IN THE MATTER OF AN ARBITRATION
BETWEEN:

TORONTO DISTRICT SCHOOL BOARD

(the "Employer")

-and-

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4400

(the "Union")

AND IN THE MATTER OF GRIEVANCES 2019 - C- 7434, AND 2018- B - 01915

Louisa M. Davie - Sole Arbitrator

Appearances

For the Union: **Ian McKellar**

For the Employer: **Nadine Zacks**

Introduction

This award addresses a dispute between the Toronto District School Board ("the Employer") and the Canadian Union of Public Employees, Local 4400 ("the Union") about the interpretation of article C.6 of the collective agreement. That article deals with the allocation of sick days and short-term disability days (hereafter collectively referred to as "sick leave") to employees. More specifically, the dispute between the parties revolves around what they referred to throughout the hearing as the "refresh period." The issue is and whether permanent employees are entitled to a sick leave allocation each year on the first day of the fiscal year or whether employees accessing sick leave on the last regularly scheduled day of the previous fiscal year, who attend on the first regularly scheduled day of the following fiscal year, must work eleven (11) consecutive days before their sick leave is "refreshed".

Consistent with their usual practice the parties filed briefs in advance of the hearing. The briefs identified the issue in dispute and the facts. The submissions in the briefs were augmented with oral submissions made during a video conference hearing on September 17, 2020. At that hearing the parties agreed I was properly seized and did not raise any issues with respect to my jurisdiction to hear and determine these grievances.

The relevant provisions of article C.6 state:

C6.00 SICK LEAVE

C6.01 Sick Leave Short Term Leave and Disability Plan

Definitions:

…

"Fiscal Year" means September 1 to August 31.

"Wages" is defined as the amount of money the employee would have otherwise received over a period of absence.

a) Sick Leave Benefit Plan

The Board will provide a Sick Leave Benefit Plan which will provide sick leave days and short term disability coverage to provide protection against loss of income when ill or injured as defined below. An employee, other than a casual employee as defined above, is eligible for benefits under this article

Sick leave days may be used for reasons of personal illness, personal injury, personal medical appointments, or personal dental emergencies only.

Employees receiving benefits under the Workplace Safety and Insurance Act, or under a LTD plan, are not entitled to benefits under a school Board's sick leave and short term disability plan for the same condition.

b) Sick Leave Days Payable at 100% Wages

Permanent Employees

Subject to paragraphs d), e) and f) below, Employees will be allocated eleven (11) sick days at one hundred percent (100%) of wages on the first day of each fiscal year, or the first day of employment.

…

c) Short-Term Disability Coverage — Days Payable at 90% Wages

Permanent Employees

Subject to paragraphs d), e) and f) below, permanent Employees will be allocated one hundred and twenty (120) short-term disability days at the start of each fiscal year or the first day of employment. Permanent Employees eligible to access short-term disability coverage shall receive payment equivalent to ninety percent (90%) of regular wages

…

d) Eligibility and Allocation

A sick leave day/short term disability leave day will be allocated and paid in accordance with current Local practice

Any changes to hours of work during a fiscal year shall result in an adjustment to the allocation.

Permanent Employees

The allocations outlined in paragraphs b) and c) above will be provided on the first day of each fiscal year, or the first day of employment, subject to the exceptions below:

> Where a permanent Employee is accessing sick leave and/or the short-term disability plan in a fiscal year and the absence continues into the following fiscal year for the same medical condition, the permanent

Employee will continue to access any unused sick leave days or short-term disability days from the previous fiscal year' s allocation.

A new allocation will not be provided to the permanent Employee until s/he has returned to work and completed eleven (11) consecutive working days at their regular working hours. The permanent Employee's new sick leave allocation will be eleven (11) days at 100% — wages. The permanent Employee will also be allocated one hundred and twenty (120) short term disability days payable at ninety percent (90%) of regular salary reduced by any paid sick days already taken in the current fiscal year.

If a permanent Employee is absent on his/her last regularly scheduled work day and the first regularly scheduled work day of the following year for unrelated reasons, the allocation outlined above will be provided on the first day of the fiscal year, provided the employee submits medical documentation to support the absence, in accordance with paragraph (h).

…

e) Refresh Provision for Permanent Employees

Permanent Employees returning from LTD or workplace insurance leave to resume their regular working hours must complete eleven (11) consecutive working days at their regular working hours to receive a new allocation of sick/short-term disability leave. If the Employee has a recurrence of the same illness or injury, s/he is required to apply to reopen the previous LTD or WSIB claim, as applicable….

(emphasis added)

Issue in Dispute-Position of the Parties

The Union represents employees in bargaining units B, C and D. Unit B is comprised primarily of instructors. Unit C is comprised of many different classifications of office, clerical, secretarial, food service and aquatic employees, and also includes educational assistants. Unit D consists primarily of caretakers and cleaning staff and includes security employees. The language at issue in this case is central language common across the units represented by the Union.

It is the Employer's position that permanent employees who access sick leave in one fiscal year and who continue to be absent in the following fiscal year for the same medical condition are not entitled to a new sick leave allocation until they have returned to work and completed eleven (11) consecutive working days at their regular working hours. An employee absent and accessing sick leave on the last regularly scheduled workday of the previous fiscal year must complete eleven (11) consecutive working days at their regular working hours in the following fiscal year before a new sick leave allocation is provided to the employee. In order to receive a new sick leave allocation it is not sufficient for employees on sick leave on the last day of the prior fiscal year to merely attend work on the first day of the new fiscal year.

It is the Union's position that permanent employees are entitled to receive their allocation of sick leave on the first day of each fiscal year, or on the first day of employment. That entitlement is subject to certain exceptions which do not apply in the circumstances of these grievances. Thus, the employee who attends work on the first regularly scheduled workday of a new fiscal year is entitled to receive the sick leave allocation. The Employer is not permitted to impose an eleven (11) consecutive working days requirement on employees merely because the employee who attends on the first regularly scheduled workday of the new fiscal year accessed sick leave on their last regularly scheduled workday of the previous fiscal year.

<u>The Facts</u>

The Union has filed two grievances. An individual grievance of RB, and a group grievance which states:

> I/We the undersigned claim that: the Board has violated the Collective Agreement, including but not limited to Articles D, Articles R, Appendix D, Articles C6.00, the corresponding provision of any relevant previous collective agreement and any other relevant provision or legislation by failing to refresh the grievors 11 sick leave credits on the grievors pay stubs at the start of the school calendar
>
> The Union reserves the right to rely on any other articles of the collective agreement that may also apply in all of the circumstances.

The parties agreed upon the basic facts giving rise to these grievances and cited three examples of specific employees affected by the grievances. In each example the employee was absent and accessed sick leave on the last day of the 2017/2018 fiscal year.

Each employee attended work on September 4, 2018 which was their first regularly scheduled workday of the 2018/2019 fiscal year.

Each employee was absent due to medical reasons for one or more days within the first eleven (11) consecutive working days of the 2018/2019 fiscal year.

The “will say” statement of one of the employees (YL) was that her two (2) single day absences within the first 11 consecutive working days of the 2018/2019 fiscal year were for medical appointments and reasons unrelated to the medical condition which caused her absence and access to sick leave on the last day of the 2017/2018 fiscal year. That employee did not submit medical documentation to support the absence or her “will say” statement.

In addition to these basic facts the parties produced the attendance records of the three employees. A review of those records indicates that in the 2017/2018 fiscal year two (2) of the three (3) employees were absent and accessed sick leave for a lengthy period before the last day of the 2017/2018 fiscal year. One of the two employees had been continuously absent since May 2, 2018, while the other was continually absent from April 3, 2018 onwards. The third employee was absent and had accessed sick leave for the last week of the 2017/2018 fiscal year (four days) and had periodic absences throughout 2017/2018 fiscal year. These were generally absences of one or two days but there are also blocks of absences of 3 to 9 days. It is this employee’s evidence that

the three single days of absence within the first weeks of the new 2018/2019 fiscal year were for unrelated reasons.

The attendance records tendered in evidence also disclosed that two (2) of the three (3) employees “refreshed” and received their full sick leave allocation in October/November 2018 after having worked 11 consecutive days.

I was advised that the parties had resolved the outstanding issues regarding the sick leave entitlement and allocation to the third employee, grievor RB, but that such resolution did not address their dispute about the appropriate interpretation of the collective agreement language at issue in this case.

The documentary evidence tendered also disclosed the following facts which were referenced by counsel in their submissions and which provided background and context to their differing interpretations of the language. Most significantly the parties referred to the history of the language found in the current collective agreement to provide context.

That history started with the 2008 – 2012 local collective agreement between the parties which provided for a Sick Leave and Gratuity Plan. Under the provisions of that collective agreement employees were credited “at the beginning of each working year” or “at the beginning of employment” with a number of sick leave credits which could be accumulated in their sick leave account from year-to-year. Deductions from the credits in their sick leave account were made when employees were absent due to illness. Upon retirement, or in case of total permanent disability, and in accordance with a formula spelled-out in the collective agreement, a sick leave gratuity could be paid to the employee who had sick leave credits remaining in their account. The Sick Leave Credit and Gratuity Plan did not require employees to work eleven (11) consecutive

days following a return to work after an illness in order to receive their annual sick leave credits.

In 2012 the provincial government initiated centralized bargaining and commenced negotiations with various Unions in the education sector including CUPE. I need not detail those negotiations or the *Putting Students First Act (2012)* which impacted those negotiations. It is sufficient to note that as a result of the centralized bargaining and legislative enactments the 2012 – 2014 collective agreement between these parties consisted of two (2) Memorandum of Understanding (MOU) executed on December 31, 2012 and May 10, 2013 and Ontario Regulation 1/13 ("O. Reg. 1/13"). Pursuant to these sick leave credits were provided to employees on the first day of the fiscal year. The only exception was that employees absent on the last workday of the fiscal year and on the first workday of the next fiscal year for the same condition would not get the credits until the employee returned to work. For example, the December 31, 2012 MOU provided

i) Sick Leave Days

1. Each fiscal year, an employee shall be paid 100% of regular salary for up to eleven (11) days of absence due to personal illness… Subject to section 2 below, such days shall be granted on the first day of the fiscal year provided the employee is actively at work…

2. An employee who was actively at work or on an approved leave of absence on the last scheduled day of work prior to September 1st and scheduled to return to work on September 1st and is unable to return due to a medical condition that is documented to the satisfaction of the Board and meets the requirements under the applicable disability management program, shall qualify for their entitlement to sick days at 100% in accordance with clause i) 1 above.

ii) Short Term Leave and Disability Plan (STLDP)

…

2. Each fiscal year, an employee absent beyond the sick leave days paid at 100% of salary, as noted in clause i) 1 above, shall be entitled up to an additional one hundred and twenty (120) days short term sick leave…..

As was the case with the 2008 – 2012 collective agreement, neither O. Reg. 1/13 or the MOU referenced a requirement that employees work eleven (11) consecutive days in order to receive annual sick leave credits.

This brings us then to the 2014 – 2019 collective agreement which contains the language at issue in this case and under which these grievances were filed. The grievances were filed in 2018.

In their submissions the parties also referred to arbitrator Kaplan's interest arbitration award dated October 18, 2016 which addressed the issue of a sick leave refresh period in the collective agreement between the Ontario Public Schools Boards' Association ("OPSBA") and the Elementary Teachers' Federation of Ontario. Ontario (see *Public School Boards' Association v Ontario, 2016 CanLII 69703 (ON LA) (Kaplan)*.) In his award arbitrator Kaplan awarded the OPSBA proposal that the collective agreement contain an eleven (11) day refresh period so that access to a new allocation of sick leave credits would not be provided to teachers absent for a recurrence of the same illness or injury until the teacher had completed eleven (11) consecutive working days without absence due to illness. A similar requirement is also in the collective agreement between the Employer and the Ontario Secondary School's Teachers Federation which provides

> v. Where a Teacher is accessing sick leave, STLDP, WSIB or LTD in a fiscal year and the absence due to the same illness or injury continues into the following fiscal year, the Teacher will continue to access any unused sick leave days or STLDP days from the previous fiscal year's allocation. Access to the new allocation provided as per paragraphs C9.1(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.

Submissions of the Union

It was the Union's position that article 6.01 states that all permanent employees will be provided the sick leave allocation on the first day of each fiscal year subject only to certain exceptions. Those exceptions are spelled-out in article 6.01 (d), (e) and (f). It is not disputed that paragraphs (e) and (f) which deal with employees returning to work from long-term disability or workers' compensation benefits are not at issue in this grievance, and that this case revolves around 6.01 (d).

The Union argued that the exception in 6.01 (d) does not apply to an employee who is accessing sick leave at the end of a fiscal year and who attends and works on the first regularly scheduled workday of the following fiscal year. For the exception in (d) to apply the absence of the employee must "continue" into the following fiscal year. Where an employee attends on the first regularly scheduled workday of the following year it cannot be said that the absence "continues".

The Union asserts that article 6.01 (d) only permits the Employer to impose an eleven (11) consecutive working day requirement where an absence "continues" from one fiscal year to the following fiscal year "for the same medical condition." It cannot be said that an absence "continues" if the employee attends on either the last regularly scheduled workday of the prior fiscal year or on the first regularly scheduled workday of the following year. The Union submitted that the Employer was attempting to imply a new term and requirement in article 6.01 (d) which is not present in the language.

In support of its position the Union relied upon what it argued was the plain and ordinary meaning of the word "continues". The Union cited the definition of "continue" in the Merriam Webster dictionary which provides:

> intransitive verb
>
> 1: to maintain without interruption a condition, course, or action. The boat continued downstream.
>
> 2: to remain in existence: endure. The tradition continues to this day.

3: to remain in a place or condition: stay. We cannot continue here much longer.

4: to resume an activity after interruption. We'll continue after lunch.

transitive verb

1a: keep up, maintain - continues walking

b: to keep going or add to: prolong - continue the battle also: to resume after intermission

Having regard to this definition the Union maintained that "absence continues" can't include a period of time where the employee attends at work. That is not to "maintain without interruption" or "remain in existence."

That this should be the definition attributed to "absence continues" in article 6.01 (d) was evident from the remainder of the language employed in article 6.01 (d). For example, the parties clearly expressed that an absence from which the employee did not return at the start of the following year meant that a new allocation would not be provided until the employee returned to work and completed eleven (11) consecutive working days at their regular hours. In addition, the fact that the last paragraph of 6.01 (d) established a mechanism by which an employee can prove that their continued absence related to a different medical condition was further support that the intended meaning of "the absence continues" was its ordinary meaning of "remain in existence". There would not be a need for employees to demonstrate the continued absence was for unrelated reasons unless "the absence continues" in the first paragraph referred to an absence on the last day of the fiscal year and an absence on the first day of the following fiscal year.

The Union submitted also that the Ontario Public School Boards Association's (OPSBA) position at the interest arbitration involving the Elementary Teachers Federation of Ontario (ETFO) was further support for the Union's interpretation of "the absence

continues". OPSBA is the designated bargaining agency which bargained the central terms of the collective agreement. In the interest arbitration before arbitrator Kaplan OPSBA argued that the existing central language in the ETFO collective agreement allowed for an anomaly that an employee who had been on sick leave at the end of the fiscal year but who attended for only the first day of the following fiscal year would receive a new allocation of sick leave. In other words, OPSBA interpreted and agreed that "the absence due to the same illness or injury continues" did not include circumstances where the employee attends work on the first regularly scheduled workday of the following fiscal year.

OPSBA sought and was awarded language which corrected this anomaly. The ETFO collective agreement contains specific language which addresses the anomaly cited by OPSBA and restricts access to a new sick leave allocation where an illness from the previous year continues, or reoccurs after the employee returns to work, until the employee has attended work for eleven (11) consecutive working days. The same is true for the Employer's collective agreement with the Ontario Secondary School Teachers' Federation. The Union submitted that I should not imply a similar term into the collective agreement between these parties. If the Employer wants to achieve a similar result in his collective agreement with CUPE the place to do that is at the bargaining table or through interest arbitration, and not through an award in these rights grievances.

Union counsel argued the language of article 6.01 was mandatory. The allocation "will be provided on the first day of each" fiscal year. With this as the default the parties turned their minds to those circumstances when employees are not provided a sick leave allocation on the first day of each fiscal year, and those circumstances where employees will be required to attend work for eleven (11) consecutive working days in order to receive a new allocation. They agreed that employees absent on the last day of the fiscal year who are also absent on the first day of the following fiscal year must attend work for eleven (11) consecutive days to receive a new allocation. They did not

agree that if an employee attends on the first scheduled workday of the fiscal year the employee must work for eleven (11) consecutive days to receive the new sick leave allocation merely because the employee was absent on the last day of the prior fiscal year.

The language of article 6.01 clearly indicates that these parties turned their minds to the issue of various exceptions or circumstances when the sick leave allocation would not be provided to employees on the first day of the fiscal year. Given that the parties considered exceptions to the mandatory allocation on the first day of a fiscal year, the absence of specific language to address circumstances where employees are absent on the last working day of the fiscal year but attend on the first working day of the following fiscal year indicates that the parties did not intend to create an exception for those circumstances.

In response to the Employer's position that this is an absurd result as an employee could attend for only one day and be absent for the remainder of the year and yet have their sick leave "refreshed", the Union submitted that this should not be seen as an absurd result because it was precisely the result which the parties had bargained in preceding collective agreements. Neither the 2008 – 2012 nor the 2012 – 2014 collective agreements contained a requirement that employees work eleven (11) consecutive days before receiving their sick leave allocation. Both preceding collective agreements also indicated the allocation would be provided to the employee on the first day of the fiscal year or the first day of employment.

Finally, Union counsel maintained that while its definition and interpretation of "the absence continues" was consistent throughout, to accept the Employer's position and interpretation would attribute different meanings to the term "continues" depending on the circumstances surrounding the employees absence from work.

As an alternative submission the Union submitted that the first paragraph of article 6.01 (d) did not apply to the employee who was absent within the first eleven (11) working days of the 2018 – 2019 fiscal year for reasons which did not relate to the "same medical condition" for which she was absent on the last working day of the 2017 – 2018 fiscal year. The employee was not required to access unused sick leave from their allocation for the 2017 – 2018 fiscal year, but could access the sick leave allocation she was entitled to receive when she attended on the first working day of the 2018 – 2019 fiscal year. The absence within the first eleven (11) days was not for the "same medical condition". In this regard the Union maintained also that the last paragraph of article 6.01 (d) did not apply and the employee was not required to submit medical documentation because the preconditions of that last paragraph did not exist. The employee was not "absent on his/her last regularly scheduled workday and the first regularly scheduled workday of the following year…". The employee was present on the first regularly scheduled workday of the following year.

Submissions of the Employer

It was the Employer's submission that the Union's proposed interpretation would lead to an absurdity and was inconsistent with both the plain language of the article and the intent and purpose of the sick leave provisions and the exceptions set out in article 6.01(d).

Employer counsel argued that the Union's focus on the word "continues" as an un-interrupted period of time was misguided and also ignored the other definitions of the word, including "to resume an activity after interruption." It was the Employer's position that the focus of the exception found in article 6.01 (d) was not on whether an employee was present or absent on the last day of the fiscal year or the first day of the following fiscal year. Rather, the focus was on whether an employee who was "accessing sick leave" in one fiscal year and continues to be absent the following fiscal year for the same medical condition for which they were accessing sick leave.

The Employer maintained that read as a whole, and in context, the proper interpretation of article 6.01 (d) was that when an employee has accessed sick leave and continues to do so for the same medical condition the employee must satisfy two conditions in order to receive a new or fresh allocation of sick leave. The employee must return to work and complete eleven (11) consecutive days of work. Stated somewhat differently, it was the Employer's position that the continuity of accessing sick leave is broken only when an employee returns to work and completes eleven (11) consecutive days of work. Where an employee continues to access sick leave for the same medical condition the employee must satisfy these two preconditions (return to work and work eleven (11) consecutive days) regardless of which calendar day the employee returns to work.

In making these submissions the Employer asserted that it was inappropriate to merely rely upon a dictionary meaning of "continues". The context of the collective agreement, and in particular the context of the article to be interpreted, was important. In this regard counsel noted that the provision for an eleven (11) day refresh period was new language in the collective agreement pursuant to which these grievances were filed. That context was significant. A context which was equally significant from the Employer's perspective however was the fact that all of the predecessor collective agreements which provided for sick leave specifically referenced an absence on the first day of the fiscal year. The 2008 – 2012 collective agreement referred to "absent from duty at the start of a working year". O. Reg. 1/13 referred to being "absent on the… first workday" while the December 31, 2012 MOU referred to being unable to return to work "on September 1" which was the first workday of the new fiscal year. The newly negotiated requirement that employees work eleven (11) consecutive days before receiving a new allocation of sick leave was inserted into the collective agreement at the same time that the parties removed language which spoke to attendance on the first and last days of a fiscal year.

It was the Employer's position that it was significant context that when they bargained the eleven (11) day refresh period, the parties deliberately chose different language

than that previously used. The parties did not refer to last day and first day of the fiscal year. When they provided for exceptions for the sick leave allocation to be refreshed the parties deliberately removed that language and chose different language which focused on "accessing sick leave". As noted by arbitrator Sheehan in *Toronto District School Board v Canadian Union of Public Employees, Local 4400, 2019 Can LII 103861* the previous language which focused on the first day of the fiscal year became "spent" when the 2014 – 2019 collective agreement was negotiated and ratified.

The Employer argued it was improper and inappropriate for the Union to seek to insert or imply into article 6.01 the same "last day" and "first day" type of language when it was specifically removed by the parties. The collective agreement does not say "if you are absent on the last day of the school year and the first day of the school year you must satisfy the refresh period, with the converse interpretation that if you are present on either of those days you …immediately get the refresh, regardless of whether your absence continues." Having negotiated language which differed significantly from the language in the predecessor collective agreement the meaning to be attributed to the language used must also be different than a focus on the first day of the fiscal year.

That the language of the first paragraph in article 6.01 (d) must mean something different than merely looking at the last day of the fiscal year and the first day of the following fiscal year is emphasized when considered in context of the last paragraph of article 6.01 (d). In that paragraph the parties expressly used the "last regularly scheduled workday and the first regularly scheduled workday" language. If the parties had intended the language of the first paragraph to mean the same thing, they clearly knew the language to use. Yet, the parties deliberately chose not to import that type of language into the first paragraph of article 6.01 (d). Instead the "last day" and "first day" language applies only in the narrow circumstances set out in the last paragraph of article 6.01 (d) namely, when an employee is absent on each of those days and the absence on the first day of the fiscal year is for unrelated reasons.

In terms of a contextual analysis the Employer submitted it was also relevant to look at the purpose of the article. The case law makes it clear that the purpose of the sick leave provision and the eleven (11) day refresh requirement is twofold. First, to ensure that the employee is fit to return to work and resume their duties. Secondly, to correct an anomaly or fix the unintended consequence which would otherwise have permitted an employee to come back and work for only one day (or less) and have their sick leave bank fully refreshed. (see *Public School Boards' Association v Ontario, (Kaplan) supra and Toronto District School Board v Elementary Teachers' Federation of Ontario (Elementary Teachers of Toronto), 2019 Can LII 110785 (Parmar))*

From the Employer's perspective it was also important to remember that the issue arises because of absences due to illness in an employment setting. As demonstrated by the attendance records in this case, in the employment setting it is not uncommon for employees to access sick leave on non-consecutive days for the same illness. Employees may be absent for some time, return to work for a while and then be absent again for the same illness. It does not make sense to say, as the Union's position suggests, that the absence for illness did not "continue" because there was a brief interruption. It makes more sense to define "continue" in that context as a resumption or reoccurrence of the illness.

In context where the parties must be presumed to know that absences from work due to illness often continue and do not occur in a single block of time the parties negotiated an eleven (11) day refresh period. If absences due to illness were always or only in non-consecutive blocks of time one would not need a refresh period at all. The absence due to illness would simply end and not recur. It is precisely because employees regularly have ongoing absences for the same medical condition following a return to work that the parties negotiated the requirement that the employee return to work and work eleven (11) consecutive working days before receiving a new allocation of sick leave. They agreed that to break the continuity of an absence due to illness the employee needs to work eleven (11) consecutive days. That break in continuity indicates the

employee is ready to resume the duties of the position. Merely returning to work for one day does not mean that the employee has demonstrated that they are ready to resume their duties and that the medical condition won't lead to a continuation of the absence.

Finally, the Employer argued that the Union's interpretation would lead to absurd results and should therefore be rejected. An employee who happens to attend on the first day of the new fiscal year would receive their entire new allotment of sick leave notwithstanding that they were absent the previous year or were absent again immediately following that first day. On the other hand, an employee who misses the first day but who attended thereafter would not receive their allocation until later in the school year, and, depending on the number of consecutive days between absences, could potentially not receive their allocation at all (i.e. the employee could work 9 or 10 days, have a 1 or 2 day absence, work another 9 or 10 days, have one day of absence etc.). The Employer argued "it makes no sense that there is one day of the school year on which the refresh language does not apply, but that it applies to the other approximately 194 working days each year."

With respect to the employee who claims the absences in the following fiscal year were not for the same medical condition, the Employer submitted that the first time that matter was raised was in the briefs which were filed in advance of the hearing date. The employee had not previously indicated the absences were not related. Moreover, the employee had not provided any medical documentation to show that was the case. The Employer argued that in the absence of such documentation it was reasonable for the Employer to conclude that the absences within the eleven (11) day refresh period were related to the medical condition which caused the employee to access sick leave in the prior fiscal year. It was not good enough for the employee to say that it was for unrelated reasons. The employee had to provide documentation.

Decision

There is substantial merit to the able submissions which both counsel advanced on behalf of their respective clients. Indeed, I was initially drawn to the straightforward simplicity of the Union's position that "absence continues into the following fiscal year" can't apply where an employee attends work on the first day of the following year because an absence interrupted by attendance can not be said to "continue". Upon reflection however, having regard to the language used in the collective agreement, the purpose of sick leave and a requirement that in certain instances an employee work eleven (11) consecutive days in order to "refresh", and given the context in which the article was negotiated, I prefer the Employer's position.

There is no dispute between the parties about the appropriate rules arbitrators apply when interpreting a collective agreement. In undertaking this interpretive exercise, the arbitrator seeks to ascertain the intention of the parties by reading the article of the collective agreement, both on its own and in context of the entire collective agreement. In so doing there are rules of construction typically employed by arbitrators including that words used by the parties should be given their "plain and ordinary" meaning, all words must be given meaning, and different words and phrases are presumed to have different meanings. In addition, when reading collective agreement language, standing on its own or in context of the collective agreement as a whole, arbitrators will adopt a contextual analysis which gives due regard to the surrounding circumstances in which the language was negotiated. The intent of the parties is discerned not just from the words used but also from the purpose for which the language was negotiated and the context surrounding its inclusion in the collective agreement.

With these principles in mind I turn to examine article 6.01 (d).

I have not found focusing only on the plain and ordinary meaning of the words "absence continues" to be determinative in this case. As demonstrated by the four definitions

provided by the Union the word “continue” has a certain degree of vagueness and can have different meanings. Certainly, “continues” in article 6.01 (d) can mean both “to maintain without interruption” as the Union submits, and “to resume an activity after interruption” as the Employer maintains. I have therefore focused more on a contextual analysis and the purpose of the article to ascertain its meaning and the intent of the parties and to determine its appropriate application.

In my view the purpose of providing sick leave is self evident. Sick leave is “to provide protection against loss of income when [an employee is] ill or injured.” I agree with arbitrator Kaplan in *Public School Boards’ Association v Ontario,(Kaplan) supra* when he stated:

> Short-term sick leave is by definition short-term…
>
> Short-term sick leave was never intended to last in perpetuity, or close to it, through top up. It is intended to provide income protection for short-term periods. It is intended to serve as a bridge, where necessary, to LTD, either full or partial. Short-term sick leave – and by any measure the plan here is a generous one – is for short-term illnesses. LTD is for long-term illnesses.

In this collective agreement the eleven (11) days of sick leave and one hundred and twenty (120) days of short-term disability coverage set out in article 6.01 are similarly designed and intended to provide short-term income protection. These sick leave and short term disability days are not intended to go on forever or in perpetuity which is the result if employees automatically receive a new sick leave allocation merely by attending at work on the first day of each fiscal year.

Similarly, the purpose of a requirement or precondition that employees work a specific number of days before they receive a “new” allocation of sick leave is also self evident. The purpose of requiring employees to work eleven (11) continuous day following access to sick leave is to establish and ensure that the employee is ready to resume his/her duties. The eleven (11) consecutive working days requirement is intended to ensure that the employee has recovered from the illness which caused them to access

sick leave. As arbitrator Kaplan noted in *Public School Boards' Association v Ontario,(Kaplan) supra* "There is nothing unreasonable in applying a precondition for refreshment when the purpose is to ensure that the teacher is actually ready to resume her duties." (See also *Toronto District School Board v. Elementary Teachers' Federation of Ontario* supra). That this is the intended purpose in this collective agreement is apparent also from the provisions in article 6.01 (e) which address employees returning from LTD or WSIB leave who must <u>also</u> complete eleven (11) consecutive working days before receiving a new allocation of sick leave, and who must apply to reopen the previous LTD or WSIB claim if there is a reoccurrence of the same illness or injury.

A contextual analysis of the circumstances surrounding the inclusion of article 6.01 (d) discloses that, prior to the 2014 – 2019 collective agreement there was no requirement that employees complete eleven (11) consecutive workdays before receiving a sick leave allocation. Employees were provided their sick leave allocation on the first day of the fiscal year (although there were certain rules pertaining to the use of sick leave credits for employees absent on the first day of the fiscal year). However, the context also indicates that the previous collective agreements between these parties used "first day" and "last day" type of language. Unlike the current article 6.01 (d) which focuses on employees "accessing sick leave" the focus of the predecessor collective agreement was on an employee's attendance or absence from work on a particular day and how that impacted the sick leave available to the employee.

The fact that the language in the current collective agreement contains, for the first time, a requirement that in certain circumstances employees must work eleven (11) consecutive days, together with the absence of a specific reference to being absent on a particular day and a reference instead to employees "accessing sick leave" for "the same medical condition" suggests to me that the exception set out in article 6.01 (d) is intended to address circumstances where there is a recurrence of the illness for which the employee was accessing sick leave. In my view that purpose is reinforced by the

fact that article 6.01 (d) clearly indicates that the employee "will continue to access any unused sick leave…from the previous fiscal year's allocation."

Having regard to the language used by the parties in this particular article, read in context of the collective agreement as a whole, and employing a contextual analysis which considers the purpose of sick leave and the eleven (11) consecutive working days requirement, together with the circumstances surrounding its inclusion in the collective agreement, I accept the Employer's position that the focus of the first paragraph of article 6.01(d) is not so much on when the allocation of sick leave is made, but rather on when sick leave is accessed. I agree that the focus of article 6.01 (d) is not on the attendance or absence of an employee on a particular day. Instead, the focus of the exception set out in 6.01 (d) is on when employees can access sick leave and which sick leave provided in any fiscal year must be accessed. In this regard I find that when it comes to the "same medical condition", the direction and exception in article 6.01 (d) is that the employee who has been accessing sick leave must continue to use the same sick leave allocation they were accessing the previous fiscal year. The employee is not permitted to access a new allocation of sick leave to which they are or may become entitled in the current fiscal year. They must continue to access the previous year's allocation.

Read as a whole the direction in the first paragraph regarding absences for the same medical condition flows naturally with the references to receipt of a "new allocation" and "new sick leave" after completion of eleven (11) consecutive working days in the paragraph immediately following the direction to access any unused sick leave from the previous fiscal year. When it comes to absences for the "same medical condition", employees must use their "old" allocation, rather than a "new" allocation.

In this regard it is important to keep in mind that even if the employee is not able to access a new allocation of sick leave credits on the first day of the fiscal year that does

not necessarily mean they are without access to sick leave. If their absence is for the same medical condition, they continue to be able to access unused sick leave days from the previous year. That scheme of having to use or access sick leave from the previous fiscal year is consistent with the scheme under the 2008 – 2012 collective agreement which provided the sick leave credits which could accumulate from year to year, and the 2012 – 2014 collective agreement. In the 2008 – 2012 predecessor collective agreement employees absent "at the start of a working year" could access any unused sick leave credits in their account to cover that day's absence. Those who had exhausted their credits were not entitled to sick leave credits until they returned to work. They were then granted sick leave credits on a prorated basis. Similarly, under the 2012 – 2014 collective agreement O. Reg. 1/13 provided that employees absent on the first workday could "not use a sick leave credit provided for the current fiscal year in respect of the first workday" but could "use any unused sick leave credits provided in the immediate preceding fiscal year" to cover the absence. The exception in article 6.01 (d) preserves that scheme by permitting employees who were accessing sick leave in the prior fiscal year to continue to access that same sick leave for the same medical condition.

That the focus of the first paragraph of article 6.0 1(d) is on whether employees are accessing sick leave, and not on whether employees are present or absent on particular days, is emphasized by the very distinct and different language used in the final paragraph of article 6.01 (d) pertaining to permanent employees. In the last paragraph, in very narrow circumstances which focus on the absence of the employee on the first and last day, if the employee's absence is for "unrelated reasons", the employee may receive their sick leave allocation on the first day of the fiscal year. They will then be able to use that sick leave to cover their absence on the first regularly scheduled day. In other words, such employee need not continue to access unused sick leave from the prior year because their absence is not for the "same medical condition" and is not a reoccurrence of the medical condition for which they had accessed sick leave in the prior year..

The language of this last paragraph stands in sharp contrast to the language used in the first paragraph. If the parties intended the exception in first paragraph of article 6.01 (d) to depend on an employee's attendance or absence on a particular day rather than on an employee's access to sick leave they would have used language similar to that used in the last paragraph.

The absence of specific language which focuses on an employee's attendance or absence and language which instead focuses on an employee's access to sick leave, supports the Employer's position, which I accept, that the purpose and thrust of the first paragraph of 6.01 (d) is to ensure that the employee accessing sick leave is ready to resume their duties and can meet two (2) conditions before receiving a "new" sick leave allocation--- the employee must return to work and work eleven (11) consecutive days.

In the result I have concluded that article 6.01 (d) sets out various exceptions (plural) under which permanent employees will not be provided a new sick leave allocation on the first day of each fiscal year. An exception is set out for employees "accessing sick leave" whose absence (and need to continue accessing sick leave) continue into the following year for the same medical condition. Those employees can continue to access their unused sick leave allocation from the previous fiscal year but must return to work and work eleven (11) consecutive days before receiving a new allocation.

Another exception is set out for employees absent on the last work day of the fiscal year and also absent on the first work day of the following fiscal year for unrelated reasons. Those employees must submit proof of illness that the absences were for unrelated reasons in order to receive a new allocation on the first day of the fiscal year.

There are also exceptions to receipt of a sick leave allocation on the first day of the fiscal year for employees returning from LTD or WSIB, and for employees on Long

Term Supply Assignment, but the parties agree those exceptions are not engaged in these grievances.

This brings me then to the one employee, YL, who was absent on the last day of the fiscal year, present on the first day of the following fiscal year, and thereafter absent during the first eleven (11) consecutive workdays for reasons claimed to be unrelated to those which caused her to access sick leave in the prior fiscal year.

The last paragraph under the "permanent employees" part of article 6.01 (d) relating to employees who are absent on the first and last day for unrelated reasons does not apply to this employee because she was present on the first day of the fiscal year.

The exception in the first paragraph may also not apply. The first paragraph applies where an absence "continues… for the same medical condition." Thus, if it is claimed that the absence is not for the same medical condition the exception may not apply and the employee may be entitled to their sick leave allocation on the first day of the fiscal year.

In my view, where an employee advances a claim that the absences were not for the same medical condition the onus is on the employee to establish that fact. In the absence of such an assertion or claim the Employer is entitled to presume that the continued absence in the following year is for the same medical condition which caused the employee's absence on the last day of the prior fiscal year and for which the employee accessed sick leave.

The individual circumstances of YL are encompassed in the group grievance. There is nothing in the material filed to suggest these circumstances or the claim that the

absences were for unrelated reasons was discussed between the parties at the various steps of the grievance process as might have been the case if an individual grievance had been filed. As this matter proceeded by way of written briefs the Employer was unaware of the employee's claim that the absences were not for the same medical condition until the Union's brief was filed. Beyond the employee's "will say" statement, which the Employer is not prepared to accept at face value, there is no documentary evidence to substantiate or support that the absences were not for the same medical condition.

In the circumstances of this case therefore YL shall be permitted to provide any supporting proof or documentation that the absences were not for the same medical condition within thirty (30) days of the date of this award. I will remain seized in the usual manner in the event the parties experience any issues, including issues relating to the sufficiency of proof that the absences were not for the same medical condition.

Except for my specific direction with respect to YL therefore the group grievance is dismissed. The Employer did not violate the collective agreement when it failed "to refresh…sick leave credits on [an employee's] pay stubs at the start of the school calendar" in circumstances where the employee was accessing sick leave in the prior fiscal year, had not completed eleven (11) consecutive work days at their regular working hours, and continued to access sick leave for the same medical condition.

Dated this 14th day of October 2020

Louisa Davie

Louisa M. Davie