

JOB SECURITY HANDBOOK

GUIDE TO THE CUPE CENTRAL
HOSPITAL AGREEMENT



2023

CUPE

ABOUT THIS GUIDE

The Ontario Council of Hospital Unions (OCHU) of CUPE has bargained provincially on behalf of 35,000 hospital staff since 1982. CUPE hospital workers have made very real gains in job security as a result of OCHU's commitment in collective bargaining to obtain the greatest possible degree of employment security for our members. This Guide is intended to assist local unions to enforce the job security provisions of the central agreement in a consistent way. The Guide has been reviewed by the officers, staff, and specialists who assist with the negotiation, arbitration and administration of the collective agreements, as well as by the lawyers who represent OCHU and CUPE in arbitrations involving central language.

The job security provisions operate in an integrated way. It is important to have an appreciation of the entire network of provisions to understand how each of them operates. This guide deals with various issues that may arise out of redeployment, including layoffs, notice of layoff, alternatives to layoff and employee options, contracting out, and contracting in.

The purpose of the whole of the job security language is twofold. On the one hand, it offers protection to individual employees who are subject to redeployment, protection that may depend upon the length of the layoff and an individual employee's seniority. Second, and just as important, it provides maintains the integrity of the Local Union's bargaining unit.

We do not expect that this guide will be able to answer every question that may arise. Instead, we are hoping to provide Local Union officers with an overview of the main features of collective agreement provisions so that they can continue to provide effective and informed representation of their members. We look forward to any comments you may have as to how we can improve the Guide.

Michael Hurley, OCHU President,
Sharon Richer, OCHU Secretary-Treasurer,
Dave Verch, OCHU First Vice-President.

NOTICE OF LAYOFF

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.

“Layoff” For Purposes of Article 9.08(A) Has Broad Meaning

The threshold critical question under 9.08(A) is whether a proposed “layoff” is being contemplated. The term “layoff” under Article 9.08(A) has a different and broader meaning than it does under other provisions of the collective agreement.¹ While a traditional ‘layoff to the street’ will trigger the notice requirements of Article 9.08(A), so will many other changes to an employee’s terms and conditions of employment which may involve reassignment, elimination or reduction in work. A “layoff” for the purposes of Article 9.08(A) has been held to include:

- A reassignment that is not in accordance with the “reassignment” restrictions in Article 9.08(A)(b).²
- A reduction in the regular hours of work of a full-time or part-time employee, no matter how small.³
- A layoff resulting from a change to the qualifications required to perform a position, e.g. new legislative registration requirements for “Pharmacy Technicians”.⁴
- A transfer of the employee’s job to a successor employer (i.e. in a “sale of a business” under *Labour Relations Act* or a “health services integration” under PSLRTA) where the employee elects to remain in the employ of the Hospital.⁵

- A layoff resulting from a contracting out that meets the requirements of Article 10.02 of the Collective Agreement, whether or not the displaced employee elects to follow their job to the subcontractor.⁶
- A reassignment resulting from the termination of an Article 10.02 subcontracting arrangement where the Hospital takes the work back.⁷
- Being displaced by a laid off employee in the exercise of the latter's bumping rights.⁸

First, Early Retirement and Voluntary Exit Option

Before a notice of layoff or the elimination of a position occurs, the requirements of Article 9.08(B) (Retirement Allowance) and 9.08(C) (Voluntary Exit Options) must be complied with. These requirements are dealt with later in the Guide, but for now it is important to appreciate that these offers must be made before any layoff notices are served within that classification.

"Permanent or Long Term" Defined

Article 9.08(a) requires the Hospital to give notice to the Union of a "permanent or long-term" layoff, or the elimination of a position. A "permanent or long-term" layoff has been found to include one which is at least 13 weeks in length.⁹

Different Notices Required

There are three different types of notice requirements that may be required. Where an individual is laid off, notice of layoff must be provided to both the Union and the individual. In addition, where a position is eliminated, the Union is entitled to notice of the elimination of a position, regardless of whether or not individuals are laid off.¹⁰

Notice Must be Specific

The notice of layoff or elimination of position must be provided five months before the event, and it must be specific. When a hospital has given general or 'blanket' notice of the elimination of positions or layoff of employees which does not adequately specify when the event will take place, the notice has been found to be deficient and has been disallowed. For example, when a hospital gave the Union notice that it would eliminate house-keeping positions as they became vacant, without identifying any particular positions and without identifying any dates, the notice was found to be deficient for the purposes of Article 9.08(A).¹¹

Hospital Must Maintain Status Quo Through Notice Period

The purpose of the notice period is to retain the status quo (i.e. the existing circumstances) throughout the period of notice. It has thus been held that the Hospital cannot require an employee to begin working in another classification that they have

opted to bump into until the notice period is over.¹² Where a vacated full-time position is slated for elimination, the Hospital cannot fill it with one or more part-time employees during the notice period.¹³ A hospital also cannot leave a vacated full-time position vacant during the notice period if it still needs the work of the vacant position performed. However, a hospital is not required to post a job where there is no work to do and no employees affected.¹⁴

Payment in Lieu of Notice

Payment in lieu of notice is required for any missed portion of the notice period. The Hospital will be required to pay damages equal to all payments owing to the Union or members of the bargaining unit during the notice period, including lost wages that would have been paid to members of the bargaining unit, as well as dues that would have been paid to the Union.¹⁵ Payment for late notice does not relieve a hospital of the obligation to follow the other required steps (for example, canvassing for early retirement).

KEY CASES:

- 1 *Hamilton Health Sciences Corp. v. CUPE Local 4800*, [2005] O.L.A.A No. 305 (Burkett)
- 2 See for example *Scarborough General Hospital v. CUPE, Local 1487 (Contracting Out Grievance)*, 2006 O.L.A.A. No. 42 (Burkett) and "Reassignment" topic below.
- 3 *St. Vincent de Paul Hospital and CUPE Local 2491*, [2006] O.L.A.A. No. 615 (Devlin); *Ottawa Hospital v. Canadian Union of Public Employees, Local 4000 (Rockett Grievance)*, 2012 O.L.A.A. No. 81 (Schmidt); *Ross Memorial Hospital v. CUPE Local 1909*, 2019 CanLII 22849 (Schmidt)
- 4 *North Bay Regional Health Centre v. CUPE Local 139*, 2017 CanLII21416 (ON LA) (Goodfellow)
- 5 *Pembroke Regional Hospital v. CUPE Local 1502 (Grievances Concerning Transfer of Laboratory Services)*, unreported, July 10, 2009 (Burkett)
- 6 *Credit Valley Hospital v. CUPE Local 3252*, 2012 ONSC 7266 (CanLII), upholding *The Credit Valley Hospital v. CUPE Local 3252*, unreported, October 21, 2011 (Shime) and *Trillium Health Centre v. CUPE*, 2012 CanLII 12407 (ON LA) (Kaplan)
- 7 *Steripro Canada LP v. CUPE Local 5180.1*, 2017 CanLII 33309 (ON LA) (Goodfellow)
- 8 *Sudbury Regional Hospital v. CUPE Local 1623*, 2007 CanLII 37013 (ON LA) (Albertyn); *St. Joseph's Healthcare (Hamilton) v. CUPE Local 786*, 2014 CanLII 42574 (ON LA) (Kaplan); *Ross Memorial Hospital v. CUPE Local 1909*, 2017 CanLII 20431 (ON LA) (Gedalof)
- 9 *Whitby General Hospital and CUPE Local 3082*, unreported, September 10, 1996 (Springate)
- 10 *Chedoke-McMaster Hospitals v. CUPE Local 839 (Employer Restructuring Grievance)*, [1998] O.L.A.A. No. 106 (Burkett)
- 11 *Hamilton Health Sciences Corp. v. CUPE Local 839* (2001), 94 L.A.C. (4th) 156 (Adams); *CUPE Local 7811 v. Cornwall Community Hospital*, unreported, October 23, 2018 (Petryshen)
- 12 *Toronto Hospital (Toronto Western Division) v. CUPE Local 1744*, unreported, February 17, 1997 (Charney)

- 13 *Kingston General Hospital v. CUPE Local 1974* (2002), 112 L.A.C. (4th) 104 (Devlin)
- 14 *Winchester District Hospital v. CUPE Local 3000*, 2020 CanLII 98764 (ON LA (Kaplan)); *Sudbury Regional Hospital v. CUPE Local 1623*, 2007 OLAA No. 183 (Burkett)
- 15 *CUPE Local 786 v. St. Joseph's Healthcare (Hamilton)*, unreported, April 2, 2011 (Howe)

REASSIGNMENT

9.08(A) – NOTICE AND REDEPLOYMENT COMMITTEE

- (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 employee's wage rate or hours of work;
 - (IV) the job to which the employee is reassigned is located at the employee's original work site or at a nearby site in terms of relative accessibility for the employee;
 - (V) the job to which the employee is reassigned is on the same or substantially similar shift or shift rotation; and
 - (VI) where more than one employee is to be reassigned in accordance with this provision, the reassigned employees shall be entitled to select from the available appropriate vacancies to which they are being reassigned in order of seniority provided no such selection causes or would cause a layoff or bumping.

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

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

Purpose and Implications of Reassignment

The purpose of article 9.08(A)(b) is to give hospitals some relief from the obligations of the layoff language.¹⁶ If a hospital properly reassigns an employee in accordance with article 9.08(A)(b), a layoff will not have occurred under the Collective Agreement, the Hospital will not have to serve notice of layoff under Article 9.08(A)(a), and all the consequences of a layoff will be avoided. For example, if a hospital reassigns

employees in compliance with this article, it may contract out the work previously performed by those employees without a layoff being found to have occurred.¹⁷ Conversely, if the reassignment fails to meet the requirements of Article 9.08(A)(b), then the reassignment will be considered a layoff thus triggering all the layoff requirements under Article 9.08.¹⁸

Onus on Hospital to Prove Strict Compliance with “Bright Line” Requirements

In order for a hospital’s actions to fall within article 9.08(A)(b), the Hospital must ensure that the employees are reassigned in accordance with the requirements listed in the article. These requirements have been described as “bright line requirements that must be met if the seniority rights triggered by the giving of notice of layoff...are to be avoided.”¹⁹ The Hospital must fully comply with these requirements; ‘substantial’ or partial compliance is not good enough. The onus is on the hospital to demonstrate that it has met these conditions – not on the Union to prove that it hasn’t.

Permanent Position

A proper reassignment must be to an appropriate “permanent” position (9.08(A)(b)(II)). This requirement was found to have been met where:

- employees were reassigned on a temporary basis to a “swing space” during renovations, as there was no question that the affected employees would be returned to their jobs within 18 months and thus the critical job interest of continuity of employment was protected.²⁰
- an employee was redeployed to 'float' position lacking a job description created for redeployment purposes, as there were tasks associated with the position, the grievor performed work, and was compensated.²¹

Skills and Training

For a reassignment to be proper, the new position to which the employee is assigned must accord with the employee’s skills, abilities, qualifications and training or training requirements (9.08(A)(b)(II)).

No Reduction in Wages

A proper reassignment must not result in a reduction of the employee’s wage rate (9.08(A)(b)(III)). This requirement was found to have been met by ‘red-circling’ employees at their previous wage rate, even where the employee is deprived of future wage increases applicable to their prior position.²²

No Reduction of Hours

A proper reassignment must not result in a reduction of the employee's hours of work (9.08(A)(b)(III)). This requirement was found to have been violated where the reassignment resulted in a reduction of just half an hour over a two-week period.²³

The Same or a Nearby Worksite

A proper reassignment must be to a same or nearby worksite in terms of relative accessibility for the employee (9.08(A)(b)(IV)). is at risk of running afoul of 9.08(A)(b)(IV), depending on factors such as how far away the new worksite is, the employee's personal circumstances, transit options, etc.

The Same or Substantially Similar Shift

A proper reassignment must be to the same or a substantially similar shift or shift rotation (9.08(A)(b)(V)). There is no "bright line" that can be used to determine whether or not two shift schedules are "substantially similar". Arbitrators will consider at least four different parameters, including the days of the week, the time of the day work, the length of the shift and the frequency or regularity of the rotation.²⁴ The "substantially similar" requirement was found to have been breached where employees were reassigned from day shifts to night shifts,²⁵ from straight day shifts to rotating nights,²⁶ or from a position with 12-hour shifts to one with 7 ½ hour shifts.²⁷ However, this requirement was found to have been met even though the frequency of night shifts increased by 50%, because the shift times, lengths and days of the week remained the same.²⁸ In one case, even though an employee's shift had been changed from days to nights, the arbitrator found it relevant that the employee wanted to work that shift and had exercised seniority to bid on it.²⁹

Seniority Requirements

The reassignments must occur in reverse order of seniority (9.08(A)(b)(I)) and the Hospital must allow affected employees to select from available vacancies in order of seniority ((9.08(A)(b)(VI)). The Hospital was found to be in violation of these requirements where it targeted the most senior employees for reassignment (rather than proceeding in reverse order of seniority) and by placing affected employees into vacancies based on scheduling considerations (rather than allowing them to select from available vacancies in order of seniority).³⁰

Posting Requirements

As per 9.08(A)(c), the Hospital is not required to post the positions into which employees are reassigned. This article must be read however, in conjunction with article 9.05(e), which requires hospitals to post vacancies within thirty days of their

occurrence or else eliminate the positions pursuant to Article 9.08(A)(a). It states in part:

The Hospital agrees that it shall post permanent vacant positions within 30 calendar days of the position becoming vacant, unless the Hospital provides the Union notice under Article 9.08(A)(a) of its intention to eliminate the position. We are of the view that after that 30-day period has elapsed, the vacancy cannot 'reappear' for the purposes of a reassignment. In other words, where a vacancy is used for reassignment purposes, this must occur within the 30-day window provided for by Article 9.05(e).

Note, however, that a hospital may be able to reserve more positions for reassignment purposes that there are people being reassigned, in order for the hospital to provide choices for reassigned employees.³¹

KEY CASES:

- 16 *Hamilton Health Sciences Corp v. CUPE Local 4800 (Contracting Out Grievance)*, [2005] O.L.A.A. No. 305 (Burkett)
- 17 *Hamilton Health Sciences Corp v. CUPE Local 4800 (Contracting Out Grievance)*, [2005] O.L.A.A. No. 305 (Burkett)
- 18 *Scarborough Hospital v. CUPE Local 1487 (Contracting Out Grievance)*, [2006] O.L.A.A. No. 42 (Burkett)
- 19 *Scarborough Hospital v. CUPE Local 1487 (Contracting Out Grievance)*, [2006] O.L.A.A. No. 42 (Burkett)
- 20 *CUPE Local 1487 v. Scarborough Hospital (Julien Grievance)*, [2004] O.L.A.A. No. 132 (Mitchnick)
- 21 *Cornwall Community Hospital v. CUPE Local 7811*, 2018 CanLII 12100 (ON LA) (Flaherty)
- 22 *Sudbury Regional Hospital v. CUPE Local 1623 (Bosse Grievance)*, [2008] O.L.A.A. No. 758 (Stewart)
- 23 *Scarborough Hospital v. CUPE Local 1487 (Contracting Out Grievance)*, [2006] O.L.A.A. No. 42 (Burkett)
- 24 *Re Niagara Health Systems and SEIU, Local 1*.on [2005] O.L.A.A. No. 110 (Whitaker); *St. Joseph's Healthcare Hamilton and CUPE Local 786*, 2015 CanLII 18978 (ON LA) (Slotnick)
- 25 *CUPE Local 1487 v. Scarborough Hospital (Julien Grievance)*, 2004 O.L.A.A. No. 132 (Mitchnick)
- 26 *Scarborough Hospital v. CUPE Local 1487 (Contracting Out Grievance)*, [2006] O.L.A.A. No. 42 (Burkett)
- 27 *Re Health Sciences North and CUPE, Local 1623* 2013 CanLII 67386 (ON LA), 2013 CanLII 67386 (ONLA) (Kanee),
- 28 *St. Joseph's Healthcare Hamilton and CUPE Local 786*, 2015 CanLII 18978 (ON LA) (Slotnick)
- 29 *Cornwall Community Hospital v. CUPE Local 7811*, 2019 CanLII 1685 (Albertyn)

- 30 *CUPE Local 942 v. Royal Ottawa Health Care Group (Reassignment)*, unreported, January 16, 2017 (Flaherty)
- 31 *Kingston Health Sciences Centre v. CUPE Local 1974*, 2021 CanLII 5447 (Bernhardt)

REDEPLOYMENT COMMITTEE

9.08(A) – NOTICE AND REDEPLOYMENT COMMITTEE

(d) 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 procedures 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 as 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 accompanying documentation, to the Union.

Separate Committee

This committee's mandate is far greater than that of the Labour/Management Committee. It exists specifically to carry out the mandate provided under this article.

Setting Up the Redeployment Committee

Upon receiving notice of a proposed layoff or elimination of position, the Union should immediately write to the Hospital requesting establishment of a Redeployment Committee with its proposal for the Committee's size and Union members. This requirement holds even if no layoffs are taking place (i.e. the position is eliminated after being vacated through attrition). Damages for lost opportunity to discuss alternatives may be awarded where a hospital fails to convene a Redeployment Committee.³²

Timeframe

The Committee must be set up within two weeks of the notice of the proposed layoff or elimination of position being given to the Union.

Committee's Mandate - Identifying Alternatives

The Committee is mandated not only to search for existing vacant positions in the Hospital, but, in combination with Article 10.03 – "Contracting In", to identify work that would fall within the bargaining unit but is currently being contracted out. Bargaining unit employees capable of performing the work who are or who would otherwise be laid off have the right to be considered for contracted in work.

This article makes the Hospital responsible for locating work for employees who would otherwise be laid off, and shifts the onus onto the Hospital to justify any refusal to do so, even when it means contracting in work.

Committee's Mandate – Identify Vacant or Soon-To-Be Vacant Positions

The Committee is to identify positions that are currently vacant or are to become vacant within six (6) months within the bargaining unit or in another CUPE bargaining unit or outside of any bargaining unit.

Committee's Mandate – Identify Training Needs and Facilitate

The Committee is to identify the training needs of workers who are or would otherwise be laid off, and to facilitate such training.

Hospital Required to Hire

The Hospital is required to award vacant positions to workers who would otherwise be laid off if, with six months retraining, they become able to meet the normal requirements of the job.

Dispute Resolution

Any dispute relating to the Committee's procedures or mandate may and should be filed as a "step two" grievance to achieve quicker movement to arbitration.

Committee Composition: Equal Union/Management

The Union has the right to participate as a full partner in the operation of the Committee. Whatever the actual number of committee members agreed to locally, there must be the same number of representatives for the Union and Hospital.

Committee Composition: Co-Chairpersons

The Union appoints a Co-Chair responsible for alternate meetings of the Committee. The Co-Chairs jointly determine Committee meeting agendas, prepare Committee minutes and conduct Committee correspondence.

Right to Information

The Hospital is obliged to provide the Committee with “all pertinent staffing and financial information”. This obligation was breached where a hospital refused to provide a copy of its contract with a subcontractor, insisting that it was enough to provide the union with its own summary of the date of the documents. The arbitrator confirmed that documents related to contracted out services “are actually the very information the parties expressly agreed would be considered by the Committee,” that the union was entitled to full copies of these documents and that the union was not required to prove the relevance of these kinds of documents.³³

Importance of Documentation

The Committee is clearly empowered to propose alternatives to layoffs. Accessing complete information is crucial in building these alternatives. The powers given to the Committee shift the onus onto the Hospital to show why alternatives are impractical or not cost-effective, should it choose not to follow the Committee’s proposals. The documentation and supporting rationales therefore are extremely important should a future dispute arise over the Hospital’s right to ignore alternatives proposed by the Committee.

Access to CEO and Hospital Board

If the Committee cannot agree on alternatives, the individual members (including Union members) of the Committee have the right to present their suggested alternatives to layoffs to the Chief Executive Officer and Hospital Board.

Right to Rationalization Plans

The Union has a right to a copy of any rationalization plan involving layoffs or the elimination of positions that the Hospital may submit to either the District Health Council (now defunct) or Ministry of Health. The Union also has a right to a copy of any documentation accompanying such a submission. These provisions would appear to provide even more notice to the Union should such plans be submitted in advance of the six-month notice requirement set out in 9.08(A)(a).

KEY CASES

32 *Winchester District Hospital v. CUPE Local 3000*, 2020 CanLII 98764 (Kaplan); *Oak Valley Health Markham Stouffville Hospital v. CUPE Local 3551*, 2021 CanLII 88145 (Price)

33 *St. Joseph's Healthcare Hamilton v. CUPE Local 786*, 2017 CanLII 55589 (Parmar)

RETIREMENT ALLOWANCE AND VOLUNTARY EXIT OPTION

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 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 departments(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 and will be no

earlier than thirty (30) calendar days immediately following the employee's written acceptance of that 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.

Purpose of Early Retirement and Voluntary Exit Packages

The purpose of early retirement and voluntary exit options has been described as, "to avoid layoffs if possible by enabling eligible persons to retire [or exit], thereby creating sufficient vacancies for employees who might potentially be laid off to fill the vacancies and avoid being laid off."³⁴

Packages Must be Offered Prior to Issuing Notice of Layoff

It is significant that this article specifically requires the employer to offer the retirement allowance and voluntary exit packages "prior to issuing notice to layoff". Employees in the same classification(s) as those who may be affected by any layoff must first be offered the option of taking early retirement. If, after making offers of early retirement, layoffs are still required, the Hospital must offer voluntary early exit options to the affected classifications within the department.

An employee who accepts a package will cease employment at a date decided by the hospital, but not later than 30 days following the employee's written acceptance of the offer.

Packages to be Offered Within the Classification

Both Article 9.08(B) and 9.08(C) provide that the offers of early retirement or voluntary exit are to be made within "the classification(s)", without any qualification for full or part-time status. In a recent groundbreaking case, the Divisional Court confirmed that this precludes a hospital from making offers of early retirement or voluntary exit to only full-timers or only part-timers within a classification. All full-time and part-time employees within a classification must receive the offer, even if the layoff is targeted at a particular full-time or part-time position.³⁵

Offers are made within the classification in which the layoff is to occur, first within the same department as the potential layoff and then to other departments within that classification. Offers are made in order of seniority. There is a condition that the remaining employees be qualified to perform the work.

Packages Must be Offered to Employees in Classifications Displaced Through Bumping

Where an employee subject to a layoff elects to displace an employee in another classification, the displaced employee is “deemed to be laid off” within the meaning of Article 9.09(d) and offers of early retirement and voluntary exit must be made to employees in that classification.³⁶

Packages Available in a Transfer

Where there has been a transfer of the employee’s job to a successor employer (i.e. in a “sale of a business” under *Labour Relations Act* or a “health services integration” under PSLRTA), employees may elect to remain with the Hospital and in those circumstances, the Hospital is required to offer packages prior to issuing these employees notice of layoff.³⁷

Enhanced Packages

In some cases, Hospitals seek to offer enhanced exit packages to entice employees to leave. It has been held that this may be within the scope of management rights, provided that (1) the offers are made in conjunction with the union; (2) employee acceptance is voluntary; and (3) the offers are not in contemplation of a layoff. If there is any intent of a permanent or long-term layoff, then the Hospital must proceed under Articles 9.08 and 9.09 which has been described as a “complete code” for layoffs.³⁸

In deciding whether to agree to enhanced packages, it is important that Local Unions make sure they are not enabling the hospital to contract out the work once the positions are vacated.

Calculation of Packages for Part-Time Employees

The value of early retirement and voluntary exit packages is two weeks’ salary for each year of service up to a maximum of 52 weeks’ salary. For part-time employees, this calculation must be pro-rated. It has now been confirmed that, despite earlier jurisprudence to the contrary,³⁹ the phrase “two (2) weeks salary” refers to a part-time employee’s actual salary, and the phrase “year[s] of service” refers to the employee’s actual calendar years of service, without any adjustment for status.⁴⁰

KEY CASES:

34 *The Credit Valley Hospital v. CUPE Local 3252*, unreported, October 21, 2011 (Shime), upheld on judicial review in *Credit Valley Hospital v. CUPE Local 3252*, 2012 ONSC 7266 (CanLII)

35 *Hamilton Health Sciences v. CUPE Local 7800*, 2021 ONSC 1337

- 36 *Sudbury Regional Hospital v. CUPE Local 1623*, 2007 CanLII 37013 (ON LA) (Albertyn); *St. Joseph's Healthcare (Hamilton) v. CUPE Local 786*, 2014 CanLII 42574 (ON LA) (Kaplan); *Ross Memorial Hospital v. CUPE Local 1909*, 2017 CanLII 20431 (ON LA) (Gedalof); *St Joseph's Healthcare (Hamilton) v Canadian Union of Public Employees, Local 786 (Grievance 14-principal-00797, Layoff)*, [2017] OLAA No 129 [Schmidt]
- 37 *Pembroke Regional Hospital v. CUPE Local 1502 (Grievances Concerning Transfer of Laboratory Services)*, unreported, July 10, 2009 (Burkett)
- 38 *The Credit Valley Hospital v. CUPE Local 3252*, unreported, October 21, 2011 (Shime), upheld on judicial review in *Credit Valley Hospital v. CUPE Local 3252*, 2012 ONSC 7266 (CanLII)
- 39 *Canadian Union of Public Employees, Local 1974 v. Kingston General Hospital*, 2013 CanLII 33 (ON LA) (Steinberg)
- 40 *Ross Memorial Hospital v. CUPE Local 1909*, 2018 CanLII 4622 (Gedalof)

OPTIONS AND ENTITLEMENTS ON LAYOFF

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)(b); or
- (d) displace another employee who has lesser bargaining unit seniority in the same or a lower or an identical-paying classification in the bargaining unit if the employee originally subject to layoff has the ability to meet the normal requirements of the job. An employee so displaced shall be deemed to have been laid off and shall be entitled to notice in accordance with Article 9.08(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 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 the 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.

Employee Options

As set out in the Article, an employee in receipt of notice of layoff may accept the layoff (and thus be placed on the recall list), receive a separation allowance under Article 9.12, retire as outlined in Article 9.08(B), or bump another employee. Employees who accept a layoff should refer to Article 9.11 ("Retraining").

Right to Bump in a Temporary Layoff

The "bumping" provisions apply to both temporary and permanent/long-term layoffs. A "permanent or long-term" layoff has been found to include a layoff of at least 13 weeks in length.⁴¹ Employees who are laid off for periods shorter than that still have the right

to accept the layoff or displace another employee in accordance with 9.09(a) and (d). Thus, where a Hospital closed surgical units on a short-term basis around holiday weekends, it was found that employees were on layoff and were entitled to bump.⁴²

Bumping to Same or Lower or Identical-Paying Classification

The employee can pick a position in the same or lower or identical-paying classification and “bump” the person holding that position provided that person has less bargaining unit seniority.

An “identical paying classification” refers to one in which the straight time hourly rate for a corresponding level of service falls within one per cent (1%) of the laid off worker’s hourly rate.

An employee who chooses to bump an employee with lesser seniority must advise the Hospital within seven days after receiving a notice of layoff.

“Bumping Up”

A laid off employee may “bump up” where there are no employees with seniority in the same or lower or identical-paying classifications whom the laid off employee could bump. In that case, the laid off employee may bump someone with lesser seniority in a higher-paying classification.

Requirement to Meet Normal Requirements of Job

Any employee who chooses to “bump” is required to have the ability to meet the normal requirements of the job. This is the same test as for a job posting.

Displaced Employees Entitled to Full Layoff Rights

Any employee who has been displaced by bumping is entitled to notice of layoff and all the rights that come with that, from the beginning of the redeployment process. This includes offers of early retirement or voluntary exit, the establishing of a redeployment committee, and all the rights and options outlined in Article 9.09.⁴³

Benefit Premiums During Notice Period

The Hospital must pay its share of insured benefit premiums during the five-month notice period (even if the Hospital chooses to provide payment in lieu of notice).

Recall Time Limits

A laid off employee is obliged to accept a recall within seven calendar days of being notified by registered mail or forfeit their seniority and ability to be recalled to any future positions. It is therefore crucial that laid off workers keep an up-to-date address on file with the Hospital. When a laid off worker is not going to be available for a seven-day period, it may even be appropriate to have the Union designated as the employee’s agent to ensure that the recall is acknowledged within the time limits.

Posting and Recall

Positions are to be posted before recalls occur. Any position must first be posted before it can be filled by recall. This allows more senior employees not on layoff to bid on the position. However, new employees cannot be hired until laid off workers have been given the chance to return.

An employee recalled to work in a different classification from which they were laid off has a six-month 'grace period' during which they may return to their position of origin should it become vacant.

Other Recall Provisions

Laid off employees keep their layoff status with seniority for 48 months, however, a failure to return to work within seven calendar days of being recalled will result in a deemed termination with a loss of all seniority and service (Article 9.03). The Redeployment Committee shall identify the retraining needs of workers who are on the recall list (as well as those who would otherwise be laid off) and award vacant positions to such employees in order of seniority if, with the benefit of up to six months retraining, the employee is able to meet the normal requirements of the job (Article 9.08(A)(b)).

Layoffs of Full-Time Employees By Reason of Duties Being Assigned to Part-Time Employees

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. This clause has been interpreted very narrowly by arbitrators, who tend to find that the reassignment of the full-timer's duties to one or more part-timer is due to a legitimate operational need, and not "by reason of his/her duties being assigned to one or more part-time employees."⁴⁴

KEY CASES:

41 *Whitby General Hospital and CUPE Local 3082*, unreported, September 10, 1996 (Springate)

42 *Lakeridge Health Corporation v Canadian Union of Public Employees, Local 1999*, 2011 CanLII 52248 (ON LA)

43 *Sudbury Regional Hospital v. CUPE Local 1623*, 2007 CanLII 37013 (ON LA) (Albertyn); *St. Joseph's Healthcare (Hamilton) v. CUPE Local 786*, 2014 CanLII 42574 (ON LA) (Kaplan); *Ross Memorial Hospital v. CUPE Local 1909*, 2017 CanLII 20431 (ON LA) (Gedalof); *St Joseph's Healthcare (Hamilton) v Canadian Union of Public Employees, Local 786 (Grievance 14-principal-00797, Layoff)*, [2017] OLAA No 129

44 See for example *Rouge Valley Health System v CUPE Local 4385 (Full Time Layoff Grievance)*, [2007] OLAA No. 275 (M.R. Newman); *Re Hamilton Civic Hospitals and CUPE Local 794*, [1994] OLAA No. 651 (Samuels)

BENEFITS ON LAYOFF

9.10 – BENEFITS ON LAYOFF

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

In the event of a lay-off of an employee, the Hospital shall pay its share of insured benefits premiums up to the end of the month in which the lay-off occurs.

The employee may, if possible under the terms and conditions of the insurance benefits programs, continue to pay the full premium cost of a benefit or benefits for up to three (3) months following the end of the month in which the lay-off occurs. Such payment can be made through the payroll office of the Hospital provided that the employee informs the Hospital of his or her intent to do so at the time of the lay-off, and arranges with the Hospital the appropriate payment schedule.

9.11 – RETRAINING

(a) Retraining for Positions within the Hospital

Where, with the benefit of retraining of up to six (6) months, an employee who has either accepted the layoff or who is unable to displace any other employee could be redeployed to a hospital position identified by the Redeployment Committee in accordance with Article 9.08(A)(d)(i):

- (i) Opportunities to fill vacant positions identified by the Hospital Redeployment Committee through retraining shall be offered to employees who apply and would qualify for the position with the available retraining in order of their seniority until the list of any such opportunities is exhausted. Opportunities to fill vacancies outside of CUPE bargaining units maybe offered by the Hospital in its discretion.
- (ii) The Hospital and the Union will cooperate so that employees who have received notice of permanent lay off and been approved for retraining in order to prevent a layoff will have their work schedules adjusted in order to enable them to participate in the retraining, and scheduling and seniority requirements may by mutual agreement be waived. The Redeployment Committee will seek the availability of any federal or provincial retraining program funds to cover the cost of tuition, books and travel, as well as any wages eligible under the terms of such program.
- (iii) Apart from any on-the-job training offered by the Hospital, any employee subject to layoff who may require a leave of absence to undertake retraining in accordance with the foregoing shall be granted an unpaid leave of absence which shall not exceed six (6) months.

- (iv) Laid-off employees who are approved for retraining in order to qualify for a vacant position within the Hospital will continue to receive insured benefits.

(b) Placement

Upon successful completion of his or her training period, the Hospital and the Union undertake to waive any restrictions which might otherwise apply, and the employee will be placed in the job identified in 9.11(a)(i).

An employee subject to layoff who applies but later declines to accept a retraining offer or fails to complete the training will remain subject to layoff.

Eligibility for Retraining

Employees who have been given notice of layoff are eligible for retraining if they are on there are no vacancies available for which they currently qualify, no work can be found through contracting in, or they are are unable to displace another worker.

Employees affected by a technological change may also be eligible for retraining under Article 9.13, even if they have not been given notice of layoff.

Employees Must Apply for Retraining

Even though training opportunities are identified by the Redeployment Committee, employees still must apply for them.

Retraining and Seniority

Retraining is to be offered in order of seniority.

Hospital Must Adjust Schedule for Retraining

The Hospital is required to cooperate in adjusting the schedules of retrainees so that they can participate in retraining program. Scheduling and seniority requirements may be waived by mutual consent for the same reason.

Leave of absence must be granted

An unpaid leave of absence of up to six (6) months is available for those needing it in order to retrain.

Insured Benefits Continue

Employees approved for retraining within the Hospital have a right to continue to receive insured benefits during that training.

Retraining May be Refused

Unlike a refusal to accept recall, an employee may refuse a retraining offer without losing their rights under the layoff and recall provisions.

SEPARATION ALLOWANCES

9.12 – SEPARATION ALLOWANCES

- (a) Where an employee resigns within 30 days after receiving notice of layoff pursuant to article 9.08(A)(a)(ii) that his or her position will be eliminated, he or she shall be entitled to a separation allowance of two (2) weeks' salary for each year of continuous service to a maximum of sixteen (16) weeks' pay, and, on production of receipts from an approved educational program, within twelve (12) months of resignation, may be reimbursed for tuition fees up to a maximum of three thousand (\$3,000) dollars.
- (b) Where an employee resigns later than 30 days after receiving notice pursuant to Article 9.08(A)(a)(ii) that his or her position will be eliminated, he or she shall be entitled to a separation allowance of four (4) weeks' salary, and, on production of receipts from an approved educational program, within twelve (12) months of resignation, may be reimbursed for tuition fees up to a maximum of one thousand two hundred and fifty (\$1,250) dollars.

30 Day Mark Key to Payment Level

When an employee resigns after receiving Notice of Layoff, they are eligible for a Separation Allowance. The amount differs significantly depending on the time of resignation. If they resign within 30 days of receiving their Notice, they are to receive 2 weeks pay per year's service to a maximum of 16 weeks, and may also be reimbursed for up to \$3000 in tuition fees. If, however, they resign after the 30 days, they will receive only four weeks' salary and be eligible for only \$1250 in tuition reimbursement.

Integration with Severance

Article 9.12(a), which provides a payment based upon years of continuous service, has been found to offset any severance payments owed to the employee under the *Employment Standards Act*.⁴⁵ On the other hand, Article 9.12(b) is not based upon years of continuous service, so arguably there would be no offset against an employee's severance payment.

KEY CASE:

45 *Northeast Mental Health Centre v. Ontario Public Service Employees Union (Bedard Grievance)*, [2004] O.L.A.A. No. 219 (Kaplan)

TECHNOLOGICAL CHANGE

9.13 – TECHNOLOGICAL CHANGE

The Hospital undertakes to notify the Union in advance, so far as practicable, of any technological changes which the Hospital has decided to introduce which will significantly change the status of employees within the bargaining unit.

The Hospital agrees to discuss with the Union the effect of such technological changes on the employment status of employees and to consider practical ways and means of minimizing the adverse effect, if any, upon employees concerned.

Where new or greater skills are required than are already possessed by affected employees under the present methods of operation, such employees shall be given a period of training, with due consideration being given to the employee's age and previous educational background, during which they may perfect or acquire the skills necessitated by the new method of operation. The employer will assume the cost of tuition and travel. There shall be no reduction in wage or salary rates during the training period of any such employee. Training shall be given during the hours of work whenever possible and may extend for up to six months.

Employees with one (1) or more years of continuous service who are subject to lay-off under conditions referred to above, will be given notice of the impending change in employment status at the earliest reasonable time in keeping with the notification to the Union as above set forth and requirements of the applicable law.

Purpose of Technological Change Protection

The purpose of this article is to afford employees a measure of protection against technological changes that could protect their status. It does not minimize the protections afforded in other provisions, such as the restrictions on contracting out in Article 10, but supplements them. In particular, where a hospital laid off its medical transcriptionists, having contracted out its transcription services to a company which employed new transcription software, the arrangement was held to be an impermissible contracting out, even though the new transcription methods amounted to a technological change.⁴⁶

Notice of Technological Change Required

The Hospital is required to notify the Union of any technological advances which it has decided to introduce which will significantly change the status of employees within the

bargaining unit. It is also required to notify individual employees with one or more years of continuous service who are subject to a layoff arising from technological changes of the impending change in employment status "at the earliest reasonable time." These notice requirements are separate from, and in addition to, the obligation to provide notice of layoff or notice of elimination under Article 9.08(A)(a).

Duty to Discuss

The Hospital must discuss the technological change with the Union and must consider practical ways of minimizing their adverse effects on employees concerned.

Training Opportunities

Where the technological change demands new or greater skills than those already possessed by employees under present modes of operations, affected employees must be provided with paid training opportunities of up to six months at the Hospital's expense and, wherever possible, during the employee's hours of work. These training requirements are separate from, and exist in addition to, the retraining requirements for laid off workers addressed under Article 9.11.

KEY CASE:

46 *CUPE Local 2119 v. Perth and Smith Falls District*, unreported, May 6, 2020 (Schmidt). See also *Service Employees' International Union, Local 777 (Sunnybrook Hospital Employees Union) v. Sunnybrook Health Science Centre (Contracting Out Grievance)* (1997), 63 L.A.C. (4th) 227 (Goodfellow)

CONTRACTING OUT

10.01 – CONTRACTING OUT

The Hospital shall not contract out any work usually performed by members of the bargaining unit if, as a result of such contracting out, a layoff of any employees other than casual part-time employees results from such contracting out.

10.02 – CONTRACTING OUT

Notwithstanding the foregoing, the hospital may contract out work usually performed by members of the bargaining unit without such contracting-out constituting a breach of this provision if the hospital provides in its commercial arrangement contracting out the work that the contractor to whom the work is being contracted, and any subsequent such contractor, agrees:

- (1) to employ the employees thus displaced from the hospital; and
- (2) in doing so 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, and to execute into an agreement with the Union to that effect.

In order to ensure compliance with this provision, the hospital agrees that it will withdraw the work from any contractor who has failed to meet the aforesaid terms of the contracting-out arrangement.

Purpose and Function of Articles 10.01 and 10.02

These articles offer a high level of protection against job security erosion resulting from contracting out. Contracting out is prohibited if it leads to layoffs, unless the contractor employs employees displaced from the Hospital and stands in the Hospital's shoes for the purpose of the collective agreement with the Union.

Work Usually Performed by Members of the Bargaining Unit

For an arrangement to qualify as a "contracting out", it must involve "work usually performed by members of the bargaining unit." The term "work" in this context is a broad and general term that refers to the end product, e.g. "preparation and cooking of food." It is to be contrasted with "tasks" or "duties" which are the means or methods through which work is accomplished. Thus, where the Hospital entered into an arrangement for the preparation and cooking of food which resulted in the layoff of its food services employees, the arbitrator found the arrangement to be a contracting out, even though the contractor's employees used different technologies, and hence were assigned different tasks and duties, to prepare and cook the food.⁴⁷

Contracting Out Prohibited if Layoffs Result

A contracting out is prohibited if layoffs result from the contracting out. The definition of "layoff" for this purpose is very broad, and may include:

- A layoff "to the street".
- A reassignment that is not in accordance with the "reassignment" restrictions in Article 9.08(A)(b).⁴⁸
- A reduction in the regular hours of work of a full-time or part-time employee.⁴⁹

Contracting Out Permissible if No Layoffs Result

The prohibition against contracting out in Article 10.01 does not apply if no layoffs result from the contracting out. If no layoffs are established, then a legitimate contracting out will be upheld as permissible.⁵⁰

Remedy for Improper Contracting Out

In the event a hospital breaches article 10.01, the proper remedy is to cancel the contracting out and return the work to the bargaining unit. It is not enough for the Hospital to try to 'repair' the layoff by providing monetary compensation to the affected employees.⁵¹

Contracting out or Contracting In?

If no layoffs result from what appears to be a contracting out, then it is worth investigating whether the arrangement is actually a legitimate contracting out before concluding that no remedies are available to the Union. If the arrangement is found to be a 'contracting in' rather than a legitimate 'contracting out', then the employees concerned will be considered members of the bargaining unit covered by the Hospital's collective agreement with the union.⁵²

The distinction between a 'contracting in' and a 'contracting out' lies in who exercises actual direction and control over the employees' working conditions: the contractor or the Hospital. In an arms-length relationship where the contractor directs and controls its own workforce, the subcontractor will be viewed as the 'true employer' and a legitimate contracting out will be found to have occurred. However, where the Hospital is directing and controlling the contractor's workforce - even if the contractor functions as the nominal employer and signs the employees' paycheques - then the Hospital will be considered the "true employer" for labour relations purposes, making the arrangement a 'contracting in' rather than a 'contracting out'.⁵³

Article 10.02 Requirements

Article 10.02 governs the content of the commercial agreement between the Hospital and contractor as well as the agreement between the contractor and the Union. It requires that the Hospital and the contractor have as part of their commercial

agreement, an agreement by the contractor to employ the employees displaced from the Hospital, to recognize the Union as the bargaining agent and to enter into a collective agreement with the Union, which must be identical to the collective agreement between the Union and the Hospital.⁵⁴ If a contractor does not fulfill this requirement, the Hospital is obligated to take the work back in-house.

Employees Hired Under Article 10.02 Still Entitled to Notice of Layoff

Even where a contracting out is permissible under Article 10.02, the employees displaced from the Hospital as a result of the contracting out are entitled to notice of layoff under Article 9.08(A)(a).⁵⁵

KEY CASES:

- 47 *Service Employees International Union, Local 77 (Sunnybrook Hospital Employees Union) v. Sunnybrook Health Science Centre (Contracting Out Grievance)* (1997), 63 L.A.C. (4th) 227 (Goodfellow)
- 48 See for example *Scarborough Hospital v. CUPE, Local 1487 (Contracting Out Grievance)*, 2006 O.L.A.A. No. 42 (Burkett).
- 49 *St. Vincent de Paul Hospital and CUPE Local 2491*, [2006] O.L.A.A. No. 615 (Devlin); *Ottawa Hospital v. Canadian Union of Public Employees, Local 4000 (Rockett Grievance)*, 2012 O.L.A.A. No. 81 (Schmidt)
- 50 *Chedoke-McMaster Hospitals v. Canadian Union of Public Employees, Local 839 (Employer Restructuring Grievance)*, [1998] O.L.A.A. No. 106 (Burkett); *Hamilton Health Sciences Corp. v. CUPE Local 4800 (Contracting Out Grievance)*, [2005] O.L.A.A. No. 305 (Burkett)
- 51 *Scarborough Hospital v. CUPE, Local 1487 (Contracting Out Grievance)*, 2006 O.L.A.A. No. 42 (Burkett); *William Osler Health Centre v. CUPE Local 145 (Contracting Out Grievance)*, [2007] O.L.A.A. No. 59 (Springate)
- 52 See for example *Hydro Ottawa Limited v. International Brotherhood of Electrical Workers (Local 636)*, 2007 ONCA 292; *IKO Industries v. U.S.W.A.* (2002), 118 L.A.C. (4th) (Picher)
- 53 See for example *Hydro Ottawa Limited v. International Brotherhood of Electrical Workers (Local 636)*, 2007 ONCA 292; *IKO Industries v. U.S.W.A.* (2002), 118 L.A.C. (4th) (Picher)
- 54 *St. John's Rehabilitation Hospital and CUPE Local 790 and Brookfield LePage Johnson Controls*, unreported, January 15, 2002 (Abramsky)
- 55 *Credit Valley Hospital v. CUPE Local 3252*, 2012 ONSC 7266 (CanLII), upholding *The Credit Valley Hospital v. CUPE Local 3252*, unreported, October 21, 2011 (Shime) and *Trillium Health Centre v. CUPE*, 2012 CanLII 12407 (ON LA) (Kaplan)

CONTRACTING IN

10.03 – CONTRACTING IN

Further to Article 9.08(A)(d)(i)(1) the parties agree that the Redeployment Committee will immediately undertake a review of any existing sub-contract work which would otherwise be bargaining unit work and which may be subject to expiry and open for renegotiation within six (6) months with a view to assessing the practicality and cost-effectiveness of having such work performed within the Hospital by members of the bargaining unit.

Applies Whether or not There is a Layoff

This provision applies whether or not a notice of layoff has been sent to an employee or not. Refer also to 9.08(A)(d).

WORK OF THE BARGAINING UNIT

ARTICLE 11 – WORK OF THE BARGAINING UNIT

Employees not covered by the terms of this Agreement will not perform duties normally assigned to those employees who are covered by this Agreement, except for the purposes of instruction, experimentation, or in emergencies when regular employees are not readily available.

Purpose of Article 11.01

The purpose of article 11.01 is to maintain both the type and volume of work within the bargaining unit. A violation of this article is not dependent upon whether a layoff has occurred.

Elements of Article 11.01

A violation of Article 11.01 is established where: 1. the duties in question were normally assigned to members of the bargaining unit; 2. the duties in question have been reassigned to employees outside of the bargaining unit; and 3. the assignment was not for the purposes of instruction, experimentation, or an emergency when regular employees are not readily available.

Duties “Normally Assigned”

It has recently been confirmed that Article 11.01 protects both the type and volume of duties “normally assigned” to members of the bargaining unit. To establish a violation of Article 11.01, it is not necessary for the union to demonstrate a casual connection between a significant transfer of work out of the bargaining unit and a real erosion of the bargaining unit.⁵⁶ Nor is it necessary to show, as it once was, that the duties in question were assigned exclusively to members of the bargaining unit. In other words, an overlap in duties between members of the bargaining unit and employees outside of the bargaining unit does not negate an Article 11.01 violation. A reduction in the amount of work assigned to employees within the classification may trigger the operation of the clause if there is a corresponding increase in work assigned outside of the bargaining unit.⁵⁷

KEY CASES:

⁵⁶ *Health Sciences North v. CUPE Local 1623*, 2018 CanLII 93856 (Schmidt)

⁵⁷ *Extendicare (Laurier Manor) and O.N.A.*, unreported, July 4, 1997; (Mitchnick); *The Credit Valley Hospital and CUPE Local 3252*, unreported, June 9, 2007 (McLean)

THE USE OF VOLUNTEERS

11.02 – VOLUNTEERS

The use of volunteers to perform bargaining unit work, as covered by this agreement, shall not be expanded beyond the extent of existing practice as of June 1, 1986.

The Hospital shall submit to the Union, at three (3) month intervals, the number of volunteers for the current month and the number of hours worked and the duties performed.

Purpose of Article 11.02

Article 11.02 is intended to restrict the hospital in assigning bargaining unit work to volunteers. The restriction is based upon the extent of existing practice at June 1, 1986. In other words, the hospital may not expand the use of volunteers performing bargaining unit duties, beyond the June 1, 1986 threshold.

Qualitative and Quantitative Aspects of Limitation

Article 11.02 protects both the quality (type) and quantity (amount) of bargaining unit work. Thus a hospital can breach article 11.02 either when it assigns bargaining unit work to volunteers for the first time, or when it increases volunteers' share of bargaining unit beyond the 1986 levels.⁵⁸

KEY CASE:

58 *Oshawa General Hospital and CUPE Local 45*, unreported, August 26, 1997 (Swan)

FISCAL ADVISORY COMMITTEE

ARTICLE 21 – FISCAL ADVISORY COMMITTEE

Recognizing the value of Union input on behalf of employees, the parties agree to the following:

- (a) The Union's representative(s) will be included in the consultation and planning process from the early phases of the budget planning process, through representation on the Fiscal Advisory Committee or equivalent committee to its final stages of completion, to assist the Hospital in minimizing layoffs or job loss, and in developing labour adjustment strategies where necessary, and in otherwise minimizing adverse effects on CUPE-represented employees through program or service restructuring.
- (b) Where the Hospital experiences unforeseen circumstances such that will necessitate changes to its budgetary plans which have been approved by the Ministry of Health, or the Local Health Integration Network, the Hospital agrees that revisions to the budget will be carried out in consultation with the Union.
- (c) In furtherance of the foregoing, and where possible, in advance of any scheduled FAC or equivalent committee meeting, the Hospital agrees to provide to the Union in a timely way any financial and staffing information pertinent to its budget, or to any other re-structuring plan that would affect the Union's members.
- (d) It is understood that employee time spent at FAC or equivalent committee meetings with the employer in pursuance of the above shall be deemed to be work time for which the employee shall be paid by the Hospital at his or her regular or premium rate as may be applicable.

Development and Revision of Budget

Article 21 obligates the Hospital to involve the Union in the budgetary process to the extent that staffing is affected. The Union is to be involved from the outset of the budgetary process and is also to be involved in any subsequent budgetary revisions.⁵⁹

The Hospital's Article 21 obligations are separate from those arising under Article 9.08(A). Article 21 obligations are triggered independently of, and prior to, the contemplation of layoffs. In other words, by the time employees receive notice of layoff or reassignment, the union should have already had the opportunity to participate in the labour adjustment strategy.

Provision of Information

In addition to allowing the Union participation in the development and amendment of hospital budget plans, Article 21 imposes an obligation on the hospital to provide financial and staffing information which is pertinent to the operating plan, or to any other re-structuring plan which impacts upon the members of the bargaining unit.

KEY CASE:

59 *CUPE Local 2198 v. Amprior Regional Health*, 2016 CanLII 72403 (Goodfellow)

TRANSFORMATION IN HEALTHCARE

9.07(C) - TRANSFORMATION IN HEALTHCARE

Right to Return or Transfer

Employees who are relocated/transferred to another employer by the Hospital will retain their seniority and service at their original hospital for a 48-month period.

Without prejudice to the Union's or Hospitals' rights under the collective agreement or the *Labour Relations Act* or the *Public Sector Labour Relations Transition Act*, employees relocated/ transferred* shall have the right to post for vacancies that arise, prior to or subsequent to the relocation/transfer*, at their originating Hospital for that 48-month period.

If they are the successful applicant, they will return to the employ of the Hospital with seniority accrued and service intact but not accrued, for the period that the employee was relocated/ transferred* to another employer.

*Pursuant to a "Sale of a Business" under Section 69 of the *Labour Relations Act*, or to a transfer pursuant to the *Public Sector Labour Relations Transition Act*.

Purpose of Right to Return or Transfer

This provision protects the seniority and service of employees who are transferred from the Hospital to a successor employer pursuant to a "sale of a business" under s. 69 of the *Labour Relations Act* or a *PSLRTA* transfer for a 48-month period.

Transferred Employees May Return

For the 48-month period following their transfer, transferred employees retain the right to post for vacancies at their original Hospital. It has been held that when applying for a job with the Hospital, transferred employees have a right to be considered together with internal applicants for the job posting and may use all their accumulated seniority with the Hospital in the bidding process. If successful in the bid, the transferred employees are not to be treated as new employees and do not have to serve a probationary period again.⁶⁰

Seniority and Service for Returning Employees

Where a transferred employee returns to the Hospital, their seniority will be deemed to have continued to accrue for the period that the employee was transferred to another employer. Their service will be recognized up to the point of transfer.

Transferred Employees Lack Standing to Grieve

While transferred employees retain the right to return for 48 months, they are not bargaining unit employees for other purposes and therefore lack standing to file a grievance. Thus, where a dispute arises regarding the Article 9.07 rights of a transferred employee, the affected individual may not file an individual grievance. However, the Union may file a policy grievance.⁶¹

Protection Only Applies to LRA or PSLRTA Transfers

The “right to return” protection only applies to declared transfers under the *Labour Relations Act* or the *Public Service Labour Relations Transition Act*. An employee who elects to transfer to a contractor pursuant to Article 10.02 cannot avail themselves of this protection unless the contracting out is determined by the Labour Board to be a transfer under the LRA or the PSLRTA.⁶²

KEY CASES:

60 *Sudbury Regional Hospital v. CUPE Local 1623 (Huggman Grievance)*, [2011] O.L.A.A. No. 387

61 *Sudbury Regional Hospital v. CUPE Local 1623 (Huggman Grievance)*, [2011] O.L.A.A. No. 387

62 *Trillium Health Partners v. CUPE Local 5180 (Siloch Grievance)*, [2015] O.L.A.A. No. 335

