

IN THE MATTER OF AN ARBITRATION

BETWEEN

YORK UNIVERSITY

("University" or "York")

and

CANADIAN UNION OF PUBLIC EMPLOYEES LOCAL 3903

("Union")

Re: Unit 3 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 Levebvre, 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 arbitration was compelled following passage of the *Back to Class Act (York University), 2018* (the "Act").
3. The Award relates to a bargaining unit as defined in Article 3.01 of the Collective Agreement known as Unit 3. It is comprised of full-time graduate students receiving financial assistance from/through the University and who as a result are employed in administrative, clerical or research work but not where that research relates to their program and degree requirements.
4. CUPE Local 3903 represents graduate teaching assistants, contract faculty, and graduate assistants in three bargaining units at York.
5. 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.
6. A single hearing was held although it was understood that separate awards would issue. Comprehensive pre-hearing briefs were exchanged for each bargaining unit.
7. This Award may be read together with the Unit 2 Award issued on the same date.

Background

8. 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.

9. 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.

10. 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.

11. 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 with some matters referred to interest arbitration.

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

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.

Interest Arbitration

15. Subsection 17 (2) of the *Act* does not fetter the exercise of reasonable arbitral discretion but does set out criteria that must be applied to Units 1 and 3¹:

In making an award, the mediator-arbitrator under this Act shall take into consideration all factors that he or she considers relevant, including the following criteria:

1. The employer's ability to pay in light of its fiscal situation.
2. The extent to which services may have to be reduced, in light of the award, if current funding and taxation levels are not increased.
3. The economic situation in Ontario and in the Greater Toronto Area.
4. A comparison, as between the employees and comparable employees in the public and private sectors, of the nature of the work performed and of the terms and conditions of employment.
5. The employer's ability to attract and retain qualified employees.
6. The purposes of the *Public Sector Dispute Resolution Act, 1997*.

16. The purposes of the *Public Sector Dispute Resolution Act, 1997* are:

- a) To ensure the expeditious resolution of disputes through collective bargaining;
- b) To encourage the settlement of disputes through negotiation;
- c) To encourage best practices that ensures the delivery of quality and effective public services that are affordable to taxpayers.

17. The basic principles of interest arbitration are well formed and well known and require no repetition here. The objective of interest arbitration is to identify an outcome that would best replicate terms that would have occurred in free collective

¹ The fourth criterion is of prime relevance here.

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

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

The applicable principles are to replicate the outcome that would have been achieved in free collective bargaining had interest arbitration not been imposed.

19. 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:

The Union's history of engaging in collective action has resulted in *a collective agreement which is unique and which is superior to other agreements in the University sector*. Application of a principle of replication of collective bargaining outcomes must take this into consideration.

(italics added)

20. 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

21. 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 the maintenance of a very large number of proposals said to be important without clear prioritization between them.

Discussion

Numerous Proposals

22. The Union advanced 22 proposals stating that: “each...is of importance to the Union and its members.” York made one proposal but responded to many of the Union issues at least in part. When a party puts forward an exceptionally ambitious agenda that would substantially alter the *status quo*, the prospect of achieving the kind of incremental change that would replicate the likely outcome of free collective bargaining is seriously diminished.

23. The issue raised by the Union relating exclusively to Unit 3 concerns a decision taken by the University, during the life of the previous Collective Agreement, to adopt a York Fellowship funding model for graduate students. The model removed the requirement that many students work as graduate assistants as a condition of their receiving funding from the University. This action resulted in the removal of hundreds of people from Unit 3 who continued as students but were no longer employees of the University and covered by the Collective Agreement.

24. The Union asserts that this was a colourable device that stripped career-building work opportunities, and access to a suite of benefits, from Unit 3 members. The Union brings proposals designed to counter the new model. The University responds that the Union’s bargaining to impasse on this issue amounted to an unlawful recognition strike and that its proposals fall outside the scope of collective

bargaining. York provided an explanation for its transition to the Fellowship method of graduate student funding.

25. While, no doubt, there are graduate students who preferred the previous model, the benefit to graduate students of unconditional funding is not insignificant. In my view, the subject of this arbitration should be on the terms and conditions of employment for students who are actually employees; an award cannot purport to require students to become employees.

Comparators

26. 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.

27. 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.

Replication and the Unit 2 Settlement

28. Application of the replication principle makes it clear that agreements reached by the same parties in free collective bargaining provide the best possible comparator evidence. The freely bargained Unit 2 Collective Agreement constitutes

such evidence. The Union submission that Unit 3 members should be awarded higher wages and superior provisions is not sustainable.

29. The same logic applies, by extension, to the disposition in this arbitration of the remaining common issues in dispute. The outcome should be identical.

Other Relevant Considerations

30. The following additional factors are of particular significance in this case:

- The baseline Collective Agreement currently addresses a broad mix of academic, professional, and equity issues as well as typical terms and conditions of employment;
- 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 increase proposals;
- The expired baseline Collective Agreement was already sector leading in every respect before this round of collective bargaining. The Union Brief described it as “superior to other agreements in the University sector”;
- The ‘gap’ between Unit 3 and its peers elsewhere was widened further by agreements reached by the parties during direct collective bargaining;
- Accepting the York position at arbitration without modification would even further extend the lead of CUPE Local 3903 over all its sector peers;

Decision

31. Unit 2 Determinations

The Unit 2 MOS at Appendix A will apply to any common issue with Unit 3.

The Unit 2 Award will also apply to the determination of any common Unit 3 issue.

Where relevant Funds have been ordered, the University's total liability for all three bargaining units is capped at the particular assigned dollar number.

32. Wages/Remuneration for Graduate Assistants

Replicate Unit 2 settlement rates: wages, authorized replacements, supplementary graduate assistance, graduate financial assistance.

33. Article 10.02: replace with University proposal effective September 1, 2018.

34. Graduate Assistant Assignment Protocol

Letter of Intent as proposed by the University.

35. Research Costs Fund

Joint proposal as per Unit 1: \$1600 cap.

36. Retroactivity

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

37. Remaining Proposals

Any other matter agreed upon by the parties during collective bargaining preceding this arbitration to be included. Any other proposal not referenced in this Award is dismissed.

38. Remaining 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