INTEREST ARBITRATIONS AFTER BILL 26

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On January 30, 1996, Bill 26, entitled "An Act to Achieve Fiscal Savings and to Promote Economic Prosperity through Public Sector Restructuring, Streamlining and Efficiency and to implement other aspects of the Government's Economic Agenda," received Royal Assent.

Schedule Q of Bill 26 (a copy of which is attached to this paper) amended five statutes which provide for interest arbitration. These Acts are:

1. *Fire Department Act*.
2. *Hospital Labour Disputes Arbitration Act.*
3. *Police Services Act.*
4. *Public Service Act.*
5. *School Boards and Teachers Collective Bargaining Act.*

The thrust of the amendments is that the statute now sets forth Five Factors, which interest arbitrators are to consider when making awards. These Five Factors are as follows:

1. The employer's ability to pay in light of its fiscal situation.

2. The extent to which services may have to be reduced, in light of the decision or award, if current funding and taxation levels are not increased.

3. The economic situation in Ontario and in the municipality where the hospital is located.

4. A comparison, as between the employees and other comparable employees in the public and private sectors, of the terms and conditions of employment and the nature of the work performed.

5. The employer's ability to attract and retain qualified employees.

The wording in all of the five Acts is identical, except for Factor 3 regarding the geographic scope of the economic situation clause. For all of the Acts, except the Public Service Act, the arbitrator is to consider not only the economic situation in the entire Province, but also in the specific municipalities where the employer is located. Under the Public Service Act, only the economic situation of the entire Province is listed as a factor.

Prior to these changes, only the Police Services Act even listed what criteria the arbitrator was to consider. Therefore, most of the law on what an arbitrator should or should not consider grew out of the arbitral common law. The overriding theme or purpose of interest arbitration what to try to replicate free collective bargaining, that is to fashion a collective agreement along the same lines as the parties would likely have agreed, if the power to strike or lock out existed.

Now the situation is different. All of the statutes set forth Five Factors which the arbitrator is to consider. The purpose of this paper will be two fold: First, to examine the individual factors and second, to explore the issue as to whether or not these Five Factors are compulsory or merely directory.

Factor 1 - The Employer's ability to pay in light of its fiscal situation.

The issue of whether an interest arbitrator can or should take the employer's ability to pay into account has been discussed at length, both in various academic articles and numerous arbitration awards. It now seems clear that arbitrators can (and perhaps must) consider this factor. The issue is then exactly what is the Employer's ability to pay and how the parties could present relevant evidence on this topic to a board of arbitration.

First of all, if this factor is being relied upon by a single employer in an industry where there are many employers (i.e. a single nursing home) this provision would seem to require the arbitrator to look at the individual fiscal situation of the employer, not the general business climate of the industry. This may well lead to the situation where, unless an individual

employer's fiscal situation is different than other employer's in that same industry, this factor becomes unimportant.

This is because the general economic situation in the industry should already be reflected in the comparative wage levels and benefits paid by other employers. In other words, if the whole nursing home industry is in a slump and the average profit margin is 1%, then this situation should be reflected in the average terms and conditions of employment in the nursing home industry. Thus, if nursing home X is running at a profit margin of 1.1%, the particular fiscal situation of Nursing Home X is not particularly useful, since it is no different than its fellow employers.

It should also be noted that ability to pay is also a doubled edged sword, although it will usually be argued as an inability to pay position. There is no reason a union could not take the position that as this particular Nursing Home is showing a better profit picture than the average, it has a greater ability to pay and, thus should pay more than the industry standard. This, of course, would have the effect of penalising the more efficient employer and rewarding the less efficient one. However, that seems to be a natural consequence of looking at ability to pay.

There is also no reason to believe that looking at the employer's ability to pay means necessarily accepting the assumption behind the employer's financial statements or accepting the manner in which the employer chooses to organise his business. In other words, if an employer Hospital claimed that it did not have sufficient monies to pay the going wage for its nurses, it would seem to be open to the Union to question whether this was caused by factors such as;

- too many layers of management.
- excessive salaries or perks for executives.
- reluctance of management to dispose of excess lands or properties.
- Unusual accounting practices.

The point is once you plead that you cannot pay the on-going wage because you are broke, you open yourself to an intensive inquiry as to whether you are in fact broke, how you got to be broke and what steps you have taken to remedy the situation other than seeking to pay lower than industry wage rates.

As you can quickly see, this type of inquiry would greatly expand and complicate the evidence and procedure at an interest arbitration. The party seeking to rely on the employer's inability or ability to pay would clearly have the onus of proof. This means that in most cases the employer would have to present proper financial evidence to justify its position. The Union could force Employer's to properly prove their financial situation, both by requiring the calling of live witnesses under oath and by presenting expert evidence of their own. It will probably become common to see Hospital CEO's and Nursing Home owners being extensively cross-examined by Union counsel on the fiscal situation of the employer.

Factor 2 - The extent to which services may have to be reduced, in light of the decision or award, if current funding and taxation levels are not increased.

This factor would seem to be similar in nature to the ability to pay factor; however, rather than looking at the present fiscal situation of the specific employer, the arbitrator is to look at what effect the award may have on the employer's operation. In other words, a Employer would presumably bring forth evidence or argument to show that, if a wage award of a certain amount is granted, then they would have to:

- close a certain number of beds;
- limit the operating hours of a clinic;
- eliminate or limit recreational activities for patients;
- introduce user fees, thereby restricting access.

As with the ability to pay factor, it would be open to the Union to question these consequences or to put forward their own version of how the wage increase could be implemented without resorting to the service cuts proposed by the Employer.

In order to present the factual evidence for an argument of this nature it may involve the presentation of detailed economic detailed economic evidence that covers issues such as the actual savings achieved by the proposed service reductions, whether alternative and less drastic service reductions would achieve the same goal and whether or not the spending priorities of the Employer were appropriate.

By directing interest arbitrators to look at this factor, which previously was the exclusive role of management, it greatly expands the power and responsibility of the interest arbitrator. In

effect, the interest arbitrator may be required to second guess numerous management decisions, most of which are completely unrelated to the traditional labour relation issues discussed at the bargaining table. For instance, if the owner of a nursing home indicates that there should be a wage rollback because to do otherwise would necessitate the cancellation of an expansion programme seeking to add more beds to the facility, presumably the interest arbitrator would be entitled to inquire into the importance and necessity of this expansion programme, determine its importance relative to the labour relations goal of comparability of wages within an industry, and determine whether or not it should be allowed to justify a wage rollback. Now the arbitrator could not, of course, order the cancellation of the expansion, but he or she could, and presumably must, take their issues into account when determining the terms of the collective agreement.

Most existing interest arbitrators have little or no formal training or experience in managing any business enterprise larger than their own offices. Their background is in labour relations and collective bargaining, not in running a hospital or a nursing home. Since the motivating factor behind this legislation in the first place seemed to be a governmental distrust of interest arbitrators, it seems somewhat ironic that arbitrators are now being given expanded powers to examine new issues for which few of them have any formal training or practical experience.

Factor 3 - The economic situation in Ontario and in the municipality where the hospital is located

There is not much new in this factor as interest arbitrators routinely look at data involving the cost of living, unemployment rates and other economic indicators in their decision making process.

The direction to look at "the municipality where the hospital is located" would seem to be like the ability to pay argument in that, unless the specific municipalities economic situation was significantly different than that of the overall Province, it does not add anything to specifically consider the municipality's economic condition.

Thus, if the economic situation in Orilla was worse than the overall Province, presumably this would justify lower wages. However, if Oshawa's economic situation was better than the that of the Province , then the Oshawa nursing home employees should presumably get higher increases than the industry average.

Factor 4 - A comparison, as between the employees and other comparable employees in the public and private sectors, of the terms and conditions of employment and the nature of the work performed

This is more or less simply of restatement of the main factor in most interest arbitrators. Most of the evidence traditionally presented in interest arbitrators focuses on a comparison between one party's proposal and whatever that party thinks a proper comparator.

One of the most frustrating aspects of being an interest arbitrator is trying to work your way through the mountain of data that the parties present to you at the hearing with respect to this factor. Each party presents their own data in their own way, often on an issue by issue basis. I have noted the following tactics employed by parties which have the effect, if not the intent, of confusing, rather than clarifying the issues:

* Each side presenting the same data in different ways so as to make a true comparison impossible. For instance, the Union may show you data that proves that 72% of CUPE collective agreements in the health care sector provide a safety shoe allowance of $5.00 or more per month. The employer presents you with data showing that of Nursing Homes in south-western Ontario, both organised and unorganised, the average safety shoe allowance, including those Homes where there is no allowance at all, is $1.57. Both sets of data are accurate, however the interest arbitrator may feel that what he or she really wants to know is the average safety shoe allowance in Ontario for all unionised nursing homes, excluding those Homes which have no such allowance.

* Each side changing the way they present data on each issue so as to produce a more favourable result on each issue. This approach, if adopted by both parties at the same time, can produce almost comical results. For example, on one issue the Union will present data based on the whole Province, while the Employer will argue that only data from South-West Ontario is relevant. On the next issue, the Employer argues that only Province wide statistics are helpful while the Union indicates that on this particular issue, evidence of London area only hospitals is the most relevant.

* When a statistical survey would not be convincing, the party seeking to justify a proposal will simply list those particular institutions that have such a clause or term of employment and hope that the arbitrator will be impressed with the length of the list. This is on the theory that arbitrators cannot do simple math, so that simply listing 20 Nursing Homes on a sheet of paper is supposed to be more impressive than honestly telling the arbitrator that of the 400 Nursing Homes in the province, only 20 (5%) have the particular language that they are asking for.

Data that is not presented in a clear, consistent and fair manner is simply not useful to the arbitrator and will generally be ignored or discounted. I would suggest that in order to make your case more convincingly, you should first determine what you feel is a fair comparator group for all of the issues in dispute. For instance, you would have to decide the following issues:

- Do I look at whole Province, or just some part of it?
- Do I look at both unionised and non-unionised sectors?
- Do I look at all unions or employers in my area, or do I limit the data to the same Union and/or the same Employer?
- What time frame do I consider relevant?
- Do I present my evidence based on the number of collective agreements, or the number of people covered?
- Do I distinguish between freely negotiated v. arbitrated collective agreements?

Once you have decided what a proper comparator is, you should explain why you feel your comparator group is fair and relevant. Having then decided on a comparator, all of your evidence should be based on this single comparator, if possible. By applying a consistent approach such as this, your overall presentation will have more credibility and persuasive power than simply cherry picking the best data for each issue.

Factor 5 - The employer's ability to attract and retain qualified employees

I have never quite understood how this factor is supposed to be considered, in that it is clearly the Employers concern that it have sufficiently attractive wages to attract and retain a qualified workforce. I have been an interest arbitrator on numerous occasions and never have I heard an employer say " We want to pay more than the Union is asking for because otherwise we won't be able to retain qualified staff."

Similarly, if a Union says that part of the reason that they want a wage increase is to ensure the retention of the employees, the typical Employer response is to say "Thank you very much for concerning yourselves with respect to how we are going to manage the workplace by retaining employees. We feel that we already have qualified staff at the present wages and if we find out that our wages are driving away good employees, we will be the first ones to come back and ask to reopen the contract so that we can pay higher wages."

If this provision is to mean something, I suppose an employer could present evidence to show that it is having no trouble hiring and retaining staff at its present wage rates and use that as a justification for opposing a wage increase. Since it is always in the employer's self-interest to do that, I am not sure how helpful that evidence is to an arbitrator who is trying to determine what the appropriate terms and conditions of employment should be based on the theory of replicating collective bargaining.

Are the consideration of the Five Factors compulsory or merely directory?

At first blush it looks as if the interest arbitrator must consider the Five Factors, for why else would they be specifically listed in the statute?

However, a closer examination of the language causes some real doubt on that proposition.

Let us look at the opening paragraph of the statute carefully:

"In making a decision or award, the board of arbitration shall take into account all factors it considers relevant, including the following criteria:"

Does this mean:

1. The Five Factors are deemed to be relevant, thus must be taken into account, or
2. All the interest arbitrator has to do is take into account all the factors that he or she believes are relevant, but an individual arbitrator may ignore any factor he or she considers irrelevant, including one or more of the Five Factors because the chair holds a personal belief, for example , that ability to pay should never be considered as a relevant factor, or
3. If the consideration of the Five Factors is not mandatory, can a Board of Arbitration refuse to consider one or more of the Five Factors only on the basis on its relevance

in the particular case but not simply because the chair holds a personal belief that one or more of the Five Factors should never be considered.

If the correct answer is (1), then why didn't the Act say as follows:

In making a decision or award, the board of arbitration shall take into consideration the following criteria, plus any other factors it considers relevant."

If the correct answer is (2), then why did the Legislation waste their time listing the Five Factors, if any interest arbitrator could pick and choose which of the factors he or she chose to follow based on their own personal beliefs. This would amount to no change in the present law, which did not seem to be the intent of the legislature.

I believe that answer (3) is the most appropriate, In effect, this means that an arbitrator could not apply one or more of the Five Factors, but that his or her reason for not considering one of those prescribed factors must be based on the individual circumstances of the case in question, not the philosophical or political position of the arbitrator. In other words, it may not be appropriate for an arbitrator to say "I did not consider the Employer's argument on ability to pay to be persuasive, as I do not believe that it is a factor that should ever be considered in interest arbitrations."

However, it would be proper for an interest arbitrator to say "Having heard the Employer's argument on ability to pay, we do not find it to be a relevant factor in this case because its particular fiscal situation is no worse than the industry as a whole."

As a final note, I ask you to read the last section of the amendment, which reads:

"Nothing in subsection 1 affects the powers of the board of arbitration" (subsection 1 is the Five Factors)

You could certainly read this as supporting the argument that nothing in these amendments is intended to force arbitrators from doing anything different from what they did before, which means that those arbitrators who do not like ability to pay, do not have to consider if they do not want to. This, of course, raises the question then as to why did the legislature bother to introduce these sections at all, if it was not intended to change the existing practice. Another way of reading this clause would be to say that the Five Factors are not intended to restrict arbitrators' powers with respect to how a hearing is conducted, what type of remedies it could award and issues of that nature.

Fortunately , I do not have to resolve that conundrum in this paper. I leave that to future arbitration decisions.