

IN THE MATTER OF AN ARBITRATION

BETWEEN

YORK UNIVERSITY

("York" or "University")

and

CANADIAN UNION OF PUBLIC EMPLOYEES LOCAL 3903

("Union")

Re: Unit 2 Interest Arbitration

SOLE ARBITRATOR: James Hayes

A hearing was held in Toronto on November 3, 2018.

APPEARANCES

For the Union

Richard Blair, Counsel
Raj Virk, CUPE Local 3903 Staff Representative
Devin Lebevre, Chair, CUPE Local 3903
Julian Arendt, Grievance Officer, Unit 2
Sharon Davidson, Vice President, Unit 2
Sabina Mirza, Recording Secretary, Unit 1
Maria Wallis, Unit 2 Bargaining Team
Murray Cooke, Unit 2 Bargaining Team
Chelsea Bauer, Unit 1 Bargaining Team
Justin Panos, Unit 1 Bargaining Team
Erin Grosjean, Unit 1 Bargaining Team
Tai Vo, Unit 3 Bargaining Team
Steff Mendolia, Unit 3 Bargaining Team
Mariful Alam, Unit 3 Bargaining Team

For the University

Simon E. Mortimer, Counsel
Michael J. Kennedy, Counsel
Jessica M. Toldo, Counsel
Lyndon Martin, Dean
Kate McPherson, Associate Dean, Liberal Arts & Professional Studies
Rob Lawson, Associate Director, Faculty Relations
Mario Verrilli, Executive Officer
Lisa Phillips, Provost
Leanne De Fillippis, Interim Executive Director, Faculty Relations
Barry W. Miller, Senior Policy Advisor on Labour Relations

AWARD

Introduction

1. This Award settles terms and conditions to be included in a three-year Collective Agreement that will expire on August 31, 2020.
2. The Award relates to the contract faculty bargaining unit as defined in Article 3.01 of the Collective Agreement. There are approximately 1100 people in Unit 2.
3. CUPE Local 3903 represents graduate teaching assistants, contract faculty, and graduate assistants in three bargaining units at York.
4. The three Collective Agreements have been bargained, traditionally, at the same table. A number of contractual provisions and related proposals are identical. The University strongly objects to continuing in this format going forward although it acquiesced for this round.
5. A single hearing was held although it was understood that separate awards would issue. Comprehensive pre-hearing briefs were exchanged for each bargaining unit.

Background

6. CUPE Local 3903 engaged in a strike that lasted about four and a half months. Neither the Union nor the University wavered. The strike commanded significant public attention as normal operations at York were seriously affected. It was the longest in the history of the University and affected tens of thousands of students and, one way or another, countless other members of the University community.

7. Throughout the bargaining the parties had the benefit of the assistance of Greg Long, a Ministry of Labour mediator with extensive experience in the university sector. Mr. Long was unable to achieve resolution of any significant outstanding issue.

8. On April 13, 2018, William Kaplan was appointed as an Industrial Inquiry Commissioner. He engaged in extensive facilitation efforts, also without success, and issued a report to the Minister of Labour dated May 4, 2018 that concluded in part:

Post-secondary faculty contract employment is complex, multi-faceted and often precarious. These issues are not unique to these parties. They arise across the province, although their magnitude varies. They would, in my view, benefit from careful, informed and principled study and review. Accordingly, I further recommend to the Minister that the government establish a task force on precarity in post-secondary employment along the lines of the *Changing Workplaces Review*.

9. The parties later participated in a further round of mediation with Kevin Burkett. The labour dispute continued. However, on June 15, 2018, Unit 2 members ratified a Memorandum of Settlement (“MOS”) dated June 10, 2018.

10. The MOS provided as follows:

The renewal collective agreement shall consist of the expired collective agreement as amended by the initialed changes and additions agreed upon to date that are applicable to Unit 2, together with the following¹:

- a. The language set out in the attached Appendix A.
- b. *Any changes or additions to the collective agreement in respect of the issues set out in Appendix B to this Settlement, to be remitted to interest arbitration for a final determination for inclusion in the Collective Agreement as may be awarded by an interest Arbitrator. The Arbitrator shall be agreed upon by the Parties or, failing agreement, appointed by Arbitrator Kevin Burkett. The*

¹ Italics found throughout this Award were not in the originals. They were added for emphasis.

Arbitrator shall establish a procedure for submissions of the parties on all issues relevant to the unresolved proposals and any issues arising out of these Minutes of Settlement and interpretation and implementation of the attached Appendix C 'Return to Work Protocol'.

11. Mediator Burkett appointed me to act as Interest Arbitrator after consulting with the parties.

12. When the Unit 1 and 3 strikes continued, the Legislature imposed interest arbitration: *Back to Class Act (York University), 2018* (the "Act"). Shortly afterward, the parties agreed that I should act as Mediator-Arbitrator for those disputes also.

13. I met separately with the University bargaining team on September 5, 2018, and Union representatives on September 12, 2018, to receive an introductory overview of their perspectives.

14. These meetings, and prior discussions with counsel, made it clear that the parties did not see a plausible path for fruitful mediation. The lengthy strike had not altered their positions concerning the remaining issues, or, their perspectives of each other. They had participated previously in three rounds of intensive expert mediation. They were now reconciled to adjudicated outcomes.

15. Certain issues were central to the collective bargaining impasse. The Unit 2 Brief identified "proposals having to do with employment stability and employment security" as having "paramount significance for members of this bargaining unit". The University Brief identified "conversions and other full-time appointments under the YUFA² collective agreement" as one "key barrier to settlement".

² York University Faculty Association

Challenges

16. Both the leadership of the University and members of the Union share the important project of preserving and elevating the academic quality of York while differing drastically, in the moment, with respect to priorities and means.

17. As Unit 2 members well understand, York faces multiple challenges in a fluid political environment subject to unrelenting financial pressure. Nevertheless, it is not difficult to appreciate why the Union makes frequent use of the descriptor 'precariat'. Unit 2 members face ongoing uncertainty with respect to their professional careers and economic circumstances.

18. York is only one university among many others that depends heavily upon contract faculty for the delivery of undergraduate teaching. Accordingly, it is inescapable that people of integrity will be debating academic employment problems and proposed solutions long after the details of this dispute have receded in memory. There never will be a simple panacea. University labour relations are guaranteed – indefinitely - to continue to entail a challenging mix of academic objectives, conflicting opinions, and hard economic truths.

Interest Arbitration

19. It is important to be clear about what interest arbitration is not designed to do. An Interest Arbitrator is not a Task Force charged with exploring and recommending a range of solutions to complex issues. An intrinsically adversarial interest arbitration for a single publicly funded university is certainly not equipped to get to the root of job security issues presented in post-secondary institutions across North America.

20. In this respect, the Union's perspective as recorded in the Kaplan Report is not misconceived. It presaged genuine concern that third party adjudication could not possibly meet member expectations. It squarely recognized that it is the parties who are best suited for such a task:

*Indeed, in Local 3903's submission, the complicated Unit 2 job security proposals require detailed and nuanced discussion between the parties – discussions that necessarily engage institutional principles and fundamental academic goals, not to mention the needs of the union members as both educators and, in some cases, students. These matters, along with the other issues in dispute, were reviewed by the union and the point made that *the only possible solution, in the union's estimation, was for the parties to return to the table and achieve a bargained outcome. Interest arbitration was a blunt instrument only to be used in the most extreme cases, and it was one, in any event, that was particularly poorly suited to the resolution of a difficult and challenging problem – one requiring complex and creative solutions.**

21. This Award can only reflect an informed opinion as to a rational result having regard to the specific local circumstances presented at this one point in time.

22. In this respect, the basic principles of interest arbitration are well formed and well known and require no elucidation here. The objective of interest arbitration is to identify an outcome that would best replicate terms that would have occurred in free collective bargaining. Arbitrators pay close attention to terms and conditions of employment in the relevant labour market for similar work. Comparators are critical to the inquiry. In every case, interest arbitrators should not lose sight of the total compensation that will result from any award.

CUPE Local 3903 and Comparators

23. The Union accepted the prevailing jurisprudence in its Brief:

The applicable principles in interest arbitration are *of course* principles of replication, relying, where appropriate on comparators to support outcomes consistent with a freely bargained agreement.

24. Nevertheless, CUPE submits that its demonstrated willingness to carry a strike has resulted in its achievement of a leading contract that renders comparison with others less persuasive. As stated in its Brief:

However, it must be noted that the Union's history of willingness to engage in collective action – strike action – to support its demands have led to collective agreements which are in certain respects superior to other agreements in the University sector. The Affirmative Action program, for example, is an important gain won by the Union originally in 1988 through such collective action. In areas where the Union's membership has established beneficial terms of employment through its manifest capacity to strike, comparisons to others – except comparisons which reflect the historical superiority of certain provisions of the Collective Agreement – must be made with caution.

25. In effect, the Union submits - based upon historical experience and its willingness to strike in this round - that this Arbitrator could and should grant a package of proposals beyond that achieved by its peers in free collective bargaining anywhere.

CUPE Local 3903 Bargaining Model

26. The Union's approach to collective bargaining is unconventional and, so far as I am aware, unique. It provides for direct member participation; what it refers to as open bargaining. Given the size of Units 1 and 2, the multiplicity of interests within the three Units, and the single table bargaining process, this approach led inevitably to resolute maintenance of a very large number of proposals said to be important without clear prioritization between them.

Proposals

27. The Union advances seventeen proposals stating that “each...is of importance” while emphasizing the “paramount significance” of those “having to do with employment stability and employment security”. The latter group included significant internal sub-issues with numerous proposed amendments to existing language and practice. York made one proposal but responded to many of the Union issues at least in part.

28. The University Brief states that the existing Conversion program “was at the heart of the strike”. That is indisputably correct and this aspect of the dispute requires elaboration.

29. Without contradiction by the Union, the University says that the existing Collective Agreement contains “the most comprehensive suite of programs providing the strongest job security for contract faculty available at Ontario universities” – and that it has “offered to improve them”. It emphasizes that the Collective Agreement already provides for Long Service Teaching Appointments (“LSTAs”) and a Continuing Sessional Standing Program (“CSSP”) designed to provide job stability for eligible faculty. Its proposals would improve these provisions to some extent. York also points to a variety of “supports” for contract faculty who wish to apply for full-time faculty positions and asserts that it has hired at least nine of its PhD (or equivalent) graduates over the last three years through unrestricted open searches.

30. LSTAs and the CSSP provisions are designed to provide a negotiated level of employment stability and security for contract faculty *within* the bargaining unit. They are accessible to many Unit 2 members. The Conversion program is quite different. It reserves a fixed number of tenure stream appointments for assignment to qualified members of Unit 2 *outside* the bargaining unit - without conduct of an open search beyond York.

31. The Union proposal for Conversions contains multiple clauses with a variety of procedural details that reach well beyond current contractual language and do not require recitation here. The Union seeks a minimum of 10 tenure stream recommendations per year or a number equal to 10% of the tenure track hires in that academic year.³ It asks that 25% of recommendations come from members of the Affirmative Action Pool with 10 or more years of seniority and that at least 50% of recommendations be for members of the five employment equity seeking groups, with written reasons in cases where such an applicant is not selected. The Union also proposes an increase from \$130,000 to \$162,000 in existing funding enhancement to hiring units for conversion appointments to provide greater incentive to make such recommendations.

32. The University responds with an argument grounded on its academic mission and raises a number of practical issues including difficulties in matching potential conversion candidates with faculty and departmental needs and priorities. York points out that the number of conversions has varied from 1 to 8 since 1988 and that the 8 conversions per year during the currency of the last Collective Agreement was a high water mark. Pursuant to a mediated agreement under back-to-work legislation, the number was 2 for each of 2009, 2010, and 2011. The University does not suggest elimination of the Conversion program but proposes that there should be a maximum number of two conversions for the last two years of the Collective Agreement. It says that York's "agreement to 8 conversions per year was made with the expectation that there would be a return to the smaller numbers of prior rounds in keeping with conversions as rare exceptions in which the open search process is set aside for a tenure stream appointment". The University agrees to provide \$130,000 available for incentive funding in each year of the Collective Agreement.

³ The parties agree that a large number of tenure stream appointments are expected in the near term.

33. It is beyond dispute that these conflicting collective bargaining proposals present a clash of values. The University emphasizes that the current Conversion program is unprecedented in the sector in Canada. It seeks to promote and preserve its right to conduct open academic searches. The Union seeks to secure automatic entry for at least some of its senior members into the tenure stream.

34. In this proceeding, the University offers to offset a lower number of conversion appointments with a renewed Special Renewable Contract (“SRC”) program that would provide access to 6 limited-term full-time appointments per year – for an initial 5-year term with the possibility of a 5-year renewal - in the YUFA bargaining unit. York acknowledges a jurisdictional issue concerning YUFA but states that “the Employer does not object to an Award on the terms it has proposed and would seek agreement to have this implemented”.⁴

35. The Union agrees that SRCs should be awarded but differs with the University as to what the number of such appointments and the terms of such a program should be. It proposes that the Award constitute a joint request of the parties that YUFA agree to amend its Collective Agreement to include the award of 10 SRCs for each of 2017-18, 2018-19, and 2019-20. The Union states that: “there is a significant likelihood of obtaining the Faculty Association’s agreement if the Union proposal is awarded”.

⁴ In a letter dated July 23, 2018, YUFA counsel stated that: “neither the two parties to the arbitration nor you acting as interest arbitrator have jurisdiction to impose any terms that would constitute an amendment to the existing YUFA collective agreement or that would purport to establish terms and conditions of employment for employees of York University who are within the YUFA bargaining unit. No such terms shall be implemented without the consent of YUFA”.

Discussion

Comparators

36. The Union may be correct that its previous achievements in collective bargaining were directly related to its willingness to enforce its demands with collective action. However, it is indisputable that the University in this round of bargaining has demonstrated equal resolution and the same resilience.

37. In similar circumstances, after a long strike at OC Transport, a very experienced tripartite Board of Arbitration unanimously concurred with the following approach:

Neither party was able to convince the other party to accept their position. Neither party chose to compromise to the point where an agreement was possible. The role of the Board, notwithstanding the work stoppage, is to fashion an award in the normal manner, precisely because of the inability of either party to impose its agenda on the other. In other words, the role of the Board is not to embrace either party's position, but to look neutrally at the issues remaining in the dispute. The role of the Board is to make an award that reflects, to the extent possible, what parties in this sector, bargaining in good faith, would have negotiated.

City of Ottawa, unreported, October 9, 2009 (Keller)

38. The merits of this case must be assessed having regard to well-established principles of interest arbitration. They are grounded in arbitral review of comparators. They recognize that even a public sector union with enormous leverage if permitted the right to strike - police, for example - is not entitled to a non-normative outcome. Because the result of good faith negotiation is unique in each instance, 'progress' is not a guaranteed outcome where parties are negotiating freely. In fact, the process of bargaining - which replication seeks to model - entails no entitlements for the benefit of either party. Interest arbitration almost always comes back to comparators.

Relevant Considerations

39. Bearing in mind the generally accepted principles of interest arbitration previously identified, the following factors are of particular significance in this case:

- The baseline Collective Agreement is a complex, sophisticated contract. It currently addresses a broad mix of academic, professional, and equity issues as well as typical terms and conditions of employment;
- Complementary job security approaches to long-term contract faculty employment were developed incrementally over many rounds of bargaining;
- In actual practice, the current Conversion program typically affects less than half of one percent of the bargaining unit and, thus, has little impact on the employment conditions and prospects of the vast majority of the members of the bargaining unit. The 2017-2018 window was closed by the strike;
- Union proposals provided for fundamental changes raising numerous academic, cost, and practical concerns without supporting information as to demographic impact. There were no parallel comparators for the employment security or conversion amendments sought. Where a party puts forward an exceptionally ambitious agenda in the form of complex, overlapping, and interrelated proposals that would substantially alter the *status quo*, the prospect of identifying the kind of nuanced and incremental change that would replicate the likely outcome of free collective bargaining becomes vanishingly small;
- Salaries were not at issue in this arbitration. Across the board annual increases above 2%, previously accepted by Unit 2 members, led the sector in this round. Accordingly, the 'total compensation' principle commands particular attention here;
- The existing benefit package is comprehensive. There were no reasonably parallel comparators for the benefit increases sought;

- The expired baseline Collective Agreement was already, as the Union concedes, sector leading before this round of collective bargaining;
- The 'gap' between Unit 2 and its peers elsewhere was widened further by pre-arbitration agreements reached by the parties;
- Accepting the York position at arbitration without modification would even further extend the lead of CUPE Local 3903 over all its sector peers.

Decision

40. Previously agreed matters

The Collective Agreement shall include any matter agreed upon by the parties during collective bargaining preceding this arbitration including but not limited to those identified in Appendix A to the MOS dated June 10, 2018.

41. Dental

University proposal: within the existing annual maximum, effective January 2019, the University shall provide reimbursement up to \$1,000 a year per employee for dental implants as an eligible expense under the group dental plan.

42. Sexual Violence Survivor Fund

The Arbitrator confirms the parties' agreement that, for the contract year September 1, 2018-2019, York will provide the Trans Feminist Action Caucus with \$50,000 to support survivors of sexual and/or gender-based violence. The University is prepared to provide up to \$50,000 in future. The primary issue in dispute is whether the Union should control this money going forward.

University proposal except: for the contract year 2019/2020, the Union will receive \$10,000 of that fund; the Sexual Violence Response Office will meet quarterly with the Union, or at reasonable request, to discuss access to and distribution of these monies.

43. Authorized replacements

University proposal: the parties shall establish a Faculty of Health Committee, to include two practicum Course Directors appointed by the Union and two persons appointed by the Dean, to review issues relating to practicum courses including the need for replacements; the Committee will report to the parties on any possible improvements.

44. Nursing specific qualifications

University proposal: in the Department of Nursing, qualifications set with respect to proof of practice will be reasonably connected to the duties of the position.

45. Continuing Sessional Standing Program

University proposal: requalifying period increased to 5 years; at the end of each 5-year period, requalification to require maintaining an annual minimum teaching intensity of 2 FCEs over the period.

46. Long Service Teaching Appointments

University proposal: the length of initial LSTA terms to increase from 3 years, to 3 to 5 years, depending upon academic needs and the recommendation of the hiring unit.

Total number of LSTAs in any contract year not to exceed 80.

47. Conversions

- a. University proposal: \$130,000 in incentive funding available in each year of the Collective Agreement; to also be available to hiring units should any member of the Affirmative Action Pool be appointed to a tenure stream position as the result of a regular search process.
- b. University proposal: normally, tenure stream recommendations to be made by May 1st for appointments commencing the following July 1st; an explanation to be provided on request if an applicant is not recommended by the School or Department for a tenure stream position.
- c. University amended proposal: at least two recommendations in both 2018-2019 and 2019-2020 of Affirmative Action Pool members for full-time faculty positions to the tenure stream. At the parties' request, some preference should be afforded candidates who self-identify as a member of one or more of the designated employment equity groups: therefore, as the parties agree, a minimum of one such recommendation over the two years if the total number remains at four.

48. Special Renewable Contracts

18 SRCs to be awarded during the term of the Collective Agreement on terms generally consistent with Article 12.32 of the YUFA Collective Agreement; the parties are directed to seek the consent of YUFA for the implementation of such a provision.

49. Accommodation Procedure

Replicate recent freely bargained YUFA language.

50. Technology and Instruction

University proposal subject to the following addition: where e-mail communications take place, the employee shall provide students with an e-mail contact address and may, acting reasonably, determine not if but when and to what extent e-mail responses are to be provided.

51. Retroactivity

Retroactive wages for work performed to be paid within 90 days from the date of this Award.

52. Remaining proposals

Any proposal not referred to in this Award is dismissed.

53. Remain seized

The Arbitrator remains seized with respect to the interpretation and implementation of this Award until the parties reach a final Collective Agreement.

Dated at Toronto, Ontario this 3rd day of December, 2018.


James Hayes