

IN THE MATTER OF AN ARBITRATION

B e t w e e n:

STERIPRO CANADA LP

(“SteriPro” or the “Company”)

- and -

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 5180.1

(the “Union”)

and in the matter of grievance THP-2016-05 re elimination of positions/layoffs

Russell Goodfellow – Sole Arbitrator

APPEARANCES FOR THE UNION:

Mark Wright, counsel
Joe Ricci
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APPEARANCES FOR THE COMPANY:

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Hearings held on June 28, 2016, and February 13 and March 17, 2017.

AWARD

The issue in this grievance is whether the employer, SteriPro Canada LP, was required to apply Article 9.08(A) of the collective agreement and related provisions in circumstances involving the elimination of all of the bargaining unit work and all of the bargaining unit jobs.

Article 9.08(A) provides:

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.

SteriPro provides sterile processing services to hospitals. One of the hospitals to which it provided such services was Trillium Health Partners. Trillium is an amalgamation of the former Credit Valley Hospital and Trillium Health Centre. Prior to amalgamation the hospitals had subcontracted their sterile processing work to SteriPro.

Prior to the subcontracts to SteriPro, employees performing the work at the hospitals were represented by the Union in two broader-based bargaining units with separate collective agreements. The terms of the agreements included those of the central collective agreement between the Participating Hospitals and CUPE.

One of the terms of the central agreement requires hospitals that plan to subcontract bargaining unit work that will lead to layoffs to require the subcontractor to “employ the employees thus displaced from the hospital” and “to stand, with respect to that work, in the place of the hospital for the purposes of the hospital’s collective agreement with the Union”. The hospitals and SteriPro did that and in that way SteriPro became bound to collective agreements with the Union for bargaining units that consisted *exclusively* of “employees employed by SteriPro performing sterilization or related services on behalf of Trillium Health Partners”.

The subcontracting did not last. Towards the end of 2015, SteriPro and Trillium agreed that Trillium would take the work back in-house effective May 31, 2016. From that point forward all of the work performed in what was by then a combined bargaining of SteriPro employees performing work for Trillium would be gone. At the time, there were approximately 71 employees in the unit: 35 permanent full-time, 24 permanent part-time, six temporary full-time and six temporary part-time employees.

The Union submits that is all one needs to know to determine the issues in this case. The Union submits that as of December 31, 2015, which was five months in advance of the May 31, 2016, date on which all of the bargaining unit work and all of the bargaining unit jobs would be eliminated, SteriPro was required to apply Article 9.08(A) and related articles.

Article 9.08(A) requires the employer to give the Union five months written notice of the elimination of positions and *proposed* layoff of employees. The related articles, which are attached as an appendix to this award, require the employer, in advance of issuing any *actual notices of layoff*, to offer employees early retirement and, as necessary, voluntary exit options. The required amounts are two weeks pay per year of service to a maximum of 52 weeks pay. If, thereafter, layoff notices are still required, recipients must be given the following options: accept the layoff and go on a recall list; receive a separation allowance of two weeks pay per year of service to a maximum of 16 weeks pay; retire, as above; or bump a junior employee.

SteriPro did not apply these provisions. It submits that it was not required to because, as of December 31, 2015, no positions were being eliminated and there was no need for any layoffs or proposed layoffs. Until the subcontracts came to an end SteriPro had a continuing need for

employees to perform the Trillium work, afterwards there was the possibility of at least some other work outside of the bargaining unit and, in the meantime, a great many employees resigned to take jobs at Trillium. Hence, SteriPro submits, there was *never* a need for notices of elimination of positions or proposed or actual layoffs.

The first issue to be decided is whether, by not later than December 31, 2015, SteriPro was required by Article 9.08(A)(a)(i) to provide the Union with notice of the elimination of all of the bargaining unit positions.

In my view, the answer is clearly yes. Article 9.08(A)(a) refers to the “elimination of a position within the bargaining unit”. A “position” is a collection of work organized into a job. It has, amongst other things, duties, hours of work and a work location. It is something into which employees are hired or into which they post in the exercise of their seniority rights. It is the thing from which, if the work goes away, they will be laid off. Here the work was indeed going away and so too, necessarily, were the positions. It cannot be said, as the Company attempted to do, that the positions would continue to exist as vacancies. To take that approach, at least in the circumstances of this case, in which all of the work that formed the basis for the positions was being eliminated permanently or, at minimum, indefinitely, would be to render the provision meaningless.

The Company also argued that it had “substantially complied” with the provision through the information described below. I disagree. Even assuming an argument of “substantial compliance” were available, it cannot apply in a situation in which, as we shall see, the Company was being careful *not* to treat the events as engaging *any* of the relevant collective agreement obligations. Article 9.08(A)(a) is not just an information-sharing provision. It requires the employer to provide the specific notices and take the specific steps set out – notices and steps that the evidence establishes SteriPro specifically decided not to take.

I find and declare that SteriPro breached the collective agreement by failing to give the Union notice of the elimination of all of the bargaining unit positions effective December 31, 2015.

I now turn to what was clearly the central issue in this case: whether, along with the notice of elimination of positions, SteriPro was required to provide notice of “proposed layoff” of all of the bargaining unit members and the rights associated therewith not later than December 31, 2015. I will address this issue after setting out certain additional facts and observations.

On December 30, 2015, five months and one day in advance of the May 31, 2016, termination date, SteriPro advised the Union by telephone and email that the subcontracts would end as of that date and the work would be transferred back to Trillium. The Company indicated that it would provide employees with “notice of this” the next day and that meetings would be held to answer questions. Stating that it understood the “importance of working with [the Union] on the details of this transition to allow it to happen smoothly for employees and in ensuring that the terms of the Collective Agreement(s) are being followed”, the Company asked the Union to “consider” this information as something that it called “notice of the transfer of work under the terms of the collective agreement”. There is no such thing as “notice of the transfer of work” under the terms of the collective agreement. There are only the notices described above, a fact of which SteriPro was fully aware.

At the time, SteriPro’s labour relations were being handled by an experienced labour relations consultant, who gave evidence in this case. The evidence established that the consultant was completely familiar with Article 9.08 and related provisions. She testified that the December 30, 2015 email was *not* intended as notification under Article 9.08 because, at that point, she did not have “any information from Trillium as to what would be happening with the employees” and because “SteriPro continued to need employees to do the work for them”. She also stated that she did not agree with a description given by the Union to the setting up of a possible meeting at the time as a “Redeployment Committee” meeting. The consultant stated that was not the Company’s intention.

It will be recalled that SteriPro acquired the bargaining units and collective agreement as a condition of acquiring the work, a transaction that was not without its own labour relations complications. Although, as noted above, the two pre-amalgamated hospitals complied with the contracting out provisions, they also took the position that they were not required to apply Article 9.08 and the related articles because the employees could be “transferred” to SteriPro

with their work. The Union disagreed and the matters proceeded to arbitration, with SteriPro intervening in the second case. In both cases the hospitals' arguments were rejected and separate applications for judicial review, heard together, were dismissed: see *The Credit Valley Hospital and CUPE, Local 3252*, dated October 21, 2011 (Shime), *Trillium Health Centre and CUPE*, dated February 16, 2012 (Kaplan), and *The Credit Valley Hospital and CUPE, Local 3252 and Trillium Health Centre and CUPE, Local 4191*, Ct. file nos. 521/11 and 128/12, dated December 19, 2012 (Ont. Div. Ct.). Thus, prior to the events in question, SteriPro had gained an intimate familiarity with the operation of all of the relevant provisions and in closely related circumstances.

Returning to the narrative, on January 6, 2016, SteriPro's President and CEO wrote to the Union reiterating the contents of the earlier email and asking that it to "consider this letter as *formal* notice of the transfer of work" (my emphasis). Again, I repeat, there is no such thing as "notice of the transfer of work", formal or otherwise. The letter further indicated that SteriPro "still required" a "skilled and experienced workforce" as its "business continues to grow in other areas" and that it was "the intent of SteriPro to continue to employ staff at its Trillium Health Partners locations wishing to remain with the company". The latter reference was explained by the consultant as being to the continued performance of the Trillium work over the ensuing months. A similar communication was also sent to employees.

In examination-in-chief, the consultant was asked how employees would be able to move from the bargaining unit to *other* work with the Company. She responded, "*If* there was work elsewhere in the facility that was non-union, they could be moved to it if they wished; *if* there was work in another bargaining unit, they could apply for the positions" (my emphasis). The latter reference was to two other SteriPro bargaining units represented by another union servicing other hospital clients. The consultant repeated, however, that this was not intended as notice under Article 9.08(A).

The January 6, 2016, communication also included an "FAQ" document to employees, which was dated December 31, 2015, the last day before the five month lead up to the termination of the work. In the FAQ document, SteriPro stated that it viewed as important that its employees be given "as much notice as possible of this *transition*" and that "by telling you now provides you

with 5 months notice as per the collective agreements *should there be* a reduction in staffing as a result of the *change*” (my emphasis). Thus, while once again acting in contemplation of Article 9.08, SteriPro was being careful not to acknowledge that it actually applied. Not to put too fine a point on it, SteriPro appeared to be following a strategy of “hedging its bets” and/or “taking a calculated risk” that the provisions would either not be found to apply or, if they applied, that it could perhaps later argue that it had more or less complied with them or that their effects had been mitigated by subsequent events.

On February 12, 2016, the Union grieved that the Company was not complying with Article 9.08 and related articles. On March 3, 2016, the Company responded to the grievance as follows, “As there is currently work available for employees, in particular temporary assignments into which employees in the bargaining unit can be placed under the terms of Article 9.06, the Company is not in a position to provide options at this time”. At the risk of being uncharitable, this is, at best, a non-answer; at worst it is a legal *non-sequitar*.

Article 9.06, which is also included in the Appendix to this award, is entitled “Transfer and Seniority Outside the Bargaining Unit”. It prohibits the employer from transferring employees to positions outside of the bargaining unit without the employee’s consent, except for up to six months, which are referred to as “temporary assignments”, and establishes related rules, including the employee’s continued inclusion in the bargaining unit. When asked how and when the Company contemplated this provision would apply, the consultant stated, “when there was no longer any work available in the bargaining unit, we could move employees on a temporary basis into those positions”, meaning into any possible non-bargaining unit positions. I will return to this notion below.

Finally, on February 29, March 3 and March 23, 2016, SteriPro delivered the following memorandum to employees at the various Trillium work sites:

To: Permanent Full-Time/Permanent Part-Time Employees Represented
by CUPE
Fr: Vikram Dhadha, COO
RE: Work at SteriPro Canada

As you are aware, the work contracted out to SteriPro Canada by THP is being handed back to THP in stages over the next couple of months.

We would like to advise you that at this time there is currently work available at SteriPro Canada. Please note that where the available work is outside the bargaining unit, under the terms of Article 9.06(a), the company may move an employee into a temporary assignment outside the bargaining unit for a period of up to six months. We would also like to remind you that where there is available work in the company:

- As per SteriPro policy, full time SteriPro employees are not permitted to work full-time hours for another employer;
- should you have a part-time position with another employer, you are reminded of your obligations to meet the requirements for availability and expectations for carrying out your duties with SteriPro.

Specific to this matter, and not precluding the application of other policies and expectations, SteriPro employees are expected:

- to make every effort to attend work as scheduled and to do so capable of performing their duties in a safe and satisfactory manner; and
- in carrying out their duties and responsibilities, to conduct themselves both on and off the job in such a way as to not seriously prejudice SteriPro's interests or reputation.

By working two full-time positions, or hours that amount to nearly two full-time positions, we do not believe that employees will be able to work in a manner that is safe or productive so as to meet the standards and expectation of the position. Further, we believe that the interest or reputation of the company will be prejudiced.

You are required to advise your supervisor in writing by no later than March 11th as to what your decision will be for ongoing employment with the company by completing the attached form.

Should you have any questions regarding the above, please do not hesitate to contact your supervisor or manager.

Work At SteriPro Canada

I _____ (name)

- have accepted a Full-Time position with THP or elsewhere and will be resigning my position with SteriPro as of _____(date).
- have accepted a Part-Time position with THP or elsewhere and will be resigning my position with SteriPro as of _____(date) as I will not be able to meet my obligations and commitments for hours of work.
- have accepted a Full-Time position with THP or elsewhere and wish to continue to be employed with SteriPro as a Part-Time employee under the terms below.
- have accepted a Part-Time position with THP or elsewhere and wish to continue to be employed with SteriPro as a Part-time employee under the terms below.

- o have not accepted a position elsewhere and wish to accept a vacant position within the company and remain employed by the company
- o I am resigning from SteriPro as of _____(date).

Specific to this matter, and not precluding the application of other policies and expectations, I understand that should I choose to remain an employee of SteriPro, I am expected:

- to make every effort to attend work as scheduled and to do so capable of performing their duties in a safe and satisfactory manner; and
- in carrying out my duties and responsibilities, to conduct myself both on and off the job in such a way as to not seriously prejudice SteriPro's interests or reputation. _____(Initials of employee).

I understand that I am required to provide my decision to the company by no later than March 11, 2016. _____(Initials of employee)
 I acknowledge that the above is my decision and made without coercion or influence by others.

Signed the ____ day of _____ 2016 at _____ ON.

 (Employee's Signature)

I, _____ acknowledge receipt of the Option selected by the above employee on _____(date).

 (SteriPro Canada Signature)

The consultant explained that, at the time, Trillium, to the knowledge of SteriPro, was interviewing the SteriPro employees for positions at Trillium and that many had already accepted offers of full-time employment.

Also at this time, the Company was in contact with the Union, advising it that, “As you know staff have not yet been provided with their options. This is because the company feels there will be work, at least for a while under Article 9.06 and are not in a position to provide options”. The consultant testified that the word “options”, as used here and in the response to the grievance, meant the collective agreement layoff rights.

There is much to be said about the March 3, 2016, communication. Union counsel described it, variously, as “manipulative”, “threatening”, “bullying” and “mean-spirited”. I might describe

it as purposeful. (And, I would add, of dubious legality. Recall that these are employees that are represented by a Union with a collective agreement that deals with such matters.) The principal purpose appears to be the alleged “requirement” for employees to “tell their supervisor in writing by no later than March 11th as to what [their] decision[s] will be for ongoing employment with the company by completing the attached form”.

As I read the attached form, these are the options: Option 1 – I resign; Option 2 – I resign; Options 3 & 4 – I *wish* to stay with the Company, *part-time* (with no details, except for the “reminders” set out at the bottom of the page); Option 5 – I *wish* to accept a *vacant* position with the Company (again with no details); Option 6 – I resign.

In due course, 49 of the 71 employees resigned, all of whom, I was told, to work at Trillium. As for the remaining 22 or so employees, *two* were employed at SteriPro as of the first day of hearing. What happened to the others was a matter the parties agreed not to address at this time or, perhaps, at all, pending the resolution of the present issues.

Before turning to the parties’ arguments on the layoff question, a few additional observations might usefully be made, all, as it were, in SteriPro’s “defence”.

First, given that the 49 employees that resigned took employment at Trillium, under a different collective agreement but with the central hospital terms, there is a very good chance that most if not all would not have been “out of pocket”, at least in terms of wages, by the events. (They would not, however, have any collective agreement entitlement to carry their SteriPro seniority with them to Trillium.) On that basis, Company counsel submitted that to find that the disputed provisions applied would generate nothing but a “windfall” to the employees.

Second, *some* of the SteriPro employees (although, as I understand it, very few in number) came over from the predecessor hospitals with, at least as a result of the prior arbitrations, the benefit of the same set of collective agreement rights. Thus, were the grievance to succeed, those employees would seem to be in the position of receiving those benefits “coming and going”.

Third, upon acquiring the subcontracts, SteriPro trained the employees in the work. These were skills that the employees could then take with them to Trillium.

Fourth, during the “transition” period, SteriPro was required to fulfill its contractual obligations to Trillium and, given the nature of the work, to the highest possible standards. In order to do so, Company counsel pointed out, SteriPro *did* need to know which employees would be continuing to work for it, which would not, and that those that would could do so competently. This was the purpose attributed by the Company to the March 3, 2016, communication

Fifth, the collective agreement is not one that SteriPro had negotiated; it is one that it had been required to take on as a condition of acquiring the work.

Sixth, it was not even four years from inception that the subcontracts came to an end.

In all of the circumstances, one can well understand how “vexing” it *might* have been for SteriPro to consider that it might now be required to comply with the collective agreement obligations in issue and how it *might* well have balked at the idea. Assuming that such economic contingencies had not been, or were unable to be, provided for at either the front end or back end of its dealings with Trillium, it is not difficult to imagine that SteriPro *might* have felt deeply troubled by the prospect. This, it must be said, is the counterpoint to Union counsel’s description of “what was really going on here” as SteriPro “struggling mightily not to have to pay the freight of the collective agreement”. One party’s freight is another party’s baggage.

The legal arguments were few and straightforward. SteriPro submits that it was not required to provide notice of proposed layoffs because there were none. And the reason there were none is because it is a fundamental right of management to determine whether *and when* there is a need for layoffs and, here, as of December 31, 2015, there was no such need and no such determination. SteriPro continued to require employees to perform Trillium work prior to the termination of the subcontracts and there was the possibility of some other work outside of the bargaining unit thereafter. Most importantly, as it happened, over the course of the succeeding months, 49 employees left voluntarily to take jobs at Trillium. Thus, in the Company’s

submission, layoff notices were never required. To find otherwise, the Company submits, would be to infringe the fundamental right of management to determine the need for and timing of layoffs and to disregard the effects of the employee's own freedom of choice. It would be to substitute the arbitrator's judgment for that of the Company.

Further, lest there be any doubt, the Company submits that any possible need for notice of elimination of positions (on which, see above) does not determine whether notices of proposed or actual layoff are required. The collective agreement makes clear that these are different questions.

The Company refers to the following authorities: *City of Windsor and CUPE, Local 543*, (2013) CarswellOnt 15439, [2013] O.L.A.A. No. 431, 116 C.L.A.S. 353; *The Centre in the Square and IATSE, Local 357*, dated January 3, 2012 (Steinberg); *Air-Care Ltd. and USW*, [1976] 1 S.C.R. 2, 49 D.L.R. (3d) 467; *Hospital for Sick Children and CUPE, Local 2816*, (2002) CarswellOnt 9069, 69 C.L.A.S. 51 (Keller); *Kingston General Hospital and CUPE, Local 1974*, [2014] O.L.A.A. No. 224 (Goodfellow).

The Union submits that none of that is relevant. Yes, positions can be eliminated without the need for any layoffs or, in some cases, proposed layoffs. That is most evident from the words "if any", to which the Company pointed, in Article 9.08(A)(a)(ii). The Union submits, however, that these words exist in recognition of the possibility that there might be no "affected employees ... who will be laid off", because: (i) the position being eliminated is or was *vacant* (which, there is no dispute, still requires notice of elimination); (ii) steps are taken in the Redeployment Committee to avoid layoffs; or (iii) the employer is able to take advantage of the reassignment clause (Article 9.08(B)). None of that was the case here, however.

As to the Company's fundamental point, the Union does not disagree with its description of management's rights. However, it submits that such rights are subject to the balance of the agreement, including Article 9.08(A), that "layoff", at least under this agreement, does not mean "to the street", and that "layoff", at least under this agreement, is a bargaining unit concept, not an employer concept. Thus, on the facts of this case, when it was known to the Company on December 31, 2015, that all of the bargaining unit work and all of the bargaining unit jobs would

disappear five months hence, it was required to provide notice of the proposed layoff of all of the bargaining unit members along with all of the associated rights and obligations.

In addition to the two cases cited above concerning the effects of the initial contracting out to SteriPro, the Union referred to the following authorities: Brown and Beatty, *Canadian Labour Arbitration*, 4th Ed., para 7:2140; *Hamilton Health Sciences Corp and CUPE, Local 4800*, [2005] O.L.A.A. No. 305 (Burkett); *Scarborough Hospital and CUPE, Local 1487*, [2006] O.L.A.A. No. 42, 84 C.L.A.S. 99 (Burkett); and *St. Vincent de Paul Hospital and CUPE, Local 2491*, [2006] O.L.A.A. No. 615, 87 C.L.A.S. 229 (Devlin).

I agree with the Union. In my view, while it is generally true, as the Employer submits, that an employer is entitled to determine the need for and timing of any layoffs, all of that, on the facts of this case, was determined for it as of December 31, 2015. As of that date it was clear that in five months time, by a specific date, *all* of the work of the bargaining unit and *all* of the bargaining unit jobs would be eliminated. The Union's bargaining rights and collective agreement would continue but they would apply to no one and nothing. Employees' seniority rights, indeed all of their collective agreement rights, would be without practical value. In my view, that is all that was required to trigger the layoff provisions.

The layoff provisions of this agreement have been found to apply in a variety of situations in which employees have been separated from some or all of their work, including, in some cases, while still being employed in the bargaining unit: see *e.g. St. Vincent de Paul Hospital, supra* and *Scarborough Hospital, supra*. That is because of the fundamental seniority-based nature of the protections. Article 9.08 and the related provisions exist to protect employees' seniority interests in their bargaining unit jobs. As such, there can be no doubt that they apply when, owing to a lack of work in the bargaining unit, those bargaining unit jobs will be eliminated altogether.

Article 9.08(A) operates pro-actively or prospectively. It requires the employer, five-months in advance of the date on which there would otherwise be a need for *actual* layoffs, to provide notice of "a proposed layoff". The rights thus set in train – the financial obligations contained in the related articles that are the real issue here – apply not later than at that point. Such rights are

in no way affected by the need for bargaining unit work to be performed in the interim or by the potential for any non-bargaining unit work to be performed thereafter. The collective agreement protects employees' fundamental seniority-based interests in their bargaining unit positions.

The employer is not, therefore, entitled to follow a "wait and see" approach: one in which, during the five-month lead up to the practical elimination of the bargaining unit, it can await, not to say, as the Union certainly did, "encourage", resignations, and later argue that *actual* layoffs were unnecessary because employees quit. The collective agreement requires the employer to provide notice five months in advance and to follow, at that time, all of the related steps set out above (e.g. provide early retirement and voluntary exit options).

And, I repeat, this is because, *at least under this collective agreement*, a "layoff" or a "proposed layoff" is not an "employer", an "employer work", an "employer job", or an "employer employment" concept; it is a *bargaining unit* concept. It exists to protect employees' seniority rights and their right to work *in the bargaining unit*. It does not require unemployment or "layoff to the street"; it is not precluded by any possibility of non-bargaining unit work; and its obligations are not forestalled by any interim need for bargaining unit work to be performed.

In this case, it was clearly known five months in advance of the May 31, 2016, "transition" date that all of the bargaining unit work and all of the bargaining unit jobs would be eliminated. In my view, that is all that was required for the application of Article 9.08(A) and related provisions. None of the cases relied on by the Employer, all of which I have read, and one of which I wrote, suggest otherwise. All deal with entirely different factual and/or legal situations.

In contrast, the award of Arbitrator Kaplan in *Trillium Health Centre and CUPE*, dated February 16, 2012, *supra*, dealt with a closely related transaction: the elimination of the work and jobs at one of the two predecessor hospitals upon the subcontracting to SteriPro. In that case Arbitrator Kaplan stated that the "logical corollary" of the elimination of the hospital employees' jobs was that "notice of layoff must be given to the affected employees and the steps explicitly provided for in the collective agreement then put into effect". I agree.


Further, although it does not *appear* to have been the Company's position, at least in final argument, that Article 9.06(a) of the agreement provided any sort of answer to the foregoing, I wish to be clear that it does not. As noted, Article 9.06(a) deals with "*temporary assignments*" to "a position outside of the bargaining unit". It presupposes, by its very nature, the continued existence of a bargaining unit, in more than name only, to come back to. Here that was not the case after May 31, 2016. While the bargaining unit would, theoretically or, perhaps more accurately, *legally* continue, it would have no work, no assignments, no positions, and no members. In the circumstances, Article 9.06(a) could have no possible application. It cannot be utilized as a device to forestall the application of the layoff provisions.

Finally, there *did* appear to be an issue between the parties as to whether, regardless of the above, the resignations of some or all of the 49 employees could be relied on to remove them from the remedial equation. For the reasons already given, that is not possible. By the time the resignations took place, the employees' collective agreement rights and the Company's collective agreement obligations had already crystallized *and* been breached. The subsequent resignations in no way affect that breach and cannot be relied on to deprive the employees of any or all of the rights to which they were contractually entitled. To conclude otherwise would be to completely negate those rights.

In the result, in addition to the declaration set out above concerning the notice of elimination of positions, I find and declare that the Company breached the collective agreement by failing to provide notice to the Union and to all of the employees of proposed layoffs effective December 31, 2015, and all of the rights associated rights therewith.

I will remain seized in respect of any and all other remedial relief upon which the parties may be unable to agree.

DATED at Toronto this 30th day of May 2017.



Russell Goodfellow – Sole Arbitrator

APPENDIX**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's skills, abilities, qualifications and training or training requirements;
- (iii) the reassignment of the employee does not result in a reduction of the employees 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)(a) and will meet thereafter as frequently as is necessary.

(i) Committee Mandate

The mandate of the Redeployment Committee is to:

- (1) Identify and propose possible alternatives to the proposed layoff(s) or elimination of position(s), including, but not limited to, identifying work which would otherwise be bargaining unit work and is currently work contracted-out by the Hospital which could be performed by bargaining-unit employees who are or would otherwise be laid off;
- (2) Identify vacant positions in the Hospital or positions which are currently filled but which will become vacant within a twelve (12) month period and which are either;
 - (a) within the bargaining unit; or
 - (b) within another CUPE bargaining unit; or
 - (c) not covered by a collective agreement.
- (3) Identify the retraining needs of workers and facilitate such training for workers who are, or would otherwise be, laid off.
- (4) subject to article 9.11, the Hospital will award vacant positions to employees who are, or would otherwise be laid off, in order of seniority, if with the benefit of up to six (6) months retraining, an employee has become able to meet the normal requirements of the job.

- (5) Any dispute relating to the foregoing provisions may be filed as a grievance commencing at Step 2.

(ii) Committee Composition

The Redeployment Committee shall be comprised of equal numbers of representatives of the Hospital and of the Union. The number of representatives will be determined locally. Where for the purposes of HTAP (the Ontario Hospital Training and Adjustment Panel) there is another hospital-wide staffing and redeployment committee created or in existence, Union members of the Redeployment Committee shall serve on any such hospital-wide staffing committee established with the same or similar terms of reference, and the number of Union members on such committee will be proportionate to the number of its bargaining unit members at the particular Hospital in relation to other staff groups.

Meetings of the Redeployment Committee shall be held during normal working hours. Time spent attending such meetings shall be deemed to be work time for which the representative(s) shall be paid by the Hospital at his or her regular or premium rate as may be applicable.

Each party shall appoint a co-chair for the Redeployment Committee. Co-chairs shall chair alternative meetings of the Committee and will be jointly responsible for establishing the agenda of the Committee meetings, preparing minutes and writing such correspondence at the Committee may direct.

(iii) Disclosure

The Hospital shall provide to the Redeployment Committee all pertinent staffing and financial information.

(iv) Alternatives

The Redeployment Committee or where there is no consensus, the committee members shall propose alternatives to cutbacks in staffing to the Hospital's Chief Executive Officer and to the Board of Directors.

At the time of submitting any plan concerning rationalization of services and involving the elimination of any position(s) or any layoff(s) to the

District Health Council or to the Ministry of Health the Hospital shall provide a copy, together with accompany documentation, to the Union.

9.08(B) - RETIREMENT ALLOWANCE

Prior to issuing notice of layoff pursuant to article 9.08(A)(a)(ii) in any classification(s), the Hospital will offer early retirement allowance to a sufficient number of employees eligible for early retirement under HOOPP within the classification(s) in order of seniority, to the extent that the maximum number of employees within a classification who elect early retirement is equivalent to the number of employees within the classification(s) who would otherwise receive notice of layoff under article 9.08(A)(a)(ii).

An employee who elects an early retirement option shall receive, following completion of the last day of work, a retirement allowance of two (2) weeks' salary for each year of service, plus a prorated amount for any additional partial year of service, to a maximum ceiling of fifty-two (52) weeks' salary.

9.08(c) - VOLUNTARY EXIT OPTION

If after making offers of early retirement, individual layoff notices are still required, prior to issuing those notices the Hospital will offer a voluntary early exit option in accordance with the following conditions:

- i) The Hospital will first make offers in the classifications within department(s) where layoffs would otherwise occur. If more employees than are required are interested, the Hospital will make its decision based on seniority.
- ii) If insufficient employees in the department affected accept the offer, the Hospital will then extend the offer to employees in the same classification in other departments. If more employees than are required are interested, the Hospital will make its decision based on seniority.
- (iii) In no case will the Hospital approve an employee's request under (i) and (ii) above for a voluntary early exit option, if the employees remaining are not qualified to perform the available work.
- (iv) The number of voluntary early exit options the Hospital approves will not exceed the number of employees in that classification who would otherwise be laid off. The last day of employment for an employee who accepts a voluntary early exit option will be at the Hospital's discretion following the employee's written acceptance of the offer.

An employee who elects a voluntary early exit option shall receive, following completion of the last day of work, a separation allowance of two (2) weeks' salary for each year of service, to a maximum of fifty-two (52) weeks' pay.

9.09 - LAYOFF AND RECALL

An employee in receipt of notice of layoff pursuant to 9.08(A)(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 9.08(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 deemed to have been laid off and shall be entitled to notice in accordance with Article 9.08(A)(a).

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 employee 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.
- (i) In the event of a layoff of an employee, the Hospital shall pay its share of insured benefits premiums for the duration of the five-month notice period provided for in Article 9.08(A)(a).
- (j) The Hospital agrees to post vacancies during the recall period, as per the job posting procedure, allowing employees on recall to participate in the posting procedure. Should the position not be filled via the job posting procedure, an employee shall have opportunity of recall from a layoff to an available opening, in order of seniority, provided he or she has the ability to perform the work.
- (k) In determining the ability of an employee to perform the work for the purposes of the paragraphs above, the Hospital shall not act in an arbitrary or unfair manner.
- (l) An employee recalled to work in a different classification from which he or she was laid off shall have the privilege of returning to the position held prior to the layoff should it become vacant within six (6) months of being recalled.
- (m) No new employees shall be hired until all those laid off have been given an opportunity to return to work and have failed to do so, in accordance with the loss of seniority provision, or have been found unable to perform the work available.
- (n) The Hospital shall notify the employee of recall opportunity by registered mail, addressed to the last address on record with the Hospital (which notification shall be deemed to be received on the second day following the date of mailing). The notification shall state the job to which the employee is eligible to be recalled and the date and time at which the employee shall report for work. The employee is solely responsible for his or her proper address being on record with the Hospital.

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9.06 - TRANSFER AND SENIORITY OUTSIDE THE BARGAINING UNIT

- (a) It is understood that an employee shall not be transferred by the Hospital to a position outside the bargaining unit without his consent except in the case of temporary assignments not exceeding six (6) months. This period may be extended a further six (6) months upon the agreement of the employee and the Hospital. Such employees on temporary assignments shall remain members of the bargaining unit.
- (b) an employee who is transferred to a position outside the bargaining unit shall not, subject to (c) below, accumulate seniority. In the event the employee is returned by the Hospital to a position in the bargaining unit within twenty-four (24) months of the transfer he or she shall be credited with the seniority held at the time of transfer and resume accumulation from the date of his or her return to the bargaining unit. An employee not returned to the bargaining unit within 24 months shall forfeit bargaining unit seniority.
- (c) In the event an employee transferred out of the bargaining unit under (a) or (b) above is returned to the bargaining unit within a period of twelve (12) calendar months, he shall accumulate seniority during the period of time outside the bargaining unit.