

REPORT

IN THE MATTER OF AN INDUSTRIAL INQUIRY COMMISSION

PURSUANT TO SECTION 37 OF THE *LABOUR RELATIONS ACT, 1995*

and

IN THE MATTER OF THE NEGOTIATION OF NEW COLLECTIVE AGREEMENTS

TO REPLACE THE ONES THAT EXPIRED ON AUGUST 31, 2017

BETWEEN:

CUPE, LOCAL 3903, Units 1, 2 & 3

and

York University

Before: William Kaplan
Industrial Inquiry Commissioner

Appearances

For York University: Simon Mortimer
Hicks Morley
Barristers & Solicitors

For CUPE: Rick Blair
Ryder Wright Blair & Holmes
Barristers & Solicitors

The matters in dispute proceeded to a facilitation on April 15, 17 & 20, 2018 and to the Commission of Inquiry on April 23, 2018.

Introduction

On April 13, 2018, the Hon. Kevin Flynn, Minister of Labour, appointed me as the sole member of an Industrial Inquiry Commission pursuant to section 37 of the *Labour Relations Act, 1995*:

In order to facilitate the making of new collective agreements between York University and each of the three units represented by CUPE 3903, I hereby establish an Industrial Inquiry Commission and I appoint WILLIAM KAPLAN to be the Commission's sole member, pursuant to section 37 of the LRA. The Commission shall inquire into the current dispute involving CUPE Local 3903 Units 1, 2 and 3 and the employer, York University. Following its inquiry, the Commission shall report to the Minister of Labour on any issues in dispute, and what if any, steps could then be taken to address them. The report will be shared with the Minister of Advanced Education and Skills Development or designate. The Commission shall report in 21 days after this order comes into effect. However, if it is deemed necessary, the Commission may request an extension of time to report of up to 7 additional days.

It should be noted that after the order establishing the Commission was announced, I received numerous unsolicited communications from persons affected by and interested in the dispute – CUPE members, York University Faculty Association members, retired professors, undergraduate and graduate students, parents and members of the public. While these communications were, largely, acknowledged, and the volume was considerable, I decided given the short time-frame, and the evident urgency of inquiring into and reporting to the Minister, to focus my attention on the submissions of the parties.

Background to the Dispute

CUPE, Local 3903 (hereafter “the union” or “Local 3903”) represents graduate student teaching assistants (Unit 1), contract faculty (Unit 2) and graduate assistants (Unit 3) employed at York University (hereafter “York”). Notice to bargain was given in June 2017. The parties exchanged proposals in October 2017. The union filed for conciliation on December 4, 2017. Beginning in

January 2018, the parties met in collective bargaining. In February 2018, the union applied for no board reports. They were issued for all three units on February 16, 2018. On March 2, 2018, the union held votes on the outstanding York offers. All three units voted to reject these offers. On March 5, 2018, Local 3903 commenced its legal strike. Later that month, the parties met with a Ministry of Labour mediator. In total, there were 26 negotiation/conciliation meetings before the strike began.

On March 27, 2018, York applied to the Minister of Labour to direct a last offer vote. That vote took place between April 6 & 9, 2018. All three units overwhelmingly rejected the employer's last offer and the strike continued. On April 13, 2018, I was appointed. Collective bargaining facilitation took place on April 15, 17 & 20, 2018. Other than the resolution of two outstanding issues, the parties remained completely deadlocked in their positions. It is fair to say, however, that it is job security for Unit 2 – the contract faculty – that presents the most significant barrier to settlement – if it were resolved it is likely that the other issues could be satisfactorily addressed in one forum or another. In that regard, there is no disagreement about the numerous outstanding issues: it is their resolution that divides the parties. Concluding that no further facilitation would be productive, the Commission part of the proceeding convened and concluded on April 23, 2018 (although intermittent and informal facilitation efforts continued after that date up to the actual submission of this Report). Both parties filed detailed written briefs and made submissions at the hearing held in Toronto.

Local 3903

In brief, it is Local 3903's submission that York signalled at the outset its desire for the current dispute to be resolved through interest arbitration rather than through free collective bargaining. York first made this interest arbitration proposal in August 2017 and has continued to repeat it throughout the fall, winter and, now, the spring of 2018. This desire to arbitrate, rather than bargain, was not new; rather it was part of an existing, and longstanding, pattern of refusing to meaningfully participate in collective bargaining. York was clearly, in the union's view, abdicating its responsibility to bargain in good faith to achieve a collective agreement by first requesting interest arbitration and, when that failed, it was relying on the Ontario Legislature to end the dispute through back-to-work legislation and mandatory interest arbitration.

This was, in Local 3903's view, particularly unfortunate as it was of the opinion that the only way to address the outstanding issues in dispute, in particular the Unit 2 job security concerns, was through actual negotiation between the parties. Indeed, in Local 3903's submission, the complicated Unit 2 job security proposals require detailed and nuanced discussion between the parties – discussions that necessarily engage institutional principles and fundamental academic goals, not to mention the needs of the union members as both educators and, in some cases, students. These matters, along with the other issues in dispute, were reviewed by the union and the point made that the only possible solution, in the union's estimation, was for the parties to return to the table and achieve a bargained outcome. Interest arbitration was a blunt instrument only to be used in the most extreme cases, and it was one, in any event, that was

particularly poorly suited to the resolution of a difficult and challenging problem – one requiring complex and creative solutions. The union requested a Commission recommendation to the Minister of Labour that the parties be directed, forthwith, to resume collective bargaining and that York be specifically directed to bargain with the union in good faith to reach freely negotiated collective agreements.

York

In York's submission, the current dispute was part of a pattern – a pattern of acrimony and labour disruptions that it experienced with none of its other bargaining units – a pattern that was unique to Local 3903, and a pattern that made interest arbitration the only possible method of resolving collective bargaining disputes with these three CUPE units. York reviewed the numerous and lengthy labour disruptions occasioned by Local 3903 strikes – and contrasted them with the peaceful resolution of bargaining disputes with all of its other unionized groups. It pointed to Local 3903's unique bargaining approach – there was no deal with any individual unit unless there was a deal with all three units – and its bargaining behaviour: as set out in its "bargaining parameters" providing for direct bargaining unit member participation under the rubric of "open bargaining" and "bargaining from below." This approach and behaviour, which York elaborated, was, in the university's view unhelpful – replete with its unflinching and unrealistic demands, so-called "red lines," refusal to accept "concessions," (as characterized by the union), and personal attacks through social media and otherwise. It was this approach and behaviour that actually precluded meaningful dialogue that could lead to problem solving and, ultimately, to freely negotiated collective agreements. It was noteworthy to York, and telling,

that the very few management proposals were summarily dismissed without even the pretence of perfunctory discussion.

In all of the circumstances, it was hardly surprising, in York's view, that the parties could not reach a freely bargained collective agreement. In fact, it was hardly surprising that York – to avoid yet another strike – and the inevitable and all too familiar serious disruption to students and the entire academic community – initially offered, and continues to advocate for, interest arbitration as the mechanism to resolve the dispute. The only freely negotiated deal that could be achieved at the bargaining table, in York's submission, was one where all, or almost all, of the union's demands were granted. That was not free collective bargaining and that, in York's submission, considering the content of the outstanding union proposals, would be completely contrary to its academic values and to the mission and objectives of the university. What free collective bargaining should achieve are normative settlements – settlements that bore a relationship to sectoral outcomes that were the result of free collective bargaining. There was nothing about the outstanding union proposals that fit within this matrix. The only possible conclusion, York argued, was that the parties were irretrievably at odds and that resolution can only be achieved through binding interest arbitration. York asked me to recommend this to the Minister.

Discussion

In Ontario, 98 per cent of all collective bargaining negotiations result in freely negotiated collective agreements. By any measure, this reflects an excellent and effective labour relations

system. However, these parties – Local 3903 and York – have a different history. They have an established pattern of labour disputes with lengthy strikes. The current strike is the fourth by Local 3903 in the last seven rounds of negotiations.

Collective bargaining is well entrenched at York. There are collective agreements with:

1. York University Faculty Association
2. Osgoode Hall Faculty Association
3. OPSEU Local 578
4. CUPE, Local 3903, Unit 4 (Librarians)
5. York University Staff Association
6. IUOE
7. CUPE, Local 1356
8. CUPE, Local 1356-1
9. CUPE, Local 1356-2

However, other than the labour disputes with Local 3903, in the last twenty-one years there has only been one other strike, by faculty in 1997. Stated somewhat differently, over the last two decades, i.e., since 1998, York has negotiated 79 collective agreements, and the only labour disputes – meaning strikes – involve Local 3903.

While there are numerous outstanding matters that have led to the standoff, the key issues revolve around Unit 2 and its job security demands. It is most particularly, but not exclusively, in these demands that one sees the clash of values. Indeed, it is fair to say one sees the almost

complete absence of any shared core values, academic or otherwise, for example in qualifications required for contract postings and, especially, in tenure stream recruitment: negotiated minimums of Unit 2 contract faculty conversions (CUPE) versus open search (York), to name just two. It is this clash that makes it impossible for the parties to freely negotiate a collective agreement.

This conclusion is established and reinforced by a review of the bargaining history between this employer and this union. The parties need to meaningfully address issues relating to contract faculty but they cannot do so because they fundamentally disagree on underlying principles. They have completely different world views that are informed by completely different academic and institutional aspirations. This delta precludes meaningful collective bargaining.

The other outstanding union proposals, while complicated and contentious, are ultimately more amenable to settlement in collective bargaining, or before the OLRB, but not in a bargaining regime where the three units – with separate membership and clearly distinct bargaining objectives (with limited pan-unit exceptions of no real factual significance) – have agreed that there is no resolution with one unless there is resolution with them all. No comment need be made about the union's bargaining parameters and culture other than to say that it is not normative. From an experienced perspective it is easy to understand how it might not enhance collective bargaining, however laudable the values – democracy, transparency, social justice, to list three – that are said to inspire and inform it, at least in part. Given its track record in successfully negotiating collective agreements, the union might usefully reconsider its

general approach. “Open bargaining” “bargaining from below,” and no deal with one unit unless there is a deal with them all, appears to be a recipe for one thing: position polarization and a succession of lengthy labour disputes.

Findings and Recommendations

In my view, the parties have reached an impasse and there is no reason to believe that they will be able to resolve their dispute through free collective bargaining. Their history indicates otherwise. The issues in dispute, in particular those relating to Unit 2, are not amenable, absent complete position reversal by one side or the other, to resolution. It is true that York requested arbitration at the outset. The union asserts that doing so evidences York’s initial and continuing refusal to meaningfully engage at the bargaining table. However, this is not a conclusion that I share. I can only conclude that York accurately assessed the likelihood of a negotiated outcome and to avoid another long strike suggested interest arbitration.

Given the events leading up to and following the strike, one has to conclude that York’s assessment was correct. It is most unlikely that this dispute will be resolved through negotiations. More than two dozen meetings between the parties achieved little of significance. Conciliation with the assistance of the most experienced and universally respected mediator from the Ministry did not resolve it. The final offer vote did not resolve it. Interest arbitration, as agreed to by the parties, or imposed by the Legislature, is the only possible outcome for ending this dispute. The unsuccessful facilitation efforts in this Industrial Inquiry Commission process buttress this conclusion.

Post-secondary faculty contract employment is complex, multi-faceted and often precarious. These issues are not unique to these parties. They arise across the province, although their magnitude varies. They would, in my view, benefit from careful, informed and principled study and review. Accordingly, I further recommend to the Minister that the government establish a task force on precarity in post-secondary education employment along the lines of the *Changing Workplaces Review*. Consideration might be given, following extensive and appropriate consultation with stakeholders – and taking into account appropriate public policy norms, including the stated legislative intention that parties resolve their disputes through free collective bargaining – to other means of dispute resolution in this sector such as the Education Relations Commission model given the wider interests that are self-evidently engaged.

Conclusion

As Local 3903 observed – correctly in my view – in social media, “Arbitration should only be considered when attempts at bargaining have failed.” The union has indicated that interest arbitration may be a viable method of resolving collective bargaining impasses, but it is a “last resort.” Free collective bargaining has failed. There is no reason to believe that it will succeed in the future through the prolongation of the labour dispute, and every reason to conclude that it will not. It is, accordingly, my primary and most time sensitive recommendation to the Minister that he call upon the parties to enter into consensual interest arbitration: for their own good, and for the good of thousands of students and the university. York University has indicated its willingness to do so. Failing consensual interest arbitration, and assuming the continuation of

this dispute, legislative intervention imposing interest arbitration will almost certainly be necessary.

All of which is respectfully submitted.

DATED at Toronto this 4th day of May 2018.

“William Kaplan”

Industrial Disputes Inquiry Commissioner