

**He IN THE MATTER OF AN ARBITRATION
BETWEEN:**

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**WILLIAM OSLER HEALTH CENTRE
("the employer")**

and

**CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 145
("the union")**

**AND IN THE MATTER OF A GRIEVANCE ALLEGING IMPROPER
CONTRACTING OUT**

ARBITRATOR: Ian Springate

APPEARANCES:

For the Employer: Robert Little, Counsel

For the Union: Mark Wright, Counsel

HEARING: In Toronto on December 8, 2006

AWARD

INTRODUCTION

I issued a prior award in this matter on March 20, 2006. In that award I concluded that the employer had violated Article 10.01 of the applicable collective agreement by contracting out work usually performed by members of the bargaining unit with the result that employees other than casual part-time employees were laid off. This conclusion was based on wording in the collective agreement which indicated that a laid off employee included an individual in receipt of a notice of layoff. None of the employees who received notices of layoff in consequence of the events discussed below were actually laid off to the street.

The matter came back on for hearing with respect to the issue of an appropriate remedy. At that hearing the union did not seek to return employees to the positions they had held prior to receiving notices of layoff. As one requested remedy, however, it did ask that the contracted out work be returned to the bargaining unit. The employer opposed this request. It contended that an appropriate remedy would be an order rescinding the layoffs and payment of compensation to any employees who might have suffered a loss as a result of a lay-off.

COLLECTIVE AGREEMENT PROVISIONS AND THEIR HISTORY

Article 10.01 of the collective agreement is set out below. Also set out is Article 10.02 which permits contracting out that would otherwise be in violation of Article 10.01 provided the contractor agrees to employ any displaced employees and to stand in the place of employer for purposes of the collective agreement.

10.01

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

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 agreement.

At the second hearing the parties took opposing positions with respect to the intent of Article 10. Counsel for the union argued that Article 10.01 is intended to protect the bargaining unit. Employer counsel contended that Article 10 does not prohibit contracting out or protect the integrity of the bargaining unit but is instead designed to protect employees from layoffs caused by contracting out. In support of this contention he referred to several interest arbitration awards decided in connection with central hospital – CUPE bargaining.

One of the awards referred to by employer counsel was a May 31, 1996 award of a board of arbitration chaired by Arbitrator M.G. Mitchnick. In this award Arbitrator Mitchnick reviewed the history of Article 10. He noted that the first collective agreement restriction on contracting out had come in a 1979 award of Arbitrator Howard Brown which provided that: "The Hospitals will not contract out any work with the objective of effecting a layoff or reducing the regular hourly rate of pay of any employees in the bargaining unit". Arbitrator Mitchnick went on to note that the union had been concerned about the phrase "with the objective of" and in 1984 the parties agreed to language that had been awarded in 1982 by Arbitrator M. Teplitsky for bargaining units represented by Service Employees International Union, with the result that the language now read as follows:

Effective September 29, 1984, the Hospital shall not contract out any work usually performed by members of this bargaining unit if, as a result of such contracting out, a layoff of any employees other than casual part-time employees follows. Contracting out to an employer who is organized and who will employ the employees of the bargaining unit who would otherwise be laid off is not a breach of this provision.

In his historical review Arbitrator Mitchnick referred to a 1986 award of Arbitrator Kevin Burkett. He noted that the union had argued before Arbitrator Burkett that a

contractor being “organized” would not provide an assurance that wages and working conditions covering the work would be maintained. Arbitrator Burkett responded by requiring the maintenance of “similar terms and conditions” by the new employer in order for a contracting out which resulted in a layoff not to violate the collective agreement.

In the instant proceedings employer counsel filed a copy of the union’s 1986 written submissions to Arbitrator Burkett. One union proposal was that: “there shall be no contracting out of work normally performed by members of the bargaining unit during the term of this agreement”. In these proceedings employer counsel pointed out that in support of this proposal the union stated that: “the Union views subcontracting as a serious threat to the integrity of our bargaining units”. He argued that the union was claiming that Article 10 did not protect the integrity of the bargaining unit.

The union again sought a ban on contracting out in 1990 before a board of arbitration chaired by Arbitrator M.R. Gorsky. In a decision dated September 20, 1990 Arbitrator Gorsky wrote: “The Union urges an absolute ban on contracting out by the Hospitals. Its arguments invoke the traditional tenants of the integrity of the bargaining unit, and quality of care”. He went on to refuse to make any change to the then current language. In the course of doing so he commented: “Prohibition of hospital work by a contractor is an extreme form of constraint, particularly in the absence of evidence that arbitration cases have been unsuccessful in putting a stop to the disintegration of the bargaining unit. If hospitals become overly enthusiastic in their alleged pursuit of ‘inferior wages and benefits’, they will do irreparable harm to the integrity of the bargaining unit. The grievance and arbitration procedure may be effective in this regard through the simple expedient of defining the phrase ‘similar terms and conditions of employment’ ”.

Another applicable award was the one issued on May 31, 1996 by Arbitrator Mitchnick. The language in place prior to his award read as follows:

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. Contracting out to an employer who is organized and who will employ the employees of the bargaining unit who would otherwise be laid off with similar terms and conditions of employment is not a breach of this provision.

In its submissions to Arbitrator Mitchnick the union sought the removal of the “saving” provision contained in the second sentence of what was then Article 10.01. It argued that there might be practical difficulties in comparing “similar terms and conditions of employment” on a collective agreement wide basis. It also contended that the clause would not prevent a further “flip” of a contract to a once-more-removed entity. It was in the course of discussing these issues that Arbitrator Mitchnick considered the history of Article 10. After doing so he made the following comment relied on by employer counsel in the instant proceedings, namely: “That clause (Article 10) already attempts to provide significant protections for employees in the event of contracting out”.

In his award Arbitrator Mitchnick noted that future developments appeared to be directed towards “shared” or rationalized services. He suggested that in these types of situations either one hospital might continue to be the true employer, the employing entity could be a “related employer” to a hospital, or the arrangement might be characterized as a sale of a business. He indicated that in accordance with the provisions of the Labour Relations Act in these situations the collective agreement would follow the “contracted out” work. Arbitrator Mitchnick then said: “It is the view of the chairman that that basic premise – the extension of the existing collective agreement – is an appropriate starting point for the parties’ discussion of any significant realignment of the work at this time”.

In his award Arbitrator Mitchnick continued unchanged that portion of the collective agreement language now found in Article 10.01 prohibiting contracting out which results in a layoff. He amended the “saving” provision by awarding the language now found in Article 10.02. This provides that notwithstanding Article 10.01 a hospital can contract out work which results in layoffs provided the contractor agrees to employ any displaced employees and to stand in place of the hospital for the purposes of the collective agreement with the union and to execute an agreement with the union.

Another award of note was a June 28, 1999 decision of Arbitrator G.W. Adams. In that award Arbitrator Adams gave what he described as a “balanced redefinition” of a layoff in order “to grant greater flexibility to the hospitals to reassign an employee who would otherwise be entitled to a notice of layoff, provided certain critical job interests of that employee receive protection”. He awarded the language that is now found in Article 9.08(b) of the collective agreement. This provision defines a layoff so as not to include the reassignment of an employee who would otherwise be entitled to notice of layoff provided the reassignment is to an appropriate permanent job with no reduction in wages or hours of work and to the same or a nearby site in terms of relative accessibility for the employee.

In the instant case counsel for the union contended that the award of Arbitrator Adams had “pried open” the contracting out language of the collective agreement and “the Mack trucks started driving through”. The suggestion appeared to be that by reassigning staff in a manner that met the requirements of Article 9.08(b) some hospitals have been able to avoid issuing layoff notices when contracting out and thereby avoid the restrictions against contracting out contained in Article 10.01

EVENTS WHICH GAVE RISE TO THE EARLIER FINDING THAT THE EMPLOYER HAD BREACHED THE COLLECTIVE AGREEMENT

At the time of the events giving rise to these proceedings the employer was operating a hospital with three campuses, one of which was in Brampton. Cafeteria and catering operations at this campus were operated directly by the employer utilizing among others dietary aides in the Food Services Department.

Prior to the events described below dietary aides in Brampton generally did not deliver food trays to patients. Instead this task together with the retrieval of the trays was performed by service associates in the Estate Management Department whose primary functions involved housekeeping. Both the dietary aides and the service associates were included within the bargaining unit represented by the union.

At the hearing into the issue of remedy employer counsel noted that cashiers represented by the Service Employees International Union had also worked in the cafeteria. He said that these cashiers had been reassigned and the SEIU did not grieve the contracting out.

In 2004 the employer began a concerted effort to achieve substantial operating savings in order to address a serious deficit situation. As part of this process hospital departments were asked to present proposals to help the employer achieve its goal. Ms. Lana Palmer, Director of Hospital Services and Quality, who was responsible for Food Services, proposed that the cafeteria and related catering services at Brampton be contracted out. Mr. Glen Trimble, Director of Estate Management, proposed that the delivery of trays in Brampton be transferred to food service staff so as to allow housekeeping staff to focus on cleaning functions. This latter proposal had been jointly advanced by Ms. Palmer and Mr. Trimble in 2003 to a “Renaissance Task Force” that was seeking to identify operational effectiveness but the proposal had not been acted on at the time.

Although the proposals were initially developed independently of each other Executive Vice-President Ms. Vicki Truman advised Ms. Palmer of Mr. Tremble’s proposal that the tray delivery functions be transferred since if implemented it would

have an impact on Food Services. On a form that Ms. Palmer prepared with respect to her proposal that the cafeteria operations be contracted out she made the following entry respecting the possible impact of layoffs on the contracting out language of the collective agreement:

Impact of layoffs may be offset by Food Services resuming tray delivery from Environmental (Renaissance proposal of May 2003). Otherwise would trigger the "contracting out" language of the collective agreement if staff layoffed in Food Services as a result of outsourcing retail. Therefore would look at attrition or "reassign" staff which could potentially impact implementation date.

At the initial hearing Ms. Palmer indicated that if the tray delivery functions had not been transferred to Food Services she would have moved ahead with her proposal to contract out of the cafeteria functions using attrition and the reassignment of staff. Ms. Truman testified that if the tray delivery functions had not been transferred the employer would still have outsourced food services but it would have taken longer and would have been done in a different way.

Before being implemented any proposals required the approval of a Management Committee, a Joint Steering Committee comprised of employer and Ministry of Health representatives and the employer's Board of Directors. Ms. Truman was a member of the Management Committee and a Co-chair of the Joint Steering Committee.

The documentary evidence filed at the initial hearing included a version of the proposal form prepared by Ms. Palmer with respect to outsourcing the cafeteria and catering operations. This version contained the statement "Approval MC May 18", which indicated that the proposal had been approved by the Management Committee. This version of the proposal no longer contained Ms. Palmer's reference to possible attrition or the reassignment of staff. Instead the full statement now read: "Impact of layoffs may be offset by Food Services resuming tray delivery from Environmental (Renaissance proposal of May 2003). Otherwise would trigger the 'contracting out' language of the collective agreement if staff layoffed in Food Services as a result of outsourcing retail."

Ms. Palmer prepared a separate proposal form to reflect the impact of Food Services taking over the tray deliveries. This proposal was amended by an unknown person (according to Ms. Truman it was likely a staff member in the Finance Department) who added the statement: "Impact of the Food Service initiative (outsource of retail and catering services) reduction of 13 FTEs which need to be reassigned to not

trigger the contracting out clause of the collective (sic)". The document containing this entry bore the notation "Approval MC May 18".

The employer subsequently transferred the tray delivery functions to dietary aides. It also contracted out the cafeteria and catering operations to a contractor pursuant to a commercial arrangement that did not meet the requirements of Article 10.02 of the collective agreement. A cook who had been employed in the cafeteria moved into a receiver vacancy. A dietary aide who had spent 1.5 hours per day in the cafeteria in addition to certain other duties was assigned alternative functions to fill this time. Three other dietary aides who had worked in the cafeteria were assigned to other dietary aide duties, which now encompassed the tray delivery functions. A number of service associates at Brampton, nine or ten of whom had previously been doing tray deliveries as part of their duties, were given layoff notices. None of the service associates impacted by the transfer of the tray delivery functions were actually laid off to the street. Most moved into other positions without any change in their rate of pay.

In light of the evidence and representations of the parties, and bearing in mind that the collective agreement described a layoff so as to include someone who had been given a notice of layoff, I concluded as follows that the employer had breached the collective agreement:

The employer viewed the proposals to contract out the cafeteria and transfer the tray delivery functions at Brampton from Service Associates to Dietary Aides as interrelated. From the employer's perspective Dietary Aides who had been in the cafeteria could continue working in Brampton as Dietary Aides notwithstanding that their work was to be contracted out and management was not required to avoid giving them layoff notices by reassigning them to vacancies in Etobicoke, waiting for attrition to open up vacancies in Brampton or possibly taking some other step. This process, however, did result in layoff notices being given to some of the Service Associates at Brampton who had been doing the tray delivery work.

The employer addressed the two proposals as an interrelated whole and structured the situation so that the impact of the contracting out was felt by Service Associates instead of Dietary Aides. It is no answer to say that the employer could have approached matters differently. In terms of ascertaining whether the employer breached the collective agreement logically it is the approach that the employer actually adopted that is relevant. In light of the employer's approach, I find that the employer contracted out work usually performed by members of the bargaining unit and as a result of this action employees other than casual part-time

employees were laid off. I further find that by doing so the employer violated article 10.01 of the collective agreement.

At the conclusion of the March 20, 2006 award I remitted the matter of remedy to the parties to see if they could fashion a mutually agreeable outcome and retained jurisdiction with respect to the issue. I was subsequently advised that the parties had been unable to reach agreement on an appropriate remedy.

THE UNION'S SUBMISSIONS RESPECTING THE APPROPRIATE REMEDY

At the hearing into the issue of an appropriate remedy union counsel asked for: (1) a declaration that the employer had breached and was continuing to breach Article 10.01 of the collective agreement; (2) a cease and desist order requiring that the contractor vacate the cafeteria operation; (3) an order that the work be returned to the bargaining unit; (4) an order that union dues for 13 full-time equivalent employees ("FTE"s) be paid to the union from the time of the contracting out; and (5) an order that the employer compensate the union for its costs in these proceedings. As already noted, the union did not seek the movement of employees back to their original positions.

Union counsel contended that the requested remedies were based on the structure of the collective agreement, especially Article 10.01 which states that the employer is not to contract out work if it results in the layoff of employees. He argued that Article 10.01 is a prohibition against contracting out rather than a no lay-off clause. He said that the Article protects the bargaining unit and secondarily protects the job interests of employees.

Union counsel contended that the purpose of a remedy is to place the parties in the same position that they would have been in had there not been a breach of the collective agreement. He submitted that consistent with the protection provided by Article 10.01 the harm was to the integrity of the bargaining work. He claimed that retail work that was bargaining unit work is no longer the bargaining unit work, this is the loss, and this is why the union is seeking a return of the work to the bargaining unit.

Union counsel described Article 10.02 as an exception to Article 10.01 which enables the employer to contract out work that results in layoffs provided the contractor hires displaced employees and executes a collective agreement with respect to the work that reflects the agreement between the union and hospital. He contended that the article ensures compliance by having the hospital agree to withdraw work from a contractor who does not meet these arrangements. He submitted that a notice of layoff counts as a layoff but here the contractor had not executed an agreement with the union with respect

to the work. He argued that there had been a breach of Article 10.01 involving a contractor who did not fit within the exception in Article 10.02.

In support of his submissions union counsel referred to Re Canadian Pacific Limited and CAW-Canada Local 101 (1997), 50 CLAS 452 (M.G. Picher); Re B.C. Rail and U.A. Local 170 (2004), 79 CLAS 343 (D.R. Munroe); and Re York Federation of Students and Canadian Union of Public Employees, Local 1281 (2004), 132 L.A.C. (4th) 444 (M.B. Keller). In each of these cases the employer contracted out work contrary to the terms of the collective agreement and was directed to cease doing so.

Union counsel relied heavily on Re Scarborough Hospital and Canadian Union of Public Employees, Local 1487, a January 17, 2006 award of a board of arbitration chaired by Arbitrator Burkett. That case involved the same collective agreement language as in the instant case. The Scarborough Hospital decided to contract out its cafeteria operations. It offered CUPE Local 1487 an early exit package program to facilitate the placement of staff, which the union accepted. Eighteen employees accepted early exit packages. The hospital contracted out the cafeteria operations pursuant to commercial arrangements with a contractor that did not meet the requirements of Article 10.02. The bargaining unit lost some 23 FTE positions, including those who took the early exit packages, as a result of the contracting out. No bargaining unit employees were laid off to the street but as a result of the contracting out the hours and shift times of some were detrimentally impacted. Partway through the arbitration hearing the employees who had suffered a reduction in hours had their original hours restored and the hospital undertook to compensate them for the lost hours. The union, however, sought a cease and desist order requiring that the contractor vacate the cafeteria operations.

In his award Arbitrator Burkett held as follows that the applicable collective agreement language is designed to protect the integrity of the bargaining unit and the job interests of individual employees:

The Union is correct when it argues that article 10.01 is designed to protect the integrity of the bargaining unit. It is also, of course, when read in conjunction with article 9, designed to protect the employment or job interests of individually affected bargaining unit employees. Article 10.01 prohibits the contracting out of “any work performed by members of the bargaining unit if, as a result of such contracting out, a layoff of any employee ... results from such contracting out.” The protection, therefore, extends to both the institutional interests of the trade union and to the employment interests of the affected employees.

Arbitrator Burkett held that the requirements of Article 9.08(b) had not been met in the case before him since some employees had their hours reduced and others had been assigned from straight day shifts to rotating shifts. He went on to conclude that because the contracting out had not been exempted under Article 10.02 it had been prohibited.

With respect to the issue of remedy Arbitrator Burkett indicated that but for the agreement of the parties respecting early exit packages he would have ordered that the contracting out be undone and the work be returned to the bargaining unit. Because the union had agreed to early exit packages, however, he directed that the matter be referred back to the parties to see if they could agree on a satisfactory remedy. In the course of his award Arbitrator Burkett made the following comments with respect to remedy:

This brings me to the question of remedy. The Union is not seeking individual remedies but rather a remedy that restores the integrity of the bargaining unit. This would be an easy case were it not for the agreement of the Union and the Employer with respect to the early exit packages. Absent that agreement, we would simply order that the contracting out be undone and the work returned to the bargaining unit. However, in this case, the Union agreed to early exit packages that were negotiated as a specific response to this contracting out and thereby accepted a reduction in FTEs as a result of this contracting out. Some 18 food service employees opted for and received early exit packages. On the one hand, therefore, the collective agreement, on the facts here, prohibits the contracting out, thereby supporting a remedial response that recognizes the Union interest and the labour relations policy considerations that work in favour of strict compliance. On the other hand, the agreement between these parties with respect to the payment of early exit packages in connection with this contracting out raises equitable considerations that distinguish this case and mitigate in favour of a remedy that takes this into account.

It is our view that, rather than exercise our remedial authority at this point, we should remit this matter back to the parties and remain seized. In doing so, it is our hope that the parties themselves can shape an effective remedy satisfactory to both of them that reflects the somewhat unique circumstances of this case.

In the instant case union counsel contended that there had not been any evidence of enhanced early retirement or exit packages over and above those provided for in the collective agreement. He submitted that I am in the same situation Arbitrator Burkett would have been in but for the exit packages in the Scarborough Hospital case. He

argued that in line with Arbitrator Burkett's comments I should direct that the cafeteria operations be returned to the bargaining unit.

As noted above, union counsel requested an order that the employer pay dues to the union for 13 FTEs. He said that should the employer adopt a different position with respect to the number of FTEs involved I could remain seized with respect to the matter.

THE EMPLOYER'S SUBMISSIONS

Counsel for the employer contended that the remedy in this case should be limited to a declaration and an order rescinding the layoffs and directing compensation to any employees who might have suffered a loss as a result of a layoff.

Employer counsel contended that Article 10 of the collective agreement does not prohibit contracting out or protect the integrity of the bargaining unit but instead protects employees from layoffs caused by contracting out. He submitted that it provides no more and no less than layoff protection. He said that the employer cannot contract out if layoffs occur and it is the layoffs that are improper. He described Article 10.02 as providing for an exception such that even if layoffs do occur there can be contracting out. He submitted that Article 10.02 is a saving clause that saves the layoffs.

As noted above, in his submissions employer counsel referred to the history of the collective agreement language. He contended that the balance struck by interest arbitrators has not been to prevent contracting out but rather to protect individual employees from layoffs.

Employer counsel argued that Article 10 provides protection to employees and not protection to the integrity of the bargaining unit. He submitted that this underlines that the proper remedies in this case are a declaration and a rescission of the layoffs. He contended that the union does not want the layoffs rescinded as the employer had maintained a number of vacancies and accordingly employees could go where they wanted to go. He argued that it would not be appropriate to grant a remedy which does not flow rationally from the breach of the collective agreement because the union does not want a remedy that does rationally flow from the breach. At another point in his submissions employer counsel contended that substantive remedies are available to the union and the fact the union did not ask for them does not mean that the union can ask for remedies that do not flow from the breach of the collective agreement.

Employer counsel contended that a retraction of the contracting out would not flow from the breach of the collective agreement. He submitted that the breach related to the layoff of service associates and to require that the employer now hire a small number of

dietary aides and a cook and perhaps bring back the SEIU cashiers would not have any impact on the service associates. He argued that there would not be any causal connection between bringing the work back into the bargaining unit and the collective agreement breach that I had found.

In support of a contention that there must be a clear link between a remedy and a breach of a collective agreement employer counsel referred to Re: Colonial Furniture and Retail, Wholesale & Department Store Union, Local 414 (1995), 47 L.A.C. (4th) 165 (D. Lavery). The employer in that case deemed an employee's broken service to be continuous and as a result granted him a greater vacation entitlement than what was provided for in the collective agreement. By way of a remedy the arbitrator directed that the employer not again apply the agreement in the same manner without first obtaining the union's consent. At page 177 Arbitrator Lavery made the following statement about the limits on an arbitrator's remedial powers.

It may be concluded that in cases as the instant one where a simple declaration does not remedy the harm caused to the other party as a result of the breach of the collective agreement and where damages are not appropriate, the arbitrator must have the authority to fashion other remedies. The limit to this authority, other than specific limitations provided in the collective agreement, if any, is, in my view, that there must exist a clear link, and obvious nexus or a rational relationship between the breach of the collective agreement, its consequences and the remedy ordered by the arbitrator and further the remedy must not be punitive.

Employer counsel acknowledged that in the Scarborough Hospital case Arbitrator Burkett indicated that undoing the contracting out would generally be appropriate. He contended, however, that Arbitrator Burkett's statements were obiter given that he did not order any remedy. He further submitted that there had not been any suggestion in his award that Arbitrator Burkett had been given the history of Article 10. He also contended that Arbitrator Burkett had been wrong since his comments did not reflect the history of Article 10.01 in terms of the interests that it was designed to protect.

Counsel for the employer contended that another reason why rescission of the contracting out would not be proper is that it would affect innocent third parties, namely the contractor and the employees of the contractor who are performing the work. In addition he argued that rescission would be expensive and time consuming and would not result in any long term change given the employer's intention to contract out the work.

Counsel for the employer submitted that the union's request for dues payments was not rationally connected to the breach of the collective agreement since no jobs had been lost. He added that he did not know where the union's reference to 13 FTEs had come from. He opposed the union's request for costs arguing that costs are not awarded in arbitration proceedings.

THE DECISION

I recognize that had the employer known that its approach would involve a breach of the collective agreement it would have sought to rely on attrition and the type of reassignments contemplated by Article 9.08(b) to ensure that no layoffs occurred in connection with the contracting out. That, however, is logically not a consideration in formulating a remedy at this stage of the proceedings.

Employer counsel suggested that one reason why the contracting out should not be undone is that the employer would again contract out the cafeteria and catering operations using a different approach. Such a possibility was one reason why the parties might have reached agreement on the issue of remedy. Given that they did not do so, however, I believe the appropriate approach is to fashion the remedy that appears most reasonable in light of the wording of the collective agreement.

As noted above, the history of the collective agreement language was raised in the context of a contention by employer counsel that Article 10 is directed at layoff protection for employees and not to prevent contracting out. There can be no doubt that interest arbitrators have been concerned to protect individual employees from being detrimentally impacted by contracting out. They would also, however, have recognized that any restriction on a hospital's ability to contract out work would serve to protect the union's bargaining rights. In his 1990 interest award Arbitrator Gorsky declined to change the then language of the collective agreement but did voice a concern about potential harm to the integrity of the bargaining unit from contracting out. Arbitrator Mitchnick's 1996 wording for the "saving" provision in Article 10.02 was clearly aimed at preserving the union's bargaining rights by providing for a contractor to stand in place of the hospital for the purposes of the collective agreement. In such a situation the original bargaining unit might become smaller but the union would also come to represent employees of the contractor in another bargaining unit. In the Scarborough Hospital case Arbitrator Burkett concluded that the collective agreement language is designed to protect both the employment interests of employees and the institutional interests of the union. I agree with that assessment.

The language of the collective agreement creates a sharp distinction between two types of contracting out situations, namely those that result in layoffs of other than

casual part-time employees and those that do not. Article 9.08(b) enables a hospital to reassign employees rather than provide them with a notice of layoff if certain conditions are met. It does not, however, change the very different treatment of contracting out situations that either do or do not result in a layoff.

The collective agreement does not prohibit a contracting out that does not result in a layoff of employees. In contrast, Article 10.01 places a restriction on a hospital's ability to contract out work where a layoff will result. It states that: "the Hospital shall not contract out any work ... if as a result ... a layoff of any employees ... results from such contracting out". The language clearly prohibits the contracting out. It does not say, as it might have, that contracting out of work is not to result in the layoff of employees. The target of the prohibition is clearly the contracting out.

This conclusion is reinforced by the language in the "saving clause" in Article 10.02. It provides that notwithstanding Article 10.01 a hospital may contract out work without such contracting out being in breach of the agreement if the hospital's arrangement with the contractor meets certain conditions. The focus is on when contracting out can occur.

In the instant case the employer contracted out work normally performed by members of the bargaining unit, which resulted in a layoff of employees other than casual part-time employees. Its commercial arrangement with the contractor did not meet the requirements of Article 10.02. Accordingly, the employer contracted out work contrary to Article 10.01. I accept the accuracy of Arbitrator Burkett's comments in the Scarborough Hospital case respecting the appropriate general approach to remedying such a situation, namely to order that the contracting out be undone and the work returned to the bargaining unit.

As noted above, employer counsel suggested that ending the contracting out would improperly affect the contractor and its employees. The employer's very action in contracting out the work to the contractor, however, was in violation of the collective agreement. Employer counsel also suggested that hiring a small number of dietary aides and others for the cafeteria operation would not have any impact on the service associates who received notices of layoff. I do not, however, propose to direct that the employer hire any dietary aides. Decisions about how to return work to the bargaining unit would, at least in the first instance, be a matter for the employer to decide.

Having regard to the considerations discussed above I direct that the employer bring the contracting out of the cafeteria and catering operations to an end and return the work involved to the bargaining unit.

The above direction is not a bar to the parties reaching agreement on an alternative arrangement.

If the employer has been employing fewer employees in the bargaining unit than it otherwise would have due to the contracting out the union is entitled to be compensated for the amount of dues payments it lost as a result. It may be that the parties will be able to agree on what amount, if any, was lost to the union. I retain jurisdiction to address that issue if the parties cannot reach agreement.

The normal practice is for both parties to cover their own arbitration costs. I was not referred to any agreement or practice of the parties that would support a variation from this practice. Accordingly I do not make any award of costs.

I retain jurisdiction to address any matters that might arise directly out of this award.

Dated this 10th day of February 2007.


Arbitrator