

The parties appointed me as mediator/arbitrator for the periods July 1, 2009 to June 30, 2010 and July 1, 2010 to June 30, 2011.

The mediation phase dealt with non-monetary issues - workload and dispute resolution. The parties were successful in reaching resolutions subject to certain details of which I remain seized. These represent substantial gains for UTFA and necessitate amendments to The Memorandum of Agreement. For reasons which will become apparent, mediation on pension, salary and benefits was unsuccessful.

There has been a very recent review of the principles applicable to interest disputes between these parties. Chief Justice Winkler issued an award on March 27, 2006 for the years 2005-2006 and 2006-2007. Because I am in agreement with the Chief Justice's useful analysis of the guiding general principles, it is unnecessary for me to review these. I must, however, consider one matter which confronted the parties in this round of mediation/arbitration but was not an issue when Chief Justice Winkler made his award.

The Government tabled its Budget Bill (Bill 16) on March 25, 2010. Schedule 25 to Bill 16 is the "*Public Sector Compensation Restraint to Protect Public Services Act 2010*" (the Act).

This Act precludes any increases in compensation for a 2-year period - March 24, 2010 to March 31, 2012. It applies to approximately 350,000 public sector employees who are not

represented by a Union or an association. This total includes approximately 1,300 U of T employees. UTFA members are not directly affected by this legislation because they are represented by an association. Presumably the reach of the Act was limited because of a concern that including unions and associations would infringe on freedom of association in the Charter of Rights. As matters stand, 1,300 U of T employees are not eligible for increases. The rest are. This is an unsatisfactory outcome within any organization and particularly a University which promotes collegiality. In the larger picture, private sector employees receive wage increases. Some in the public sector do not. No doubt this dichotomy must strike the affected public sector employees as unfair.

In any event, the Government attempted to achieve indirectly what it had been unwilling to legislate, judging by the following “Frequently Asked Question” document issued on March 24, 2010. The relevant portions include the following:

“105. The Government provided further comment on the Budget statement above in a Frequently Asked Question (“FAQ”) document issued on March 24, 2010 (Tab 18, University Documents) concerning employees in the broader public sector represented by trade unions or organizations that collectively bargain compensation with employers as follows:

- Q. Why only non-bargaining employees of public sector employers, and not those who bargain collective (e.g. unionized)?
- A. All broader public sector employees would be asked to contribute to protect public services during these challenging times. It is only the fair thing to do.

Non-bargaining employees would see their compensation structures frozen for two years.

Employees who are part of a union or who bargain compensation collectively would see their current agreements honoured. When these agreements expire and new contracts are negotiated, the Government will work with transfer payment partners and bargaining agents to seek agreements of at least two years' duration that do not include net compensation increases.

The fiscal plan provides no funding for compensation increases for future collective agreements.

It doesn't matter whether contracts expire next month, next year or the year after that—all employers and employee groups will be expected to do their part.”

In this release, the Government asserts that any negotiated increases will not be funded. Because public sector employers are dependent on Government funding in whole or in part, this is a very serious threat, which would impact any employer's bargaining position.

The University submitted that in the context of a replication model of interest arbitration, I should take this legislation and the accompanying policy statement into account in fashioning any award. UTFA was adamant that such a course would be de facto recognition of ability to pay as a relevant criterion in a public sector interest arbitration and would compromise the independence of arbitrators. My reasons for rejecting the University's submission are these:

This interest dispute is governed by a Memorandum of agreement between the parties which was initially made on June 28, 1977. It has been amended from time to time and the last consolidation of which I am aware is dated December 31, 2006. Included in Article 6 is this direction to the arbitrator: “attempt to reflect the agreement the parties would have reached if they had been able to agree”. In my respectful opinion, because the parties in their bargaining should have known that an interest arbitrator would not take the legislation into account, the replication principle supports the opposite conclusion than the University is contending for.

The parties know that ability to pay has been rejected by interest arbitrators for at least 4 decades. Chief Justice Winkler, in his award cited the following passage from an award by Arbitrator Shime in *Re McMaster University*:

“...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.”

It is plain that what drives the Government’s legislation and policy is its legitimate concerns about the huge provincial deficit and its impact on the Government’s ability to provide services. Obviously “0%” public sector increases make funding of services easier. The full title to the legislation makes this intent clear. This is a clear case of either requiring or asking public sector employees to subsidize the public because public services benefit the public as a whole. A

more equitable approach to protect these services would be to spread the “pain” widely by measures which increase revenues (more taxes or user fees) although I recognize that such measures would be less popular than the one adopted by the government. I agree with UTFA that recognizing the “Act” as relevant would be a recognition of ability to pay as a relevant criterion and recognizing the policy statement would compromise my independence. I would appear a minion of government. Thus, in fashioning this award, I have not taken into account either the legislation or the policy.

On the other hand, the legislation and the policy may impact collective bargaining outcomes, particularly in a “strike-lockout” regime. Evidence of some “0” contracts was adduced. In the next round of bargaining between these parties, University sector comparables will probably be lower. Because University sector comparables should be considered, dispute resolution between these parties may be affected. And, interest arbitrators will consider these comparables regardless of the reasons which have contributed to the result because these will be relevant collective bargaining facts. However, there is no impact in this round because most Universities had settled for 2009-2010 and 2010-2011 before the Compensation Restraint Act was passed.

Salaries

I accept as Chief Justice Winkler concluded, that UTFA’s members should be “at the top of the market”. They clearly are. To the extent that comparative total compensation can be determined by me on the available evidence, the average faculty salary at the U of T is

significantly higher than at other comparable Universities. Additionally, UTFA members make smaller pension contributions than other comparables.

The Position of the Parties

Consistent with the Government's directive, the University proposes a "0" increase in each year. UTFA asks for approximately 3.5% in each year, the average increase at other comparable institutions. The University also proposes an increase to faculty pension contributions and UTFA seeks augmentation for retirees. A few benefit issues were resolved. (See Schedule "A")

In fashioning this award I propose to follow Chief Justice Winkler's approach which included a "multi-factoral" analysis. Chief Justice Winkler also recognized the corollary to the principle that public sector employees do not have to subsidize the public; namely, that the community does not have to subsidize public sector employees. Chief Justice Winkler referred to Arbitrator Adam's award in *Re Beacon Hill Lodges and SEIU* at pg. 4-5 where he wrote:

"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. ..."

I turn to the various factors.

CPI

In my opinion, based on the approach in prior rounds of bargaining, 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 the ATB increase should generate. In fact, over the past 30 years, total increases in the ATB have coincided almost exactly with the increase 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 increases 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.

General Economic Conditions

For the two years in question, it seems to me that overall economic conditions are poor. The optimism expressed in the Spring of 2010 has faded less than 6 months later and predictions are pessimistic. Unemployment continues at rates in excess of 8% . This is better than in the USA but too high to suggest substantial economic recovery. Recent declines in residential real estate activity are also ominous. However, it is difficult to translate general economic conditions into an award in considering not for profit sectors. In a private sector dispute if economic

conditions have hurt the employer's financial position, this can be shown and is direct evidence of the impact of economic conditions. A direct correlation does not exist in the public sector. In a recent award between SEIU and Extendicare (The Master Agreement) the arbitrator declined to consider the "Act" but he awarded 1.45% for 12 months, a total of 2% for 16 ½ months because of economic conditions. This award is about 25% less than both other increases in the health care sector and private and public sector settlements generally. In deciding public sector disputes, I have always considered that what the community generally is receiving from its employment in wage increases is the best measure of the impact of economic conditions. Applying a deduction for economic conditions which is not tied to an objective standard strikes me as either arbitrary or mere guesswork.

Private and Public Sector Settlements

To recognize the principle that the public does not have to subsidize public sector employees, it is necessary to examine what the private and public sector have achieved in wage increases over the relevant period. Ministry of Labor statistics for 2009 show wage increases for all settlements of 2.1%. For 2010, the overall average is 2.3%. Obviously the Faculty's demands, if given effect to would result in the public subsidizing the award. Equally, 2 "0's" as sought by the University would result in UTFA subsidizing the public.

In this context, I need to address a submission advanced by Mr. Sack. As Canada's leading practitioner in interest disputes on the Union side, his submissions are entitled to great weight. However, I find myself on this rare occasion unable to agree with him. Mr. Sack

submitted that rather than examining private sector settlements broadly, I should consider those sectors which provide services akin to those supplied by UTFA's members: professional and technical services, management of companies and enterprises, educational services, health care and social assistance and public administration. These sectors achieved wage gains in the 2009 fiscal year between a low of 3.9% and a high of 7.8%.

In my respectful opinion these groups and these statistics are not helpful.. Comparables are usually examined for two different reasons. One reason is to determine whether the equitable principle of equal pay for equal work is being followed. Ordinarily, persons living and working in the same general area performing the same work should receive more or less the same compensation. UTFA's members enjoy the highest average total compensation in the University sector. Any award I make will continue their position at the "top of the market". How the equal pay for equal work principle applies to these other groups is impossible to determine because there is no evidence of what the average earnings in these other sectors are or how these sectors actually compare to a university setting which is research intensive.

Another use of comparables is to determine a wage increase in any particular year. Mr. Sack submits that if a firefighter or police officer in City X received a 3% increase, a firefighter in city Y should receive the same increase; so too in the university sector. What this analysis omits is that this approach only applies if the firefighter in City Y had a historical relationship of approximate parity with either the firefighter or the police officer in City X. UTFA is at the top of the market. It has never been in a position of approximate parity with other universities. Its

position at the top of the market will not be disturbed with an increase less than that achieved at other universities where faculty are likely seeking catch-up increases with UTFA. UTFA is driven to argue that its relative position at the top of the market must continue with no change. There is no arbitral authority for this proposition of which I am aware. Moreover, such a principle would stultify bargaining. Indeed, UTFA would be hostage to the bargains of its colleagues at other institutions. As opposed to being an important factor in wage determination, these results would be controlling. Moreover, in the context of the U of T which is “at the top of the market” being chased by the rest of the sector, the inevitable result would be “whipsawing”.

University Comparable

For each of 2009-2010 and 2010-2011, these are in the 3%-4% range with an average of 3.5%. These increases were negotiated both before and after the onset of the “recession” Historically, the parties have considered these comparable and they are an important factor.

However, as I have noted, one should recognize that those comparable are “chasing” the sector leader, which is the U of T. “Catch-up” arguments are available to them. Were it necessary to award 3.5% to keep UTFA at the “top of the market”, I would do so, notwithstanding such a level of increase considerably exceeds what the public, on average, is achieving in wage increases. Arbitrator Shime indicated in *McMaster*, supra, that the equal pay for equal work principle would trump the principle that the community should not subsidize the public sector. By analogy, the same approach would apply to “top of the market”. As I have said, that is not this case.

Taking all of the above factors into account, I have concluded that the following increases to the ATB for 2009-2010 and 2010-2011 should be awarded:

Commencing July 1, 2009, 1.25% or the following flat dollar increase if its value is greater than 1.25%:

- an increase to the annualized salary for tenured/tenure stream professoriate of \$1,720;
- an increase to the annualized salary for teaching stream faculty of \$1,215 ;
- an increase to the annualized salary for Librarians of \$1,143

Commencing January 1, 2010, 1.00% not compounded or the following flat dollar increase if its value is greater than 1%:

- an increase to the annualized salary for tenured/tenure stream professoriate of \$1,376;
- an increase to the annualized salary for teaching stream faculty of \$972.
- an increase to the annualized salary for Librarians of \$914.

Commencing July 1, 2010, 1.25% or the following flat dollar increase if its value is greater than 1.25%:

- an increase to the annualized salary for tenured/tenure stream professoriate of \$1,791;
- an increase to the annualized salary for teaching stream faculty of \$1,265;
- an increase to the annualized salary for Librarians of \$1,190

Commencing January 1, 2011, 1.00% not compounded or the following flat dollar increase if its value is greater than 1%:

- an increase to the annualized salary for tenured/tenure stream professoriate of \$1,433;
- an increase to the annualized salary for teaching stream faculty of \$1,012;
- an increase to the annualized salary for Librarians of \$952

The formula for the flat dollar increases is complicated, so I shall remain seized should

there be any errors or difficulties in the way I have expressed it or in its implementation.

With the other improvements, I am awarding the overall total compensation for the two years is over 5%. This is more than sufficient for CPI protection and somewhat above the average of overall increases in the public and private sectors. Recognition of comparable university settlements requires some upward adjustment. This award leaves the faculty “top of the market”.

The usual PTR will be awarded for July 1, 2010.

All of these amounts are fully retroactive. I turn to the Pension issues.

Pension

The University sought a substantial increase in member contributions based on the pension plan’s deficit and because at some comparable universities, pension plan contributions are higher.

Although this demand is framed within the pension context, it is, in reality, an attempt to reduce total compensation. I am not satisfied that a reduction in total compensation is warranted. Rather, I have found that an increase is appropriate. To take away with the left hand what was given with the right seems inconsistent.

Pension Augmentation

UTFA argued strenuously for augmentation. Although the University framed its opposing argument as one of principle, I do not view it that way. The relevant CPI increases for purposes of augmentation were very low. There is no pressing need at this point for any augmentation. There is no reason why augmentation cannot be achieved in subsequent rounds. There is no doubt that the pension plan is in difficulties. Adding to the liabilities of the plan without guaranteeing the funding for the additional liability is not wise at this time. This demand is dismissed.

PERA

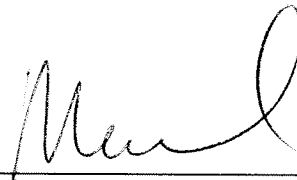
UTFA sought increases. I find that an increase to \$1,500.00 per annum for all UTFA members is appropriate. A further increase for Pre-Tenure and Pre-Promotion Teaching Stream Faculty to \$1,750.00 is also awarded. This applies to all Pre-promotion Teaching Stream Faculty whether or not they are working on 3-year contracts. However, they must be in the pre-promotion stream. This shall be applied retroactively.

Per Course Stipend and Overload Rate

These rates should be increased to \$15,000.00 for 2009-2010 and \$15,340.00 for 2010-2011. This shall be applied retroactively.

Pending implementation of this award I remain seized.

DATED the 5th day of October, 2010

A handwritten signature in black ink, appearing to read 'Martin Teplitsky', written in a cursive style.

MARTIN TEPLITSKY, Q.C.
Mediator/Arbitrator