

IN THE MATTER OF a labour arbitration pursuant to the *Ontario Labour Relations Act, 1995*

BETWEEN:

Mackenzie Health

(the Employer)

- and -

Ontario Public Service Employees Union, Local 374

(the Union)

And in the Matter of the posting grievance of Florencio Briones dated December 15, 2022.

Before: Daniel A. Harris

At: Toronto, Ontario, by Videoconference, held on February 8, 2024 and June 26, 2025.

Award Dated: July 18, 2025.

Appearances:

For the Employer: Robert Hickman, Counsel; Ashton White and others, Mackenzie Health.

For the Union: James Craig, Counsel; Lilia Elliston, OPSEU and Florencia Briones, grievor.

AWARD

1. This decision deals with a grievance filed by the Ontario Public Service Employees Union, Local 374, the Union, on behalf of Florencio Briones, the grievor, an employee of Mackenzie Health, the Employer. The grievor works in the Environmental Services department (EVS) as a cleaner in the Child Care area of the hospital on the 4 PM to 12:00 AM shift at the Employer's Richmond Hill location.
2. On November 29, 2022, the Employer posted an "internal call for interest" for a 4 PM to 12 AM shift in the same department. The grievor expressed an interest, was denied the opportunity and the Union grieves the denial.
3. The hearing proceeded on the basis of an Agreed Statement of Fact (ASF) and the submissions of the parties.
4. The relevant provisions of the collective agreement are articles 3.01 and 15.07, which read as follows:

3.01 The Union recognizes that the management of the Hospital and the direction of the employees are fixed exclusively with the Hospital and shall remain solely with the Hospital except as specifically limited by the provisions of this Agreement, and without restricting the generality of the foregoing, the Union acknowledges that it is the exclusive function of the Hospital to:

- a) to maintain order, discipline, efficiency and in connection therewith to establish and enforce reasonable rules and regulations, provided that the rules shall not be inconsistent

with the provisions of this Agreement;

b) to hire, transfer, lay- off, recall, promote, demote, classify, assign duties, discharge, suspend or otherwise discipline employees who have completed their probationary period for just cause, provided that a claim of discriminatory transfer, promotion, demotion of classification or a claim that an employee who has completed their probationary period has been discharged or disciplined without just cause, may be the subject of a grievance and dealt with as hereinafter provided. The discharge of a probationary employee shall be solely at the discretion of the Hospital;

c) to have the right to plan, direct and control the work of the employees and the operations of the Hospital. This includes the right to introduce new and improved methods, facilities, equipment, and to control the amount of supervision necessary, the planning or splitting up of departments, work schedules, and the increase or reduction of personnel in a particular area or overall.

d) The Hospital recognizes that the rights described in the Article shall be exercised in a manner consistent with all provisions of the Collective Agreement.

15.07 Line Selection

In advance of position vacancies being posted, where appropriate, employees within the work unit or department will be granted an opportunity to select the line or shift being vacated, in accordance with the following:

1. The line vacancy will be posted or otherwise advertised within the work unit/ department for a five (5) day period.
2. Employees will indicate their interest to the hiring manager. It is understood that line vacancy opportunities will not apply outside of the area of the (unit or department) of the work schedule and not across sites.
3. It is understood that line vacancy opportunities will not be utilized to effect a change in employment status (FT, PT, Cas)

4. In clinical areas it is understood that selection will be based upon seniority unless the candidate does not possess a skill, knowledge or experience requirement that must be met on the team sharing the rotation.
5. In non-clinical areas it is understood that line selection shall apply to the shift (scheduled hours) available.

6. The grievor worked in Environmental Services, a non-clinical area of the hospital.

The vacancy was in the same area and on the same shift in which the grievor was already working. It is agreed that the “*internal call for interest*” did not specify what area of the hospital was to be cleaned. However, the grievor concluded that the area involved was outside of the Child Care Area. It is agreed that duties, such as cleaning, may be assigned/reassigned by management. It is also agreed that full-time staff are generally assigned to the same cleaning duties on their shift, and it has not been management’s practice to make reassignments to different cleaning duties on the same shift. In this regard, paragraph 8 of the ASF reads as follows:

8. The practise [sic] for several years is that full time staff are generally assigned the same cleaning duties. Duties can be re-assigned by management, but the practise [sic] has been not to do that whenever possible. Part time and casual staff are assigned to different duties as needed.

7. *Internal calls for interest* and line vacancies “specify the shift with set hours rather than specify duties” (ASF ¶9). Management advised the grievor that he was not eligible for the *internal call for interest*, because he was already working on the same shift as set out in the *internal call for interest*. The vacancy was then posted; the grievor did not apply.

8. The grievor had indicated his interest in the position by emails dated November 30, 2022. In the first email he said that he wanted different duties in order to avoid the bending and squatting required in the Child Care area. However, there is no indication, on the agreed facts that the grievor had a disability that might require accommodation. The Employer's email reply to the grievor, on November 30, 2022 at 1:48 sets out that, "The internal call for interest is for all full time to apply, however if you are already on that shift, you will not be moved to a different area. It's [sic] has been this way for some time now...". The grievor had relied in his email on a situation wherein he said that another employee named Victoria had been allowed to move from an evening to an evening shift. He acknowledged in his email that there was a one-half hour difference in the two shifts. Management dealt with that situation in it's reply that continues from above, "Victoria moved up a half hour, if [the position] was 4-12 she would not have been offered the position."
9. The Union submitted that the grievor's request to move to different cleaning duties was reasonable in that he wanted new duties for a change of pace; It said that the shift being posted was more than just a scheduled time, rather that it was a bundle of different duties, in a different area of the hospital. The Union submitted that article 15.07 should give some acknowledgement of the importance of seniority. It also said that article 15.07 confers entitlements on employees, in which case any restrictions or limitations should be explicit, and there are no such explicit restrictions or limitations in the article. That is, the article does not say an employee cannot move from one area to another on the same shift.

10. The Union also submitted that there is no evidence of harm to, or difficulty in, the Employer allowing the grievor to clean in a different area of the hospital. It said that to doggedly refuse the move is unreasonable.
11. Finally, the Union submitted that the grievor raised a health and safety concern that ought to have been given consideration.
12. The Union relied on *Expertech Network Installation Inc. and Unifor* (2019) Can LII 14942 (ON LA).
13. The Employer submitted that it had followed the process set out in the collective agreement by asking for expressions of interest in the 4pm-12am evening, cleaning shift. It reviewed the grievor's expression of interest and reasonably excluded him because he was already working an evening cleaning shift. The Employer noted that this was a non-clinical area, so the line selection applied to the "shift (scheduled hours) available" as set out in article 15.07. The question of what cleaning duties were involved is not a question that arises in these circumstances and only the hours of the shift, being 4 pm to 12am, are involved. The Employer said that the words of article 15.07 are explicit, and they explicitly refer only to the hours of the shift. It said that there is no evidence of harm to the grievor, nor of any health and safety issue. The Employer said that there is no evidence that it acted arbitrarily, discriminatorily or in bad faith.

14. The Employer relied upon the following authorities: *UFCW, Local 175 and Olymel s.e.c./l.p. (Pandemic Pay), Re*, (2021) CarswellOnt 7272; *Association des juristes de justice c. Canada (Procureur général)*, [2017] SCC 55; *Irving Pulp & Paper Ltd. v. CEP, Local 30*, [2013] SCC 34.

15. In reply, the Union submitted that there was no objection to the process that the Employer followed, rather it was the outcome that was not reasonable. It said that the six bullet points of article 15.07 do not say that you cannot apply for a job on the same shift. Further, it is important to appreciate the context, which includes the duties of the position being offered.

16. I have carefully considered the ASF, the documents in the record, the submissions of the parties and the jurisprudence relied upon. The Union submitted that *Expertech*, supra, supports a liberal interpretation of article 15.07 in this matter. I note that in *Expertech*, Arbitrator Stout was dealing with entitlement to short term disability benefits (§6, 4th point), which is not the case here. Of greater assistance is Arbitrator Stout's 3rd point which reads as follows:

- the IPP is to be interpreted in accordance with the same rules of interpretation applicable to interpreting a collective agreement. In other words, the object is to discern the intention of the parties as found in the words they have chosen to reflect their agreement. The words are to be interpreted as a whole and in context. The interpretation should promote the true intention of the parties and where two interpretations are plausible, then the interpretation supporting the intention is to be preferred.

17. In this matter, the parties have chosen the process for filling position vacancies in article 15.07. As noted by Arbitrator Stout, the object is to determine the intention of the parties from the words they chose. Further, the words are to be interpreted as a whole and in context. The context of article 15.07 is the filling of position vacancies which are described by the title *Line Selection*. The last bullet point in article 15.07 specifically defines line selections in non-clinical areas as applying to the “shift (scheduled hours) available”, without reference to the duties of the line selection available. Accordingly, the work opportunity available was posted by the *internal call for interest* as, “1 SHIFT AVAILABLE 4:00 PM-12 AM”. In my view, this is consistent with interpreting the words of article 15.07 as a whole and in context.

18. The Union submitted that its objection was to the outcome of the process not to the process itself. However, the process laid down by 15.07 explicitly limits the vacancy to being an evening shift in the Environmental Services Department, without regard to the specific duties that may be performed. The grievor already occupied that position. Contrary to the Union’s submission, the shift being posted was indeed just a scheduled time. That is the applicable, explicit restriction or limitation in article 15.07 with respect to the posting of available line selections. The union also submitted that the grievor’s seniority ought to have been considered to his benefit. However, the article makes no reference to seniority and there is no evidence that seniority was considered either to his benefit or detriment in the filling of the vacancy at issue.

19. The Union also submitted that the Employer's refusal of the grievor's request was unreasonable. The Employer has the right under Article 3 to manage the workplace. In *UFCW and Olymel*, Arbitrator Anderson considered the applicability of the reasonableness standard to decisions of management. He summarizes the jurisprudence at paragraph 14 as follows :

14 The Union cites *Irving* and *AJC* for the proposition that an arbitrator has a general jurisdiction to determine the reasonableness of the exercise of management rights, by applying a balancing of interests approach, whether or not another provision of the collective agreement is engaged. In my view, neither *Irving* nor *AJC* supports such a broad proposition. Rather, ***Irving* and *AJC*, which adopts the reasoning of *Irving*, apply the balancing of interests approach set out in *KVP* to circumstances in which an employer had unilaterally adopted a workplace rule, the breach of which could expose an employee to discipline.** As explained in *Irving*, in these circumstances the exercise of management rights is subject to review for reasonableness because it engages other provisions of the collective agreement, specifically the right not to be disciplined without just cause:

...

(emphasis added)

20. Here the Union submits that the reasonableness standard should be applied in such a fashion as would tip the balance in favor of the grievor's desire to clean a different area of the hospital than the area where he is currently stationed. That the grievor simply wanted a change is the highest that the ASF reaches. There are no disciplinary consequences at play in the circumstances before me. Quite apart from whether disciplinary consequences are a requirement in a *KVP* analysis (see: *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co.* (1965), 16 L.A.C. 73 (Robinson)), the balance to be struck in the instant circumstances is between the desire of the grievor and those of the Employer. That balance is at the heart of article 15.07, and the intention of the parties expressed there is that the specific duties to be performed are not part of the consideration. This is a non-clinical area, and the line selection definition applies only to the shift (scheduled hours) available.

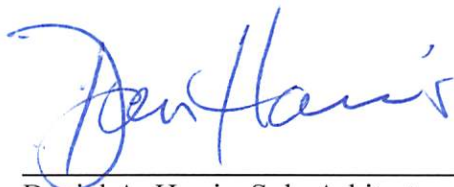
21. Finally, the Union submitted that the grievor's health and safety concerns ought to have been given consideration in favour of the grievor being allowed to move out of the Child Care area of the hospital. The only evidence before me is the grievor's preference to be moved out of Child Care. There is no evidence before me that the grievor has a disability that requires accommodation nor that the *Occupational Health and Safety Act* R.S.O. 1990, Chapter O.1 is engaged. Accordingly, any such considerations are not involved in upsetting the balance the parties have adopted in the plain words of article 15.07.

22. Accordingly the plain words of article 3.01 and article 15.07 have the combined effect of excluding the grievor from consideration for the *internal call for interest* for the available EVS evening shift because he already held that position.

The Decision

23. For the reasons set out above, the grievance is denied.

Dated at Toronto this 18th day of July 2025.



Daniel A. Harris, Sole Arbitrator