6-5-2005

Re Provincial Health Services Authority and CUPE, Loc 805

Innis Christie

B Crockett

S Robinson

Re Provincial Health Services Authority and Canadian Union of Public Employees, Local 805

[Indexed as: Provincial Health Services Authority and C.U.P.E., Loc. 805 (Re)]

Prince Edward Island
I. Christie, R. Crockett and S. Robinson

Heard: April 13, 2005
Decision rendered: June 14, 2005

UNION GRIEVANCE concerning job vacancy. Grievance allowed.

B. McKinnon, for the union.
R. MacLeod, for the employer.
P. Beauregard, for the third party, International Union of Operating Engineers.

AWARD

Grievance by the Union alleging breach of Article 20.1, and any other applicable articles, of the Collective Agreement between the Union and the Employer effective April 1, 2001 - March 31, 2004, which the parties agreed is the Collective Agreement that governs this matter, in that, when Ronald Smith, a Physio Aide, retired the Employer failed to post that position.

At the outset of the hearing counsel to the Employer and the representative of the Union agreed that this Board of Arbitration is properly constituted, is properly seized of this Grievance and should remain seized after the issue of this award to deal with any matters arising from its application. They also agreed that all time limits, either pre- or post-hearing, are waived. The I.U.O.E. had been properly notified of this hearing. Its Business Representative, Paul Beauregard, attended the hearing and participated to the extent of asking questions in cross-examination and commenting on the argument.

AWARD

This arbitration is to determine whether, under this Collective Agreement, upon the retirement of a Physio Aide, the Employer was required to post that position in circumstances where the work formerly done by the retired Physio Aide was being done by a casual employee, who was a qualified Physio Assistant and paid as such, although there is no such classification in the CUPE Collective Agreement. The parties disagree on the interpretation and application in this context of Article 20.1, the "Job Postings" provision, and other relevant provisions of the Collective Agreement, but there is no significant dispute about the facts. The following agreed statement of facts, dated April 13, 2005, the day of the hearing, and signed by counsel for the Employer and the representative of the Union, was put before us.

We have interspersed additional relevant facts established at the hearing:

1. The Employer operates the Queen Elizabeth Hospital (QEH) in Charlottetown, PEI.
2. The classifications contained with the CUPE collective agreement and employed within the QEH are represented exclusively by CUPE and are subject to a collective agreement between the parties.

3. CUPE represents all employees holding the Physio Aide classification within the health sector on Prince Edward Island and the International Union of Operating Engineers (IUOE) represent all employees holding the Physio Assistant classification.
4. Ronnie Smith was a Physio Aide with the CUPE bargaining unit until his retirement on March 27th, 2004.
5. Gail Taylor was also a Physio Aide with the CUPE bargaining unit and remains in that position as an employee of PHSA to this day.
6. Upon Ronnie Smith's retirement the Employer did not post the vacancy created by Ronnie Smith but instead utilized casual employees, working full time hours, to fill the vacated position of Physio Aide.

After Mr. Smith retired part of his work was done by casuals, but after about six weeks, at the Union's insistence, there was a posting for a temporary six week Physio Aide position in the CUPE bargaining agent. The resulting appointment, of Ed Power, was grieved by the Union on the basis of seniority. The Grievance was allowed by the Employer and Mr. Power was replaced by John Stewart, the senior CUPE bargaining unit applicant, whose relevant experience consisted of cleaning in the department. He lasted in the job for only one and one-half shifts. There was testimony about the fact that Mr. Stewart lacked the qualifications stated in the posting, and was far from having the qualifications the Employer says it now seeks, but the appropriateness of his appointment is not before us.

In this context the Union was advised that the Employer was considering posting a Physio Assistant position under the International Union of Operating Engineers Collective Agreement. However, that the position was thereafter filled by a casual employee and was not again posted.

7. The Employer deducted CUPE dues from the casual employee working in the Physio Aide position, and paid those dues to the Union, from March 26th, 2004 to January 28th, 2005. At this point in history (January 28th, 2005) the Employer made the decision to refund the casual employee, working in the Physio Aide position all of the CUPE dues deducted from her pay between October 19th, 2004 and January 14th, 2005 inclusive

   The Employer paid those dues to the IUOE bargaining unit. The Employer then credited the casual employee, working in the Physio Aide position, the difference between a Physio Aide wages and the Physio Assistant wages retroactive to October 19th, 2004.
8. As of the pay period ending January 28th, 2005 the casual employee began receiving Physio Assistant wages for all hours worked in the position vacated by Ronnie Smith

The person referred to in the Agreed Statement of Facts as "the casual employee", is Sabrina Springle, who was hired as a new casual employee in February of 2004. In mid-April 2004 Ms. Springle was asked to come to work on a regular basis and has done so since. She is a trained Physio Assistant who holds certificates in Occupational Therapeutic Assistance and Physiotherapy Assistance and a Diploma in Social Science. Her pay was increased, and the CUPE dues deducted from her pay were refunded, retroactively to October 19, 2004 because that was the date upon which she was awarded her certificate in Physiotherapy Assistance.

> 9. The Employer acknowledges that CUPE was not made aware that the Employer had changed the dues deductions in January of 2005 and once CUPE found out about the change in dues and wages a grievance was filed immediately.

The Grievance was filed June 15, 2004.

> The issue for this board to determine is whether or not a vacancy existed in the CUPE Physio Aide classification that the Employer was required to post pursuant to the collective agreement.

In his opening statement for the Union Mr. McKinnon noted that it was only during the preparation for this arbitration hearing that the Union learned that the Employer had "altered the jurisdiction and payment of dues". He reiterated that union jurisdiction and dues is not the issue here. That matter has since been grieved. As agreed by the parties, the issue before us is; "whether or not a vacancy existed in the CUPE Physio Aide classification that the Employer was required to post pursuant to the collective agreement."

For the Employer Mr. MacLeod stated that he was taking issue with the suggestion that CUPE only became aware of the added qualifications demanded by the Employer in the course of preparation for the hearing in this matter. That was not our understanding of what Mr. McKinnon had said in his opening, and, in any case, the point at which the Union became aware of the Employer's intentions, or actions, does not appear relevant here.

For the International Union of Operating Engineers, Mr. Beauregard stated that that Union had not been aware that there was an employee at the QEH doing the work of, and being paid as, a Physio Assistant. He further stated that if his Union were aware of such a situation it would grieve if seniority had not been respected. The International Union of Operating Engineers bargaining unit

includes employees at a number of institutions on P.E.I., some of whom might be qualified for the Physio Assistant position.

We find the following additional facts, or clarifications, from the evidence. There are no Physio Assistants, classified as such, working at the QEH and the CUPE Collective Agreement does not list them as a pay classification. Until Mr. Smith retired there were two Physio Aides, classified and paid as such, at QEH, he and Gail Taylor. There is now one, Gail Taylor, who is a highly respected and competent employee with thirty years seniority.

Ms. Springle was paid the Physio Aide rate from April 2004 to the end of January 2005. Since then she has been paid at the Physio Assistant rate, as set out in para. 7 of the agreed statement of facts quoted above, an increase of about $10,000 per year. The Physio Assistant rate appears only in the International Union of Operating Engineers Collective Agreement, which applies to Physio Assistants in other P.E.I. hospitals. In January 2005 Heather Cutcliffe, the head of the Department of Physical Medicine at QEH, told Ms. Springle that she would be "going to the IOUE union and would receive a rate increase". Ms. Cutcliffe testified that she did this because her intent was to get approval for posting the Physio Assistant position at the next senior management meeting. The question she said, was whether she had the budget to do that. At the date of the hearing before us she still did not have formal budget approval. However, the important point for us is that Ms. Springle has never been classified as a Physio Assistant for purposes of the CUPE Collective Agreement under which we have been appointed.

Physio Aides and Physio Assistants differ in their qualifications. In the simplest terms, to be a Physio Assistant requires formal course training and certification. Formal training is an asset for a Physio Aide but is not required. The document in evidence before us entitled *Competency Profile: Essential Competencies of Physiotherapist Support Workers in Canada*, published in July 2002 by the Canadian Alliance of Physiotherapy Regulators in partnership with the Canadian Physiotherapy Association places Physio Assistants in what is referred to as "Group 1" and Physio Aides in "Group 2". It states, at p. 6:

> Group 1 physiotherapist support workers have acquired knowledge, skills and attitudes either through formal post-secondary education or other substantially equivalent process. ... The tasks and interventions assigned by the

> physiotherapists to Group 1 physiotherapist support workers are more complex than those assigned to Group 2 physiotherapist support workers, with an emphasis on direct client care.
>
> Group 2 physiotherapist support workers have acquired knowledge, skills and attitudes through formal, informal and/or on-the-job training. ... The range of tasks and interventions assigned by the physiotherapists to Group 2 physiotherapist support workers are more technical in nature with an emphasis on supporting the operation of the physiotherapy service.

This is not a document binding on either of the parties here, but it makes clear the direction of physiotherapy assistance in Canada.

The Physio Aide's work at QEH has evolved from being primarily custodial when Ms. Taylor started to being now 60-70% patient care, with much of that evolution having occurred in the last twelve to fifteen years. The evolution has occurred because of assignments made by supervisors, consistent with changes in the job description of 1996 to that of 2001.

The work of the Physio Aides has been divided, not officially but as a matter of process, between work in rehab and work with acute cases, which is more demanding. For some time Gail Taylor and Ron Smith worked year and year about in these roles, but some four years before his retirement the work with acute cases had become too difficult for Mr. Smith, so Ms. Taylor regularly worked only in acute care. Within this general framework the two of them handled the total workload, including when one or other of them was on vacation or otherwise absent.

After Sabrina Springle was hired as a casual in February of 2004 the year and year about arrangement was reinstituted, but at the time of the hearing before us Ms. Taylor was suffering from an injury, so Ms. Springle was doing a disproportionate part of the acute care work. Apart from that they work interchangeably as Ms. Taylor and Mr. Smith had done. It was not disputed that for purposes of this Award they should be considered to be doing the same work. There is no evidence that the work done by either or both of them has changed since Ms. Springle was hired or that Ms. Springle is doing work significantly different from that done by Mr. Smith at his retirement. There is also no doubt that Ms. Taylor has been working for some years at the high end of what Physio Aides, or "Group 2 physiotherapist support workers", as they are referred to in the 2002 *Competency Profile*, generally do. Ms. Springle testified that her work "could change if I become a Physio Assistant", to using

more "modalities" (equipment such as ultra sound) and doing more testing.

Ms. Taylor was asked about the duties listed on in the QEH job description for Physiotherapy Aide, last revised February 7, 2001. It suffices to say that both she and Ms. Springle have performed, and regularly do perform, each of the duties listed there except those connected with the pool, because the pool has been closed. The "Statement of Qualifications" in that document is:

1. The incumbent in this position must have completed Grade XII + additional training e.g. PT Assistant/Aide Program
2. Previous working experience with both individuals or groups
3. Experience with pool maintenance.

Ms. Taylor was also asked which of the tasks set out in the QEH job description "Developed" March 24th, 2004 for Physiotherapy Assistant she and Ms. Springle perform. Heather Cutcliffe, Manager of Physical Medicine at QEH, testified about the development of this as yet unposted QEH job description for Physiotherapy Assistant. It was based on the position of Rehabilitation Assistant in use at the new Prince County Hospital. The aim, she said is to ensure a higher standard of care, consistent across the country, as new people come into this kind of work. Her plan is that Physio Aides at QEH be replaced by Physio Assistants. She has made the business case for this change and has sought budget approval. Ms. Cutcliffe testified that paying Ms. Springle at the Physio Assistant level was approved by Human Resources, although to her knowledge there had been no negotiations with the International Union of Operating Engineers. In cross-examination Ms. Cutcliffe stated that if she succeeded in getting the Physio Assistant classification for QEH she would "look at grandfathering" Ms. Taylor and "get her upgraded". Serious as these moves undoubtedly are, we must stress that this job description has never been posted at QEH, and, to quote Ms. Cutcliffe "is not in use at QEH". In short, there is no such job classification at QEH.

Nevertheless, Mr. McKinnon, for the Union, took Ms. Taylor through this document and she testified that both she and Ms. Springle perform almost all of the tasks set out in it. In setting it out here we indicate the tasks which, according to the evidence, neither of them performs, and the one task, "testing", which Ms. Springle performs slightly more fully than Ms. Taylor. Ms. Cutcliffe did not contradict Ms. Taylor's testimony.

The unposted job description follows, with our comments interspersed. Ms. Cutcliffe testified that the bulleted tasks set out in bold italicized type are those that a new employee (i.e. not Ms. Taylor or Mr. Smith, who could do many of these because of their "contextual" training) could not do without formal training, but which a qualified Physio Assistant could do after orientation. "It is not", she said, "about people in the job now but about people coming in who don't have Gail's experience and don't have formal training".

Position Summary

The Physiotherapy Assistant assumes various duties under the supervision of a Physiotherapist, including: carrying out assigned Physiotherapy activities; collecting patient information; maintaining equipment & preparing treatment areas; and performing administrative and other related duties.

1. **The Physiotherapy Assistant is responsible for carrying out assigned Physiotherapy activities. Representative duties include:**
   - Orienting clients/patients to the treatment area, including relevant policies.
   - Supervising/***instructing***/assisting with client/patient programs, as ***prescribed by*** a physiotherapist, which may include: application of selected therapeutic exercises, functional mobility, whirlpool, use of aids & devices, ***deep breathing & coughing and modalities.***

Neither Ms. Taylor nor Ms. Springle "does all modalities". "Modalities" refers to equipment, such as ultra sound, and whether or not Ms. Taylor can deal with a particular piece of equipment depends, she testified, on whether she has taken the course on it.

   - ***Demonstrating awareness of safety issues related to patient/client, staff and care givers.***
   - ***Organizing and delivering group treatment programs as prescribed by a physiotherapist.***

Neither Ms. Taylor nor Ms. Springle organizes or delivers group treatment programs.

   - Monitoring treatment program and reporting observations related to assigned activities to the physiotherapist; including patient's/client's comments, ***responses to intervention, and status during application of intervention, etc.***
   - ***Participating as a team member in patient/client care.***
   - ***Demonstrating effective communication with patient/client and family, the rehabilitation team and other members.***

2. **The Physiotherapy Assistant is responsible for the collecting of patient information. Representative duties include:**
   - ***Carry out selected measures or tests under the instruction and at the discretion of the physiotherapist.***

Both Ms. Taylor and Ms. Springle do certain tests, but not a lot. Ms. Springle does a few that Ms. Taylor does not.

- ***Monitoring patient/client responses and status throughout assigned testing.***
- ***Reporting patient/client information in a complete and timely manner to the physiotherapist to to [sic] supplement the physiotherapist's assessment and reassessment.***
- ***Documenting and recording patient/client information as assigned by the physiotherapist.***

Neither Ms. Taylor nor Ms. Springle "documents".

- ***Contributing to the development and revision of the intervention activities by providing appropriate feedback to the physiotherapist.***

3. **The Physiotherapy Assistant is responsible for maintaining equipment and preparing Physiotherapy treatment areas. Representative duties include:**
   - Preparing hot packs, ice packs, ice baths, etc.
   - Filling and cleaning whirlpool several times daily, monitoring temperature, preparing any accessory equipment needed.
   - Filliing [*sic*] and cleaning wax baths when necessary, monitoring temperature.
   - Preparing pool area for all scheduled pool activities - cleaning pool & filters as required, monitoring water levels, ordering chemicals & adjusting levels as appropriate, maintaining change rooms and keeping pool statistics.

Because the pool has been closed neither Ms. Taylor not Ms. Springle performs these tasks.

- Preparing and maintaining all treatment areas for patient care e.g. changing bed linen, cleaning exercise mats, organizing towel and linen supply from cart, placing soiled laundry in pick-up location, generally checking that all supplies and equipment are in place for the department's daily activities.
- Reporting to a supervisor or manager when equipment appears in need of repairs.

4. **The Physiotherapy Assistant performs some administrative duties. Representative duties include:**
   - ***Maintaining daily and monthly workload measurement data as per MIS guidelines.***

Neither Ms. Taylor nor Ms. Springle does statistics unless the physiotherapist is away, and then each only does her patient stops.

- ***Contributing to the identification of yearly goals and objectives for the service area.***
- ***Identifying and reporting needs in the service.***

Ms. Taylor testified that she did not know what this item means. There was no other evidence on the point.

- ***Assisting with the maintenance of an up to date Manual of Policies and Procedures, Risk Management, and Qulaity [sic] Assurance Guidelines to ensure Continuous Quality Improvement in compliance with Accreditation standards and to provide a safe environment for both staff and patients/clients.***

5. ***The Physiotherapy Assistant Performs other related duties as required.***

STATEMENT OF QUALIFICATIONS:

- Successful completion of Grade XII
- ***Must hold a diploma from a recognized Physiotherapy or Rehabilitation Assistant Program.***
- Previous working experience in a rehabilitation setting as a direct care giver would be an asset.
- ***Good interpersonal and communication skills with demonstrated flexibility.***
- ***Self motivated with good organizational skills.***
- ***Ability to work in a team setting.***

These qualifications can be contrasted with those for the Physio Aide classification set out above. The evidence is that Ms. Taylor does not have the diploma required for the Physio Assistant position, and when she started as a Physio Aide did not have either the "additional training" or the "previous working experience" now apparently required for the Physio Aide position.

Guidance and Direction

Direction and supervision is provided by Physiotherapists and departmental manager. Guiding references include hospital and departmental policy and procedural manuals.

Physical Effort

Requires moderate to heavy physical effort.

Equipment Utilized

Modalities, heat and cold modalities.
Ambulation aids and exercise equipment.
Computer

JOB DESCRIPTION RECORD

Date Developed: March 24th, 2004

Positions of the Parties

The Union's position is simply that the Employer has not filled a vacancy which the Collective Agreement requires it to fill. A CUPE

bargaining unit member retired, his position was posted as a temporary vacancy, was filled by a CUPE member, and that same position then became vacant again. The same work continued to be done by a casual, so, by Article 20.1 of the Collective Agreement the Employer was required to post it, and by Article 20.5 it was required to appoint the senior qualified member of the bargaining unit, and has not done so. Article 20.1 and 20.5 provide:

> *ARTICLE 20 - PROMOTIONS AND STAFF CHANGES*
>
> 20.1 *Job Postings*
>
> When any vacancy occurs or a new position is created within or outside the bargaining unit, the Employer shall post notice of the position on bulletin boards for a minimum of seven (7) days. Copies of all postings shall be forwarded to the Secretary of the Union upon posting.
>
> ...
>
> 20.5 *Role of Seniority in Promotions and Transfers*
>
> Both parties recognize:
>
> (a) the principle of promotion within the service of the Employer
>
> (b) that job opportunity should increase in proportion to length of service;
>
> therefore, in making staff changes, transfers or promotions, appointment shall be made of the applicant with the greatest seniority and having the required qualifications. The required qualifications must be relevant to the position. Appointments from within the bargaining unit shall be made within three (3) weeks of posting.

The Union seeks a declaration that a *permanent* vacancy existed on March 26th, 2004 or sometime thereafter and should have been posted, and is to be posted upon the issue of this Award. The Union does not seek damages.

The Employer's position is that it wanted to hire a person with the qualifications necessary for the additional duties of a Physio Assistant to be assigned to her in the future. For the Employer Mr. MacLeod asserted that it could have done so when Mr. Smith retired, but caused difficulties for itself under the CUPE Collective Agreement by delaying the filling of Mr. Smith's position. Mr. MacLeod admitted that it was "hard to argue that the Union was not entitled to a declaration that there was a *temporary* vacancy that should have been posted". However, he submitted, the Employer had the right to restructure the work of Physio Aides in the CUPE bargaining unit and to transition the work of assisting physiotherapists to Physio Assistants in the International Union of Operating

Engineers bargaining unit. In this context, he said, there cannot be said to have been a permanent vacancy for purposes of Article 20.1. Mr. MacLeod relied on three arbitration awards dealing with overlap between classifications and across unions in the P.E.I. health care sector.

An order to now post the position of Physio Aide, as sought by the Union, would, Mr. MacLeod said, freeze the work into the CUPE bargaining unit. By the date of the hearing before us, he submitted, the Physio Aide position vacated by Ron Smith had in fact been transitioned to the International Union of Operating Engineers bargaining unit. The fact that it was being filled by a casual was properly the concern of that Union, not of CUPE.

Decision. The parties have stated in their agreed statement of facts that "The issue for this board to determine is whether or not a vacancy existed in the CUPE Physio Aide classification that the Employer was required to post pursuant to the collective agreement." It became apparent in the course of the hearing that, through counsel, the parties now agree that there was a vacancy that the Employer was required to post. They disagree on whether the vacancy the Employer was required to post was simply that, a vacancy, as claimed by the Union, or a temporary vacancy, as claimed by the Employer, which could be posted as such. The Employer's claim that it was required to post only a temporary vacancy is based on its allegation that when John Stewart left the position of Physio Aide in March of 2004 the Employer intended to move the work of that position to the classification of Physio Assistant in the International Union of Operating Engineers bargaining unit, so there would only be work for a Physio Aide on a temporary basis.

The Employer, mainly in the person, it seems, of Heather Cutcliffe, Manager of Physical Medicine at QEH, was, and is, struggling to align the classifications of physiotherapist support workers at QEH with evolving Canadian standards of health care, in the complex context of collective agreements with several unions, budgets which are, as ever, tight, and yet another reorganization of the health care sector in P.E.I. These management concerns are not to be taken lightly, but, as Mr. MacLeod for the Employer emphasized, Article 17.5 makes plain what is already understood, that "The Board of Arbitration shall not have the power to change this Agreement, or to

alter modify or amend any of its provision." Probably for that reason we heard very little testimony about budget constraints and virtually nothing about the pending reorganization. Our concern can only be with the Collective Agreement between these parties, this Employer and this Union, as we interpret it and as it is understood in the context of the arbitration awards relied upon by the parties.

One of those awards is an award between these parties dated November 28, 2003 by an Arbitration Board consisting of the three of us on this Board. We dealt there with the Employer's posting of three part-time positions rather than the position vacated. The majority (Ms. Robinson dissenting) held that in failing to post the vacant position the Employer had breached the Collective Agreement. The issue here, which is whether, based on the intent of one of its managers, when a position is vacant the Employer can post a temporary vacancy, rather than simply a vacancy, is different, but in that Award we stated some basic propositions that apply here.

With respect to the same management rights clause before us here we stated at p. 15 of our November 28, 2003 Award:

> Counsel for the Employer asserts that management "has an inherent right to direct the workplace, and determine the needs of the operation, and how to best address those needs." In our view management's rights, which flow from Article 8.1, are to, "...exercise the regular and customary function of management and to direct the working forces, subject to the terms of this Agreement." We agree with her submission that "Vacancies do not arise merely because an employee resigns, retires or transfers" ...

We continued, at p. 16:

> The employer's "discretion" to determine whether vacancies exist ... is, quite correctly, characterized by Employer's counsel as aspect of the right of management, in the absence of explicit constraints in the collective agreement, to determine the assignment of work. ... the classic statement is that of Arbitrator Paul Weiler in *United Steelworkers and Algoma Steel* (1968), 19 L.A.C. 236, at p. 243, relied upon by the Employer here:
>
> > An employer has the right to ... redistribute tasks among or within existing classifications in order to reorganize his work force. There is no implied proprietary right of an employee in the job duties he is actually performing and specific provisions of the agreement must be relied on to restrict managerial initiative. ...
>
> Earlier, at pp. 239-40, Prof. Weiler had said:
>
> > Management has the presumptive privilege of making changes in the organization of its work force, as long as it is exercised in good faith and for purposes of business efficiency, rather than the undermining of

> provisions of the agreement. No one has a proprietary interest in the specific set of job functions he is or has been performing.

Management's "presumptive right", in the absence of explicit constraints in the collective agreement, to make changes in the organization of its work force, as long as it is "exercised in good faith and for purposes of business efficiency, rather than the undermining of provisions of the agreement", has been accepted in many awards, including the three P.E.I. awards relied on by counsel for the Employer here.

In *Re Queen Elizabeth Hospital and C.U.P.E., Loc. 1466*, unreported, 1981 (Donald MacLean, Chair) the Employer assigned the work previously done by an LNA who had been promoted, to an RN, who was in a different bargaining unit under a different Collective Agreement. The Arbitration Board found no express limitation precluding this in the Collective Agreement, and emphasized management's presumptive rights. The posting provision, Article 20.1 of that Collective Agreement, was the very provision before us here. In that Award the Board held that Employer was not required to post the vacancy because after the previous incumbent had been promoted there was no LNA work to be done and therefore no vacancy to fill. There was no LNA work to be done because the Employer had chosen to reorganize and transfer that work to an RN, there being nothing in the LNA's job that did not fall within the RN job description and qualifications.

Similarly, in *Re Southern Kings Regional Authority and C.U.P.E., Loc. 1778*, (unreported) 2001 (Outhouse, Chair) when a vacancy developed the Employer decided that the work of the vacated position should be done by employees in a different classification and a different bargaining unit. The Board found that the tasks performed by the LNA who had vacated the position overlapped with the work of employees in the classification to which the Employer had assigned them, and denied the grievance, stating management's rights in much the same terms as the passage quoted above from our 2003 Award between these parties. In *Re Regional Health Authorities of Prince Edward Island and I.U.O.E., Loc. 942* (unreported) 1999 (Outhouse, Chair) the Chair again stated management's presumptive rights, in much the same terms, at pp. 31-2:

> (1) Absent some express restriction in the collective agreement, management is free to reorganize its workforce and to reassign duties as long as it does so

> for *bona fide* business reasons and not as a pretext for undermining the bargaining unit. [cases cited]
>
> (2) In the absence of job descriptions freezing the duties of a job classification, an employee has no proprietary rights in any particular bundle of job duties. [cases cited]
>
> (3) Management has a presumptive right to assign duties from one classification to another. [cases cited]

This case would be similar to the 1981 case and the *Southern Kings* case if the Employer had assigned Mr. Smith's work to a Physio Assistant under the International Union of Operating Engineers Collective Agreement. That is not what it did here. It had the work done by a casual, albeit a very well qualified one, but the work of the position was still there to be done, so there was a vacancy and Article 20.1 constrained the Employer. Even after it purported to transition Ms. Springle to a Physio Assistant position the Employer did not simply assign the work to her in that role, but continued to characterize her as a casual. That is, the very job previously performed by Mr. Smith continued to be performed throughout by a causal. In these circumstances the vacancy had to be posted.

We did not find the arbitration award in *Re Regional Health Authorities of Prince Edward Island (West Prince Regional Authority) and I.U.O.E., Loc. 942*, (Veniot, arbitrator) (unreported) August 18, 1999 adds anything to these considerations. As in the three cases just considered, the learned arbitrator there held that management had not bargained away its right to assign work in the context before him. Specifically, he concluded that management had not done so for the purposes of his Award by agreeing to the same language found in Article 6.3 of the Collective Agreement before us here:

> 6.3 Work of the Bargaining Unit
>
> Persons whose jobs are not in the Bargaining Unit shall not work on any jobs which are included in the Bargaining Unit, except in cases mutually agreed upon by the parties.

This provision may, of course be relevant in a dispute over the extent to which Ms. Springle, as a Physio Assistant and a member of the International Union of Operating Engineers bargaining unit, if such she is, can do the work of a Physio Aide at QEH, but that is not the issue before us. As Mr. McKinnon said at the outset, without

challenge by Mr. MacLeod or Mr. Beauregard, union jurisdiction and dues is not the issue here. That matter has since been grieved.

Returning to the issue which is before us, on p. 17, of our 2003 Award, with respect to the question of whether a vacant position can be left unfilled, we stated, with approval:

> In *Re Toronto Harbour Commission and C.U.P.E., Local 186* (1979), 22 L.A.C. (2d) 56 (Teplitsky, Chair), put before us by counsel for the Employer, the majority ... states, in part, at p.58;
>
> > Arbitrators have been alert to prevent an employer from depriving the employees of their right to compete by avoiding the posting whenever there is in fact a job to be filled. On the other hand, the jurisprudence notes that the requirement of posting is not a job security provision, or one which prevents in itself the employer's reorganization of its work-force.
> >
> > Thus, in *Toronto Electric Com'rs*, Mr. Carter found that a vacancy in fact existed after the death of an employee, because the job previously performed by the deceased continued to be performed. In these circumstances the vacancy had to be posted. That award is no authority for the proposition that the requirement of posting a vacancy prevents an employer from reorganizing its work-force to eliminate a job by parcelling out various aspects of the job to others.

We then considered "the Horton Steel doctrine" [*Re Horton Steel Work Ltd. and U.S.W., Loc. 3598* (1973), 3 L.A.C. (2d) 54 (Rayner)], which we thought particularly relevant to the issue before us there, and then stated, in terms upon which Mr. McKinnon for the Union laid considerable stress here:

> In the words of *Horton Steel*, "no vacancy" in this context means that there was no vacancy "in the company's opinion ... exercised on the basis of a reasonable view of the objective facts as they exist[ed] at the time the vacancy [was] alleged to [have] exist[ed]". In other words, only if there had been no vacancy in the sense that the work was no longer there to be done could the employer not post the vacancy in accordance with the literal words of the collective agreement.

Finally, on p. 35 we stated:

> In summary, while the employer may have acted in good faith and for legitimate business reasons, "pitted against" those business reasons, in the words of Arbitrator McLaren in *C.U.P.E., Loc. 1758 v. Red Lake Margaret Cochenour Hospital* at p. 24, [quoted by Arbitrato Hunter in *Re Maplewood Nursing Home Ltd. Tilsonburg (Maple Manor) and London & District Service Workers Union, Loc. 220* (1989), 9 L.A.C. (4th) 115], "is the integrity of the seniority and vacancy provisions of the collective agreement". The parties agreed to the simple words of obligation in Article 20.1 of the Collective Agreement: "When

> any vacancy occurs ... within ... the bargaining unit, the Employer *shall post* notice of *the* position" [emphasis added].

Counsel for the Employer has admitted that there was a vacancy here, and that it should have been posted. The real issue is whether it should be treated as having been a temporary vacancy for purposes of our order to comply with the Collective Agreement.

Two things are readily apparent. First, the exact same job previously performed by Ron Smith continued to be performed up to the date of the hearing. As we said in our 2003 Award, as quoted above, "only if there had been no vacancy in the sense that the work was no longer there to be done could the employer not post the vacancy in accordance with the literal words of the collective agreement." That was clearly not the case here.

Second, although there is nothing in the Collective Agreement about temporary vacancies, it is clear from the evidence that the Employer has in the past posted temporary vacancies, in the case of long illnesses, and undoubtedly in the case of maternity leaves, temporary transfers and the like. Elaine Fagan, Chief Shop Steward testified that where a person is out sick the Union's position is that there has to be a posting after six weeks. The posting of a temporary vacancy in such circumstances would flow naturally from the Employer's obligation to restore the absent employee to his or her position upon return, and the fact that the position was posted as temporary rather than permanent would certainly have to be regarded as having been done "in good faith and for legitimate business reasons".

The same might be true here if the creation of a Physio Assistant job in place of Mr. Smith's Physio Aide job had been committed to by the Employer and was scheduled. The Physio Aide job *might* then have been legitimately posted as a temporary position. But that is not what the Employer did. It simply hired a Physio Assistant, as a casual, and did not post the vacant position at all. When Ms. Springle obtained her certification the Employer made a side deal with her, treated her as if she were in the International Union of Operating Engineers bargaining unit and continued to characterize her as a casual, which meant the work of the vacant position was performed, without posting it, for well over a year. However "legitimate" Ms. Cutcliffe's "business", or health care, "reasons" may have

been, this cannot be characterized as having been done in accordance with the Collective Agreement.

There was a vacant Physio Aide position here, in the sense that the Employer had the work of the position done by Ms. Springle as a casual, not by Ms. Springle as a member of the International Union of Operating Engineers bargaining unit. Undoubtedly the vacancy lasted longer than Ms. Cutliffe hoped or thought it would. It was, nevertheless, a vacancy which the Employer did not intend to fill and simply did not fill, on either a temporary or permanent basis, when it was required to. This appears to have been because of Ms. Cutcliffe's concern, in the interests of improved patient care, to align the classifications of physio support workers with standards that were evolving across Canada, but that vacancy did not disappear through reorganization, although it may in the future. No tasks were added or subtracted, the work was done by Ms. Springle alone and not by Ms. Springle along with other duties.

Conclusion and Order

The Union is entitled to a declaration that there was and is a vacancy in Mr. Smith's position and an order that the Employer is to fill the vacancy in accordance with the applicable Collective Agreement, which is the CUPE Collective Agreement. In so doing the Employer can, of course, exercise its rights with respect to qualifications. Once the position is filled, in accordance with Article 20, the Employer can then exercise its rights and powers to change or eliminate the position, subject to the constraints of the Collective Agreement.

We hereby declare that there was and is a vacancy in the Physio Aide position vacated by Mr. Ron Smith in February 2004. We hereby order that position to be posted and filled in accordance with Article 20.1 of the Collective Agreement.