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Via E-mail (eobrien@opseu.org)

Eric O'Brien
OPSEU
100 Lesmill Road
Toronto, Ontario
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Dear Mr. O'Brien:

Re: Opinion regarding Bill 124 and CAAT-A Bargaining Proposals

You have asked for our view regarding the whether workload proposals by OPSEU's bargaining team violate the *Protecting a Sustainable Public Sector for Future Generations Act, 2019*, S.O. 2019, c. 12 ("Bill 124") in light of concerns raised by the College Employer Council ("CEC").[1]

As described in greater detail below, Bill 124 imposes caps on salary and compensation increases in collective agreements for three year "moderation periods". As you are aware, a legal challenge to the constitutionality of Bill 124, based on s. 2(d) (freedom of association) of the *Charter*, remains before the courts. For the purposes of this opinion, we are assuming that the Bill was validly enacted. We also understand that both sides have agreed upon language to reopen negotiations if Bill 124's restrictions on salary and compensation increases are struck down.

In short, our view is that OPSEU's workload proposals do not offend Bill 124. Full-time CAAT-A employees receive an annual salary and are not paid by teaching contact hours (TCH) or by attributed hours on the Standard Workload Form (SWF). The CEC has elsewhere taken the position that the SWF is simply a tool for consistently assigning courses across the system, and does not reflect the actual weekly hours of work by teachers, which are variable. It is also significant that SWFs are developed individually and collaboratively between the employee and their manager. In our view, OPSEU's proposals do not result in an increase to salary or

[1] See e.g. https://www.collegeemployercouncil.ca/en/news/comparison-chart-of-cec-and-caat-a-team-offers-of-settlement

compensation, as defined by Bill 124. Furthermore, OPSEU's proposal for a workload committee with binding arbitration does not offend Bill 124, because Bill 124 permits the review of arbitration awards by the Minister but does not preclude arbitration itself.

Bill 124

Bill 124 imposes restrictions on the ability of unions and certain employers to bargain wage and compensation increases. Bill 124 applies to colleges of applied arts and technology and post-secondary institutions in Ontario, among other types of employers. Bill 124 establishes three-year "moderation periods". In the case of the collective agreement between OPSEU and the CEC, the moderation period commenced as of October 1, 2021, following the expiry of the collective agreement.

Section 10 of Bill 124 imposes a hard cap of 1% on any increases to salary rates during each 12-month period. There are exemptions for salary increases authorized by a collective agreement that relate to years of employment, merit, or completion of educational programs (i.e. movement up the grid would not be counted against the 1% cap).

Section 11 of Bill 124 imposes a separate overall 1% annual hard cap on any incremental increases to existing or new compensation entitlements (which includes any increases to salary rates). Compensation is defined broadly in s. 2 to include salary, as well as "anything paid or provided, directly or indirectly, to or for the benefit of an employee, and includes… benefits, perquisites and all forms of non-discretionary and discretionary payments." However, the 1% restriction does not apply where the cost to an employer to maintain an existing benefit at the same level increases over time (for example, the cost of third party insurance premiums for existing benefits plans). There are certain exceptions related to voluntary exit programs, costs related to the conversion of pension plans, and temporary COVID-related payments, which are not relevant here. Bill 124 also prohibits employers from agreeing to catch-up payments before or after the moderation period to make up for what employees will not receive during the moderation period.

Bill 124 provides the Minister with the authority to declare a collective agreement or arbitration award void if it is deemed to be in non-compliance with the salary and compensation restrictions. If this happens, Bill 124 contemplates that the parties will return to the same status that applied immediately before they settled the collective agreement, i.e. they return to the same stage in bargaining, and the same terms and conditions of employment that were in effect prior to the settlement of the collective agreement apply. The parties are then required to conclude a new collective agreement that is consistent with Bill 124. That is, if the parties make an error in their understanding or application of Bill 124, the Minister will simply require them to return to collective bargaining and negotiate a new collective agreement consistent with the Minister's requirements.

Finally, it is relevant to note that Bill 124 specifically provides that other than the specified restrictions, "the right to bargain collectively is continued".

OPSEU's Workload Proposals

OPSEU's proposals with respect to workload consist of the following:

- add language to enable faculty to receive additional time for courses with an online component, following discussion with their manager (new 11.01 D3 (x));
- increase time for essay/project evaluation and feedback to a maximum of 7 minutes and 12 seconds per student per week (for a 3-hour course) from the current 5 minutes and 24 seconds (amendment to 11.01 E 1);
- joint Workload Committee to deal with longer-term workload issues with binding arbitration (the CEC has a similar proposal which would be non-binding) (new LOU);

The CEC's Position

The CEC has stated that Bill 124 applies to total compensation which is directly tied to workload. We understand they have raised two specific concerns about OPSEU's proposals above.

According to the CEC, if changes to workload result in increased cost to deliver the same amount of services, this would be contrary to Bill 124. In this regard, the CEC has argued that if Article 11 of the collective agreement is changed so as to reduce the number of TCHs that can be assigned to faculty without reducing salary, the "salary rate" per TCH will be increased. The CEC's view is that such a change must be counted toward the 1% limit under Bill 124 for both "salary" and "compensation" entitlements (i.e. s. 10-11 described above). We understand that the CEC's objection to the Union's proposals regarding new 11.01 D3 (x) and amended 11.01 E 1 are based on this concern.

The CEC has also raised a concern about the Union's proposal regarding the joint workload committee. While both parties have made proposals regarding a joint workload committee, the Union's proposal includes binding arbitration while the CEC's proposal would only make non-binding recommendations for changes to be made in the next round of collective bargaining. The CEC has justified its own proposal with reference to Bill 124 as follows: "Unfortunately, the very real constraints placed on our sector by Bill 124 makes that very difficult – and we cannot break the law. But there's good news: Bill 124 will expire at the end of 2024 – and that's when we can move to a new collective agreement that includes the recommendations we develop together through the Workload Committee."

The CEC has made reference to the conclusion of Arbitrator Keller, who assisted the parties in a failed mediation in late 2021. In a report concerning the mediation, Keller commented that proposed changes to article 11 (except 11.02 B 2, composition of Workload Monitoring Group) would offend Bill 124 because there would be a reduction in the amount of work being performed for the same compensation and the employer would need to hire more people to do the required work. We understand while Arbitrator Keller met with both parties, this was in a mediation context,

and he did not have the benefit of legal submissions regarding the application of Bill 124 to specific proposals.

Opinion

In our view, the Union's proposals regarding workload do not offend Bill 124.

We start with the observation that full-time CAAT-A members are paid an annual salary. They are not paid by TCH. The number of TCH by employee often varies considerably, without affecting their compensation. While there is a maximum of 18 TCH, there is no minimum number. Occasionally, an employee may have no TCH on their Standard Workload Form, because they are engaged in other approved activities, and yet they continue to receive their annual salary. Employees also continue to receive their salary during periods with no TCH and that are not covered by a SWF. Full-time CAAT-A members may be assigned workload up to 44 hours per week, but nothing in the collective agreement requires them to be assigned a minimum workload.[2] Accordingly, the CEC's position is premised on a mischaracterization of CAAT-A salary and workload provisions, as teachers' salaries are not tied to hours attributed on the SWF.

We note the CEC's position regarding the impact of Bill 124 related to workload provisions appears inconsistent with the positions it has taken in other matters related to the CAAT-A bargaining. In recent communications regarding the Union's work to rule campaign,[3] the CEC has taken the position that the collective agreement requires teachers to perform "such work as is necessary to deliver their assigned courses" and has minimized the relevance of the SWF to the actual work and workload of teachers: "A SWF is not designed to speak to the whole of the work individual teachers do to fulfill their responsibilities within the college. It is simply a tool for consistently assigning courses across the system." As the CEC has observed, the SWF attributes the same notional preparation and evaluation time every week, which may or may not be worked each week. The CEC's recent letter quoted from Arbitrator Starkman as follows, "The formulas are negotiated and undoubtedly bear some relation to the time required to perform various functions such as preparation and evaluation/feedback, but the hours on a SWF are notional and are not related to the actual time that a particular teacher spends in preparation or student evaluation in a particular course."

Given the CEC's position that hours as set out on a SWF are simply notional, do not reflect the actual performance of work (i.e. the actual hours worked may be lower or higher than as set out on the SWF from week to week or from teacher to teacher), and that the workload formulas exist as a tool to ensure consistency amongst teachers in the assignment of courses, the minor adjustments to the workload formula proposed by OPSEU would not be expected to pose any concern with respect to the restrictions imposed by Bill 124.

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[2] See discussion in https://cdn-ca.aglty.io/cec-website/Attachments/NewItems/bargaining/workloadtaskforcereportcaata_mar_2009.PDF

[3] https://www.collegeemployercouncil.ca/en/news/correcting-caat-a-misinformation-response-to-warren-smokey-thomas

With respect to the proposed Art. 11.01 D3 (x), this may be considered as an update intended to ensure that consistency as between employees is maintained in light of the introduction of online teaching. In our view, it is also relevant to note that individual SWFs are developed in a collaborative approach between the employee and their manager. The new language simply captures a new potentially relevant factor for discussion between the employee and their manager within the parties' existing SWF framework, but does not predetermine any result for any particular employee, or for employees generally. Arguably, the new language simply operates to permit existing workloads (which now include online teaching) to be accurately captured in a manner that promotes consistency across the system.

It is not anticipated that teachers will automatically teach more or less than before as a result of the Union's proposals. An increase attributed to online teaching on a SWF, or to essay or evaluation time, does not necessarily mean that a teacher will teach fewer courses (i.e. their course load may remain the same so long as they do not exceed the parameters of 18 TCH or 44 hours). As a result, nothing in the Union's proposal compels any direct or indirect increase to salary or compensation within the meaning of Bill 124.

The Union's proposal for binding arbitration in relation to a workload committee does not offend Bill 124. In this regard, Bill 124 subjects arbitration awards to review but does not preclude the process of binding arbitration. Rather, an arbitrator would have the obligation to consider any submissions made by either party regarding any potential impact of Bill 124 in making any award, and their award would be subject to the potential for Ministerial review under s. 26 of Bill 124 for compliance with its provisions.

The CEC has taken the position that Bill 124 is violated where the cost of delivering services increases as a result of collective bargaining. Arbitrator Keller raised a similar point in his report. There are two responses to this argument. Firstly, we do not necessarily accept the CEC's premise that the Union's workload proposals would increase the cost of delivering services by requiring the hiring of additional teachers. In any event, even if the CEC's premise is correct that the cost of delivering services would increase as a result of the Union's workload proposals, this is not a *prima facie* breach of Bill 124. Nothing in Bill 124 requires employers to limit themselves to 1% increases in the cost of delivering their services. For example, nothing in the Bill prohibits employers from hiring additional staff or changing staffing models or practices in a manner that increases the cost of service delivery. Rather, Bill 124's focus is more narrowly on restricting the increases in salary/compensation that flow to employees. Compensation is no doubt a component of the overall cost of delivering services, but these are different concepts.

We are not aware of any cases to date that have specifically considered whether adjustments to a workload formula for salaried employees are restricted by Bill 124. As far as we are aware, the Minister has never expressed an opinion that Bill 124 restricts employers from negotiating terms related to workload. We are aware that the Minister has taken the position that "benefits proportionally linked to salary" must be included for Bill 124 costing purposes, because they

resulted in "extra money flowing to employees".[4] The Minister provided the example of the quantum of vacation pay increasing as a result of a salary increase. In our view, minor adjustments to the workload formula (the purpose of which is to ensure consistency between employees, and which may not reflect actual weekly hours of work, according to CEC) cannot be characterized as "extra money flowing to employees" within the meaning of the Minister's previous comments on the scope of the Bill 124 restrictions. It is also important to be mindful that Bill 124 continues the right of collective bargaining outside of its specific restrictions.

In our view, the decision of the Ontario Labour Relations Board in *Ontario English Catholic Teachers' Association v The Crown In Right of Ontario and Ontario Catholic School Trustees' Association*, 2020 CanLII 4501 (ON LRB) may be of assistance in interpreting the relevance of Bill 124's restrictions to collective bargaining related to workload. The decision, by the Chair of the OLRB, Bernard Fishbein, was made in the context of an unfair labour practice complaint alleging violations of the statutory freeze as well as bad faith bargaining related to the Government's class size regulation. The Crown sought to adjourn the OLRB proceeding in light of the court challenges to Bill 124. In declining the request to adjourn, the Chair commented that class size and wages were not the same. While noting the necessary impact of class size on the effects of restricting wages (i.e. the workload of teachers is increased), the Chair held that the two issues could be considered separately. While there are important differences in the statutory context of teacher bargaining and workload as compared to the CAAT-A bargaining, the decision of the Chair supports that changes to workload and the cost of service delivery (i.e. in the event of a successful challenge to the class size regulation by OECTA) would not engage the salary restrictions in Bill 124.

Conclusion

The concerns raised by the CEC concerning Bill 124 and workload should not interfere with the parties' ability to freely negotiate a collective agreement. While we have set out above our view that the Union's proposals do not violate Bill 124, even if the parties negotiate a collective agreement and the Minister subsequently declares that it is inconsistent with Bill 124, the only consequence is that the parties are simply required to return to bargaining and conclude a new collective agreement consistent with the Minister's requirements.

We also note that a solution to the parties' disagreement regarding whether the Union's proposals are consistent with Bill 124 would be to resolve the outstanding bargaining through binding interest arbitration. There have been dozens of interest arbitration awards in the Bill 124 context, and an arbitrator could hear arguments from the parties and reach a determination of whether the Union's proposal is consistent with Bill 124, and determine the final terms of the collective agreement.

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[4] See *Windsor Regional Hospital v Ontario Public Service Employees Union, Local 101*, 2021 CanLII 80170 (ON LA)

In either case, whether through free collective bargaining or interest arbitration, the Union's outstanding positions on workload do not represent an impediment to the conclusion of a collective agreement.

Sincerely,

Christine Davies
CD:sw/cope 343

c.c. Chris Donovan (*via E-mail*)
Jean-Michel Corbeil (*via E-mail*)

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