IN THE MATTER OF AN ARBITRATION

BETWEEN:

Durham College

-the employer

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION, LOCAL 354

-the Union

Union Grievance No. 2020-00354-0001
Concerning the grievance of Kelly Webdale (Ottenbrite)

Before:	Kathleen G. O'Neil, Single Arbitrator
For the Union:	Christine Davies, Counsel Pat Mongeon, President Local 354 Kathleen Flynn, Vice-President, Local 354 Annette Patrick, Steward, Local 354 Bryan Jordan - Steward William Chilton - Steward Kevin Griffin - Steward Dawn McGuckin - Steward Kelly Webdale Grievor
For the College:	Wallace Kenny, Counsel Jennifer Cosway, Associate Vice-President, Human Resources Tina Di Lauro, Manager, Pension and Benefits

Hearing by videoconference January 22, 2021

Award

This decision deals with the grievance of Kelly Webdale (Ottenbrite), a Coordinator and professor in the School of Business, claiming that the college breached the collective agreement by requiring vacation entitlement to be taken concurrently with maternity leave. The remedy requested is that her Supplementary Unemployment Benefits (SUB) begin at the outset of her pregnancy/parental leave, and that her vacation be deferred until the end of her parental leave.

The dispute concerns the treatment of pregnancy/parental leave which starts in the summer months, which would typically be non-teaching vacation time. The union maintains that the period should be treated as pregnancy/parental leave, rather than vacation, and that top-up should be made in the same manner as if the leave started in any other period of time. Vacation pay should be paid in advance, or deferred. By contrast, the employer is of the view that the grievor was correctly paid when she was paid vacation pay during July and August, and commenced receiving SUB top-up following the usual vacation period.

The facts

The parties argued this matter based on an agreed statement of facts and supporting documentation; no oral evidence was called. The portions of those facts most important to this decision are summarized here.

The grievor is a full-time faculty member who ordinarily works ten months of the year, i.e. during the academic year of September to June, and receives paid vacation for July and August. A faculty member's annual salary includes vacation pay, and is treated as earned over the 10-month academic year. In accordance with a longstanding practice, two-twelfths of the salary is held back to be paid out over the normal July/August vacation period.

After exchanges concerning options for different combinations of length of pregnancy and parental leave, the Union indicated to the employer that the grievor wished to commence pregnancy/parental leave on July 1, 2020, and take her 2019-2020 vacation pay (deferred pay) as paid time off after her parental leave, i.e. in 2021 or as a lump sum payout in advance of her leave. The College maintained the position that deferred salary would be paid during July and August 2020 up to 93% of her salary, rather than before or after the pregnancy/parental leave, leading to the filing of the grievance on June 1, 2020. The College remained agreeable to the

grievor's taking an additional two months on an unpaid basis commencing in September 2021 if she wished.

The College denied the grievance on June 23, 2020 and requested that the grievor confirm that she wished to have her deferred earnings/vacation pay continue over July and August 2020 to provide benefit and pension payment continuity.

The union and the grievor did not agree that SUB benefits were not payable for the months of July-August 2020, but in the interests of maintaining the grievor's pay and benefits/pension, confirmed that the grievor wished to continue to be paid over the July/August 2020 period, without prejudice to the positions taken by the parties in the grievance. The grievor's last day of work before her leave was June 26, 2020. The grievor's Record of Employment in respect of her commencement of her pregnancy/parental leave reflects she was last paid July 3, 2020. She gave birth on July 8, 2020

The grievor applied for and received Employment lnsurance (El) benefits with a claim start date of June 28, 2020. Her waiting period was June 28-July 4,2020. She received 15 weeks of El maternity benefits over the period July 5 -October 18, 2020. She received EI parental benefits commencing October 19, 2020. At the time of the hearing, the grievor anticipated she would be on parental leave for 23 weeks, and would return to work with the employer on or about April 12, 2021 for the balance of the 2020-2021 academic year.

While in receipt of SUB payments, i.e. beginning in September 2020, the grievor elected to continue to accrue pension service; her benefits coverage was maintained, with contributions deducted from the SUB payments.

Collective Agreement Provisions and statutory extracts

The relevant provisions of the collective agreement, including Article 15 – Vacation, and Article 22 – Pregnancy and Parental leave, are attached as Appendix "A" to this decision for ease of reference. Extracts from relevant statutes are attached as Appendix "B".

Positions of the parties in brief

The union's position is that the grievor is entitled to take pregnancy/parental leave in the summer and receive Supplemental Unemployment Insurance [SUB] benefits or top-up during

the summer, pursuant to Article 22. In the union's view, vacation can be taken after the pregnancy/parental leave, with vacation pay paid in a lump sum, or paid vacation taken at some other time than July and August. What happened instead was that the grievor received the portion of her deferred earnings required to top-up her EI benefits to 93% of her regular salary in July and August 2020, with no SUB benefits paid during the summer, a period when she thought she would be on maternity leave. Union counsel describes this result as the College having agreed to grant unpaid leave of absence at the end of pregnancy and parental leave, rather than moving her vacation time from July and August 2020.

In the union's view, vacation time and pay for the 2019/20 academic year had already been earned at the outset of the pregnancy leave, and the grievor should have been paid SUB benefits in the summer, and not had to fund her own leave out of her own vacation pay, which is how union counsel characterizes the use of deferred salary to reduce the payment of SUB benefits in that summer to zero.

By contrast, the employer emphasizes the common ground that beginning in September of each academic year, the College holds back 2/12 of each person's pay, to be paid out over the normal vacation period in July and August. The employer stresses that there is no obligation to pay it at some other time. Article 22 provides the calculation of the SUB benefit as the difference between the sum of EI benefits and other earnings received and 93% of the grievor's regular salary. The grievor started pregnancy leave on July 5, and she was in receipt of EI, as well as in receipt of deferred earnings.

The approach of the College to the language of Article 22 is to consider the EI benefits being paid and bring the employee up to 93% of her regular pay, and defer the rest of the deferred pay normally paid out in July and August. Basically, to paraphrase the employer's position, because of the longstanding practice of the colleges to defer 2/12 of regular pay to July and August, the sum of the EI benefits and the deferred "vacation" pay is such that there is no gap to be filled by SUB payments to get the grievor's pay to 93%. Thus, the employer paid no SUB benefits to the grievor in July and August 2020, and in the employer's view, did not breach the collective agreement in so doing. Important to the employer's case is the assertion that if she were to receive SUB benefits in addition to EI and the deferred vacation pay, she would receive much more than the article contemplates. The intention of the language, simply put, in the employer's view, is 93% of the employee's regular pay, and not more.

There appeared at first to be a minor issue as to whether the pregnancy/parental leave had to start on a Monday, but employer counsel did not see it as an issue, indicating that it is up to the government to determine that. Neither party pressed the issue, so I have not addressed it below.

Concerning the entitlement of the grievor in the academic year 2020/2021, employer counsel argues it is premature to determine that. As can be seen below, I agree it is appropriate to deal with the question pertaining to the summer of 2020, and to remit the question of the following year to the parties in the first instance.

The fuller submissions of counsel for both sides will be discussed below.

Considerations and Conclusions

The issue to be determined is whether the employer is entitled to take account of deferred salary to reduce its obligation to pay supplementary unemployment benefits [SUB] to an employee on pregnancy/parental leave during the summer months. There is no issue as to the grievor's entitlement to pregnancy/parental leave and SUB payments in the summer months as a matter of general principle. The dispute is over whether the calculation of the SUB payment can be permissibly reduced to zero by paying out deferred salary during the portion of the pregnancy/parental leave that takes place in the summer months, which is the typical vacation period for academic employees.

The collective agreement language relating to calculation of the SUB payments is found in Article 22.02 C. It provides, in summary, that an employee on pregnancy and/or parental leave who has qualified for EI benefits, is entitled to payments equivalent to the difference between the sum of the weekly EI benefits and any other earnings received by the employee, and 93% of the regular salary which the employee would otherwise have earned during such period. This is known as the "top-up", as it is for the purpose of topping up EI benefits to 93% of the employee's regular salary. The full language is found in Appendix "A".

The specific linguistic interpretation issue is whether the phrase "any other earnings received by the employee" properly includes the amounts normally paid in July and August as vacation pay, deferred salary earned in the typical academic year from September through June.

The issue here is a dispute over the interpretation of the parties' agreement and the intention expressed therein. The tools for interpretation of disputed terms of collective agreements and other contracts are well established, and were not the subject of controversy before me. The interpretative exercise is to be done in the entire context of the collective agreement, looking for a harmonious interpretation of all its terms in light of the purpose and intention of the words used, avoiding absurd results or inconsistent interpretations. The intention of the parties is to be found in the words they use, taken in their plain and ordinary meaning, unless the context or evidence establishes the contrary. Different words are presumed to have different meanings, and specific provisions prevail over general ones. Both as a matter of general law, and by operation of language in this collective agreement, the interpretation should be consistent with relevant statutory provisions. Despite their dispute over the meaning of Article 22, neither party suggested that extrinsic evidence was required to interpret the wording here in question.

The arguments before me posit two opposing interpretations of the words in issue. The employer's focus is on the words "earnings received", and the agreed fact that the grievor received deferred earnings during July and August of 2020. By contrast, the union is of the view that this is not a proper reading of the language of the collective agreement in context, for several reasons, which will be discussed below. These include the union's assertion that it is not permissible to treat SUB benefits differently, depending on the month in which the leave commences, since there is no language in Article 22.02 authorizing that.

By contrast, the employer is of the view that the long-time practice, acknowledged in the agreed statement of facts, to pay 2/12 of the employees' salary during months when they do not perform teaching duties, obliges the College to pay that amount during July and August. In the employer's view, since it is obliged to pay the deferred pay at that time, it is entitled to take it into account in the formula set out in Article 22.02 C (ii). The collective agreement is silent on the question of the timing of vacation pay, but, given the compelling practice, and in light of the broad management rights clause in Article 6 of the collective agreement, it is the employer's position that the grievor has been properly paid, and that, in any event, it is not a matter of the individual employee's choice when vacation pay is paid out.

It is common ground that the deferred payments intended to represent vacation pay are usually paid in July and August, but the union is of the view that there is no requirement that they not be paid at other times when paying them adversely affects the grievor's right to SUB payments or

other collective agreement entitlements. In the union's view, that can mean a number of options, including a lump sum separate and apart from the leave and SUB entitlement.

The union is of the view that the grievor should have received SUB payments over the entire statutory leave, without diminishing her entitlement to the deferred salary earned over the 2019/2020 academic year. The union contends that the employer cannot use earned vacation pay to fund the SUB payments under the collective agreement, that it cannot have been the parties' intention that vacation pay would be diminished by taking pregnancy/parental leave, or that she would fund her own entitlement to SUB payments out of her separate entitlement to vacation pay.

The union's position centres on the mandatory requirement of Article 22, that the employer pay SUB benefits to a person in the grievor's position. It is a breach of the collective agreement, in the union's view, to pay no SUB benefits during July and August. The union invites a finding that it is clear from the structure of the article that the parties contemplated a situation where the employee on pregnancy/parental leave would be receiving less than 93% of their salary during unpaid pregnancy/parental leave, were it not for the top-up.

The union posits the example of a male faculty member with a baby due July 1, who worked 10 months of the year, as did the grievor. This father would take his vacation leave in the summer, and then parental [as opposed to pregnancy] leave and receive SUB payments in the fall. The union argues that the grievor should not be in the different position of having to give up earned vacation pay because she took pregnancy leave in the summer.

Union counsel emphasizes the mandatory nature of the wording in Article 15 that a full-time employee who has completed one full academic year's service *shall* be entitled to a vacation of two months. The collective agreement does not require vacation to be taken in the summer months. It can be arranged in ways other than the typical two-months of July and August, or if assigned to teach 11 months, a bonus is paid to compensate for the month of vacation foregone. The union urges the conclusion that there is nothing in Article 22.01 inconsistent with pregnancy leave during the period where there would typically have been no assignment of academic courses.

The union argues that other mandatory provisions of the collective agreement and statute support their position. Chief among these is Article 22.01 E, which makes explicit that the College shall not require an employee to take vacation entitlement concurrently with leave under this article. However, on return from the leave, an employee may forego vacation time owing. This is permissive, and there is no suggestion that the employee would forego vacation pay if she gave up the entitlement to the vacation time. Union counsel observes that this is consistent with section 51 of the *ESA,* which deals with the issue of conflicts between leaves and vacation, providing that the employee may defer vacation until after the leave, similar to the provisions of the collective agreement. The grievance highlights the union's position that the employer's actions amount to requiring vacation entitlement to be taken concurrently with pregnancy leave, contrary to this portion of Article 22.02.

A further mandatory provision is found in Article 22.02 A to the effect that an employee shall have benefit coverage during pregnancy leave. This is consistent with the provisions of the *Employment Standards Act [ESA]* which requires that benefits are to continue during pregnancy leave. Union counsel remarked that this puts the employer's position in its communications to the grievor that she would need to receive deferred salary in the summer to continue to receive benefits in an interesting light.

The union also emphasizes the mandatory nature of article 22.02 D, which requires consistency with s. 37(2) of the pertinent regulation under the federal *Employment Insurance Act* [*EIA*]. Union counsel highlights that the SUB plan is required to be financed by the employer and separately accounted for. Further, deferred remuneration payments are not to be increased or decreased by the SUB payments. The union is of the view that the effect of the employer's treatment of the deferred salary had exactly that effect. Given the employer's definition of "earnings received", the union maintains that the grievor did not receive her full entitlement to deferred salary for vacation pay. A portion of it was converted to SUB payments, and in doing so, the employer effectively required vacation with pay during the summer, in the union's view.

Recapping the union's position, counsel submitted that the grievor had separate entitlements to vacation with pay under the collective agreement as well as to pregnancy leave with SUB payments. The grievor should receive vacation under Article 15, and her earned vacation pay is not permitted to be used to top-up EI benefits. In the union's view, the employer's approach is inconsistent with the collective agreement, and the scheme of vacation pay and SUB pay, as well

as inconsistent with the provision that an employee cannot be required to take pregnancy leave and vacation concurrently. Paying the grievor as they did in the summer of 2020 created a further inconsistency with the provision that an employee can waive vacation time, but not pay, in the union's view.

The union referred to the case law noted in Appendix C, which will be discussed as necessary below.

By contrast, employer counsel argues that the grievor has been properly paid 93% of regular salary during her leave. He highlights the fact that the collective agreement does not deal with vacation pay, but vacation time, in Article 15.01. The only reference to payment in the article dedicated to vacation is the reference to the remainder of pro-rated annual salary in the circumstance that an employee who has completed less than one full academic year's service shall be entitled to a two-month vacation and shall be paid the remainder of the employee's prorated annual salary. Employer counsel notes that every other article dealing with vacation speaks to scheduling of vacation time. Thus, in the employer's view, this case is not about scheduling of vacation time, but about pay for vacation. The collective agreement does not codify how employees are paid; rather, as set out in the agreed Statement of Facts, a faculty member's annual salary includes vacation pay. Two-twelfths of the salary, which is earned over the course of the ten-month academic year, is held back to be paid out over the normal July/August vacation period.

Employer counsel refers to Arbitrator Kaplan's interest arbitration award concerning the academic bargaining unit, reported as *College Employer Council v OPSEU (CAAT-A Bargaining Unit),* 2019 CanLII 99938 (ON LA). That award notes that it was the uniform practice of the Colleges to withhold 2/12 of an employee's annual salary to be paid out over the summer vacation period ensuring both a two-month vacation and salary continuity. Further, that award found the practice as to vacation pay such an established longstanding practice that it did not need to be included in the collective agreement. As well, the award notes the parties' agreement in their provincial pay equity plan that: "A portion of the hourly rate is in lieu of vacation pay" and "Regular pay includes a payment in lieu of vacation."

It is the employer's position that, given the practice, it has become an *obligation* to pay out the deferred amount in July and August. Employer counsel observes that what the union is asking is

a right in the employee to defer the deferred vacation pay outside the year in which they are earned, in the facts of this case, outside the 2019/2020 academic year. The College is of the view that the whole amount should be paid out in the academic year in which it is earned. The result of the union's argument is that the employee would receive the entire amount of salary, plus the SUB benefit, plus EI, in the same 12-month period. The employer is of the view that that is not the intent or proper interpretation of the collective agreement. The employer invites a conclusion that the employee was properly paid, as she received 93% of her regular salary while on leave, and is not entitled to more.

Noting that the collective agreement talks about the ability to take vacation time after the leave – for the grievor in September/October 2021, counsel submits that it would be without pay at that point because she will already have been paid her deferred salary in lieu of vacation pay for the academic year 2019/2020.

Important to the difference between the parties, employer counsel argues that the phrase "vacation entitlement" in Article 22.01 E should not be interpreted to include deferred pay in lieu of vacation. Article 22.01 E provides as follows:

> The College shall not require an employee to take vacation entitlement concurrently with leave under this Article. On return from the leave, an employee may forego vacation time owing.

Employer counsel notes that this is an exception to the usual operational standards for scheduling vacations set out in Article 15.02. Further, counsel observes that, although an employee gets to say she does not want vacation time after pregnancy/parental leave, the language does not reference pay. In interpreting the phrase "vacation entitlement", in article 22.01 E, counsel highlights the fact that it is the language in 15.01 (a) which provides an entitlement to a vacation of 2 months, so that the mirroring of the term "entitlement" in Article 15.02, should be interpreted to mean that the employee cannot be forced to take the entitlement to vacation time at the same time as pregnancy leave, but that it has nothing to say about when the vacation pay is remitted to the employee.

Counsel for the employer observes that it is fair to give the option to the employee about taking or foregoing vacation time after leave, because it would be without pay, and because of the right in the College to schedule vacation, the employer would otherwise be able to require it. Thus, the employer invites a finding that there has been no breach of Article 22.01 E, because the

employer did not require the grievor to take vacation entitlement at same time as maternity leave. The college has complied with the collective agreement by allowing the grievor to take vacation when she wants it. What she is entitled to is the time, in the employer's view. However, since pay is not referenced there, that is a separate issue.

The College sees its obligation as limited to getting the grievor's pay to 93% during the leave in question, and argues that there is nothing contrary to the collective agreement in doing it the way it was done, taking into account the deferred vacation pay. Therefore, no top up was required in the summer of 2020. Counsel notes that a factor in *Seneca College and Ontario Public Service Employees Union (Dhawan),* an unreported decision dated July 10, 2006 of the majority of a panel chaired by David K. L. Starkman, was that the position of the union would require it to pay 112% of her regular pay had she been at work during the year of her pregnancy/parental leave, a result the decision found to be contrary to the express language of Article 22.02 C. Employer counsel argues that the union's request here is the same, that the College pay more than 93% during the year of the leave.

Counsel for the employer maintains that there is nothing inequitable about the employer's approach because the grievor will have received 93% of her regular pay during the year of her leave. Employer counsel says the sum of the EI benefits and top-up calculated without regard to the receipt of deferred salary, would amount to more than 100% of salary over the year of leave, a proposition that employer counsel rejects, as not authorized by the collective agreement. In the employer's view, what the grievor received is what is important in 22.02 C, not that she earned it before that time. In sum, employer counsel argues that equity is on the college's side, because the grievor received 93% throughout her leaves.

The first mention of top-up with SUB plan is in 22.02 A and B as an exception to the concept that pregnancy/parental leave is without pay. The employer's basic position is that no top-up was required because of the formula expressed there, which takes into account other earnings received. Taken together with the practice which requires payment in July and August, the employer asserts that nothing else was owed through the summer period, as she was paid up to 93%, and the remaining portion of her deferred salary is paid when she returns from leave.

Employer counsel emphasizes that the College's obligation is under the collective agreement, and submits that there is no breach of the portions of Article 22.02 D which require compliance

with the *Employment Insurance Act*. Employer counsel characterizes the union's position as requiring double payment during the leave period, contrary to 22.02 D, since the employer did not increase or decrease her entitlement. The employer's position is that they did not use her earnings to diminish the SUB, because they have no obligation beyond the wording of the collective agreement, which authorizes the use of earnings received as part of the SUB calculation.

Employer counsel also notes that there is no conflict with the provisions of s. 51.1 of the *ESA,* which deals with possible conflicts between pregnancy leave and vacation time. These provisions operate where there is a restriction on when vacation time must be taken, which is not a feature of the academic collective agreement, or the facts of this case. It is the employer's position that the College is not requiring anyone to forfeit anything.

As to the case law cited by the union, counsel for the employer distinguishes all of it on the basis of the wording in the academic collective agreement providing that the employer is entitled to take into account other earnings in computing the SUB payments. In the employer's view, this is a difference in the quality of the SUB plan, which is dependent on the particular language of the collective agreement.

Commenting on the decision or Arbitrator Howe in *OPSEU v. Sault College, Grievance of Piotrowski* (unreported decision, dated October 2, 2006), employer counsel notes the finding that the College in that case could schedule vacation during a professional development leave because of the comparison to the language providing an exception for scheduling vacation at the same time as pregnancy leave. The decision relies on the result that academic employees received their money for the 12 months, no matter when they take vacation.

In reply to the employer's submissions, union counsel submitted that there was no obligation to pay out deferred pay in the same academic year as it was earned. It is the union's position that the employer should not be paying out vacation pay when the employee is not on vacation. Referring to the *Seneca College* decision relied on by the employer, union counsel submits that the charts appended to that decision appear to show that the grievor received vacation and deferred pay after her pregnancy leave.

Concerning employer's counsel's arguments to the effect that the calculation of the SUB benefit properly takes into account deferred earnings in lieu of vacation pay, as "any other earnings

received by the employee", the union disagrees with that characterization of deferred salary. The structure of the section, in the union's view, clearly contemplates earnings that are less than 93% of regular salary, rather than deferred earnings that well exceed 93% of the regular salary. Counsel for the union submits that an employee could have other earnings, which would fit within the structure of the benefit, such as pay from committee work.

More fundamentally, union counsel observes that if an employee has earnings that are 100% of her regular pay in that period, she is not eligible for EI benefits, as there would be no interruption of earnings as required by the *EIA*. Counsel for the union argues that it does not make sense that the practice of paying out deferred salary in lieu of vacation pay in the summer months to employees on vacation could obligate or authorize the employer to eclipse the SUB benefit entirely during a summer pregnancy leave. It is the union's position that there is nothing in the collective agreement or regular practice inconsistent with paying the deferred vacation pay to an employee on pregnancy leave in the summer at a later time, preferably when they are actually on vacation.

As to the employer's submissions that the deferred pay must be paid in the same academic year in which it is earned, union counsel observes that there are a number of adjustments made when taking pregnancy leave, including in the summer. When the grievor takes vacation after the conclusion of her leave, she would not be receiving earnings for the subsequent academic year because she is already on vacation, and should receive the deferred salary at that time. In this respect, the union disagrees with the employer's characterization of the facts of this case as the same problem for different reasons as those in the *Seneca* decision of Arbitrator Starkman. Union counsel urges a finding that receiving vacation pay at the later time vacation is taken is not really a problem, as there is nothing inconsistent with the collective agreement in such an approach.

As to the employer's submissions about the Kaplan award, union counsel argues that it is speaks to the general practice for the purpose of settling the terms of the collective agreement, and the union agrees that paying out vacation pay in the summer is the ordinary practice. Nonetheless, in the union's view, neither that award nor the practice mandates payment of deferred salary in the summer months when an employee is on pregnancy/parental leave and the effect is to eliminate SUB payments under the collective agreement.

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The above submissions surface two difficulties in interpretation in particular, the meaning of the phrase “vacation entitlement” in article 22.02 E, and the meaning of the phrase “any earnings received” in Article 22.02 C. Given the undisputed facts of this matter, and the number of interlocking provisions of the collective agreement and the relevant statutes engaged by these issues, it is unsurprising that this dispute has arisen. The right of an employee to take pregnancy leave in the summer months is not disputed, but it does not fit neatly with the employer’s usual practice in respect of the typical July/August vacation period and pay. On the other hand, the employer’s solution of paying part of the deferred pay to reduce its SUB payments to zero for a pregnancy leave that starts in the summer, and the rest of the deferred pay at a later time, does not fit neatly, either with the usual method of paying all of the deferred vacation pay in July and August, or with some of the larger structural elements of the collective agreement and relevant statutes.

What follows is my approach to the search for the most harmonious interpretation of all the disputed provisions in the context of the collective agreement read as a whole, which I will address by way of considering the following questions:

1. Does deferred salary in lieu of vacation pay have a separate status from SUB payments?
2. Does the term “vacation entitlement” in Article 22.01 E include vacation pay as well as vacation time?
3. What is the impact on the dispute of the longstanding practice in relation to the payment of deferred salary to academic employees in the typical summer vacation period?
4. Should the phrase “any other earnings received” in article 22.02 C(ii) be interpreted to include deferred salary in lieu of vacation pay?

Does deferred salary in lieu of vacation pay have a separate status from SUB payments?

It is central to the position of the employer that deferred salary can be paid out as part of the SUB benefit plan, while the union argues that they are separate entitlements.

The idea that vacation pay and SUB benefit entitlement are separate entitlements is supported by the fact that the right to vacation with pay and the right to unpaid maternity leave arise separately both in the collective agreement and statute. Article 15 provides the right to vacation, and Article 22.02 provides detailed provisions about the treatment of pregnancy and parental

leave in respect of length of leave and benefits. The collective agreement does not say a lot about vacation pay, but it is referenced in Article 15.01 A. Further, the parties are agreed, as recorded in the Kaplan award, cited above, that the Colleges pay vacation pay by the method of deferred salary, and that this is superior to the level of pay required by law in the *ESA.* The Kaplan award also confirms that the employer is required by the *ESA* to maintain separate accounting for vacation pay. As for the SUB plan, the regulations under the *EIA* require the employer to maintain separate accounts for it as well.

Further, s. 46 of the *ESA* provides entitlement to a pregnancy leave without pay, and the provisions of the *EIA* in respect of entitlement to EI benefits are premised on an interruption of regular earnings. The notion of unpaid leave is reflected in Article 22.01, with the obvious and important exception of the disputed entitlement in article 22.02. However, leaving aside the particulars of that portion of the dispute, which will be dealt with below, it is important to note that the general context of legislation and the collective agreement are that vacation is a paid leave, and that pregnancy leave is an unpaid leave, with the right to statutory benefits under the *EIA* and top-up for those who qualify under an approved SUB plan.

In light of the above, I find that deferred salary in lieu of vacation pay and SUB payments pursuant to Article 22.02 C are two separate entitlements and concepts. Whether the collective agreement conflates them, or permits a use of deferred vacation pay as part of the SUB plan, requires a further analysis of the disputed language, as discussed below.

Does the term "vacation entitlement" in Article 22.01 E include vacation pay as well as vacation time?

The parties disagree about whether the term "vacation entitlement" in Article 22.01 E excludes deferred salary in lieu of vacation pay, as set out above. It is true, as employer counsel argued, that Article 15 states that a full-time employee such as the grievor who has completed one full academic year`s service is entitled to a vacation of two months, and that this is the root of the employee`s entitlement to vacation time. It is also true that one can see that the word entitlement in Article 22.01 E mirrors that, and it is common ground that the college cannot require an employee to take vacation time concurrently with pregnancy or parental leave. As well, there is very little in the collective agreement about vacation pay, a fact which provides support for the

employer's view that the parties were referring only to vacation time, rather than pay, when they used the term "vacation entitlement".

By contrast, the union's position holds that vacation entitlement includes vacation pay as well as vacation time. In this regard, the plain, dictionary, meaning of the word entitlement, is the fact of having a right to something, which raises the question of whether the academic employees have an entitlement to vacation pay as well as vacation time. Given the total context, which includes the parties' agreement before Arbitrator Kaplan, and before me, that academic employees receive vacation pay by means of deferred salary, I would be hard put to find that academic employees do not have an entitlement to vacation pay by way of deferred salary. The Kaplan award also puts this entitlement in terms of an acknowledgment that the vacation pay for academic employees amounts to a superior benefit to the statutory entitlement to vacation pay than the one provided in the *ESA.* In light of these additional factors, I am not persuaded that the use of the word entitlement clearly excludes the legislatively supported entitlement in the employee to vacation pay as well as time.

The question arises whether the second sentence in Article 22.01 E, which provides that on return from the leave, an employee may forego vacation time owing, clarifies the matter. In light of the interpretative principle to the effect that the parties' use of different words should be given different meaning, it could be said that the mention of the ability to forego vacation time owing, rather than repeating the term "vacation entitlement", suggests that the entitlement includes more than time, and that the rest of the entitlement is excluded from the right to forego the time. On the other hand, it could just mean a clarification that any portion of vacation time owing could be foregone at the employee's option. In the result, I am not convinced that the second sentence advances the matter significantly. However, given the two plausible interpretations of the language here, I am not of the view that it is clear that the parties intended only vacation time and not vacation pay when they used the words "vacation entitlement" in the separate article of the collective agreement dealing with pregnancy and parental leave.

I find that the term "vacation entitlement" in Article 22.01 E does not clearly exclude deferred salary in lieu of vacation pay, so the question becomes, whether in light of other considerations, and provisions of the collective agreement, the preferable interpretation is that it does include deferred salary in lieu of vacation pay.

In any event, the general thrust of Article 22.01 E does underline that vacation leave and pregnancy/parental leave are separate types of leave, separately provided for in Articles 15 and 22, from which the union argues that an employee is not on vacation, and should not be receiving vacation pay when on pregnancy or parental leave.

What is the impact of the longstanding practice in relation to the payment of deferred salary to academic employees in the typical summer vacation period?

The employer argues that the effect of the longstanding practice of paying deferred salary during the typical vacation period is that it is obliged to do so, while the union disagrees, relying on the fact that there is no requirement in either the collective agreement or in statute that it be paid in July and August.

Consistent with the agreed facts in this case, the Kaplan award records the fact that the uniform practice of the Colleges was to withhold 2/12 of an employee's annual salary to be paid out over the summer vacation period ensuring both a two-month vacation and salary continuity. However, the focus of the dispute before Arbitrator Kaplan was not about the timing of the pay-out of vacation pay, and the award declined to include additional wording about vacation pay in the academic collective agreement. Nor does it provide that it is mandatory to pay vacation pay in the summer months, even if an employee is on an unpaid leave.

In the facts of this case, the employer did not pay out the full deferred vacation pay in the summer of 2020 because of the 93% limit on the SUB payments in Article 22, and planned to pay the remainder out after the pregnancy/parental leave. This example of part of the deferred pay being paid at some other point in the year than July and August, suggests that the well-established typical practice of paying vacation pay in the summer does permit of at least partial exception. Although certainly not at all determinative here, the facts set out in the *Seneca College* decision indicate that the practice at that college also included the ability to grant vacation and pay deferred salary after the pregnancy leave in a time other than the summer months, and other than the same academic year in which the vacation pay was earned.

The employer supports the payment of the deferred wages in the summer months with the idea that there is no requirement to pay the deferred pay any other time. Nonetheless, if the payment of the deferred vacation pay during pregnancy leave is inconsistent with other portions of the

collective agreement or statutes, it would become a consequential requirement to pay them at some other time. Further, the idea that the employer is obligated to pay the deferred salary during the summer months is inconsistent with the fact that the employer deferred part of the vacation pay until after the leave, and the provision of article 22.02 D (iii), which is language directly out of the regulation, dealt with below.

I am of the view that, at the very least, the practice of paying deferred salary to employees in the summer months is not so immune to exception that it mandates payment to employees on unpaid pregnancy leave, if that creates inconsistency with other provisions of the collective agreement, interpreted in light of relevant statutory provisions.

Should the phrase "any other earnings received" in article 22.02 C(ii) be interpreted to include deferred salary in lieu of vacation pay?

The nub of the dispute is over the meaning of "any other earnings received". If, as the employer argues, it properly includes the payment of deferred salary, then there has been no breach of the collective agreement provision to pay SUB plan benefits, because it becomes part of the definition of a SUB plan benefit. On the other hand, if, as the union argues, "any other earnings received" does not include deferred salary in lieu of vacation pay, then there has been a breach, as the grievor received only deferred salary during the summer of 2020, and no SUB benefits would have been paid for that period, when she otherwise qualified.

Important to the resolution of this portion of the dispute is the wording of Article 22.02 D, which, in summary, provides for consistency with, and paramountcy of, the applicable regulations under the EIA. The parties disagree about whether the use of deferred salary as part of a SUB plan payment represents an inconsistency with the *EIA* regulation.

I note that Article 22.02 D includes three conditions that relate to s. 37(2) of the pertinent *EIA* regulation, set out in Appendix "B". Two of the three, paragraphs (ii) and (iii) are identical to the wording in subparagraphs 37(2) (h) and (i) respectively, and provide that there is no vested right to payments under a SUB plan outside of a period of unemployment, and that payments in respect of guaranteed annual remuneration or deferred remuneration are not reduced or increased by payments received under the plan.

The third condition, in Article 22.02 D (i) provides a maximum pay-out under the SUB plan, similar to the wording in subparagraph 37(2) (d), but also adds language found in Article 22.02 C, which is not found in the regulation. Although it does not change the interpretative exercise, in my view, it is interesting to note that the language of current paragraph 22.02 D (i) is an addition to the collective agreement, which was not found in the predecessor collective agreement. The external reference point is still the wording of the *EI* regulation, from which the parties are not able to contract out, in any event.

The provision of section 37(2) of the regulation under the EIA closest to the condition set out in Article 22.02 D (i) is the following:

> 37 (2) For the purpose of subsection (1), a supplemental unemployment benefit plan is a plan that
> ….
> (d) requires that the combined weekly payments received from the plan and the portion of the weekly benefit rate from that employment do not exceed 95 per cent of the employee's normal weekly earnings from that employment;

It can be seen that the provision of subsection 37(2)(d) in the regulation does not refer to other earnings received by the employee as part of the SUB plan calculation. The employer argues that the regulation does not assist in the interpretative exercise, which pertains to the wording of the collective agreement. It is true, of course, that the central task is interpreting the collective agreement, but in the highly regulated field of SUB plans and pregnancy/parental leaves, it would be necessary to consider the statutory context in which the provisions were negotiated, even if the collective agreement didn't explicitly reference them, as it does in Article 22.02 D. There are many provisions in the *EIA* about different streams of earnings, and the treatment of earnings while eligible for benefits. The prevailing theme is that, in the absence of specific protection of provisions such as section 37(1), which deem SUB payments not to be earnings for the purposes of determining eligibility under the *EIA*, most earnings are considered in the assessment of whether there has been an interruption of employment, an essential precondition to the receipt of the benefits that are to be topped up by the SUB plan provided for under Article 22.

As well, the opening provision of Section 37(1) points to a related precondition for EI benefits, which is that there has been an interruption in earnings. By operation of section 37(1), SUB benefits are defined as *not earnings* for relevant EI purposes. If they were not so described, they

would render the employee ineligible or subject to deductions from *EI* benefits under the sections referenced.

There are two other notable points about section 37 (2) of the regulation for the purposes of this decision. It references a larger concern of the *EIA,* and many of its provisions, concerning allocation of income from different sources of employment, when it references normal weekly earnings "from *that* employment". The collective agreement, as opposed to the broader ranging statute, is naturally mainly concerned with only the employment of those which it covers. However, it is important to keep in mind the larger context of the EIA, when dealing with maintaining consistency, internally with other portions of the collective agreement, and with the external statute. The statute contemplates the possibility of earnings from a number of sources, and has myriad provisions categorizing them.

The second notable point is that sub-paragraph 37(2) uses the employee's normal weekly earnings in a grammatical context that appears to distinguish them from weekly payments under the SUB plan, as well as providing a method of calculation for the maximum amount payable. This is of relevance to the interpretation of the other two conditions in Article 22.02 D, paragraphs (ii) and (iii), as well, which will be dealt with below.

In my view, it would unduly strain the plain meaning of these provisions to find that a portion of regular earnings, i.e. deferred vacation pay, can be converted into non-earnings, depending on which month of the year the employer pays them out. Money may be fungible, but the provisions here, read together, describe different concepts, treated as separate sources of remuneration by the statute. One way to describe the effect of the employer's position is that the wording of Article 22.02 (ii) permits the relabeling of a portion of deferred vacation pay to be a component of the SUB plan. For EI purposes, this would mean that a portion of regular earnings otherwise usually considered as earnings incompatible with an interruption of earnings, would be redefined as non-earnings. At the very least, one would hope for plain language in the collective agreement as a basis for such a result in order to accept it as the preferable interpretation of these interdependent contractual and statutory terms.

Not only does one not find plain wording converting a portion of deferred regular salary into non-earnings, one meets instead the language of Article 22.02 D (iii) and section 37(2) of the

regulation, which specifically reference deferred remuneration, and the requirement that they not be reduced or increased by payments received under the plan.

The employer argues that that deferred salary is not reduced by using a portion of it to reduce the payments required under the SUB plan, because of its view of the meaning of "other earnings received" in the collective agreement. Try as I have, I fail to see how the grievor's entitlement to deferred salary in lieu of vacation pay is not reduced by using some of it to fund the SUB payment in the summer months. In the non-summer months of her pregnancy/parental leave, the SUB benefit was worth a significant amount to the grievor each pay period, separate from her regular earnings, which had ceased because she was on unpaid leave under Article 22. In the summer months, the effect of the employer's approach is that an equivalent amount of deferred regular earnings becomes unavailable for later payment as vacation pay. The only way it is possible, in my view, to say that the deferred pay is not reduced, is to accept that vacation pay and SUB payments are not separate entitlements. As I have discussed in the earlier sections of this decision, that does not seem to be the plain meaning of the separate provisions of the collective agreement and the established practice of paying vacation pay by way of deferred salary.

Further, I find merit in the idea that the *ESA's* requirement for separate accounting of vacation pay, read together with the *EIA's* requirement for separate accounting of the SUB payments provide further support for their separate status. The fact that SUB payments are protected as non-earnings in the *EIA* regulation, while regular salary is not, serves as further support for this point.

I have also considered whether the requirement in section 37(2)(e) of the regulation that the SUB plan be financed by the employer is important to the analysis. Since it might well be said that any payment made by the employer to an employee is funded by the employer, I am not persuaded that, as the union suggested, this section supports a finding that the grievor funded her own SUB payments when a portion of her deferred salary was used as part of the SUB payment. My conclusion is rather that the employer's treatment of the grievor's SUB entitlement conflated two separate entitlements under the collective agreement, i.e., deferred pay in lieu of vacation pay and SUB payments during a leave without pay.

The question remains as to what the parties intended by wording in Article 22.02 C "any other earnings received". The employer's proposed interpretation has the attraction of simplicity: that

the employee is entitled by the longstanding practice to deferred earnings during the summer months, and therefore the employer is entitled to pay as much of it during the summer months as they are allowed by the 93% limit, and have the benefit of that fact in the calculation of the SUB benefit. The union's suggestion was that other earnings in this context might refer to pay for service on committees, an assertion that was not specifically rebutted. Nonetheless, there is no agreed fact that identifies specific other possibilities that might have been contemplated by the parties in agreeing to that language, if they do not properly refer to the portion of the deferred salary actually paid to the grievor in the summer of 2020.

In the absence of an agreed fact that might give further specific content to the phrase "other earnings received" during an unpaid leave, I specifically refrain from making a finding about what other earnings the parties intended to refer to. My task is to decide whether the specific treatment of the grievor's pay in the summer of 2020 was consistent with the collective agreement, and I am not of the view that it is necessary to speculate in this regard in order to resolve the dispute before me. Nonetheless, I do find merit in the union's submission that whatever the parties intended by "other earnings received", the structure of the clause clearly contemplated them to be less than 100% of regular salary, so that they would fit within 93% of regular salary, and require top-up from *EI* benefits to achieve that 93%. Paying out deferred vacation pay, intended to be the monthly amount of full regular salary treated as paid over 12 months, does not "fit", either arithmetically or conceptually, within this structure.

Further, the *EIA* contains multiple provisions about circumstances in which monies received by an employee are treated as earnings or not for the purposes of deciding issues of eligibility, such as whether there has been an interruption of earnings, e.g. sections 10, 23 and 35 of the regulation. Given the requirement to interpret the provision consistently with the regulation, it is appropriate to note that there are many categories of employment earnings that are contemplated by the *EIA.* I find these to be properly considered alternative possibilities for giving the term content other than deferred salary in lieu of vacation pay, although I am not in a position based on the agreed facts to make a separate finding in that regard.

In this regard, I have also carefully considered the employer's contention that it is important to the interpretation of this article that the union's interpretation would mean that the employee was paid more than 100% of her salary during the summer months, or in respect of them, at some later point. The union argues that the collective agreement provides for a separate benefit of deferred

vacation pay, which is not required to be paid during the period of the grievor's summer pregnancy leave, or in the same academic year as it is earned. If this is the case, then the problem could be avoided. The deferred pay could be paid some other time, as the employer already does for the portion not required to fill the gap between the EI benefits and 93% of regular salary.

Related to this point, I have considered the fact that, as employer counsel noted, Arbitrator Starkman found as part of his *Seneca (Dhawan)* decision, cited above, that the union's interpretation in that case would have meant that the grievor would be paid almost 112% of her salary during her period of leave, rather than the 93% provided for in the collective agreement, as an integral part of his decision to dismiss the grievance. However, I am not persuaded that the conclusions in that decision are ultimately of assistance in the resolution of this case.

There are many distinguishing features between the facts and arguments in the *Seneca* decision and those before me. Although both cases deal with an academic employee on pregnancy and parental leave, the dispute in that case was related to the phrase "regular salary" in reference to SUB payments, and whether it should be calculated on the basis of 10 months or 12. It did not otherwise consider how to calculate the SUB payment, or any issue about the language "other earnings received". There was no issue, and therefore no finding, concerning the reduction of SUB payments to zero by the use of deferred vacation pay. Nor does anything in that award or the collective agreement constrain the employer from paying deferred salary outside of the academic year in which it was earned, if the reason for so doing is to maintain consistency with other provisions of the collective agreement. Further, from the facts set out in that decision, the grievor in that case appears to have received vacation with deferred salary after her pregnancy leave.

Turning to the cases cited by the union, concerning whether SUB payments should be made in non-teaching periods, some of them deal with similar employer concerns that grievors would be overpaid if SUB payments were made during the non-teaching periods in question. Union counsel observes that such arguments have not resulted in arbitrators finding that SUB benefits should not be paid where provided for in the collective agreement, even if they occur in non-teaching or other periods which do not attract pay. See for example, *Re Hastings and Prince Edward District School Board and E.T.F.O.* (2006), 152 L.A.C. (4th) 343 (Davie); *Re Avon-Maitland District School Board and E.T.F.O.* (2004), 134 L.A.C. (4th) 23 (Picher); and *Rainy River District School Board*

v. E.T.F.O. (SEB Benefits Grievance), [2005] O.L.A.A. No. 129., 2005 CanLII 71016 (ON LA) and others cited in Appendix C.

Although it is true, as employer counsel notes, that the language in the collective agreements dealt with in the above jurisprudence was different, and did not raise the same question as here, there are some analogies to be drawn, and the structural context of the federal and provincial legislation in which those cases were decided is the same. Further, and although I agree with employer's counsel that this case does not fall to be decided on the general principles enunciated in the jurisprudence discussed, there is at least one transferable idea, i.e., several of the cases support the results partly on the basis that one interpretation or the other is preferable because the upshot would make the wording operate consistently regardless of the particular month in which the leave begins.

As Arbitrator Davie put it in the *Hastings* decision, cited above: a top-up benefit should not be interpreted to mean it will be applied differently depending on when the pregnancy leave is taken, unless clear, unequivocal language indicates otherwise. I find that to be a sound interpretative conclusion, equally applicable to this case, despite the differences in the underlying issues in that case and this one. I do not find any language authorizing the operation of the SUB plan to be treated differently depending on when the pregnancy/parental leave starts. On the facts of the case before me, I am persuaded that the result of the employer's approach is that the SUB payment is applied differently, depending on whether the leave includes July and August, something not authorized by any provision of the current collective agreement or statute. This, consistent with my conclusion above to the effect that the deferred pay spoken of in the Kaplan award and the agreed statement of facts is a separate entitlement, supports the conclusion that deferred pay does not lose its character as either regular wages or vacation pay with the turn of the calendar to July and August.

In sum, then I have concluded from the above consideration of the collective agreement and related statutory provisions, that the phrase "any other earnings received" is preferably interpreted to not include deferred salary in lieu of vacation pay, in light of the provisions of Article 22.02 E, the "notwithstanding" provisions in Article 22.02 D, and the general scheme of the *EIA* referenced therein.

***

To bring together the inter-connected themes discussed above, it is my view that the above considerations, separately and combined, favour the union's interpretation as the more harmonious interpretation of all the relevant provisions together. It gives fuller meaning to the separate entitlements to deferred salary in lieu of vacation pay and SUB payments, does not offend the prohibition against requiring an employee to take vacation entitlement during a pregnancy/parental leave, and is more consistent with the larger statutory structure of the *ESA* and the *EIA.*

Further, the elements supporting the union's argument are more firmly anchored in statute, and consistent with the overall structure of the collective agreement. By contrast, the employer's approach is rooted in significant part in practice in respect of employees who are typically on vacation during the summer months, and the silence of the collective agreement in respect of the timing of the payment of vacation pay. I find these elements of the total context to carry less weight than the overall scheme of the separate entitlements in light of their related statutory provisions. Although the practice is firmly established in respect of the typical use of the summer period by academic employees, I do not find it determinative when applied to the less typical circumstances of a pregnancy/parental leave which starts in the summer, in light of the other relevant considerations.

In my view, neither the well accepted practice of the colleges of paying out deferred salary to employees not on pregnancy leave, the reference to other earnings received in Article 22.02 C and D, nor the silence of the collective agreement about the amount and timing of vacation pay, even in light of the management rights clause, authorizes replacing the entitlement to SUB payments in Article 22.02 with deferred vacation pay during the summer months. In this respect, it is of note that the management rights clause contains within it the requirement that management functions will be exercised in a manner consistent with the collective agreement.

I find that the preferable interpretation of the collective agreement is that deferred salary in lieu of vacation pay and benefits payable under the SUB plan, are two separate entitlements. Further, in light of the relevant provisions of the *ESA* and *EIA*, I find the employer's payment of deferred salary during pregnancy/parental leave to reduce to zero the SUB benefit, effectively erases it as a separately described benefit under the collective agreement and statute. In all the circumstances, the employer's treatment of the grievor's deferred salary is inconsistent with the status of the SUB plan under the collective agreement as a separate benefit from vacation pay.

In sum, I find the preferable interpretation of the disputed terms justifies the conclusion that using deferred salary to eliminate any separate payment under the SUB plan during the summer months is inconsistent with other provisions of the collective agreement as explained above. The grievor is entitled to a remedy which will correct that.

The employer argued that it was premature to deal with potential future issues, and I am persuaded that it is appropriate to remit the question of the specifics of the remedy and any other issues which may arise in respect of the academic year 2020/2021 to the parties to attempt to resolve themselves in the first instance.

Accordingly, for the reasons set out above the grievance is allowed.

I remain seized to deal with any issues of remedy and/or implementation that the parties are not able to resolve themselves.

Dated at Toronto this 14th day of June, 2021.

Kathleen G. O'Neil, Single Arbitrator

APPENDIX A

Collective Agreement Excerpts

Article 6

MANAGEMENT FUNCTIONS

6.01 It is the exclusive function of the Colleges to:

(i) maintain order, discipline and efficiency;

(ii) hire, discharge, transfer, classify, assign, appoint, promote, demote, lay off, recall and suspend or otherwise discipline employees subject to the right to lodge a grievance in the manner and to the extent provided in this Agreement;

(iii) manage the College and, without restricting the generality of the foregoing, the right to plan, direct and control operations, facilities, programs, courses, systems and procedures, direct its personnel, determine complement, organization, methods and the number, location and classification of personnel required from time to time, the number and location of campuses and facilities, services to be performed, the scheduling of assignments and work, the extension, limitation, curtailment, or cessation of operations and all other rights and responsibilities not specifically modified elsewhere in this Agreement.

6.02 The Colleges agree that these functions will be exercised in a manner consistent with the provisions of this Agreement

…

11.03

The academic year shall be ten months in duration and shall, to the extent it be feasible in the several Colleges to do so, be from September 1 to the following June 30. The academic year shall in any event permit year-round operation and where a College determines the needs of any program otherwise, then the scheduling of a teacher in one or both of the months of July and August shall be on a consent or rotational basis.

…

Article **15**
VACATIONS

15.01 A

A full-time employee who has completed one full academic year's service with the College shall be entitled to a vacation of two months as scheduled by the College. A full-time employee may request and, with the approval of the College, may have a vacation that is scheduled in periods other than a contiguous two-month block. A full-time employee who has completed less than one full academic year’s service with the College shall be entitled to a two month vacation period and shall be paid the remainder of the employee’s prorated annual salary. The request of the employee shall be in writing and a copy provided to the Union Local President.

Where the employee requests a vacation in other than a contiguous two month block, the employee shall be entitled to forty-three (43) weekdays of vacation not including any holidays as set out in Article 16.

15.01 B

A teacher assigned to teach for an additional month (11th month) over the normal teaching schedule of the equivalent to ten months as part of a continuous 12 month program shall be entitled to a vacation of one month, as scheduled by the College. Such teacher shall also receive a bonus of ten percent of the employee's annual regular salary for the additional eleventh month of teaching assignment to be paid on completion of such assignment. A teacher assigned to teach in the eleventh month for less than a full month will be entitled to a pro-rata amount of the ten percent bonus referred to above, to be paid on completion of such assignment.

A member of the teaching faculty teaching in a continuous program shall not be required to teach for more than 12 consecutive months without a scheduled vacation of at least one month.

15.01 C

It is understood that the above provisions for vacations are not intended to prohibit Colleges from scheduling non-teaching periods at Christmas and New Year's or at any other mid-term break.

15.02

In scheduling vacations, the College will take into consideration the maintenance of proper and efficient staffing of College programs and operations and the requests of employees. The College will notify employees of their vacation period at least four weeks prior to the commencement of the vacation period concerned. It is understood that following notification of vacation periods, vacation schedules may be changed in circumstances beyond the College's control or by mutual agreement. The College agrees that seniority shall be given consideration in resolving conflicting vacation requests.

…

Article 22

PREGNANCY AND PARENTAL LEAVE

22.01 A

A pregnant employee who has been employed for at least 13 weeks before the expected date of delivery shall be entitled to 17 weeks pregnancy leave of absence without pay (except as provided in 22.02), for the purpose of childbirth, or such other longer or shorter period of pregnancy leave as is required to be granted under the Employment Standards Act, 2000. Except as hereinafter provided, the leave of absence shall be in accordance with the pregnancy leave provisions of the Employment Standards Act, 2000. If through still-birth or miscarriage the employee wishes to return at an earlier date than the leave of absence originally agreed to, the College shall endeavour to arrange for such earlier return to work and such request shall not be

unreasonably denied. Notwithstanding the above, the employee may return upon four weeks notice.

22.01 B

An employee on pregnancy leave may take a further 35 weeks parental leave of absence without pay (except as provided in 22.02), or such other longer or shorter period of parental leave as is required to be granted under the Employment Standards Act, 2000, provided the employee applies in writing two weeks prior to the expiry of her pregnancy leave. Such leave shall be in accordance with the provisions of the Employment Standards Act, 2000.

22.01 C

A leave of absence of up to 37 weeks or such other longer or shorter period of parental leave as is required to be granted under the *Employment Standards Act, 2000*, is available to any parent who has been employed for at least 13 weeks. Such leave shall be pursuant to the provisions of the *Employment Standards Act, 2000*, and is not in addition to the leave referred to in 22.01 B. Parent includes a person with whom a child is placed for adoption and a person who is in a relationship of some permanence with a parent of a child and who intends to treat the child as his or her own. Such leave may begin no more than 52 weeks after the day the child is born or comes into the custody, care, and control of a parent for the first time.

22.01 D

On request, in writing, at least two weeks prior to the date of expiry of the leave under 22.01 A, 22.01 B or 22.01 C, an employee shall be granted a leave of absence without pay to a maximum leave (including leave available under 22.01 A and 22.01 B and 22.01 C) of 52 weeks. The length of such leave shall be at the discretion of the employee. If requested by the College, the employee will endeavour to return at the start of a semester.
It is understood that Section 53 of the *Employment Standards Act, 2000* shall continue to apply to a leave of absence that has been extended under this provision.

22.01 E

The College shall not require an employee to take vacation entitlement concurrently with leave under this Article. On return from the leave, an employee may forego vacation time owing.

22.01 F

Employees on leave under this Article shall continue to accumulate seniority for the duration of their leaves.

22.02 A

An employee on leave under 22.01 shall have insured benefit coverage continued (i.e., group life insurance, group disability, Extended Health, Dental and Pension benefits, and any other type of benefit that is prescribed by regulation under the Employment Standards Act, 2000 and is provided to employees under the provisions of this Agreement) during the period of the leave, as follows:

(i) the College shall continue the employee's benefit coverage for all insured benefits for which the College is responsible for payment of 100% of the billed premium (i.e. Extended Health, Dental, Basic Life);

(ii) the College shall continue to pay its percentage of premium cost for all insured benefits for which the College and the employee jointly share the cost provided the employee continues to pay the employee's percentage share of the premium cost (i.e. Supplemental Life, Pension);

(iii) any benefit coverage that is based on an employee's salary shall be based on the salary which the employee would otherwise have earned during the period;
(iv) sick leave credits will continue to accumulate.

22.02 B

An employee entitled to pregnancy and/or parental leave under 22.01, who provides the College with proof that the employee has applied for and is eligible to receive Employment Insurance (E.I.) benefits pursuant to Sections 22 or 23, Employment Insurance Act, S.C. 1996, c.23, as amended from time to time, shall be paid a top-up, in accordance with the Supplementary Unemployment Benefit Plan (S.U.B).

22.02 C

Payments made according to the Supplementary Unemployment Benefit Plan will consist of the following:

(i) for the waiting period of the first leave taken under Article 22.01 A and/or 22.01 B and/or 22.01 C, as applicable, during which the employee is serving the Employment Insurance waiting period, a payment equivalent to 93% of the regular salary which the employee would otherwise have earned during the period; and

(ii) for up to a maximum of 51 additional weeks while the employee is on pregnancy and/or parental leave, and provided the employee is eligible to receive Employment Insurance (E.I.) benefits pursuant to Sections 22 or 23 Employment Insurance Act, S.C. 1996, c.23, as amended from time to time, or was eligible to receive such E.I. benefits but has received the maximum number of weeks payable, payments equivalent to the difference between the sum of the weekly E.I. benefits the employee is eligible to receive and any other earnings received by the employee, and 93% of the regular salary which the employee would otherwise have earned during such period. The weekly top-up payment will be calculated using the weekly E.I. benefit that (45) would be payable to the employee (i.e. 55%) without regard to any election by the employee to receive a lower E.I. benefit spread over a longer period of time as may be permitted under the Employment Insurance Act.

22.02 D

Notwithstanding anything to the contrary contained herein, the terms of the S.U.B. Plan described in 22.02 B and 22.02 C shall be construed so that they comply with Regulation 37(2) of the Employment Insurance Act, including the following conditions:

(i) In no event will the top-up payment exceed the difference between 93% of the employee’s actual weekly rate of pay that the employee was receiving on the last day worked prior to the commencement of the leave and the sum of the employee’s E.I. benefit calculated without

regard to an election by the employee to receive a lower E.I. benefit spread over a longer period of time as may be permitted under the Employment Insurance Act and any other earnings received by the employee.

(ii) An employee who qualifies for benefits shall have no vested right to payments under the plan except to payments during a period of unemployment specified in the plan. (Reference: 37(2)(h) E.I. Regulations).

(iii) Payments in respect of guaranteed annual remuneration or in respect of deferred remuneration or severance pay benefits shall not be reduced or increased by payments received under the plan. (Reference: 37(2)(i) E.I. Regulations)..

Appendix B
Legislative Provisions

Excerpts from *The Employment Standards Act*

46 (1) A pregnant employee is entitled to a leave of absence without pay unless her due date falls fewer than 13 weeks after she commenced employment. 2000, c. 41, s. 46 (1).

When leave may begin

(2) An employee may begin her pregnancy leave no earlier than the earlier of,

(a) the day that is 17 weeks before her due date; and

(b) the day on which she gives birth. 2000, c. 41, s. 46 (2).

Exception

(3) Clause (2) (b) does not apply with respect to a pregnancy that ends with a still-birth or miscarriage. 2000, c. 41, s. 46 (3).

Latest day for beginning pregnancy leave

(3.1) An employee may begin her pregnancy leave no later than the earlier of,

(a) her due date; and

(b) the day on which she gives birth. 2001, c. 9, Sched. I, s. 1 (10).

Notice

(4) An employee wishing to take pregnancy leave shall give the employer,

(a) written notice at least two weeks before the day the leave is to begin; and

(b) if the employer requests it, a certificate from a legally qualified medical practitioner stating the due date. 2000, c. 41, s. 46 (4).

Notice to change date

(5) An employee who has given notice to begin pregnancy leave may begin the leave,

(a) on an earlier day than was set out in the notice, if the employee gives the employer a new written notice at least two weeks before that earlier day; or

(b) on a later day than was set out in the notice, if the employee gives the employer a new written notice at least two weeks before the day set out in the original notice. 2000, c. 41, s. 46 (5).

Same, complication, etc.

(6) If an employee stops working because of a complication caused by her pregnancy or because of a birth, still-birth or miscarriage that occurs earlier than the due date, subsection (4)

does not apply and the employee shall, within two weeks after stopping work, give the employer,

(a) written notice of the day the pregnancy leave began or is to begin; and

(b) if the employer requests it, a certificate from a legally qualified medical practitioner stating,

(i) in the case of an employee who stops working because of a complication caused by her pregnancy, that she is unable to perform the duties of her position because of the complication and stating her due date,

(ii) in any other case, the due date and the actual date of the birth, still-birth or miscarriage. 2000, c. 41, s. 46 (6).

Rights during leave

51 (1) During any leave under this Part, an employee continues to participate in each type of benefit plan described in subsection (2) that is related to his or her employment unless he or she elects in writing not to do so. 2000, c. 41, s. 51 (1).

Benefit plans

(2) Subsection (1) applies with respect to pension plans, life insurance plans, accidental death plans, extended health plans, dental plans and any prescribed type of benefit plan. 2000, c. 41, s. 51 (2).

Employer contributions

(3) During an employee's leave under this Part, the employer shall continue to make the employer's contributions for any plan described in subsection (2) unless the employee gives the employer a written notice that the employee does not intend to pay the employee's contributions, if any. 2000, c. 41, s. 51 (3).

Reservist leave

(4) Subsections (1), (2) and (3) do not apply in respect of an employee during a leave under section 50.2, unless otherwise prescribed. 2007, c. 16, Sched. A, s. 4.

Exception

(5) Despite subsection (4), subsections (1), (2) and (3) apply in respect of an employee during a period of postponement under subsection 53 (1.1), unless otherwise prescribed. 2007, c. 16, Sched. A, s. 4.

Leave and vacation conflict

51.1 (1) An employee who is on leave under this Part may defer taking vacation until the leave expires or, if the employer and employee agree to a later date, until that later date if,

(a) under the terms of the employee's employment contract, the employee may not defer taking vacation that would otherwise be forfeited or the employee's ability to do so is restricted; and

(b) as a result, in order to exercise his or her right to leave under this Part, the employee would have to,

(i) forfeit vacation or vacation pay, or

(ii) take less than his or her full leave entitlement. 2001, c. 9, Sched. I, s. 1 (11).

Leave and completion of vacation conflict

(2) If an employee is on leave under this Part on the day by which his or her vacation must be completed under paragraph 1 of section 35 or paragraph 1 of subsection 35.1 (2), the uncompleted part of the vacation shall be completed immediately after the leave expires or, if the employer and employee agree to a later date, beginning on that later date. 2001, c. 9, Sched. I, s. 1 (11); 2002, c. 18, Sched. J, s. 3 (22).

Alternative right, vacation pay

(3) An employee to whom this section applies may forego vacation and receive vacation pay in accordance with section 41 rather than completing his or her vacation under this section. 2001, c. 9, Sched. I, s. 1 (11).

APPENDIX C
Authorities cited by the Parties

Cited by the Union:

1. Excerpt from *Employment Insurance Regulations*, SOR/96-332;

2. Excerpt from *Employment Standards Act, 2000;*

3. *Greater Essex County District School Board v. Ontario Secondary School Teachers' Federation, District 9, Educational Support Staff* [2007] O.L.A.A. No. 145, 89 C.L.A.S. 26 (Levinson);

4. *Greater Essex County District School Board v. Ontario Secondary School Teachers' Federation, District 9 [2008] O.J. No. 2663*, *238 O.A.C. 157* (OSCJ, Div. Ct);

5. *Greater Essex County District School Board v. OSSTF, District 9* [2009] O.J. 2537, 25O A.C. 98 (CA);

6. *Greater Essex County District School Board v. Elementary Teachers' Federation of Ontario (Supplementary Employment Insurance Benefits Grievance);* 2010 CanLII 5158 (ON LA); [2010] O.L.A.A. No. 39 (Snow)

7. *Greater Essex County District School Board and Elementary Teachers' Federation of Ontario 83 C.L.A.S. 326*, 2005 CLB 10297 (Dissanayake);

8. *Greater Essex County District School Board v. Elementary Teachers' Federation of Ontario (Greater Essex County Local)* [2006] O.J. No. 2604, 149 A.C.W.S. (3d) 1024 (OSCJ);

9. *Re Hastings and Prince Edward District School Board and Elementary Teachers'Federation of Ontario* (2006), 152 L.A.C. (4th) 343 (Davie);

10. *Brant Haldimand-Norfolk Catholic District School Board v. Ontario English Catholic Teachers' Assn. (Hughes Grievance),* [2001] O.L.A.A. No. 142 (Devlin);

11. *Re Avon-Maitland District School Board and E.T.F.O.* (2004), 134 L.A.C. (4th) 23 (Picher);

12. *Rainy River District School Board v. Elementary Teachers' Federation of Ontario (RainyRiver District) (SEB Benefits Grievance),* [2005] O.L.A.A. No. 129 (Albertyn);

13. *OPSEU v. Sault College, Grievance of Piotrowski* (unreported decision of Howe, dated October 2, 2006);

14. *OPSEU v. Seneca College, Grievance of Dhawan* (unreported decision of Starkman dated July 10, 2006);

Cited by the Employer:

1. *College Employer Council v OPSEU (CAAT-A Bargaining Unit), 2019* CanLII 99938 (ON LA) (Kaplan)

2. *Seneca College and Ontario Public Service Employees Union (Dhawan*) unreported decision dated July 10, 2006 of the majority of a panel chaired by David K. L. Starkman