



Education Law eBulletin

A newsletter for educators

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Arbitrator finds that entitlement to sick leave is a work-based benefit

The interpretation of central terms to the collective agreement pertaining to sick leave benefits was the central issue in a grievance before Arbitrator William Kaplan, as initiated by the Ontario English Catholic Teachers' Association ("OECTA") and the Ontario Catholic School Trustees' Association ("OCSTA") and the Crown as opposing parties.¹

The specific issue before the Arbitrator was whether a teacher, who was on a voluntary unpaid non-statutory leave of absence is entitled to sick leave (first 11 days at 100% pay and the next 120 days at 90% pay), if they are unable to return to work on the scheduled return date due to an illness or injury. Examples of voluntary unpaid non-statutory leaves include time off a teacher might elect to take to go back to school, to live abroad for a year or to take time to stay at home with dependents. OECTA argued that the entitlement to sick leave was mandatory, as it served to protect teachers from economic loss as a result of illness or injury, and a requirement to return to work, or otherwise the notion that sick leave benefits are earned by attendance at work, was not a precondition to access these benefits. Second, OECTA argued that it was contrary to the Ontario *Human Rights Code* for a teacher to be entitled to sick leave benefits if he or she was returning from a statutory leave but denied the same benefits if the teacher was returning from a voluntary unpaid non-statutory leave.

In contrast, OCSTA and the Crown argued that access to sick leave benefits depended on a teacher's work status and entitlement did not kick in until a teacher made a *bona fide* return to work. Based on a basic interpretation of both local and central terms, they argued that there were no sick leave benefits allocated until the teacher returned to work – the teacher was not eligible if he or she was not present on the first day of school or if the teacher never returned to work during the year. The Arbitrator reviewed various arbitration awards and found that sick leave was almost always earned through work attendance.

The Arbitrator dismissed the grievance and found that a teacher's presence in the workplace is central to eligibility of sick leave benefits. The Arbitrator found that otherwise, a scenario may occur where a teacher who is not working and on an unpaid voluntary non-statutory leave is entitled to full sick leave benefits while a working part-time teacher is entitled to sick leave benefits on a pro rata basis only. There is of course the ability for parties to a collective agreement to agree that employees who are on unpaid leaves have access to sick leave benefits – but such entitlement must be clear and direct in the language of the collective agreement. The Arbitrator also concluded that there is no discrimination in this case where teachers who are working are distinguished from those who are on

¹ OECTA v. OCSTA, decision by Arbitration William Kaplan dated February 20, 2018

unpaid voluntary non-statutory leaves of absences. There was no prohibited ground in this case to establish any discrimination under the *Code*.

In addition to the effect of this arbitration decision on school boards who are represented by OCSTA, the decision is also important for all school boards in Ontario as it confirms that general entitlement to sick benefits is a work-based benefit. .

Bill 198 – An attempt to tackle habitual student absenteeism

Bill 198, *Student Absenteeism and Protection Act, 2018* passed Second Reading this month and was referred to the Standing Committee on Regulations and Private Bills. It is a private member's bill seeking to add habitual absenteeism and/or lateness to the *Child, Youth and Family Services Act, 2017* (the "CYFSA")² as a circumstance that would necessitate the need of protection for compulsory school aged children. The Bill would add the circumstance of habitual absenteeism or lateness for more than 40 school days in a school year, without an excuse pursuant to the *Education Act*, to the duty to report under the CYFSA. In addition, the Bill seeks to add the circumstance where it is suspected that a student is withdrawn from school for the purpose of avoiding scrutiny from a children's aid society, to the duty to report.

Currently, a tool available for school boards to address a student's habitual non-attendance at school may be found at sections 30 and 31 of the *Education Act*, where depending on the circumstances, the parent or legal guardian may be fined or a student may be convicted and become liable for other penalties, if a student fails to attend school.

Bill 198 seeks to amend the *Education Act* by adding a requirement for a school principal, attendance counsellor or other designated person to report a student to a children's aid society if they have been habitually absent or late for more than 40 days in a school year, after a meeting or an attempt to set a meeting has occurred with the student's parents or guardians.

Principals and teachers already have a duty to report pursuant to the current *Child and Family Services Act*, R.S.O. 1990, c. C. 11 ("CFSA") depending on various factors concerning risk of harm to a child under the age of 16, as laid out at section 72 of the CFSA. As of January 1, 2018, and the first set of changes as a result of the CYFSA, teachers and principals *may* report a 16 or 17 year old to a children's aid society if they suspect the same circumstances or conditions.

If Bill 198 passes, the duty to report would expand to include the reporting of a compulsory school aged student to a children's aid society if they are habitually absent from or late arriving to school for more than 40 days in a school year or if a student is withdrawn from school for the purpose of avoiding scrutiny from a children's aid society.

We welcome your comments and questions. Send them, and any updated contact information, to jessica.koper@shibleyrighton.com. If you wish to unsubscribe to this eBulletin, please send a blank e-mail to christen.broadbent@shibleyrighton.com

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² The *Child, Youth and Family Services Act, 2017* will amend the *Child and Family Services Act*, R.S.O. 1990, c. C. 11 once it is proclaimed into force. .