IN THE MATTER OF AN INTEREST ARBITRATION

Between:

The Ontario Teaching Hospitals (OTH)

and

The Professional Association of Residents of Ontario (PARO)

Before: William Kaplan
Sole Arbitrator

Appearances

For the Hospitals: Bob Bass
Bass Associates

For PARO: Steven Barrett
Nadine Blum
Goldblatt Associates
Barristers & Solicitors

The matters in dispute proceeded to a hearing held by Zoom on September 6, 2023. OTH rebuttal submissions were received on September 11, 2023.

Introduction

On May 21, 2021, an award was issued resolving all outstanding issues between the Teaching Hospitals of Ontario (OTH) and the Professional Association of Residents of Ontario (PARO) for a collective agreement with a term of July 1, 2020 to June 30, 2023. The award was constrained by the *Protecting a Sustainable Public Service for Future Generations Act, 2019* (Bill 124*)*. That legislation was subject to court challenge. Accordingly, and as was normative, the award included a reopener provision should the constitutional challenge prove successful, or should Bill 124 be otherwise modified or repealed with retroactive effect, or for some other legally relevant reason. On November 29, 2023, the legislation was struck down, and an appeal has since been argued. No interim stay was sought. The decision of the court remains outstanding. After the legislation was declared to be of no force or effect, the reopener provision was invoked and a mediation was held on June 28, 2023. The mediation proved unsuccessful and the matters in dispute proceeded to a hearing held by Zoom on September 6, 2023. OTH rebuttal submissions were received on September 11, 2023.

In brief, PARO sought wage adjustments (over and above the 1% already paid in each year) of 1%, 2% and 3.75% in each of 2020, 2021 and 2022. The OTH offered additional increases of .75%, 1% and 2%. In the third year PARO also sought specific PGY adjustments to align Ontario residents with maritime residents. Both parties made proposals for increasing stipends: PARO sought a doubling, OTH offered increases of 1.93% in 2020, 2.63% in 2021, and 5.37% in 2022. PARO sought improvements to two benefits: vision and mental health. OTH argued in favour of the status quo.

PARO Submissions

PARO submissions began with a detailed review of the critical role played by 5500 residents employed by Ontario's teaching hospitals in the healthcare system. Residents, in short, provide

diagnosis and direct care on a 24/7 basis. While the contribution of residents was second to none, they were under-compensated compared to residents in some other provinces, especially in Atlantic Canada, with Bill 124 leaving them even further behind. This unsatisfactory situation was exacerbated by pervasive inflation over the course of the collective agreement term. Inflation had had, and was continuing to have, a corrosive effect on spending power. In 2021, inflation in Ontario averaged 3.5%; but in 2022 it reached a 40-year high of 6.8%. There was no sign of inflation abating anytime soon. For 2023, inflation was currently sitting at 2.8% but excluding gasoline, it was 4% in June with grocery prices up 9.2% that month and mortgage interest costs up more than 30%. It was far from clear where exactly Ontario inflation would land in 2023, but no economist was predicting anything less than 3%. It seemed most unlikely that there would be any return to historic – annual 2% – norms anytime soon. In the meantime, Ontario's economic indicators and outlook were both good – outlined by PARO in its brief and at the hearing – while allocating funds to the hospital sector was an established government priority, a factor worth bearing in mind in a context where PARO funding came directly from the province, not individual hospitals.

Obviously, PARO pointed out, in determining the reopener, interest arbitration criteria had to be borne in mind: replication, internal and external comparability, trends in settlements and adjudicated outcomes, the economy and cost of living, were the ones most germane to this proceeding. No particular factor was paramount, however. In earlier proceedings, both external and internal comparators have been identified as extremely relevant. Indeed, extra-provincial comparisons of residents have been widely accepted by Ontario adjudicators over successive rounds for the purposes of determining compensation (an approach also followed by interest arbitrators determining resident compensation in other jurisdictions). The fact was that at one point, PARO-represented residents led the other provinces in compensation; that was no longer true. While some progress had recently been made in redressing this, PARO noted that Ontario

residents remained in 3rd place, a ranking made even more problematic as most residents lived in the GTA, with its much higher cost of living.

In PARO's view, it would not be appropriate to follow the two earliest central healthcare reopener cases. There first of these was *ONA & Participating Hospitals*, (unreported award of Stout dated April 1, 2023) – the Stout Reopener – and the second was *ONA & Participating Hospitals*, (unreported award of Gedalof dated April 25, 2023) – the Gedalof Reopener. Neither of these awards, PARO argued, appropriately addressed inflation. Notably, neither of these reopeners were followed in subsequent central healthcare interest reopener cases. PARO urged that they should not be followed here, a conclusion which was reinforced when the growing body of freely bargained reopener settlements and awards were reviewed from across the collective bargaining landscape. Simply put, these ONA reopeners were not being followed anywhere by anyone.

At the same time, freely bargained settlements were trending up, significantly so in many cases as was illustrated by examples on point. And arbitrators, PARO observed, while initially reluctant to recognize inflation in salary outcomes – awaiting free collective bargaining results to replicate – had completely reversed course, given freely bargained settlements, and given that the need to address inflation had become imperative. All these factors, and others informed, PARO's wage demands. In addition, the bargaining history between these parties illustrated a shared understanding of the need to move towards parity with Maritime doctors. It should have happened earlier, and very well could have but for Bill 124. There was no justification for further delay: it was time to complete that work with further targeted adjustments over and above general wage increases.

Also important were call stipends. Under present arrangements, a resident on weekend call, received a call stipend of $6.25 an hour; for overnight 12-hour calls, it was $11.06 an hour.

Home call rates, where the resident was required to be available and within close geographic proximity to their hospital, and where the resident was often required to return to the hospital, received $3.13 an hour for weekend home call and $5.03 an hour for overnight home call. Earlier stipend adjustments were an important first step in redressing this issue, but the time was long overdue for meaningful attention to be paid to this inequity: PARO proposed a doubling of rates, a proposal that was also justified when both internal (other hospital health care professionals including, to give two examples, resident physicians in the MRPP, and doctors represented by the OMA), and external comparators (residents in other provinces) were considered.

In terms of benefits, PARO sought a modest improvement to vision care (reflecting central hospital awards) and an increase to the mental health benefit to $2000.

OTH Submissions

In the OTH's submissions, the two ONA reopeners should be followed as the PARO Bill 124 term matched the ONA years (and did not match the other central healthcare terms): accordingly, comparing with other – higher – central hospital health care awards was completely arbitrary and self-interested. Indeed, PARO's proposal was classic cherry picking. For example, PARO sought the OCHU/SEIU 4.75% for its third year (2022), but not the negotiated results for 2020 and 2021 (1.60% and 1.65%). The OTH also objected to the absence of Quebec comparative data; this too was, in the OTH's submission, self-interested for that data demonstrated how well Ontario residents were paid when compared to Canada's second largest province.

ONA was, moreover, the long-established, repeatedly recognized comparator and that meant 1.75% in 2020, 2% in 2021 and 3% in 2022, which is what the OTH proposed (inclusive of the 1% already paid). This result was also fully in accord with the negotiated agreement between the Ministry of Health and Long-Term Care and the Ontario Medical Association (2021-2024). Mention was also made that unlike other healthcare professionals, doctors, when they begin

billing, move immediately to the maximum rate. The residents would soon enjoy an enormous salary bump as they moved into practice (as illustrated in the OTH brief). In the meantime, Ontario residents were among the best paid in the country.

The data was categorical: Ontario provided the highest wage rate for 93% of the residents working in Canada. Put another way, the wages received by 7% of the residents in the Maritimes – outcomes that have not been followed across the country – was not a template to be followed. The Maritimes skyrocketed in 2011, the result of an outlier interest arbitration award. For competitive reasons, NFLD had to follow suit. But these anomalous Atlantic Canada outcomes had not been replicated anywhere else in Canada and, the OTH argued, should not be followed here. Notably, Ontario residents are at the very top when Atlantic Canada was excluded. Even with the higher salaries out East, medical school graduates from Ontario still chose Ontario first. Ontario was a popular destination for students trained elsewhere. CARMs data indicated that in choosing a province for residency, salary, as a factor, came third.

There were other reasons in favour of the OTH's approach. Change in interest arbitration – itself a conservative process – should be incremental. Total compensation needed to be considered and relevant criteria addressed. One important distinction between this case and the central hospital awards that PARO relied upon was recruitment and retention. That factor played an oversize role in those other proceedings but had nothing to do with this one. Recruitment and retention was self-evidently not a factor. It could not and should not impact outcome. It was also worth noting that residents were short term employees and students who benefited from the education component.

Insofar as stipends were concerned, the OTH was of the view that modest increases were in order: 1.93% in 2020, 2.63% in 2021, and 5.37% in 2022. It was important to remember that stipends were not shift premiums, they were payments for being on call. It was also important to

know that with most of the stipends, Ontario was already close to the top, and with some modest tweaking these rankings could be further improved. At the very least, when the different stipends were examined and compared to the other Canadian jurisdictions, it was clear that Ontario, in the overall, was competitive. Likewise, there was no justification to increase either vision or mental health. The OTH paid the full cost of these benefits – unlike the various hospital comparators, there was no premium sharing arrangement. Overall PARO benefits were superior and there was, therefore, no need to upwardly adjust them.

Discussion

As has been established in several awards, in addressing reopeners it is necessary to consider all relevant information including negotiated and awarded outcomes from all sectors, not just the traditional comparators. It is also now generally agreed that there are no cut-off dates following which relevant evidence is to be ignored. I have followed this approach. In brief, both internal and external comparators must be examined. In this case, the best comparators for determining appropriate compensation requires an examination of what residents receive elsewhere in Canada for the exact same work. Both parties acknowledge that there is a national market for residents and so resident compensation from across the country is properly reviewed as are health care settlements and awards not to mention free collective bargaining settlements more generally.

PARO referred to and the OTH relied extensively on negotiated and awarded outcomes for the same general period under review from retirement homes and long-term care, but these results are rejected on the basis that they fall far short of even beginning to address inflation and are completely inconsistent with central hospital results – which is where the residents work. The differences between the work performed in retirement and long-term care homes and hospitals, not to mention the predominate classifications of the employees doing that work, are legion and one can readily conclude that these comparators are inapposite.

Clearly there is a historical relationship between PARO outcomes and ONA results. However, in earlier cases the predecessor to OTH suggested that much lower CUPE/SEIU results should be followed; in this case instead of pointing to the now higher CUPE/SEIU reopener amounts, it argues in favour of the lower ONA reopener amounts. It is quite clear, however, while ONA has been a long-standing and natural internal comparator as doctors and nurses work side-by-side, this comparator relationship is not an exclusive one and no one has ever said that it is: outcomes with other groups also inform results. In any event, I do not conclude that this is an appropriate case to follow the ONA reopeners as neither of them appropriately addressed inflation (although the Gedalof Reopener did include important grid changes in addition to the general wage increase). At the very least, for present purposes because of inflation, the ONA reopeners are not a reliable or relatable internal comparator for the years in question.

There are well established freely bargained outcomes in 2020, when inflation was significantly lower, and that leads one to conclude that the appropriate additional increase for that year is, as the OTH proposes, .75%. Inflation was 3.5% in 2021. How then could it be appropriate to follow a reopener that provides for a total of 2% in 2021? Inflation was 6.8% in 2022. How then could it be appropriate to award (a total) of 3%? This collective agreement expired on June 30, 2023. More than half of 2023 is now over. No one is seriously suggesting that inflation will be anything less than 3% this year. In these circumstances, PARO's general wage increase requests are granted with exception, as noted above, of the first year where the evidence is compelling that the appropriate amount is an additional .75%.

Simply stated, the ONA reopeners are not being followed because they do not address inflation. In contrast, other recent central hospital reopeners are more persuasive with general wage increases supplemented with other targeted improvements to deal with both inflation and recruitment and retention. Recruitment and retention is not a factor here for obvious reasons: it can never be an issue for residents who must obtain residencies as part of their licensing and is

not subject in any way at any time to market forces. In addition to the now normative general wage increases for the years in question, some adjustments to specific PGY steps are provided for, effective date of award, as part of a total compensation approach.

An adjustment to call stipends is necessary – both parties are in agreement about this – but must be done taking total compensation into account. PARO's proposed increase to call stipends has been costed (by it) as representing 4.88% of total compensation. From that perspective, this is untenable when considered alongside the general wage increases and the improvements to PGY steps. Much more modest increases have been awarded and have been made effective date of award.

Both benefit requests are also awarded. The vision improvement is completely normative and there is no reason why residents should not enjoy the same vision entitlement as their workplace colleagues. The fact that PARO benefits are 100% paid has never been a factor leading to reducing entitlements. The need for an increase in mental health benefits is self-evident – the pandemic was grueling and challenging for everyone, but especially so for front line healthcare workers – a modest increase for mental health benefits really requires no elaboration or discussion given continuing workplace challenges.

Decision

Wages (Additional amounts over and above the 1% in each year previously paid)

July 1, 2020: .75%

July 1, 2021: 2%

July 1, 2022: 3.75%

Apply these general wage increases to Chief and Senior Resident Stipends.

Specific PGY Adjustments

Effective date of award, increase PGY1 by a further $740, PGY7 by a further $990, and PGY8 by a further $1555.

Call Stipends

Effective date of award, increase the in-hospital weekday and conversion weekday call stipend to $161.86, the in-hospital weekend and conversion weekend call stipend to $198.49, the home weekday and qualifying weekday call stipend to $80.93, and the home weekend and qualifying weekend call stipends to $99.24.

Benefits

Vision Care

Effective sixty days following issue of award, increase by $75.00.

Mental Health

Effective sixty days following issue of award, increase by $1000.

Conclusion

At the request of the parties, I remain seized with respect to the implementation of my award including, if necessary, to address any issues that may arise should the government's Bill 124 appeal prove successful.

DATED at Toronto this 14th day of September 2023.

"William Kaplan"

William Kaplan, Sole Arbitrator