IN THE MATTER OF AN ARBITRATION BEFORE ARBITRATOR GEDALOF

BETWEEN:

THE UNIVERSITY OF TORONTO FACULTY ASSOCIATION (UTFA)

Association

and

GOVERNING COUNCIL OF THE UNIVERSITY OF TORONTO

Employer

REPLY BRIEF OF THE ASSOCIATION ON THE APPLICATION OF ATB SUBMITTED ON NOVEMBER 5, 2025

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The University of Toronto Faculty Association ("UTFA" or the "Association") makes the following submissions in reply to the arbitration brief of the Governing Council of the University of Toronto (the "Administration") submitted on October 31, 2025.

Subject to the Administration's presentation of its arguments at the November 6, 2025 hearing, the Association reserves the right to make further reply.

The Administration argues that Arbitrator Gedalof has no jurisdiction to consider the question of whether the ATB should be paid to new and former members. It further argues that individual letters of offer are binding, notwithstanding a conflict with the MoA. These arguments are erroneous and should be rejected for three reasons.

First, Arbitrator Gedalof is seized with the implementation of his award, which includes the present dispute. The Administration has provided no basis to conclude that this issue is not before him.

Second, if the Administration wished to argue that the award for ATB did not include all members, it had the burden to clearly rebut that presumption. It has provided no basis to conclude that any meaning other than the ordinary meaning of ATB and the ordinary applications of retroactivity should apply.

Third, and perhaps most alarmingly, the Administration misconstrues the MoA by reading in an ability to negotiate below the negotiated minima.

Arbitrator Gedalof is seized

The Administration's position that Arbitrator Gedalof is without jurisdiction to hear this issue is baseless. Arbitrator Gedalof's jurisdiction is pursuant to paragraph 106 of the Gedalof Award, not cited or interpreted by the Administration, which states that he remains "seized with respect to the implementation of this award". The question of whether the Gedalof Award meant ATB when it stated ATB or whether it meant something else entirely is a question of implementation that must be resolved by Arbitrator Gedalof.

Arbitrator Kaplan dealt with a similar issue in *Participating Hospitals (Implementation Dispute)*, where the Employer argued that the Board had no jurisdiction to determine whether, and how much, pandemic pay was payable to certain employees. Arbitrator Kaplan dismissed the Employer's jurisdictional objection, reasoning that the "law is dispositive that our implementation jurisdiction continues until our award has been given effect."[1]

Similarly, in *ACCO*, decided earlier this year, Arbitrator Gedalof interpreted language identical to that in paragraph 106. Like the present case, *ACCO* concerned parties that are not certified unions who proceed to arbitration on the basis of a voluntary agreement. Like in the present case, the Employer argued that Arbitrator Gedalof could not hear the dispute because his jurisdiction was limited by a provision in the

[1] *The Participating Hospitals v OPSEU*, 2024 CanLII 8238

parties' Framework Agreement that limited the matters in dispute to those presented to the interest arbitration panel.[2]

Against the Employer's objections, Arbitrator Gedalof decided he had jurisdiction to hear the dispute about the timing of retroactive pay increases:

> [W]hat this jurisdictional objection turns on is whether the Associations' request that I order a timeframe for wage increases and retroactive payments is both a matter of "implementation" and a matter with which I am otherwise *properly* seized. On the first of these requirements, I find that the timing of implementing wage increases and retroactive payments is clearly a matter of the "implementation of [my] award". If the preceding sentence reads as a tautology that is because on its plain meaning, "implementation" is the correct word to describe what is that the Employer is required to do. Implementation is the process of putting a decision into effect. When and how the employer puts the decision to increase wages and make retroactive payments into effect are essential elements of that process and are therefore matters of "implementation".[3]

Arbitrator Gedalof further stated that it "bears emphasizing that it is highly normative that interest arbitrators remain seized in this manner".[4] The same logic applies to the present case: Arbitrator Gedalof remained seized with respect to implementation and the decision has not yet been implemented. ATB and retroactivity were, without doubt, issues that were before Arbitrator Gedalof. The question of how they are to be implemented is plainly a matter within Arbitrator Gedalof's jurisdiction.

The Administration has not rebutted the presumption that across-the-board means across-the-board

The Administration's theory of its case is that, if UTFA wished to have the ATB apply across-the-board, it should have said so. According to the Administration, UTFA should have anticipated any exceptions and exclusions that the Administration may have sought to make, and it should have addressed them pre-emptively.

The Administration's theory is backwards.

Its position requires a departure from two well-established presumptions in collective bargaining and interest arbitration, both of which were outlined in the Association's Brief, dated October 31, 2025: (1) ATB means ATB; and (2) retroactivity includes former members. Both presumptions can only be rebutted with clear evidence that the parties or the arbitrator intended a different meaning. As such, if the

[2] *Ontario Crown Attorneys' Association (OCAA) v Association of Law Officers of the Crown (ALOC)*, 2025 CanLII 8871 at para 16
[3] *Ibid* at para 27
[4] *Ibid* at para 31

Administration wished to depart from the ordinary meaning of ATB, the Administration – not the Association – had the obligation to raise that proposal.

Neither presumption was rebutted. At no point during negotiations or the interest arbitration did the Administration even raise these exceptions as a possibility. Accordingly, where the Association proposed an ATB increase, it is not a "late-filed" proposal to insist that the Arbitrator meant what he said when he awarded an ATB increase. There was no need for the Association to state explicitly that no exceptions applied where it sought, and obtained, blanket language that covers everyone the Administration now seeks to exclude.

Contrary to the Administration's submissions, there is no relation between this scenario and that in *Ontario Cancer Institute*. In that case, the parties had engaged in extensive bargaining, and the Employer had agreed to several key proposals, narrowing the issues down to three. The Union then tabled a substantial revision of its proposals, including on agreed-to items. Arbitrator Burkett reasoned that the Board did not have jurisdiction to entertain fresh demands at arbitration, pursuant to the terms of the *Hospital Labour Disputes Arbitration Act,* and that allowing these fresh demands would cause "obvious prejudice" to the party that relied on the framework established by the exchange of proposals.[5] In the present case, however, UTFA has not sought to raise any new issues, it simply seeks the proper implementation of the award on issues that were obviously in dispute.

There is also no relation to the parties' last round of bargaining, where Arbitrator Gedalof decided he did not have jurisdiction to award UTFA's PTR proposal because it was not included in the schedule the parties had prepared for referring matters to him for arbitration.[6] Again, here, the Association is not proposing anything new, but is enforcing the regular and well-understood meaning of ATB increases and the presumption of retroactivity.

The only evidence the Administration points to for its argument that UTFA "was given notice" that it believed that ATB entailed various exclusions is a September 2023 email exchange between UTFA's then-General Counsel and the Administration about the application of the 2023 interest arbitration award (the "2023 Award").

This email exchange supports UTFA's position. Rather than showing notice of a reversion to any "normal practice", it shows that, in the prior round, ATB increases were actually paid across the board. The precise language in the email exchange is important. UTFA's email does not seek any exceptional payment or additional request for compensation. The email seeks "confirmation" that these members will be paid pursuant to the 2023 Award. With respect to former members, UTFA added that "[i]t is UTFA's position that retroactive compensation is to be paid to applicable Members".[7]

[5] *Ontario Cancer Institute (Princess Margaret Hospital) and Ontario Nurses' Association*, June 19, 1989 (Burkett), Tab 17 of Administration's Brief, submitted on October 31, 2025
[6] See Administration's Brief, submitted on October 31, 2025, at paras 42 to 43.
[7] Administration's Brief, submitted on October 31, 2025, at Tab 14, p 398.

The Administration's response, similarly, confirms that these members will be paid, "without prejudice or precedent to University's right to revert to our normal practice in the future".[8] The Administration provided no other evidence to support its assertion in that email that there was any particular "normal practice" to which it could revert. Even if there were a "normal practice", *which is denied*, an email from a prior round stating that the Administration may, in the future, revert to some other position does not constitute notice or relevant bargaining history that can rebut the presumption that the ordinary meaning of ATB applied in this round.

Indeed, the Administration does not rely on any relevant correspondence, discussions or documents from this round of bargaining. If the Administration wanted to exclude certain members from the ATB increases, in light of the clear and unambiguous meaning of "across-the-board" and the presumption of retroactivity, it was the Administration, not the Association, that had to explicitly propose that.

Rather, it is the Administration's proposal to limit the application of the ATB that was never properly brought to Arbitrator Gedalof for determination. As the Administration argues, the February 20, 2025, MOS expressly required that the parties specify the issues that would be referred to interest arbitration. Per the Administration's brief, it only specified the exclusions it sought in an email in 2023 with respect to a prior round of bargaining. By this token, the Administration cannot then claim that it met its obligation to specify these proposals in this round of bargaining.

Finally, the Administration cannot rely on its costing of the parties' proposals as a reason to depart from the well-established meaning of ATB. UTFA does not dispute that the total cost of a party's proposed compensation increase is a relevant factor in negotiations and at interest arbitration. However, the Administration's costing in this case indicates that the Administration itself was leaving a large margin for error based on who it included in its costing, such that it cannot now rely on its costing as an accurate portrayal of what the proposal would have actually cost. As noted in the Association's brief, the Administration's costing does not appear to account for attrition, meaning that it included people in its costing that it now seeks to exclude from the ATB increases. In addition, the Administration chose to calculate its costing based on salaries as of June 30, 2023.[9] The choice of June 30, 2023, as the starting point for costing, as opposed to July 1, 2023, means that the Administration has included the salaries of all members who retired on June 30, 2023, in its costing, despite the fact that these members were no longer working as of July 1, 2023. The Administration therefore relied on costing that inflated costs both by including individuals who retired on June 30, 2023, and, if its position is accepted, by failing to account for attrition.

[8] *Ibid*, at p 394.
[9] University Administration's Costing of UTFA's Proposals, Tab 14 of the Administration's Book of Documents, dated March 7, 2025, BOD, Tab 9.

The MOA does not allow for negotiations below the minimums

The Administration takes the ironic position, at paragraph 47 of its Brief, that, because the MoA "preserves" the process of individual negotiations to negotiate "more favourable" terms and conditions, it also "preserves" a process by which individual members can negotiate less favourable terms. This interpretation cannot stand.

At paragraph 14 of its Brief, the Administration submits:

> Read holistically, the "effective and orderly procedure for discussion and determination of salary, benefits and workload" in Article 6 of the MOA must not derogate from or diminish the existing rights of individual faculty members. Included among the existing rights of individual faculty members is the right to negotiate their compensation at the time of their appointment with the University. The Article 6 negotiation, mediation and interest arbitration process determined minimum entitlements only.

UTFA agrees. It cannot follow, however, from this statement that the MoA "places no constraints on the individual negotiations that occur at the time when prospective faculty members first seek appointments to the University." The Administration's argument relies both on misconstruing the plain terms of Article 1 of the MoA and reading in terms that simply do not exist.

For instance, the Administration insists that Article 1 "preserves and prioritizes" individual negotiations at the time of hire. It provides an analysis of Article 1, wherein that article "emphasizes" individual negotiation for new hires. The conclusion of the Administration's analysis is the Administration's preferred conclusion that the minimums in the MoA only apply to existing hires.

Yet, the Administration points to no language in the MoA that supports this distinction between new hires and the ongoing negotiations that individual members are entitled to engage in throughout their contracts. No such language exists. Nothing in the MoA states that the minimums apply only to members following their first year of employment, or that the Administration is entitled to negotiate below the minimums with new members as an exception to the general application of the MoA.

The Administration's analysis is untenable in light of the language in Article 1, which guarantees minimums to all members. Critically, the Administration fails to consider the effect of its analysis, thereby highlighting inconsistencies in its position. For instance, the Administration's position that the MoA places no constraints on pre-hire negotiation is easily disproven by the existence of salary floors, which the parties have always agreed are binding.[10] If a change to the salary floor changes a new member's salary, it is unclear on what principled basis other changes would not apply.

[10] See, for example the *Academic Administrative Procedures Manual* which states "No faculty member or librarian may be paid less than the floor for his or her rank."

Moreover, the Administration's position that new hires are not entitled to the minimums because UTFA is not a party to the pre-hire negotiations is indefensible in light of foundational principles of contract law. The MoA is a contract between UTFA and the Administration that provides benefits to UTFA and all its members. The assertion that these contracts are "clear and unambiguous" and that UTFA was not a party to them are not answers to UTFA's argument that individual contracts breach the MoA. To the contrary, this argument confirms that these contracts are contrary to the MoA. A contract to which UTFA was not a party cannot override the MoA.[11] Therefore, these individual contracts constitute a clear breach of the MoA and, to the extent that they constitute a breach, cannot be enforced.

[11] See e.g. *Loyalist College of Applied Arts and Technology v Ontario Public Service Employees Union*, 2003 CanLII 29709 (ON CA).