

IN THE MATTER OF A SALARY AND BENEFITS DISPUTE

BETWEEN:

THE GOVERNING COUNCIL OF THE UNIVERSITY OF TORONTO

("The University")

- AND -

THE UNIVERSITY OF TORONTO FACULTY ASSOCIATION

("The Association")

BEFORE:

Regional Senior Justice Warren K. Winkler Chair, Dispute Resolution Panel

Mr. Larry Bertuzzi University Nominee

Mr. Jeffrey Sack, Q.C. Association Nominee

APPEARANCES: **Larry Steinberg** *for the Association*

Christopher Riggs, Q.C., Elizabeth Brown, Daniel Michaluk
for the University

[1] The parties to this arbitration are the University of Toronto (the "University") and the University of Toronto Faculty Association (the "Association"). The arbitration was conducted pursuant to Article 6 of the Memorandum of Agreement (the "MOA") between the University and the Association. The MOA was originally negotiated in 1977 and has since been subject to amendment from time to time.

[2] At the outset of the arbitration, the Panel was asked to issue a recommendation (award) on salary and benefits for the University's faculty members and librarians for the one-year period ending June 30, 2006. However, the Panel has since been advised that

the parties have agreed that it is within the jurisdiction of the Panel to determine whether it should issue an award regarding salaries and benefits for only that period or whether its award should encompass a two year period ending June 30, 2007. The Panel has determined that the latter should prevail and therefore this award deals with salary and benefits over a two year period commencing on July 1, 2005 and concluding on June 30, 2007.

[3] The jurisdiction of the panel was also questioned with respect to certain other issues that the University characterized as being outside the ambit of Article 6 of the MOA. However, it was determined by both parties that those issues, including some proposals relating to the benefit plan and the formation of working groups to deal with certain matters, should be placed on “hold” to be resolved between the parties. Consequently, they are not included in this award.

[4] Before reaching the substance of the award we would like to acknowledge the efforts of counsel and the parties in providing the panel with extensive and thorough submissions that were of great assistance to us in our deliberations. In addition, we would be remiss if we did not also acknowledge the work of previous panels in developing general principles that have served as guideposts for the parties in respect of their submissions to this panel.

[5] Two of those general principles deserve particular exposition in that they are in essence the key pillars in the contextual framework of this award.

[6] The first is the “replication principle” which mandates that an award emanating from an arbitration conducted pursuant to Article 6 of the MOA should, as closely as possible, reflect the agreement that the parties would have reached had they been able to reach an agreement in free collective bargaining.

[7] The second underlying principle is found in the mutual commitment of the University and the Association to ensuring that the University is a leader among the world's best teaching and research institutions of higher learning.

[8] It is obvious that in the context of this dispute, the two principles are inextricably interrelated. Any attempt to replicate an agreement that might have been reached between the parties has to take into account the fact that the parties would be bargaining on common ground with respect to their mutual, commendable devotion to the excellence and reputation of the University.

[9] Utilizing the replication model, the logical starting point is the framing of the issues between the parties. In broad terms, those issues are as follows:

1. Compensation, including an Across the Board Salary increase;
2. Progress through the Ranks (PTR) increase;
3. Pension Plan amendments;
4. Professional Expense Reimbursement (PERA) amendments;
5. Extended Health Care amendments;
6. Research and Study Days for Librarians amendments.

[10] The positions of each of the parties on the issues are as follows:

Issue	University Position	Association Position
Salary	2.5 % ATB increase effective July 1, 2005	4.0 % ATB increase effective July 1, 2005 An amount of 0.5% of total salary shall be set aside for the purpose of addressing salary inversion and anomalies. Allocation shall be retroactive to July 1, 2005. The senior salary category for faculty and librarians shall be abolished, effective June 30, 2006.

Issue	University Position	Association Position
PTR	Distribute a special one time PTR allotment July 1, 2005 calculated on the basis of \$500 per FTE for Professoriate and prorated amounts for Lecturers and Librarians. Ten percent of the additional amount will be set aside to be added to Provostial and Decanal merit pools.	Each PTR pool shall be increased by 1.0% of total salary in that pool, effective July 1, 2005.
Pension	Maintain current position	<p>All retirees shall receive augmentation to their pensions in an amount equal to full inflation catch-up as July 1, 2005. This applies to all pensions from RPP, OISE and SRA.</p> <p>At the time of retirement, individual faculty and librarians shall have the option of receiving a monthly pension or a lump-sum payment equal to the commuted value of the individual's pension. Those who opt to receive the lump-sum payment shall be eligible to receive benefits on the same basis as those receiving a monthly pension.</p>
EHC	<p>A Health Care Spending Account ("HCSA") will be introduced effective July 1, 2006 as an alternative vehicle for funds available under the Professional Expense Reimbursement ("PER").</p> <p>Prior to July 1st of each University Year (July 1st to June 30th), Faculty members and Librarians entitled to the PER will be able to elect the following allocation of the PER funds for that University Year: 100% to the PER (default election); 50% to the PER and 50% to the HCSA; 100% to the HCSA.</p> <p>The timing and form of the election will be prescribed by the University, subject to</p>	<p>The current benefit for massage therapy, physiotherapy, and chiropractic care shall be increased to \$1000 maximum annually and shall be extended to include the services of a licensed optometrist.</p> <p>Orthodontics: Expenses shall be covered with the employer paying 50% of the orthodontic expense costs up to \$3,500 per person per lifetime for active and retired faculty and librarians and their dependent children.</p> <p>The long-term disability plan shall be modified to enable disability pension recipients to return to work on a part-time basis for indefinite periods of time without financial penalty.</p>

Issue	University Position	Association Position
	consultation with the Faculty Association, and the election will be irrevocable,	Faculty and librarians who retire before 1981 shall have the same benefits as those who retired during and after 1981, effective January 1, 2006.
PERA	Introduce a Health Care Spending Amount as an alternative vehicle for funds available under the Professional Expense Reimbursement (PER) as described above.	The PERA shall be increased from \$775 to \$1000 per year effective July 1, 2005 All part-time faculty represented by UTF A shall receive expense reimbursement pro-rated at 33% per full-course equivalent of the PERA rate effective July 1, 2005.
Research and Study Days for Librarians	Maintain current position	The annual number of Research and Study Days for librarians shall be increased from 5 to 20.

[11] While the replication principle is a key consideration, it must also be acknowledged that there is a certain amount of artifice involved in attempting to “replicate” the agreement that the parties “would have” reached. The very fact that third party intervention has been engaged means that the parties, based on their current positions, are at an impasse for which they foresee no resolution absent the assistance of the third party. Therefore, although the application of the replication principle theoretically results in an award that represents the likely meeting point between the parties positions had bargaining continued, that award will, in the circumstances, almost certainly be imperfect because that in effect is the very nature of collective bargaining. As stated by Arbitrator Shime in *Re McMaster University and McMaster University Faculty Association* (1990), 13 L.A.C. (4th) 199 at 202:

Arbitrator/selectors recognizing the limitations of third party intervention have always looked to free collective bargaining for assistance in decisions concerning wage determination. The use of this criteria [sic] carries with it an implicit recognition that collective bargaining is an economic power struggle where wage determination is governed by market-place conditions and therefore, arbitrator/selectors have recognized that no union, or employer is ever really satisfied with the ultimate wage

settlement. But inherent in these settlements is a recognition of market conditions and what the exercise of an economic power struggle will yield or not yield at any given time. Settlements do not reflect satisfaction and are, in effect, an acquiescence by the parties in the exigencies of the market-place at a given time.

[12] Determining an award in replication of an agreement that might have been reached in the context of the “economic power struggle” and the “exigencies of the market-place” identified by Mr. Shime requires consideration of a number of dynamic elements including the specific employer-employee relationship, the specific “industry” or “industry segment” and the general economic conditions and climate in which both exist.

[13] In respect of the specific employer-employee relationship, the parties express divergent views on whether “the fiscal context” is a relevant concern. The University argues that “it is impossible to determine what agreement would have resulted without due regard to the fiscal context in which that bargaining would have been negotiated.” In that respect, the University contends that fiscal context includes the consequences of government underfunding, the accountability expectations attached to government funding and the “continuing competitive position of salary and benefits at the University”, which taken together, constitute more important criteria than comparisons to salary increases at other institutions.

[14] The Association counters that the “fiscal context” is not a guiding principle that has been adopted by interest arbitration boards in Ontario. Further, the Association contends that the University submissions on the point are simply an attempt to import the generally rejected principle of “ability to pay” as a relevant consideration in the panel’s ultimate recommendation.

[15] Arbitrator Shime in *Re McMaster University* gave cogent reasons for rejecting the “ability to pay” argument in respect of public sector awards at p. 203:

...there is little economic rationale for using ability to pay as a criterion in arbitration. In that regard I need only briefly repeat what I have said in another context, that is, public sector employees should not be required to subsidize the community by accepting substandard wages and working conditions... (internal citations omitted). ...[T]hus, for example, if I were faced with data showing that the salary scale for assistant professors at McMaster was less than that of other universities in Ontario, I would have no hesitation in increasing the amount to achieve the same standard for McMaster regardless of the university's fiscal position.

...

The universities are funded by the provincial government. In recent years the funding has not been as generous as it might be, which no doubt has eroded the salaries of university professors. If arbitrator/selectors were to consider the funding level of universities for the purpose of salary determination, they would in effect become the handmaidens of the government. Arbitrator/selectors have always maintained an independence from government policies in public sector wage determinations and have never adopted positions which would in effect make them agents of the government for the purpose imposing government policy. Their role is to determine the appropriate salary range for public sector employees regardless of government policy, whether it be funding levels or wage controls.

I adopt this reasoning.

[16] However, the determination of the appropriate compensation does require the arbitrator to have regard to some market and economic factors. As noted by Arbitrator Adams in *Re Beacon Hill Lodges and SEIU* (25 June 1982) at pp. 4-5:

The ideal of interest arbitration is to come as close as possible to what the parties would have achieved by way of free collective bargaining in the sense that to do more would affect an unwarranted subsidization of nursing home employees by the public and to do less would result in nursing home employees subsidizing the public. ... While wages are "discussed" at the bargaining table in terms of cost of living trends, productivity, justifications for the catch-up and the overall compensation, such arguments are ultimately subject to the inherent bargaining power of parties to impose their wills on each other. It is this aspect of free collective bargaining that interest arbitration cannot reproduce. But, because there is no exact litmus test for bargaining power, boards of arbitration try to set out in detail a rational justification for their economic awards.

[17] There is a single coherent approach suggested by these authorities which may be stated as follows. The replication principle requires the panel to fashion an adjudicative replication of the bargain that the parties would have struck had free collective bargaining continued. The positions of the parties are relevant to frame the issues and to provide the bargaining matrix. However, it must be remembered that it is the parties' refusal to yield from their respective positions that necessitates third party intervention. Accordingly, the panel must resort to objective criteria, in preference to the subjective self-imposed limitations of the parties, in formulating an award. In other words, to adjudicatively replicate a likely "bargained" result, the panel must have regard to the market forces and economic realities that would have ultimately driven the parties to a bargain.

[18] This reasoning brings us full circle to revisit the common ground between the parties regarding the commitment to the pursuit of excellence. As both parties are surely aware, more than mere lip service to the ideal is required for the due administration and execution of a commitment to excellence. In that respect, the University acknowledges that "the excellence of the University owes much to the quality of its faculty and librarians". However, as the Association similarly implicitly acknowledges, "comparability and general economic conditions" are relevant factors providing a context within which the panel might determine what degree of influence adherence to the principle would exert in bargaining.

[19] In our view, while the commitment to excellence is clearly a significant factor in the relationship between the University and the Association, assessing its impact on the bargaining requires that it be considered in the context of the "marketplace" in which it is pursued.

[20] In essence, the University has staked out a position at the top of the relevant market or "industry segment". It implicitly admits that maintaining that position depends to a large degree on maintaining the quality of its faculty and librarians. That in turn requires, leaving aside the intangibles, ensuring that the total compensation package

available to those faculty members and librarians is sufficient to place them at the top of the market as well. That will be the starting point for our analysis of the specific proposals.

[21] We accept the University's position that we should have regard to the total compensation package rather than viewing each of its elements in isolation. We also accept that in collective bargaining it is legitimate for parties to make choices as to how total compensation is to be allocated in respect of salary, benefits and other forms of compensatory remuneration and, equally, that the manner of allocation may be a point of contention between the parties. However, we do not believe that the acceptance of these propositions should serve to preclude the panel from setting out a brief analysis of each individual proposal and providing a rationale for its conclusion.

Salary

[22] The University proposes a 2.5% ATB increase for salaries while the Association proposes 4.0%. The University submits its position is driven by a desire to allocate scarce resources to items other than faculty and librarian salaries, reasoning that since such salaries are at the top of the market now, a more modest increase is sufficient to maintain leadership status. We cannot accept this rationale. Taken to its logical conclusion, it effectively amounts to a request to accept the heretofore rejected "ability to pay" principle with a resulting subsidization of the objectives of the University by the Association members. While it is possible that such an approach could be actually bargained if market forces and general economic conditions dictated, we are not persuaded that those factors are currently of the nature that would permit the University's position to prevail in this round of bargaining.

[23] On the other hand, the Association proposal of a 4.0 % ATB increase includes consideration of CPI increases, "catch-up" and market place wage settlements. There is some dispute between the parties as to what the actual CPI increase is for the current year but neither submit that it is negligible and it is obviously a relevant factor, falling as it does in the area of general economic climate and conditions. However, it is clear from past settlements and awards that salary increases have never been pegged dollar for dollar

to increases in the CPI in a given year or multi-year period. In some instances, increases have been below the corresponding CPI increase and in others, above. Some years the results were driven by economic conditions and in others by legislatively mandated restraint on wage increases. The net cumulative effect over the course of approximately 25 years of bargaining history is to leave salaries (not including increases generated by Progress Through the Ranks payments) somewhat less than they would have been had they been pegged to CPI increases. It is this fact that serves as the basis for the Association's argument that some element of "catch-up" should be included in any award recommended by this Panel.

[24] Although collective bargaining is generally conducted in the shadow of past agreements, settlements are forward looking. In the absence of an express acknowledgement by both sides, it is difficult to apply a concept that mandates the cumulative tally of past wage settlements against an external standard in the expectation that a demonstrated shortfall against that standard will serve as a basis for an increase. As stated by Arbitrator Shime in *McMaster University, supra*, the "concept of historical catch-up carries with it a number of difficult issues and problems." That said however, in our view, the comparable institution wage settlements justify an increase in salaries that exceeds the quantification of the CPI increase advanced by either party, and therefore, it is unnecessary in the present circumstances to allocate a portion of the award to "catch-up" even though it may have the effect of narrowing the gap between historical CPI increases and wage increases.

[25] We turn then to the marketplace wage settlements. In that regard, we prefer to give more weight in the analysis to the comparator institutions, 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. Logically this market is limited but that is not surprising. It is the natural result of a successful pursuit of excellence for an institution so dedicated to find itself in circumstances where there are few comparables. Wage settlements in that group averaged 3.19% for the year 2005-2006 and averaged 3.17% for 2006-2007. We do not find that either the University's proposal of

2.5% or the Association's proposal of 4.0% would have ultimately held sway in bargaining against this market data. An amount more reflective of the marketplace realities as demonstrated by the settlements at comparable institutions for the periods in question, would likely have been the result of bargaining. This would maintain the leadership position of the University while at the same time giving effect to its commitment to excellence with due consideration of the marketplace reality.

[26] As we approach this award from the perspective of total compensation, and given the additional increases provided for below, the appropriate award is a 3.0% across the board increase for the year 2005-2006 and a further 3.25% across the board increase for the year 2006-2007. The 2005-06 award is to be applied retroactively from the date of confirmation of this award to July 1, 2005. The 2006-07 award is to be implemented on July 1, 2006.

Salary Anomalies

[27] The Association's position with respect to the demand it characterizes as addressing "salary inversion and anomalies" is that the manner in which the University negotiates compensation with new hires or deals with retaining individual current faculty members often creates an "inversion" or "anomaly" in compensation with respect to longer serving faculty members. The Association submits that this situation should be addressed on a collective basis by dedicating a specific amount to rationalizing compensation in such circumstances. According to the University, there is no evidence that the manner in which the University deals with individual members of the Association is driven by anything other than market forces and, since it is common ground between the parties that market conditions are a consideration in their collective bargaining, there is no principled reason to accept the Association's approach either in whole or in part. In our view, to give effect to the Association's demand would put the cart before the horse. This matter has yet to be examined by the parties in a working group to be established for that purpose. As a result, we do not believe that the Association's position would be successful in this round of collective bargaining.

[28] On the other hand, we accept the Association's position that the senior salary category for faculty and librarians should be abolished effective June 30, 2006.

PTR

[29] With respect to the competing PTR proposals, in consideration of determination that this should be a two year award, we conclude that the University's proposal to make a special allotment to the PTR pool more closely reflects the likely bargained result than does the Association's proposal to increase respective pools by 1% of salary. We extend it to apply in equal terms to the second year of the agreement. The PTR pool has historically been available to ensure that the meritorious achievement of faculty members is properly rewarded. In that respect, while PTR amounts have the dual effect of increasing the base pay of faculty members once awarded and a continuing impact thereafter in regard to faculty wide ATB increases, the available pool has never been tied specifically to the total salary allocation. The Association proposal to increase the PTR pool by the amount suggested has ramifications that require consideration of the effect on the overall economics of the relationship.

[30] In our view, the University proposal to "distribute a special one time PTR allotment July 1, 2005 calculated on the basis of \$500 per FTE for Professoriate and prorated amounts for Lecturers and Librarians", coupled with an identical special allotment to be distributed on July 1, 2006 would have been an acceptable result for both parties in bargaining. As a point of further clarification, these amounts are special allocations for the years in which they are awarded and do not constitute ongoing obligations of the University beyond the term of this award. Finally, we do not believe that the University proposal to set aside 10% of the increased funds for Provostial and Decanal awards, as opposed to the current norm of 5%, would similarly have carried the day in bargaining. This goes to the heart of the Association's concern regarding the avoidance of arbitrariness in the determination of individual merit awards. Accordingly, the additional amounts will be subject to the same current 5% allocation for Provostial and Decanal awards as the existing pool.

Pensions

[31] We turn now to the issue regarding pension augmentation. This is clearly a central point of contention between the parties. From the University's perspective, this issue invokes considerations of principle beyond the simple present day cost of the proposal advanced by the Association, which in actual quantum is a cost of approximately \$475,000 per year.

[32] In part, the University's objection to the Association proposal is driven by the fact that the pension plan, based on the assumptions now being used with respect to rate of return on investment and the future obligations, is currently in an actuarial deficit. According to the University, augmentation of pension benefits has never been granted when the plan has been in deficit and to do so now effectively means that full indexing is the assumed norm. That scenario, according to the University, would require additional modifications to the current modeling assumptions which would increase the current deficit of accrued liability of the plan by \$110 million.

[33] The Association contends that the current deficit is the result of a reduction in the actuarial assumptions regarding rate of return from 7.0% to 6.5% on a going forward basis. This change has been made in the face of actual returns over the past two years of 15.4% and 10.9% respectively. In effect the Association takes the position that the University is creating the deficit through revisions to the actuarial assumptions.

[34] In truth, the only real surplus or deficit in a pension plan is that which remains after a plan has been wound up and all accrued liabilities have been accounted for. Actuarial surpluses or deficits in the interim exist only as mathematical constructs produced by applying certain assumptions to the assets and obligations of the plan. As such they are no more than snapshots in time and subject to the periodic fluctuations driven by the dynamics of the investment market and the changing makeup of the plan's beneficiary class. While prudent management practice and regulatory oversight require the taking of such snapshots in respect of pension plans, the resulting picture does not necessarily drive a particular result in bargaining.

[35] Based on the material before us, it appears that the plan has generally operated in an actuarial surplus, at some points so robust that the University was able, indeed required by law, to take contribution holidays. In the past several years, a combination of factors has led to an actuarial deficit. In that regard, the evidence before the panel was that the University is actually taking aggressive steps to reduce the deficit, paying more into the plan on an annual basis than was required to fund both the current service cost and the legislatively mandated deficit reduction.

[36] The fact that the plan was in an actuarial surplus over a substantial period of time skews historical perspectives somewhat. However, even when the plan was in an actuarial surplus, improvements to the plan, contribution holidays for the Association members and the utilization of excess funds were matters of bargaining and choice. The mere existence of a current actuarial deficit provides no compelling reason to depart from that bargaining model. Here the Association chooses to seek augmentation to the pension benefits available to its members as part of its total compensation package. In our view, the Association's proposal is reflective of a bargained result when total compensation is considered in the context of a two year term.

[37] Although we are granting the Association's proposal on the pension augmentation issue, I do not accept the Association's position that augmentation to 100% should become the norm in the sense that it is enshrined in the plan in perpetuity. It has traditionally been a matter of bargaining and so it should remain. We award augmentation to 100% for the two years covered by this award, to come into effect in the year commencing July 1, 2006.

[38] We do not believe that the Association proposal to provide an option to commute pension benefits on retirement reflects a result that would have been bargained between the parties. It imposes an undue burden on the plan and fundamentally alters its purpose from a defined benefit plan to a hybrid that renders the actuarial calculations even more uncertain. Accordingly, this Association proposal is rejected.

Health and Professional Benefits

[39] It is common in all collective bargaining that there are major issues and those whose importance is somewhat less so. As experienced collective bargainers are aware, the parties prioritize bargaining issues and bargain in order of priority. Trade-offs are made and bargains struck in a reality where significant issues are bargained against significant issues and lower priority issues are bargained in like fashion. The remaining issues would fall into the lower priority category and we accordingly deal with them summarily.

[40] In the table set out above, the positions of each party have been set out under a number of headings. Under the heading "EHC" in our view, the University position regarding a Health Care Spending Account would not have been a bargained result. On the other hand, the Association would not likely have received much of its shopping list. The likely result of bargaining would have been acceptance of the Association proposal to include the services of a licensed optometrist in the "paramedical" coverages. Accordingly, we award the additional coverage sought by the Association in the amount of \$ 250 on a biannual basis, to be effective for the year commencing July 1, 2006. The University proposal and the remaining proposals of the Association are rejected.

[41] With respect to the Professional Expense Reimbursement, the Association position is reasonable and reflective of the current practice among comparable institutions. We would implement this award in two stages, with an increase from \$775 to \$900 effective for the year commencing July 1, 2005 and an additional increase to \$1000 in the year commencing July 1, 2006. We do not accept the Association's proposed change to the pro-rata allocation to part-time faculty.

[42] In our view, an increase in Research and Study days for librarians is justified based on the University's commitment to excellence and the practice at comparable institutions. However, the dramatic increase sought by the Association is not currently

warranted. A more likely bargained result would have been an increase of the current allotment from 5 days to 8 days. Accordingly, our award in this respect is an increase to 8 days from the current 5 commencing in the year beginning July 1, 2006.

Summary

[43] Our award may be summarized as follows:

Salary 3.0% ATB, effective from the date of affirmation of this award, retroactive to July 1, 2005;

3.25% ATB effective July 1, 2006;

PTR \$500 per FTE special allotment to the PTR pool to be distributed on July 1, 2005;

\$500 per FTE special allotment to the PTR pool to be distributed on July 1, 2006;

No continuing obligation of the University to make further special allotments to the PTR pool;

Pensions Augmentation to 100% of CPI indexing for the years commencing July 1, 2005 and July 1, 2006 respectively to be instituted in the year commencing July 1, 2006;

EHC Inclusion of optometrists, at an amount of \$250 on a biannual basis, to be effective in the year beginning July 1, 2006;

PERA Professional Expense Reimbursement to be increased from \$775 to \$1000, with increase to be implemented in two stages, going to \$900 in the year beginning July 1, 2005 and to \$1000 in the year beginning July 1, 2006;

Librarians Increase in Research and Study days from 5 to 8 days, to be implemented commencing July 1, 2006.

[44] In addition, those matters upon which the parties have reached agreement are set out in Schedule A and form part of this award.

[45] We remain seized of this matter.

Dated at Toronto this 27th day of March, 2006

Regional Senior Justice Warren K. Winkler (Chair)

Larry Bertuzzi (University Nominee)

Jeffrey Sack, Q.C. (Association Nominee)