School Board Update

Arbitrator Confirms that a Teacher on Voluntary Unpaid Leave is Not Entitled to Sick Leave Until She Makes a *Bona Fide* Return to Work

Date: February 27, 2018

In a decision dated February 20, 2018, Arbitrator William Kaplan dismissed a grievance brought by the Ontario English Catholic Teachers' Association (OECTA) concerning a teacher's entitlement to sick leave when, following a voluntary unpaid non-statutory leave of absence, she is unable to return to work due to an intervening illness or injury.

Though the individual grievance relates to a teacher from the Halton Catholic District School Board, the issue is one of general application and the grievance proceeded through the central dispute resolution process. Learn more in this *School Board Update*.

Arbitrator Kaplan's Decision

OECTA argued that the teacher is entitled to sick leave under the collective agreement (which provides for 11 days at 100% of salary and then 120 days at 90% of salary). The Ontario Catholic School Trustees Association (OCSTA) and the Crown both argued that she is not.

After carefully reviewing the arguments from all three parties, Arbitrator Kaplan agreed with OCSTA and the Crown that teachers have no entitlement to sick leave under the terms of the collective agreement if they are on a voluntary unpaid non-statutory leave of absence and are then prevented from returning to work on a scheduled date because of an injury or illness. They must first make a *bona fide* return to work.

The Arbitrator began his analysis by expressly disagreeing with OECTA's assertion that a teacher's "access" to sick leave flows automatically from their "allocation". Instead, as he explained, access and allocation are both tied to attendance, and it is the teacher's actual "presence in the workplace" that determines eligibility.

He then confirmed the fundamental principle that sick leave plans are intended to compensate people who cannot work because they are sick – not to compensate people who have chosen to take an unpaid leave and who unfortunately become ill or injured before they return to work. Indeed, when a teacher decides to take a voluntary unpaid leave, they assume the financial risks associated with illness or injury.

Finally, Arbitrator Kaplan was quick to reject OECTA's contention that it is "arbitrary and discriminatory" to treat one teacher who became sick while on a statutory leave differently than another teacher who became sick while on a voluntary unpaid non-statutory leave. He found that sick leave plans provide a benefit in exchange for the performance of work – and, in so doing, there is no prohibition on distinguishing between employees who are working and those who have decided to take an unpaid leave.

Implications for School Boards

This decision should be well-received by Ontario's school boards, which continue to grapple with the costs associated with a generous sick leave plan that was put in place in 2012. Not only does the decision confirm a reasonable limit on teachers' sick leave eligibility, but it also sets out basic legal principles regarding sick leave that may help resolve – or at least inform – future disputes. Key principles include:

- A teacher's sick leave eligibility is tied to "presence in the workplace".
- The purpose of sick leave is "most definitely not to compensate people who have chosen to take an unpaid leave and who unfortunately become ill or injured before they return to work."
- When teachers take a voluntary unpaid non-statutory leave, they assume – until they make a *bona fide* return to work – the "financial risk of illness."
- Providing sick leave (or any other economic benefit) to teachers on voluntary unpaid leaves must be agreed to in clear language.

Despite dismissing the grievance, Arbitrator Kaplan did not reject all of OECTA's arguments. In particular, he saw no need to consider OECTA's assertion that local terms dealing with sick leave are "of no force and effect" because sick leave is a purely central issue. As such, for school boards with local terms in their collective agreement that contemplate sick leave eligibility, it is important to note that the enforceability of those terms was left by Arbitrator Kaplan as "a question for a different day."

If you would like to discuss the implications of this arbitration decision for your school board, please contact any member of Hicks Morley's School Board Practice Group.

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