IN THE MATTER OF AN ARBITRATION
Pursuant to the *Hospital Labour Disputes Arbitration Act*:

Between:

Saint Elizabeth Health Care at The Hillcrest Reactivation Centre

(The "Employer")

-and-

Canadian Union of Public Employees, Local 5439

(The "Union")

Board of Arbitration:

Brian Sheehan - Chair
Irv Kleiner - Employer Nominee
Joe Herbert - Union Nominee

Award

Appearances:

For the Employer: André Nowakowski

For the Union: Jonah Gindin

Zoom Hearings held on March 5, April 17 and 22, 2021
Executive Session July 2

This matter concerns an interest arbitration proceeding pursuant to the provisions of the Hospital Labour Disputes Arbitration Act (HLDAA) regarding a first collective agreement between the Employer and the Union.

The Relevant Factual Background

The Hillcrest Reactivation Centre (Hillcrest) is a standalone site of the University Health Network (UHN). The Employer is a not-for-profit home care and community service provider. As of 2017, the Employer entered into a contractual relationship with UHN through a purchaser supplier agreement for the provision of care at Hillcrest for the reactivation and reconditioning of individuals who are generally at risk of becoming in need of Alternative Level Care (ALC). The overall goal of the enterprise is to endeavour to allow for individuals to be discharged to a community setting.

The Union was certified as the bargaining agent for staff of the Employer at Hillcrest on June 20, 2019. Currently there are 94 employees in the bargaining unit. The majority of those employees are Personal Support Workers (PSWs) and Registered Practical Nurses (RPNS). There is a small complement of Physiotherapists, Activity Aides, Nutrition Aides, Occupational Therapists and Companions.

The Union gave notice to bargain on June 21, 2019. Commencing in October 2019, the parties met several times to bargain, and also met with a Conciliation Officer in May 2020. The parties were able to reach an agreement on several provisions but

were unable to conclude with a collective agreement. On May 29, 2020, the parties were notified that the matter was referred to arbitration under HLDAA.

The hearing proceeded on a bifurcated basis as the parties agreed to initially address the issue as to the appropriate comparator. In particular, the Employer asserted that the appropriate comparators are employers who provide community services pursuant to the Home Care and Community Services Act ("HCCSA") such as other reintegration care unit/short-term transitional care providers. The Union asserted that the appropriate comparators are rehabilitation hospitals and, in particular, the "central" hospital collective agreements including the agreements that the UHN has with bargaining agents representing similar employees as those employed by the Employer. By a decision dated March 22, 2021, the Board, with Mr. Kleiner dissenting, determined that the position of the Union should prevail with respect to the appropriate comparators.

The parties were directed to take part in further bargaining in the hopes of narrowing the issues in dispute. Unfortunately, those hopes were not realized as the parties made little headway in negotiations subsequent to the issuance of the Interim Award. Accordingly, there remains a plethora of outstanding issues.

The Replication Principle – The Overall Themes of the Parties' Submissions.

The fundamental task of this Board is to take into account the legislative criteria set out at Section 9(1.1) of HLDAA, to endeavour to replicate the terms of the collective agreement that the parties would otherwise have reached through collective bargaining. In Participating Homes and Ontario Nurses' Association, 2015 CanLII 23805 (ON LA) (Davie), the Board chaired by Arbitrator Louisa Davie captured the essence of the principle of replication in the following terms:

> Replication is one of the primary principles of interest arbitration and one which we have considered. The replication principle stands for the proposition that since interest arbitration is a substitute for free collective bargaining the award of an interest board of arbitration should replicate, as best it can, the agreement the parties would have made if they had recourse to the economic sanctions of strike/lockout which are available in free collective bargaining. It has often been said that replication is not an exact science. Some arbitrators have also suggested that the notion of replication is somewhat artificial in an environment where free market pressures do not apply, and where comparisons are inevitably made to other employees whose terms and conditions of employment were also established through interest arbitration. Nevertheless the replication principle does require us to examine and weigh objective criteria such as those set out in the Hospital Labour Disputes Arbitration Act and includes market forces and the economic realities which parties must consider when engaged in free collective bargaining. Replication focuses on objective standards rather than notions of "fairness" or "what is just" as these concepts are often too subjective and ambiguous.
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> (Emphasis Added)

For the Union, a review of the relevant awards and voluntary settlements suggests that in the hospital sector, the principle of replication inexorably leads to

collective agreement results that are in accord with the centralized bargaining processes that dominate the sector. In particular, it was asserted that even in the context of first collective agreements relating to CUPE bargaining units, the objective evidence affirms that aside from very minor variances, whether by way of an arbitrated award or voluntary settlement, the result reached is the adoption of the CUPE central hospital collective agreement. That is, first agreements for CUPE in the hospital sector reflect a consistent pattern of the acceptance of the standardized norms of the CUPE central hospital agreement, whether by way of that being the result of an award or through voluntary settlements.

Mr. Gindin further argued, on behalf of the Union, that in the case at hand, the notion that the demands of the union should be mitigated by "first agreement principles" is particularly not applicable, given that first collective agreements involving UHN and CUPE bargaining units have consistently resulted in voluntary settlements and/or arbitrated awards providing for the adoption of the CUPE central hospital agreement. Further to this point, reference was made to the award of Russell Goodfellow in University Health Network Women's Own Withdrawal Management Centre and CUPE Local 5001-02 (2012) 111 C.L.A.S 168 (Goodfellow) wherein the terms of the CUPE central collective agreement were awarded without any application of "first agreement principles".

The Employer asserted that notwithstanding the conclusion reached in the Interim Award regarding the appropriate comparator, in terms of the principle of

replication, the parties' bargaining would have, undoubtedly, been significantly impacted by the reality that UHN does not receive hospital sector funding with respect to the services provided at Hillcrest. It was opined that the Union, realistically, would not have had the expectation to achieve hospital collective bargaining norms when the operations at Hillcrest only receive community care services sector funding under the HCCSA. Mr. Nowakowski further asserted, on behalf of the Employer, that if the parties were engaged in free collective bargaining, the Employer would never agree to terms and conditions of employment, including rates of pay, that bear no relation to the compensation received by the Employer pursuant to the Services Agreement between the Employer and UHN with respect to the operations at Hillcrest.

The Employer further asserted that it is imperative that the Board give due consideration to the "first agreement principles" that have traditionally been applied by arbitrators in Ontario. Specifically, it was argued that it has been steadfastly maintained that with respect to the first collective agreement, an arbitrated award should not result in a union: (1) achieving terms that are reflective of a mature bargaining relationship; (2) automatically achieving the full scope of a "master" or "standard industry agreement"; and (3) realizing dramatic breakthroughs in either collective agreement language or "catch up" rates of pay.

Mr. Nowakowski further submitted that it is important to not lose sight of the fact that the Employer employs the members of the bargaining unit, not UHN. Related to this point, it was submitted that it is imperative to recognize that this is not a contracting out

of hospital work to the Employer. Accordingly, this is not a scenario of Article 10.02 of the CUPE collective agreement wherein the hospital must ensure that the contractor accepts terms and conditions of employment that are similar to those that exist under the CUPE central collective agreement. In this regard, it was suggested that the bulk of the authorities and the voluntary settlements referenced by the Union can be distinguished on the basis that the results reached in those cases were directly related to the application of Article 10.02 of the CUPE central agreement.

The Employer further asserted that this Board in its assessment of the respective proposals of the parties should give due consideration to the well accepted "total compensation" analytic framework. That is, the proposals being advanced by the Union should be assessed in light of the total cost, both those of a direct and indirect nature, that would be borne out by the Employer if the proposals were to be awarded.

Related to the above, it was submitted that the Board should also pay heed to the Application of Protecting a Sustainable Public Sector for Future Generations Act, 2019 ("Bill 124"). While acknowledging that the Employer is not a hospital and as such, Bill 124 does not directly apply to the parties' collective bargaining, it is noted that the Interim Award decision regarding the appropriate comparator deemed Hillcrest to be a hospital. Specifically, it was submitted that since Hillcrest was found to be a hospital, that from purposive point of view, the ongoing operations at that hospital should be deemed as caught by Bill 124. Further to this point, it was submitted that the Union in its submissions throughout this proceeding have adopted a "Jekyll and Hyde" approach

regarding its characterization of the Employer and the operations at Hillcrest. Specifically, the Union wants to “have its cake and eat it too" by asserting that for replication purposes, the Employer should be treated as a hospital; yet the Union vehemently rejects the claim that the Employer should be treated as such for the purposes of Bill 124.

Mr. Nowakowski further asserted that even if Bill 124 is deemed not to be directly applicable to these parties in their bargaining, this Board, as other Interest Arbitration Boards have done in the past, should give considerable weight to a governmental policy directive implementing compensation restrictions and limitations in the hospital sector. In support of this point, reliance was placed upon the decision in the Participating Nursing Homes and Service Employees International Union Local 1, Canada (September 27, 2012) unreported (Teplitsky).

While not necessarily proceeding with a formal "inability to pay" argument based on financial statements, the Employer advanced a "modified ability to pay" argument. In support of the Employer’s assertion that it would not be in a position to pay for wage increases in excess of 1% annually, reference was made to the following: (1) the Employer's not-for-profit status; (2) the terms of the Services Agreement between the Employer and UHN; (3) that UHN only receives community service sector funding with respect to the operations at Hillcrest; (4) Bill 124 and its implications; and (5) the uncertain financial situation existing in Ontario— in particular, the existing massive debt obligations of the provincial government. It was further claimed that awarding

compensation above the 1% threshold could lead to such drastic results as the UHN terminating its service contract with the Employer— or going a step further— the Ministry of Health and Long-Term Care potentially closing Hillcrest as a reactivation centre.

Additionally, the Employer submitted that this Board should consider the uniformly accepted interest arbitration principle of "demonstrated need". Specifically, it was opined that arbitrators have traditionally adopted the perspective that the status quo should prevail unless the party seeking a change to the collective agreement can demonstrate a need for the change sought.

Decision

Upon carefully reviewing the thorough submissions of the parties and the legislative criteria set out at Section 9(1.1) of HLDAA, the Board's reasoning is as follows:

An Overview of the Application of the Principle of Replication

Certain aspects of the parties' submissions regarding replication gave cause to revisit the appropriate comparator arguments dealt with in the Interim Award. In particular, the arguments of the Employer focusing on the weight to be given to the contractual nature of its relationship with UHN, and the nature of the funding operations for the operations at Hillcrest, were not far removed from its appropriate comparator

submissions. Moreover, it could be suggested those arguments were aligned with the replication analysis that focuses on the employer's status as a contractor, which drove the reasoning in Aramark (Elizabeth Bruyere Health Centre) and CUPE Local 4266 (December 20, 2001) (Foisy). As outlined by the following excerpt from the Interim Award, such analysis has ceased to carry the day in terms of hospital sector collective bargaining in Ontario:

> In connection to this point, since 2005, the jurisprudence pertaining to interest arbitration in Ontario has entrenched the principle that with respect to a contracting out of services in the hospital sector, the appropriate comparators for replication purposes are relevant collective agreements of the hospital pertaining to employee groups performing the same type of work. In particular, reference is made to the seminal decision of Arbitrator Burkett in Aramark Canada Facility Services Limited and Service Employees International Union, Local 1 (May 5, 2005) unreported (Burkett). In commenting upon a prior decision of Arbitrator Foisy, involving a contracting out scenario in the hospital sector, Arbitrator Burkett observed:
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> > Arbitrator Foisy in *re: Aramark (Elizabeth Bruyere Health Centre) and CUPE Local 4266 (December 20, 2001),* in contrast to arbitrator Kaplan, relied upon collective agreements to which Aramark and its contractor competitors in the Ottawa area were party. He rejected the union plea to base his award upon the terms and conditions provided in the hospital sector for comparable work. In doing so, he was influenced by the prior collective bargaining between Aramark and the predecessor local trade union and; most importantly, he was influenced by what he saw as the purpose of contracting out, i.e. to lower costs, and the untenable economic position into which Aramark would have been put if it had agreed to hospital rates. In arbitrator Foisy's opinion, Aramark would have priced itself out of business and, therefore, would never have agreed to hospital terms and conditions in free collective bargaining.
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> > We reject arbitrator Foisy's analysis. Firstly, the Mitchnick contracting out language that appears in both the S.E.I.U. and the

> CUPE central hospital agreements establishes the parameters within which contracting out is to occur in the hospital sector. The fundamental parameter thus established is that contracting out is not an acceptable device to reduce wage and ongoing benefit costs.

Turning directly to the issue of replication, there can be little doubt that objectively the central hospital collective agreements that dominate the sector constitute the normative backdrop for collective bargaining and interest arbitration, whether the particular employer be a hospital, or a contractor utilized by a hospital. As Arbitrator Burkett noted in Toronto General Hospital and Canadian Union of Public Employees, Local 2001 (May 30,1986) unreported (Burkett):

> The initial task facing the Board in considering the 'central' issues that remain in dispute is to develop a framework for an assessment of the merits. These parties are free to negotiate their own collective agreement apart and distinct from the centrally negotiated collective agreements. However, the agreement that is negotiated will be a hospital sector collective agreement covering the same types of employees who are covered by the centrally negotiated collective agreements. The terms of the centrally negotiated collective agreements cover the majority of hospital support staff employees in this province, and, therefore, establish the norm. Notwithstanding the decision of an individual hospital and local union to negotiate separately, therefore, the centrally negotiated collective agreements must directly influence their negotiations....
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> However, where there exists a prevailing set of terms and conditions of employment covering the same type of employees in the same sector, as embodied in the centrally negotiated collective agreements, the onus must be upon the party to the individual negotiations seeking to depart from the norm to justify the departure.
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> (Emphasis Added)

As to the argument raised by the Employer that the settlements and awards relied upon by the Union can be distinguished due to the impact of the contracting out provision (Article 10.02) of the CUPE central hospital collective agreement, the existence of that provision is relevant in the case at hand but not necessarily in the way suggested by the Employer. As Arbitrator Burkett in the above-cited excerpt from Aramark Canada Facility Services Limited, *supra,* affirmed, the introduction of that contracting out language, as well as similar language in the SEIU central hospital collective agreement, represented a "sea change" for hospital sector collective bargaining. That is, the key point of analysis is not necessarily whether a particular case is an "Article 10.02 case", but that the existence of such provisions in the central hospital agreements fundamentally altered the dynamics of collective bargaining for contractors in the hospital sector—as contracting out was now deemed generally as not an "acceptable device to reduce wage and benefit costs". Further to this point, in the following cases involving contractors, the key provisions of the CUPE central hospital agreement were awarded, especially in terms of wages and benefits, notwithstanding that Article 10.02 was not directly involved in the following cases: Elizabeth Bruyere and CUPE (2005) unreported (Goodfellow); Aramark and CUPE Local 4000 (September 18, 2006) unreported (Mikus); Aramark Canada Limited at the Ottawa Hospital and CUPE (January 15, 2004) unreported (Kaplan).

Related to the above point, this is not an Article 10.02 "rights" arbitration case whereby the relevant issue is whether UHN has violated a CUPE collective agreement

due to its contractual relationship with the Employer. This is an interest arbitration dispute addressing what shall be deemed the appropriate provisions of the collective agreement with respect to an entity operating in the hospital sector against the backdrop of the pervasiveness of the central collective bargaining regimes in that sector. Further to this point, the Employer did not cite a case in Ontario involving a contractor operating in the hospital sector wherein the terms of the collective agreement substantially diverged from the normative pattern set out in the relevant central hospital agreements.

As to the general applicability of "first agreement principles", there can be little doubt that if the relevant sector at issue was the long-term care sector, the Employer's argument would have, to a large extent, carried the day. The accepted rule in that sector is that absent extenuating circumstances, an awarded first collective agreement should not result in a union achieving ground-breaking improvements or terms associated with a mature bargaining relationship. This view was captured succinctly by Arbitrator Steinberg in ParaMed Home Health Care-Oshawa/Lindsay and Ontario Nurses' Association 2019 CanLII 68721 (ON LA) (Steinberg):

> Arbitrators have consistently held that major collective agreement breakthroughs in either contract language or in compensation cannot be expected in a first collective agreement. From a practical perspective, this generally means that first collective agreements rarely achieve the terms and conditions of employment found in mature bargaining relationships.

However, as was emphasized in the submissions of both parties, replication involves an objective assessment of the normative results that have been reached in the relevant sector. Accordingly, if there is a clear and distinct pattern concerning the impact of "first agreement principles" in that sector then, for replication purposes, that pattern should be given considerable weight.

With respect to the bargaining in the hospital sector the evidence, as represented by voluntary settlements and/or arbitrated awards, affirms that the application of "first agreement principles" has to a large extent been relatively muted. That is, there has been a general trend, especially where a hospital is the employer, for the adoption of the terms of the central hospital collective agreements that dominate the sector, irrespective of the fact that the parties are bargaining a first collective agreement. On this point, reference is made to the summary in the materials of the Union regarding the uniform acceptance of the key provisions of the CUPE central agreement by hospitals, whether or not they are a "Participating Hospital", in first collective agreement scenarios. Additionally, it is not lost that UHN in its bargaining with CUPE, in the context of a first collective agreement, has voluntarily adopted the terms, including the applicable wage rates, of the CUPE central hospital agreement. Additionally, reference is made to the decision in University Health Network Women's Own Withdrawal Management Centre, *supra*, wherein Arbitrator Goodfellow overwhelmingly adopted the CUPE central hospital agreement, even though the funding for the programs of the

Withdrawal Management Centre were not tied to "hospital funding" and were in the context of a first collective agreement.

The only "first agreement principles" case cited by the Employer involving the hospital sector in Ontario was the Haldimand War Memorial Hospital and Grand River Valley Health Care Employees Union (Christian Labour Association of Canada, Local 305) CanLII 63561 (ON LA) (Slotnick) award. CLAC has a very limited presence in the hospital sector and indisputably does not set the pattern for bargaining in the sector. Moreover, even in that case, Arbitrator Slotnick, noting the large gap between the existing rates of pay and the OPSEU comparator rates, closed the gap halfway.

In summation, with respect to the applicability of “first agreement principles”, while it is accepted that the concept is relevant in the case at hand, it does not definitively resonate as loudly as it would otherwise, given the normative trend with respect to CUPE bargaining units in the hospital sector.

As to the Employer's Bill 124 argument, indisputably, that Act has no direct application to these parties' collective bargaining. As the Employer repeatedly emphasized, it is not a hospital; and as such, it is not caught under the purview of the Act. Yet, the frustration for the Employer with respect to the non-applicability of Bill 124 is entirely understandable. For the appropriate comparator and replication purposes, the Union has vehemently asserted that the Employer should be treated as a rehabilitation hospital. Yet, the Union, at the same time, has also asserted that for the purposes of Bill

124, the Employer is not a hospital. That point noted, if it was the intent of the Legislature to include contractors operating in the hospital sector under Bill 124, it, obviously, could have easily done so. Additionally, Bill 124, in all likelihood, will have a bearing going forward on the collective bargaining between these parties. That is, the compensation "modification period" under that Act will become applicable to the CUPE central hospital agreement upon the renewal of the current central collective agreement. Accordingly, for replication purposes, it would be the expectation that future bargaining between the parties will likely be impacted by the application of the "modification period" to the CUPE central hospital agreement.

The above analysis regarding the application of the Act to a large extent addresses the Employer's Bill 124 argument. However, consideration also has to be given to the Employer's supplemental assertion that the general governmental policy directive that Bill 124 represents, in terms of seeking to regulate compensation increases in the broader public sector, should be given considerable weight. On this point, reliance was placed on the decision in The Participating Nursing Homes and Service Employees International Union Local 1 Canada, *supra,* case. While it is acknowledged that Arbitrator Teplitsky did give consideration to a provincial government policy directive for 0% total compensation increases, it could be suggested that the key factor driving the result in that case was a private sector settlement involving SEIU and the Red Cross which provided for 0% increases. Generally, with respect to the issue of the weight that an interest arbitration board should give to governmental policy

directives that do not provide for legislated mandated results, the following analysis of Arbitrator Burkett in Participating Hospitals and Service Employees International Union (November 5, 2010) unreported (Burkett) is relevant:

> If we were to be governed by these government pronouncements, absent legislative confirmation, the effect here would be to put these employees at a significant disadvantage relative to their CUPE counterparts doing the same work in the same jurisdiction at the same time when their compensation increases had been identical since 1989. Clearly, this would be an inequitable result that would undermine employee morale and complicate future bargaining. It is for this reason that we adopt the reasoning and conclusion of arbitrator MacDowell, as pertaining to the weight to be given to these government pronouncements in an interest arbitration under the HLDAA. In *re: Sunnybrook Health Sciences Centre and Service Employees (August 19, 2010) unreported*, arbitrator MacDowell was called upon to adjudicate a collective bargaining dispute precipitated, as this one has been, by the decision of the employer hospital to recalibrate its bargaining position by withdrawing a compensation offer already made on the basis of the same Bill 16 related pronouncements. In refusing to give much weight to mere government pronouncements that lack legislative confirmation, arbitrator MacDowell reasoned as follows:
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> > To be clear: we are not unmindful of the quandary in which the Hospital finds itself — believing, as it may, that it is required to adhere to the Government Budget Statement as it understands it and may face criticism if it proposes or agrees to anything other than the "freeze" that seems to apply (now) to non-union workers (we do not know whether *they* got increases in 2008 or 2009 or 2010). However, this Board has no such constraint. Rather, the recent Government Statement is but one factor among many that we may consider; and in the circumstances of this case, we are not inclined to give it much weight, in light of the more persuasive collective bargaining criteria and the specific factors that we are obliged to consider under the *HLDAA*, in respect of this particular collective agreement.
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> > ….
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> Reference may also usefully be had to the award of arbitrator Jesin in *re: Participating Nursing Homes and SEIU (September 15, 2010)*, a

> pattern setting interest award as distinct from this award which is pattern following. Arbitrator Jesin disregarded the provincial government's Bill 16 related intention to withhold funding in fashioning what he considered to be a fair and equitable award based on the factors he was required under the statute to consider.
> We have pointed out that for many years the compensation increases for these employees have been in lockstep with those for the CUPE represented Participating Hospitals' employees. The Participating Hospitals here acknowledge that absent Bill 16 and the intended funding restrictions, they would have sought, and indeed did seek, to maintain the historical pattern as set by the August 2009 CUPE settlement. The task before us then is to decide what weight to give to the intended funding restrictions in light of the longstanding pattern.
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> While there is no doubt that this province has fallen upon difficult economic times, we must consider the full range of relevant economic indicators as they impact upon collectively bargained terms and conditions of employment. Government pronouncements of intent with respect to future funding are not, in and of themselves, sufficient to override what would otherwise be the content of an arbitrated award. A legislated directive would be required for this to happen. Indeed, if an interest arbitrator was to allow government expressions of intent with respect to funding, even in difficult economic times, to determine the content of an award, the effect would be to resurrect the ghost at the bargaining table long ago laid to rest and to thereby strip Section 9(1) of the HLDAA of all meaning.

With respect to the Employer's "modified ability to pay" argument, a straightforward rebuttal to that argument is that it is not an "inability to pay" argument as contemplated under the provisions of HLDAA. The Employer did not submit financial documentation in support of an argument that it would not be able to bear the increased compensation consequences associated with this Award. However, the potentially significant impact of an award that provides for terms aligned with the central hospital agreement, in terms of the operations of the Employer at Hillcrest, is recognized and has been duly considered. Specifically, the concern regarding the impact upon the

Employer given the apparent level of remuneration it currently receives from UHN under the existing Services Agreement is, at one level, understandable. The impact on the Employer, however, cannot be definitively determined since the Services Agreement provides that at a minimum, the “services prices” will be reviewed by the contracting parties on an annual basis, and consideration will be given to “any changes in external factors/assumptions…”. Moreover, with respect to this point, neither UHN nor the Employer could suggest, given the potential impact of unionization, that consideration ought not to be given to the impact of the centralized collective bargaining process that dominates the hospital sector.

Finally, as to the Employer’s "demonstrated need" argument, it is not accepted that the Union is necessarily obligated, on a provision-by-provision basis, to establish the need for a particular provision if a review of the relevant comparators establishes the provision in question is normative in nature. With respect to this point, reference is made to the following reasoning of Arbitrator Anderson in Honeywell Limited and Unifor Local 636 2016 CanLII 17001 (ON LA):

> I also do not agree with Honeywell’s suggestion that a demonstrated need must be independently shown for each particular proposal. This misconceives the role of demonstrated need in interest arbitration. The expired collective agreement and comparator collective agreements serve to establish a normative expectation as to the terms of the renewal collective agreement. The relevance of comparator collective agreements is in part that they reflect labour market conditions. In that sense, they “demonstrate a need” to award comparable terms. That normative expectation is subject to modification by a variety of other factors. One of those factors is demonstrated need: either party may

> seek a departure from the normative expectation on the basis of some other “demonstrated need”.
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> (Emphasis Added)

Moreover, the existing wide disparity in the existing terms and conditions of employment currently applicable to members of the bargaining unit in comparison to the terms and conditions of similarly situated employees in the hospital sector, especially in terms of wages and benefits, arguably provides a complete answer to the "demonstrated need" argument.

Acknowledging the above point, "demonstrated need" is not necessarily totally irrelevant in the case at hand. The Employer is not the UHN. Accordingly, in my view, attention has to be given to the appropriateness of awarding certain provisions of the CUPE central hospital agreement, especially during this round of bargaining, given the relatively small size of the bargaining unit, and that it is a standalone bargaining unit. The Employer’s argument that UHN has the ability to unilaterally terminate the Services Agreement by giving three months’ notice has also been taken into consideration.

An Award that the Board has found to be particularly compelling is the decision of Arbitrator Mikus in Aramark Canada Ltd, *supra.* Similar to the case at hand, the facts of that case involved a first collective agreement with respect to a contractor in the hospital sector whereby the comparator was the CUPE central hospital agreement. Mindful of the fact that it was the first collective agreement, and the potential impact of the substantial wage and benefit enhancements being awarded, Arbitrator Mikus suggested

the focus of the Award should be on wage and benefit improvements with such enhancements being rendered applicable later in the term of the collective agreement. In particular, referencing the decisions in Aramark Canada Facility Services Limited, *supra*; Elizabeth Bruyere, *supra*; Aramark Canada Limited at the Ottawa Hospital, *supra,* Arbitrator Mikus noted:

> Each of arbitrator's Kaplan, Burkett and Goodfellow remarked that the transition to hospital sector terms and conditions of employment will not occur overnight. As in the other decisions, the move here to hospital sector terms and conditions of employment will be staged.
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> ….
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> We are mindful of the fact this is a first collective agreement…… It is our intention to stage the increases towards the end of the term of the collective agreement and like the Kaplan board focus on the wage and benefit issues. We are also aware of the Union's desire to have this collective agreement coincide with as much as possible with the Hospital Central Agreement. While we agree in principle with that proposition, in some circumstances we do not feel the full context of the Hospital Agreement is necessary or applicable. In this agreement is to leave the parties with the collective agreement that contains most of the "basics" (wages, health and welfare/pension benefits, premiums by the end of the four-year term…… Other benefits, including "upper-level" vacations and benefits for retirees for example, are left to the parties future bargaining"

This Board has generally adopted the above perspective.

The Awarded Provisions

The term of the agreement shall be from June 21, 2019, to June 20, 2021.

Any reference to “Hospital” in an awarded Union proposal should be replaced with the term “Employer”. Any proposal of either party not expressly referenced has been denied.

Issue 1 – Recognition

Based on the agreement of the parties, the Employer’s proposal that the Operations Co-ordinator position should be excluded from the bargaining unit is Awarded.

Issue 2 – Definitions

The Union proposal is Awarded, save and except with respect to the definition of Temporary Employee – the Employer may extend the leave on its own up to 18 months “where the leave of the person being replaced extends that far”.

Issue 3 – Relationship

The “No Discrimination” Union Proposal (Article 3.01) pertaining to the Union being copied on written notices to employees regarding disciplinary matters will be dealt with as part of Issue 6 – Discipline.

The Union Proposal (Article 3.02) regarding the non-inclusion of certain absences for the purposes of an Attendance Management program is Not Awarded.

Issue 4 – Notification to Union

The Union Proposal (Article 5.09 (a) and (b)) is Awarded with the amendment that the notification to the Union is to be provided quarterly as opposed to monthly.

Issue 5 – Union Representation and Committees

Union Proposal (Article 6.01) regarding Union Activity on premises is Awarded.

Union Proposal (Article 6.02 (b)) regarding employees not losing regular earnings for attending a Labour Management Meeting is Awarded. The rest of the Union's Proposals regarding Labour Management Meetings (Articles 6.02 (c) (d) (e)) are Not Awarded.

The Union Proposal Negotiating Committee (Article 6.03) is Awarded.

The Union Proposal Central Bargaining Committee (Article 6.04) is Not Awarded.

The Union Proposal Union Stewards (Article 6.05) is Awarded.

The Employer Proposal Grievance Committee (Article 6.06) is Awarded.

Issue 6 – Discipline

The Union Proposal Clearing of Record (Article 8.02) is Awarded.

The Employer Proposal Issuance of Discipline-Notification to the Union (Article X.03) is Awarded.

Issue 7 – Seniority, Job Posting and Layoffs

The Union Proposal Probationary Employees (Article 9.01) is Awarded.

The Union Proposal Definition of Seniority (Article 9.02(A)) save and except the last sentence is Awarded.

The Union Proposal Seniority Lists (Article 9.02 (B)) is Awarded.

The Union Proposal Loss of Seniority (Article 9.03) is Awarded.

The Union Proposal Effect of Absence (Article 9.04) is Awarded.

The Union Proposal Job Posting (Article 9.05) is Awarded, save and except subparagraph (g) is Not Awarded and at subparagraph (j), the reference to the leave not exceeding one (1) year is amended to eighteen (18) months.

The Union Proposal Transfer Outside the Bargaining Unit (Article 9.06) is Awarded.

The Union Proposal Transfer of Seniority and Service (Article 9.07 (A)) is Awarded.

The Union Proposal Portability of Service (Article 9.07 (B)) is Not Awarded

The Union Proposal Transformation in Healthcare (Article 9.07 (C)) is Not Awarded.

The Union Proposal Notice of Lay-off (Article 9.08 (A) (a)(b)(c)) is Awarded, save and except the notice requirements set out at Article 9.08 (A) (a) (i) and (ii) shall be three (3) instead of five (5) months.

The Union Proposal Redeployment Committee (Article 9.08 (A) (d)) is Not Awarded.

The Union Proposal Retirement Allowance (Article 9.08 (B)) is Not Awarded.

The Union Proposal Voluntary Exit Option (Article 9.08 (C)) is Not Awarded.

The Union Proposal Layoff and Recall (Article 9.09) is Awarded, save and except Article 9.09 (b) and (c) are deleted and the reference in Article 9.09(i) to 5 months is amended to 3 months.

The Union Proposal Benefits on Leave (Article 9.10) is Awarded.

The Union Proposal Retraining (Article 9.11) is Not Awarded.

The Union Proposal Separation Allowance (Article 9.12) is Not Awarded.

The Union Proposal Technological Change (Article 9.13) is Awarded, save and except that the third paragraph is deleted and replaced by the second paragraph of the Employer's Counter Proposal (Article X.02).

The Union Proposals with respect to Professional Development, Professional Responsibility and Workload (Article 9.14 to Article 9.16) are Not Awarded – the Employer Counter Proposals regarding Professional Development and Workload Issues are Awarded (to be included as Articles of the collective agreement).

Issue 8 – Contracting Out

The Union Proposals-Contracting Out (Article 10.01 and Article 10.02) are Awarded.

The Union Proposal-Contracting In (Article 10.03) is Not Awarded.

Issue 9– Work of the Bargaining Unit

The Union Proposal-Work of the Bargaining unit (Article 11.01) is Awarded.

Issue 10 – Leaves of Absence

The Union Proposal Personal Leave (Article 12.01) is Awarded.

The Union Proposal Union Business (Article 12.02) is Awarded with the time frame for requesting such a leave to be 4 weeks instead of 14 days. Additionally, the maximum number of employees taking such leave at any one time shall be three (3) employees.

The Union Proposal (Article 12.03) Leave for OCHU Executive Positions is Awarded.

The Union Proposal Bereavement Leave (Article 12.04) is Awarded.

The Union Proposal Jury and Witness Duty (Article 12.05) is Awarded.

The Union Proposals Pregnancy Leave-(Article 12.06 (A) and (B)) are Awarded save and except the “top-up” is to be 75% of the employee’s normal weekly earnings as opposed to 93%.

The Union Proposals Parental Leave (Article 12.07 (A) and (B)) are Awarded, save and except the “top-up” is to be 75% of the employee’s normal weekly earnings as opposed to 93%.

The Union Proposal Education Leave (Article 12.08) is Awarded excluding the third paragraph.

The Union Proposal Pre-Paid Leave (Article 12.09) is Not Awarded.

The Union Proposal Medical Care and Compassionate Leave (Article 12.10) is Awarded.

The Union Proposal Compassionate Care Leave (Article 12.11) is Awarded.

Issue 11 – Sick Leave Injury and Disability

Union Proposal HOODIP (Article 13.01) is Awarded.

Union Proposal Injury Pay (Article 13.02) is Awarded.

Union Proposal Payment Pending WSIB Claim (Article 13.03) is Not Awarded.

These provisions are to come into force two months after the date of this Award.

Issue 12 – Hours of Work and Scheduling

The Union Proposals Daily and Weekly Hours of Work (Article 14.01 to Article 14.04) are Awarded.

However, for the life of the collective agreement, the Employer is permitted to maintain the existing practice of scheduling Part-time and Casual employees for “short shifts” of between 4 and 7.5 hours.

The Union Proposal Job Sharing (Article 14.05) is Not Awarded.

The Employer Proposal Scheduling (Article 14.10) is Awarded,

Issue 13 – Premium Payment

The Union Proposals with respect to Premium Pay (Article 15.01 to Article 15.09) are Awarded, save and except the Employer counter proposal - Temporary Transfer (Article 15.08) is Awarded.

These provisions become effective the date of this Award.

Issue 14 – Holidays

The Union Proposals with respect to Holidays (Article 16.01 to Article 16.05) are Awarded.

These provisions become effective the date of this Award.

Issue 15 – Vacations

The Union Proposals with respect to Vacations (Article 17.01 to Article 17.04) save and except the deletion of “upper-level” vacation entitlements beyond 5 weeks for full-time employees and 10% for part-time employees are Awarded.

The Employer Proposals regarding the Scheduling of Vacation (Article 17.03 to Article 17.09) are Awarded.

These provisions become effective the date of this Award.

Issue 16 – Health and Welfare Benefits

The Union Proposal with respect to Insured Benefits (Article 18.01) is Awarded.

The Union Proposal with respect to Change of Carrier (Article 18.02) is Awarded.

The Union Proposal with respect to Participation in HOOPP (Article 18.03) is Awarded.

The Union Proposal with respect to Payment in lieu of Benefits (Article 18.04) is Awarded.

The Union Proposal with respect to Union Education (Article 18.05) is Not Awarded.

The Union Proposal for a Letter of Understanding Re-Transfer of Pension Assets to HOOPP is Awarded.

These provisions are to come into force two months after the date of this Award.

Issue 17 – Health and Safety and Wellness

The Union Proposal with respect to Protective Footwear (Article 19.01) is Not Awarded.

The Union Proposal with respect to Influenza Vaccination (Article 19.02) is Awarded.

The Union proposal with respect to Violence (Article 19.03) is Not Awarded.

Issue 18 – Job Classifications/Descriptions

The Union Proposal with respect to a New Job Classification (Article 20.01 (A)) is Awarded.

The Union Proposal with respect to Job Descriptions (Article 20.01 (B)) is Awarded.

The Union Proposal with respect to Promotion to a Higher Classification (Article 20.03) is Not Awarded, rather the Employer's Counter Proposal is Awarded.

The Union Proposal with respect to Wage and Classifications Premiums (Article 20.04) is Not Awarded.

The Union Proposal with respect to Progression on the Wage Grid (Article 20.05) is Not Awarded.

Issue 19 – Fiscal Advisory Committee

The Union Proposal with respect to a Fiscal Advisory Committee (Article 21) is Not Awarded.

Issue 20 – Miscellaneous

The Union Proposal regarding Bulletin Board (Article L 10.01) is Awarded.

The Union Proposal regarding Printing of Collective Agreement (Article L 10.02) apparently has been agreed to; if not, it is Awarded.

The Union Proposal regarding Membership Meetings (Article L 10.03) is Awarded.

The Union Proposal regarding Job Descriptions (Article L 10.04) has been agreed to.

The Employer Proposal regarding Changes to Employment – Related Information (Article X.01) is Awarded.

Issue 21 – Wages and Retroactivity

Effective June 21, 2019, the wage rates for the following classifications are to be as follows:

Activity Aide	$23.28	Companion	$22.71
Nutrition Aide	$22.71	Occupational Therapist	$45.50
Personal Support Worker	$22.79	Physiotherapist	$45.50
PTA	$26.96	Receptionist	$23.09
RPN-Facility	$31.36	Social Worker	$47.45

In addition, the following general wage increases are to be applied to all classifications:

Effective September 29, 2019-1.60%.

Effective September 29, 2020-1.65%.

All of the above adjustments/increases only become effective as of the date of the issuance of this Award. For clarity purposes— no retroactivity on wages is owing for the period before the date the Award is issued.

With respect to the wage rate issue, Mr. Nowakowski suggested in oral submissions that the "elephant in the room" was the decision of Arbitrator Kaplan in The McCall Centre for Continuing Care and CUPE Local 3874 (February 16, 2018) unreported (Kaplan). In that case, Arbitrator Kaplan, while deeming the appropriate comparator to be the CUPE central hospital agreement only closed the then existing significant wage gap between the current rates of pay and the applicable hospital sector rates of pay by 50%, effective the last day of the collective agreement. The clearly distinguishing factor with respect to The McCall Centre for Continuing Care, *supra,* case was that for over 30 years, the union had not sought parity with wage rates existing in the hospital sector. Against that background, Arbitrator Kaplan deemed it inappropriate for the union to achieve hospital parity in one full swoop. Consideration was also given to the previously referenced decision in Haldimand War Memorial Hospital, *supra*, whereby in the context of a first agreement, Arbitrator Slotnick only awarded that the wage gap between the existing rates and the hospital sector rates be closed by 50%. As previously outlined, CLAC is far from being a dominant union in the hospital sector; accordingly, the relevancy of that decision is outweighed by the nature of the first

agreement collective bargaining that has taken place with respect to CUPE bargaining units in the hospital sector.

It is our view that the competing interests of the parties involved are addressed by mandating that the applicable wage adjustment rates and compensation increases only becoming effective as of date of the issuance of the Award.

The Board directs that the parties incorporate this decision regarding the items in dispute and any agreed-to items within a new collective agreement to be signed by the parties.

Pursuant to Section 9 (2) of HLDAA, this Board remains seized with respect to any dispute regarding the interpretation or implementation of the Award until the new collective agreement is in effect.

This Award is issued in Mississauga this 7th day of October 2021.

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Brian Sheehan – Chair

"dissent attached"

_____

Irv Kleiner – Employer Nominee

"partial dissent attached"

_____

Joe Herbert – Union Nominee

DISSENT OF EMPLOYER NOMINEE

It is not my intention to revisit the reasons for my Dissent in the Board's Interim Award wherein the Chairman determined that rehabilitation hospitals were the appropriate comparator for the purposes of the parties' collective bargaining.

Having said that, I am mindful of the fact that these parties were required to negotiate a first collective agreement and to have any bargaining impasse determined by this Board. A bargaining impasse was indeed reached and as a result, this Board was constituted to replicate a freely negotiated bargaining outcome that likely would have been achieved with the economic sanctions of strike and lockout looming in the background. .

I would maintain that a replicated freely negotiated outcome would not have been one which would have put this Employer's contractual relations with UHN at risk. As the Chairman has properly pointed out in the Award, the process of replication is one that "focuses on objective standards rather than notions of "fairness" or "what is just", as these are concepts that are often too subjective and ambiguous.

While I can appreciate that the Chairman previously identified the "comparator" in the Interim Award, I would suggest that the comparator simply served to identify a "target" for the parties to refer to in their collective bargaining over a period of time and over successive rounds of collective bargaining. While I appreciate that the Chairman has rendered an Award that does not involve a requirement to pay any retroactivity to the bargaining unit employees, the effect of the determinations that have been made will put the commercial agreement between UHN and this Employer at considerable risk. Going forward and based upon the evidence that was presented to us, this Employer cannot possibly continue to provide the services that have been contracted for under the terms of the existing commercial agreement with UHN if it were required to implement the financial terms of this Award. This Employer is a home care and community service provider that is governed by the *Home Care and Community Services Act*. It is not a "hospital" and it is not funded as it were a hospital.

Once again, I find it difficult to reconcile the fact that an interest Board such as this one could render an

award that could potentially result in the loss of a commercial agreement, with what a freely negotiated first collective agreement would have presented.

It is also important that I note my disagreement with the references that have been made by the Chairman to cases which have involved a true "contracting out" of services, in support of the determinations that have been made by the Chair . As I indicated in my earlier Dissent in the Interim Award, this case did not involve a "contracting out" of services. UHN entered into a contract with Saint Elizabeth for the provision of reactivation and reconditioning services. UHN did not replace UHN employees in its bargaining unit with the Employer's employees. The services that were being provided by Saint Elizabeth were not being provided by UHN bargaining unit employees at the time that the contract with Saint Elizabeth was entered into. The services being provided by the Employer were being provided in what was then a vacant building that was owned by UHN. The agreement between UHN and the Employer facilitated an initiative to "repurpose" the vacant Hillcrest location. UHN had ceased operating this building as a hospital in the latter part of 2012.

The Chairman referred to the Award of Arbitrator Russel Goodfellow in University Health Network Women's Own Withdrawal Management Centre and CUPE Local 5001-02 (2012) 111 C.L.A.S 168 (Goodfellow) wherein the terms of the CUPE central collective agreement were awarded without any application of "first agreement principles".

It makes a great deal of sense that Arbitrator Goodfellow awarded the provision of the central CUPE hospital agreement in a first agreement situation given the fact that it was acknowledged by the parties involved in that arbitration that it was UHN that actually provided the services. The services provided by the MWMC were also provided by UHN which is why the employees providing those services were made subject to the Toronto Western Hospital agreements. Both WOWMC and MWMC were part of UHN's existing Addiction Services program.

Hillcrest is not part of any program that is like the Addiction Services at UHN. Saint Elizabeth at Hillcrest is a stand alone entity that provides services which are entirely different from other parts of the UHN network as we heard in the evidence. The Goodfellow Award is not helpful for our purposes given the different facts that were presented by the Employer in this case relative to those that were presented to Arbitrator Goodfellow. The Goodfellow Award in no way indicates that there is a "norm" that the

services being provided by Saint Elizabeth at Hillcrest should be compared to other UHN operated centres, facilities or programs nor is there any evidence which establishes similarity between the operations that were before Arbitrator Goodfellow and those that are currently being provided by Saint Elizabeth at the Hillcrest location.

I would maintain that "first agreement principles" ought to have been afforded considerable weight by the Chairman and, that those principles are not exclusively reserved for collective bargaining in the long term care sector as indicated by the Chairman. Those are principles that ought to have been applied in the course of determining what a replicated collective bargaining outcome would have presented. In my respectful submission, whether this Board were applying "first agreement principles" or traditional "replication principles", I take issue with any arbitrated determination which leads to a conclusion that these parties would have "freely" concluded a first collective agreement with amongst other things, hospital wage parity which would in turn put Saint Elizabeth's contract with UHN at risk of being terminated, and also bargaining unit employees' continued employment at the Hillcrest location at risk of being terminated.

Dated this 7th day of October 2021

"Irv Kleiner"

Employer Nominee

Partial Dissent

While I agree with the Chair's decision to adopt a 'replication' approach in determining the outcome of this dispute, in my view the failure to award any retroactivity at all on wages is not the correct result. In my view, employees ought to have received some retroactive payment. In light of the well-developed caselaw concerning the proper comparator for contractors such as this one working within the hospital sector, it was extraordinary and somewhat adventurous to my mind, for the contractor to have set wages so far below the norms paid within the hospital sector to employees in like classifications performing similar or the same work – in addition of course to being seriously prejudicial to the employees affected. Some retroactive wage improvements were due for the period from June 2019 until the date of the award, and I would have so ordered.

Dated this 7th day of October, 2021

Joe Herbert

Union Nominee