

Hastings and Prince Edward District School Board v. Elementary Teachers' Federation of Ontario (Top-Up Grievance)

Ontario Labour Arbitration
L.M. Davie (Arbitrator)
MPA/Y600930

Heard: Belleville, Ontario, June 14, 2006.
Award: July 5, 2006.

Appearances:

Howard Goldblatt, counsel for the union,

Kees Kort, counsel for the employer.

Award

1 The issue to be determined in this case is whether the collective agreement between Hastings and Prince Edward District School Board ("the Employer") and the Elementary Teachers' Federation of Ontario ("the Union") requires the Employer to pay a SEB "top-up" benefit to teachers on pregnancy leave during non-teaching times such as the summer months school vacation period.

2 The facts are not in dispute. Moreover, I did not hear any extrinsic evidence about the collective bargaining negotiations which led to the inclusion of the SEB benefit language in this collective agreement, a collective agreement effective from September 1, 2004 to August 31, 2008. The parties each have a different perspective of the effect and application of the language agreed upon, but agree that neither could lead extrinsic evidence about what was said at the bargaining table to assist me in the interpretation and application of the disputed language. This language is new to the collective agreement and neither side sought to advance an estoppel argument.

3 The undisputed facts are as follows:

4 The predecessor collective agreement between the parties had provided for a SEB Plan for a number of years. Initially, the collective agreement provided a benefit only during the two-week period that a teacher had to wait before receiving pregnancy benefits under the applicable provision of the Employment Insurance Act, S.C. 1996, c. 23. The amount of that payment was 95% of the teacher's usual salary, and was paid regardless of whether the two-week waiting period occurred during a teaching or a non-teaching time frame. That is to say, a teacher who commenced her pregnancy leave in August would receive this SEB benefit for the two-week waiting period even though the pregnancy leave commenced during a non-teaching period.

5 In its negotiations for the 2002-2004 collective agreement, the Union was not successful when it sought to improve upon that benefit. The Union had sought to extend the benefit beyond the two-week waiting period and have it paid for the entire 15 weeks that teachers would receive E.I. pregnancy benefits.

6 During the life of that collective agreement, however, and as result of other decisions (which held that it was discriminatory to deny sick leave benefits during pregnancy leave) the Union advised its members that, instead of receiving the E.I. pregnancy leave benefit, they should request six weeks of sick leave following the two-week E.I. waiting period. That six week period is generally referred to as the post-partum recovery period. The Employer agreed to pay sick leave benefits for those 6 weeks, and made a corresponding deduction from the teacher's sick leave bank.

7 It is not disputed that the practice of the Board was to pay sick leave benefits only during those time frames when the absent teacher would otherwise be teaching. The Employer did not pay those sick leave benefits to teachers on pregnancy leave during those periods of time identified as non-teaching periods, for example the summer months.

8 In the negotiations of the current 2004-2008 collective agreement the Union again proposed enhancements to the SEB benefit, and was successful in negotiating the language at issue in this case. Basically, the language provides a benefit of 100% of her regular salary for the two-week waiting period. This was an improvement over the 95% found in the predecessor collective agreement. In addition, the parties agreed to a further top-up benefit which entitled the teacher to 100% of her regular salary for the six week post-partum portion of her pregnancy leave, and 60% of her regular salary for the remaining nine weeks of pregnancy leave. (See article 32.04.06 below) Articles 32.02.05, 32.02.06 and 32.02.07 (set out below) were also added to the collective agreement. In addition article 32.02.04 was amended somewhat. The former article 32.02.04 had provided as follows:

Pregnancy leave may commence up to seventeen (17) weeks preceding the expected birth date and ends seventeen (17) weeks after the pregnancy leave began if the Teacher is intending to take a parental leave. Nothing in this article precludes a Teacher from entitlement to sick leave pay if the Teacher's absence is due to illness arising out of the pregnancy.

9 In the current collective agreement the parties have added "or prior to the Pregnancy Leave." to the end of the last sentence of article 32.02.04.

10 Since the new language for the SEB was negotiated, it has been the practice of the Employer to pay the SEB benefit at 100% of the teacher's regular salary for the two-week waiting period, regardless of whether that waiting period occurs during a teaching or a non-teaching period.

11 The Employer does not however pay the top-up for any timeframe beyond that initial two-week waiting period if the pregnancy leave occurs during a nonteaching period of time such as the summer, Christmas and March break vacation periods. Neither the additional four-week top-up to 100% of regular salary, nor the nine week top-up to 60% of regular salary is paid to the teacher if her pregnancy leave occurs during a non-teaching period of time.

12 It is also not disputed that teachers at this Board receive their annual salary in 26 equal installments. The teachers are paid a portion of the salary earned in the September - June school year during the summer months notwithstanding these are non-teaching months. It is the practice of the Employer to pay a teacher who commences her pregnancy leave during the summer months the balance of her salary at the end of June, rather than during the July and August non-teaching months.

13 The Union asserts that the Employer's failure to pay the top-up benefit to teachers during a non-teaching period violates the collective agreement. The Employer submits that its payment of the top-up benefit is consistent with the language of this collective agreement.

14 The relevant provisions of the collective agreement to which the parties made reference are as follows:

32.02 Pregnancy Leave

Pregnancy Leave shall be granted upon request provided that:

32.02.04 (was amended as set out above)

32.02.05 Nothing in this Article precludes a Teacher from entitlement to sick leave, without providing further medical documentation, for up to the first six (6) weeks from the date of delivery. Sick benefits will not apply to non-pay periods. No salary shall be paid to a Teacher for her absence due to Pregnancy Leave beyond the number of credits in her sick leave account except pursuant to resolution of the Board.

32.02.06 Should the Teacher require additional sick leave beyond the six (6) weeks, the Teacher shall be required to provide a certificate from a legally qualified medical practitioner.

32.02.07 It is understood that time on sick leave in these circumstances counts as time for the purposes of Pregnancy Leave.

32.04 General Provisions for Pregnancy and Parental Leave

32.04.06 For Pregnancy Leave only, and in lieu of the option to access sick leave for the post-partum period of recovery in accordance with 32.02.05, a Teacher who is eligible for E.I. may opt for a Pregnancy Leave SEB top-up; such top-up may be in addition to the SEB which is available for the two-week waiting period. (emphasis added)

32.04.06.01 The Pregnancy Leave SEB top-up is based upon and is subject to Employment Insurance (E.I.) Regulations.

32.04.06.02 The Pregnancy Leave SEB top-up shall provide for the difference between what a Teacher receives from E.I. and 100 per cent of her regular salary (based on 1/194) for the maximum of the six-week post-partum period of recovery with no deduction of sick leave for this period.

32.04.06.03 For the nine (9) weeks of Pregnancy Leave following the two-week waiting period and the six (6) weeks of post-partum recovery, or for the fifteen (15) weeks of Parental Leave following the two-Week waiting period, or any portion of both or either, the Employer shall provide Pregnancy/Parental Leave SEB top-up equal to the difference between sixty (60) percent of the Teacher's regular weekly salary and the weekly amount of the E.I. benefit.

32.05 Supplemental Employment Insurance Benefit Plan

- 32.05.01 The plan is to supplement the Employment Insurance benefits received by Teachers for temporary unemployment caused by Pregnancy and/or Parental Leave.
- 32.05.02 Teachers must prove that they have applied for and are in receipt of Employment Insurance benefits in order to receive payment under the plan.
- 32.05.03 The Supplemental Employment Insurance Benefit is payable for a period during which a Teacher is not in receipt of Employment Insurance if the only reason for non-receipt is the two-week Employment Insurance waiting period the claimant is serving.
- 32.05.04 The benefit level paid under this plan is set at 100% of the Teacher's salary.
- 32.05.05 Payment in respect of guaranteed annual remuneration or in respect of deferred remuneration or severance pay benefits will not be reduced or increased by payments received under the plan.

32.09 Supplemental Unemployment Benefits (SEB) for Family Medical Leave

- 32.09.01 Effective the first day of the month following ratification, the Board shall provide for Teachers on Family Medical Leave, a Supplementary Unemployment Benefits Plan providing for 100% of the Teacher's allowable Employment Insurance Benefit, provided that the two-week waiting period falls within the school year. Proof of receipt that the waiting period was served must be forwarded to the Payroll Department.

15 This is not the first case to address the issue of a top up during a non teaching period. The issue has been addressed in The Brant Haldimand-Norfolk Catholic District School Board and the Ontario English Catholic Teachers' Association (2001), 63 C.L.A.S. 263 (Devlin), Avon-Maitland District School Board and Elementary Teachers' Federation of Ontario (2004), 134 L.A.C. (4th) 23 (P.C. Picher), Rainey River District School Board and Elementary Teachers' Federation of Ontario [2005] O.L.A.A. No. 129 (Albertyn), Greater Essex County District School Board and Elementary Teachers' Federation of Ontario [2005] O.L.A.A. No. 680 (Dissanayake). It is not necessary to set out for the most part the submissions of the parties in this case mirrored those made in the above referenced cases.

16 These cases have enunciated a number of principles which can be briefly summarized. First, entitlement to the pregnancy leave SEB top-up is generally based on receipt of E.I. It is not based on receipt of salary. Secondly, the SEB top-up is separate and distinct from sick leave. While sick leave entitlement is an income replacement scheme, the SEB top-up is a benefit "not designed to replace income that would otherwise be payable during the ... weeks of pregnancy leave into which it falls." (Avon-Maitland District School Board supra at pg. 35) Rather, it is a benefit paid in recognition that, in the year ahead, while on pregnancy leave, the teacher does not receive a salary. The cases also recognize that, in order to deny the benefit to teachers merely because the pregnancy leave occurs during a non teaching period, collective agreement language which expressly or implicitly denies or limits the payment of the top-up benefit is required.

17 These principles are captured in the following paragraphs of Arbitrator Picher's award in Avon Maitland District School Board where, she stated at pages 33-35:

"The parties in article 23.04(b)(i) have agreed without qualification that the School Board will pay the pregnancy benefit for eight weeks. The Arbitrator is satisfied that this stipulation is a clear and unequivocal directive and is not qualified by reference to the point during the year when the eight week period occurs. The only criterion for the payment of the eight-week pregnancy benefit is that an employee be on Statutory Pregnancy Leave. The parties' agreement that the Board will pay a pregnancy benefit for eight weeks is not qualified, therefore, by a further requirement that the six-week portion arise during teaching, as opposed to non-teaching, months. For the Arbitrator to read such a restriction into the clearly stated stipulation that "the Board will pay a pregnancy benefit for eight (8) weeks" would require a clear and unequivocal indication to that effect.

...

The School Board asserts that because sick leave is normally understood to be a salary replacement benefit, the six-week pregnancy benefit newly agreed to by the parties as an addition to the SEB Plan under the instant collective agreement should also be understood to be a salary replacement benefit. The School Board asserts that just as the practice under the prior collective agreement had been for the sick leave benefit to be restricted to teaching months only, so too should the six-week top-up benefit under the SEB Plan in the current collective agreement be payable only in teaching months. The Arbitrator cannot agree.

The addition of the six-week top-up benefit under the SEB Plan is different in kind from the six-week leave benefit which the School Board would pay upon request under the prior collective agreement scheme. The difference is underscored by the fact that the current collective agreement provides for both a six-week sick leave benefit still to be payable in certain circumstances, as well as the new six-week SEB Plan benefit. Given that both are in the collective agreement, it is apparent to the Arbitrator that they serve different purposes. The six-week SEB Plan benefit is a pregnancy leave benefit and is not designed to replace income that would otherwise be payable during the six calendar weeks of the pregnancy leave into which it falls. As expressly stipulated in article 23.04(b)(i), "Normal salary shall not be paid during the leave." Entitlement to the SEB benefit is not tied to otherwise being entitled to receive salary during that period, i.e. teaching months. It is premised, instead, on being on pregnancy leave. It is a pregnancy leave benefit, not an income replacement benefit.

The nature of the six-week top-up benefit is just as much a pregnancy leave benefit as the two-week waiting period. The School Board acknowledges that the two-week benefit is payable during non-teaching months. The Employment Insurance Act expressly provides that such SEB Plan benefits may be paid during non-teaching months. In the absence of language expressly or impliedly stating an intention to deny the payment of the six-week top-up benefits during non-teaching months, the Arbitrator must conclude that there is no basis for imposing such a distinction ..."

18 To this I would add, as Union counsel argued in this case, that, as a matter of collective agreement interpretation, and in the absence of clear, unequivocal language which would dictate such a result, an arbitrator should not interpret a benefit in a manner which means that it will be applied differently based merely on the timing of when pregnancy leave is taken. Unless clear,

unequivocal language indicates otherwise, a collective agreement benefit of this nature should be administered as equitably as possible.

19 In this case Employer counsel has argued that the particular language of the collective agreement indicates that teachers on pregnancy leave are not entitled to the top-up benefit if the pregnancy leave occurs during a non-teaching period of time. In particular, the Employer submits that the article 32.04.06 phrase "and in lieu of the option to access sick leave for the post-partum period of recovery in accordance with 32.02.05" is clear language indicating that the top-up benefit is not payable during non-teaching months, in the same manner as the parties have agreed that sick leave benefits "will not apply to non-pay periods." The "in lieu of" language indicates teachers have an option of accessing sick leave or the SEB top-up, and because sick leave is not available during non-teaching periods, neither is the top-up. Employer counsel asserts that the collective agreement links the eligibility to the top-up with eligibility for sick leave.

20 It is the Employer's further position that it is not unusual for these parties to agree that during a non-teaching period of time teachers are not eligible for certain benefits. Evidence of this is found in article 32.02.09 which denies teachers on a Family Medical Leave the SEB benefit if the leave does not occur within the school year.

21 I do not agree that the phrase "in lieu of the option to access sick leave for the post-partum period of recovery" is clear, unequivocal language to indicate the top-up benefit is not payable during non-teaching months, in the same manner that sick leave benefits are not payable during non-teaching periods. I accept the point made in each of the cases that sick leave benefits are separate and distinct from these types of top-up benefits. One is income replacement. The other is a top-up benefit paid once statutory entitlement to E.I. is established, not as an income replacement, but in recognition that while on pregnancy leave the teacher does not receive a salary.

22 The language of this collective agreement indicates that entitlement to the top-up is based on E.I. eligibility. Article 32.04.06 specifically states that only teachers "eligible for E.I." may opt for the top-up. The top-up is separate from sick leave, and the "in lieu of the option to access sick leave" language ensures that employees have an option of taking either sick leave or the E.I. top-up, but not both. The "in lieu of" language gives employees the choice of which benefit to claim, and also makes it clear that an employee cannot claim both sick leave and E.I. top-up.

23 I agree article 32.04.06 must be read with reference to article 32.02.05, however, the two benefits continue to be separate and distinct. Article 32.02.05 makes it clear that a teacher can, if she so desires, choose to claim sick leave (without providing medical documentation) for the six-week post-partum period. However, a teacher who chooses not to claim sick leave is still entitled to the top-up benefits set out in article 32.04.06.

24 The fact that the benefits are separate and distinct is emphasized by the use of the words "in lieu of the option." That language connotes a choice. An "option" is an alternative, a choice of two or more selections. "In lieu of" means "instead of" or "in place of." Thus, a teacher can choose or select the top-up benefit in place of, as a replacement to, sick leave. In addition, the "option" language underscores the fact that teachers are entitled to the top-up benefit even if the pregnancy leave occurs during a non-teaching period of time. The collective agreement clearly indicates that teachers will not receive sick benefits for such non-pay or non-teaching times such as the summer months. There is therefore no "option" or no choice to select sick leave during these non-teaching periods. That "option" is not available and the "in lieu of" language can only operate when there is an alternative to choose.

25 As indicated, I also agree that it makes little sense to interpret collective agreement language in a manner which means that a benefit is applied differently depending on the time of

year the benefit is to be paid. Clear, express language to deny the top-up benefit based solely on the timing of the pregnancy leave would be required for that result. Such clear, explicit language is notably lacking from article 32.04.06. The absence of such unequivocal language is even more telling because, in article 32.09, the parties drafted specific language to confirm their mutual intent that the SEB benefit payment for the two-week E.I. waiting period for teachers on Family Medical Leave is only payable where that waiting period falls within the school year. Thus, elsewhere in the collective agreement, when the parties intended to limit or deny a benefit to the school year, they have specifically said so. That they did not do so in article 32.04.06 is significant.

26 The Employer's interpretation of article 32.04.06 in a manner which limits payment of the top-up benefit to teaching times during the school year also leads to some curious and anomalous results. It is not disputed that the pregnancy leave SEB payable during the two-week waiting period is paid, regardless of whether the waiting period occurs during a teaching or non-teaching time. A teacher who commences her pregnancy leave at the beginning of August therefore would receive the SEB for the two week-waiting period, would not receive the top-up for several weeks, and then, with the commencement of the school year, would again receive the top-up in September. Similarly, a teacher who commenced her pregnancy leave at the beginning of June would receive the two-week SEB payment, would receive the 100% top-up for several weeks until the end of the school year in June, would not receive a top-up during the timeframe which covers the summer vacation, and yet could receive the 60% top-up for the first week or two in September when school resumes. Unless the collective agreement language clearly compels these types of inconsistent and irregular results, it should be interpreted in a manner which does not lead to such anomalies. In the same vein I note that the Employer's position also fails to adequately address the manner in which to administer the 60% top-up for the nine weeks following the two-week waiting period and the six week post-partum recovery period. That is not a timeframe during which sick leave under article 32.02.05 is available to the teacher (although under article 32.02.06 she may be able to access sick leave for that time frame if able to provide a certificate from a legally qualified medical practitioner.)

27 In the result I find that the language of this collective agreement entitles teachers to the top-up benefit if the teacher is eligible for E.I. The top-up benefit is based on statutory entitlement to E.I. It is not based on either receipt of salary or time frames during which the teacher would normally teach. The Employment Insurance Act entitles teachers to E.I. Pregnancy Leave benefits during non-teaching periods. The teacher is therefore entitled to the negotiated top-up benefit for the period during which the teacher receives E.I. subject only to the limitations on amounts and number of weeks that the parties have agreed upon in article 32.04.06. Entitlement is not qualified by reference to the time when pregnancy leave is taken, and entitlement to the top-up benefit therefore is not restricted to a teaching period. There is no specific, explicit language to indicate that teachers are disentitled to the payment of the top-up benefit during non-teaching periods. The benefit is not restricted or limited to time frames which fall within the school year (as is the case with the SEB for Family Medical Leave in article 32.09) or teaching periods.

28 The grievance is allowed. In accordance with their agreement, I remit the matter of remedy to the parties, but will remain seized to deal, with that issue in the usual manner in the event the parties are unable to agree upon the remedial relief or the implementation of this award.