

## School Board Update

### Arbitrator Orders New Sick Leave Provisions for ETFO Teachers

**Date:** October 31, 2016

In an important interest arbitration award, Arbitrator William Kaplan accepted the proposal of the Ontario Public School Boards Association (OPSBA) and the Crown to add two specific sick leave provisions to the central terms of the Elementary Teachers Federation of Ontario (ETFO) teachers' collective agreements. These proposed amendments address anomalies that arose under the sick leave provisions that were imposed during the last round of bargaining.

The changes proposed by the Crown and OPSBA were accepted at all central negotiations, with two exceptions: (1) ETFO refused to accept the proposed changes for either its teacher or education worker groups; and (2) the Ontario English Catholic Teachers' Association (OECTA) agreed to different amendments to the sick leave plan.

The Crown, OPSBA and ETFO were unable to reach agreement with respect to the proposed sick leave amendments, and as a result agreed to refer the matter to interest arbitration before Arbitrator Kaplan.

In this *School Board Update*, we discuss this significant award.

## The Issue

At interest arbitration, both OPSBA and the Crown argued that unintended consequences arose as a result of the 2012 regulatory regime that amended the sick leave plan applicable to ETFO teachers. These unintended consequences included the possibility of "perpetual" sick leave, and the problem of sick leave "refresh", both of which are described below:

**Perpetual Sick Leave:** A person with a long-term illness or injury that allowed a partial return to work could utilize short-term sick leave (i.e. 11 days of sick leave plus by 130 days of short-term disability days) to top-up his or her earnings to full-time indefinitely.

**Sick Leave Refresh:** A person absent from work due to a long-term illness or injury that commences in one school year could return to work for less than one full school day in the subsequent school year, yet benefit from two allocations of short-term sick leave for a single illness.

To address these issues, OPSBA and the Crown proposed the following language:

### Perpetual Sick Leave

In the event the Teacher exhausts their STLDP allotment and continues to work part-time their salary will be reduced accordingly and a new prorated sick leave and STLDP allocation will be provided. Any absences during the working portion of the day will not result in a loss of salary or further reduction in the previous year's sick leave allocation, but will instead be deducted from the new allocation once provided.

### Refresh Period

Access to the new allocation provided as per paragraphs b) and c) for a recurrence of the same illness or injury will not be provided to the Teacher until the Teacher has completed eleven (11) consecutive working days at his/her full FTE without absence due to illness.

OPSBA submitted that these amendments were required because short-term sick leave was never intended to replace long-term disability (LTD) coverage. Rather, it was intended to bridge employees to full or partial LTD in the case of long-term illnesses or injuries. The changes proposed by OPSBA and the Crown were therefore consistent with the overall purpose of the sick plan provisions.

OPSBA also submitted that the amendments ought to be awarded because they were freely negotiated at all other central tables (with exception to ETFO and OECTA), and therefore were the normative and pervasive results of free collective bargaining in the sector. Moreover, the proposed amendments made fiscal sense and would help ensure that the sick leave plan remains sustainable into the future.

## The Decision

Arbitrator Kaplan agreed with OPSBA and the Crown. While stating that ETFO was free to negotiate terms that differed from sectoral norms, he found that “given the overall collective bargaining context, and the results that were reached elsewhere, it is hard to imagine a negotiated outcome that would have led to the ETFO proposals / status quo. Put another way, applying the replication criteria to this case largely determines the result and certainly makes manifest that it is the OPSBA proposals, not the ETFO ones, that should be awarded.” The proposals addressed unintended consequences arising from recent legislative change and short-term sick leave “was never intended to last in perpetuity,” nor was it intended to replace long-term disability benefits.

The Arbitrator stated that “perpetuating the current regime, referred to by ETFO as the status quo, would be inconsistent with this conceptual and practical underpinning. ... While the replication and comparability criteria cannot be mechanistically applied, they are definitely applicable here so normative and pervasive are the results of free collective bargaining.” The Arbitrator also noted that there was nothing *prima facie* discriminatory about the proposal, which was an issue raised by ETFO.

## Implications

This interest arbitration award brings the 2014-2015 central school board negotiations very close to their conclusion. The identical dispute remains outstanding for ETFO education workers, but that would also proceed before Arbitrator Kaplan. Kaplan’s award helps resolve some serious problems in school board sick leave plans and ensures consistency among most of the sick leave plans in the sector.

*The Ontario Public School Boards’ Association and the Crown in Right of Ontario and The Elementary Teachers’ Federal of Ontario* (18 October 2016, Kaplan)

Should you have any questions about this award, please contact [John-Paul Alexandrowicz](#) at 416.864.7292 or [Julia Nanos](#) at 416.864.7341, who argued the case for OPSBA, or your regular [Hicks Morley lawyer](#).

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