IN THE MATTER OF AN ARBITRATION

BETWEEN:

The Participating Hospitals

and

OPSEU

(Implementation Dispute)

Appearances

Before:	William Kaplan, Chair Brett Christen, OHA Nominee Joe Herbert, Union Nominee

Appearances

For the Union:	Steven Barrett Colleen Bauman Goldblatt Partners Barristers & Solicitors
For the OHA:	Craig Rix Hicks Morley Barristers & Solicitors

The matters in dispute proceeded to a hearing on January 29, 2024. The Board met in Executive Session immediately thereafter.

Introduction

On August 3, 2023, the Board issued its Bill 124 re-opener award in *Participating Hospitals and OPSEU*. One of the issues addressed in the award was "Pandemic Pay." We ordered as follows:

Pandemic Pay

A one-time lump sum payment to all full-time, part-time and casual employees in the bargaining unit as of August 13, 2020, and who did not receive pandemic pay under the government program, as follows: $1,750 full-time, $1,250 part-time, and $750 casual. Payments to be made within sixty days less deductions required by law.

The parties are back before us because of an implementation dispute. At issue is what amount - $1750 for full-time, $1250 for part-time or $750 for casual – is payable to an employee temporarily carrying out the duties of a full-time position at a participating hospital on August 13, 2020 (trigger date), but whose "official" status at the hospital was otherwise part-time (or casual). The union asserts that the question is answered by looking at whether the employee was working on a full-time basis on the trigger date, and if the employee was working full-time, whatever their official status was, there was an entitlement to $1750. This interpretation, in the union's submission, was consistent with the manifest intention of the award.

The OHA sees matters differently. In its view, the Board was without jurisdiction to decide the issue as it was now *functus* and, in any event, the union was mistaken in its interpretation of the Board's award.

The matters in dispute proceeded to a hearing held by Zoom on January 29, 2024. The Board met in Executive Session immediately thereafter.

Submissions on Jurisdiction

Turning first to jurisdiction, the OHA argued that the Board was *functus*: an individual's entitlement to pandemic pay was no longer a matter within our jurisdiction. In the OHA's view, any issue of collective agreement interpretation/application belonged before a grievance or "rights" arbitrator, and it relied in support of this proposition on the decision of Arbitrator Stout in *Participating Hospitals and ONA*, 2020 CanLII 90501 (ON LA).

The union disagrees. In its submission, the issue in this case was distinguishable from the one before Arbitrator Stout. That case involved the interpretation of a collective agreement. This one does not. In marked contrast to the matter before Arbitrator Stout, pandemic pay is a one-off event to be addressed in the course of implementing the interest arbitration award. There will never be a collective agreement provision in respect of pandemic pay. Accordingly, there will never be a provision to grieve or a provision for a grievance arbitrator to interpret. Notably, the OHA agreed that "Pandemic Pay" would not form part of the collective agreement and would instead be conclusively dealt with in the course of implementing our interest arbitration award.

Discussion and Decision on Jurisdiction

In *Participating Hospitals and ONA,* Arbitrator Stout distinguishes, correctly in our view, between determining the *contents* of a collective agreement, which is the role of an interest arbitration board appointed under the *HLDAA*, and *interpreting* that collective agreement, which falls to a "rights" arbitrator appointed pursuant to s.48 of the *Labour Relations Act*. In our case, there will never be a collective agreement provision to interpret (and both parties agree about that). Here, there will be only our award, and our residual jurisdiction continues until

implementation is complete. See *Ontario Hospital Association v OCHU/CUPE*, 2024 CanLII 2363 (ON LA). And see also section 9(2) of *HLDAA,* which provides that "the board of arbitration shall remain seized of and may deal with all matters in dispute between the parties until a collective agreement is in effect between the parties."

The law is dispositive that our implementation jurisdiction continues until our award has been given effect. Accordingly, we find we have jurisdiction to determine this implementation matter. The OHA objection is dismissed.

Submissions of the Parties on the Merits

In its submission, the union argues first that the positioning the word "all" before "full-time" in the "Pandemic Pay" provision of our award illustrates the Board's intention that all "full-time" employees include those who are formally part-time employees under the collective agreement, but who were, on August 13, 2020, temporarily assigned to work on a full-time basis. The union rejects the idea that the Board intended to be guided by formal collective agreement definitions of full- and part-time employee status. It submits that it was highly unlikely that the Board would have turned its mind to that provision in the collective agreement that states that an employee temporarily assigned to a position within a different status (i.e., a part-time employee temporarily assigned to a full-time position) retained their original status. Instead, the Board would have been guided by what work an employee was *actually doing* on August 13, 2020, rather than being concerned with the employee's formal status on that date.

This interpretation also accorded, in the union's view, with the clear underlying intention of the award, its manifest intention, in other words. Placed in context, the clear purpose of the

pandemic pay provision was to reward employees for the actual work they performed during the pandemic period, and this meant that any employee working full-time hours on the trigger date should receive the full-time amount regardless of formal status. This interpretation was further buttressed by the fact that Temporary Full-time Employees – full-time employees hired externally to fill temporary vacancies – received pandemic pay. It was counter-intuitive and inconsistent, in the union's view, to provide the full-time pandemic pay amount to those hired from the outside to fill temporary full-time vacancies, while denying that very same payment to a hospital's part-time employees who was also performing full-time work.

The OHA sees matters differently. In its view, the union interpretation could only succeed by rewriting the award to say, in effect, "pandemic pay to occupants of full-time positions." However, the award did not say that. It said pandemic "payment to all full-time, part-time and casual employees…." Moreover, the OHA pointed out, it would take clear wording to negate the status expressly conferred under the collective agreement: Artice13.01(c). That article states in part:

> Where regular or casual part-time workers fill temporary full-time vacancies, such workers shall maintain their regular or casual part-time status….

In the OHA's submission, the wording in the Board's award, and the awarded provision, left little doubt but that entitlement was determined by collective agreement status, not by hours being worked on the trigger date.

Discussion and Decision on the Merits

The issue we need to decide is whether we intended an employee's formal status under the collective agreement on August 13, 2020, as the OHA argues, to determine the employee's entitlement to pandemic pay, or whether that entitlement is to be determined by what the employee was actually doing on August 13, 2020, for example, in the case of a part-time employee temporarily working on that date in a "full-time" assignment.

We begin by confirming that the placement of the word "all" in the award does not assist the union. The phrase "all full-time, part-time and casual employees" refers to each of these groups, it means all full-time employees, all part-time employees, all casual employees. It applies the payment based on status, not based on their activity on the trigger date. The award definitely does not say employees working full-time hours, etc., on the trigger date. The award does not say employees in full-time positions on the trigger date. It says: "all full-time…."

As stated in our award, our intention was to provide members of this bargaining unit with pandemic pay, as was received by other hospital workers who also put themselves at risk during the April to August 2020 time period. The comparability principle, in our view, required such a result. We were also mindful that our award arrived late in the day, some three years after the events in question. Our intention was to avoid the imposition of an administrative burden on hospitals of recreating who was where and doing what during an incredibly stressful, hectic and demanding period, and the ensuing disputes that would inevitably occur.

Accordingly, our award used a simple straightforward benchmark to establish eligibility for payment. To qualify, an employee needed only to be "in the bargaining unit" on August 13, 2020, and to be either full-time, part-time or casual. It should be obvious that more restrictive criteria were available – such as for example, being "on payroll" or "actively employed" on that date, which would have then disentitled, for example, employees on leaves of absence. Obviously, we did not wish to disentitle any employee who may have contributed prior to August 13, 2020, but who might be on leave on that date. We recognized that our award had to be practical, and practicable from an implementation perspective, so we assigned eligibility to status and provided a trigger date.

Put another way, eligibility for pandemic pay, as required by our award, does not turn on what, if anything, a full-time, part-time or casual employee happened to be doing on August 13, 2020. It mattered only that they maintained formal employee status within the bargaining unit on that date. That formal status determined both eligibility and amount received. We do not, in any event, agree with the union submission that it is either counter-intuitive or inconsistent to pay Temporary Full-Time Employees who have been hired externally the full-time amount.

Accordingly, we conclude that the interpretation of our award provided by the OHA is the one more consistent with the wording and intent of our award and we so declare.

Dated at Toronto, this 6th day of February 2024.

"William Kaplan"

William Kaplan, Chair

I concur.

Brett Christen, OHA Nominee

I dissent.

Joe Herbert, Union Nominee