IN THE MATTER OF AN INTEREST ARBITRATION
UNDER THE HOSPITAL LABOUR DISPUTES ARBITRATION ACT (HLDAA)

BETWEEN:

WINDSOR REGIONAL HOSPITAL

AND

CAW – CANADA, AND ITS LOCAL 2458

(LABORATORY AND RADIOLOGICAL UNIT)

BOARD OF ARBITRATION:
Susan Tacon, Chair
D. Stephen Jovanovic, Employer Nominee
Frank Luce, Union Nominee

APPEARANCES:

FOR THE UNION:
Katha Fortier, CAW Director of Health Care
Tullio DiPonti, Local 2458 Financial Secretary
Richard Baillargeon, Local 2458 Chairperson
Connie Goudreau, Local 2458 Negotiating Committee
Kim Mellow, Local 2458 Negotiating Committee

FOR THE HOSPITAL:
George King, Counsel
Jennifer Astrologo, Counsel
Sharon Morris, Director, Labour Relations
Ralph Nicoletti, Director, Diagnostic Imaging/Interim Director, Emergency Services

A HEARING WAS HELD IN WINDSOR ON DECEMBER 19, 2012

AN EXECUTIVE SESSION WAS HELD IN TORONTO ON FEBRUARY 4, 2013

AWARD

This interest arbitration is constituted pursuant to the Hospital Labour Disputes Arbitration Act ("HLDAA"). There was no dispute as to our jurisdiction to hear and determine the issues remaining between the parties.

Introduction

The employer is the Windsor Regional Hospital. Services are provided at two locations. The Metropolitan campus includes acute care facilities and the Windsor Regional Cancer Centre. The Tayfour campus provides continuing care, rehabilitation and inpatient adult specialized mental health services, as well as the Windsor Regional Children's Centre. There are nine bargaining units represented by various bargaining agents. The bargaining agent with which we are concerned is CAW Local 2458, representing those employees engaged in laboratory and diagnostic imaging services with respect to inpatients and outpatients. The numbers in the unit approximate 125.

The most recent collective agreement, effective April 1, 2009, expired on March 31, 2011. That agreement was the result of an interest arbitration, culminating in what is referred to as the "Albertyn award", after the Chair, Christopher Albertyn.

The parties were unable to negotiate a renewal agreement. Notice to bargain was given February 24, 2011. Bargaining took place in 2012 on January 11, February 7 and April 10. A conciliation meeting on May 17, 2012 was not successful and a "No Board" report was issued on May 24, 2012, whereby the outstanding matters were referred to this Board of Arbitration.

The parties were able to resolve a number of issues prior to the hearing date. Both the union and the employer requested that this Board of Arbitration adopt those items previously agreed to and that those items be incorporated into the collective agreement resulting from our award. We accede to that request. Accordingly, those

items agreed to by the parties are to be incorporated into the renewal collective agreement, to take effect upon the issuance of our award.

Statutory Authority and Jurisprudence

S. 10(11) of HLDAA provides for a term of two years, except where the parties agree to a longer term of operation. In this instance, that would comprise a renewal of the collective agreement, effective April 1, 2011 and expiring March 31, 2013.

Further, the statute establishes certain criteria in s. 9(1), which reads.

"In making a decision or award, the Board of Arbitration shall take into consideration all factors it considers relevant, including the following criteria:

1. The employer's ability to pay in light of its fiscal situation.
2. The extent to which services may have to be reduced, in light of the decision or award, if current funding and taxation levels are not increased.
3. The economic situation in Ontario and in the municipality where the hospital is located.
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 the work performed.
5. The employer's ability to attract and retain qualified employees."

These factors have been considered over the years in various interest arbitration awards. It is not necessary to review that jurisprudence at any great length. It is appropriate to summarize several of the principles and approaches that have emerged. Where citations are noted, those are merely illustrative of those issues.

The first operative principle is replication. Since interest arbitration constitutes a replacement for free collective bargaining wherein the parties have recourse to economic sanctions through a strike or lockout, a Board of Arbitration should seek to replicate the outcome that would have been achieved in that voluntary bargaining process. A multitude of decisions have adopted this theory. The following excerpts are illustrative.

In the seminal award in Welland County General Hospital (1965), 16 L.A.C. 1, Harry Arthurs wrote:

"On balance, it is difficult to avoid the conclusion that the Hospital Labour Disputes Arbitration Act, 1965, was intended to alter only the procedure, and not the end-product, of collective bargaining.
…
But arbitration is made to substitute for the strike and should therefore likewise be considered an exercise in discovering labour market realities. This being so, it is to relevant wage comparisons that we must look rather than abstract notions of justice or questions of high policy in hospital administration."

Another formulation of that theory was expressed in Governing Council of the University of Toronto (1986, Munroe):

"…the modern arbitral consensus is that the replication model does represent the ideal. That is because of any of the models for third party intervention, it is the least inimical to the accepted norm of free collective bargaining. Accordingly, it helps to maintain the acceptability – to the employer and employees alike – of interest arbitration as an alternative to strike and lockouts in public and essential industries."

A second operative principle, expressly reflected in the statute, is comparability. The interest arbitration award should flow from an analysis of objective data regarding the terms and conditions of employment currently existing within the public and private sectors in the relevant labour market. That theme has echoed throughout interest arbitration awards over the decades: see, for example, Beacon Hill Lodges of Canada 19 L.A.C. (3d) 288 (Hope); City of Toronto (2003, Armstrong); Leeds and Grenville County Board of Education (1976, Ellis); and, Halifax Regional Municipality (1998), 71 L.A.C. (4th) 129 (Kuttner). In that last noted decision, the arbitrator opined that "within the universe of relevant criteria, pre-eminence of place has almost invariably been given, both by arbitrators and by legislators, to the comparability factor."

The following passage from McMaster University (1990, Shime) warrants repeating.

"Arbitrator/selectors recognizing the limitations of third party intervention have always looked to free collective bargaining for assistance in decisions concerning wage determination. The use of this criteria (sic) carries with it an implicit recognition that collective bargaining is an economic power struggle where wage determination is governed by market-place conditions and therefore, arbitrator/selectors have recognized that no union, or employer, is every really satisfied with the ultimate wage settlement. But, inherent in these settlements is recognition of market conditions and what the exercise of an economic power struggle will yield or not yield at any given time."

In carrying out the obligations under HLDAA, it has also long been recognized that a Board of Arbitration must preserve its independence and impartiality and must not act as an agent of the government to impose public policy. That necessity for independence has continued to be expressed even in the context of recent government policy statements and severe funding constraints. The criteria enumerated in HLDAA have been regarded as neither exhaustive nor to be ascribed any particular relative weight. Nonetheless, the imperative of independence and impartiality has reduced the weight accorded to the criterion of "ability to pay", at least in the sense that the "ability to pay" factor cannot be a subterfuge for a government's unwillingness to provide the funds necessary to achieve comparability. See, generally, Kingston General Hospital, (1979, Swan); McMaster University (1990), 13 L.A.C. (4th) 199 (Shime); Ontario Housing Corporation (1993, Knopf); Oxford Regional Nursing Home (1994, Kaplan); St. Joseph's Health Care, London, (2010, Etherington); and, University of Toronto (2010, Teplitsky).

Within the framework of this general discourse in the jurisprudence, we next turn to the application of these principles and factors to the instant context. We accept that comparability is a critical factor. That said, that acceptance begs the question as to what the appropriate comparator comprises. It is tempting for the parties to "cherry pick" the best, or worst, elements of various collective agreements and combine those into a single proposal. As well, it must be noted that, in free collective bargaining, the parties rarely, if ever, trigger a strike or lockout while maintaining an exhaustive "wish list" of proposals. Those are whittled down and prioritized before moving to the contest of raw economic bargaining strength

inherent in a strike or lockout. If interest arbitrators are rightly circumspect about becoming a "minion of government", there should also be concern that a party is not rewarded for presenting a panoply of items to the decision-makers in the hopes that there will be some "split the difference" approach. In our view, that would fail to give effect to the realities of free collective bargaining.

Through the Commitment to the Future of Medicare Act, 2004, the government has imposed accountability agreements mandating balanced operating positions from 2005/2006. The Minister of Health has the authority to issue compliance directives and orders. If the accountability provisions are not met, there is the potential of a clawback of the CEO's salary. A new funding model was introduced in April 2012 whereby annual economic adjustments are replaced by funds based on the relevant community profile to be served.

Counsel for the employer argued that the fiscal situation of the Hospital is extremely serious: there is a significant capital funding deficit and bank debt. In an effort to avoid formal bankruptcy, the Hospital has had to obtain loans from the Ministry and banking institutions. The new funding model has also negatively impacted the base funding for the Hospital. Extensive documentation of the Hospital's fiscal position, including audited financial statements, was filed in evidence to support this argument.

Counsel for the Hospital bluntly submitted that, in the face of the steep funding cuts being imposed by the government, a collective agreement freely negotiated would not include lump sums and/or wage increases or other cost items. If this award imposes increased costs, the Hospital would be forced to reduce and/or eliminate services.

Notwithstanding counsel's representations, we are not amenable to ignoring the jurisprudence regarding the need for independence and impartiality in reaching our determination. The factor of "ability to pay", when that is controlled by the government, cannot supersede all else.

On the other hand, we do consider that the local context is also relevant. Windsor has the highest unemployment rate for any city in the country, at 10% as of November 2012, as compared with the Ontario rate of 7.9% and the country's overall rate of 7.2%. It is no secret that a number of businesses have closed or announced closure in Windsor over the past few years. Negotiated collective agreements in the auto sector (GM, Chrysler and Ford) in Windsor have provided for lump sums but no wage increases. This data cannot be ignored in assessing the parties' respective positions.

As well, these "Detroit 3" employers in the auto sector have recently eliminated semi-private hospital coverage for their employees. This has occasioned a significant reduction in the Hospital's revenue stream for preferred accommodation. Other employers are following suit in eliminating this coverage. The inescapable conclusion is that, quite apart from the government's policy, this employer's "ability to pay" is being restricted as a consequence of free collective bargaining in the local economy.

It is in the above context that we now turn to the specific issues in dispute. In so doing, we acknowledge the concept of total compensation, that is, the entirety of the cost consequences for improvements in wages and benefits must be taken into account: see, Windsor Regional Hospital (2002, Swan); Kent County Board of Education (1976, O'Shea); Metropolitan Board of Commissioners of Police (1978, Samuels); Lambton County Board of Education (1978, Teplitsky); Participating Hospitals and SEIU (1981, Weiler).

Issues in Dispute

1. Article 10 Seniority

The union proposed the following change to 10.13(b).

10.13 Severance and Retirement Options

10.13(b) Prior to issuing notice of layoff pursuant to Article 10.03(a) to employees in the affected classification in any classification(s), the Hospital will offer early retirement allowance to a sufficient number of active employees eligible for early retirement under HOOPP within the affected classification(s) in order of seniority to the extent that the maximum number of employees within an affected classification who elect early retirement is equivalent to the number of employees whose positions have been eliminated within the affected classification.

Within thirty (30) days from the date of notice of layoff, an employee who has received notice of layoff of a permanent or long term nature in the affected classification may retire provided that the employee is eligible to retire under the terms of the Hospitals of Ontario Pension Plan. An employee who chooses this option forfeits her right to notice and will receive severance pay on the basis of two (2) weeks' pay for each year of service with the Hospital to a maximum of fifty-two (52) weeks on the basis of the employee's normal weekly earnings. In addition, full time employees will receive a lump sum payment equal to one thousand dollars ($1,000.00) for every year less than age sixty-five (65), to a maximum of five thousand dollars ($5,000.00).

The change requested by the union would move the maximum number of weeks for severance pay from the current twenty-six (26) weeks to fifty-two (52). This proposal amounts to a 100% increase in the existing benefit for eligible employees. Further, the current language links the requirement to offer the early retirement benefit to the number of employees whose positions have been eliminated. In the current economic climate, there is no justification for such an increase.

We decline to award this proposal.

2. Article 13 Hours of Work Overtime and Other Working Conditions

The employer proposed the following change to 13.06.

13.06 Minimum Hours Between Shifts

13.06 A period of at least twelve (12) consecutive hours shall be scheduled between tours of duty (exclusive of time worked as a result of call-in while on standby duty).

Failure to provide at least twelve (12) hours rest between shifts shall result in payment of overtime at established rates for any hours worked during such normal rest period.

The employer's proposal would reduce the current level from sixteen (16) to twelve (12) hours. The employer has sought to justify this proposal on the basis that additional flexibility in scheduling is needed to help contain costs. On the other hand, scheduling is an issue that impacts every employee in the bargaining unit on a constant basis. We are not satisfied that it is appropriate in this interest arbitration to accede to this request.

We decline to award this proposal.

The union proposed the following change to 13.11

13.11 Responsibility Pay

If an employee is required to perform the duties of a Charge Technologist or Team Leader, she shall be paid an additional allowance of one dollar, forty cents ($1.40) per hour for each hour worked in the capacity of Charge Technologist or Team Leader position.

The union proposal would move the responsibility pay from one dollar per hour ($1.00) to one dollar, forty cents ($1.40) per hour. We appreciate that this proposal has financial consequences but, in our view, the factor of comparability sustains the union's position in this regard.

We award this proposal on a "going forward" basis, effective as of the date of this award.

3. Article 14 Paid Holidays

The union proposed the following changes to the current language.

14.02(a) To qualify for such holiday pay, the employee must have worked her last scheduled work day immediately prior to such holiday and must work her next normal scheduled work day immediately following such holiday. Provided,

however, that if the employee is absent because of illness or injury, the employee will still qualify for any holiday which occurs while the employee is being paid sick leave pay.

14.02(b) When a holiday falls on an employee's scheduled day off, they may request to use a lieu day, scheduled by mutual agreement within thirty (30) days of the holiday. Unscheduled/unused lieu days will not be carried over from year to year and will be paid out.

14.02(c) When an employee works on a holiday, they will either be entitled to payment at two and one-half (2-1/2) times their regular rate of pay, or time and one-half (1-1/2) times their regular rate of pay, plus the lieu day in (b).

The union's proposal would add the language in (b) and (c) for the first time. The employer responded, in part, that this provision would decrease the employer's flexibility in scheduling around holidays, particularly in the summer period. While we have not increased the employer's flexibility in scheduling, as noted above with respect to article 13.06, we are not persuaded that the current flexibility should be reduced.

We decline to award this proposal.

4. Article 15 Vacations

15.05 Full time employees who have three (3) years of continuous service but less than eleven (11) years or more of continuous service between May 1st and September 30th in each year, shall be entitled to vacation of four (4) weeks with pay at the basic straight time rate in effect as of the date on which her vacation commences.

15.06 Full time employees who have eleven (11) years but less than twenty-two (22) years of continuous service between May 1st and September 30th in each year shall be entitled to vacation of five (5) weeks with pay at the basic straight time rate in effect as of the date on which her/his vacation commences.

15.07 Full time employees who have twenty-two (22) years of more continuous service between May 1st and September 30th in each year shall be entitled to vacation of six (6) weeks with pay at the basic straight time rate in effect as of the date on which her/his vacation commences.

15.08 Full time employees who have twenty-five (25) years of more continuous service between May 1st and September 30th in each year shall be entitled to

vacation of seven (7) weeks with pay at the basic straight time rate in effect as of the date on which her/his vacation commences.

The union's proposal would increase the vacation entitlement as follows:

15.05 Reducing the years of continuous service from thirteen (13) to eleven (11) to receive four (4) weeks of paid vacation.

15.06 Reducing the years of continuous service to eleven (11) to receive five (5) weeks of paid vacation.

15.07 This would remain as six (6) weeks for those with continuous service of between twenty-two (22) or more, subject to 15.08

15.08 Reducing the years of continuous service from twenty-eight (28) to twenty-five (25) to receive seven (7) weeks of paid vacation.

Again, this proposal has significant cost implications and it is not appropriate to accede to this request at this time.

We decline to award this proposal.

5. Article 16 Health Care Benefits

16.01 Drug Prescription Plan

The Employer will provide full time employees with a prepaid drug prescription plan ($1.00 charge per prescription) sponsored by Manulife (or equivalent plan) for employee and dependents, and will pay 100% of the premium for such plan for all full time employees subscribing therefore. The Employer will be entitled to incorporate into such drug plan Mandatory Product Selection provided, however, that there will be no generic substitution where a prescription so indicates. The Plan shall include over the counter (OTC) drugs.

The Employer will provide full time employees with the Manulife Extended Health Care Plan with the Employer paying one hundred percent (100%) of the premium cost of such plan.

Massage Therapy coverage to four hundred dollars ($400.00) annually with no maximum cost per visit and annual PSA testing.

Chiropractic coverage to maximum of four hundred dollars ($400.00) annually with no qualifier.

Physiotherapy coverage to maximum of four hundred dollars ($400.00) annually with no qualifier.

The union proposal would increase each of massage therapy and chiropractic coverage to four hundred dollars ($400.00) annually from three hundred dollars ($300.00) annually.

The union's proposals have very significant cost consequences. Further, the union made significant gains in this area in the last collective agreement resulting from the Albertyn award. An additional enhancement to these items is not warranted at this point.

We decline to award this proposal.

16.05 Vision Care

The Employer will provide full time employees with the Manulife Vision Care Plan with the benefit of four hundred dollars ($400.00) every twenty-four (24) months. The employer will pay one hundred percent (100%) of the premium charged thereof. Vision care may be used towards laser eye surgery.

Eye exams will be covered every two (2) years to a maxim of ninety dollars ($90.00).

The union proposal would increase coverage to four hundred dollars ($400.00) from two hundred and fifty ($250.00) and would provide that vision care may be used towards laser eye surgery.

The same comments apply to the union's proposal in 16.05 as in 16.01. However, we are satisfied that it is appropriate to permit an employee, who so wishes, to put the existing level of vision care benefit toward laser eye surgery. This provision does not increase the current level of costs to the employer but provides some flexibility to the employee to allocate the benefit.

We decline to award this proposal, except for the sentence "Vision care may be used towards laser eye surgery".

6. Part Time Employee Benefits

The union proposed the following language.

16.09 Part time Employees Payment in Lieu of Benefits

(c) Part time employees shall have the option to purchase Extended Health Care and Dental Benefits provided they pay one hundred percent (100%) of the premium.

This item 16.09(c) is new and would afford part time employees the option of purchasing extended health care and dental benefits with one hundred percent (100%) of the premium to be paid by the employee exercising this option. The employer resisted this proposal on the basis that it would constitute the "thin edge of the wedge" and result in proposals in future bargaining to share the cost of the premium. That may well be an accurate prediction. On the other hand, there is no compelling basis to not permit the part-time employees to access extended health care and dental benefits at this time provided they pay one hundred (100%) of the premium.

We award this proposal.

7. Benefits on Early Retirement

The union proposed two changes to the language in article 16.12. There is no need to replicate the entire article, given its length and the nature of the proposed changes.

First, the proposal eliminates the introductory words: "Effective upon ratification" in the first paragraph.

Second, the final paragraph would read:

"In any given year, the Hospital will provide up to ten (10) early retirement benefit packages at a level outlined in the collective agreement from the list prepared above."

The second union proposal would increase the number of early retirement benefit packages from six (6) to ten (10), although it should be noted that, in the Albertyn award, a Letter of Understanding was directed to the effect that seven (7) early retirement benefit packages be offered in the 2011 calendar year.

The first wording change should be awarded since it reflects the fact that this collective agreement is a consequence of an interest arbitration.

The second proposal, however, is not warranted. The evidence is that only six eligible employees have firmly indicated an intention to take early retirement. That some others may have not returned the requisite forms within the requisite time frame is not a sound basis for altering the current language. Moreover, it should be noted that the Albertyn award declined to increase the obligation in 16.12 but simply added a Letter of Understanding that operated only for the 2011 calendar year on the basis that, for that year, seven employees had indicated their intention to take early retirement.

We decline to award this proposal.

8. Article 17.09 Sick Leave and Long-Term Disability

The employer proposed a new paragraph to read as follows.

Limitation on payment of sick time for first fifteen (15) hours for the sixth (6) and subsequent periods of absence within the fiscal year (i.e., April 1 to March 31).

This proposal would institute a limitation of sick time payments for the first fifteen hours for the sixth and subsequent periods of absence within the fiscal year. We are satisfied (Mr. Luce dissenting) that this proposal is consistent with the comparability factor and affords some measure of cost containment.

We award this proposal.

9. Article 23 Contracting Out

The current article is 23.01 which reads.

23.01(a) The Union will be advised in writing by the Hospital whenever any services have been contracted out which are normally performed by members of the bargaining unit.

(b) The employer shall not contract out any work normally performed by members of the bargaining unit, if as a result of such contracting out, a layoff of any bargaining unit members results from such contracting out.

(c) Notwithstanding the foregoing, the Hospital may contract out work usually performed by members of the bargaining unit without such contracting out constituting a breach of this provision if the Hospital provides in its commercial arrangement contracting out the work that the contractor to whom the work is being contracted, and any subsequent contractor, agrees:
(i) to employ the employees thus displaced from the Hospital; and
(ii) in doing so to stand, with respect to that work, in the place of the Hospital for the purposes of the Hospital's Collective Agreement with the Union, and to execute an Agreement with the Union to that effect.

The union proposed the following new language.

23.02 Work of the Bargaining Unit

It is agreed that nobody excluded from the bargaining unit shall perform any duties or work within the bargaining unit except for the purpose of instruction or in cases of emergency beyond the control of the Employer.

In our view this language has serious consequences for the contracting out provisions and, as well, for assignments across other bargaining units with regard to duties which currently are shared or overlap. There is no basis for imposing such a provision in the context of this interest arbitration.

We decline to award this proposal.

10. Letter of Understanding #8

The Board was advised at the hearing that the union's proposal was being discussed by the parties and the Board was not to deal with this issue. Accordingly, we have noted the item as part of the union's proposals in the documentary material but have not further addressed the matter.

11. Schedule "A" Classifications and Wage Rates

The union proposed the following.

Effective April 1, 2011 – lump sum payment as per the Kaplan award OPSEU Central, retroactive for all employees on the payroll as of that date, payable within 30 days of the award.

Effective April 1, 2012 – lump sum payment as per the Kaplan award OPSEU Central, retroactive for all employees on the payroll as of that date, payable within 30 days of the award.

Effective March 31, 2013 – general wage increase to all classifications of 2.75%, retroactive if required.

We would first note that we have reviewed the recent arbitration awards cited by the parties. We are mindful that the union's proposal with respect to April 1, 2011 and 2012 imposes additional costs on the employer. These increases may well result, as employer counsel indicated, in reductions in services and/or reductions in the complement of employees in the bargaining unit. Nonetheless, we consider the Kaplan award in this respect to be a suitable comparator.

We award this proposal, with the change in the wording to require the monies be "payable within sixty (60) days of this award". Employer counsel requested that, if the increases sought by the union for 2011 and 2012 were awarded, this additional time would be needed to enable the complex calculations to be carried out. As the monies are retroactive, the additional time period afforded to the employer is reasonable in the circumstances.

The final portion of the union's proposal, that there be a general wage increase to all classifications of 2.75% effective March 31, 2013, is not justified. The statute mandates a two-year term for the collective agreement unless the parties agree to a longer term. That has not happened here. Thus, it is not clear that this panel would have the statutory authority to award an increase on the final day of the collective agreement that results from this interest arbitration that, in effect, imposes a wage increase for a "third year". No examples were cited of such a proposal being adopted in interest arbitration and this is not the time to sanction such a novel proposal. We do recognize that this will result in a time lag with respect to comparability within the sector but that is a matter with which the parties herein must deal in the next round of bargaining.

We decline to award this element of the union's wage proposal.

Finally, we remain seized with respect to the implementation of this award.

DATED this March 1, 2013

"Susan Tacon"
_____
Susan Tacon, Chair

"I concur, except as noted."

"Frank Luce"
_____
Frank Luce, Union Nominee

"I concur."

"D. Stephen Jovanovic"
_____
D. Stephen Jovanovic, Employer Nominee