

IN THE MATTER OF AN ARBITRATION BETWEEN:

Ontario Public Service Employees Union

(“the Union”)

and

Kinark Child and Family Services

(the “Employer”)

Re: Grievance No. 2018-0213-0004

Before: Matthew R. Wilson - Arbitrator

For the Union:

David Ragni - Counsel

For the Employer:

Angela Rae – Counsel

Allison Medjuck - Counsel

Hearing held in Hamilton, Ontario on January 17, 2019.

AWARD

1. This grievance challenges the employer's decision to deny the grievor's request to transfer from a full-time position to a relief position.
2. The grievor worked as a full time Child and Youth Worker. In March 2018, he requested a transfer from full-time status to relief status. I was told that relief status means that the employee has minimal availability obligations and can pick up shifts on a casual basis. The employer denied the request, which was the impetus for this grievance.
3. During the course of submissions, it became apparent that there was no collective agreement provision entitling the grievor to transfer from full-time status to relief status. Rather, the union's case rested solely on seven examples where, it says, transfers from full-time and part-time status to relief status had been allowed. It sought to introduce past practice evidence of these transfers in support of its argument that the employer's decision was arbitrary, discriminatory or in bad faith. The union also argued that a harassment complaint filed in September 2017 was also a possible motivation for the employer's decision.
4. The employer objected to the admissibility of past practice evidence. It argued that such evidence should not be permitted unless there was an ambiguity in the collective agreement or as part of an estoppel argument. As neither position was raised by the union, the employer argued that it would be improper to rely on evidence of past practice.
5. Additionally, the employer argued that such evidence was irrelevant as it occurred in 2013 or earlier, under two previous collective agreements. It explained that the collective agreement language had changed in previous rounds of negotiations and that there was no incident where such a transfer occurred under the collective agreement for which this issue arose.
6. After considering the parties' submissions, I ruled orally that the evidence of past practice was not admissible in this case. As the arbitral authorities bear out, evidence of past practice is only admissible where there is an ambiguity in the collective agreement provision or to establish a party's intentions with respect to an estoppel argument. Neither of these arguments are available to the union in this case. Thus, it would be improper to introduce such evidence as the sole basis for the grievor's assertion that he ought to have been granted the transfer.
7. I further explained that the examples put forward by the union were not relevant since they occurred in 2013 or earlier and pre-dated the changes to the collective agreement. Thus, these examples could offer nothing to the

analysis of whether the grievor should have been granted the transfer request.

8. Following my oral ruling, it became apparent that the union had no basis in the collective agreement for the assertion that the grievor's request to transfer from full-time status to relief status ought to be granted. In the absence of a collective agreement provision stipulating such a right, there was no basis for me to allow the union's grievance.
9. For these reasons, the grievance is dismissed.

Dated in Whitby this 21st day of January, 2019.

A handwritten signature in black ink, appearing to read 'Matthew R. Wilson', written in a cursive style.

Matthew R. Wilson