

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

**The Ontario English Catholic Teachers' Association**

**and**

**The Ontario Catholic School Trustees Association**

**And**

**The Crown in Right of Ontario as Represented by the Ministry of Education**

**Before:** William Kaplan  
Sole Arbitrator

**Appearances**

**For OECTA:** Bernie Hanson  
Cavalluzzo  
Barristers & Solicitors

**For OCSTA:** Eric Roher  
Borden Ladner Gervais  
Barristers & Solicitors

**For the Crown:** Ferina Murji  
Legal Counsel  
Ministry of the Attorney General

The matters in dispute proceeded to a mediation and then a hearing in Toronto on February 7, 8 & 14, 2018.

## **Introduction**

The dispute at hand – and it is one of general application – concerns the contested entitlement of a teacher to the sick leave/short term leave and disability plan (hereafter “sick leave”) when she is unable to return to work following a voluntary unpaid non-statutory leave of absence because of an intervening illness or injury. Sick leave is compensated as follows: the first 11 days at 100%, then 120 days at 90%. It is axiomatic that teachers apply for and receive voluntary unpaid leaves of absence in a wide variety of circumstances making the particular circumstances of one person’s leave non-dispositive of any issues in dispute.

Simply put, the question that arises – in a grievance filed pursuant to the central dispute resolution process – is whether a teacher on a voluntary unpaid non-statutory leave of absence is entitled to sick leave if she is prevented from returning to work on the scheduled date by an intervening illness or injury? The Association say that she is, while OCSTA and the Crown disagree. There is no dispute about the sick leave entitlements of teachers who are precluded by illness or injury from returning to work on their scheduled return date who are on statutory leaves of absence. Nor is there any dispute, at least not in this case, about the various collective agreement entitlements and restrictions applying to teachers who, described in broad terms, have been accessing sick leave and who are returning to work.

This case, which proceeded to a mediation and then a hearing in Toronto on February 7, 8 & 14, 2018, requires the interpretation of the central terms relating to sick leave, and they are set out below. The individual grievance relates to a teacher from Halton, and so the Halton CDSB & OECTA local terms are also in issue.

## The Central Terms

3.1 The school board will provide a sick leave/short-term leave and disability plan which will provide sick leave days and short-term leave and disability coverage to permanent full-time and part-time teachers, when the teacher is ill or injured or for purposes of personal medical appointments as described below. Teachers employed in a term position (including but not limited to adult and continuing education assignments) or filling a long-term assignment, shall be eligible to receive sick leave benefits under this plan in accordance with the provisions in the Sick Leave/Short-Term Leave and Disability Plan – Long-Term Occasional Teachers and Teachers Employed in a Term Position. A teacher is eligible for a full allocation of sick leave and short-term leave and disability plan days regardless of start date of employment. Sick leave/Short-Term Leave and Disability Plan days will be deducted in increments consistent with existing practices.

3.2 Subject to paragraphs 3.4-3.8 below, full-time teachers will be allocated eleven (11) sick days payable at one hundred percent (100%) of salary on the first day of each school year. (Clarification- For permanent full time teachers the rate will be calculated by dividing annual grid salary inclusive of any applicable allowances, by 194.) When a teacher's employment status is less than full time, the teacher's eligibility for sick leave credits shall be prorated by the ratio that the teacher's FTE status is to full time status. Teachers on an unpaid leave of absence are not eligible to access benefits under this article for the portion of the workday for which the teacher is on an unpaid leave of absence. Sick leave days may be used for reasons of personal illness and injury, and personal medical appointments.

3.3 Subject to paragraphs 3.4-3.8 below, full-time teachers will be allocated one hundred and twenty (120) STLDP (Short Term Leave Disability Plan) days on the first day of each school year. If a teacher's employment status is less than full time, the teacher's eligibility for short term disability days shall be prorated by the ratio that the teacher's FTE status is to full time status. Teachers on an unpaid leave of absence are not eligible to access benefits under this article for the portion of the workday for which the teacher is on an unpaid leave of absence.

3.5.1 The allocations outlined in paragraphs 3.2 and 3.3 above, will be provided on the first day of each school year. In the event that a teacher is absent on the first day of the school year, the allocations outlined in paragraphs 3.2 and 3.3 above will be granted subject to the restrictions outlined in paragraphs 3.5.3 to 3.5.5. If a teacher is absent on the last day of a school year and the first day of the following school year for unrelated reasons, the allocations outlined in paragraphs 3.2 and 3.3 above will be provided on the first day of the school year.

3.5.2 Changes to the teacher's employment status during a school year shall result in an adjustment to allocations, as per 3.2 Sick Leave Days and 3.3 Short-Term Leave and Disability Plan.

3.5.3 Where a teacher is accessing sick leave and/or the short-term leave and disability plan in a school year and the absence for the same condition continues into the following school year, the teacher will continue to access any unused sick leave days or short-term disability days from the previous school year's allocation. A new allocation in accordance with paragraphs 3.2 and 3.3 will not be provided to the teacher until s/he has submitted medical clearance (consistent with the requirements of paragraph 3.7) confirming that s/he is able to return to work and a bona fide return to work occurs.

3.5.4 A teacher who has utilized 131 days of combined sick leave and short-term leave and disability leave in the immediately preceding school year and continues to be absent for the same condition must provide medical clearance (consistent with the requirements of paragraph 3.7) confirming s/he is able to return to work and a bona fide return to work occurs, before s/he will be allocated further leave under this Article in the next school year. 3.5.4 A teacher who has utilized 131 days of combined sick leave and short-term leave and disability leave in the immediately preceding school year and continues to be absent for the same condition must provide medical clearance (consistent with the requirements of paragraph 3.7) confirming s/he is able to return to work and a bona fide return to work occurs, before s/he will be allocated further leave under this Article in the next school year.

3.5.5 A teacher returning from a long-term disability leave must provide medical clearance (consistent with the requirements of paragraph 3.7) confirming s/he is able to return to work and a bona fide return to work occurs for the teacher to receive a new allocation of sick leave/short-term leave and disability leave. If the teacher has a recurrence of the same illness or injury the teacher is required to apply to reopen the previous LTD or WSIB claim.

3.6 For teacher absences that extend beyond the eleven (11) sick leave days provided above, teachers will have access to a sick leave top up for the purpose of topping up salary to one hundred percent (100%) under the Short-term Leave and Disability Plan.

This top up is calculated as follows:

3.6.1 Eleven (11) days less the number of sick days used in the prior year. These days constitute the top-up bank.

3.6.2 In addition to the top-up bank, compassionate leave top-up may be considered at the discretion of the board. The compassionate leave top-up will not exceed two (2) days and is dependent on having two (2) unused leave days in the current year. These days can be used to top-up salary as described in 3.6.1 above.

3.6.3 When teachers use any part of a short-term sick leave day they may access their top-up bank to top up their salary to 100%. For clarity, one day in a top up bank may be used to top-up ten days of STLDP from 90% to 100% of salary.

## The Local Terms

### 10.01 GENERAL

(a) A teacher may be granted a leave of absence for reasons of education, health, or a personal reason that the Board deems acceptable. The period of absence, if granted, will be determined by the Executive Officer, Human Resources Services in view of the nature of the request. The teacher granted leave under this Article may participate in the Benefit Plans provided the full premium cost of participation (100%) is paid in advance by the teacher and on a payment schedule established by the Board.

...

(c) A leave of absence under this Article shall not be recognized for seniority or increment purposes.

Effective September 1, 2016, a leave of absence under this Article shall not be recognized for increment purposes.

...

(e) Upon the teacher's return to duty, teacher entitlement to SL/STLDP days is as per Article 3 of Part A [Central Terms].

## OECTA Submissions

In OECTA's submission, the case was straightforward: a teacher on a voluntary unpaid non-statutory leave of absence is entitled to sick leave if she does not return to work on her scheduled return date because of an intervening illness or injury. A number of arguments were advanced in support of this submission.

### 1. Sick Leave Allocation Was Automatic

OECTA counsel argued that the central terms of the collective agreement require the applicable board to provide sick leave and the language was mandatory: entitlement – “will be” – allocated on the first day of the school year for full-time teachers regardless of start date. Some exceptions were carved out, but they were, in OECTA's view,

inapplicable. Notably, the collective agreement did not require a return to work as a precondition for entitlement. Had the parties wished to tie entitlement to an actual return to work they could have easily done so. Had the parties wished to tie sick leave to attendance at work – an earned plan – they could have, and would have, said so. When they wished to draw such a distinction, for example, entitlement to benefits, they used clear language. With sick leave, significantly, they had not.

In these circumstances, where a teacher was on a voluntary unpaid non-statutory leave of absence, with a scheduled return date, if she became ill or was injured, she was entitled to access sick leave. The purpose of the plan was to provide the teacher with income protection, and if she was unable, by illness or injury, to return to work as scheduled she should be able to avail herself of the benefits of the provision. That meant protecting teachers from economic loss as a result of illness or injury. That fact that a teacher had previously been on a voluntary unpaid non-statutory leave of absence was, in OECTA's submission, irrelevant when a purposive approach was taken. Moreover, when the teacher became sick on or about her scheduled return date, she was no longer on an unpaid leave. She was then absent because of sickness or injury, so entitled to the benefit of the plan. A voluntary unpaid non-statutory leave of absence may have preceded the illness or injury. However, but for that illness or injury she would be at work and entitled to compensation for her loss. Entitlement to allocation and access was, therefore, established.

## **2. No Fetters on Use**

In considering possible limitations, it was important, in OECTA's view, to emphasize the purpose of sick leave: it was to provide teachers with replacement income when

they cannot work because of illness or injury. An examination of the provision revealed no distinction between allocation and use. What would be the point of a mandatory allocation and then a barrier to use? Again, where the parties wished to impose limitations (e.g. absences carrying over from one school year to another, or denial of benefits when a teacher was on an unpaid leave), they did so with plain language. Allocation was equivalent to entitlement: the applicable provisions allocated the sick days and imposed no fetters on their use. Put another way, access was implicit in allocation. And pro-ration had nothing to do with it. Full-time teachers should receive full coverage and part-time teachers the pro-rated amount. In either case, coverage was intended to compensate for actual loss. That is the only reason why the pro rata provisions were negotiated. Stated somewhat differently, their purpose was not to deny access to sick or injured teachers.

### **3. No Requirement That Sick Leave Benefits Be Earned**

It was true enough, OECTA conceded, that some sick leave plans required entitlement to be earned through attendance at work. That was not, however, this plan. This plan did not impose any requirement that sick leave benefits be earned by attendance at work. Indeed, it was noteworthy, and factually and legally relevant, to observe that the parties did impose some restrictions on access – as set out above and including by way of another example, pro-rating depending on status – but active employment was not one of them. There were arbitration authorities to the contrary, however, once carefully examined, they were inapplicable and distinguishable for reasons counsel outlined.

#### **4. Arbitrary, Discriminatory and Possibly in Violation of the Human Rights Code**

What possible reason could justify, OECTA counsel asked, treating a teacher who got sick or injured one way simply because she was returning from a statutory leave, while treating a teacher who got sick or injured another way simply because she was returning from a voluntary unpaid non-statutory leave? Other examples were advanced to illustrate this point. In one case, a teacher was entitled to benefits, in another she was not. In fact, two teachers could have the same illness or injury, but only one would be covered. If the employer had concerns about the *bona fide* nature of the illness, those concerns could be readily and appropriately addressed. The practices in place were definitely arbitrary and quite possibly discriminatory. And if so, that was a violation of the *Human Rights Code*.

#### **5. The Central Provisions Occupy the Field**

Local provisions were, in OECTA's view, of no force and effect as the central provisions fully occupied the field. Sick leave was a central issue and the central provisions were dispositive. A review of the governing legislation made this manifest.

#### **Conclusion to OECTA Submissions**

OECTA sought a declaration of breach affirming the sick leave entitlements of a teacher on a voluntary unpaid non-statutory leave who suffers an illness or injury precluding return to work on the scheduled date together with an order compensating the individual grievor for her losses. OECTA asked me to remain seized with respect to the implementation of this award.

## **OCSTA & Crown Submissions**

Both OCSTA and the Crown were agreed: a teacher on a voluntary unpaid non-statutory leave had no entitlement to access sick leave until a *bona fide* return to work had occurred. Sick leave was work based; reserved for employees at work, not employees on voluntary unpaid non-statutory leaves of absence. This conclusion flowed from an interpretation of the central and local provisions, from the case law, and from sound public policy not to mention avoidance of absurd results. Each of these issues was addressed in turn.

### **1. The Collective Agreement (Central and Local)**

In OCSTA's and the Crown's submissions, when read as a whole, and together, the central and local terms evidence an intention that teachers on a voluntary unpaid non-statutory leave of absence return to work before they receive their sick leave allocation. A careful review of the central terms led to the conclusion that the allocation was to full-time teachers at work: they received complete coverage – no matter when they actually returned to work – and that part-time teachers received pro rata coverage. The conclusion that inevitably followed was that teachers who were not at work received nothing until they actually returned to work. There was nothing to allocate until the teacher returned to work. If the teacher was not there on day one, nothing to allocate. If the teacher did not return during the year, nothing to allocate. And if no allocation, no entitlement. That was what was meant by the word “eligible.” If the teacher returned to work – a *bona fide* return – then she was eligible for her full allocation. Read together, that is what the central terms provided.

No other interpretation, OCSTA and the Crown argued, made any sense: how could it be, for example, that a full-time teacher on a voluntary unpaid non-statutory leave of absence who did not return to work on her scheduled date could receive complete sick leave coverage, i.e., 131 days, while a part-time teacher who had actually been at work only received a pro rata portion of that amount? Likewise, a teacher who had a change in status during the year from full- to part-time, had her allocation appropriately adjusted. This too signaled the shared understanding that presence at work mattered and eligibility could be and would be affected by actual work.

If the parties had wished full-time teachers on voluntary unpaid non-statutory leaves of absence – for purposes as diverse as education, beachcombing, family, to name just three reasons why a teacher may take an unpaid leave, to qualify for sick leave before they ever even returned to work, it was open to them, OCSTA and the Crown argued, to do so, but that was not this negotiated regime. Allocation was different than access, but in any event, according to the central terms, allocation occurred at the start date of employment. For most teachers in most situations that was day one of each school year; for teachers returning from a voluntary unpaid non-statutory leave of absence, that was the day they actually returned to work – not some notional date that they were planning on returning to work.

## **2. Central and Local Terms Both Govern**

*The School Boards Collective Bargaining Act, 2014* set out a bifurcated bargaining regime, with both central and local issues, central and local issues bargaining, and central and local issues terms and provisions. One of the local terms, agreed to by the parties was Article 10.01(e). It provided that sick leave entitlements arise upon the teacher's "return

to duty". Any doubt about the shared intention memorialized in the central terms, was put to rest, OCSTA and the Crown argued, by this provision.

### **3. The Jurisprudential Context Matters**

Sick leave provisions are among the most highly litigated at grievance arbitration, and as OCSTA and the Crown argued, are negotiated in a context: the arbitral context reflecting an understanding of accepted industrial relations norms arising out of a vast history of jurisprudence that further informs expectations and understandings. Each case necessarily depended on its unique language and facts, not to mention, where teachers are concerned, the statutory framework then in place. Nevertheless, the overriding principles set out in the cases mattered and informed the interpretation of provisions of this kind. Accordingly, a large number of awards were reviewed and a number of observations made.

Many arbitrators have commented on the earned nature of sick leave: it is, almost without exception, earned through attendance at work. It is payment for services performed. Sick leave plans are overwhelmingly understood to be a form of compensation in exchange for work: "Sick leave credits were earned through attendance at work" *Ottawa Board of Education & OSSTF* [1984] OLAA No 38 (Shime) at para. 16. This conclusion, Arbitrator Etherington has noted, came at a certain time and place, where the statutory scheme was different than that today. However, it indicates "a mindset on the part of the part of the parties that is consistent with the general arbitral and community understanding of the nature and purpose of sick leave credit systems as payment for services performed" *ETFO & Lambton Kent DSB* [2007] OLAA No 422 at para. 28). Arbitrators acknowledge that parties can depart from this general

understanding, but the cases likewise indicate the requirement for clear and unambiguous language in order to do so.

The authorities, OCSTA and Crown counsel pointed out, also squarely address some of the issues raised in this case. For example, in *Grand Erie DSB & OSSTF*, [2008] LVI 3767 (Knoph) the arbitrator considered the suggestion that an absent full time teacher could secure a greater benefit than a present part-time teacher: “If the union’s argument is correct, then a teacher who is absent 100% of the term would receive the full allocation of sick leave credits, while the teacher who was working part of the time or for the full year would have their credits reduced on a pro-rated basis. While that could be a deliberate result, it does seem unlikely to the point of absurdity” (at para. 20). OCSTA and the Crown agreed: it would be absurd that a non-working teacher received a better outcome than a teacher who was at work. Arbitrator Knoph continued: “...there is a general understanding that sick leave credits are earned and are not an automatic entitlement flowing simply from employment status. Therefore, any other interpretation must be founded on something concrete in a collective agreement to indicate an intention to depart from the general understanding” (at para. 23). Also considered, albeit *obiter*, was entitlement while on unpaid leave: “Nor would sick leave be allotted for an unpaid or self-funded leave of absence” (at para. 24).

#### **4. No Discrimination**

Both OCASTA and the Crown submitted that there was absolutely no evidence of any discrimination in this case. *ONA v. Soldiers Memorial* [1999] OJ No. 44 was extensively reviewed and the point made that the law was now established: discrimination is not

made out by distinguishing between employees who were working and those who were not.

### **Conclusion to Submissions by OCSTA and the Crown**

In conclusion, OCSTA and Crown counsel argued that the case for entitlement had not been made – quite the contrary, in fact – and they asked that the grievance be dismissed.

### **Decision**

Having carefully considered the submissions of the parties, it is my view that the grievance must be dismissed.

It is true enough that the sick leave plan does not specifically set out either the entitlements or restrictions applicable to a teacher on a voluntary unpaid non-statutory leave of absence who does not return on her scheduled return to work date. The Association places great emphasis on allocation taking the position that the question of access is asked and answered by the fact that teachers are mandatorily allocated a certain number of days.

Respectfully, this is a view that I cannot share. A full-time teacher is given her full allocation on the first day of the school year or some other employment start date. The scheme of the provision, considered in the overall, is to marry allocation and access tying both to attendance. You get it on the first day of the school year, or when you return to work. Your presence in the workplace is what makes you eligible. Other provisions in the collective agreement support this interpretation. It would, as OCSTA

and the Crown argue, be a somewhat surprising outcome to conclude that a teacher on a voluntary unpaid non-statutory leave who does not return to work is nevertheless entitled to 131 days of generous compensation while, by way of one example, a part-time teacher who is at work receives only her pro rata entitlement. The pro rata provisions and the denial of benefit entitlement to employees on unpaid leave together support the conclusion that a return to work is a necessary precondition to allocation and then use. This theme is developed further below.

To be sure, the parties can negotiate whatever regime they wish, including providing sick leave for individuals on unpaid leaves. The likelihood of them doing so, counsel for the Crown argued, was rather remote, especially in an era of fiscal restraint where the financial sustainability of the plan is paramount. The purpose of sick leave is to compensate people who cannot work because they are sick or injured: it 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 a person goes on an unpaid leave of absence, there is no sick leave for that period. An individual on an unpaid leave does not require income protection: they are not receiving any income. To be sure, the situation is different once they start work, but the mere identification of a projected return to work date is insufficient to establish either allocation or access.

There is no question in this case, and presumably many others, of the legitimacy of the illness, but under this collective agreement, sick leave is not available to employees on voluntary unpaid non-statutory leaves of absence. When a teacher takes a voluntary unpaid non-statutory leave of absence, she assumes – until she returns to work – the financial risk of illness. Just because a teacher becomes ill or injured close to the

projected return work dates does not confer either allocation or access. Once they make a *bona fide* return to work, they receive their allocation and their access. As has already been established in the authorities, there is nothing unreasonable *per se* in applying a precondition for access, for instance a refreshment period. Indeed, this is now the dominant sectoral norm: not governing, of course, but worth noting. Under the regime in this case, the only (lesser) precondition is a *bona fide* return to work.

This conclusion, needless to say, is in complete accord with the authorities. As OECTA counsel pointed out, those authorities do not squarely address the issues in this case. But they do set out the governing principles which are the backdrop – non-dispositive certainly but instructive – for adjudication and interpretation. Also relevant is the generally accepted jurisprudential principle that clear language is required to confer an economic benefit, especially one that would be non-normative. As previously noted, the parties can decide to provide sick leave to employees on voluntary unpaid non-statutory leaves of absence, but they should do so directly, and I find that the language at issue, properly interpreted, leads to the exact opposite conclusion.

There is no need here to resolve the central-local issues conundrum; nor to tackle head on the issue whether local issues that impinge on central ones are *ultra vires*. That is another question for a different day although it is worth pointing out, as set out in *Durham District School Board et al & OSSTF OLRB 0376-15-U* (Fishbein) that: “Issues that are resolved at the central table will become part of each local collective agreement, in addition to whatever is bargained at the local table” (at para. 16). All that need be said is that the local terms – agreed to by the parties, are instructive, and they are in full accord with the interpretation and result.

In addition, the claimed discrimination has not been established. The sick leave plan in place provides a benefit in exchange for work. The one is logically and properly tied to the other. Requiring work in exchange for this benefit is reasonable and *bona fide*. It is not prohibited discrimination to distinguish for the purposes of compensation between teachers who are providing services and teachers who are on a voluntary unpaid non-statutory leave of absence.

There is no evidence – in the agreed facts, in the exhibits, or in any of the submissions – of any discrimination based on a prohibited ground. Individuals who decide to take a voluntary unpaid non-statutory leave of absence are not working – that is the decision they have made – and until they return to work they are not eligible for sick leave. Once they actually return to work, they receive their full allocation and entitlement. The sick leave benefit is inextricably tied, not to status, but to performance of work. Sick leave is to compensate employees who cannot work, not employees who are unable to return from a voluntary unpaid non-statutory leave of absence. It is hard to imagine anyone going away on an unpaid leave and believing that they can access the sick leave plan if they are unable to return to work. Individuals necessarily retain their status as employees, including the right to return to work, but not the right to sick leave before doing so. Someone who provides no services whatsoever cannot come within the scope of the benefit. The result in this award is required by the central terms, it is consistent with the local terms, and with the jurisprudential framework. It is not discriminatory.

Accordingly, and for the foregoing reasons, the grievance is dismissed.

DATED at Toronto this 20<sup>th</sup> day of February 2018.

*“William Kaplan”*

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William Kaplan, Sole Arbitrator