

IN THE MATTER OF AN ARBITRATION

BETWEEN:

Winchester District Hospital

and

CUPE, Local 3000

(Grievance #2-2016)

Before: William Kaplan, Chair
Kathy Butler Malette, Employer Nominee
Joe Herbert, Union Nominee

Appearances

For the Employer: André Champagne
Emond Harnden
Barristers & Solicitors

For the Union: Peter Engelmann
Goldblatt Partners
Barristers & Solicitors

The case proceeded to a hearing on May 21, 2019 and September 18 and October 13, 2020. Closing argument was by written submissions. The Board met in Executive Session by Zoom on December 4, 2020.

Introduction

This August 9, 2016 policy grievance concerns the alleged violation of two articles of the collective agreement: 9.05 and 9.08. Under Article 9.05, the Hospital is required to post a vacant position within thirty days of it becoming vacant. Article 9.08 requires the Hospital to provide five-months notice of the proposed elimination of a position and to strike a Redeployment Committee to consider alternatives to that elimination. The case proceeded to a hearing on May 21, 2019 and September 18 and October 13, 2020. Final argument was by written submissions. The Board met in Executive Session on December 4, 2020.

The Positions of the Parties Stated in Brief

The union's position can be summarily stated. On July 26, 2016, a full-time RPN named Virginia Doody retired from the Complex Continuing Care Unit (CCCU), after having announced her intention to do so several weeks earlier. Her position was not posted or filled. The union asserts that the Hospital then required other union members – RPNs – along with an RN represented by ONA – to perform Ms. Doody's duties and responsibilities as the work of the position clearly continued during the five-month notice period. What the Hospital should have done instead was post and fill Ms. Doody's full-time position for five months while the Redeployment Committee considered alternatives to that position's elimination. In these circumstances, the union asserts that both Articles 9.05 and 9.08 were breached. Making matters worse and exacerbating the situation, in the union's view, the Redeployment Committee was deprived of the opportunity to search for and

consider alternatives. The union did not take issue with the Hospital's right to eliminate a position, provided the collective agreement was followed. The union also submits that the grievance was filed under the correct collective agreement – the full-time agreement – because the Hospital failed to post a position in the full-time bargaining unit – a matter that went to the integrity of the bargaining unit. The union asked that its grievance be allowed and an appropriate remedy issued.

For its part, the Hospital rejected the assertion that any provision of the collective agreement had been breached. All that happened here, in the Hospital's opinion, was that a vacant position – the *status quo* – was not filled because there was no work to be performed. In addition, the Hospital takes the position that remedial relief is limited as the union grieved under the full-time collective agreement: there were no grievances from anyone in the part-time bargaining unit who might have applied for a temporary full-time position, and, accordingly, no losses suffered by anyone, assuming for the sake of argument that there was a collective agreement breach. In the Hospital's view, the grievance should be dismissed, or at the very best, the remedy limited to a declaration.

The Evidence

The CCCU is a 12-bed unit that provides for patients requiring sub-acute and rehabilitative support and care. When Ms. Doody announced her retirement, and retired, occupancy was on the decline, and had been for years. Full-time RN positions, except for a single RN team leader, had been earlier reduced and patient

acuity began to decline as the role of the CCCU was repurposed (as was described in detail in the evidence). On August 4, 2016, the Hospital met with employees and advised that it would not be filling Ms. Doody's position for the five-month notice period because of the declining occupancy numbers. A formal letter to this effect was also sent in which the Hospital memorialized its decision to eliminate the position. The Hospital asserts that a meeting of redeployment committee was held on August 9th, at which time the Hospital again pointed to the declining occupancy numbers that informed management's decision to eliminate the position.

About this, there is little doubt: the evidence shows that at the time of Ms. Doody's retirement, CCCU occupancy had fluctuated between 40% and 80% since early 2013. Average occupancy was only 60%. Bed usage ranged from 2 to 11, out of the 12 on the unit. Average bed occupancy, again when Ms. Doody retired, was around 6. In the three years prior to Ms. Doody's retirement, according to the evidence of the CCCU's clinical manager at the time, the unit had not once operated at 100% capacity. It was extremely rare for an RPN to ever carry a full patient load, both before and after Ms. Doody retired. On numerous occasions, the shifts of part-time union members were cancelled, or RPNs sent home early, because there was no work to be done, or RPNs were assigned elsewhere in the Hospital.

Union Argument

In the union's submission, the collective agreement had been breached. Quite clearly, a Redeployment Committee had not been established within two weeks as

required by the collective agreement. The union took specific issue with the Hospital's claim that a Redeployment Committee had been struck, that it met, or had conducted the kind of review of alternatives to elimination anticipated and set out in the collective agreement. In the union's view, the grievance succeeded on that basis. It also succeeded, the union argued, as a result of Article 9.08A(a). The five months of notice meant something, and what it meant was the continuation of the *status quo* while the Redeployment Committee went about its work: identifying possible alternatives to the proposed elimination of the position. During the five-month notice period, the *status quo* had to be maintained, and that meant the position had to be maintained. After all, the union noted, the elimination of the position was, by the very words of the collective agreement, "proposed," not a *fait accompli*.

The Hospital could not, the union argued, avoid its collective agreement obligations by attempting to opportunistically take advantage of a retirement and claim that this was the *status quo* that had to be maintained, especially where doing so increased the workload of other union members and resulted in the RN taking on RPN work, which it asserted had happened here. If this interpretation was accepted it would enable a Hospital to do a complete end run around the notice period; to render it moot and meaningless. This was, the union argued, completely contrary to the weight of authorities, which it carefully reviewed.

Turning to the facts, the union pointed out that after Ms. Doody retired, the evidence that it called established that her position continued with part-time RPNs being called in and the RN taking on significantly more duties and responsibilities. The RPNs and the RN were doing a large part of the work that Ms. Doody had previously performed. Another result of not posting Ms. Doody's position was that the other RPNs on the unit began to be seriously over-worked and had, for example, to skip breaks when the CCCU was busy. The fact was that the volume of work stayed the same – it even slightly increased – as could be seen by total RPN hours worked in the months before and after Ms. Doody retired, and even more so when the RN's additional work was taken into account. In the five months prior to Ms. Doody's retirement, there were an average of 1245 RPN hours per month. After Ms. Doody retired, the average increased to 1261, numerically illustrating the fact that her position was ongoing. This work was the *status quo* that had to be maintained.

For all of these reasons and others, the union asked that the grievance be allowed. The union sought a declaration of breach specifying that the vacated position should have been posted and filled for the duration of the notice period. It also sought union dues, compensation to the union arising from the loss of the opportunity to engage in meaningful consultation at the Redeployment Committee, and an order requiring that affected members be made whole. The union asked that the Board remain seized to deal with any issues arising from the implementation of its award.

Employer Argument

In the Hospital's submission, management was fully within its rights to eliminate Ms. Doody's position upon her retirement and it submitted that in doing so the collective agreement was not breached. As earlier noted, the Hospital also observed that the union filed the grievance under the full-time collective agreement instead of the part-time collective agreement, and this disentitled it to any relief for individual members. Quite clearly, no full-time union member had suffered any loss of any kind. Therefore, the Hospital was of the view that in the unlikely circumstances that the Board found a breach, the only appropriate remedy would be a declaration to that effect.

The Hospital made reference to numerous authorities standing for the proposition that Article 9.08 required maintenance of the *status quo*, and in this case the *status quo* was a vacated position for which there was no work to be assigned. Ms. Doody's position was understandably eliminated. Simply put, the Hospital argued, it made no sense in this case, and as concluded in other cases the Hospital referred to, to require the Hospital to post a job where there was no work to do and where no employees were affected. Moreover, the authorities also stood for the proposition that under the central agreement, Hospitals are not required to post for work that would not, but for the posting, need to be performed. This explained why the job was not posted: the position was no longer required; it would have been "make work." Had the Redeployment Committee come up with an alternative to position elimination, the Hospital could have withdrawn its notice (although the Hospital

acknowledged that “there may not have been a formal meeting of the redeployment committee”).

Turning to the facts, the Hospital pointed out that there was no basis to maintain a full complement of staff at the CCCU. Indeed, by eliminating Ms. Doody’s position, and by the remaining RPNs, both full- and part-time, voting on a new schedule, the job security of all of the part-time RPNs in the unit was demonstrably improved. As was indicated in an email from Naomi Thick, the Clinical Manager at the time responsible for the CCCU, “the good news being that by utilizing this opportunity no one will be losing their job” as a result of the declining occupancy, and for other reasons. The Hospital pointed to its evidence that by not filling the position, part-time RPNs achieved an otherwise unachievable guarantee of hours. In other words, more part-time RPNs got more hours while short shifts were avoided.

For all of these reasons, the Hospital took the position it had fully complied with the collective agreement. It was entitled to eliminate the position, and had ample rationale for doing so. It gave notice of elimination to the union. A meeting of the Redeployment Committee was held. The *status quo* was maintained during the notice period. There was no work to be done during the notice period. No union member was adversely affected; no one was laid off, and no member of the full-time unit – and the grievance was filed under that collective agreement – had lost any employment opportunity. As this was a policy grievance filed under the full-time collective agreement that precluded any individual relief for employees in the part-

time bargaining unit. It was also factually and legally significant that a not a single member of the part-time bargaining unit had filed a grievance alleging that they had been improperly denied a five-month full-time assignment. At the end of the day, there was no collective agreement breach. The Hospital asked that the grievance be dismissed.

Decision

Having carefully considered the submissions of the parties, we conclude first of all that we have jurisdiction under the full-time collective agreement and that it has been breached. A full-time position was lost and the integrity of the bargaining unit affected. The Redeployment Committee should have been formed within two weeks of notice of the proposed elimination of Ms. Doody's position to consider alternatives to that elimination. We conclude that it was not convened as is required: a single meeting between the union and the employer cannot be re-characterized, after the fact, as a meeting of the Redeployment Committee.

It is also our view that the five months notice is there for a reason, so the Redeployment Committee can look for alternatives. If the Hospital could simply eliminate a position without providing the five months notice, what would be the point of a Redeployment Committee to consider alternatives to the proposed elimination of a position? Why would the parties have referred to a "proposed" elimination? The answer to both questions is that it is generally anticipated in both instances that the position will be maintained during the notice period (subject to

the comments below). The language reflects a shared agreement that the Hospital notify the union that it was *proposing* to eliminate a position and that the Redeployment Committee will then be activated to look for alternatives. This is the *status quo* to be maintained as this process takes place. Notably, the collective agreement confers highly prescriptive responsibilities on the Redeployment Committee.

The *status quo* is not, and cannot be, a vacancy occasioned by a retirement. The *status quo* is a position that the Hospital proposes to eliminate. Put another way, the *status quo* in this case is not some long-standing vacancy; rather, it is a position that existed where the incumbent happened to retire. The *status quo* was a position, not a vacancy.

Clearly, the Hospital has the right to eliminate a position, and it had an understandable rationale for wanting to do so. But the collective agreement sets out a process that must be first followed first. And it was not, and so on this basis, as elaborated below, that the grievance is allowed.

Before turning to remedy, however, some additional observations are in order about the facts – the context that must be considered so that an appropriate award can be fashioned. By that we are referring to the unique factual matrix and the contested question whether there was any work to be performed during the notice period, although we accept the union’s evidence that if a five-month temporary full-position

had been posted it was more likely than not that a part-time RPN would have applied for it. Stated somewhat simply, if we were to find that the work of the vacation position continued during the notice period, then we would conclude that the Hospital should have posted it and that any remedy would need to redress this breach.

Obviously one corollary of this is that no arbitration board would sanction pay for work that would otherwise not be required and compel a Hospital to post and fill an unnecessary full-time position for the five-month notice period; certainly not in circumstances where there is no identifiable affected employee. Another corollary of this is that no arbitration board would require a Hospital to pay damages to an imaginary person who was identified, or came forward, years after the fact for work that never needed to be performed; a person who was covered by a different collective agreement and who had not grieved when she or he had an opportunity to do so, again where the work was not required.

While the evidence is equivocal, on balance, we conclude that there was *no full-time position* to fill, no full-time work to perform; the position was no longer needed.

What evidence we have does not support the factual conclusion that RPNs, and the RN, took on the full range of Ms. Doody's full duties. The RN did some bedside CCCU work before Ms. Doody retired, and he did some after (a matter somewhat complicated by the scheduling changes). The increase of only 16 hours a month in total RPN hours pointed to by the union certainly does not establish the

continuation of this full-time position especially when the total does not account for cancelled and short shifts. In fact, the inference that we draw is that this evidence points to the exact opposite of what the union suggests: the position was no longer required. In addition, it is undisputed that it was extremely rare for RPNs on the unit, before and after Ms. Doody's retirement, to carry a full patient load. While CCCU occupancy remained steady, what that meant was that the unit was continuing to operate at well below capacity. It is factually important to note that no additional staff was hired because of Ms. Doody's retirement.

All of this goes to the point that there was no excess of work that had to be assigned arising from her departure. In addition, and notwithstanding the union's submissions on excessive workload, not once over the notice period did any RPN record HWL: Heavy Work Load. The absence of any such notations, along with all of the other evidence, supports the conclusion, which we reach, that the full-time hours of the position, the bundle of duties as this is sometimes referred to in the authorities, was gone and the Hospital was not required to hire someone to fill a position for which there was no need. We do not find persuasive the submission that since the CCCU was operating below capacity prior to Ms. Doody's retirement means that we should require the Hospital to have hired someone to perform duties that were not required before the retirement, or after.

Nevertheless, there was still a collective agreement breach: the failure to convene the Redeployment Committee, and we so declare. The union was deprived of the

opportunity to engage in meaningful discussions and it is our responsibility to fashion an appropriate remedy. In this case, that remedy extends beyond declaratory relief. That means damages for the loss of a meaningful opportunity to consult, a remedy that has been granted in other cases, including one brought to our attention. We adopt and endorse Arbitrator Devlin’s finding in *Kingston General Hospital and CUPE 112 LAC* (4th) 104, a comparable case:

...the Union is entitled to some compensation for the loss of an opportunity to engage in consultation with respect to the elimination of the positions in issue (para. 24).

Arbitrator Devlin remitted the quantum to the parties, and we do likewise.

Conclusion

Accordingly, and for the foregoing reasons, the grievance is allowed and the issue of compensation remitted to the parties with the Board remaining seized should they be unable to agree.

DATED at Toronto this 9th day of December 2020.

“William Kaplan”

William Kaplan, Chair

I dissent. Dissent attached.

Kathy Butler Malette, Employer Nominee

I agree. Addendum attached.

Joe Herbert, Union Nominee

DISSENT OF EMPLOYER NOMINEE

I respectfully dissent from the majority in one regard: the awarding of damages to the Union for the failure of the employer to comply with the provisions of Article 9.08 of the full-time collective agreement as it pertains to the convening of the Redeployment Committee in accordance with collective agreement provision. In my view, in light of the circumstances of this case, a declaratory award would be sufficient.

As the majority pointed out in the award:

- 1) the work of the vacant position was not required due to the very low occupancy of the unit over a number of years;
- 2) after the retirement of a full-time RPN in the unit, there was no excess of work assigned to staff in the unit arising from the resulting vacancy;
- 3) there was no identifiable full-time employee or employees affected by the non-posting of the vacant position;
- 4) no employees covered by either the part-time or full-time collective agreements grieved the non-posting of the vacant position when they would have had an opportunity to do so.

The Board agreed with the facts in this case: there was no full-time work to perform and thus no full-time position to fill as the position was no longer needed.

In these circumstances, an award of damages is unwarranted. While I understand the need to preserve the value of the role played by the Redeployment Committee, an award of damages serves no useful purpose in these circumstances as the 'loss of opportunity' is unascertainable. From a labour relations policy perspective, a declaratory award would have been a sufficient deterrent. This case is clearly distinguishable from the Kingston General Hospital and CUPE (Devlin) award. For these reasons, I must dissent.

Respectfully submitted,

December 9, 2010

Kathryn Butler Malette, Employer Nominee

ADDENDUM

Without necessarily adopting all of statements and conclusions in the award, I agree with the findings that the *status quo* to be preserved was a position and not a vacancy, and that the process contemplated by the collective agreement on eliminating a position was not followed. Thus, damages are appropriate.

Dated at Ottawa, this 9th day of December, 2020.

Joe Herbert
Union Nominee