H/I000409

In the Matter of an Arbitration Under the Hospital Labor Disputes Arbitration Act

Between

Chatham Kent Health Alliance [Employer]

And

Ontario Public Service Employees Union, Local 132 [Union]

Before: **M. Brian Keller, Chair**
Patricia Balfour, Employer nominee
Terry Moore, Union nominee

HLDA

Appearances: **D. Brent Labord, Debbie Ancocik , for the Employer**
Martha Mercer DeSantis, Marisa Forsyth, Elizabeth Hitchcock, Terrie Liberty-Shaw, Gloria French, for the Union

Hearing in Chatham, November 15, 2011

09-1574 (12)

H/E000409

Award

This Board was appointed by the parties and is duly constituted to settle a collective agreement on them pursuant to the provisions of the Hospital Labour Disputes Arbitration Act. The term of the collective agreement is from April 1, 2010 to March 31, 2012 as the parties were unable to agree on the term and the term is therefore two years as established by the Act.

The Alliance is a 300 bed community hospital formed on April 30, 1998 as a partnership between three previously autonomous hospitals in the region. The bargaining unit is an Office and Clerical Unit comprised of approximately 112 employees, of whom about half are full-time, 47 part-time and eight casual.

Three other bargaining agents represent employees at the hospital. The Christian Labour Association of Canada represents service employees. ONA represents the nurses and OPSEU represents hospital professional employees. The latter two groups participate in central bargaining.

The parties have put 10 issues before this Board. Eight are Union issues and two are Employer proposals.

This Award incorporates by reference all matters agreed to by the parties up to and including the date of this Award. Unless otherwise specifically provided, proposals awarded by the Board come into effect the date of the Award.

The Board remains seized to deal with any issues that might arise dealing with the application, administration or interpretation of any aspect of this Award.

The differences between the parties in this matter are relatively simple. The Union takes the position that the appropriate comparator for this bargaining unit should be the CUPE Central Award. It argues that the work performed by employees in this bargaining unit is, generally speaking, the same as employees covered by the Central Award. It further, argues, based on historical arbitral precedent that there is a strong bias to emulating the terms of the Central Award.

The Employer, on the other hand, argues that this bargaining unit must demonstrate a need for what it proposes. It submits that the CUPE Central Award is not the appropriate template and that, in the past, the parties have freely negotiated matters that have not emulated the Central Award.

It strongly submits that the pattern of recent arbitral awards demonstrates the current labour relations reality that calls for, at least in the second year of this collective agreement, no across-the-board increase but, instead, a lump sum payment.

What it really comes down to, at the end of the day, is the impact of the Central Award on bargaining units which are not parties to that Award.

The Chair of this Board has written in the past about the impact of Central awards on

non- central bargaining units. Those views have been no different than views expressed by the vast majority of arbitrators in this Province. Central awards have a strongly persuasive effect on arbitrations where the parties are outside of a Central regime, but where the employees in the bargaining unit perform substantially the same work as employees covered by a Central award. This is not to say that all elements of a Central award must slavishly be followed. Local conditions, as well as past bargaining history where the parties have freely negotiated certain provisions without resort to arbitration must also be considered.

The Chair, as well as many other arbitrators, has also written recently about the impact and role of Bill 16. Suffice it to say, that arbitrators have determined that the Bill should not impact the normal dynamics of collective bargaining, particularly in situations such as this unit which is a trailing unit.

The principal complicating factor in this arbitration is that the term of the collective agreement before the Board is out of sync with recent awards and settlements providing for, in the second year of this collective agreement, 0% across-the-board increases, coupled with lump sum payments. Rather, both years of the collective agreement are years where the CUPE Central Award provided for across-the-board increases. The question the Board has to deal with is whether employees covered by this collective agreement should receive the same across-the-board increases as was provided for in CUPE Central.

The majority of the Board, the Employer nominee dissenting, accepts the important and overriding principle of following the Central Award, at least in so far as the wage increase is concerned. The Board adopts the reasoning of Arbitrator Gray, at paragraphs four to eight inclusive in the award of Stevenson Memorial Hospital and OPSEU dated December 14, 2011. We are of the view that the reasoning in that award is no less compelling in the case of this bargaining unit.

Prior to dealing with the issues in dispute, the Board wishes to make some comments with respect to the replication principle. We believe it is fair to say that although Boards of Arbitration under HLDAA are to attempt to replicate or emulate what would be the result of free collective bargaining, this is largely a theoretical exercise and even more so where patterns, such as Central Awards, exist. The reality is that the dynamics of collective bargaining where there is no right to strike or lockout are very different from how collective bargaining is conducted where there is the right to strike or lockout. What the parties look at, who they compare themselves to and how they conduct collective bargaining is different.

The goal is the same [achieving a collective agreement] but the dynamics, strategy and means are different. In each sector where there is no right to strike and where arbitration to resolve impasses is mandated and where there is a Central settlement or Award (or a number of Awards or settlements where there is no Central bargaining), there are recognized patterns. These patterns have become more important in determining how negotiations are carried out than what is transpiring in the right to

strike sector. Thus, we believe it is fair to say that, fortunately or unfortunately, what the replication principle has really come to mean is more a replication of the settlements achieved and Awards made in the same sector and less collective agreements freely negotiated in the right to strike sector unless employees in that sector perform the same work, the employers provide the same services and the funding model is essentially the same. The above should not, in any way, be viewed as a statement of approbation: it is simply the reality.

In consideration of what is stated above and taking into account the evidence the submissions of the parties and the statutory requirements, what follows is the Award of the Board on matters in dispute between the parties.

Wages

Effective April 1, 2010, a 2% general across the board wage increase to all steps and classifications.

Effective April 1, 2011, a 2% general across the board wage increase to all steps and classifications.

This is consistent with the CUPE Central wage settlement.

Layoff and Recall

Article 13.01 a) (ii) is amended to read four months.

Parental Leave

The Union proposal is awarded. Paragraph (d) is to be worded to mirror the provision in the collective agreement dealing with pregnancy leave reinstatement.

Vacations

The Union proposal to modify vacation entitlements to provide for 25 days of vacation after 13 years of continuous service is awarded.

Percentage in Lieu

The Union proposal is not awarded.

Work of the Bargaining Unit

During the hearing, the Board expressed some reservations about the meaning of the Union proposal. Consequently, because of the uncertainty of its affect, among other reasons, the Board is not prepared to make this award.

Benefits

The Board awards an increase in the maximum vision care payment to $250 every 24 months per person.

Retirement Benefits

The proposal is not awarded.

Hours of Work-Shift Exchanges

The Board is of the view that the existing language in the collective agreement already provides the Employer with the right to deny shift exchanges. Consequently, the issue raised by the Employer appears not require a change to the language of the collective agreement as proposed.

Hours of Work – 4 Hour Shifts

Although the Board is not unsympathetic to the issue raised by the Employer, we decline to award this proposal. We do so, for two reasons. The first is as a result of the potential negative economic implications on employees. The second, is that there is a mechanism in the appendices to the collective agreement where issues such as this should be fully discussed and resolution attempted.

Given that the parties have already or will be shortly entering into negotiations for a renewal collective agreement, we anticipate that this issue will be raised again, but we would expect a greater airing of it by both sides.

Retroactivity

The Board awards full retroactivity on all wages and wage-related increases within 60 days of the Award to all active employees and those that have left the employ of the

Employer during the new duration period.

Dated at Ottawa, this 22nd day of March, 2012.

M. Brian Keller, Arbitrator

"Patricia Balfour"
Patricia Balfour, Employer Nominee
See partial dissent attached

"Terry Moore"
Terry Moore, Union Nominee
See partial dissent attached

Partial Dissent of the Employer Nominee

I have reviewed the award of the Chair and with regret I must dissent on the issue of wages.

The wage award does not replicate what would be a freely negotiated outcome in the economic and funding circumstances that were presented to this Board. In my respectful submission, and for the reasons highlighted herein, the pattern that was established by the 2011 ONA and OPSEU central Hospital awards of lump sum payments equivalent to 1% of wages with no base wage increases more realistically reflect what would have been achieved by these parties in a right to strike environment.

The stark fiscal situation of the Ontario Government and the ensuing constrained funding climate constitute compelling reasons for deviation from the 2%/annum wage increase level that was negotiated by CUPE and the Hospitals in 2009. In August 2009, the devastating impact that the recession wrought on the provincial government's finances was not fully known. These sobering facts were not disclosed until the release of the Ontario Budget of March 2010. As revealed in that Budget, and the subsequent 2011 Ontario Budget, the severity of the economic conditions are such that the sustainability of public services will be jeopardized if the government does not achieve its compensation restraint objectives.

The Ontario Government funds the health care system, including hospitals, through transfer payments to the LHINs. The prevailing fiscal health or ill health of an employer is a driving force in private sector negotiations. The province's debt load, deficits, and related interest costs are as real as the economic straits faced by many private sector employers and must equally be reflected in settlement and arbitral awards within the public sector.

Quite simply, economic realities drive negotiations in the private sector. In times of significant downward economic change, private sector negotiators give lesser weight to historic pattern bargaining relationships than to the need to maintain a viable business and employment for the workers. One need only review the response of the CAW, one of the architects of pattern bargaining, in the auto industry during the recession to appreciate this fact.

Arbitrators Weiler, Dubin, Teplitsky, and many others have stated that it is the private sector that brings a true benchmark for boards of arbitration to consider, for it is in that sector where the real life forces of the economy, funding and the right to strike and lockout compel difficult choices. The price of not achieving a settlement is a strike or lockout. The price of not responding and adjusting to difficult economic conditions is massive layoff or closure.

Unfortunately, since March 2010, interest arbitrators in their desire to assert their independence from government fiscal policy statements have, in my respectful view, lost sight of these fundamental principles. This Chair's description of what the replication principle has become in the HLDAA arbitration environment is, sadly, accurate. Instead of analysing the economic conditions that underlie the Ontario government's compensation restraint policies in order to assess the likely outcome of private sector negotiations conducted in such economic circumstances, awards in this sector have continued to replicate earlier hospital trends and awards. Instead of appropriately taking notice of current right to strike outcomes, increasing warning signs of stymied economic recovery, and current disclosures of the sad state of Ontario's finances, interest arbitrators have instead focused attention only on the settlements and awards within the same sector that were achieved years ago and, even more narrowly, on the settlements and awards for similar classifications of workers.

This arbitral history reflects the major challenge in the application of the replication principle in the interest arbitration environment: the ability to respond to significant economic change. Collective agreements in the private sector react immediately to worsening economic events. Yet, in the public sector, where the adverse economic consequences of a fiscal deficit are not so immediately obvious and closure is seldom, if ever, a contemplated consequence, unions have little incentive to reflect the changed economic environment in settlements. Hence, a difficult circle ensues. With no perceived risk of a lower result at interest arbitration, public sector unions cling to the settlement trends achieved in a different economic climate. Interest arbitrators are loathe to reflect the private settlement trends absent significant settlement precedents within the HLDAA sector and therefore simply reinforce the earlier established pattern through their awards. The ability to break the pattern no matter what the state of the economy or government fiscal situation becomes impossible.

I acknowledge that this Chair's award of 2% for the first year of this renewal term, April 2010-March 31, 2011 is consistent with the overwhelming majority of these hospital interest awards.

However, the arbitral landscape dramatically changed in the summer of 2011 with the issuance of the central Hospital ONA and OPSEU awards of Arbitrators Devlin and Kaplan, respectively. With respect, this change ought to have been reflected in this award.

Each of these central awards covered a three year term (April 1, 2011 – March 31, 2014). In the first two years, these awards provide for zero wage adjustments, net zero non-wage compensation adjustments, and lump sum payments equivalent to 1% of wages. In the 3rd year, April 2013-March 2014, a 2.75% wage increase was awarded as well as some non-wage compensation and benefit improvements.

Thus, in the circumstances before this Board, there were <u>three</u> central Hospital awards and settlements that capture the second year of this Chatham-Kent agreement, not one: two awards issued in 2011 and one settlement achieved in 2009. The 2011 ONA and

OPSEU awards are deserving of much more consideration than the 2009 CUPE central settlement.

The ONA and OPSEU awards were issued with full knowledge of the precarious financial position of the province and the funding restraints that have resulted from a significant provincial deficit. Of note, these arbitration awards do not slavishly follow the government's fiscal policy statement. Compensation, in the form of lump sum payments, was awarded to the employees in these units in each of the first two years. The government's compensation restraint policy allows for no such compensation adjustments. The awarding of these lump sum payments, however, clearly reflect the considered recognition that economic realities do not support the 2% wage increases previously awarded or negotiated.

The considerable weight that ought to have been given to these central ONA and OPSEU awards is further underscored by consideration of the market power of the employees covered by these awards. Nurses, in particular, have achieved higher levels of wage increases in this province in recent bargaining rounds because the demand for their services has far outstripped supply. Given the bargaining power that results from such a market demand, nurses, perhaps more than any other hospital employee group, would have a strong argument that they should not be forced to take 'zero' in advance of CUPE members whose contract does not expire until 2013 . Quite simply, there is no basis other than the prevailing serious economic conditions for nurses to take 'zero' wage adjustments and 'net zero benefit adjustments' in a year in which CUPE bargaining unit members are receiving a 2% wage increase.

At Chatham-Kent Alliance, these awards cover the majority, approximately 55% of the unionized employees. The RNs at this Hospital and the paramedical workers are represented by ONA and OPSEU, respectively, and participate in the central ONA and OPSEU Hospital bargaining processes. The compensation of the non-unionized employees of this Hospital has been statutorily frozen pursuant to the provisions of the *Public Sector Compensation Restraint to Protect Public Services Act, 2010* from March 25, 2010, with such freeze continuing until April 2012.

This Chair stated in his award for *Windsor Regional Hospital and OPSEU Local 143,* October 10, 2010, at pages 4-5 of the award:

> *One of the principles considered by arbitrators is comparability. That is, we must compare the terms and conditions of employment of employees in this bargaining unit with those of employees similarly employed in other hospitals in the Province.* ***We must also look at, and compare, how the employer has treated other employees, in other bargaining units at this hospital, for the same period.***
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> *The former comparison is important because of, among other reasons, the principle of equal pay for work or equal value. In other words, this Board must consider terms and conditions of employment of employees who perform similar work at other hospitals in the Province for the same timeframe. Given the nature of the business of the employer, and the method of funding, one of the questions*

that must be considered is why employees of this hospital should be treated differently than their peers employed elsewhere?

The latter comparison [internal] is important because it is instructive to see how the employer has treated other of its employees over the same period. The question that comes out of this comparison is, if substantial numbers of employees are treated in one fashion, what is the compelling reason to treat another group of employees any less favourably over the same period of time? (emphasis added).

With respect, I believe that with the current challenging financial conditions, there is no compelling reason to treat these office and clerical employees more favourably than the majority of employees of Chatham-Kent Health Alliance. Even if these parties had a bargaining history of slavishly following the CUPE central hospital negotiated or arbitrated pattern, which as the evidence revealed is definitely not the case in these parties' prior unbroken history of voluntary settlements, the stark economic conditions would compel a deviation of this pattern.

In this hearing we heard that these ONA and OPSEU central Hospital awards have impacted awards and settlements, both within the HLDAA environment and in the health care right to strike environment: awards and settlements for non-paramedical and non-nurse bargaining units. In the recent award of *Dryden Regional Health Centre and Canadian Office & Professional Employees Union,* October 12, 2011, (Raymond), Arbitrator Raymond awarded a 2% wage adjustment for April 1, 2010, followed in April 1, 2011 by a 1% lump sum payment and no base wage adjustment for an office and clerical bargaining unit. Moreover, at least one other hospital voluntary settlement freely followed the lump sum pattern in an office and clerical settlement. The four year voluntary settlement between Windsor Regional Hospital and IBEW, achieved in late fall of 2011, provided for a 2% wage increase April, 1, 2010, a 1% lump sum payment April 1, 2011, a 1% lump sum payment April 2012 and 2% wage increase April 1, 2013.

Very significantly, the ONA and OPSEU awards are being replicated in health care negotiations that fall outside of the scope of HLDAA. In the fall of 2011, ONA, OPSEU and CUPE each freely negotiated and ratified three year central settlements with the CCACs. All of these CCAC collective agreements had expired in 2011, with the majority having expired on March 31, 2011. In the first two years of these three year settlements, all of these Unions agreed to a lump sum payment equivalent to 1.2% of gross earnings, with no other wage or compensation adjustments. In the third year, the Unions agreed to a base wage increase of 2.75%, with some premium adjustments and modest improvements to the benefits. Each of these ONA, OPSEU and CUPE CCAC central negotiation processes covered a range of health care worker classifications, including office and clerical. None of these unions negotiated a higher level of increase for the office and clerical workers than that which was negotiated for the nurses or paramedical or other employees within the bargaining units.

The CCACs, as with this Chatham-Kent Hospital and all other Hospitals, are funded through Ontario Government transfer payments. However, unlike, the Hospitals, the CCACs operate in a right to strike environment. Accordingly, the parties are not spared from having to make the difficult choice of achieving a settlement or taking a strike. Indeed, the first of these settlements, the ONA CCAC settlement was achieved under the threat of imminent strike.

It is difficult to understand why the CCAC CUPE settlement was not viewed by the majority of this board as being of considerable significance. CUPE, the very Union which achieved the 2%/annum 4 year settlement with the Hospitals in 2009, voluntarily resiled from its 2%/annum hospital settlement when negotiating in the right to strike health care environment. In 2011, armed with the full knowledge of the stark economic conditions and finances of the Ontario government, knowledge it did not possess in August 2009, CUPE freely adopted the lump sum approach of the central ONA and OPSEU Hospital awards.

These CCAC settlements constitute pure examples of hard choices that had been forced on both the Unions and the Employers by a government fiscal policy. As such they present compelling precedents for what public sector unions will negotiate when there is no interest arbitration buffer from hard choices.

In my respectful opinion, the highest wage result for the second year of this term should have been a lump sum payment equivalent to 1% of wages.

I concur with the Chair's decision to not award the Union's proposals for an improved part-time employee in-lieu payment and the introduction of an early retiree benefit. The cost of each of these benefit improvements is extremely high and is not justified in the current challenging economic and funding environments. The benefit or non-wage compensation adjustments that are reflected in current hospital interest arbitration awards and settlements are not of the costly nature presented by these two Union proposals. These parties have enjoyed a mature bargaining relationship in which they have achieved voluntary settlements in each of their prior rounds of negotiations. The central CUPE and SEIU hospital precedents for these Union proposals have existed throughout this bargaining history. Where the parties did not negotiate these costly benefits in healthier economic times, it would be inappropriate for an arbitration board to so award in strained economic times. Although a lesser retiree benefit was awarded by Arbitrators Devlin and Kaplan in the ONA and OPSEU central hospital awards, the cost of this benefit was entirely offset by significant cost reductions in the sick leave plans and early retirement allowances.

All of which is respectfully submitted,

Patricia G. Balfour

March 20, 2012

Union Nominee Partial Dissent, Chatham Kent Health Alliance and OPSEU

There is much in the Chair's award I can wholeheartedly endorse, beginning with his reaffirmation of CUPE Central as the appropriate comparator for this Hospital Support bargaining unit and his related rejection of the employer's invitation to substitute ONA and/or OPSEU Central awards as the relevant industry standards.

Having accepted CUPE Central as the appropriate comparator, the chair goes on to award the CUPE pattern with respect to wages, vacation improvements and other entitlements.

The key problem I have with the award, however, is the Chair's failure to award early retiree benefit language that CUPE Central achieved many years ago (as early as 1993) and which this unit still does not have in its collective agreement.

The employer, of course, claims that early retiree benefits are prohibitively expensive, despite the fact that the vast majority of Hospital employers of service and clerical employees in Ontario have provided this benefit for many years. The union presented clear and compelling evidence that the projected costs of early retiree benefits are often inflated beyond any reasonable connection with on-the-ground realities.

First of all, Hospitals are required to use accounting methods devised to protect private sector investors which inflate overall deficit numbers when applied to public sector service providers.

Secondly, highest cost assumptions regarding future claims experience are used to place a cost on future employee utilization of the benefits. Meanwhile the evidence indicates many employees are staying in the workforce longer for financial reasons delaying their retirement until age 65 or 70. The early retirement benefits being sought by the union expire at age 65 yet the costing of this benefit assumes sustained high levels of utilization from earliest eligibility.

Third, a number of employees in this unit may not utilize retiree benefits under this employer's plan at all because they are covered under a partner's or spouse's plan with a different employer.

Finally, the CUPE Central language requires employees to pay 25% of the premium costs associate with early retiree benefits and a significant number of retirees may not be able to afford those premiums given limited pension income based on their credited service and average income.

For all of the above reasons, I would have awarded the union's early retirement benefit proposal.

Terry Moore

Union Nominee

March 19, 2012