IN THE MATTER OF A MEDIATION/ARBITRATION

BETWEEN:

HEALTH EMPLOYERS ASSOCIATION OF BC

(the "Employer")

AND:

HEALTH SCIENCES PROFESSIONAL BARGAINING ASSOCIATION

(the "HSPBA")

(Layoffs re 37.5 Hour Work Week)

MEDIATORS/ARBITRATORS:	Vincent L. Ready
COUNSEL:	Delayne Sartison, Q.C. for the Employer
	Lindsay M. Lyster for the HSPBA
HEARING:	March 10, 2014 Vancouver, BC
AWARD:	April 7, 2014

I. INTRODUCTION

This arbitration arises out of a dispute between the parties regarding the implementation resulting from the changeover from the previous 36 hour work week to the 37.5 hour work week negotiated between the parties in their recent Collective Agreement.

The Health Sciences Professional Bargaining Association ("HSPBA") is certified under the *Labour Relations Code* of British Columbia to represent employees in several Unions in this sector; namely, Health Sciences Association ("HSA"), BC Government & Service Employees' Union ("BCGEU"), Hospital Employees' Union ("HEU"), Canadian Union of Public Employees ("CUPE") and Professional Employees Association ("PEA").

The Health Employers Association of BC ("HEABC") represents the employers in this sector and in the matters before this board.

II. THE GRIEVANCES AND THE POSITIONS OF THE PARTIES

There are a number of grievances relating to whether the reduction of part-time employee hours constitutes a lay off for the purpose of the Memorandum of Understanding – Implementation of 37.5 Hour Work Week (the "MOU"). Collectively, the Unions have filed in excess of 1,600 grievances respecting what they view as the Employers' failure to comply with the MOU, and many of the grievances relate to the reduction of hours for part-time employees.

The Unions grouped their grievances into six categories, depending on the nature of the conduct in question. Those categories are described by the HSPBA as follows:

i. Grievances filed if the Employer lays off any employee, either part-time or full-time including reducing the hours of any employees or not increasing the hours of any full-time employees ("Category 1");

ii. Grievances filed if the Employer announces an intention or gives notice of laying off any employees, including reducing the hours of any employee, either part-time or full-time ("Category 2");

iii. Grievances filed if the lay-off described above is of employee(s) who are not the most junior on the most relevant seniority list ("Category 3");

iv. Grievances filed if the Employer engaged in a flawed process such as they failed to provide clear indication of their health delivery objectives, failed to engage in discussions with affected staff, failed to explain why schedules were denied, failed to give notice, consult and/or consider options as set out in the MOU and other relevant agreements ("Category 4");

v. Grievances field if the Employer reduces the hours of more than one part-time employee by .2 or less rather than directing the entire layoff to the junior employee or employees ("Category 5");

vi. Grievances filed where the Employer tries to introduce additional process or objective on top of the implementation of the 37.5 hour work week. If the Employer is relying on the MOU-transition to 37.5 hours work week process to implement changes that are not necessary in transitioning to a 37.5 hour work week (for example smoothing out of all schedules within an organization, expansion of coverage days and hours, implementing budget cuts, recovering deficit, or any other process that would require independent section 54 notice) ("Category 6").

The Unions assert that the Employers breached Category 1, Category 2, Category 3 and/or Category 5 grievances in a number of work locations. Specifically, the Unions say the following:

- A reduction in the hours of work of a part-time employee constitutes a layoff and is therefore in breach of the MOU;
- In the alternative, if it is not always a layoff, then such a reduction is a layoff where particular part-time employees are singled out for reduction, particularly where it was done without regard to seniority;
- And, if a reduction of hours is permitted, then the MOU creates significant restrictions and limitation on the circumstances in which the Employer could reduce the hours of work of part-time employees.

HEABC argues that the reduction of part-time employee's hours does not constitute a layoff under the MOU and is not otherwise prohibited by the Collective Agreement. HEABC points to the bargaining history as well as the language in the MOU and the Collective Agreement to support its assertions.

III. RELEVANT DOCUMENT AND COLLECTIVE AGREEMENT PROVISIONS

There are a number of relevant documents that were presented by the parties. For the purpose of this decision, we wish to highlight the wording of the MOU, the January 30 Letter and the April 15 Guidelines.

The MOU states:

> 2012 Collective Bargaining in the Health Sector
>
> Renewal of the 2010-2012 Health Science Professionals (HSP) Collective Agreement
>
> Amend the collective agreement, by adding the following Memorandum of Understanding:

MOU – Transition to 37.5 Hour Work Week

During collective bargaining the parties agreed to a thirty-seven and one-half (37.5) hour work week.

The Employer agrees that this will not result in any layoffs for health science professionals and will be done in a manner that minimizes the impact of these changes on individual health science professional's employment and security.

It is recognized that in many areas it will be necessary to revise the rotations and/or shift schedule in order to implement the thirty-seven and one-half (37.5) hour week. The parties commit to work together to ensure a smooth transition as a result of changes to rotations and/or shift schedules due to increased hours of work.

In order to minimize impact of the transition to the thirty-seven and one-half (37.5) hour work week, the Employer agrees to consider the following options:

a) Regularization of casual and overtime hours (part-time or full-time basis), such as creating built in vacation relief.
b) Use of current vacancies to maintain current part-time employee's hours of work.
c) Offer job shares as per Appendix 8.
d) Other options as mutually agreed between the Union and the Employer.

The Employer and the Union agree to develop a process to expedite the building of the rotations and/or shift schedules.

The January 30, 2013 Letter, which was written by Ms. Hook and sent to Ms. Meyers reads:

Re: Implementation of 37.5 Hour Work Week

This is to confirm our agreement on the application of certain provisions of the Collective Agreement relating to implementation of the 37.5 hour work week.

The parties agree to the following:

- Upon implementation of the 37.5 hour work week by an Employer, any schedules with shifts longer than 7.5 hours are considered to be Extended Work Day/Week schedules, not EDO/ATO schedules. Appendix 6 will not apply.
- Either party may terminate existing Extended Work Day/Week schedules by providing 30 days notice, subject to Article 24.08.
- When implementing the 37.5 hour work week, employers can make changes to or eliminate existing EDO/ATO schedules (including 9 day fortnights) without following the process set out in Appendix 6, subject to the following:

    - such changes shall not take effect prior to the date of implementation of the 37.5 hour work week at the Employer;
    - changes to existing EDO/ATO schedules will be done on an individual department/work group basis (i.e., not health authority-wide);
    - Employers will give 90 days notice (or a mutually agreed lesser amount) to the affected work group rather than 30 days as required under Appendix 7;
    - the provisions of the MOU re: Transition to 37.5 Hour Work Week will apply; and,
    - no new overtime waiver will be required where changes relating to implementation of the 37.5 hour work week are made to Extended Work Day/Week schedules, including to any work schedule with shifts between 7.2 and 8 hours where the employees did not need to sign an overtime waiver under the current and/or previous Collective Agreement(s). If the employees continue to work a 9 day fortnight or any other Extended Work Day/Week schedule, they are deemed to have signed the overtime waiver.

The April 15 Guidelines were agreed to by the parties when implementing the 37.5 hour work week and read as follows:

HEABC and HSPBA 37.5 Hour Work Week Implementation Process

The Health Employers Association of BC (HEABC) and the Health Sciences Professional Bargaining Association (HSPBA) agree to the following guidelines when implementing the new 37.5 hour work week:

1. Since most, if not all, work schedules will need to be revised to reflect the new work week, this document serves as notice and satisfies the requirement to issue 90 days' notice in the January 30, 2013 Letter of Agreement.

2. All other provisions of the Memorandum re: Transition to the 37.5 Hour Work Week and the January 30, 2013 Letter of Agreement (both attached) remain in effect.

3. An extended hours schedule is any schedule with work days in excess of 7.5 hours per day.

4. When revising current extended hours schedules, the new schedules developed for the 37.5 hour work week may result in either of the following outcomes, subject to the criteria set out in paragraph 5 below:

    a. Current extended hours schedules (including those formerly referre3d to as EDO, ATO, etc.) may be eliminated.
    b. Current extended hours schedules may be modified into similar or different extended hours schedules.

5. In establishing the new schedules, the parties agree that the following procedures will be followed at the affected department/work-unit with the assistance of Union stewards or representatives if required:

    a. The Employer must give the Union and the affected employees an outline of its service delivery objective(s) (e.g. service days and hours). The Employer may propose a specific work schedule which meets its objective(s).
    b. The Employer must give the employees a reasonable opportunity (at least 2 weeks) to propose a work schedule or, if the Employer proposed a work schedule, provide a response or alternative to the Employer's proposed schedule.
    c. The Employer must consider any proposals which the employees put forward and, if the proposal is rejected, provide an explanation in light of its service delivery objective(s).

6. A 52 week scheduling period (1950 hours) shall be used for the purpose of developing work schedules. This does not

alter any rights or entitlements of employees under the Collective Agreement.

7. The Employer may commence the process set out in paragraph 5 above as soon as possible but no later than 60 days prior to implementation of the 37.5 hour work week and must complete the process no later than 30 days prior to implementation of the 37.5 hour work week.

8. The parties agree that the process set out above is considered to satisfy the requirements of section 54 of the Labour Relations Code, if it applies.

9. Following implementation of the 37.5 hour work week, any changes to work schedules, including the creation of new extended hours schedules, shall be done in a manner consistent with the Collective Agreement.

Finally, the parties took me to the following Collective Agreement provisions:

6.04 Seniority

The principle of seniority as defined in this Article is recognized by the Employer.

Seniority for a regular employee is defined as the length of the employee's continuous employment (whether full-time or part-time) from the date of commencement of regular employment; plus any seniority accrued, while working as a casual employee of the Employer.

Seniority for regular employees continues to accrue when:

1. an employee is on WCB leave;
2. an employee is on LTD leave; (including the qualifying period)

Seniority for casual employees is defined as the total number of hours worked as a casual by the employee for the Employer, plus calendar time spent (on the basis of a 36 hour work week) as a regular employee.

When a casual employee returns to work after a WCB claim, the employee will be credited with seniority hours based on their relative position on the casual list while receiving Workers' Compensation benefits.

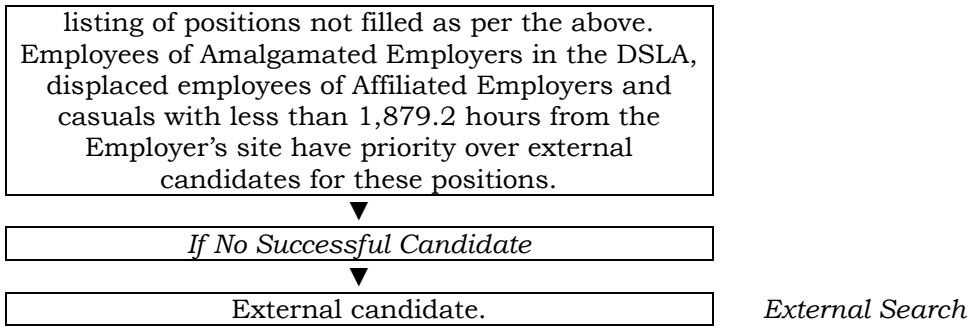
Seniority relates to institutional seniority only (except as modified by Article 9.01, 29.02(e), or by mutual agreement between the parties).

Article 9 – Vacancy Posting

9.01 The Employer agrees that when a vacancy occurs for a position covered by the union certification, the Employer will give union members in the health organization first consideration in filling a vacancy. Where first considered applicants are not appointed to a vacancy, they will be given a verbal explanation as to why their application has not been accepted, if the employee so requests. The following process shall be followed in filling a regular ongoing vacancy:

(Note: This Article is impacted by Appendix 21 – Memorandum of Understanding re Article 9 Vacancy Postings)

Group 1 – Amalgamated Employer **	
Regular on-going vacancy occurs in an Amalgamated (Health Authority) Employer Site.	
▼	
Post vacancy in that Employer Site. All health science professional employees whether displaced, laid off, regular or casuals with more than 1,879.2 hours can apply and are considered pursuant to Article 10.	*Employer Site Posting*
▼	
If No Successful Candidate	
▼	
Consider displaced employees of Amalgamated Employers in the DSLA who have expressed an interest in the "unfilled vacancy".	*Unfilled Vacancy*
▼	
If No Successful Candidate	
▼	
Recall laid off employees of Amalgamated Employers in the DSLA.	*Recall*
▼	
If No Successful Candidate	
▼	
Forward to all other Employer Sites in the DSLA, information allowing for display on notice boards, a	*Regional Posting*



* The posting process steps may occur simultaneously. The employer may implement electronic job posting and employee application for job posting in place of or in conjunction with paper posting.

** See Attachment B for a list of Amalgamated Employers and worksites in the DSLA.

…

9.07 The following changes to the status or scheduling of a position create a requirement to post under section 9.01:

(a) a change in status between full-time and part-time, or

(b) a change in scheduled hours of more than 7.2 hours per week within a twelve (12) month period from the date of such change, or

(c) a change in assigned permanent shift (i.e. days, evenings, nights).

If the incumbent does not apply or applies and is not appointed then the employer can exercise rights under Article 10.05.

The Employer will consider the impact of the proposed change on the incumbent before making a change in status or a significant change in hours of work.

(This article may be impacted by the Health and Social Services Delivery Improvement Act.)

Article 10 – Promotion, Demotion, Transfer or Lay-off

10.01 Application of Seniority

(a) In the promotion, demotion, transfer or lay-off of employees, in respect of Grade 1 positions, capability, performance, qualifications, and seniority shall be the determining factors.

(b) In the promotion, demotion, transfer or lay-off of employees, in respect of positions other than Grade 1, capability, performance and qualifications shall be the primary consideration. When such factors are equal between employees, seniority shall be the determining factor.

…

10.05 Displacement and Bumping Process

(a) Layoff in Reverse Order of Seniority
In the event of a reduction in the workforce, employees shall be laid off in reverse order of seniority provided that there are available employees with seniority whose capability and qualifications meet the Employer's requirements for the work of the laid off employees.

…

IV. DECISION

I have read and considered the Relevant documents, the Collective Agreement, the case law and submissions of the parties with respect to the threshold question of whether a reduction of hours for part-time employees constitutes a layoff. I find that *prima facie*, it does not.

In reviewing the bargaining proposals, the correspondence between the parties in negotiating the 37.5 hour work week, and the final language respecting part-time hours that was agreed to by the parties to the MOU, I find that the parties understood and established that it was a possibility that part-time employee hours could be impacted in this process. The MOU expressly

contemplates that in order to minimize the impact of the transition, the Employer must consider, as an option, how to utilize current vacancies "…to maintain current part-time employees' hours of work". I agree with HEABC that if I were to find that a reduction of part-time hours constituted a layoff for the purpose of interpreting the MOU, it would render that option quite meaningless, especially in light of the proposals that were exchanged with respect to the MOU language.

This MOU and accompanying documents were discussed and negotiated for a very specific purpose: moving the hours of work per week of health science professionals to an average of thirty-seven and one-half (37.5) work hours per week. Therefore, for the specific purpose of interpreting and implementing the MOU across the industry, I do not find that a reduction of part-time employee hours of work constitutes a layoff and was therefore prohibited by the MOU.

This then begs the question as to whether there were restrictions and limitations on the circumstances in which the Employer could ever reduce the hours of work of part-time employees when implementing the MOU. I find that there must be restrictions and limitations and that the parties themselves imposed the restrictions and limitations in the MOU and the accompanying documents.

The MOU states that the Employer agrees to consider a number of options to minimize the impact of the 37.5 work week and that looking at the part-time employee's hours of work was just one of such options for the Employer to consider. Although the transition to a different schedule was bound to be disruptive, the parties agreed that the change "…will be done in a manner that minimizes the impact of these changes on individual health science professional's employment and security". This commitment would apply when the Employer was considering any reduction to part-time hours, as

would the commitments agreed to as to process, which are canvassed in detail in the companion award to this decision.

Therefore, I find that although the reduction of part-time hours does not constitute a lay-off in the context of implementing the MOU, the parties were bound by the commitments negotiated to and agreed in the MOU as well as the January 30 Letter and the April 15 Guidelines. As such, in any reduction of hours for part-time employees, it would have been incumbent on the Employer to implement such changes in a manner that minimizes the impact, and was done in accordance with all process requirements, including the requirement that the Employer consider and respond to proposals which part-time employees put forward once service delivery options were outlined by the Employer.

On a final note, although the MOU does not speak to seniority, I would agree with HSPBA that regular part-time employees accumulate seniority (see Article 3.02) and that the seniority of part-time employees would be a labour relations consideration of the Employer when considering the options negotiated in the MOU and making the difficult decisions as to how to implement new hours of work in the industry.

It is so awarded.

Dated at the City of Vancouver in the Province of British Columbia this 7th day of April, 2014.

Vincent L. Ready