

IN THE MATTER OF AN ARBITRATION

B E T W E E N:

BRUYERE CONTINUING CARE

(The "Employer")

- AND -

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4540

(The "Union")

AND IN THE MATTER OF A SUPPLEMENTARY AWARD CONCERNING THE  
GRIEVANCE OF NORMAND BURNETT AND A GROUP AND POLICY GRIEVANCE  
CONCERNING THE MEANING OF GROSS EARNINGS IN ARTICLE 11.01(C) OF  
THE COLLECTIVE AGREEMENT

David K.L. Starkman

Arbitrator

APPEARANCES FOR THE EMPLOYER

Andre Champagne

Counsel

APPEARANCES FOR THE UNION

Peter Engelman

Counsel

A Hearing in this matter was held on October 13, 2016 at Ottawa, Ontario and written submissions were concluded on November 8, 2016

## SUPPLEMENTARY AWARD

On January 5, 2016 this Board of Arbitration issued an Award pertaining to grievance numbers 10i-74, 11i-70 and 11i-80 with respect to the meaning of the words "gross earnings" in article 11.01(c) of the collective agreement.

At page 17 of the Award the Board of Arbitration stated that:

The Employer is directed to calculate vacation pay for regular part-time and casual employees based on their gross earnings. Gross earnings include amounts in addition to base pay. I will remain seized with respect to all matters concerning the interpretation of this Award, including questions of whether any particular payment is included in gross earnings, and including the issues as to the precise date that the estoppel was brought to an end.

The parties were able to resolve many of the issues arising from the prior Award but for the following:

- whether gross earnings includes vacation pay;
- the implementation date for the change in the calculation of gross earnings;
- whether interest is payable on monies owing;
- issues concerning notification of affected persons;
- the timing of the payment of monies owing; and
- an issue of union dues with respect to monies paid.

For the purpose of determining these issues the parties have arrived at an Agreed Statement of Facts as follows:

#### CHRONOLOGY OF EVENTS

3. On January 4, 2010, the Union served the Employer with a notice to bargain for the renewal of the collective agreement covering April 1, 2007 to March 31, 2010 (i.e., bargaining for the collective agreement to commence April 1, 2010).
  4. On May 21, 2010, the parties had their first bargaining meeting for negotiation of the renewal collective agreement commencing April 1, 2010, at which time the parties tabled proposals. Neither of the parties tabled any proposals respecting Article 11.01(c) or the meaning of "gross earnings".
  5. The parties had two other bargaining meetings for the renewal collective agreement commencing April 1, 2010, on June 22 and June 24, 2010. Neither party raised any issues with regard to the interpretation of 11.01(c) at these sessions.
  6. On January 7, 2011, the parties proceeded to conciliation for the renewal collective agreement commencing April 1, 2010. Neither party raised any issues with regard to the interpretation of 11.01(c) at these sessions. At the conclusion of conciliation the Union requested a "no board" report.
  7. On January 17, 2011, a no board report was filed regarding the renewal collective agreement commencing April 1, 2010. The no board report stated that all outstanding matters were to be decided in arbitration.
  8. On March 2, 2011, the Union filed an individual grievance (10i-74) on behalf of Normand Burnett alleging a violation of article 11.01(c) and all other applicable articles of the collective agreement. The grievances were filed while the parties were operating under the collective agreement in force between April 1, 2007 and March 31, 2010.
  9. On June 1 and 2, 2011, the parties proceeded to mediation for the renewal collective agreement commencing April 1, 2010.
  10. On November 10, 2011, the parties proceeded to mediation, with the assistance of mediator Don Sheppard, for grievance 10i-74 (individual). The parties agreed to place the grievance in abeyance for a period of six (6) months to discuss a possible resolution.
-

11. On December 6, 2011, the Union filed a policy grievance (11i-70) and a group grievance (11i-80) alleging a violation of article 11.01(c) of the collective agreement and any other relevant articles. The grievances were filed while the parties were operating under the collective agreement in force between April 1, 2007 and March 31, 2010.
12. On May 15, 2012, an interest arbitration hearing was held before a Board of Arbitration, presided by Ken Petryshen, for the renewal collective agreement commencing April 1, 2010. No proposal dealing with the interpretation of Article 11.01(c) was tabled or dealt with at the hearing.
13. On September 22, 2012, Arbitrator Petryshen rendered his interest arbitration award for the collective agreement covering the period from April 1, 2010 to March 31, 2012.
14. At no point during the course of bargaining for the renewal collective agreement commencing April 1, 2010 or during the course of the interest arbitration hearing, giving rise to the above-noted interest arbitration award, was the issue of "gross earnings" discussed by the parties, nor were there any proposals filed by the respective parties in relation to "gross earnings".
15. On October 3, 2012, the Union served the Employer with a Notice to Bargain the renewal of their collective agreement covering the period from April 1, 2010 to March 31, 2012 (i.e., bargaining for the collective agreement commencing April 1, 2012).
16. On October 4, 2012, the parties proceeded to arbitration for grievance 10i-74 (Individual), 11i-70 (Policy) and 11i-80 (Group), before Arbitrator Starkman. The arbitration did not proceed but was adjourned sine die as confirmed in the attached letter from Arbitrator Starkman.
17. On May 2, 2013, the parties signed the collective agreement covering the period from April 1, 2010 to March 31, 2012.
18. On June 5 and July 3, 2013, the Parties met to bargain the renewal collective agreement commencing April 1, 2012. Neither of the parties tabled proposals respecting the meaning of "gross earnings" in article 11.01(c). However on June 5, 2013, the Union served the Employer with written notice, within their bargaining proposals, which read:

"CUPE IS SERVING NOTICE TO THE EMPLOYER ON THE APPLICATION OF 11.01(C) THAT REGULAR PART-TIME AND CASUAL EMPLOYEES MEMBERS ARE TO HAVE THEIR VACATION ENTITLEMENT ON GROSS EARNINGS AND THAT 11.01(C) BE

**RESPECTED AND APPLIED AS IT WAS INTENDED"**

19. On June 5, 2013, the Employer replied to the Union's notice with regard to Article 11.01(c) by advising it that the Employer was applying the language in article 11.01(c) as intended and would not change just by serving notice, and that if the union wanted a different result they would have to change the language.
  20. Neither party tabled any proposal respecting the meaning of "gross earnings" in Article 11.01(c) on or before conciliation on October 16, 2013.
  21. On October 16, 2013, the Parties proceeded to conciliation for the renewal collective agreement commencing April 1, 2012. CUPE requested that a no board be issued.
  22. On October 17, 2013, a no board report was filed regarding the renewal collective agreement commencing April 1, 2012. The no board report stated that the matters remaining in dispute were to be decided by arbitration.
  23. On May 3, 2014 the Parties proceeded to arbitration before Arbitrator Kaplan for the renewal collective agreement commencing April 1, 2012.
  24. During the course of the interest arbitration proceedings before Arbitrator Kaplan, none of the parties raised the issue of the meaning of "gross earnings" in Article 11.01(c).
  25. Arbitrator Kaplan released his interest arbitration award on May 3, 2014.
  26. On May 5, 2014, the Union served the Employer with a notice to bargain for the renewal of the collective agreement covering the period from April 1, 2012 to March 31, 2014 (i.e. bargaining for the collective agreement commencing April 1, 2014.)
  27. On August 8, 2014, counsel for the Union wrote to Arbitrator Starkman to indicate that the grievances remained unresolved and asked to reconvene the parties for a hearing.
  28. On October 20, 2014, the parties held their first bargaining meeting for renewal collective agreement commencing April 1, 2014, at which time they exchanged proposals for amendments to the previous collective agreement. Neither of the parties tabled any proposals respecting Article 11.01(c) or the meaning of "gross earnings".
  29. The parties also met five (5) other times to bargain the renewal collective agreement commencing April 1, 2014. These meetings were on October 28, 2014, November 26, 2014, January 16, 2015, February 9, 2015 and May 22, 2015.
  30. On December 10, 2014, the parties signed the collective agreement covering the period from April 1, 2012 to March 31, 2014.
  31. On May 22, 2015, the Parties proceeded to conciliation for the renewal collective agreement commencing April 1, 2014. CUPE requested that a no board report be issued.
  32. On June 1, 2015, a no board report was filed regarding the renewal collective agreement commencing April 1, 2014. The no board report stated that the matters remaining in dispute were to be decided by arbitration.
-

33. On April 29, October 20, and 23, 2015 the parties proceeded to arbitration before Arbitrator Starkman for grievances 10i-74, 11i-70 and 11i-80.
34. On January 5, 2016, Arbitrator Starkman rendered his award for grievances 10i-74, 11i-70 and 11i-80.
35. On February 5, 2016, March 22, 2016 and April 21, 2016, the parties met to discuss the implementation of the award for grievances 10i-74, 11i-70 and 11i-80.
36. On May 2, 2016, an interest arbitration hearing was held before a board of arbitration for the collective agreement covering the period from April 1, 2014 to March 31, 2018. Arbitrator Felicity Briggs rendered her decision on June 13, 2016.
37. The parties have yet to sign the collective agreement covering the period from April 1, 2014 until March 31, 2018.
38. The Employer contends that "gross earnings" for the purpose of vacation entitlement and calculation of payment for regular part-time and casual employees, includes wages, overtime pay and premium pay, holiday pay, standby, shift and weekend premiums and percentage in lieu of benefits.
39. The Union submits that, in addition to the items included in the Employer's formula outlined in paragraph 38, vacation pay should also be included in the calculation of vacation pay based on "gross earning" for part-time and casual employees.
40. The Parties agree that these facts may be used for the purposes of arguing the two outstanding issues between them: a) the issue of what is included in "gross earnings", referred in paragraphs 38 and 39 of this Agreed Statement of Facts; and b) the implementation date for the change in calculation of vacation pay as directed by Arbitrator Starkman in his award of January 5<sup>th</sup>, 2016.

ISSUE NO. 1: IS VACATION PAY INCLUDED IN GROSS EARNINGS FOR THE  
PURPOSES OF CALCULATING VACATION PAY AND  
VACATION ENTITLEMENT UNDER ARTICLE  
11.01(c)?

The Union submitted that the term gross earnings, in the absence of limiting language in the collective agreement, includes vacation pay. Reference was made to the decision in *Continuous Colour Coat Ltd. and United Steelworkers, Local 3950-65 (Vacation Pay Calculation Grievance)* [2011] OLAA No. 559, 214 L.A.C. (4<sup>th</sup>) 64 (Luborsky) where at paragraph 26 the Board stated:

...I am entitled to consider that the word "earnings", in the absence of express or properly implied collective agreement language to the contrary, has been interpreted in the majority of the arbitration awards submitted to me to include a broad range of remuneration received by an employee, including vacation pay, notwithstanding the lengthy past practice by an employer in excluding such payment in the calculation of the vacation entitlement...

Reference was also made to the decisions in *Re Scarborough Centenary Hospital Association and Ontario Public Service Employees Union, Local 574* (1984) 13 L.A.C. (3d) 416 (H.D. Brown), *Bedford Furniture Industries Inc. and United Steelworkers of America*, (2002) 113 L.A.C. (4<sup>th</sup>) 145 (L. Slotnick), *Atlantic Packaging Products Ltd. and C.P.U., Loc. 333* (1993) 34 L.A.C. (4<sup>th</sup>) 59 (D.K.L. Starkman), all of which reached a similar conclusion.

The Employer submitted that the proper definition of gross earnings was to exclude vacation pay and reference was made to section 35.2 of the *Employment Standards Act* ("the ESA") which provides:

An employer shall pay vacation pay to an employee who is entitled to vacation under section 33 or 34 equal to at least 4 per cent of the wages, excluding vacation pay that the employee earned during the period for which the vacation is given.

The Employer also referred to the replication principle which is widely used when arbitrators settle disputes regarding collective agreements arising under the *Hospital Labour Disputes Arbitration Act* and reference was made to paragraph 17 of the decision in *University of Toronto v. University of Toronto Faculty Assn. (Salary and Benefits Grievance)*, [2006] O.L.A.A. No. 782 (Winkler) which stated:

[17] There is a single coherent approach suggested by these authorities which may be stated as follows. The replication principle requires the panel to fashion an adjudicative replication of the bargain that the parties would have struck had free collective bargaining continued. The positions of the parties are relevant to frame the issues and to provide the bargaining matrix. However, it must be remembered that it is the parties' refusal to yield from their respective positions that necessitates third party intervention. Accordingly, the panel must resort to objective criteria in preference to the subjective self-imposed limitations of the parties, in formulating an award. In other words, to adjudicatively replace a likely "bargained" result, the panel must have regard to the market forces and economic realities that would have ultimately driven the parties to a bargain.

From the Employer's perspective, if the issue of whether vacation pay was included in gross earnings had been raised at the bargaining table, it is extremely unlikely that it would have conceded exceeding the minimum standards set out in the ESA by paying vacation pay on vacation pay unless a significant concession was received from the Union in return.

#### DECISION RE: ISSUE NO. 1

I must interpret the collective agreement from the words used by the parties, and not from any assumption of what their intention may otherwise have been.

In my view it is clear that the words gross earnings include more than base pay and the case law makes it clear that vacation pay is included in gross earnings. As stated at paragraph 14-15 of the decision in *Atlantic Packaging Products*, supra,

14. It appears from a review of the arbitral jurisprudence that it has been consistently held, since the early 1980's, that the prior year's vacation pay forms part of gross earnings for the calculation of vacation pay. As stated in *Re Scarborough Centenary Hospital Assn. and O.P.S.E.U., Loc. 574* (1984, 13 L.A.C. (3d) 416 (H.D.Brown) p. 419:

It has been held that vacation pay is earned just as



an employee's hourly wages are earned and is directly therefore related to the work performed. See also *Re Phoenix Paper Products Ltd. And Canada Paper-workers Union, Local 908* (1977), 14 L.A.C. (2d) 201 (O'Shea)...

15. Other decisions which reach the same result include *Re United Glass & Ceramic Workers, Loc 295 and Pilkington Brothers (Canada) Ltd.* (1966), 17 L.A.C. 146 (Arthurs); *Re St. Peter's Hospital and C.U.P.E., Loc 778* (1980), 28 L.A.C. (2d) 284 (O'Connor); *Re Apex Metals Kitchener Ltd. And U.A.W. Loc. 1524* (1981), 29 L.A.C. (2d) 15 (H.D. Brown); *Re St. Joseph Nursing Home (Rockland) Ltd. and C.U.P.E., Loc. 2899* (1989), 7 L.A.C. (4<sup>th</sup>) 187 (Roach); *Re Clarke Institute of Psychiatry and O.N.A.* (1982), 5 L.A.C. (3d) 155 (Beck), and *Re Tencor Packaging Inc. and C.P.U., Loc 333-19* (unreported) [summarized 30 C.L.A.S. 361]. April 22, 1993 (Marcotte).

Section 35.2 of the ESA concerning vacation pay does not change the fact that the parties negotiated a superior provision. For the same reason, the replication theory, which is most commonly applied when parties or Boards of Arbitration look to what has been negotiated in the industry when determining appropriate provisions for a renewal collective agreement, does not apply in these circumstances. Other collective agreements may have lesser entitlements, but this does not change my conclusion that the words gross earnings in this collective agreement includes vacation pay. Accordingly, the prior years vacation pay is to be included in gross earnings for the purposes of calculating vacation pay and vacation entitlement under article 11.01(c) of the collective agreement.

## ISSUE NO. 2: WHEN IS THE ESTOPPEL ENDED?

The Union submitted that the implementation date for changes in what is to be included in gross earnings arising from the January 5, 2016 Award in this matter should be April

1, 2012 being the date of the coming in force of the next collective agreement after the Employer had received notice of the Union's intention to insist on a strict application of Article 11.01(c) through the filing of the grievances in March and December, 2011. In its view, the Employer had an opportunity to bargain changes to the collective agreement in bargaining for the 2010 to 2012 collective agreement and it failed to do so.

Reference was made to the decision in *Collingwood General and Marine Hospital and O.N.A.* (2012) 216 L.A.C. (4th) 313 (Herlich) where at para. 79 the Board stated:

...The typical labour arbitration formulation proceeds on the premise that the party seeking to invoke the doctrine may have reasonably foregone opportunities to bargain an entitlement because of their reliance on the other party's representation that it would not enforce its strict legal rights. Thus, arbitrators will frequently determine that an estoppel ought to remain in place pending a meaningful opportunity to negotiate. Typically, the formulation maintains an estoppel in place for the duration of the collective agreement in force at the time notice of the discontinuance was given...

The Employer submitted that estoppel should not be brought to an end until the expiry of the current collective agreement being April 1, 2018 because the current collective agreement is the first collective agreement between the parties, after the receipt of the arbitration award making it clear that gross earnings includes payments other than base wages. In its view, estoppel is an equitable doctrine and when an estoppel is ended equity is the guiding principle and depends on the facts of a particular case.

Reference was made to the decision in *Windsor (City) v. Windsor Professional Firefighters Assn.* [2011] O.L.A.A. No. 586 (P.F. Chauvin) at paragraphs 44-46 which stated:

44 In most of the cases, an estoppel is found to exist with regard to a

representation made regarding a provision of a collective agreement. In these cases, the estoppel comes to an end once the party that relied on the representation has had an opportunity to renegotiate the provision of collective bargaining. This scenario is reflected in *British Columbia Public School Employers' Assn v. B.C.T.T.* (2007), 91 C.L.A.S. 324 (B.C. Arb.)[[2007] B.C.C.A.A.A. No. 225 (B.C. Arb.)] (J. Kinzie) at paragraph 33:

It is trite that an estoppel is brought to an end on reasonable notice. In the collective bargaining setting, that will almost always mean notice coincident with the commencement date of the next following collective agreement, thus affording the party in whose favour the estoppel has been found the opportunity to bargain about the matter prior to the estoppel being lifted. In that way, the doctrine of estoppel protects a party from lost bargaining opportunity, where not to do so would be inequitable within the meaning of the authorities.

45 However, in the following additional passage from *British Columbia Public School Employees' Association*, Arbitrator Kinzie also notes that there are many other circumstances under which an estoppel can arise, and states that the time at which the estoppel can be brought to an end can therefore vary, depending on the circumstances of the case:

Turning to the duration of estoppel, at issue is what constitutes a reasonable period of notice in the particular circumstances of this case. The effect of the application of estoppel is the suspension of legal rights. Generally, although not invariably, the suspension continues following notice until the parties have had an opportunity to negotiate their agreement.

I say generally, because the doctrine of estoppel is flexible. Arbitrators are not bound by any strict rules of law when determining the duration of an estoppel. The issue is to be determined by the arbitrator in light of all of the facts of each case.

The Employer also submitted that the existence of a statutory freeze in section 13 of the *Hospital Labour Disputes Arbitration Act* preventing the changing of the terms and conditions of employment once notice of an intention to bargain has been given should be a significant factor leading to the conclusion that the estoppel should not be ended as of April 1, 2012 as submitted by the Union. The Employer also relied on the decision

in *London (City) and C.U.P.E., Local 101* (1990) 11 L.A.C. (4<sup>th</sup>) 319 (Roberts). In that matter the employer informed parking meter enforcement officers that they would no longer receive shift premiums. The payment of the premiums had been a long standing practice. The union filed group and policy grievances challenging the employer's interpretation but failed to seek the payment of shift premiums at the next round of collective bargaining which occurred after the notice had been provided by the employer but prior to the conclusion of the grievance arbitration.

The employer took the position that any estoppel relating to the payment of shift premiums had terminated upon the signing of the new collective agreement. The union took the position that the estoppel continued until the arbitration of the grievance had been resolved. In rejecting the employer's submission and holding that the estoppel continued until the conclusion of the round of collective bargaining following the issuance of the arbitration decision the Board reasoned as follows at paragraph 15:

15. But because we have found that the union had at least a prima facie case that the existing language of the collective agreement, interpreted in light of negotiating history and long-standing past practice, already provide for the payment of shift premium to parking meter enforcement officers, we find that the union was entitled to pursue its rights under the grievance and arbitration procedures of the collective agreement without risking termination of the estoppel. Having taken the good faith position that the existing language of the collective agreement already required payment of the shift premium, the union could not be obligated to negotiate new language in the collective agreement to gain the same objective.

In the alternative the Employer submitted that the estoppel should be continued until the date of the initial Award being January 5, 2016 and in this regard reference was made to the decision in *Atlantic Packaging Products Ltd., supra*. In the further

alternative it was submitted that the earliest appropriate date for the estoppel to end is the first day of the renewal of the collective agreement reached after the filing of the policy grievance being April 1, 2014

Reference was also made by the Employer to the decisions in *442952 Ontario Inc. and U.S.W.A.*, [1993] O.L.A.A. No. 76 (M. Bendel), and *Ottawa Business Interiors Ltd.*, [2011] O.L.R.D. No. 2104, and *Queensway Nursing Home, a Division of Provincial Nursing Home Limited Partnership and Service Employees' International Union, Local 1.0n* [2007] No. 588 (G.F. Luborsky).

#### DECISION RE: ISSUE NO. 2

It is apparent from the case law that an estoppel can be brought to an end when the parties have had a meaningful opportunity to negotiate with respect to the language. The history of this matter is quite lengthy, but I find the following facts to be significant.

The phrase gross earnings has been in the collective agreement for a considerable number of years. In 2005 the Union filed a group grievance concerning the non-inclusion of vacation pay in gross earnings, and the grievance was subsequently withdrawn on a without prejudice basis.

In January, 2010 the Union served the Employer notice to bargain for a renewal collective agreement commencing April 1, 2010. The parties tabled proposals in May, 2010. Neither tabled any proposals respecting the meaning of gross earnings. In January, 2011 the parties proceeded to conciliation for the renewal collective agreement commencing April 1, 2010.

On March 2, 2011 the Union filed an individual grievance alleging a violation of article 11.01(c). The parties proceeded to mediation in November, 2011. They agreed to place the grievance in abeyance for a period of six months to discuss a possible resolution.

In December, 2011 the Union filed a policy grievance and a group grievance alleging a violation of article 11.01(c). In May, 2012 an interest arbitration was held and the Board released its decision in September, 2012 for a collective agreement covering the period from April 1, 2010 until March 31, 2012.

On October 3, 2012 the Union served the Employer with a notice to bargain for a renewal collective agreement commencing April 1, 2012. On October 4, 2012 the parties proceeded to arbitration with respect to the individual, group and policy grievances concerning the meaning of the words gross earnings but the matter was adjourned sine die.

On June 5, and July 3, 2013 the parties met to bargain a renewal collective agreement for the term commencing April 1, 2012. Neither party tabled proposals concerning the meaning of gross earnings. On June 5<sup>th</sup> the Union served the employer notice that it believed that gross earnings in article 11.01(c) included vacation pay and other payments and the Employer responded that it believed it was correctly interpreting the language of article 11.01(c) by not including these payments.

On May 3, 2014 the parties proceeded to arbitration before Arbitrator Kaplan and neither party raised the issue of the meaning of gross earnings in article 11.01(c). Arbitrator Kaplan released his award on May 3, 2014.

Given the bargaining history it is clear that the Union filed the initial individual grievance of Normand Burnett on March 2, 2011 after the parties had exchanged proposals for the April 1, 2010 - March 31, 2012 collective agreement and after the parties had proceeded to conciliation in January, 2011. This grievance raised the issue of whether vacation pay should be included in gross earnings.

In December, 2011 the Union filed a policy and group grievance which raised broader issues as to whether other payments such as premiums and overtime were to be included in gross earnings for the purpose of calculating vacation pay. In my view, by the time these issues had crystallized it was too late in the bargaining process to introduce meaningful proposals and have meaningful discussions about such a large issue and for this reason I find that the estoppel continued for the duration of the 2010 - 2012 collective agreement.

With respect to bargaining for the 2012-2014 collective agreement, the situation is quite different. The Union served notice to bargain on October 3, 2012 for the renewal collective agreement commencing April 1, 2012. On June 5, and July 3, 2013 the parties met to bargain and neither party tabled any proposals concerning the meaning of gross earnings despite both parties being aware that there were outstanding issues concerning what payments were included in gross earnings. On June 5<sup>th</sup> the Union presented the Employer with a written notice that vacation pay should be included in gross earnings and the Employer replied that it believed it was interpreting article 11.01(c) correctly.

The parties then proceeded to conciliation and interest arbitration and neither party

---

raised the issue of the meaning of gross earnings.

The arbitration board chaired by Arbitrator Kaplan released its decision on May 3, 2014 setting out the provisions of a collective agreement for the period April 1, 2012 until March 31, 2014 with no discussion of gross earnings and no change to the language of article 11.01(c).

In these circumstances I have determined that during negotiations for the April 1, 2012 to March 31, 2014 collective agreement both parties had a meaningful opportunity to discuss the meaning of the term gross earnings and they failed to do so at their peril. The Employer referred to the decision in *London (City) and C.U.P.E., Local 101*, supra, in which the estoppel was continued while the Union pursued a rights grievance with respect to the employer stopping payment of shift premiums to meter enforcement officers. The language of that collective agreement with respect to the shift premium is considerably more complicated and may have allowed each of the parties to believe their interpretation of the collective agreement to be correct.

In any event the approach in that case is not normative. The normative approach is to bring an estoppel to an end after the parties have had a meaningful opportunity to negotiate changes to the language. As stated at paragraph 74 of *Collingwood General & Marine Hospital and O.N.A.*, supra:

Once a grievance is filed challenging the employer's interpretation of the collective agreement, both parties are aware that there is a dispute between them regarding the meaning and application of the collective agreement. That fact is clear from the grievance filed in this case. Where collective bargaining for the renewal of the collective agreement commences before that dispute has been resolved through the grievance and arbitration process, any party who does not seek to table bargaining proposals to vindicate its position does so at its peril...they are of course



free to run that risk, but I am unable to see why (barring some agreement between the parties) an extant grievance should protect either of the parties from the strategic risks commonly associated with bargaining.

Similarly in this case neither party made a proposal in bargaining for the 2012-2014 collective agreement with respect to the meaning of the words gross earnings and both therefore ran the risk of their position not being upheld. While a statutory freeze may have been in effect while the parties were bargaining, there was nothing preventing either party from making proposals to change or clarify the meaning of the words gross earnings in the renewal collective agreement being discussed.

The Employer submitted, in the alternative, that there should be a finding that the estoppel ended as of the date of the Award being January 5, 2016 and referred to the decision in *Atlantic Packaging*, supra. In that matter the Union grieved in December, 1992 with respect to a vacation pay entitlement calculation that had been made in June, 1992 and also sought to have the vacation pay calculation applied to vacation years prior to the filing of the grievance and that Board of Arbitration held there was to be no retroactive calculation of vacation pay for years prior to the filing of the grievances and no retroactive calculation for 1992 because the grievances were filed outside the time lines provided in the collective agreement for the filing of grievances.

In this matter the Union is seeking changes to the manner in which vacation pay is calculated for years after the filing of the grievances and in such circumstances I see no reason to depart from the normative approach. In bargaining for the 2012-2014 collective agreement both parties had a meaningful opportunity to introduce proposals to change or clarify the meaning of the words gross earnings and I have therefore

concluded that the estoppel came to an end on March 31, 2014, and that effective April 1, 2014 gross earnings should include the matters agreed to by the parties and, for the reasons outlined above, should also include vacation pay,.

**ISSUE NO. 3: SHOULD THE EMPLOYER BE REQUIRED TO PAY INTEREST ON MONIES OWING?**

The Union submitted that an award of interest on monies owing should be made and referred to the decisions in *Kitchener-Waterloo Ambulance (1987) Inc. and C.U.P.E., Local 791*, (1993) 36 L.A.C. (4<sup>th</sup>) 1 (Mikus), and *Cornwall Community Police Services Board and CPA (Pay in lieu of Benefits)*, (2016) 267 L.A.C. (4<sup>th</sup>) 144 (Snow).

The Employer submitted that no interest should be payable and referred to the decision in *Re Central Park Lodges (Versa-Care Windsor Place) and Service Employees International Union, Local 210* (2001) 95 L.A.C. (4<sup>th</sup>) 222 (Etherington).

**DECISION RE: ISSUE NO. 3**

In my view the parties have made provision in article 27.01 of the collective agreement for the payment of retroactive pay to employees who have left the employ of the Hospital and have not required the payment of interest on these retroactive payments.

Article 27.01 provides as follows:

27.01 The Unionized employees of CUPE Local 4540 will receive retroactivity pay from April 1, 2012.  
The employees who have left their employment at the Hospital from the renewal date of the collective agreement will be eligible for reimbursement of the general wage increase.  
Within thirty (30) days following the effective date of the collective agreement, the Hospital will communicate with the employees who have left their employment, in writing, at their last known address, with copy of said letter to the Union. The concerned employees have thirty (30) days

from the date of the letter to claim, in writing, their retroactivity.

As noted above, the 2010 - 2012 collective agreement was settled by interest arbitration on September 22, 2012 some six months after the expiry of the agreement and article 27.01 was sufficient to deal with retroactive pay for employees who left the employ of the Hospital during the thirty-one month period prior to the release of the interest arbitration award without the payment of interest.

Similarly, the 2012-2014 collective agreement was settled by interest arbitration on May 3, 2014, and article 27.01 was sufficient for dealing with retroactive pay for employees who left the employ of the Hospital during the previous approximately twenty-five months without the payment of interest.

The 2014-2018 collective agreement was settled by interest arbitration on June 13, 2016 and article 27.01 was sufficient for dealing with retroactive pay for persons who left the employ of the Hospital during the previous approximately twenty-six months.

Having determined that the estoppel is brought to an end as of April 1, 2014 the passage of approximately thirty-two months is not out of line with the payment of retroactive pay in previous rounds of bargaining for which no interest was payable and therefore no award of interest is made in this matter.

#### ISSUE NO. 4: OTHER ISSUES

The Union requested that the Employer be required to do the following with respect to the payment of retroactive monies:

- a. Send a letter to the last known address of any affected individuals who are no longer in the bargaining unit.
  - b. Send an email to all current employees who are bargaining unit members of CUPE, Local 4540, whether full time, part time or casual;
  - c. Put advertisements in the Ottawa Citizen, the Ottawa Sun and Le Droit; and
-

d. Put notices on the Employer's website and Facebook page.

As well, the Union submitted that affected individuals be allowed a period of six months to make themselves known to the Employer, starting from the date that the Award relating to the implementation of the January 5, 2016 Award is rendered, and that the Employer be ordered to pay affected individuals any amounts owed within 45 days of receiving notice from that affected individual.

The Union also requested that union dues be paid on monies owing whether or not the monies were claimed.

The Employer submitted that the retroactivity provision in Article 27.01 of the collective agreement provides the best guidance as to the appropriate approach to employee notification.

The Employer also requested 120 days from the date of the Award to implement the new method of payment and 150 days from the date of the Award to pay any retroactivity.

#### DECISION RE: OTHER ISSUES

Given the existence of article 27.01, and considering the bargaining history set out above I have determined that the passage of some thirty-two months from April 1, 2014

until the release of this Award does not cause me to significantly depart from the precedents established by the parties for payment of retroactive monies. I do not fully appreciate the Employer's need for a time frame of 120 days from the date of the Award to implement the new method of payment and 150 days from the date of the Award to pay any retroactivity.

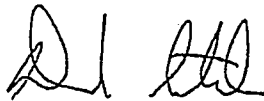
It may be that the Employer required an extended period for operational reasons, or it may be that, at this time of year, because there are statutory holidays and perhaps vacation time which may affect the Employer's ability to alter the manner in which it calculates gross earnings and to contact affected employees, and it may impact the ability of affected employees to receive and respond to such communications that extended period of time are warranted. I encourage the parties to discuss these issues and I will remain seized should they be unable to agree on any of the time lines concerning these matters.

The Employer is directed to communicate with affected employees in writing, and affected employees shall claim any monies owing in writing. The time lines for these communications and the time lines for the payment of the monies shall initially be discussed by the parties. The Union's request that the Employer send emails to employees or place advertisement in newspapers or notices on websites is denied without prejudice to the right of the Union to place such advertisements or notices or send emails should it choose to do so.

---

Finally, the Union requested that the Employer be required to calculate and remit all union dues owed to the Union arising out of the amount the Employer owes to the affected individuals regardless of whether an affected individual claims the monies owed to them. With respect to the payment of Union dues I did not receive extensive submissions concerning this issue. I direct the Employer to pay dues in accordance with article 6 of the collective agreement and will remain seized with respect to this issue and any other issues arising from the interpretation or implementation of this Award.

Dated at Maberly, Ontario this 18<sup>th</sup> day of December, 2016



---

David K.L. Starkman