

IN THE MATTER OF AN INTEREST ARBITRATION

BETWEEN:

PARTICIPATING HOSPITALS

(“the Hospitals”)

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

(“the Union”)

BOARD OF ARBITRATION: Stanley M. Beck, Chair
Roy C. Filion, Hospitals Nominee
J. Cameron Nelson, Union Nominee

APPEARANCES:

For the Hospitals:

Bob Bass, Counsel

For the Union:

Michèle Dawson Haber, Counsel

A hearing in this matter was held in Toronto on May 18, 19 and 20, 2005.

SUPPLEMENTARY AWARD

On June 28, 2005, this Board issued an Award pursuant to the Hospital Labour Disputes Arbitration Act, to settle the remaining issues between the Participating Hospitals (the Hospitals) and the Ontario Public Service Employees Union (OPSEU or the Union) for the renewal of the Collective Agreement which expired on March 31, 2004, for a two-year term expiring on March 31, 2006.

On July 29, 2005, the Board heard from the parties that they were unable to agree on the implementation of two items from our Award. These are:

1. The length of time that part-time employees on pregnancy/parental leave are owed payments in lieu of health and welfare benefits.

2. The Wage Grid for Biomedical Technologists.

ISSUE 1

On Issue 1 (pregnancy/parental leave), OPSEU's position is that the Board's Award was clear and unambiguous, and that the Board, at this stage, has no jurisdiction to interpret its Award. The Board's Award in this matter reads as follows:

OPSEU's proposal appears to be the norm with SEIU and CUPE, and given the relatively low cost, we award the Union's proposal in this area.

The Union's position is that our Award was clear, that we did not limit the in lieu benefits for part-time employees on pregnancy or parental leave to 27 weeks (17 weeks of pregnancy leave and ten weeks of parental leave), and we have no jurisdiction to do so now. As to the Board's reference to CUPE and SEIU, OPSEU argues that it was "simply an acknowledgment of the normative principle that percentage in lieu payments are continued in the sector".

The Hospitals argue that throughout its Award, the Board relied on existing centrally bargained Hospitals precedents for all its decisions. And in the case of in lieu payment, it specifically relied on the SEIU and CUPE agreements, and it was the OPSEU submission itself that relied heavily on the precedent of the SEIU and CUPE provisions and referred to the Hospitals' position as being "outdated" in comparison with those provisions. It was argued that the Board's decision clearly referred to "the norm" of the SEIU and CUPE agreements, and that is what it apparently thought it was awarding when it awarded OPSEU's proposal. Accordingly, the submission was that it was appropriate for the Board to now clarify what it awarded as there is a clear ambiguity in the concluding sentence that refers to the SEIU and CUPE norm and goes on to say it awards the OPSEU proposal.

There is no question that Central arbitration boards and the courts have been open to submissions that an HLDAA board of arbitration should clarify its intent. There is also ample precedent on the jurisdiction of arbitration boards to clarify their awards subsequent to their release given the relevant language in sections 9.1 and 9.2 of the HLDAA:

Section 9.1 The Board of Arbitration shall examine into and decide on matters that are in dispute and any other matters that appear to the board necessary to be decided in order to conclude a collective agreement between the parties.

Section 9.2 The board of arbitration shall remain seized of and may deal with all matters in dispute between the parties until a collective agreement is in effect between the parties. (emphasis added)

On the first issue, which is the length of time that part-time employees on pregnancy/parental leave are owed payments in lieu of health and welfare benefits, we are of the opinion that there was a clear ambiguity in our Award. In the same sentence, we said that we were awarding what appeared to be the SEIU and CUPE norm and that “we award the Union’s proposal”. The OPSEU proposal was, in fact, not the CUPE and SEIU norm, but went beyond that. That was not our intention, and our Award is clarified to indicate that the length of time for part-time employees on pregnancy/parental leave is to be as set out in the SEIU and CUPE agreements. We would also note that our Award was clear that we remained “... seized as to all matters arising out of the interpretation or implementation of this Award.” The ambiguity in the concluding sentence of the

paragraph dealing with the in lieu pregnancy/parental leave benefits clearly raises a matter of interpretation and, accordingly, we have dealt with it as set out above.

ISSUE 2

The second issue is that of the placement on the wage grid for Biomedical Technologists (“Biomedes”). In its submission to the Board, the Union requested reclassification in nine positions, and the Board awarded reclassification in three of those positions: Kinesiologist, Biomedical Technologist and Echocardiographer. As to the Biomedes, the Award stated, as OPSEU requested, that they “should move to the RT grid”. An unintended consequence of moving the Biomedes to the RT Grid is that because of the fact that the RTs have a longer grid than the Biomedes, a straight movement across the grid based on years of service would see some Biomedes red-circled, that is, frozen, until their years of service resulted in a wage increase. A straight lateral move onto the RT Grid would result in a decrease in salary for some Biomedes. In short, as OPSEU pointed out, the Biomedes would be detrimentally affected as a result of being classified under the method that the Hospitals propose to move the Biomedes to the RT Grid.

What the Union proposes is that the Biomedes would be placed on their new wage grid (the RT Grid) on the basis of years of continuous service, effective June 28, 2005. Should this method result in a wage decrease, the employee would be placed on the step on the new wage grid that is at least as much as they were earning on June 27, 2005. Through this method, our Award would ensure that no Biomed would be detrimentally affected as a result of the reclassification we awarded.

It is true, as argued by the Hospitals, that because of the difference in grid lengths, this would result in Biomedics earning more than an RT with the same level of service, at least for a period of time. There is, however, no avoiding that result if an unintended and inequitable result of our Award is to be avoided. And it is our holding that that result should be avoided. It is a well-accepted principle that no employee should lose as a result of moving to a higher classification, and it was certainly not our intention, and was clearly an unintended consequence, that Biomedics would be detrimentally affected by moving to the RT Grid.

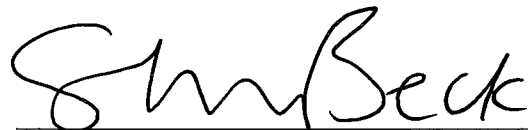
In agreeing with the OPSEU proposal and ordering that the Biomedics be placed on the RT Grid at the level that would give them an increase in pay at the time they move across to the RT Grid, we are making an Award that is consonant with Arbitrator Keller's decision in the last round of local issues bargaining between OPSEU and the Participating Hospitals. Arising out of that award, Quinte Hospital wrote to Arbitrator Keller to ask that the board consider the impact of its award and delay its implementation due to cost considerations. In agreeing to do so, Arbitrator Keller held as follows:

There is a little known law called the Law of Unintended Consequences. There are also the better known principles of equity and fairness. There is, further, the recognition that the Board remain seized to deal with the implementation of its award... It was never an intended consequence that the employer would be liable for a cost item that, had it had earlier notice, it could have managed or avoided.

It was never an intended consequence of our original Award that the Biomedes would be detrimentally affected by moving to the RT Grid. Accordingly, we clarify our Award by ruling that a Biomed should move to the step on the RT Grid that gives him/her a wage increase that is closest to his/her current wage, effective June 28, 2005, the date of our Award. And the Biomedes so moved would move progressively up the grid from their new position in each subsequent year.

We will remain seized as to all matters arising out of the interpretation or implementation of this Supplementary Award.

DATED at TORONTO this 16th day of September, 2005.



Stanley M. Beck, Chair

“Roy C. Filion” – I concur

Roy C. Filion, Hospitals Nominee

See attached Partial Dissent

J. Cameron Nelson, Union Nominee

Partial Dissent of Union Nominee – J. Cameron Nelson

I agree with the Chair that the Board has jurisdiction to clarify the intent of the Award with respect to both issues raised by the Parties and with the award with respect to the placement of Biomedical Technologists on the RT wage grid.

I respectfully disagree with the clarified decision with respect to the length of time that part-time employees are to receive payment-in-lieu of benefits during a pregnancy/parental leave.

I do so for the following reasons.

The first is the issue of equal treatment as between the full-time and part-time employee. The essence of the Union's argument was that part-time employees should receive equal treatment with their full-time counterparts who continue to receive benefit coverage during the entire leave period. On this basis alone I would have awarded the Union position. As Arbitrator Fisher stated in the June 1991 Pioneer Manor Home for the Aged – CUPE Local 148 award "to deny their pay in lieu during maternity leave while allowing benefits to their full-time sisters would unduly discriminate against the part-timer".

Second, it appears to me that when these provisions were first included in both the CUPE and SEIU collective agreements the underlying purpose of those provisions was to provide both full time employees and part-time employee with the benefits or pay-in-lieu for the entire period of their leave. It has only been the failure of those agreements to keep pace with the changes in legislation which mandated more appropriate leave provisions that a disparity between full-time and part-time has emerged.

The principles of equal treatment and non-discrimination are far too important in my mind to be outweighed by a strict normative comparison

The Union position provided for equal treatment and was consistent with the principles pursuant to which these provisions were included in the CUPE and SEIU agreements and I would have awarded it.