, Ontario this 20th day of November 2019.

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Brian Sheehan-Chair

I Concur

_____
Joe Herbert-Union Nominee

Dissent Attached

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Luc Presseau-Employer Nominee

DISSENT

Respectfully, I do not agree with the Chair in this matter.

While article 9.02 defines seniority and article 9.05 defines how it will be used in the context of job postings, only one clause in agreement relates to how often seniority is to be revised: article G. Although, one could argues that it only specifies when seniority lists must be posted, by inference it also speaks to calculation of seniority, because the employer must at least revise seniority on quarterly basis, before posting a revised list.

This is the sole indication, in either central or local agreements, of the parties' intentions as to how frequently seniority must be revised (and therefore calculated/updated).

In the absence of any other clear indication of frequency of updating agreed to by parties, related provisions of the collective agreement should be interpreted in accordance with the parties' intent as expressed in article G. Selection of any other interval is contrary to what the parties' intended when they negotiated the agreement.

While the employer has now agreed to update seniority on a more frequent basis, as technology now permits, it does so as a means to resolve an issue with the Bargaining Agent. However, in my view it is wrong to uphold a grievance at this point when no clear violation can be established based on the clear provisions of the collective agreement.

Accordingly, I would have dismissed the grievance and encouraged the parties to continue to work together to clarify intent as part of the negotiation process.

Luc Presseau

Employer nominee

November 2019