

Report of the Mediator in the Matter of a Dispute

Between

College Employer Council [CEC or employer)

And

Ontario Public Service Employees' Union [Union]

Mediator: M. Brian Keller

October 28, 2021

On September 27, 2021, I was appointed as mediator jointly by the parties to assist them in negotiating a renewal collective agreement. The previous collective agreement had a term commencing on October 1, 2017 and expiring on September 30, 2021. The parties exchanged initial positions on July 8, 2021.

The Colleges of Applied Arts and Technology Academic (CAAT-A) bargaining team's proposals numbered over 350, spread across 9 themes. The CEC's initial bargaining proposals numbered just under 40.

The parties initially met on July 7, 2021, and subsequently met 12 more times. I believe it is not unfair to say that the meetings cannot be described as true negotiations. Rather, what took place was more of an exchange of statements and speeches without any of the give-and-take that one would normally expect to see in true collective bargaining. It was not possible for the parties to address individual proposals put forward by either side because the CAAT- A team would not agree to respond to questions or engage in dialogue posed by CEC. They appeared content to make speeches rather than negotiate. I liken what transpired to the phony war that took place at the outset of World War II. It is for that reason that I have chosen to write that the parties "met" rather than writing that the parties "bargained".

Just prior to my appointment, the CEC tabled a without prejudice settlement offer by which it proposed to set aside the majority of its proposals in favour of a few modest amendments touching on its key concerns as well as those which the CAAT-A team had identified as its key areas of interest.

In any event, the “negotiations” went nowhere. Little or no progress had been made. There were still over 350 proposals on the table from the CAAT-A team and 14 proposals from the CEC, all on a without prejudice basis.

The CAAT-A team proposed mediation and it was at that point that the parties agreed that the assistance of a third party was required.

At the outset of the mediation, I first met jointly with the parties and then with each of them separately. I made it clear to the CEC that they had to respond to the CAAT-A team’s proposals but I also told them that I understood that with the number of proposals on the table from the CAAT-A team a reasonable response was difficult. I told them I would attempt, in meeting with the CAAT-A team, to reduce the number proposals to a meaningful level, one which would permit true negotiations. I also encouraged the parties to enter into meaningful dialogue and discussion, which are essential elements of true bargaining.

When I met with the CAAT-A team, I expressed to them that the proposals on the table did not allow for fruitful negotiations. I strongly urged them to consider what their priorities were and to reduce their proposals to those priorities. I reminded them that not every proposal was of equal importance. I candidly told them that the number of proposals, as well as the substance of many of them, were a major impediment to reaching a settlement.

I reminded the CAAT-A team that what they were negotiating was a renewal of a mature collective agreement, one that resulted from a 5-week strike in 2017. I told them that a major rewrite of the collective agreement [at that point, there were still over 350 proposals from the CAAT-A team, which constituted about half of the collective agreement] was unattainable. I was also made aware, at that time, that the advice I was giving did not differ from the advice they were receiving from the assigned bargaining agent staff.

I was clear to them, I believe, that if they were serious about trying to achieve an agreement through negotiations, they would have to reduce their proposals, both in number and effect, to their true priorities.

On October 4, 2021, the CAAT-A team did modify their proposals. The number was reduced to just over 150 demands touching on roughly 40 % of the collective agreement. Notwithstanding that reduction, the essential difficulty or problem remained the same: there were still too many

proposals to permit true negotiations and what was remaining would still require a major rewrite of the collective agreement. It was my opinion, and I expressed it clearly to the CAAT-A team, that their revised position, if one was being realistic, would never be acceptable to this employer or, for that matter, any other employer.

I met again with both parties. The CEC expressed its frustration that it did not know how to respond to the CAAT-A team's proposals as they refused to engage in meaningful discussions. It indicated that it felt incapable of responding to the CAAT-A team's revised position for two reasons. One, the number of proposals remaining was still unrealistic. The employer felt it would be bargaining with itself. Two, notwithstanding the reduction in the number of proposals, the essential and problematic issues in dispute had not changed

In my subsequent meeting with the CAAT-A team, I expressed my frustration and indicated, once again, that what was remaining on the table would not, ever, result in an agreement between the parties. I indicated to them that if they were serious about attempting to conclude a collective agreement, they were going about it the wrong way. I asked them, again, to put their minds to what their true priorities were. I told them that I was not looking for their final position, but that they had to determine what they really wanted. I stated that they could not have everything that they were looking for.

That afternoon, the CAAT-A team returned with a revised list of proposals. On an initial review, I considered there to have been sufficient movement on their part to require the parties to meet and to attempt to negotiate. It was my expectation that the parties would use the CAAT-A team's revised list of proposals as a jumping off point for fruitful discussions.

The revised list of union proposals appeared, on the surface, to be five proposals. However, on analysis, there were in fact 19 proposals. As before, the remaining proposals were designed to modify major elements of the collective agreement.

The parties met three more times. Following those meetings, the employer expressed to me that it felt that no progress had been made, and that the union was unprepared to modify what it had put on the table. I was provided, by the CEC, with a chart indicating what was remaining, comparing what was still on the table with the CAAT-A team's original proposals. The purpose of the chart, as I understood it, was to demonstrate that the initial major impediments to reaching agreement were still outstanding. That document was shared with the CAAT-A team.

I asked the CAAT-A team to respond to the document. At the same time, I indicated to both parties that I was at a point where I had to decide what the next steps, if any, should be in the mediation. To that end, I required the parties to send me what they considered to be a basis for a meeting of the minds. I indicated that I was not requesting a bottom line or final offer. What I

was looking for from the parties was an indication as to whether or not continued mediation would be fruitful.

I have considered the documents received from the parties. I have reviewed and analyzed them. I have concluded, albeit reluctantly, that I see no path to settlement with the current proposals from the CAAT-A team still outstanding.

At the outset of the mediation, it was apparent to me that the CAAT-A team's proposals were highly aspirational but not realistic. They represented what I have to characterize as the hopes and dreams of at least some of the bargaining unit and the CAAT-A team. But they were not, in my opinion, designed to result in successful negotiations. And, I believe, most if not all of the members of the CAAT-A team knew and understood that.

It is not my role, as mediator, to question the strategy of either party. Whatever the strategy of the CAAT-A team was or is, however, it is evident to me that the strategy is faulty if the true goal of the CAAT-A team is to achieve a renewal collective agreement through negotiations with the CEC.

I believe that an essential part of my role as mediator is to try to get the parties back to the bargaining table to “negotiate in good faith and make every reasonable effort to make a collective agreement or to renew the collective agreement”. [Section 4, *Colleges Collective Bargaining Act, 2008*]. To achieve that end, part of my role is to give each party a reality check. In doing so, part of my role is to indicate what I believe to be unreasonable, what I believe to be reasonable and, perhaps most importantly, what I believe to be unachievable. In providing that advice, it is generally the hope of the mediator that the result will be a retraction of those proposals, on either side, that pose major impediments to settlement.

I am not so naïve as to not understand that each party has its own agenda. Each party has what it considers to be its priorities, its “must haves”. Each party has its own hill to die on. Notwithstanding that, at some point, there has to be a realistic assessment of what is achievable and what is not. There must be an acceptance that certain goals are unattainable. In other words, at some point, reality has to trump idealism. It is my considered opinion that the CAAT-A team has yet, for whatever reasons, to reach that point.

In summary, in my view, the CAAT-A team has not engaged in meaningful bargaining with a view to concluding a collective agreement. In my preliminary, and subsequent meeting with the CAAT-A team, I believed I had clearly articulated that almost all that was being sought was unachievable either through direct negotiations with the employer or, if it came to that, in binding arbitration. I am still firmly of that opinion. Many of the CAAT-A team’s remaining

demands are highly aspirational and completely unrealistic. The CAAT-A team claims to recognize that fact but has showed no willingness to sufficiently moderate its demands to give me any hope that further mediation at this stage could result in a negotiated agreement.

I would be remiss if I did not, at this point, comment on at least some of the remaining proposals, either specifically or in a general way.

In my opinion, the proposed changes to article 11 (except 11.02 B 2) would offend and be contrary to *Bill 124*, even if the consequence is indirect. This is because there would be a reduction in the amount of work being performed for the same compensation and would require the employer to hire more people to do the required work, thus resulting in an increase beyond the 1% increase permitted legislatively to the total compensation envelope. The same rationale applies to the article 26.01 and the Classification Plan proposals.

With respect to the Intellectual Property (IP) proposals, I note that the proposals would result in unfettered and complete ownership of IP in college-directed work product to the faculty member. This is, in my opinion, a completely unrealizable goal. If there is an example elsewhere, I am not aware of it. It is a complete reversal from the current provision and may well be at odds with the *Copyright Act*.

The proposal regarding contracting out is, in no way a contracting out provision even though it is styled as such. It is rather, a reservation to the bargaining unit of all work that could potentially fall within the class definitions in the collective agreement. A consequence of the proposal would be to incorporate into this bargaining unit work currently performed in other bargaining units. By way of example, Student Success Advisors in the Support Staff unit would have their work removed to the Academic unit.

The CEC has proposed the inclusion of medical cannabis on certain terms. The CAAT-A team has further proposed the inclusion of dental implants in the benefit plan. I see merit with respect to both proposals. The caveat, however, is that the introduction of the new benefits need to fit within the *Bill 124* constraints. Accordingly, the parties will have to determine how they can be introduced.

I have reviewed the proposals regarding Equity, Diversity and Inclusion (EDI) of both parties. They do not appear to be far apart on the goals and aims they seek to achieve. I am aware that OPSEU has a specialized Equity Unit, with specific expertise in EDI, as well as employment equity. Both parties would be well served by bringing their expertise to bear in their efforts to finalize this issue.

I have given much consideration to the various proposals advanced by the CAAT-A team dealing with the issue of Indigeneity. They are found throughout their proposals and are a major pillar of their goals in this round of bargaining. I agree that these are issues that need to be addressed.

However, a collective agreement is an employment contract. It is not a social contract. What the bargaining team is seeking, through negotiating an employment contract, is to effect social and cultural change. Collective bargaining, which is designed to change an employment contract, is not the right forum to effect social and cultural change. The goal is laudatory and deserves to be pursued, but not in this forum.

This fundamental cultural and attitudinal shift transcends the traditional employment relationship. Further, this is an issue that goes beyond the interests of only this bargaining unit. What is required is a thoughtful, respectful and non-adversarial process. It needs to be collaborative if there is to be any meaningful change. It also needs to involve more than just faculty. It needs to be addressed systemwide with a process that seeks meaningful input from every employee of the College system.

To that end, I recommend a non-adversarial process to commence no later than the end of March, 2022. It should be led by an Indigenous facilitator who is to be agreed to by OPSEU and

the CEC as soon as possible. Representatives of OPSEU and the CEC are then to meet with the facilitator to determine the path forward, engaging all of the stakeholders, in order that the process can commence by the end of March. The parties are to share the costs of the facilitation.

In the circumstance, the mediation is at an end. I hope that this Report can be used by the parties to find a path to settlement. I am available, at any time, to further assist the parties.

Ottawa, the 28th day of October, 2021.



M. Brian Keller, mediator