

In the Matter of an Interest Arbitration

BETWEEN:

THE UNIVERSITY OF TORONTO

(the "University")

AND

THE UNIVERSITY OF TORONTO FACULTY ASSOCIATION

(the "Association")

BEFORE: Eli A. Gedalof, Sole Arbitrator

APPEARANCES

See Schedule "2"

AWARD

INTRODUCTION AND BACKGROUND

1. This is an interest arbitration convened pursuant to Article 6 of the Memorandum of Agreement between the University and the Association (the "MOA"). Article 6 of the MOA provides for the negotiation of salary, benefits and workload for faculty and librarians represented by the Association. Where the parties are unable to reach an agreement on these issues, Article 6 provides for interest arbitration before a Dispute Resolution Panel.

2. By Memorandum of Settlement dated January 25, 2022 (the "MOS"), the parties agreed to enter into a three-year agreement commencing July 1, 2020 and ending June 30, 2023. They also agreed to certain monetary terms for the first two years of that agreement, while referring salary, benefit and workload matters in the third year to interest arbitration. They further agreed that I would sit as sole arbitrator in place of the Dispute Resolution Panel, and that this award would be treated as a unanimous report for the purposes of paragraph 22 of Article 6 of the MOA.

3. When this proceeding commenced, the three-year term of the agreement was subject to the *Protecting a Sustainable Public Sector for Future Generations Act, 2019*, generally referred to as "Bill 124". Bill 124 imposed a three-year "moderation period" during which annual salary increases were limited to 1%, and overall monetary improvements were limited to 1% of total compensation for each year. At that time, the Association, along with other bargaining agents, had brought a constitutional challenge to Bill 124 that had not yet been determined. In that context, the parties, in their MOS, agreed to annual salary increases of 1%, and to benefit improvements equal to the residual of 1% of total compensation in the first two years of the agreement. With respect to the third year (July 1, 2022 to June 30, 2023), this matter has proceeded in five steps.

4. First, on September 15, 2022, I issued an interim Award, ordering a 1% across the board salary increase, together with an increase to the minimum per course stipend, effective July 1, 2022. The interim Award was without prejudice to either party's position with respect to the constitutionality of Bill 124 and the ongoing litigation in that regard.

5. Second, the parties filed written briefs and made oral argument over two days with respect to both workload and benefit issues for the third year of the agreement.

6. Third, the parties then entered into a Memorandum of Settlement with respect to benefit improvements in the third year, having regard to the Bill 124 1% envelope.

7. Fourth, having settled the benefit issues, workload issues from the second step remained to be decided. Before I issued a final Award on those issues, however, the Court released its decision in *Ontario English Catholic Teachers Association v. His Mastery*, 2022, ONSC 6658 ("OECTA"), finding that Bill 124 was unconstitutional, void and of no effect. The parties then engaged in mediated discussions in an effort to settle the outstanding monetary issues but were not able to reach an agreement.

8. Fifth, when the parties were not able to settle the outstanding monetary issues, they filed additional briefs and materials and on May 23, 2023, presented further oral argument with respect to those monetary issues. The parties subsequently filed further materials providing additional information and updates related to comparator data.

9. This award therefore determines the outstanding salary and workload issues for the third year of the parties' agreement.

OVERVIEW OF ISSUES AND PROPOSALS

10. There is no dispute, in the absence of Bill 124, that I retain jurisdiction to award salary increases beyond the 1% increase arising from my interim award. The Association proposes an across the board ("ATB") increases of 12.75% percent, in addition to the 1% previously awarded, together with lump sum payments to compensate for lost salary in years 1 and 2. The University proposes an additional 1.75% ATB increase. The Association also proposes that PTR breakpoints and increments increase by an additional 9.3% retroactive to July 1, 2022. The University opposes any increase to PTR.

11. The gulf between the parties' positions can be attributed, to a significant degree, to a dispute concerning the scope of my jurisdiction, and the import of the agreements reached in the MOS.

12. From the Association's perspective, the agreements reached in the MOS were all without prejudice to its challenge to Bill 124. Those agreements were not voluntary settlements in any meaningful sense. Now that Bill 124 has been struck down, this award should restore the Association to the position that it would have been in but for the imposition of unconstitutional constraints. For the Association, this means that while my jurisdiction may be limited to year 3 of the agreement, within that year I ought to award substantial across the board increases, lump sums, and improvements to PTR. Those increases should address the losses suffered by members in the first two years of the agreement, having regard to agreements that have been freely bargained and, of paramount importance, correcting for substantial inflation over the term of the agreement.

13. From the University's perspective, all terms of the agreement for the first two years, in addition to PTR in year 3, were fully, finally and voluntarily resolved. In the University's submission, all that remains to be determined on the monetary front is the appropriate across the board increase for the third year. Further, according to the University, the increases should be determined by looking primarily to what comparable U15 universities have negotiated for that specific year. In the University's submission, the parties chose to settle the first two years of the agreement, and there is no basis for awarding any additional amounts attributable for those years.

14. Before addressing the merits of the parties' monetary proposals, therefore, it is necessary to look closely at both the MOA and the MOS to determine the scope of my jurisdiction.

15. The workload issues in dispute are long-standing points of contention between the parties. They include several Association proposals directed

toward addressing what it describes as “crushing workloads that are inequitably distributed within units and disproportionately borne by equity-seeking groups”. These include proposals related to providing technical and pedagogical support to faculty, several proposals directed at creating transparent and consistent standards for assignment of workload, and proposals placing limitations on the assignment of teaching to Teaching Stream faculty. The University maintains that the Association’s proposals would constitute unwarranted breakthroughs in the absence of any demonstrated need and would interfere with the collegial assignment of work at the unit level.

16. These workload issues, although not precisely the same proposals, were also raised in the prior round of interest arbitration in *The University of Toronto and The University of Toronto Faculty Association*, unreported, June 29, 2020 (Kaplan) (the “*Kaplan Award*”). From the University’s perspective, the *Kaplan Award* bears careful examination. For the same reasons as articulated in that award, the University maintains that, at most, I ought to award very modest and incremental changes to the workload language. In contrast, the Association maintains that the *Kaplan Award* misapprehended the workload issues raised by the Association, and the kind of modest and incremental change awarded in that decision would be wholly inadequate to address the demonstrated need for real and substantial workload protections.

17. The Association also proposes to incorporate into the MOA a provision to maintain salaries and benefits and workload during bargaining and throughout the interest arbitration process, i.e., a “freeze” proposal. The University objects to this proposal on both jurisdictional and substantive grounds.

18. In this award I will therefore address the following issues:

1. The scope of my jurisdiction under the MOA and the MOS, and identification of which proposals are properly before me;
2. Salary proposals;
3. Workload proposals;
4. Freeze proposal;
5. The ongoing significance of Bill 124.

JURISDICTION

The Parties' Agreements

19. My jurisdiction arises primarily from Article 6 of the MOA. Sitting in place of the Dispute Resolution Panel, and in accordance with Article 6(19), my jurisdiction:

...shall encompass only those unresolved matters relating to salaries, benefits and workload that have been referred to [me] by the parties...[taking] into account the direct or indirect cost or savings of any change or modification of any salary or benefit agreed to by the parties..."

20. There are two related elements of this provision that underlie the dispute before me. First, there is a dispute over which matters remain "unresolved". Second, there is a dispute concerning whether certain of the proposals the Association now pursues were "referred to me by the parties".

21. In assessing what has and has not been resolved by the parties and what matters have been referred to me by the parties, it is necessary to carefully consider the terms of the January 25, 2022 MOS arising from the parties' mediation with mediator Burkett. The MOS is attached as Schedule "1" to this award. Of note, the MOS:

- Includes a "whereas" clause acknowledging the Bill 124 restrictions in place at the time and the Association's outstanding constitutional challenge, and provides that "any agreement in this Memorandum of Settlement with respect to salary rates and compensation is without prejudice to that ongoing constitutional challenge";
- Provides for a three-year term, with 1% across the board increases in each of the first two years and a corresponding increase to the per course stipend rate upon ratification;
- Provides for time limited increases to the existing Health Care Spending Account, and for ongoing expansion to and improvements to paramedical and dental benefits, attributable to years one and two of the Agreement;
- Incorporates the parties' August 2021 agreement for the payment of PTR, and provides for an additional July 1, 2022 PTR payment for the July 1, 2021 to June 30, 2022 assessment period as addressed further below;

- Refers salary, benefits and workload matters for the third year of the Agreement to interest arbitration “as set out in schedules A and B attached hereto”; and,
- In respect of year 3, but not years 1 or 2, specifies that the agreement is without prejudice to whether the DRP, following the issuance of an award for salary, could “remain seized or retain any jurisdiction in the event that thereafter Bill 124 is found to be unconstitutional or should Bill 124 be otherwise modified or repealed with retroactive effect.”
- Includes a Schedule A with Association Proposals and a Schedule B with University Proposals while providing that “[a]ll other proposals are withdrawn by both parties”. Schedule A includes a clause stating that “UTFA’s proposals are without prejudice to its position on the constitutionality of Bill 124”.
- Includes, in Schedule A, the Association’s salary proposal for a 1% ATB increase effective July 1, 2022 with the following proviso:

If Bill 124 is found to be unlawful, UTFA proposes an ATB increase that is fair and reasonable in light of the unparalleled professional expectations faced by U of T faculty and librarians, trends in recent settlements in higher education, and broader economic considerations.

The University’s Argument

22. The University distinguishes the references to the Association’s agreements and proposals as “without prejudice” to its position on the constitutionality of Bill 124—references found in a whereas clause and in the Association’s proposals—from the kind of broad Bill 124 re-opener provisions that had become common in other parties’ collective agreements and interest arbitration awards under Bill 124. To say that the Association’s agreements and proposals are “without prejudice”, the University argues, means no more than that they cannot be relied upon to undermine the Association’s constitutional challenge. But in the University’s submission, the agreements reached between the parties throughout the process leading up to this arbitration are, nonetheless, just that: agreements. And having entered into a binding resolution on terms for years 1 and 2, without bargaining a Bill 124 re-opener for those years—a practice that was widespread and well-known at the time—the University argues that the Association cannot now seek to obtain additional compensation attributable to those years. Rather, the parties’ agreement permits the Association to pursue specific proposals for a specific period of time. With respect to compensation the University argues that the

proposal must be limited to across the board increases for year 3, i.e., for the period July 1, 2022-June 30, 2023.

23. Neither, argues the University, is there any equitable or policy basis for setting aside the parties' agreements on compensation. The MOS is not a one-sided "contract of adhesion" or in any way contrary to public policy, as discussed in *Heller v. Uber Technologies Inc.*, 2020 SCC 16 ("*Heller*"). In the University's submission, the parties were fully apprised of all the relevant circumstances, including the possibility that Bill 124 might be struck down, and chose to voluntarily negotiate a settlement that limited the Association's recourse to pursuing an additional ATB increase effective July 1, 2022. That limited right was preserved in my September 15, 2022 interim award, and that is what the Association is entitled to pursue here.

24. Further, in the University's submission, the parties' agreements must be considered in light Article 6(19) of the MOA and section 5(a) of the MOS; the arbitrator's jurisdiction is limited to "those unresolved matters...that have been referred by the parties" and those unresolved matters have been enumerated by the parties in Schedules "A" and "B". Read together with the terms of the MOS, the University submits that all compensation for Years 1 and 2, including retroactivity, in addition to PTR for year 3, are matters that have been resolved and which cannot therefore be referred to arbitration. The parties similarly restricted outstanding benefit issues to Year 3, "for the period July 1, 2022 to June 30, 2023".

25. The Association's only salary proposal, as set out in Schedule "A", is for a "fair and reasonable" ATB increase in year 3 in the event that Bill 124 is found to be unlawful. The University acknowledges that the Association's current proposal for ATB increases is therefore a matter that is in dispute and properly before me. But in contrast to this salary proposal, Schedule "A" includes no proposal to revisit PTR for the assessment period July 1, 2021 to June 30, 2022. Neither does it include any proposal for stipends, lump sum payments or any other form of compensation attributable to the Years 1 and 2 of the agreement. In the University's submission, the absence of any such proposals is entirely consistent with the fact that the parties fully and finally resolved those issues. It is also, argues the University, consistent with my interim award, which ordered a salary increase, but left open the prospect of further ATB increase in accordance with the Association's outstanding proposal in the event Bill 124 was struck down.

The Association's Argument

26. The Association describes the University's objections as "jurisdictional sand in the eyes". The Association acknowledges that my jurisdiction is limited to awarding monetary increases for the third year of the three-year agreement. But it maintains that all its proposals fall squarely within that time frame. There is a distinction, it asserts, between making an award for improved terms during the first two years of the agreement—which it acknowledges I cannot do—and making an award during the third year of the agreement that also compensates for the inadequate compensatory improvements provided in those first two years. The University's jurisdictional objections conflate this distinction, the Association argues, hence the "jurisdictional sand".

27. There is nothing in the terms of the MOS, the Association argues, that either expressly or implicitly suggests that an Arbitrator cannot consider the losses suffered by the Association's members in Years 1 and 2 in determining the appropriate compensation increases for year 3. Further, while Schedule "A" to the MOS may not explicitly refer to lump sum payments, the Association maintains that the University's characterization of the arbitrator's jurisdiction is unduly narrow; as compensation for lost ATB increases in years 1 and 2, the Association maintains that the lump sum payments it seeks are reasonably captured by its proposal. With respect to stipends, the Association notes that its proposal specifically included a clarity note that its "proposal to increase ATB by 1% is intended to include per course stipend rates".

28. Further, argues the Association, it is important to consider the reasons that Justice Koehnen overturned Bill 124 in *OECTA*, emphasising the importance of collective bargaining¹ and the extent to which Bill 124 infringed the Association's rights under s.2(d) of the *Charter*. In this context, argues the Association, it becomes apparent that I must exercise my jurisdiction in year three of the parties' agreement, to address the artificially and unlawfully deflated terms in years one and two.

29. The Association also takes its argument concerning the significance of the parties prior agreements a step further. It argues that as Bill 124 has now been struck down, "any terms related to salary and compensation that were constraining by Bill 124 should no longer be treated as binding". This includes, it asserts, the 1% increases in years 1 and 2, and the 1% increases to PTR in Years 1, 2 and 3. According to the Association, when the parties recognized

¹ See also *Health Services and Support—Facilities Subsector Bargaining Association v British Columbia*, 2007 SCC 27 and *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC.

in the MOS that “any agreement in this Memorandum of Settlement with respect to salary rates and compensation is without prejudice to that ongoing constitutional challenge”, it was understood by both parties that the Association’s agreements were conditional on the legal status of the legislation.

30. The provisional nature of the 1% increases is further reflected, the Association argues, in its prior proposals and submissions, and in my September 15, 2022 Interim Award, which awards 1% ATB increases, “without prejudice to either party’s position with respect to the constitutionality of Bill 124 and the ongoing litigation in that regard...”. In these circumstances, the Association maintains that it is both within my jurisdiction and appropriate to reopen the terms of the agreement.

31. In the further alternative, the Association argues that enforcement of the 2022 MOS is contrary to public policy, and that it should be set aside on this basis. The principle of public policy, as distinct from the principle of unconscionability, as a basis for voiding a contract, focusses on the content of the contract, and whether it conflicts with valued principles in a democratic society. The Association argues that to hold it to the terms of the MOS, which it would never have made but for the imposition of unconstitutional legislation, would allow that unconstitutional legislation to continue to interfere with the rights of the Association’s members.

32. In support of its public policy argument, the Association relies upon *Heller* at paras 108-09, citing *In Re Estate of Charles Miller, Deceased*, [1983] S.C.R. 1 and *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4. The public policy doctrine is fundamental to contract law, it emphasises, and while exceptions to the enforceability of contracts may be narrow, the Association argues that they ought at least to “protect individuals from the enforcement of contractual provisions that are in violation of the *Charter*.” The Association also relies upon *Canada Trust Co. v. Ontario (Human Rights Commission)*, (1990), 69 D.L.R. (4th) 321 (OCA)(“*Canada Trust*”) at para 39 for the proposition that a party should not be bound to the terms of contract that were dictated by unconstitutional legislation.

Analysis and Decision

Is the MOS Binding and Enforceable: The Association’s Public Policy Argument

33. The University’s jurisdictional objections, while founded on the terms of the MOA, are also premised on the binding nature of the MOS and the agreements between the parties that are set out therein. Thus, while the

Association's public policy argument is not its primary argument, it is nonetheless a threshold issue and an appropriate place to start.

34. The Association's argument is, in essence, that: i) it would never have agreed to the terms of the MOS but for the imposition of Bill 124; ii) Bill 124 has now been determined to be unconstitutional and to have fundamentally undermined the constitutional rights of the Association's members; and, iii) it would therefore offend public policy to enforce the MOS, since this would be tantamount to endorsing unconstitutional legislation and enshrining it in the parties' agreement.

35. The University, for its part, acknowledges that freedom of contract is not absolute, but cautions that exceptions should be carefully and narrowly construed. In this case, the Association had all the necessary information and knew exactly what it was doing when it entered into the MOS. Had it not wished to agree to the terms of the MOS, it could have elected to instead bring all its issues to interest arbitration, where it could have pursued a Bill 124 reopener. Many other parties to interest arbitration, it emphasises, did exactly that. Instead, fully informed, it made a choice to enter in the MOS, and that choice was "proportionate in the context of the parties' relationship" (as discussed by Justice Brown in *Uber*). The Association may now regret that choice, but that is not a basis for invalidating the parties' agreement.

36. In deciding this issue, I accept, as the Association argues, that it is important not to conflate "unconscionability" as a basis for invalidating a contract with the "public policy" argument that it is making. The majority decision in *Heller* is based on the former, while Justice Brown's concurring reasons are based on the latter.

37. The key passage from *Heller* upon which the Association relies, found in Justice Brown's concurring reasons, reads as follows (at paras 106):

But while privileging freedom of contract, the common law has never treated it as absolute. Quite simply, there are certain promises to which contracting parties cannot bind themselves. As this Court has stated:

... there are cases in which rules of law cannot have their normal operation because the law itself recognizes some paramount consideration of public policy which over-rides the interest and what otherwise would be the rights and powers of the individual. It is, in our opinion, important not to forget that it is in this way, in derogation of the rights and powers of private persons, as they would otherwise be ascertained by principles of law, that the principle of public policy operates. [Emphasis added]

38. The question this articulation of the public policy principle raises, though, is whether the terms of the MOS are a form of promise “to which contracting parties cannot bind themselves”. In answering this question, it bears emphasizing that the facts in the instant case are very different from the facts in *Heller*, or any of the other cases cited by the Association.

39. In *Heller*, the terms of an arbitration clause, unilaterally imposed on a low-wage gig-economy worker with minimal transparency, were so onerous that they effectively denied him any access to justice. In the instant case, the University and the Association are both highly sophisticated and well-resourced parties. They jointly negotiated a dispute resolution mechanism (the MOA) for determining certain terms and conditions of employment for the Association’s members, and they are both fully capable of participating in that dispute resolution process.

40. It is true that by virtue of Bill 124, if the Association wanted to attain any wage increases for its members at all, it had no choice but to accept the 1% increases the University was prepared to offer. By the same token, the University had no choice but to limit its offer to 1%. The Court has found that that constraint violated the Association’s members’ constitutional rights, and the Court will determine how that breach ought to be remedied.

41. But in the matter before me, the parties did have a choice to make, which was how they wished to address the potential striking down of Bill 124 in the context of their MOA. And the choice they made was to settle the monetary improvements for the first two years, leave open the ability to negotiate additional ATB increases in the third year, and to refer only compensation issues for that third year to me for arbitration. The parties’ intention is manifest throughout the MOS and in schedule A. Indeed, they specifically turned their minds to the jurisdiction of the DRP in the event that Bill 124 was struck down at paragraph 5(i), but only with respect to amounts ordered in Year 3. They could have agreed otherwise, and absent agreement they could have pursued, under the MOA, a different mechanism for addressing the potential striking down of Bill 124. Instead, they entered into the MOS. In this context, there is simply nothing in the MOS that is even remotely analogous to Mr. Heller’s circumstances.

42. In *Canada Trust*, the court refused to give effect to certain terms of a charitable trust that were blatantly racist and discriminatory. The Association argues that just as the specifically offensive content of the trust was unenforceable, so too should its agreement to limit compensation increases to 1% in the first two years of a three-year agreement, because those 1% increases are the product of unconstitutional constraints on bargaining. But that is not for me to decide; the parties did not choose to refer that issue to

me for arbitration. A remedy for the breach of the Association's *Charter* rights *vis a vis* compensation in years 1 and 2 is simply not before me. And there is nothing inherently offensive in the parties' choice to limit my jurisdiction that is akin to the circumstances in *Canada Trust*.

43. I therefore find that the MOS, insofar as they give rise to my jurisdiction, are binding and enforceable.

Is the Association's Proposal for Increased Stipends Properly Before Me?

44. The University's objection to the Association's proposal to increase stipends is easily disposed of.

45. The clarity note to the Association's Year 3 ATB proposal, found at paragraph 4A of Schedule "A" to the MOS, makes crystal clear that the Association's Bill 124 compliant proposal for 1% ATB increases was intended to include increases to stipends. That very same proposal, which encompassed increases to the stipends, was subject to a caveat that the Association would propose an ATB increase that is "fair and reasonable" if Bill 124 is found to be unlawful.

46. Reading the Association's ATB proposal in its entirety, as a coherent whole, as one should in accordance with the principles of contract interpretation, it is clear that the intent of the caveat was to permit the Association to revisit its ATB proposal in the event that Bill 124 was struck down. That proposal included increased stipends. The Association's proposal to further increase the per course stipends is therefore squarely and properly before me as a matter in dispute between the parties.

Is the Association's proposal for an additional PTR increase in year 3 properly before me?

47. It is equally clear that the parties have resolved the issue of PTR to be paid in year 3. The Association's PTR proposal is therefore not properly before me. To be clear, I accept that the Association's PTR proposal is for additional payments in year 3 of the agreement and one which would therefore fall within the temporal scope of my jurisdiction. But in accordance with paragraph 19 of the MOA between the parties, my jurisdiction "shall encompass only those unresolved matters relating to salaries, benefits and workload that have been referred to [me] by the parties."

48. The parties' agreement on payment of PTR in year 3 is set out at paragraph 4 of the MOS and reads as follows:

4 JULY 1, 2022 PTR FOR THE JULY 1, 2021 TO JUNE 30, 2022 ASSESSMENT PERIOD

(a) It has been the University's consistent position that issues related to July 1 PTR are subject to negotiations and/or the dispute resolution process for salary, benefits and workload under Article 6 of the MOA for the relevant July 1 to June 30 period such that it is the University's position that issues related to July 1, 2022 PTR are subject to the dispute resolution process for salary, benefits and workload for the Year 3 period July 1, 2022 to June 30, 2023.

(b) Notwithstanding paragraph 4(a) above the parties have from time to time, as they are entitled to do, agreed to PTR issues for the relevant July 1 prior to reaching an agreement or the conclusion of a dispute resolution process regarding salary, benefits and workload for the relevant July 1 to June 30 period on a without prejudice or precedent basis to the University's position set out in paragraph 4(a) above.

(c) In the context of paragraphs 4(a) and (b) above, the parties agree that PTR for the 2021-2022 assessment period shall be paid on July 1, 2022, with the PTR breakpoints and increments moving by the 1% amount of the ATB percentage wage increase agreed to for the period July 1, 2021 to June 30, 2022. PTR funds shall be allocated utilizing the model in place prior to the 2015 Memorandum of Settlement (i.e. using the same model as was used for the July 1, 2020 PTR payment). The PTR assessment process for PTR to be paid on July 1, 2022 for the July 1, 2021 to June 30, 2022 assessment period is subject to any mutually agreed modifications to the process for determining PTR awards and assessments for that assessment period as may arise as a result of the provisions of paragraph 2.10 of the COVID LOU that; "[i]f the University's operations continue to be limited or impacted by COVID protocols that prohibit or limit indoor gatherings beyond December 31, 2021, the parties shall meet to discuss whether and on what terms there should be any modifications to the process for determining PTR scores and awards for the 2021-22 assessment period." [emphasis added]

49. In the emphasised text above, the parties agreed to when PTR for the 2021-22 assessment period "shall be paid", and they agreed to increase breakpoints and increments by 1%. It is simply not possible to read this section of the MOS as doing anything but resolving the PTR issue for 2021-22 assessment period, i.e., the PTR that is to be paid out in year three.

50. Further, under paragraph 5 the parties agreed to terms concerning the interest arbitration for salary, benefit and workload for the period July 1, 2022 to June 30, 2023. In paragraph 5(a), the parties agree to refer those issues “as set out in Schedules A and B attached hereto...”. UTFA’s proposals for the one year period July 1, 2022 to June 30, 2023 were “attached hereto as Schedule A”. Consistent with the parties’ intention to have settled the PTR to be paid in Year 3, and in stark contrast to the Association’s proposal concerning ATB increases, Schedule A does not contain any proposals with respect to PTR.

51. PTR is therefore neither an unresolved matter nor a matter that has been referred to me, and I have no jurisdiction to award the Association’s PTR proposal.

Is the Association’s proposal for lump sums properly before me?

52. Unlike PTR, the parties have not explicitly settled the issue of lump sums in year 3. There is simply no mention of lump sums, as a proposal or otherwise, anywhere to be found in the MOS.

53. From the University’s perspective, the absence of a proposal on lump sums in Schedule “A” is a complete answer and precludes awarding lump sum payments. I do not agree that the issue is so clear cut. Parties to interest arbitration make specific proposals, but except in the context of final offer selection or some similar arbitration regime, interest arbitrators can, and frequently do, craft provisions in their awards that deviate from the parties’ proposals. Awarded provisions replicate the agreement the parties would likely have reached, not necessarily their positions coming into interest arbitration. As the Association argued, lump sums and ATB increases are often integrated components of a monetary award. I would not, therefore, foreclose the possibility that in appropriate circumstances an arbitrator might properly award lump sum payments in conjunction with ATB increases, even absent a specific proposal from either party.

54. But the Association’s proposal is for lump sum payments as compensation for what its members lost in years 1 and 2 of the agreement, because of Bill 124. As described above, in their MOS the parties drew a line between compensation for the first two years, which they settled, and compensation for year three, which they referred to arbitration. In this context, had the parties intended that additional compensation attributable to years 1 and 2 of the agreement constitute an unresolved matter to be referred to arbitration, it would have been incumbent on them to include such a proposal in Schedule “A”. The absence of such a proposal, in combination with

the settlement of compensation for years 1 and 2, leads me to conclude that it is not an unresolved matter that has been referred to me for arbitration.

55. To be clear, my conclusion that the parties settled compensation issues for years 1 and 2 does not mean that I ought not to consider what the parties agreed to for those years in determining how to properly decide those matters in dispute that are properly before me. Article 6(19) of the MOA is telling in this regard, and reads:

19. The jurisdiction of the Dispute Resolution Panel shall encompass only those unresolved matters relating to salaries, benefits and workload that have been referred to it by the parties. The Dispute Resolution Panel shall, however, take into account the direct or indirect cost or saving of any change or modification of any salary or benefit agreed to by the parties in making its recommendation for terms of settlement.
[emphasis added]

The 1% increases agreed to in years one and two are not strictly “cost savings” in the sense that they represent increases, as opposed to decreases, in cost. But they clearly represent substantial cost savings in comparison to normative outcomes that are not constrained by Bill 124. It is trite that in collective bargaining parties will always consider the of costs of total compensation over the term of the agreement as a whole, as reflected in Article 6(19). To fail to account for the sub-normative costs to the University in years one and two of the agreement in fashioning a wage increase for year three would subvert the principle of replication that guides this arbitration.

56. I will further address this issue, and the University’s argument that “catch up” for years 1 and 2 of the agreement is beyond my jurisdiction, below.

SALARY PROPOSALS—ATB INCREASE FOR YEAR 3

Association Proposal and Argument

57. The Association proposes an ATB increase of 12.75%, including an increase to per course stipends and overload payments, in addition to the 1% already awarded, for a total ATB increase of 13.75%, in year three, retroactive to July 1, 2022.

58. Of the considerations relied upon by the Association in support of its proposal, inflation is primary. After 20 years of low and stable inflation, the 3-year period covered by the parties’ agreement has been marked by a rapid increase in inflation. During the period July 1, 2020-21 (Year 1), the CPI

increased by 3.7%. During the period July 1, 2021-22 (Year 2), the CPI rose a further 7.6%. At the time the parties presented their argument, the Association submitted that based on conservative estimates from the Bank of Canada for the period July 1, 2022-23 (Year 3), expected inflation was expected to be at approximately 4% (although it now appears that that estimate was high).²

59. Further, the Association argues, the impact of inflation on residents of the GTA has been particularly acute. Housing prices in the GTA have reached unprecedented heights, while interest rates are rapidly rising. As a ratio of price to salary, the Association asserts, a professor at McGill or Dalhousie could buy approximately twice as much housing as a professor at the University of Toronto.

60. During the same period, and to the limited extent that the Association acknowledges that the University's financial position is relevant, the Association cites the University's audited financial reports as demonstrating the University's healthy financial circumstances; enrolment has increased, net income and budgetary surpluses have grown, and the University is realizing ongoing savings from the absorption of its pension plan into the University Pension Plan. The Association also emphasises that the University's strong financial position is attributable in no small part to the workload demands placed on faculty.

61. The Association argues that its proposal for an additional 12.75% increase in year 3 is necessary to ensure that its member's salaries are not eroded by inflation³. Further, the Association argues that this is not a typical case of "catch up", where salaries have gradually lagged over an extended period of time, as in *Burkett*, where there may be reason to make up those losses more gradually. In this case, we are addressing erosion of wages within the term of a single agreement. In this context, the Association argues that there is no reason to delay the necessary correction to wages.

62. The Association also emphasises that while inflation is not the only relevant factor in establishing wage increases, it becomes increasingly important in times of high and rapidly rising inflation. In support of this argument the Association relies on *Ontario Hospital Association v ONA*, unreported, April 1, 2023 (Stout), *65 Participating Hospitals and CUPE, Re*, 1981 CarswellOnt 3551 (Weiler), *Participating Nursing Homes v Service Employees' International Union Local 1, Canada*, 2022 CanLII 90597 (ON

² References to CPI are for Canada and all items, as presented in the parties' materials.

³ I note that the Association's proposal tracks the CPI increases as compounded over the three years.

LA)(Stout) and *Homewood Health Centre Inc. v United Food and Commercial Workers, Local 75*, 2022 CanLII 49154.

63. The Association acknowledges that in *University of Toronto and University of Toronto Faculty Association*, unreported, October 5, 2010 (Teplitsky)(the "*Teplitsky 2010 Award*") the arbitrator applied a "retrospective" approach to considering inflation, basing ATB increases on inflation from the prior year, as opposed to the "prospective" approach that underlies the Association's proposal. In the Association's submission, however, that is because the parties do not typically know what inflation will be for each year of the agreement. In this case, though, we do know the prospective numbers, and in the Association's submission there is no reason they ought not to be followed.

64. Nonetheless, the Association emphasises that the greatest inflationary increases were in Year 2, and those increases must be accounted for on either approach. And on either approach, it maintains that the University's proposal falls woefully short. In support of its prospective approach, the Association relies on *OPG and The Society*, 2023 CanLII 37956 (ON LA) (Kaplan)(the "*OPG Kaplan Award*") and *Participating Hospitals v Ontario Nurses Association*, 2023 CanLII 33967 (ON LA) (Gedalof) (the "*ONA Second Reopener*") for the proposition that arbitrators ought to look to information that is available at the time of the decision and ought not to take an artificial "time machine" approach.

65. Looking to its relevant comparators, the Association begins from the long-held premise, recognized over almost 40 years of interest arbitration between these parties, that salaries for faculty at the University must be "top of market". As the leading academic institution in Canada, professional expectations on faculty and librarians exceed those of any other university in Canada, and salaries must reflect these expectations. In support of this proposition, the Association relies on *the Burkett 1982 Award, University of Toronto v. University of Toronto Faculty Association (Salary and Benefits Grievance)*, 2006 CanLII 93321 (ON LA)(Winkler)(the "*Winkler 2006 Award*").

66. In the Association's submission, the top of market position of faculty salaries at the University have been substantially eroded, and the University's relative position to its peers has deteriorated since 2000-01. For example, according to the data presented by the Association, the salary advantage of the University over other Ontario U15 universities has eroded from 13-21% higher than other universities, to only 2-10% higher in 2021. Of particular note, median salaries at the University have fallen behind median salaries at McMaster University, reflecting an especially steep decline in relative salaries for faculty members who do not fall within the top 10% of earners at the

University or faculty who are not with the Rotman School of Business or the Faculty of Law.

67. In looking to specific comparators, the Association cites *OPSEU v Ontario (Minister of Education)*, 2016 ONSC 2197 (OSCJ) and *Ontario Hospital Association v ONA*, unreported, April 1, 2023 (Stout)(the “*ONA First Reopener*”) for the proposition that Bill 124 artificially altered the collective bargaining landscape, and that settlements made under the legislation are not appropriate comparators. Citing *re Beacon Hill Lodges of Canada and Hospital Employees Union*, 1985 CanLII 5413(BC LA)(Weiler) it also argues that settlements outside of Ontario, are in different labour markets and therefore of limited relevance.

68. Instead, the Association argues that particular weight should be given to the voluntary settlement between the University and CUPE 3902, where the parties agreed to ATB increases of 4%, 4% and 3%, effective September 1, 2021, 2022 and 2023. It notes that since the certification of CUPE 3902 Unit 3 (sessional lecturers), the Association has generally obtained at least the same or greater increases and was ahead for the period 2012 to 2020 when Bill 124 was imposed. Consequently, the Association maintains that while the 11.4% (compounded) increase agreed to with CUPE is inadequate, it at least establishes a floor for compensation increases for the Association’s members. The Association also relies on post-Bill 124 settlements at Queens, Carlton, Ottawa and Brock, as well as a variety of non-University settlements and awards in the broader public sector, all of which are well in excess of the Bill 124 1% increases. It also notes that in the construction industry, where Bill 124 was not imposed, increases have ranged as high as 20.7% during the period 2022-2025.

69. Central to the Association’s argument is the concept of “catch up” to address the extent to which, by Year 3 of the agreement, wages have fallen behind inflation and comparators. In support of the appropriateness of a “catch up” award, the Association relies on the *Burkett 1982 Award*, the *ONA Second Reopener*, *65 Participating Hospitals and CUPE, Re*, 1981 CarswellOnt 3551, *Capital District Health Authority and N.S.G.E.U., Re*, 2004 CarswellNS 749 and a number of post-Bill 124 awards, including the *OPG Kaplan Award*, *Participating Nursing Homes v. Service Employees’ International Union Local 1, Canada*, 2022 CanLII 90697 (ON LA)(Stout), and *Homewood Health Centre Inc. v. United Food and Commercial Workers, Local 75*, 2022 CanLII 49154 (ON LA)(Hayes).

University Proposal and Argument

70. The University proposes an additional ATB increase of 1.7%, for a total increase of 2.7% for the one-year period effective July 1, 2022 to June 30, 2023.

71. In support of its proposal, the University emphasises the principle of replication, as enshrined in Article 6(16) of the parties MOA. The central role of the replication principle under the MOA has been recognized in numerous decisions between these parties, including awards from arbitrators Kaplan, Munroe and Winkler. What these decisions, and others such as *Mount Alison University* (Burkett), reinforce, argues the University, is the importance of assessing objective criteria, i.e., the “market forces and economic realities that would have ultimately driven the parties to a bargain” (Winkler), including relevant collective bargaining outcomes. As the University argues, citing *Bridgepoint Hospital*, 2011 CanLII 76737 (Goodfellow) comparability, i.e., looking to actual comparable collective bargaining outcomes, “puts flesh on the bones of replication, providing the surest guide to what the parties would likely have done, in all the circumstances, had the collective agreement been fully and freely bargained” (at page 4).

72. The primacy of replication, argues the University, has been recognized by numerous arbitrators facing demands for inflationary adjustments. Citing *Toronto Transit Commission and ATU, Local 113, Re 2022 CarswellOnt 3* (Kaplan)(the “*TTC Kaplan Award*”), *ATU, Local 113 and Toronto Transit Commission, Re 2022 CarswellOnt 3773* (Wilson)(the “*Kaplan TTC Award*”), and *Ottawa (City) and CIPP, 2022 CarswellOnt 1365* (Kaplan), the University argues that replication, as informed by looking to relevant comparator outcomes, overrides inflation-based requests for wage adjustments. As the University put it, each of these awards rejected extraordinarily large inflationary adjustments because “a proper application of the replication principle requires a consideration of the boarder collective bargaining patterns, not a myopic focus on fluctuations in the Consumer Price Index”.

73. Further, the University argues that in any event none of the awards cited by the Association support anything close to the 13.75% ATB increase the Association is seeking. Many of those awards also included special adjustments where wages had fallen behind the relevant comparators. In this case, on the University’s proposal, wage rates at the University of Toronto will continue to be the highest in the country, maintaining its historic position as “top of the market”. Further, as found in the *Teplitsky 2010 Award*, the parties’ mutual commitment to be top of the market does not mean maintaining the University’s relative position at the top of the market, particularly where other

university faculty “are likely seeking catch-up increases with UTFA”, and such an approach would lead to “whipsawing” (page 11).

74. Further still, argues the University, even where arbitrators have granted inflation-based increases, those increases do not generally offset past, present and future CPI increases in their entirety (see *Homewood Health Centre* and *ONA Second Reopener*).

75. Turning to the relevant comparators in this matter, the University cites the *Winkler 2006 Award* for the proposition that increased weight ought to be accorded to the outcomes at those comparable universities across the province and the country, i.e., the U15. On this comparison, the University looks to those U15 universities who have reached a non-Bill 124 settlement for the one year period July 1, 2022 to June. In its brief, the University identifies seven such agreements with average increases for the year of 2.06%. Further, it emphasises that settlements like the agreement reached at Queens were “forward looking” and did not include the kind of inflationary catch-up that the Association is seeking. Neither, argues the University, is the fact that settlements in Alberta and Nova Scotia may have been subject to compensation moderation directives a reason to ignore those outcomes. These institutions continue to compete with the University for faculty and librarians and the compensation at those institutions is still relevant.

76. In response to the Association’s reliance on the settlement between the University and CUPE Local 3902 in respect of sessional lecturers, the University argues that the main factor influencing that outcome was the fact that CUPE sessionals had fallen behind their comparators at York and Queens. The CUPE agreement, argues the University, stands as an example where the principle of comparability supported the negotiated increases, not as an example of the kind of “unprecedented inflationary offset” that the Association is seeking. In any event, argues the University, the CUPE Local 3902, Unit 3 agreement has never set the pattern for faculty wage increases. The University also notes that it has bargained three other post-Bill 124 CUPE agreements, each for the term July 1, 2021 to June 30, 2023, with each providing for ATBs of 2.6% in year 1 and 2.7% in year 2, outcomes that are consistent with what it is proposing here.

77. Notwithstanding the primacy of the U15 comparators, the University also emphasises that both arbitrators (see *Monroe* and *Winkler*) and the parties have recognized that it is also appropriate to look to broader public and private sector settlements and trends. It is particularly important to do so here, it argues, in order to assess settlements outside the context of Bill 124, and where U15 comparators may be unavailable.

78. Looking at the broader collective bargaining landscape does not, the University stresses, mean overemphasising a small number of favourable outcomes in unrelated industries, as the University asserts the Association has sought to do. For example, the University rejects any reliance on construction industry outcomes, which reflect labour supply issues unique to that sector. In its review of broader public sector interest arbitration awards issued after Bill 124 was struck down, the University identifies over a dozen awards, including several under the *Hospital Labour Disputes Arbitration Act* in the long-term care and hospital sectors, none of which include the kind of inflation catch up increase that the Association seeks, and most of which top out at less than 3% annual increases.

79. Throughout its submission on the appropriate comparators the University focuses on a comparison between the single year within my jurisdiction, and that same year under other agreements. This approach is tied to the University's argument that "[a]n award that would allow for compensation matters that pre-date July 1, 2022 to impact the amount of the ATB salary increases awarded for the Year 3 period of July 1, 2022 to June 30, 2023 would be outside the jurisdictional limits imposed by Article 6(19) of the MOA and section 5 of the January 25, 2022 MOS". In the University's submission, to do so would permit the Association to do indirectly what it cannot do directly: that is, to exercise a broad reopener that it did not bargain.

80. In the alternative, however, the University maintains that even if one did look back to the prior two year period, it would still not justify the Association's proposal.

81. The University's first point under this alternative argument is that having regard to the *Teplitsky 2010 Award*, CPI must be considered retrospectively, i.e., for each ATB increase one looks at the previous 12 months of inflation. For the period July 1, 2019 to June 30, 2020, there was no substantial increases to CPI. On this measure, there is no justification for any catch up in respect of the July 1, 2020 ATB. Further, a review of U15 salary increases for the period July 1, 2020 to June 30, 2021 shows a range of outcomes from 0% to a high of 2.15%, with most falling below 2% and an average outcome of 1.27%. For the 2021-2022 academic year, even excluding the Bill 124 driven outcomes at Ontario universities, U15 settlements averaged 1.44%.

82. Finally, the University emphasises that even where arbitrators have found it appropriate to award catch up, they have not generally required employers to make large catch up payments on an immediate basis (see *Constitution Place Retirement Residence* 2016 CanLII 48301 (ON LA) (McNamee), *Garrison Place Retirement Residence*, 2011 CanLII 58257(ON LA)

(Laborsky) and *Nova Scotia Agricultural College*, 2012 CarswellNS 1048 (Outhouse).

83. In addition to the principle of replication the University also relies upon the principles of gradualism, arguing that the Association's salary proposal would constitute an extraordinary breakthrough in the absence of exceptional circumstances (see *Via Rail Canada Inc.* (2009) 101 C.L.A.S. 146 and the *Kaplan U of T Award*). It further relies on the principle of total compensation, noting that the Association's proposed 12.75% increase (in addition to the 1% previously awarded) alone would cost \$77,745,000, on top of the cost of the various other monetary improvements the parties have agreed to. In contrast, the University's proposed increase would cost just over fifteen million dollars, or an additional 9.6 million on top of the cost of the 1% previously awarded, a figure the University argues is more appropriate in light of the University's financial circumstances and the fact that inflation is decreasing and is anticipated to continue to do so.

Analysis

55. The overarching guiding principle in interest arbitration is the principle of replication. The parties, in their MOA, have expressly adopted this principle in paragraph 16 of Article 6. Article 6 sets the terms for negotiation and interest arbitration, and paragraph 16 directs the Dispute Resolution Panel (in this case the sole interest arbitrator) to issue a report (in this case an award) "which shall attempt to reflect the agreement the parties would have reached if they had been able to agree."

84. In applying the principle of replication, the question that sits at the heart of the dispute between the parties here is this: to what extent would the impact of extraordinary inflation have influenced the agreement that these parties would have reached if they had been able to agree? Inflation is by no means the only factor that informs the appropriate outcome in this case; comparability and other considerations are of course significant, and they will be addressed. But the fact remains that it is the extraordinary impact of inflation over the term of the agreement that underlies the wide gulf between the parties' proposals.

85. Related to inflationary losses is the relevance of the 1% increases agreed to by the parties in years 1 and 2. I have explained above why I find that the principle of replication requires that I consider those years in determining what the parties would likely have agreed to in year 3. Simply put, parties in free bargaining always consider total compensation over the full term of the agreement. It is beyond dispute that an agreement to less

favourable terms in one year can produce more favourable terms in another. Further, inflationary losses are cumulative, and it would be highly artificial to look at only a single year in isolation.

86. The University argues that in seeking to recover “losses” from years one and two, the Association is seeking to obtain indirectly the reopener it failed to obtain directly, and that accounting for those years is beyond my jurisdiction. I have rejected the Association’s efforts to set aside its prior bargain, but I do not agree that its proposal for a year 3 ATB increase that catches up for salary erosion in years one and two is akin to a “reopener” or in any way outside my jurisdiction.

87. Bargaining a reopener was not the only way that parties might chose to address the potential unconstitutionality of Bill 124. In this case, the parties chose to address that possibility by referring salary increases for year 3 to interest arbitration where, once Bill 124 is struck down, as it now has been, the Association was entitled to pursue:

...an ATB increase that is fair and reasonable in light of the unparalleled professional expectations faced by U of T faculty and librarians, trends in recent settlements in higher education, and broader economic considerations. (Schedule A to the MOS)

88. Thus, while the parties did not bargain a reopener, they did leave year three of the agreement open as a metaphorical Bill 124 relief valve. In the normal course, both parties and interest arbitrators will look to the parties’ agreement as a whole to determine whether a particular proposal is fair and reasonable or appropriately awarded. There is nothing in the parties’ agreement that would constrain an interest arbitrator’s normal jurisdiction to consider the terms agreed to for years one and two in determining appropriate increases in the third year, i.e., in replicating free collective bargaining.

89. Considering the 1% Bill 124 compliant increases already awarded, wages over the term of the parties’ agreement were estimated to have eroded by 12.75% as compared to the CPI. Using the prior year CPI comparison, the number is 8.6%. The questions are therefore which approach is correct, and how significant a factor ought inflation to be? In answer, and having regard to the bargaining history between these parties, I find that the prior year approach to accounting for CPI best replicates how these parties’ have bargained historically, and best replicates a freely bargained outcome here. What also becomes clear when one examines the bargaining history between these parties, is that maintaining salaries in relation to inflation has been a preoccupation and a highly significant factor for these parties for a very long time.

The Burkett 1982 Award

90. The parties began bargaining under a memorandum of agreement in 1977 and their early history is set out in the *Burkett 1982 Award*. In 1981 they adopted the so-called “adjudicative” approach to interest arbitration, in which the arbitrator is required to base their award on a series of enumerated factors. The first of those factors was changes in the CPI index for Canada and Toronto, and the other factors included salaries at other universities and for other professions, current compensation, total compensation adjustments in public and private sector collective bargaining settlements and the need for the University “to operate in a reasonable manner”. The *Burkett 1982 Award* addressed several of the same issues and arguments that we are faced with here and has served as a foundation on which subsequent awards have built. It therefore merits close consideration.

91. At the time of the *Burkett Award*, over a 10-year period, salaries had fallen behind inflation by approximately 25%. The parties’ salary proposals are discussed from paragraphs 13-16. The Association was seeking an increase of 22.1%, which included 12.1% to adjust for increases in the cost of living over the prior year, 8% to begin to “catch up” to losses in relation to CPI and to other comparators, a 1.5% productivity and workload increase and a 0.5% increase in recognition of lost salary over the prior decade. The University, as it does here, objected to any notion of “catch up”. It did, though, agree that faculty ought to be protected from inflation over the prior year. To that end it offered an ATB increase of 11.45% which in conjunction with other improvements, including PTR in the University’s submission, amounted to a 14.26% increase; an increase it maintained represented a balanced view of all the criteria.

92. Arbitrator Burkett, like others who have followed him, rejected the argument that PTR should be included in assessing the quantum of wage increases. He also rejected the notion of an additional increase for lost wages in prior years, reasoning that prior substandard deals are not “a loan which must be repaid in the form of salary increases in excess of that required on an application of the criteria” (at para. 19). The main issues before him, he found, were “catch up” and protection against salary erosion in the prior year (para. 17).

93. On the first of these issues, Arbitrator Burkett found that “catch up”, while not an enumerated criterion, is essential to the legitimacy of the interest arbitration process. Historical benchmark comparisons become artificial if the need for catch up is not accounted for. The question before Arbitrator Burkett was whether the enumerated arbitral criteria agreed to by the parties left room for the application of this otherwise normative consideration. He found

that it did. In the instant case, where the parties have long-since adopted the usual replication model for interest arbitration, the availability of catch up in appropriate circumstances is, as arbitrator Burkett held, fundamental to the comparative exercise and ought to be non-controversial.

94. In weighing the significance of inflation to these parties, Arbitrator Burkett held as follows (at para 31):

It is appropriate to comment at this juncture that in my view comparisons to other groups or professions and to general wage level indicators are more meaningful for purposes of determining the amount of a salary award to a group whose salaries are in large measure funded from the public purse. Wage settlements do not always move in a lock step relationship with movement in the CPI. If the working public, who both support and benefit from our institutions of higher learning, are receiving wage increases in excess of the rate of inflation there is no justification for limiting salary increases to those who staff these institutions to the rate of inflation. On the other hand, if wage increases are less than the rate of inflation there is no justification for providing faculty with full cost of living protection; a degree of protection against inflation not guaranteed to any other group in society and not guaranteed to faculty on a reading of the criteria as a whole. However, having expressed these views I recognize that the expectation and the practice of the parties is to relate the economic increase to movement in the CPI for the relevant period. Indeed, the first criterion refers to movement in the Consumer Price Index and the University's offer is based on movement in the CPI since July, 1981. I am prepared, therefore, to give considerable weight to the movement of U of T salaries relative to movement in the CPI both prior to and since July 1, 1981.

95. The conclusion that the CPI benchmark has not necessarily been determinative of wage outcomes between these parties but that it has nonetheless been a particularly influential factor for them is a theme that continues through subsequent awards and settlements between these parties. In 1982, Arbitrator Burkett found that a 25% wage increase would be required to address the erosion of salaries relative to the CPI and to wages and salaries generally (para. 45). In constructing his award to address that erosion he noted that (at para. 54):

...In past negotiations between the parties, the economic increases have been based on an amount needed to restore salary relativities or purchasing power lost during the preceding year. The parties have looked backward as of July 1 of each year and negotiated an amount to reflect what has transpired during the year past, in the knowledge that the same exercise will be repeated the following year...Because of the retrospective nature of the negotiations between these parties and

because of the erosion of faculty salaries up to July 1, 1981, my award must be comprised of two distinct elements; an element to address the shortfall or erosion of faculty salaries prior to July 1, 1981 and an element to deal with the period July, 1981 to June 30, 1982.

96. In the ensuing paragraphs, Arbitrator Burkett considered all of the enumerated factors, but focussed on movement of the CPI, reasoning that where salaries had eroded to such an extent, it was incumbent on him to provide "significant rectification" (para. 57). Balancing all the factors, including concerns about fiscal responsibility, Arbitrator Burkett ordered a series of increases, split over the term of the agreement, that were intended to manage annual costs while producing an end rate that included an 11.5% increase to maintain salary against the prior years' inflation, plus an additional 6.5% in catch up (para 59). His intent was that "salary restoration [in relation to inflation and comparators] should be achieved within some reasonable period" (para 60).

The Munroe Awards

97. After the *Burkett Award* the parties again amended the framework for interest arbitration under their MOA, moving to the so-called "replication model", which continues in place today. As arbitrator Munro explained in *The Governing Council of the University of Toronto and Toronto Faculty Association*, unreported, January 8, 1987 (Munroe)(the "*Munroe 1987 Award*"), the first award under the current model, the model may be less prescriptive than the adjudicative model, but it is not undisciplined (at p.6):

The essential function of the decision-maker becomes the identification of factors which likely would have influenced the negotiating behaviour of the particular parties in the actual circumstances at hand. It is the dynamic mix of those factor which produces the end result.

98. In other words, focus must be maintained on what these parties in particular would likely have found compelling in the specific circumstances in which they find themselves.

99. In the *Munroe 1987 Award*, the Board found that the parties would have looked for guidance to several factors, including CPI increases in the range of 4.2% (federal) to 5.1% (Toronto) over the preceding 12 months, normative salary increases at other universities of around 4%, and public sector settlements of around 5.0% (pp.9-10). Upon reviewing all the evidence, the Munroe Board awarded a July 1, 1986 increase of 4.5% and a further 2.0% increase on May 1, 1987. Reading the award as a whole, it is clear that like the Burkett Board, insulation from the prior year's inflation, and the ongoing

need for catch up were pivotal considerations, albeit in less extreme circumstances.

100. The next award, also chaired by Arbitrator Monroe, was issued during what he described as the most oppressive recessionary conditions since the Great Depression (pp. 12-13). While the award included improvements to benefits and pension, it did not include any ATB increases (*The Governing Council of the University of Toronto and The University of Toronto Faculty Association*, unreported, June 18, 1993 (Munro)(the "Munroe 1993 Award"). In the context of a major recession, the CPI catch up sought by the Association was not available.

The Winkler 2006 Award

101. In 2006, the Winkler Board again addressed the question of inflation and catch up in *Re University of Toronto and University of Toronto Faculty Association*, (2006) 148 L.A.C. (4th)(the "Winkler 2006 Award"). Much of the award focusses on the parties' mutual commitment to maintaining U of T faculty and librarians as "top of market". The issues raised are again not so different from the parties' arguments here: the university maintained that its proposal for a 2.5% increase was sufficient in part because U of T faculty and librarians were already top of market, and nothing more was required to maintain that position; the Association sought a 4% increase to include "consideration of CPI increases, 'catch-up' and marketplace wage settlements".

102. Arbitrator Winkler, like Arbitrator Burkett, held that CPI increases were an "obviously relevant factor", but that past settlements and awards between the parties could be higher or lower than inflation and had "never been pegged dollar for dollar to increases in the CPI in a given year or multi-year period" (para. 23). On the facts before him, Arbitrator Winkler found that an increase greater than the prior year's inflation was warranted having regard to comparator settlements. It was therefore unnecessary for him to allocate a portion of his award to "catch up", although he noted that it would also have the effect of narrowing the inflationary gap (paras 24-26).

The Teplitsky 2010 Award

103. In 2010, Arbitrator Teplitsky succinctly summed up the parties' approach to inflation, affirming the continuing relevance of the factor, as follows (at p. 8):

In my opinion, based on the approach in prior rounds of bargaining, the CPI is considered retrospectively. In other words, for 2009-2010 and 2010-2011, the relevant CPI increases are 2008-2009 and 2009-2010. UTFA submitted that these were approximately 2% in each year. In fact, the total increase in the CPI, whether one looks at June 2008-June 2010 or July 2008-July 2010, is approximately a total of 2%. The Faculty's position in the past has been that CPI protection is the minimum that ATB increases should generate. In fact, over the past 30 years, total increases in the ATB have coincided almost exactly with the increases in the CPI for the same period. In any bargaining round, the ATB increase has been higher or lower than the CPI increase. For example, in the settlement for 2007-2008 and 2008-2009, the ATB increase exceeded the CPI for those years. Although increases in CPI are not determinative, the fact of a 30-year coincidence between the total ATB increase and the increases in CPI, and the obvious role of CPI in the ATB increase given a compensation structure which includes PTR, CPI is a very relevant factor.

The Appropriate Award for 2020-23

104. Having also reviewed the bargaining history between these parties, I agree with my predecessors' consistent assessment. Wage increases may lag or exceed inflation from time to time, particularly where other factors are overwhelming. Wages do not remain, as they have all found and as both Arbitrator Burkett and Justice Winkler articulated, "in lock step" with inflationary increases. But inflation is nonetheless "obviously" (Winkler) and "very" (Teplitsky) relevant.

105. Indeed, as the economic data filed by the Association amply demonstrates, salaries for faculty and librarians have, with occasional corrections as discussed above, kept pace with inflation over the past 20 years. As set out in the chart below, average increases have fallen at roughly the mid-point between the federal and provincial CPI increases:

Year	Canada	Ontario	Canada	Ontario	UTFA ATB	Notes
1993-1994	85.68	84.79	1.50%	1.40%	0%	
1994-1995	86.03	85.14	0.40%	0.40%	0%	
1995-1996	87.87	87.13	2.10%	2.30%	0%	
1996-1997	89.39	88.67	1.70%	1.80%	0%	
1997-1998	90.60	90.04	1.4%	1.6%	0.50%	
1998-1999	91.44	90.84	0.9%	0.9%	1.50%	
1999-2000	93.46	93.08	2.2%	2.5%	1.50%	
2000-2001	96.03	95.91	2.7%	3.0%	2.00%	
2001-2002	98.16	98.38	2.2%	2.6%	1.50%	
2002-2003	101.09	100.98	3.0%	2.6%	3.00%	

2003-2004	102.98	102.95	1.9%	1.9%	3.00%	2.25%+0.75%
2004-2005	105.21	105.11	2.2%	2.1%	3.37%	2.7%+0.615%
2005-2006	107.60	107.52	2.3%	2.3%	3.00%	
2006-2007	109.61	109.12	1.9%	1.5%	3.25%	
2007-2008	111.94	111.17	2.1%	1.9%	3.00%	3.0% +\$585 in Jan 2008

2008-2009	114.44	113.71	2.2%	2.3%	3.00%	3.0%+\$605 in Jan 2009
2009-2010	114.89	114.18	0.4%	0.4%	2.50%	
2010-2011	117.22	117.33	2.0%	2.8%	2.50%	1.25% July 2009, 1.25% Jan 2010+flat dollar
2011-2012	120.55	120.79	2.8%	3.0%	1.70%	1.0% + \$1000
2012-2013	121.95	122.03	1.2%	1.0%	2.00%	1.0% + \$1520
2013-2014	123.24	123.51	1.1%	1.2%	2.25%	1.0% + \$1815
2014-2015	125.49	126.34	1.8%	2.3%	1.90%	1.0% in July 2014 and 0.9% in Jan 2015
2015-2016	127.05	127.94	1.2%	1.3%	1.90%	1.0% in July 2015 and 0.9% in Jan 2016
2016-2017	128.98	130.38	1.5%	1.9%	1.75%	
2017-2018	131.09	132.57	1.6%	1.7%	1.75%	1.0% + \$1150
2018-2019	133.92	135.50	2.2%	2.2%	1.90%	
2019-2020	136.59	138.03	2.0%	1.9%	2.00%	1.0% + \$1520
Compounded Average			1.80%	1.87%	1.84%	

106. Having regard to the bargaining history between these parties in particular, inflation is clearly a very relevant and highly influential factor in replicating a freely bargained outcome, especially in the current economic circumstances, and one that supports a substantially greater wage increase than the 1.75% in additional compensation proposed by the University.

107. This bargaining history also distinguishes the present case from awards such as the *Kaplan TTC Award* relied upon by the University. The University relies on the *Kaplan TTC Award* for the proposition that replication overrides inflation-based claims for wage increases. I do not agree that the case stands for such a proposition.

108. In the *Kaplan TTC Award*, as also discussed at paragraph 41 of my *Participating Hospitals and ONA* award, the parties had a long-established and agreed-upon list of comparators that invariably resolved their collective agreements. There is no mention in the award of a history of tracking inflation,

and at the time there were no freely bargained outcomes that warranted a departure from the parties' established comparators. In the present case, the parties do have a history of arbitrated and negotiated outcomes that are heavily influenced by inflation. The question is not, therefore, whether replication trumps inflation; the question is whether in the specific context of this case, replication warrants giving greater or lesser weight to inflation as a factor that would drive the outcome for these parties had they been able to reach an agreement. In *TTC*, considering the history of bargaining between the parties and the broader collective bargaining landscape, inflation was not a compelling factor. In the instant case, where there is no history of following lockstep behind a particular set of comparators and where there is a history of bargaining and awarding inflationary increases, inflationary factors are plainly of greater significance.

109. Further, what becomes apparent when one looks at the broader context of collective bargaining outcomes today is that inflation has also been a major driver of those outcomes. The more recent broader public sector settlements and awards cited by the Association, including agreements that overlap with the term of the agreement in issue here, amply reflect this reality. In this regard, economic circumstances today are much closer to those that faced by Arbitrator Burkett in 1981 than they are to those that faced Arbitrator Munroe in 1993. As the ongoing impact of inflation has become entrenched and amplified, bargaining outcomes have trended upwards to address it. Private sector outcomes such as those in the construction industry, albeit of limited significance as comparators for faculty and librarians, represent the extreme end of this bargaining trend. But more recent broader public sector outcomes are nonetheless following that same upward trend, with many falling in the range of 3%-4% annual increases over multiple years.

110. In assessing comparators, I have carefully considered all the comparator data put forward by the parties. In so doing, I specifically reject what the Association described as the "time machine" approach to interest arbitration, where information that may not have been available to the parties when they were bargaining directly with each other is ignored. In my view, Arbitrator Kaplan correctly and definitively rejected this approach in *OPG*, at pages 15-19, and I adopt his reasoning here. I note that to the extent that Arbitrator Kaplan's reasoning was framed in the context of a Bill 124 reopener, it is nonetheless equally applicable here, where the parties agreed to leave wages for year 3 unresolved and to refer the issue to interest arbitration, with the explicit understanding that proposals could be adjusted in the event that Bill 124 was struck down.

111. Arbitrator Kaplan's decision in *OPG* also serves as an illustration of the current trend in broader public sector bargaining outcomes. In that case, the

outcome followed upon a freely bargained agreement between OPG and the PWU of 8.25% increases plus lump sums over two years—an agreement reached under an approved mandate from Treasury Board. I do not suggest that nuclear workers are a direct comparator to university professors. But there are many more such examples in the broader public sector in the parties' materials.

112. Looking to the university comparators in particular, I agree with the University, as Justice Winkler also found, that settlements amongst those universities, both in Ontario and nationally, "whose aims and objectives with respect to the combination of education and research most closely resemble those of the University" (i.e. the U15) warrant particular consideration (para 25). However, it must be acknowledged that outcomes across those universities vary widely for any given year, and unlike the facts in the *TTC* case, there is no history here of rigorously tracking any particular comparator. Further, this exercise is somewhat complicated by the unique circumstances of this case.

113. First, one must account for the impact of Bill 124 and the fact that other provinces also imposed forms of wage restraint that impacted U15 outcomes. It is, as the Association argued, important not to simply replicate outcomes that resulted from the imposition of unconstitutional wage restraint.

114. Second, one must also consider the prevailing conditions at the time those parties entered into their agreements, particularly when those agreements were made without a full understanding of the corrosive impact of inflation over the relevant time frame, and where bargaining followed previously established trends that no longer apply.

115. Further, one must also consider the impact of the agreement between the instant parties for years one and two. As discussed above, comparison to benchmarks is a cumulative exercise. There can be no doubt that over the first two years of their agreement, wage increases for faculty at the University fell behind many of the comparators. I have already found that the "lost" cash flow over the course of those years is not something that can or should be undone here. But it is highly relevant to the question of how any catch up awarded ought to be staged.

116. The relationship between catch up, the incremental nature of collective bargaining and cash flow is well illustrated in the *Burkett 1982 Award*. Here, as the Association emphasises, its members have already suffered substantial erosion in their real wages through inflation and sub-normative ATB increases in years one and two of their agreement, and the University has enjoyed corresponding savings over those years in comparison to other Universities

and other employers more broadly. PTR increases have tracked those substandard ATB increases and have also lagged behind anything that could be described as normative for that period. In these circumstances, particularly where the inflationary comparison is made on a prior year basis and where there are no countervailing and overwhelming economic considerations, there is no apparent reason that faculty ought not to begin catching up now.

117. On balance, having regard to all these factors, including the substantial erosion of wages experienced over the prior years, I find that an additional award of 7%, for a total award of 8%, retroactive to July 1, 2022, is appropriate.

118. Based on the prior-year inflationary assessment, this award goes a significant way toward restoring wages against inflation. It is true, given the retroactive term being decided here, that we know that inflation has continued to rise above recent norms, and that further erosion of wages has occurred. But the practice for these parties has been to consider the prior year's inflation, and that erosion can be addressed by future increases, if appropriate at that time, as these parties have typically done. To be clear, I am not ignoring current levels of inflation because it is new information; I wholeheartedly adopt Arbitrator Kaplan's reasoning in *OPG*. Rather, it is that the reason for giving significant weight to inflation in this award is because to do so has been the practice of these parties, and that very practice has been based on the retroactive model. Replication must be based on real world bargaining trends and outcomes, not selective cherry picking of factors.

119. This award will also ensure that salaries for faculty at U of T remain "top of market". The parties join issue over how one ought to compare salaries across universities in assessing whether wages are "top of market", and whether one ought to compare averages or medians, or exclude certain outliers. It is unnecessary to resolve this dispute here considering that the quantum of this award will clearly maintain wages for the Association's members at top of market.

120. Finally, this outcome, again considering the total compensation over the three-year term of the agreement, is consistent with more recent trends in broader public sector bargaining, including amongst U15 comparators such as UBC and Queens, albeit over a different term and with different staging of increases and cash flow.

121. When these comparators are weighed in conjunction with inflationary considerations and two years of 1% increases, a total increase of 10% over the three-year term of the parties' agreement, with the bulk of that increase

in the final year, reasonably reflects the freely bargained outcome that these parties would have reached had they been able to reach an agreement.

122. I therefore award an ATB increases of 8%, inclusive of the 1% already awarded on an interim basis, retroactive to July 1, 2022.

WORKLOAD PROPOSALS

Guiding Principles and Proposals

123. The guiding principle in assessing the outstanding workload proposals is of course replication, no less so than in determining monetary issues. The principles of gradualism and demonstrated need are also of particular significance. These parties have a mature bargaining relationship, dating back to 1977. In this context, interest arbitrators are reluctant to award “breakthrough” proposals, altering a long-established *status quo*, absent a demonstrated need to address a real and pressing problem. Interest arbitrators have long reasoned that where parties have agreed to long-standing terms that are fundamental to their bargain, it is only in the face of a very compelling demonstrated need that they ought to unilaterally alter those terms over the objection of one of the parties.

124. The Association has 9 proposals to amend the workload provisions of the MOA, including proposals with respect to:

- Technical Support;
- TA Support;
- Mandatory Unit Workload Policy Factors;
- Equitable Course Release;
- Annual Workload Documents;
- Distribution of Effort in Unit Workload Policies and Workload Letters;
- Teaching Stream Course Load;
- Teaching Stream Service Release; and
- Librarian Research and Scholarly Contributions.

125. From the Association’s perspective, its members are experiencing “crushing workloads that are inequitably distributed within units and disproportionately borne by equity-seeking members”. In the absence of clearly expressed expectations with respect to distribution of effort, and the imposition of caps on teaching, it maintains that teaching stream faculty in particular are vulnerable to excessive workload and insufficient time for scholarship. More broadly, it maintains that the current *University of Toronto Workload Policy and Procedures for Faculty and Librarians (WLPP)* is, according to the Association, ineffective at protecting its members from

excessive and inequitable workloads and is insufficiently transparent. The Association's proposals seek to address these problems by implementing concrete parameters for assessing and assigning work and for communicating work assignments to members and the Association.

126. In particular, the Association proposals are intended to:

- Require that unit heads consider the level and/or hours of technical and/or pedagogical support for online teaching available when determining the teaching component of a member's workload (Proposal 1A);
- Ensure clearer, more transparent, and more consistent standards for TA support across the University and within divisions (Proposal 1D);
- Require that unit workload policies expressly address the factors known to most significantly impact teaching and service workload (Proposal 1G)
- Require that course releases be distributed equitably within units (Proposal 1H);
- Require that units annually prepare a Unit Workload Document setting out the assigned teaching and service loads within the unit for the year in order to enhance transparency and equitable workload distribution (Proposal 1I);
- Require that unit workload policies and member workload letters expressly set out members' distribution of effort ("DOE") (Proposal 1J);
- Limit Teaching Stream teaching load to not more than 150% of the Tenure Stream teaching load within the same unit (Proposal 1K);
- Ensure units provide teaching and service release for pre-tenure/pre-continuing status faculty members prior to their interim reviews and some professional practice and service release for pre-permanent status librarians (Proposal 1L); and
- Clarify that librarians' research and scholarly contributions are self-directed (Proposal 1M).

127. From UTFA's perspective, its proposals represent incremental change to address longstanding problems, for which there is a strong demonstrated

need. Further, the Association points to comparator agreements across the University sector where parties have agreed to similar provisions.

128. From the University's perspective, the bulk of the Association's proposals are anything but incremental. They seek to impose ridged workload standards, particularly for teaching stream faculty, where none have previously existed, and to dismantle the localized structure of the WLPP. As provided for in Article 8 MOA, workload is assessed at the Unit level and as set out in the WLPP, it is determined through the collegial process and subject to variability across units. The Association's proposals, argues the University, would impose ridged standards across the University, fundamentally altering the basis upon which these parties have operated for many years.

129. Such changes, argues the University, would constitute unwarranted breakthroughs, contrary to the principle of gradualism. Further, while the Association makes bald assertions about inequitable workload and claims that the WLPP is inadequate to address inequalities, the fact is that there have been only 2 workload complaints filed under the process. There is, it maintains, no demonstrated need to alter the status *quo*, and any changes awarded ought to comply with the principle of gradualism.

Analysis

130. The University agrees to the Association's Technical Support proposal to amend Article 4.2 of the WLPP, and that agreement is reflected in our award below. The remaining workload proposals are all in dispute.

131. Having carefully reviewed and considered all the outstanding workload proposals, I find that these proposals would constitute a significant alteration to the status *quo*, and much more so than the Association would allow. With limited exceptions, which I will address below, these changes would impose standards and limitations at the University level, where these parties have freely bargained a model of more localized and flexible workload assignment.

132. I accept, as the Association argues, that other Universities have adopted such standardized approaches to workload. I also accept, as is evident in the materials filed by the Association, that concepts such as "distribution of effort", and the consideration of the various factors identified by the Association in assessing workload, are already very much applied in various ways throughout the University. They are not foreign concepts. It is also true, as the Association argues, that in requiring units to address particular factors in workload assignment, it is not dictating or predetermining how those units might chose to weigh or apply those factors.

133. But in seeking to implement University wide standards, or to dictate the manner in which workload must be assessed or expressed at the local level, the Association is clearly seeking major structural changes to the parties' agreement. It would be naive in the extreme to presume that these amendments would not result in significant changes in practices across the University, and significant disruption to the *status quo*. Indeed, effecting substantial change in the assignment of workload is precisely the reason that the Association is pursuing these amendments. But that is also the reason that it is required to establish a compelling demonstrated need for its amendments before an interest arbitrator would be justified in unilaterally imposing them on the University.

134. It bears emphasizing that the existing WLPP already contains provisions directed toward establishing a "fair, reasonable and equitable distribution of workload". It also contains a mechanism for binding dispute resolution where a member complains that their workload does not comply with the policy. The Association asserts that the WLPP has been ineffective. But prior to the last round of interest arbitration, there had only ever been two such complaints. Since then, I have been advised of none. It is difficult to square the lack of any complaints under the existing provisions with the asserted crisis that the Association asserts is reflected in its survey of its membership.

135. Addressing similar proposals in the prior round of arbitration between these parties, Arbitrator Kaplan addressed the same problem with the Association's proposals that I find here. His reasons are apposite and for that reason I will set them out at some length (pp. 4-7):

The Association makes two proposals to amend *The WLPP* and two proposals to amend *The AAPM* relating to the Progress Through the Ranks Policy (hereafter "The PTR Policy"). These proposals are informed by its view that change is required to address significant and well-established problems of both over-work and inequitable distribution of work. In the Association's submission, clear and transparent workload norms are necessary to address the myriad problems identified and discussed in detail in its written submissions. Excessive and inequitable workload, the Association argues, affects everyone but disproportionately impacts Association members who identify as women or who are racialized and especially as it is experienced by members of the Teaching Stream. Pre-tenure status and employment precarity, not to mention an overall lack of workload transparency, inhibit and discourage filing of workload complaints, formal and informal. In the Association's view, its proposals are fully justified when all of the criteria are examined: its proposals reflect university norms across the country, are justified by evidence of demonstrated need and, considered in the overall, are incremental,

conforming to the gradualism principle and cannot properly be fairly characterized as breakthrough. Moreover, the Association observes, the University of Toronto has staked and maintained a position at the top of the market in salaries, and a corollary of that is that working conditions need to catch up.

For its part, the University submits that when the outstanding Association proposals are seen through the lens of the governing interest arbitration criteria, none of them are justified or should be awarded. It was inconceivable that more than two thousand tenured and tenure track faculty and librarians would go on strike when three of the four outstanding issues relate exclusively to the teaching stream. The case could be, and should be, justified, the University submitted, on the basis of replication alone with the Award incorporating the University's proposals. Application of the other factors confirmed this conclusion. The Association's WLPP proposal – through mandatory inclusion of respective weightings and a cap on the assignment of teaching to teaching stream members – in other words, rigid workload formulas, was not gradual; rather it represented a fundamental change to the long-standing status quo, and it was a proposal made with scant evidence, at best, of demonstrated need.

Reasons for Decision

Having carefully considered the submissions of the parties, along with the relevant criteria, it is my view that some changes are in order, particularly with respect to workload transparency. Association members should have their workload written down and available for review and comparison, subject to confidentiality requirements such as, for example, where an accommodation plan is in place. It is only fair that faculty members know how workload is distributed, particularly where it is asserted that workload distribution has a negative impact on members of equity-seeking groups. The change awarded here, together with what was agreed upon at mediation for electronic access to all written assignments within an academic unit (subject to any confidential accommodation agreements), will provide full transparency on individual and relative workloads.

The evidence, however, does not make out a case for the Association's proposed rigid workload formula, or for limitations on the teaching of teaching stream members. As the Association observes in its brief, the workload of faculty and librarians is inherently fluid and cannot be rigidly quantified or measured according to units of time. It evolves within a year and over years. Experience indicates that faculty have a very clear idea of expectations, especially for PTR evaluation.

Consistent with the replication principle, this award attempts to achieve the outcome that would have been arrived at had this dispute run its course and that does not encompass awarding these Association proposals. Moreover, while the Association describes its proposals as modest and

gradual, the changes sought are major. They are just the sort of significant changes that the parties should reach voluntarily. Demonstrated need, an effective counterpoint to gradualism, and a factor that can lead to a breakthrough, has also not been established. Approximately 3400 faculty workload assignments are made annually. Since 2011, there have only been two complaints referred to the Workload Adjudicator under The WLPP. While there is survey evidence in the Association's brief pointing to problems, the conclusion is inescapable that this is not a pressing issue requiring arbitral attention. This remains an issue best left to the parties to resolve. Accordingly, the Association's proposals for major change are rejected. However, I am persuaded by the submissions that change is appropriate to the PTR Policy.

[emphasis added]

136. I adopt the same approach and reasoning here and come to a similar conclusion. The parties have a history of bargaining incremental change to the terms of the MOA. It is reasonable to conclude that had the parties reached a freely bargained outcome here, they would have continued to move toward greater transparency in workload assignment, as they have in prior rounds. But the evidence before me does not support the conclusion that they would have agreed to the more substantial, top-down changes sought by the Association. My award below is intended to strike this balance.

137. I note that in awarding the Association's alternate Annual Workload Document proposal rather than the University's proposed compromise, I do not agree that the clause prioritizes certain factors that a unit might consider over others. The enumerated factors are, as the University acknowledges, ones that the parties have already agreed are relevant considerations. The fact that each may be of more or less significance in the context of a given work assignment does not alter the fact that providing this information will result in increased transparency.

138. Further, where other factors are relevant and influence the assessment of workload at the unit level, the clause contemplates that the Unit may include those factors in the document as well. The focus of the provision, as the Association argues, is to promote transparency, not to dictate what a unit may or may not consider relevant, or how it may balance relevant considerations. In my view, Arbitrator Kaplan correctly identified the importance of full transparency, "particularly where it is asserted that workload distribution has a negative impact on members of equity-seeking groups." The proposal awarded represents a further and incremental move toward greater transparency, while maintaining the overall structure of the parties' agreement. Should increased transparency shed light on a problem,

that problem can be addressed as a demonstrated need in future rounds of bargaining.

FREEZE PROPOSAL

139. The Association proposes to amend the MOA to include a provision that would maintain salary, benefits, and workload provisions where notice has been given under Article 6, until such time as a new agreement is reached by settlement or award. This provision would essentially replicate the statutory freeze provisions at s.86 of the Labour Relations Act, 1995 (the "LRA"), applicable to certified bargaining agents under a collective agreement. The Association argues that the freeze is necessary to maintain a proper balance of interest between the parties, just as does the statutory freeze under the LRA. The statutory freeze is a normal and essential aspect of every collective bargaining scheme across the country, and the Association maintains that it is equally justified in the context of bargaining under the MOA, notwithstanding that these parties operate outside of a statutory collective bargaining regime.

140. The Association cites the circumstances in The University of Toronto and the University of Toronto Faculty Association (PTR Dispute), unreported, January 4, 2021 (the "PTR Dispute") as evidence of a demonstrated need to establish a freeze provision under Article 6 and argues that the widespread application of the statutory freeze to university/faculty association collective agreements broadly supports replication of the freeze for these parties.

141. The University objects that this proposal is outside the scope of a Dispute Resolution Panel's jurisdiction since it would constitute an amendment to the MOA. Article 17 of the MOA provides that amendments to the agreement "may be made by mutual consent of the parties at any time". It further notes that imposing a freeze provision would constitute a fundamental change to the unique bargaining structure that these parties have created; a structure in which they have proven adept at addressing any changes in terms and conditions, and within which any changes can be addressed retroactively where appropriate.

142. The University also argues that the proposal is an effort to sidestep the arbitration award between the parties and an effort to effectively remove PTR from the negotiation process by rendering it payable prior to the negotiation/arbitration of the next agreement. In addition to arguing that such a provision is outside my jurisdiction, the University maintains that it would

offend the principle of gradualism and demonstrated need and would not replicate any agreement the parties would reach.

143. I need not decide the University's jurisdictional argument to conclude that the Association's proposed freeze would constitute a fundamental alteration of the existing structure within which these parties bargain salary, benefits, and workload (including PTR). The Association is correct that the statutory freeze forms an integral part of the LRA's legislative framework for collective bargaining. But these parties do not participate in that framework and have instead constructed their own unique bargaining framework. Reference to comparator universities who do participate in that statutory scheme are therefore not persuasive evidence in support of the principle of replication.

144. Further, even assuming I have the jurisdiction to grant a proposal that would fundamentally amend the parties bargaining framework, such a fundamental change would require establishing a demonstrated need that is not present here. As Arbitrator Kaplan observed in the PTR Grievance, the Association's expectation that PTR will continue to be paid is well-founded. As Arbitrator Munroe observed in the Munroe 1993 Award, PTR has been "at the heart of the parties bargaining relationship..." (p.13). Each year there is an ongoing collegial process that is predicated on the expectation that it will be paid out. But while the parties have had to bargain around PTR, as arbitrator Kaplan also observed, it has ultimately been paid without exception. Such a history does not support a demonstrated need for altering the long-standing bargaining framework to which these parties voluntarily agreed. Such changes are better left to the parties to negotiate themselves.

THE ONGOING SIGNIFICANCE OF BILL 124

145. The Government of Ontario has appealed Justice Koehnen's decision striking down Bill 124. That appeal has not yet been decided. The University requests that in the circumstances where I have awarded additional compensation, as I have, that I "remain seized of any and all issues concerning the payment of awarded compensation increases to faculty members and librarians that exceed the limits on such increases prescribed by Bill 124, if Bill 124 is determined to be constitutional". This is essentially the corollary of the Bill 124 reopens that became the norm when Bill 124 was in effect, and I find it appropriate to remain seized as requested for that reason.

146. The University has also requested that I delay issuing this award, or delay the payment of any compensation under this award, to prevent “double recovery” as between this award and any remedial orders that Justice Koehnen may ultimately make. The Association points out that the University is not a responding party to the constitutional challenge and that “double recovery” is not possible. In any event, the Association agrees that it will not seek “double recovery”, in the sense that “so long as this Board takes jurisdiction over UTFAs’ proposal for the Year 3 increases to reflect losses in Years 1 and 2, UTFAs will not seek a further remedy against the University in a Bill 124 remedial trial”.

147. Given that the University is not a responding party to the constitutional challenge, any prospect of “double recovery” appears to me to be very remote. Indeed, it appears especially remote given that I have not granted the Association’s proposal for lump sum payments in compensation for the “losses” in years 1 and 2, losses that the Association attributes to the interference of Bill 124. It is difficult to imagine how a remedy against the government for having interfered with the Association’s constitutional rights could constitute “double recovery” vis a vis the determination by an interest arbitrator that the University of Toronto ought to grant its employees a pay increase. Put differently, I see no reason to delay what constitutes a reasonable order setting salaries, based on all the usual applicable criteria—a decision that is squarely within my jurisdiction and expertise—simply because another adjudicative entity might award the Association’s members compensation in remedy of a breach of rights committed by the government—a matter that is expressly not within my jurisdiction.

148. However, because the Association’s agreement not to seek remedies that might impact the University or constitute “double recovery” in that proceeding is conditional, and because I have no jurisdiction in respect of the Court proceeding, the most prudent course is to also remain seized in the event that the Association obtains any remedy that impacts the University in its constitutional challenge.

AWARD

1. **Wages**-ATB Increase of 8%, inclusive of the 1% increase previously ordered on an interim basis, retroactive to July 1, 2022;
2. **Per Course Stipends/Overload**-Increase Per Course Stipends/Overload by 8%, inclusive of the 1% increase previously ordered on an interim basis, retroactive to July 1, 2022;

3. **Technical Support**-Amend Article 4.2 of the WLPP, as agreed to in the University's brief at paragraph 122, by adding:

Level and/or hours of technical and/or pedagogical support for online teaching;

4. **Annual Workload Documents**-Amend Article 3 to the WLPP by adding a new Article 3.X as follows:

3.X. Each Unit shall prepare, on an annual basis, a Unit Workload Document setting out:

i) The assigned teaching and assigned service workload for each member in the Unit;

ii) For each course that a member teaches, the assigned teaching credit, the mode of delivery, the class size, and the level and/or hours of TA support, and any other factor which the Unit Workload Committee determines is a reasonable factor for comparison;

iii) For each member any teaching release and the reason for it (e.g., pre-tenure course reductions), subject to any confidential accommodation agreements.

The Unit Workload Documents will be provided to all members of the Unit and to UTFA by June 30 of each year.

CONCLUSION

149. I remain seized with respect to the implementation of my award. I also remain seized of any and all issues concerning the payment of awarded compensation increases to faculty members and librarians that exceed the limits on such increases prescribed by Bill 124, if Bill 124 is determined to be constitutional and in effect for the period of my award. Finally, I remain seized with respect to any claim by the University that any part of this award constitutes "double recovery" having regard to any remedies arising from the Bill 124 litigation.

Dated at Toronto, Ontario, this 6th day of September 2023.

"Eli Gedalof"

Eli A. Gedalof, Sole Arbitrator

SCHEDULE "2"

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