



Elementary Teachers' Federation of Ontario
(ETFO)

Fédération des enseignantes et des enseignants
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Bill 124 Remedy Decision: Summary

The arbitration hearing to determine the Bill 124 remedy for Year 3 of 2019-2022 collective agreements took place on January 15 and 16, 2024. The board of arbitration was comprised of William Kaplan (Chair of the Arbitration Board), Bob Bass (Crown nominee) and David Wright (ETFO/OSSTF nominee). It is the Chair of the arbitration board that issues the final and binding decision; nominees may either agree with or dissent from that decision and provide their reasons in writing.

The 32-page remedy award was issued by the Chair on February 9, 2024. The Bill 124 remedy award for Year 3 was determined by the Chair to be 2.75%.

The Crown nominee issued a two-page dissent as an attachment to the award. The Crown nominee disagreed with the Chair's award, arguing that the remedy award issued by the Chair should have been less than 2.75%.

The ETFO/OSSTF nominee issued a two-page dissent as an attachment to the award. The ETFO/OSSTF nominee disagreed with the Chair's award, arguing that the remedy award issued by the Chair should have been more than 2.75%.

Bill 124 Remedy Decision: Summary of Arguments and Award

In the award on the Bill 124 remedy the Chair of the Arbitration Board, William Kaplan, summarized the positions being advanced by ETFO, OSSTF and the Crown and, as is noted below, rejected virtually all of the Crown's arguments.

After summarizing the parties' submissions, the Chair began his analysis by acknowledging the importance of the critical work performed by ETFO and OSSTF members and recognizing their extraordinary contributions to students and society during the pandemic, often in very trying, stressful and demanding circumstances.

The following arguments were raised by ETFO, OSSTF and/or Crown counsel during the arbitration hearing:

1. Is the arbitration process comparable to a "wage reopener"?

While acknowledging that the parties had not included a classic re-opener provision in their collective agreements, the Chair found that, in the context of the pandemic, they had agreed to moderated collective agreements without prejudice to their right to challenge Bill 124 before the courts and to seek appropriate relief if their constitutional challenge was successful. After Bill 124 was declared of no force and effect (which has now been confirmed by a majority of the Ontario Court of Appeal), the parties met and negotiated the Bill 124 remedy Memoranda of Settlement

(MOS's) giving rise to the arbitration process. Mr. Kaplan noted that nothing in the remedy MOS's required the arbitration board to adopt an approach in any way different than if this were a regular Bill 124 collective agreement re-opener.

In this case, as in re-opener cases, the arbitration board must determine the appropriate level of compensation for a year when Bill 124 applied and the jurisdiction of the arbitration board and the process is essentially the same.

The Chair further held that, because the parties had agreed to this process as the remedy for the Charter breach, there was no need, in these circumstances, to delve deeply into principles that might otherwise apply in Charter remedy cases.

2. Is this a 'point in time' analysis?

The Crown had argued that, to decide the appropriate percentage for a remedy for Year 3 of 2019-2022 collective agreement, the arbitration board should only look at the time when the collective agreements were concluded, not the time when the remedy arguments were presented to the arbitration board.

Mr. Kaplan rejected the Crown's argument, finding that such an approach was contrary to the weight of authority in almost all the re-opener cases available, and that all relevant information must be considered. He said that relying only on economic projections from 2019 and 2020 when actual data is available about what happened in 2022 and afterwards is available would constitute wilful blindness, particularly since we know that inflation was 6.8% in 2022 and that many of the fiscal projections from the last round of bargaining had proven to be inaccurate.

3. Does ETFO engage in pattern bargaining which must be followed when considering the remedy percentage?

Mr. Kaplan found that there was no governing bargaining pattern between the parties. While bargaining patterns can be important, he held that, even if there was one here, the situation dramatically changed in 2022 (Year 3 of 2019-2022 collective agreements) when inflation peaked at 6.8%. To hold the parties to a bargaining pattern or bargaining positions tabled in 2019, by adopting a point in time analysis, in the face of dramatically changed economic circumstances, would ignore the impact of actual inflation on wages and serious issues in recruitment and retention. The onset of high inflation in 2022 broke any pattern for settlement which might have existed.

In addition, the bargaining pattern relied on by the Crown arose when inflation was at normative levels and there was a teacher surplus, which is the opposite of the situation in 2022.

4. What is the impact of inflation on the remedy decision?

In considering inflation, the Chair found that it has been both dramatic and persistent. For Year 3 of the collective agreements (September 1, 2021 to August 31, 2022), it was 6.8%. Economists are not predicting a return to historical norms of 2% any time soon.

Significant and sustained inflation is normatively addressed in bargaining and by interest arbitrators.

5. Is there a significant recruitment and retention issue in the education sector?

Mr. Kaplan accepted that there is a significant recruitment and retention problem currently.

As reported by the Ontario College of Teachers, “a new teacher shortage is underway...[T]his situation warrants early action to increase the province’s annual supply of new teachers.” Similarly, there is more demand than supply for classifications such as educational assistants. Recruitment and retention is one of the statutory factors under the *School Boards Collective Bargaining Act* that arbitrators are to consider in assessing compensation issues. As Mr. Kaplan stated, by any metric there is a staffing shortage in the education sector that is expected to continue.

Applying the recruitment and retention criteria, the Chair held that, while increases to compensation are not a panacea, there is no question that compensation is a driver in attracting employees to a field and retaining them. In the circumstances of high 2022 inflation and an established recruitment and retention problem, the Crown’s offer of a 1.5% additional increase in Year 3 was inadequate.

6. What did the Chair rely on in making his award?

The Chair explained that ‘comparability’ is one of the criteria that interest arbitrators always examine but that it cannot be applied in the abstract without consideration of other criteria.

Mr. Kaplan acknowledged that compensation for teachers and education workers in Ontario is at or near the highest in Canada. While the parties have not generally looked to teachers elsewhere in the country as a relevant comparator, the Chair nonetheless found this consideration to be somewhat relevant to the task before the arbitration board. However, he held that higher incomes do not necessarily lead to the conclusion that a sub-normative, across-the-board increase should follow, particularly in circumstances where there is widespread agreement that inflation and recruitment and retention necessarily result in higher wage increases and where these factors have led to re-opener and other collective bargaining outcomes well beyond what was proposed by the Crown. These outcomes include *The Participating Hospitals and ONA* (total of 3.85% for 2022), *The Participating Hospitals & CUPE/SEIU* (4.75% total for 2021-2022 along with many other economic improvements), *The Participating Hospitals & OPSEU* (4.75% total along with many other economic improvements), *OHA & PARO* (4.75% total for 2022 (along with many other economic improvements), and the *Crown & OPSEU (Corrections)* (3% along with an additional 1% for 2022).

The Chair also found that amounts agreed to in “free collective bargaining” were relevant and referred to such settlements as the one between OPG and PWU (4.75% effective April 1, 2022) and the one between the Government of Canada and PSAC (4.75% for 2022), noting the absence of any recruitment or retention issue in those cases. He also found that results from the post-secondary education sector should be taken into account, including the College Employer Council and OPSEU (3% total for 2022), University of Toronto (10% over three years) and Metropolitan Toronto University (8.25% over three years), and Queen’s University (3.5% in 2022). In all these examples, there were no recruitment and retention issues.

The Chair accepted that, while the parties had not previously considered teacher, occasional teacher and education worker outcomes in other jurisdictions, nor central hospital settlements in their prior rounds of bargaining, the health care cases were extremely relevant given inflation and the recruitment and retention issues also faced in the that sector.

The Chair also noted that, after the hearing, two consent re-opener awards were issued in the Ontario Public Service involving AMAPCEO and the OPSEU unified bargaining unit. The Chair distinguished these awards, finding that there are no major recruitment and retention issues in either of these bargaining units.

The Chair also rejected the Crown's reliance on average re-opener results for 2021 and 2022, finding that averages can be distorting, and that re-opener results from the long-term sector are factually distinguishable in every respect.

In light of the evidence, the application of criteria and other re-opener awards and settlements, especially those where inflation and recruitment and retention were addressed, the Chair concluded that an increase at the higher end of the agreed-upon range was appropriate. Applying this reasoning, the Chair awarded an additional 2.75% in 2021-22, for a total of 3.75% (inclusive of the 1% already paid), for OSSTF and ETFO affected members.

“Bill 124 Remedy Decision: Summary of Arguments and Award” was prepared by ETFO legal counsel Colleen Bauman and Howard Goldblatt.