In the Matter of an Arbitration

Between:

Northumberland Hills Hospital

(The “Employer”)

-and-

Canadian Union of Public Employees, Local 2628

(The “Union”)

Re: Grievance of K. Tripp

Board of Arbitration

Chair: Brian Sheehan
Employer Nominee: Brian O’Byrne
Union Nominee: Joe Herbert

Appearances:

For the Employer:	Carolyn Kay – Counsel
For the Union:	Mark Wright – Counsel Ella Bedard – Counsel

Hearing Conducted via Videoconference on September 25, 2020

This Award pertains to a grievance filed by the Union asserting that the Employer violated Article 9.07(B) of the collective agreement by failing to give Kiersten Tripp (the "grievor") credit for her previous related experience as an RPN with respect to her placement on the RPN wage grid.

The relevant facts in this matter are not in dispute; accordingly, the hearing proceeded based on an Agreed Statement of Facts (ASF). Based on the ASF, the following are relevant facts pertaining to this matter:

1. The Grievor began her employment with the Hospital on September 17, 2018 as a part-time Registered Practical Nurse (RPN).
2. At the time of hiring, the Grievor was still employed on a part-time basis as an RPN by the Victoria Order of Nurses (VON).
3. Neither at the time of hire nor subsequently did the Hospital ever provide the Grievor with a form on which she could have claimed consideration for recent and related experience, nor did she request a form at any time.
4. The Grievor completed her probationary period at NHH after she had completed 450 hours of work.
5. In June 2019, the Grievor became aware that she could claim, consideration for recent and related experience with another employer for the purposes of wage progression. Around that same time, the Grievor contacted her previous employer, the VON, to procure documentation relating to her work hours there.
6. On August 13, 2019, the Grievor provided a letter dated June 5, 2019 from VON Canada outlining the Grievor's employment with the VON.
7. That letter indicated in error that the Grievor was a permanent part-time RPN with the VON from August 12, 2015 to December 20, 2018.
8. The Grievor had, in fact, worked as a Personal Support Worker for VON from August 2015 to August 2017, and then as an RPN from September 1, 2017 to December 2, 2018.
9. As indicated in the letter from VON, the Grievor had accrued 1726 hrs. as an RPN at VON for the period from September 1, 2017 to December 2, 2018.

10. By an email dated August 13, 2019, Ms. Wendy Perry, Human Resources Advisor for the Employer advised the Grievor that:

> When giving staff credit for recent related experience, we can only take into account the hours worked prior to your date of hire. If you have worked more than 1725 hours prior to your start date, I could move you up to the next pay grid. Based on the letter you gave me; I cannot give you credit for these hours.

11. To determine how many hours, she had worked at VON as an RPN prior to her start date with the Employer (September 17, 2018) the Grievor sought further information from VON.

12. In a letter dated October 21, 2019, the VON clarified that the Grievor had worked 321.5 hours as an RPN from September 1, 2018 to December 20, 2018. It is agreed that those hours which accrued after the Grievor was hired by the Employer do not count for the Grievor's claim for recent related experience.

13. In total then, the Grievor accrued at least 1404.5 hours as an RPN at VON prior to her date of hire with the Employer.

14. There is no dispute that recent and related experience for part-time RPNs has always been calculated on the basis of one year of credit based on 1725 hours previously worked. The Union agrees that 1725 hours is required for part-time RPNs.

15. The parties are in disagreement, however, on the time period over which the relevant 1725 hours are to be calculated.

The Relevant Provisions of the Collective Agreement

ARTICLE 9 – SENIORITY

9.01 – PROBATIONARY PERIOD

A new employee will be considered on probation until he has completed sixty (60) days of work (or 450 hours of work for employees whose regular hours of work are other than the standard workday), within any twelve (12) calendar months. Upon completion of the probationary period he shall be credited with seniority equal to sixty (60) working days. With the written consent of the Hospital, the probationary employee and the President of the Local Union or designate, such probationary period may be extended. Any extensions agreed to will be in writing and will specify the length of the extension. The release or discharge of an employee during the probationary period shall not be the subject

of a grievance or arbitration unless the probationary employee is released for reasons which are arbitrary, discriminatory, in bad faith, or for exercising a right under this Agreement.

9.02 – DEFINITION OF SENIORITY

Full-time employees will accumulate seniority on the basis of their continuous service in the bargaining unit from 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, 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.

9.07 (B) – PORTABILITY OF SERVICE

An employee hired by the Hospital with recent and related experience may claim consideration for such experience at the time of hiring on a form to be supplied by the Hospital. Any such claim shall be accompanied by verification of previous related experience. The Hospital shall then evaluate such experience during the probationary period following hiring. Where in the opinion of the Hospital such experience is determined to be relevant, the employee shall be slotted in that step of the wage progression consistent with one (1) year's service for every one (1) year of related experience in the classification upon completion of the employee's probationary period. It is understood and agreed that the foregoing shall not constitute a violation of the wage schedule under the collective agreement.

20.05 – PROGRESSION ON THE WAGE GRID

(The following clause is applicable to part-time employees only)

Effective October 10, 1986 part-time employees, including casual employees, shall accumulate service for the purpose of progression on the wage grid, on the basis of one year for each 1725 hours worked. Notwithstanding the above, employees hired prior to October 10, 1986 will be credited with the service they held for the purpose of progression on the wage grid under the Agreement expiring September 28, 1985 and will thereafter accumulate service in accordance with this Article.

The Submissions of the Parties

The Union asserted that in accordance with the express wording of Article 9.07(B) of the collective agreement, the calculation of recent and related experience of a newly hired employee for the purposes of the Article takes place upon the completion of the employee's probationary period. Accordingly, it is claimed that since at the end of her probationary period the grievor clearly had more than 1725 hours of credited service as an RPN (credit for the 1405 hours of related experience with VON plus 450 hours of experience with the Employer), she was entitled to be credited one year's service for the purposes of the RPN wage grid.

Mr. Wright, on behalf of the Union, asserted the first part of Article 9.07(B) sets out a process by which the employee brings to the attention of the Employer his/her recent and related experience. The language of the provision then provides that the Employer will assess that information during the employee's probationary period. It is understood that the evaluation of the information pertaining to recent and related experience is subject to the discretion of the Employer as to whether the experience satisfies the test of being relevant. Mr. Wright opined the key language of Article 9.07 (B) with respect to the issue in dispute is that the parties expressly agreed that the "employee shall be slotted in that step of the wage progression consistent with one (1) year's service for every one (1) year of related experience in the classification upon completion of the employee's probationary period". Accordingly, it was submitted, the hours of work by the grievor during her probationary period are by express agreement of the parties to be included in the calculation of whether she had the requisite 1725

hours of related experience to constitute a year of credited service for the purposes of her placement on the RPN wage grid.

It is the Union's view that the Employer's interpretation is predicated upon ignoring wording that is set out in Article 9.07(B); and moreover, seeks to include wording that is not in the provision. Specifically, it was submitted that the Employer's interpretation is based upon reading out the phrase "upon completion of the employee's probationary period" and an attempt to insert the phrase "date of hire" in its place. It was further suggested that the Employer's interpretation fails to give credit at the relevant point of determination (the completion of the employee's probationary period) for the partial year of related service (i.e. experience) of the grievor; and there is no basis under the collective agreement suggesting that such service should not be considered for the purposes of Article 9.07(B).

In support of its submissions, the Union submitted the following authorities: Dufferin-Peel Catholic District School Board and OECTA 1998, 77 LAC (4th) 69 (Herlich); Family and Children's Services of Renfrew County and OPSEU (2004) 124 LAC (4th) 321 (Knopf); Re Regency Towers Hotel Ltd and Club Employees Union Local 299 (1973) 4 LAC (2nd) (Schiff); Royal Ottawa Hospital and ONA, 1990 CarswellOnt 5375 (H. Brown); F.J. Davey Home for the Aged and ONA 1990 CarswellOnt 5447 (Samuels); Regional Municipality of Haldimand-Norfolk (Grandview Lodge) and Health, Office & Professional Employees, Local 175 (1991) 23 LAC (4th) 282 (Rose); East York (Borough) Board of Education and OPSTF, 1994 CarswellOnt 7115 (Bendel).

The Employer asserted that the wording of Article 9.07(B) dictates that in the case of the grievor, it was only the hours she worked as an RPN, prior to being hired, that were relevant with respect to the determination if she had the requisite 1725 hours of recent and related experience to constitute a year of credited service for the purposes of her placement on the RPN wage grid. That is, for the purposes of Article 9.07(B), the probationary hours worked by Grievor were not pertinent, whatsoever, with respect to the calculation of whether she had the requisite 1725 hours of recent and related experience.

Ms. Kay, on behalf of the Employer, asserted that the Union's interpretation of Article 9.07(B) is not only inconsistent with the wording of that provision but with the collective agreement as a whole. In particular, it was submitted that the Union's argument is an attempt to improperly double count the 450 hours of service the grievor worked during her probationary period. That is, the Union improperly seeks to count those 450 hours for the purposes of related experience under Article 9.07(B) and also count it for the purposes of the wage progression provision under Article 20.05.

The Employer further asserted that the Union's interpretation leads to a potential absurdity. It was noted that pursuant to Article 9.01, an employee's probationary period can be extended through the mutual agreement of the parties. Accordingly, if the Union's interpretation is accepted, an employee who has his/her probationary period extended, would, for the purposes of Article 9.07(B), potentially end up in a better off position than an employee who successfully completed his/her probationary period within the normal 450 hours timeframe.

In support of its submissions, the Employer submitted the following authorities: Royal Ottawa Health Care Group and Ontario Public Service Employees Union 2015 CanLII 79555 (ON LA) (Albertyn); Lakeridge Health Corporation and Ontario Nurses' Association 2014 CanLII 25565 (ON LA) (Carter); Re Lakeridge Health Corporation and Ontario Nurses' Association 2016 CanLII 15954 (ON LA) (Carter); Ontario Public Service Employees' Union, Local 331 and Ontario Shores Centre for Mental Health Sciences 2017 CanLII 68134 (ON LA) (Schmidt); Humber River Hospital and OPSEU Local 590 (Harriott) 2018 CarswellOnt 2511 (Herman); Hamilton Health Sciences Corporation and Ontario Nurses' Association 2004 CanLII 55275 (ON LA) (Slotnick): Grand River Hospital Corporation and Ontario Nurses' Association (August 22, 2007) unreported (Burkett).

Decision

With respect to the task of interpreting the wording of Article 9.07(B), the following two broad principles of collective agreement interpretation are relied upon: (1) the parties are assumed to have intended what they have said and that the meaning of the collective agreement is to be sought in its express provisions; and (2) the words used are to be read in their grammatical and ordinary sense, with due consideration to the provisions of the collective agreement as a whole and relevant factual context.

In terms of discerning the parties' intent with respect to the wording of Article 9.07(B), it is important to "not lose sight of the forest for the trees". That is, it must be recognized that overall, the purpose of the provision relates to a newly hired employee potentially receiving credit for the employee's recent and related experience, with

respect to his/her placement on the relevant classification wage grid. Further to this point, the title of the provision Portability of Service underscores that the theme of the provision relates to the possible ability of the newly hired employee being able to "transfer" his/her service (recent and related experience). Accordingly, the focus of the provision relates to the experience that the newly hired employee possesses at the time of hiring.

Further to the above, the clear wording of the first sentence of Article 9.07(B) sets the table with respect to the application of the provision by establishing: (1) that the consideration of recent and related experience is only relevant at the time of hiring; (2) that it only applies to employees "with recent and related experience"; as it is the recent and related experience that the newly hired employee possesses at the time of hiring that is going to be assessed by the Employer; and (3) the process contemplates that the employee will set out his/her pre-existing recent and related experience on a form provided by the Employer. The second sentence of Article 9.07(B) refers to the employee supplying information to verify the claimed "previous related experience"; thereby, reinforcing the notion that it is only the previously held experience of the employee that is relevant for the purposes of the application of the provision. That point is further accentuated by the third sentence where it is stipulated that the Employer shall then evaluate such experience during the employee's probationary period. Again, the experience referenced by the term "such" is clearly the recent and related experience of the employee as of the time of hiring.

The fourth sentence of Article 9.07(B), which contains the key wording in dispute, contains three elements: First, it is confirmed the decision as to the relevancy of "such

experience" (as in the recent and related experience of the employee as of the time of hiring) rests in the hands of the Employer. Secondly, that sentence goes on to stipulate that the valuation of any such relevant experience will be on the basis "the employee shall be slotted in that step of the wage progression consistent with one (1) year's service for every one (1) year of related experience in the classification". It is clear, therefore, that to be granted an adjustment for the purposes of the wage grid, the employee must have at least one (1) year of related experience. Finally, the sentence concludes that the slotting in on the wage grid shall take place "upon completion of the employee's probationary period".

Contrary to the submissions of the Union, it is our view that the reference to "upon completion of the employee's probationary period" simply sets out a timeframe by which the Employer has to assess the newly hired employee's previous related experience, and if it is determined there is sufficient related experience, the slotting in of the employee on the wage grid will take place when this period is completed.

In more straightforward terms, what is being solely assessed and valued under Article 9.07(B) is the employee's related experience at the time of hiring. Further to this point, there is no language in Article 9.07(B) suggesting that an employee's service with the Employer during the probationary period is to be viewed as constituting recent and related experience for the purposes of Article 9.07(B). The Union's argument may have had a tad bit more cogency if the calculation for being credited one (1) year of service simply referred to the employee at the end of his/her probationary period having amassed one (1) year of experience in the classification. The fact the calculation refers to at least "one (1) year of related experience" removes any doubt, in our view, that the

only experience being weighed under Article 9.07(B) is the experience the employee brings to the table at the time of hiring.

Moreover, as the Employer suggested, the Union's interpretation of including an employee's service during the probationary period for the calculation of recent and related experience under Article 9.07(B) could potentially lead to anomalous results. Under Article 9.01, the probationary period of an employee may be, with the written agreement of the Union, extended for an unspecified period. The result in these circumstances could lead to the scenario wherein the employee's calculation of recent and related experience under Article 9.07(B) could be primarily related to his/her current service with the Employer. In relation to this point, consider the scenario of two RPNs hired on the same date with both of them being credited with prior recent and related experience equivalent of 1200 hours. If employee A successfully completes his/her probationary period, he/she would not be entitled to any credit for his/her prior related experience. If, however, employee B had his/her probationary period extended by 200 hours he/she would be entitled at the end of his/her probationary period, according to the Union's interpretation, to be granted a year of service for the purposes of being slotted in on the wage grid. In our view, the parties would never have intended such a result.

Finally, it is noted that the outlined interpretation of Article 9.07(B) does not in any way impact upon the relevancy of the probationary hours worked by an employee for wage progression purposes under Article 20.05. Those hours do count for the purposes of Article 20.05 but are not relevant for the purposes of Article 9.07(B), as

those hours do not relate to the recent and related experience of a newly hired employee.

In light of the above reasoning, the grievance is, hereby, dismissed.

This Award is issued in Mississauga this 18th day of November 2020.

_____
Brian Sheehan-Chair

"I concur"
_____
Brian O'Byrne-Employer Nominee

"dissent attached"
_____
Joe Herbert-Union Nominee

DISSENT

With respect, the Chair's decision fails to sensibly interpret the plain wording of the collective agreement. Assume a neutral example, where a newly hired employee arrives with the hourly equivalent of almost two years' service, so that she will easily pass the threshold for the two year point on the wage grid once she is credited with the 450 hours that are credited upon completion of the probationary period. She will obviously be credited at that point (i.e. upon completion of the probationary period) with service deriving from two sources. First, she will be credited with the amount of related prior service that she brought to the employment relationship, and that will indisputably advance her on the wage grid. The point to which she is advanced however, *will also depend upon the service credited after completion of the probationary period*. That second source of service cannot be simply eliminated, as the result of the Chair's award would suggest. That would be a plain and obvious violation of the collective agreement. At the conclusion of the probationary period, she must be placed at the point on the wage grid which acknowledges not simply her prior related service as the Chair's award claims, *but which also acknowledges the 450 hours service she has now accumulated with the instant employer*. Otherwise, her 450 hours of service upon completion of probation is eliminated for the purpose of placement on the wage grid. With respect, the collective agreement allows for no other interpretation than crediting her with her complete service. There is no issue of 'double counting', as employer counsel suggests. Instead, the Chair's award fails to count the employee's hours with the employer that are credited upon completion of the probationary period, for determining her position on the wage grid. This is a straightforward, unsupportable, offense to the plain wording of the collective agreement.

Had there been any ambiguity to the agreement, I would have relied upon the long established line of arbitral authority which concludes that ambiguities related to length of service are properly resolved in favour of the interpretation which bestows credit upon an employee's length of service (see, for example, *Sault Ste. Marie Roman Catholic Separate School Board*, 21 LAC (3d) 107 (P. Picher), and *Ryerson Polytechnical Institute*, 27 LAC (2d) 378 (R. MacDowell).

But in this case, there is no ambiguity so that reliance on that authority, while available to the union, is unnecessary.

Dated this 13th day of November, 2020.

Joe Herbert
Union Nominee