

IN THE MATTER OF AN INTEREST ARBITRATION

Between:

The Crown in Right of Ontario

(Ministry of Education)

and

Ontario Public School Boards' Association

and

Elementary Teachers' Federation of Ontario

(Teachers/Occasional Teachers)

Before:

William Kaplan, Chair
Bob Bass, Crown/CTA Nominee
Michael Wright, ETFO Nominee

Appearances

For the Crown:

Sunil Kapur
Kate McNeill-Keller
Jessica Wuergler
McCarthy Tetrault
Barristers & Solicitors

For the OPSBA:

Dolores Barbini
Colleen Nevison
Grant Nuttall
Hicks Morley
Barristers & Solicitors

For ETFO:

Howard Goldblatt
Colleen Bauman
Goldblatt Partners
Barristers & Solicitors

The matters in dispute proceeded to a hearing on April 17, 2024.

Introduction

This interest arbitration was convened pursuant to the terms of a November 21, 2023. Memorandum of Agreement (Memorandum) between the Crown in Right of Ontario (Crown), the Ontario Public School Boards Association (OPSBA), and the Elementary Teachers' Federation of Ontario (ETFO). The Memorandum memorializes the agreement of the parties to refer to interest arbitration the outstanding compensation issues in respect of the teacher and occasional teacher (T/OT) bargaining units represented by ETFO.

There is no mandatory referral of collective bargaining disputes to interest arbitration; nor is it common in this sector. This is the second time that any central party in the public education sector has agreed to resolve an entire collective bargaining impasse through voluntary interest arbitration (OSSTF was the first to do so in a Voluntary Binding Interest Arbitration Agreement (VBIA Agreement) dated August 25, 2023. In 2016, the Crown/OPSBA and ETFO referred a single issue – a sick leave dispute – to interest arbitration.) T/OTs are subject to the strike-lockout provisions of the *Labour Relations Act* (LRA) (modified in some respects by the *School Boards Collective Bargaining Act* (SBCBA)). The Memorandum reflects a shared intention that there be no labour disruption.

The matters in dispute proceeded to a hearing held in Toronto on April 17, 2024.

The collective agreement settled by this award shall consist of the unexpired and unamended provisions of the predecessor collective agreement, items agreed to in collective bargaining by the parties including as provided in the Memorandum, and the terms of this award.

Legislative Framework & Criteria

By and large, labour relations in the education sector have, since 2014, been governed by the SBCBA (with, as noted above, some limited application of LRA). Under the SBCBA, collective bargaining is two-tiered: central bargaining at the central table with the participation of the Crown (and in the case of T/OTs, OPSBA), and local bargaining at local tables between individual school boards and local unions. Section 38 of the SBCBA sets out the statutory criteria that must be considered by an Interest Arbitration Board:

1. The school boards' ability to pay in light of their fiscal situation.
2. The extent to which services may have to be reduced, in light of the decision or award, if current funding and taxation levels are not increased.
3. The economic situation in Ontario.
4. A comparison, as between the employees and other comparable employees in the public and private sectors, of the terms and conditions of employment and the nature of work performed.
5. The school boards' ability to attract and retain qualified employees.

Boards of Interest Arbitration – and the parties were agreed about this – must also consider the normative criteria including replication, gradualism, demonstrated need and total compensation. Of these criteria, the most important is replication: replication of free collective bargaining.

Brief History of Bargaining

ETFO gave notice to bargain on June 13, 2022. The parties met in July 2022 and between November 22, 2022, and November 16, 2023, following which the parties signed the Memorandum referring to interest arbitration salary, wages and other direct compensation for T/OTS.

The Parties

The Crown/OPSBA

The Crown is not the employer. However, it funds the public education system and is a mandatory participant in central bargaining with ETFO by negotiating all central terms, including compensation. As a practical matter, the Crown is represented in central bargaining by the Ministry of Education (Ministry). The SBCBA requires that the Crown cooperate in bargaining with other employer bargaining agencies which, in this case, is OPSBA. OPSBA is the employer bargaining agency for all 31 English-language public district school boards and 10 public school authorities in Ontario.

ETFO

ETFO is the designated employee bargaining agent for elementary T/OTs employed at 31 English-language public district school boards, in elementary school boards or elementary school district areas established under section 68 of the *Education Act*, and at one school authority. In 2021, there were 1.3 million students enrolled in Ontario's English elementary schools. As of 2021-2022, the ETFO T/OT bargaining unit was composed of approximately 54,000 T FTEs and 13,500 OT FTEs. Of the T FTEs, 82% are at the highest level of the wage grid. ETFO also represents Education Workers (EWs) in the English-language and Catholic education systems at 14 different school boards. The EW collective agreements were resolved by the Crown/CTA and ETFO replicating the agreement reached between the Crown/CTA and CUPE reached in November 2022 (the Crown/CTA and CUPE agreement).

Position of the Parties on the Outstanding Issue

ETFO

Ts

Across-the-board increases

September 1, 2022: 6%.

September 1, 2023: 6%.

September 1, 2024: 5%.

September 1, 2025: 5%.

OTs

Increase minimum rate for casual OTs to \$275/day followed by application of the T across-the-board increases.

Crown/OPSBA

Ts

Hourly Salary Schedules

Increase by \$1 per hour in each year.

Annual Salary Schedules

Increase each step in the grid each year by \$1406.50.

OTs

Increase by \$7.25 day for each year of the agreement (\$1406.50 multiplied by 1/194).

ETFO Submissions

Overview

In ETFO's view, this interest arbitration had to be placed in context and that included Bill 124 and other earlier unconstitutional legislation that seriously undermined the union's ability to bargain normative increases and other terms and conditions of employment, the global pandemic and its psycho-social-political and educational impact on the learning environment affecting teachers, students and parents, inflation which had eroded previous, albeit modest, wage gains and seriously undermined spending power, and a continuing and serious recruitment and retention crisis that had brought Ontario's primary educational system to the brink of collapse.

Also important to bear in mind, in ETFO's submission, were the daily challenges T/OTs faced including increased violence in the workplace, a lack of supports for students with special needs, students suffering from learning gaps resulting from the pandemic, heavy workload and burnout. The system was buckling: T/OTs were being asked to work in schools that were both psychologically and physically unsafe. Not surprisingly, T/OTs were expressing uncertainty about remaining in the profession. A lack of respect and recognition, inadequate working conditions, the increasing volume and complexity of their duties and the need for additional work-life balance were among the reasons explaining why so many Ts were second-guessing remaining in the profession. Despite all this, ETFO and its members were doing whatever they could to limit classroom disruption. T/OTs were unwavering in their focus on delivering high quality education in Ontario's elementary schools.

The Criteria

In ETFO's view, the overriding goal of any interest arbitration process was to replicate the agreement the parties would have reached in free collective bargaining. In approaching that task, ETFO submitted that the most relevant factors to consider were the economic situation, most notably continuing persistent inflation, the recruitment and retention crisis and comparability. When these factors were assessed, the conclusion was inevitable that ETFO's wage proposal should be awarded.

The Economic Situation

The economic situation was obviously important. It was a governing factor that needed to be considered. But that required looking at two discrete but interrelated issues: the economic situation in general and inflation in particular. The provincial economy was good – all the economic indicators from GDP to unemployment – were proof positive of that. Globally and locally, the economy was getting better and better (in Ontario, revenue growth and budget surpluses were around the corner). There was no inability to pay; rather there was a political decision to underfund the education system, and that ETFO argued, should be given short shrift.

On the other hand, persistent inflation had substantially eroded the value of wages and was expected to continue to do so in the short- and medium term. No one was expecting a return to historic inflation norms – (2%) – anytime soon. Essentials inflation was particularly pernicious. One year inflation was 6.9% in August 2022 heading into the first year of the collective agreement, and 3.8% in the second. Since 2012, ETFO member wages had eroded by 10.68% compared to inflation (even after the Bill 124 Remedy Decision). Interest arbitrators were now

uniformly awarding increases to account for inflation. Wage settlements, both freely bargained and imposed, in the public and private sector, were, in 2023 coming in at around 4.2%.

In ETFO’s view, replicating collective bargaining could not result in an outcome that provided for less than that (and would also be completely contrary to the weight of Ontario public sector settlements where the Crown was the employer). How, ETFO asked, could the Crown/OPSBA assert that general wage increases in the 1.5% range were appropriate for teachers, when it bargained increases more than double that amount for every other group where it was the employer? How, in another question ETFO asked, could the Crown/OPSBA offer be seriously considered when it was – unfavourably – compared to superior health care awards, electricity sector settlements awards and university settlements and awards? The answer was that it could not. How could the Crown/OPSBA offer be awarded when it was completely inferior when compared, for example, to the Treasury Board and PSAC settlement that now applied to hundreds of thousands of federal public servants? It was, ETFO observed, completely non-normative. Any wage adjustment had to meaningfully address both the current and historic erosion of real wages due to inflation and reflect prevailing bargaining norms.

Recruitment and Retention

There were no “ifs” or “buts” in ETFO’s view. Ontario was in a severe T/OT shortage, one that was only predicted to get worse. It was a crisis with profound implications leading to collapsed classes, cancelled remedial support to students with special needs, loss of specialty instruction, and a constantly revolving door of new and often unqualified teachers. Increased compensation was not the only answer, but it was an important part of the solution. Addressing this statutory

criterion by increasing wages would help ameliorate and perhaps turnaround the staffing crisis. The evidence establishing a crisis was, in ETFO's submission, categorical and irrefutable.

For example, the Ontario Principals Council (OPC) was on record that there were "staff shortages...in every employee group," and that the crisis needed to be "addressed immediately." A 2023-2024 survey conducted by People for Education, a public action group, found that about one quarter of Ontario's public schools were facing daily staff shortages; almost half were facing weekly shortages. The reasons for the crisis were complex. Teacher colleges were reporting declining enrollments. The Ontario College of Teachers (OCT) estimated that new teacher candidate admissions at Ontario's teaching colleges were about 1400 below the annual requirements, and that number was only predicted to increase. Declining enrollment could be seen at the other end as well: the lower numbers of new annual licenses issued by the OCT. The shortage was also apparent by examining the unemployment rates. In 2014, there were 7762 unemployed teachers, by 2014, just 359. Demand clearly far exceeded supply. There were 37,000 license holders not employed in public education, those teachers having left (or never entered) the profession. That disturbing statistic demonstrated how serious the overall recruitment and retention situation really was. Compounding the problem, again according to the OCT, about 17% of new teachers were not renewing their licenses by their fifth year. Data from the Ontario Teachers' Pension Plan indicated that annual retirements were up with a significant bump expected in the short-term.

When Ontario's growing population was added to the mix, it was clear, ETFO argued, that the situation would only deteriorate further. The Financial Accountability Office projected a need for

substantial staffing in the years to come; an almost impossible undertaking unless steps were immediately taken to turn around the recruitment and retention crisis.

The most urgent matter was the OTs: “the problems with respect to the shortages of daily occasional teachers are particularly acute.” Many school boards were regularly unable to find qualified daily OTs. This resulted in what the parties referred to as a “failure to fill” (and those numbers were dramatically increasing year after year). Failure to fills left school boards with little choice but to turn to an uncertified or unqualified teacher. While these teachers must have a temporary certificate from the OCT, they required nothing more than a high school degree in terms of training. ETFO survey results indicated that in the 2022-2023 school year, failures to fill were a significant issue. Local ETFO presidents were on record that low salaries and poor working conditions were the main reasons why. Between September 2022 and February 2023, there were 130,829 person days not filled by Ts, and 173,716 person days not filled by OTs (there were 88,244 person-days worked by non-certified teachers and principals and vice-principals). The impact of all this on the quality of education was considerable.

It was well-known, ETFO observed, that multiple school boards were realizing staffing shortages. All the stakeholders were painfully aware of the situation. The problem was that the Ministry was employing stop gap measures, not considered and curated and carefully thought-out plans with appropriate accompanying resources. For example, in 2021, the Ministry introduced a temporary certificate program that allowed unqualified teachers to be hired on daily OT rosters for short-term teaching contracts. In 2021, 2329 of these were granted, 4106 in 2022, and 2187 in the first five months of 2023. Another stop-gap measure was allowing second year

teacher college students to obtain a temporary license while completing the last components of their program. A third stop-gap measure was to allow retired teachers to teach more days without pension impact. The OTF did not agree to renew that arrangement in 2023-2024, however. It stated that “deflecting responsibility onto retired teachers is neither a sufficient nor a sustainable option to address staffing challenges...[because] changing the rule for retired members neither encourages working teachers to remain in the system nor does it attract prospective candidates to join the profession.”

None of these measures were, in ETFO’s view, the kind of meaningful and consequential steps that the recruitment and retention crisis called for. What was required were substantial and considered approaches to deal with root causes. Speaking of which, ETFO took strong exception to the Crown/OPSBA assertion that sick leave was the cause of an OT absenteeism issue. The data did not justify this erroneous assertion in ETFO’s view. Sick leave usage was largely constant between 2014-2015 and 2021-2020. There was a spike between 2020-2022. That was because of a global pandemic. During that time, Ts were under strict public health direction not to attend at work if they had any COVID-19 symptoms or had tested positive. Obviously, sick leave usage increased. A spike in sick leave during a global pandemic could not fairly ground a claim that it was the cause of a huge and growing shortage of certified and qualified OTs to fill daily vacancies. That, in ETFO’s submission, belied common sense. What did make sense was providing the real wage increases ETFO sought. Increased compensation was not the sole solution to a recruitment and retention crisis, but it was a vital and essential part. Compensation was a key driver in attracting employees to a profession and keeping them there.

Ts

In ETFO's view, its proposed T across-the-board wage increases were the necessary and appropriate outcome when the governing criteria were examined. A total of 22% over four years would begin to address inflation and start turning around the recruitment and retention crisis. It was also entirely affordable given the robust state of provincial finances that established that recovery not recession was underway. ETFO had, and had previously used, its strike power to achieve its bargaining demands. There was no reason not to believe that had it done so in this round, that it would not have fully achieved its bargaining demands. Put another way, in replicating the outcome of free collective bargaining, ETFO bargaining power had to be kept in mind. What would not be appropriate would be the mechanistic application of a completely inapplicable settlement that had been reached between the Crown/CTA and CUPE.

The only possible comparators for ETFO Ts were OSSTF Ts, OECTA Ts and AEFO Ts. ETFO had never agreed to a lump sum for Ts, and never would. It was legally and factually material that no T affiliate was willing to even consider the Crown/CTA and CUPE agreement because it was *sui generis* to EWs, not T/OTs (and that is why ETFO had agreed to it for ETFO EWs). Imposing that outcome on T/OTs would not replicate free collective bargaining but would penalize T/OTS for their higher level of education and experience. \$1 per hour also made no sense in the T/OT context. T/OTs were not hourly employees. They received a salary and regularly worked well beyond any notional work week. Likewise, just because Ontario's Ts were among the highest paid in the country was not a reason to deny them a normative wage increase. ETFO asked that its T wage proposal be awarded.

OTs

An ETFO bargaining priority in this round was addressing the wide degree of variation in the OT rates in local collective agreements. As of September 1, 2021, the OT rate varied from a low of \$243.25 to a high of \$270.51 (simple average: \$258.67). Making matters worse, from ETFO's perspective, OTs did not have access to paid sick leave or benefits. The wide daily rate variation was unjustified given that they were all doing the same work for the same employer: a school board. Standardizing the rate was an achievable collective bargaining objective and could be reasonably anticipated to substantially reduce failure to fill numbers with evident benefits to students who would now have a licensed and qualified OT in the classroom.

Crown/OPSBA Submissions

Overview

The Crown/OPSBA made clear at the outset: it highly values the work that T/OTs perform in Ontario's elementary schools. It did not agree, however, with some of ETFO's characterizations of the current school environment. Notably, and even assuming for the sake of argument that the survey results ETFO relied on were reliable – which for sample size reasons along with various methodological flaws, they were not – there was no nexus drawn between conditions (inaccurately) complained about and how the ETFO compensation proposal would remedy those identified issues. Assuming for the sake of argument that the surveys did provide some useful information, it was surely relevant that they pointed to factors such as working conditions and a need for greater work-life balance as key sources of discontent, not wages. This was not surprising to the Crown/OPSBA as Ontario's teachers are at, or near, the very top of the Canadian compensation pyramid.

In the Crown/OPSBA's view, there was only one possible outcome to this proceeding: imposition of the Crown/CTA and CUPE agreement. Bargaining history made this mandatory.

Since the inception of the SBCBA, each of the central tables – T/OTs and EWs – have bargained for a collective agreement with the same term at or around the same time. It has never mattered which table went first: the wage pattern set at the first table to settle formed the basis for agreement at all other tables. The Crown/OPSBA pointed out that there has never been any deviation from this pattern, and no justification to introduce one in this proceeding. The recent Bill 124 Remedy Decision (Bill 124 Remedy Decision) (*Crown and OSSTF and ETFO*, 2024 CanLII 8967) proved this point.

While nominally between the Crown and OSSTF and ETFO, the Bill 124 Remedy Decision was subsequently applied lockstep to CUPE, AEFO and OECTA (with the cascade across the sector expected to continue). This pattern was further emphasized by the result in the one other earlier instance these parties of proceeding to interest arbitration on a central term (*OPSBA/Crown & ETFO*, 2017 CanLII 69703). In the Crown/OPSBA's view, there could only be one conclusion to this case: imposition of the Crown/CTA and CUPE agreement. However, that outcome was also the result of the application of the other criteria, both normative and statutory, beginning with replication. Before turning to that factor, the Crown/OPSBA reviewed the guiding principles.

Review of Guiding Principles

The case law was categorical: interest arbitrators must craft a collective agreement that reflects the agreement that the parties would have reached. The task of an interest arbitration board was

not to impose conditions that seemed attractive or fair – to the Board – but a collective agreement that comes as close as possible to what the parties would have agreed to if their bargaining been successful and culminated in a collective agreement. In the Crown/OPSBA view, the best way of discharging this mandate was by examining what identically situated parties had done, which inevitably led to the Crown/CTA and CUPE agreement. The case for replication of that agreement was made even stronger by bargaining history.

The parties to central bargaining in the public education sector have, the Crown/OPSBA observed, a long history of pattern bargaining, especially on wages where wage increases reached with one of the unions – invariably the first past the post – are replicated by the other bargaining units across the sector, and it has never mattered which union set the pattern. Put another way, the Crown/OPSBA pointed out, once a wage result was reached with one group, the other groups follow. Labour relations were orderly, predictable, and consistent, and no union was penalized for settling first. There was no reason to upset this long-standing history, and many obvious reasons not to as a review of the governing criteria established.

The Criteria

Replication

On November 20, 2022, the Crown/CTA settled the 2022-2026 central collective agreement with CUPE. To say that round of bargaining was hard fought, the Crown/OPSBA observed, would be an understatement. On October 30, 2022, the union gave notice to strike. The next day, the Ontario Legislature passed the *Keeping Students in Class Act, 2022* and invoked the notwithstanding clause. Labour disruption followed and proceedings commenced before the

Ontario Labour Relations Board. The government then announced its intention to repeal the legislation, which occurred on November 14, 2022. Two days later, the union again gave notice to strike. The parties reengaged in mediation and an agreement was reached on November 22, 2022. The Crown/CTA & CUPE agreement was subsequently replicated – identically on wages and substantially on other issues – by OCEW (entered into in December, 2022, and ratified on January 24, 2023) and ETFO-EW (entered into in September, 2023, and ratified on October 21, 2023). This agreement was, the Crown/OPSBA submitted, the beginning and end of any analysis: it was both dispositive and governing.

The Crown/CTA & CUPE agreement did not, the Crown/OPSBA pointed out, contain the usual percentage across-the-board increase. The relevant monetary feature of the Crown/CTA & CUPE agreement was \$1 per hour in each year of the term. A fixed dollar amount rather than a percentage increase gave effect to the agreement of the parties to prioritize compensation for the lowest paid employees. The data demonstrated just how effective this model was in achieving the parties' shared objective: lower paid employees disproportionately benefited from the architecture of the agreement, just as the parties intended. The important point from the Crown/OPSBA's perspective was that this was the agreement the parties freely negotiated, and this was the same agreement that was then followed by other education sector unions, giving effect to a shared commitment to raise rates for the lowest paid employees. There were no exceptional circumstances, or compelling reasons, and no persuasively distinguishing features, advanced by ETFO, why this agreement should not equally apply to T/OTs, except that ETFO wanted more, which was not a relevant interest arbitration criterion.

Notably, the Crown/CTA and CUPE agreement, and its \$1 per hour, also applied to higher-paid ETFO professional EWs at the top of that grid who received compensation comparable to Ts (Psychologists, Speech Language Pathologists and Social Workers). Application of the replication criterion – and the Crown/OPSBA comprehensively reviewed some key authorities – required that this same agreement be imposed here. Whatever bargaining power ETFO possessed, it did not have the bargaining power and strike momentum that CUPE so successfully leveraged in November 2022. The Crown/OPSBA would have never agreed to ETFO’s demands after having reached the Crown/CTA and CUPE Agreement – an apex agreement – and to find otherwise would not replicate the actual and most likely collective bargaining outcome.

Economic Considerations

The provincial government funded the school boards and the province’s projected fiscal position indicated challenges ahead (and, overall, the economy was potentially deteriorating). Indeed, the 2024 Ontario Budget predicted higher program expenses and a marked deterioration from the fiscal outlook from just one year earlier. There was a plan to balance the budget (and to begin to address the largest sub-national debt in the world), but that required the province to take a responsible, targeted approach to spending, one that did not include funding non-normative, profligate union demands, demands that were completely unaffordable under any metric. This was not to say that the government was not investing in education: over \$16 billion in capital grants, for example, had been allocated over the next 10 years to build more schools and childcare spaces. That was the obvious spending priority in a context where economic growth was projected to slow as the province faced elevated inflation, high interest rates and a weaker global environment. Spending needed to be controlled; the substantial provincial debt managed

(and reduced). To maintain front line services without increasing taxes, compensation increases must be restrained. When the ETFO T/OT compensation demands were costed – and details were provided in the Crown/OPSBA brief and elaborated upon at the hearing – it was crystal clear that they were both unaffordable and fiscally irresponsible. Application of principles of total compensation, demonstrated need and gradualism also supported the Crown/OPSBA wage proposal.

Inflation

In the Crown/OPSBA's view, inflation was already addressed in the Bill 124 Remedy Decision, and since then had been falling. It was likely to achieve historic norms – 2% – sooner rather than later. To legitimize its bargaining demands, the ETFO was, the Crown/OPSBA argued, relying on inaccurate data. There was an inflationary spike in 2022 (which for present purposes was only relevant for the first four months of the first year of the term), but since then it had been trending downward. ETFO's picture of wage erosion was, accordingly, exaggerated; some of its data misleading. ETFO bargaining outcomes have never tracked inflation. Sometimes they were lower, sometimes higher. Other than the Bill 124 Remedy Decision, there was not a single instance where ETFO T/OTs received a wage increase greater than 3%. There was, therefore, no justification in this case for an economic outcome beyond that negotiated by the Crown/CTA and CUPE, which took inflation fully into account over the exact same term.

Comparators

Ontario teachers are, the Crown/OPSBA pointed out, the highest paid in Canada (although it was worth mentioning that the parties never looked to external comparators; historically, there has

been no reason to do so). To the contrary, what these parties looked to – and instituted – was parity across negotiated settlements. This was a cornerstone of education sector collective bargaining. Since 2014, and the onset of central bargaining under the SBCBA, wage settlements have been replicated between and across the T/OT and EW bargaining units. In this round, that pattern was set in November 2022.

To the extent any attention was paid to education outcomes outside of the province, there was one factor that needed to be kept in mind: Ontario’s teachers are among the highest, if not highest paid, in the country. The data on point was unassailable; by and large, the other provinces did not even come close (and miscellaneous cherry-picked general wage increases negotiated in particular years from outside of Ontario did not establish a basis for the current ETFO 22% demand over four years). Related to this point, was the total compensation of the T/OTs considered more generally. When pension and benefits were added to the mix, it was clear that the complete compensation package of the T/OTs was second to none, and there was no basis on either a comparability analysis, or one informed by either demonstrated need or total compensation, to award ETFO’s proposed general wage increases.

Recruitment and Retention

In the Crown/OPSBA submission, recruitment and retention was best considered by looking at the facts, and they established that there were more than enough teacher candidates graduating from teacher colleges to meet permanent staffing demands. Potential teachers continued to be attracted to the profession as enrolment numbers demonstrated. Indeed, there was more supply of

qualified teacher candidates than demand. If anything, there was a surplus of fully certified recent graduates available to be hired as permanent Ts or otherwise.

For example, in late 2023, there were only 27 permanent T vacancies in the entire province. Of these 27 vacancies, one almost common denominator was location: very small numbers of vacancies in hard to fill northern school boards. OT data told the same story. In 2023-2024, there were only 31 unfilled long term occasional (LTO) positions in the entire province, a number entirely in line with recent experience. As was the case with unfilled T positions, most unfilled LTO positions were found at the northern boards. In these circumstances, the Crown/OPSBA argued, it could not be credibly asserted that there were any difficulties whatsoever in recruiting qualified permanent Ts and LTOs. There was a staffing challenge, but it was in filling daily vacancies caused by absences of Ts and OTs on long-term assignments.

Retention was also not an issue. Ts were not voting with their feet. The numbers illustrated this: for example, approximately 70% of Ts have been employed for 10 years or more. This indicated a high degree of job and compensation satisfaction. Ontario's teachers were not leaving the province to teach elsewhere, and if they were it was not because of the money; they were already paid at or near the Canadian top. ETFO miscited a newspaper article supposedly standing for the proposition that the government agreed that there was a recruitment and retention crisis. The truth was otherwise, yes, there were staffing challenges, and no, it was not because of recruitment and retention but because of a daily OT shortage caused because of T absenteeism. Other examples – for example, ETFO's use of anecdotal evidence to support its incorrect claims

– abounded, but when carefully considered the truth emerged: there was no problems in either recruitment or retention.

The Crown/OPSBA did not dispute a staffing problem; there was one, it was caused by absenteeism. The T/OT collective agreement provided an incredibly generous sick leave plan, one that annually provided 11 sick days paid at 100% of salary and 120 sick days paid at 90% of salary. Sick leave usage was going up, year over year. Rising sick leave usage by Ts and OTs on long-term assignments led to staffing challenges, driving demand for daily OTs. Some of these daily demands could not be filled for myriad reasons including local collective agreement caps limiting school board hiring (exacerbated by some OTs being included on more than one school board list further reducing availability). The sick leave problem led to unfilled OT positions. This problem would not be solved by spending more money on wages.

This problem should be, and was being, studied by a multi-party provincial task force: the Teacher Supply and Demand Action Table. That is where the work needed to be done. What was not required was awarding increases that went far beyond the Crown/CTA and CUPE agreement. If ETFO believed otherwise, it had the onus of establishing with clear and compelling evidence how increased compensation for teachers would, or even could, lead to a decrease in sick leave, an onus that it had completely failed to discharge. There was also no reason to believe that increasing T/OT compensation would attract new teachers to the field when all the evidence – which the Crown/OPSBA reviewed in its brief – demonstrated that there was an appropriate balance between supply and demand and no need to demonstrably improve rates to either recruit or retain. Letters of Permission, and other short-term prophylactic measures, when considered in

context did not establish difficulties in either recruitment or retention. The overall numbers of Ts engaged by these measures, considered in context, were, in any event, *de minimis*.

Conclusion to Crown/OPSBA Submissions

In conclusion, the Crown/OPSBA argued that the only outcome that would fairly replicate free collective bargaining was imposition of the Crown/CTA and CUPE agreement. The Crown/OPSBA would not have settled for no less. As mentioned, there was no recruitment and retention challenge – there was an excessive sick leave problem. In any event, to the extent there was a recruitment and retention issue, it had been addressed in the Bill 124 Reopener Decision. The same was true about inflation, which was on the decline. The state of provincial finances was such that ETFO’s completely non-normative demand of 22% over four years was unaffordable and had not been voluntarily agreed to or awarded in any relevant comparator. The OT proposal – costed by the Crown/OPSBA at 35.83% – should also, the Crown/OPSBA argued, be rejected. ETFO had failed to provide any justification for its demand that existing freely negotiated rates be erased having been maintained since the advent of central bargaining. ETFO’s proposal was for a radical wage increase, a breakthrough, in effect, and was completely bereft of any demonstrated need.

Discussion

T/OTs provide important and valuable services to our students and schools. T/OTs work very hard and make a vital, indeed, indispensable contribution to public education.

In determining the outstanding issues in dispute, we have carefully considered the statutory criteria together with the normative ones, the most important of which is replication of free collective bargaining. Replication requires us to do our very best to fashion an award that to the greatest extent possible reflects what the parties would have agreed to had free collective bargaining been allowed to run its course. And in exercising this important responsibility, we look to what similarly situated parties have done in comparable circumstances.

ETFO insisted that replication cannot be achieved by imposing the Crown/CTA and CUPE agreement as it would never have agreed to that agreement in free collective bargaining. The Crown/OPSBA insisted that replication requires imposing the Crown/CTA and CUPE Agreement because it would never have agreed to anything else but that agreement in free collective bargaining. The fact is that both parties have come before us with positions and proposals that do not reflect any possible free collective bargaining outcome. The proposals of both parties are completely non-normative: in the case of the ETFO, the 22% over four years proposed compensation increase for Ts, and immediate increase to the highest OT rate, have no parallel in any relevant freely bargained settlement – at least anyone familiar to us or referred to by the parties in their submissions – while in the case of the Crown/OPSBA, the wage proposal would produce an unacceptably low across-the-board percentage increase that, likewise, has no parallel in any relevant freely bargained settlement. We can only assume that when agreeing to voluntary interest arbitration it was within the contemplation of the parties that this Board of Interest Arbitration would attempt to discharge its important responsibilities by coming up with an outcome that reflected the realities of contemporary collective bargaining in Ontario. That is what we intend to do as is elaborated below.

In this case, that means looking first at the Crown/CTA and CUPE agreement. It is true that CUPE does not bargain for T/OTs. That does not mean, however, that the CUPE outcome should be disregarded. The context leading to the Crown/CTA and CUPE agreement – described above – is legally and factually material.

There have been few labour disputes, before or since, where almost all organized labour rallied in support of a single union. The Crown/CTA and CUPE agreement was reached in circumstances that were favourable to that union, reflected in the very positive outcome that it freely negotiated. For the lowest paid members of the CUPE bargaining unit, the \$1 per hour increase in each year of the collective agreement was equivalent to 4.2%, or 16.8% over the four years. On average, the \$1 per hour equated to 3.59%, or 14.4% compounded over the four years. ETFO calculated that the Crown/CTA and CUPE agreement, when applied to ETFO EWs, worked out to annual average percentage increases of 3.93%, 3.78%, 3.64% and 3.65%.

We are not of the view, however, that the \$1 per hour as proposed by the Crown/OSPBA should be awarded. It is legally and factually material that all the affiliates have categorically rejected the \$1 per hour for T/OTs. To be sure, one union, CUPE, agreed to a lump sum rate where the composition of its bargaining unit made that appropriate and sensible (as did ETFO EW and OCEW). Imposing that result on OSSTF EWs gave effect to the replication principle, as was explained in the decision dated April 24, 2024 (2024 CanLII 40839 (ON LA)). Imposing that result on T/OT bargaining units would be neither appropriate nor sensible. To the extent there is any bargaining pattern, it is of across-the-board percentage increases. While we intend, as discussed below, to follow the now established bargaining pattern of providing additional monies

to the lowest paid in the bargaining unit – the OTs – we do not agree that it would be appropriate to replicate the lump sum amount for Ts.

In our view, there are fundamental and governing differences between the duties, responsibilities, education and qualifications of T/OTs compared with (the overwhelming percentage) of EWs. Ts are paid an annual salary; they are not, like the EWs, (largely) paid by the hour. The architecture of a flat amount per hour cannot be rationally applied to Ts. To the extent that there is a pattern of general wage increases applying across the sector, there is no pattern of a flat amount per hour, and experience in these matters suggests that it is obvious why. Ts are not fairly compared to EWs where a flat rate will give effect to the needs of lower income employees. According to the data, more than 82% of the Ts are at the highest level of the wage grid. Insofar as bargaining for Ts is concerned, low wage earners are obviously not a consideration as it was in the Crown/CTA and CUPE agreement (and as it was when ETFO and OCEW voluntarily agreed to replicate the Crown/CTA and CUPE agreement for EWs).

Imposing the Crown/CTA and CUPE agreement on ETFO Ts would result in an award which, in our judgement and experience, could never be the result of free collective bargaining, and one that would be completely at odds with just about every single freely negotiated collective agreement and interest arbitration award in Ontario (including all the freely bargained settlements, interest arbitration awards and consent awards where the government was one of the parties). Put somewhat differently, there is ample justification to replicate a bargaining pattern of additional compensation for the lowest paid members of this bargaining unit – and we do that to a limited extent with the much lower paid OTs – but absolutely no justification to do so for Ts at

the \$1 an hour rate. While the \$1 per hour equated, on average, to 3.59%, or 14.4% over 4 years for CUPE members, the result when applied to ETFO could not be more divergent. According to the data in the Crown/OPSBA brief, imposing the Crown/CTA and CUPE agreement on teachers would produce substantially sub-normative compensation increases.

Imposing that agreement would, according to the Crown/OPSBA data, result, for Ts, in the following annual average percentage increases in each of the four years of the term: 1.43%, 1.41%, 1.39% and 1.37%, for a total of 5.72%. For OTs, the results are increased (at the max): 2.68%, 2.61%, 2.54% and 2.48% for a total of 10.72%. In these circumstances, imposing the Crown/CTA and CUPE agreement would not be replication – it would not even replicate the Crown/CTA and CUPE Agreement which provided 3.59%, or 14.4% over 4 years for CUPE members (and when applied to ETFO EWs led to increases of each of the four years of 3.93%, 3.78%, 3.64% and 3.51% for a total of 14.86%). Imposing that Crown/CTA and CUPE agreement would ignore all the criteria, statutory and normative, would be a triumph of form over substance, and would bring the independent interest arbitration process into disrepute.

A lump sum made sense when there was a shared desire to disproportionately raise the rates of lower paid employees, which was the majority of the CUPE bargaining unit, but the converse is simply not true. A lump sum cannot be fairly applied to Ts who receive a salary: they are not hourly paid employees; they get paid for doing a job. A lump sum cannot be fairly imposed when it would effectively result in an across-the-board increase amount which has not been voluntarily agreed upon or awarded by anyone anywhere in the current cycle.

In determining compensation, we have carefully considered inflation and recruitment and retention. It is true that inflation persists (although it appears to be on the decline). This was significantly addressed by the result in the Bill 124 Remedy Decision. Likewise, recruitment and retention was also addressed in the Bill 124 Remedy Decision. There is a distinction to be made between these two criteria: inflation if it persists continues to be relevant in setting rates. Recruitment and retention are different.

The evidence on recruitment and retention was hotly disputed by the parties (above). Without a doubt, there are staffing issues that require urgent attention even if there is no agreement on either their causes or their solutions. We are not, however, satisfied that above-normative increases will increase supply, assuming numbers of teaching school graduates cannot keep up. T and LTO absences are clearly an issue. The point is that human resource questions are not easily answered or susceptible to a quick fix such as, for instance, raising rates. Compensation is, however, an important part of solving a long-term, complicated problem, and money attracts people to jobs and keeps them there. For whatever this observation is worth, we are also of the view that considering selected general wage increases of much lower paid Ts in other jurisdictions is not particularly helpful given that the parties have never looked to comparators outside the province, and the Ts in this bargaining unit are at or near the top ranking of Canada's teachers.

T Grids

Accordingly, we have determined that the appropriate adjustments to the T grid are as follows:

Across-the-board increases

September 1, 2022:	3%
September 1, 2023:	3%
September 1, 2024:	2.75%
September 1, 2025:	2.50%

OT Grids

There is no justification for existing disparities in rates. Employees with the same education and training doing the same work for the same employer, a school board, should be comparably compensated. Standardization of rates is consistent with centralized bargaining over wages. Some of the daily rates are substantially less than what would emerge from a reasonable proration of the applicable T grid. In consideration of the established bargaining pattern of directing more money to the lowest paid employees, and in consideration of the replication principle, we have decided to provide for adjustments in the OT rates. In doing so, we are mindful of the governing normative criteria of gradualism.

Accordingly, we direct that the general wage increases for Years 1 and 2 of the term be applied to the OT rates. In Year 3 – September 1, 2024 – prior to the application of the general wage increases provided for in this award, a simple average of all OT rates in the province should be calculated. OTs below that simple average rate should be moved up to that average rate, and then the Year 3 general wage increase applied. In Year 4 the general wage increase will apply. While this improvement will not, obviously, impact all of Ontario’s OTs, it will result in an immediate and significant improvement for many of them. It may even attract some licensed Ts to work as

OTs. In making this award, we are mindful that there are some local terms governing OTs that may need to be addressed by the parties as they go about implementing this change.

Conclusion

At the request of the parties, we remain seized with respect to the implementation of our award.

DATED at Toronto this 29th day of May 2024.

“William Kaplan”

William Kaplan, Chair

I concur in the result.

Bob Bass, Crown/OPSBA Nominee

I concur in the result.

Michael Wright, ETFO Nominee