IN THE MATTER OF AN ARBITRATION

BETWEEN:

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

(the "Employer")

AND:

BRITISH COLUMBIA TEACHERS' FEDERATION

(the "Union")

Re: Reimbursement for Union Leave – Employer Grievance
Section 104 of the *Labour Relations Code* – Case 65618/13R

ARBITRATOR:	Irene Holden
COUNSEL:	Delayne M. Sartison, Q.C. For the Employer Craig Bavis For the Union
COMMENCEMENT OF PROCEEDINGS:	June 19, 2013
HEARING DATES:	September 16 & 17, 2013
DATE OF AWARD:	January 29, 2014

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INTRODUCTION

Pursuant to Section 104 of the *Labour Relations Code,* the Labour Relations Board appointed me as sole arbitrator to decide an Employer policy grievance between the British Columbia Public School Employers' Association (the "Employer" for purposes of this award) and the British Columbia Teachers' Federation (the "Union" for purposes of this award). The policy grievance involves an interpretation of Article G.6 of the parties' provincial Collective Agreement – specifically clauses 3 and 4 and the meaning of the phrase "salary amount" in each clause.

ARTICLE G.6

Article G.6 of the provincial Collective Agreement entitled "Leave for Union Business" reads as follows:

> 1. a. Any union member shall be entitled to a leave of absence with pay as authorized by the local union or BCTF and shall be deemed to be in the full employ of the board.
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> b. 'Full employ' means the employer will continue to pay the full salary, benefits, pensions contributions and all other contributions they would receive as if they were not on leave. In addition, the member shall continue to be entitled to all benefits and rights under the Collective Agreement.
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> 2. The local or BCTF shall reimburse the board for 100 percent of such salary, benefits, pension contributions and all other contribution costs upon receipt of a monthly statement.
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> 3. Where a TTOC replaces the member on union leave, the reimbursement costs paid by the local or the BCTF shall be the salary amount paid to the TTOC.
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> 4. Where a non-certified replacement is used, the reimbursement costs paid by the local or the BCTF shall be the salary amount paid to the replacement.
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> 5. Where teacher representatives are requested by the board to meet on union-management matters during instructional time, representative(s)

shall be released from all duties with no loss of pay.

Short-term leave (leave of 10 consecutive school days or less)

6. Such leave will be granted subject to the availability of a qualified replacement. The request shall not be unreasonably denied.

Long-term leave (leave of more than 10 consecutive school days)

7. Such leave will be granted subject to the availability of a qualified replacement and educational needs of the school district. The request shall not be unreasonably denied.

8. Upon return from leave, the employee shall be assigned to the same position or, when the position is no longer available, a similar position.

Elected union officer release

9. Such leaves will be granted upon request.

10. Upon return from leave, the employee shall be assigned to the same position or, when the position is no longer available, a similar position.

It should be noted that the reference to "TTOC" in Article G.6 above and in this award refers to a Teacher Teaching on Call or a Teacher on Call.

EMPLOYER'S INTERPRETATION

The Employer's interpretation of Article G.6 is that the Article outlines the conditions of granting the Union leave requests but that the Employer was to be reimbursed for all costs of the leave, including benefit costs. The Employer claims that those were the representations made by the Union during collective bargaining for the 2011-2013 renewal Collective Agreement. The Employer further claims that the reference to the "salary amount" in clauses 3 and 4 of Article G.6 is merely a reference to the rate of pay that the reimbursement costs would be based upon if the teacher on Union leave was replaced with a TTOC or a non-certified replacement.

UNION'S INTERPRETATION

The Union claims that the "salary amount" referenced in clauses 3 and 4 of Article G.6 refers only to the Union's obligation to reimburse the salary costs when an employee on leave is replaced with a TTOC or a non-certified replacement, as the wording suggests. It does not reference cost of benefits as outlined in clause 2 of Article G.6. The Union further contends that it did not represent to the Employer that it would pay all replacement costs in all cases.

BACKGROUND

Article G.6 in the parties' 2011- 2013 Collective Agreement originated as a Union proposal. The parties began bargaining in March of 2011. The Employer had received a net zero mandate from the provincial government which mandated that there would be no additional compensation costs to the Collective Agreement without offsets in savings – hence the term "net zero". Although the Employer shared the substance of the mandate with the Union, the Union did not agree with it or feel governed by it.

The Union introduced the proposal regarding Union leave on June 1, 2011. The initial proposal included full reimbursement costs to the Employer for long term leaves, and salary reimbursement for short term leaves when a TTOC or non-certified replacement was hired to replace the employee on leave. Further, the Union proposed in the original language that the Employer would bear all costs for Union leaves to participate in contract negotiations. The Union altered its position on January 17, 2012 and proposed that it would reimburse the Employer for "100% of salary, benefits and statutory benefits" for long term leaves and withdrew that section of the proposal which would have obligated the Employer to pay for the full cost of those Union members on leave for contract negotiations. The Union's language for short term leaves remained the same as its original proposal and the current language found in Articles

G.6.3 and G.6.4. There were no other face to face meetings regarding this proposal. In September of 2011 the Union took a strike vote and commenced job action while the parties continued to bargain.

In March of 2012 the provincial government passed Bill 22 or the *Education Improvement Act* suspending the teachers' job action, establishing a cooling off period and appointing a mediator to work with the parties toward a negotiated agreement. Failing such agreement, the mediator was mandated to provide non-binding recommendations to the government by the end of June 2012. Dr. Charles Jago, the former president of the University of Northern British Columbia, was appointed as the mediator in question. Dr. Jago met with the parties separately during the mediation. There were approximately sixteen meetings with each bargaining team. The parties continued to exchange proposals on the current Article G.6 and other outstanding issues. An agreement was reached on June 26, 2012 and the parties signed off on the language in Article G.6 on that date as well.

In the 2012/2013 school year the Employer discovered that some school districts were not being fully reimbursed by the Union when a TTOC or non-certified replacement was hired to replace a teacher on Union leave. When the Employer could not convince the Union of its interpretation, the Employer raised this grievance and placed a "housekeeping" item on the current bargaining table which, in the Employer's view, would rectify the situation. The proposal on the current bargaining table revises clauses 3 and 4 of Article G.6 as follows:

> 3. Where a TTOC replaces the member on union leave, the reimbursement costs paid by the local or the BCTF shall be 100% of salary, benefits, pension contributions and all other contribution costs of the TTOC. Where there is agreement the local parties can implement an average cost of a TTOC.
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> 4. Where a non-certified replacement is used, the reimbursement costs paid by the local or the BCTF shall be 100% of salary, benefits, pension contributions and all other contribution costs of the replacement.

EVIDENCE

Employer evidence was provided by Jacquie Griffiths, the Employers' Association's previous Executive Director and chief spokesperson for the Employer during the bargaining and the mediation for the 2011-2013 Collective Agreement. Ms. Griffiths testified that the Employer would never have agreed to the language found in clauses 3 and 4 of Article G.6 if it meant that all costs of replacing the teacher on leave with a TTOC or non-certified replacement would not be reimbursed to the school boards. She stated that she had not costed the proposal since in her view there would be no cost to the Employer.

Jim Iker, the chief spokesperson for the Union in the collective bargaining for the 2011-2013 Collective Agreement, testified that the Union thought the Employer understood the difference in the language. He was adamant that the language was clear – that the school districts would be reimbursed for salary only for the replacement costs if a TTOC or non-certified replacement was utilized. Mr. Iker contended that he made it clear that full reimbursement would apply only in certain cases. Further, he introduced into evidence a chart as to what was being paid for reimbursement under clauses 3 and 4 of Article G.6 and what was "okay to pay" under the terms of the Collective Agreement.

Mr. Iker also introduced a chart which compiled what the various locals were being charged by the school boards under clauses 3 and 4 of Article G.6. The chart indicated that there were various practices throughout the province – a salary amount which included a $3. premium over the daily rate in lieu of benefits (found in Article B.2.5) and/or an average rate which sometimes included benefits and at times did not. Hence there was no consistent practice.

Extrinsic evidence in the form of notes taken by each side during bargaining and during mediation in the individual meetings with Dr. Jago was introduced into these

proceedings. Wherever a reference was made to Article G.6 or associated proposals, the bargaining and/or mediation notes of the various discussions were provided.

All the language proposals which ultimately became Article G.6 were also introduced into evidence.

ARGUMENT

Employer

The Employer seeks a declaration that Article G.6 requires the Union or its locals to reimburse employers for the cost of employees conducting Union business, but with the proviso that the Union need reimburse only the TTOC or non-certified replacement costs when the teacher on leave is replaced by someone in either category. The Employer seeks an order that the Union make the Employers whole but with a direction that the parties attempt to work out the monetary obligations prior to any final order.

The Employer refers to the Union's notes in mediation in which the Union repeatedly talks about the "cost" of the TTOC or non-certified replacement. The Employer interprets the reference to "cost" or "costs" to include benefit costs.

The Employer further submits that Article G.6.2 is an overarching or general 100% reimbursement requirement and G.6.3 and G.6.4 are exceptions to the general clause. Arbitrators have typically narrowly construed exceptions to a general rule in analogous circumstances, contends the Employer : see *Re FBI Foods Ltd. and United Food and Commercial Workers' International Union, Local 117-2-FBI,* [1985] 22 L.A.C. (3d) 157 (Emrich); and *Sheet Metal Workers' International Association v. Giffin Sheet Metal Ltd. (Shift Premium Grievance)* [1999] O.L.A.A. No. 96 (Surdykowski).

The Employer submits that the Union's interpretation would result in a significant "windfall" for the Union and as such should be reflected in clear language in the Collective Agreement which is not the case here: see *Superior Propane (a Division of Superior Plus LP) v. Teamsters Local 31 (Hourly Rate Adjustment Grievance)* [2012] B.C.C.A.A.A. No. 117 (Glass); and *British Columbia Institute of Technology v. British Columbia Government and Service Employees' Union, Local 703 (Rest Periods Grievance)* [2012] B.C.C.A.A.A. No. 53 (McPhillips).

Finally, the Employer maintains that if I find that the language of Article G.6.3 and G.6.4 is properly interpreted to eliminate the Union's obligation to reimburse the Employer for benefits when the employee on leave is replaced by a TTOC or non-certified replacement, the Employer requests that the Union be estopped from asserting that right so long as the 2011-2013 Collective Agreement is in force, as a result of its repeated representations that there would be no cost to the Employer : see *Insurance Corporation of BC v. Office & Professional Employees' International Union, Local 378* [2002] B.C.C.A.A.A. 109, 106 L.A.C. (4th) 97 (Hall).

Union

The Union argues that my task is to determine the mutual intent of the parties primarily through the Collective Agreement language. The value of the extrinsic evidence as to what was said to Dr. Jago in the separate meetings with the mediator is limited, states the Union. According to the Union, the only intent comes from face to face meetings. Further, the intent of one party is not mutual intent: see *Board of School Trustees, School District No. 57, Prince George and International Union of Operating Engineers, Local No. 858* [1976] B.C.L.R.B.D. No. 41; *University of British Columbia and Canadian Union of Public Employees, Local 116* [1976] B.C.L.R.B.D. No. 42; *Re North Cariboo Forest Labour Relations Association and International Woodworkers of America, Local 1-424*

[1985] B.C.C.A.A.A. No. 365 , 19 L.A.C. (3d) 115 (Hope); and *Re Nanaimo Times Ltd. and Graphic Communications International Union, Local 525-M* [1996] B.C.L.R.B.D. No. 40.

The Union contends that it did not make representations to the Employer either face to face or via the mediator that the intention was that the Union would bear 100% of the costs in all cases. In support of this, the Union submits if I review the minutes or notes from those face to face meetings I will discover that Mr. Iker when he first presents the language talks about "salary". Further, the Union contends Mr. Iker differentiates the language by referring to "100% reimbursement" when he talks about long term leaves or the general category found in item 2. He refers to "cost" or "salary" when referring to the reimbursement for the TTOC or non-certified replacements, according to the Union.

There is no windfall for the Union here, submits the Union. The Union did not get what it initially proposed. The Employer gained the concept of "qualified replacements" and meeting the "educational needs of the school district". Long term leaves would typically be replaced via the post and fill process. Clauses 3 and 4 of Article G.6 would therefore apply to short term leaves in the majority.

The Union further urges me to look at the language in the entire Article. If the parties had intended salary to include benefits they would have said that - just as they did in Article G.6.2.

When there is no mutual intent then the arbitrator must revert to the plain Collective Agreement language, submits the Union. The Union argues that Colin Taylor's award in *British Columbia School District No. 39 (Vancouver) and Vancouver Teachers' Federation* [1996] B.C.C.A.A.A. No. 203 is the closest case on point. In those circumstances School District 39 drew an assumption as to what the Union meant on one of the proposals. The assumption was not discussed during bargaining and as a

consequence the extrinsic evidence was of little help and the case had to be decided on the plain meaning of the language. The language was found to favour the Union's interpretation. The Union argues that those facts and the result are analogous to the case at hand.

The Union submits the doctrine of mutual mistake must be met in order to alter the language in the Collective Agreement: see *Teck Cominco Metals Ltd. v. United Steelworkers, Local 480* [2006] B.C.C.A.A.A. No. 143 (Taylor); and *Westfair Foods Ltd. v. United Food and Commercial Workers, Local 247 (Statutory Holiday Designation Grievance)* [2013] B.C.C.A.A.A. No. 49 (Lanyon). In the case at hand there was no mutual mistake but a unilateral mistake on the part of the Employer, submits the Union.

As for a monetary benefit, and the notion that this is a "windfall" for the Union, the Union argues that this is not an "extraordinary monetary benefit"; nor is there an onus on the Union to prove that a monetary benefit has been bargained. The task is to find the mutual intention of the parties within the competing interpretations put forward by the parties: see *Surrey School District No. 36 (British Columbia Public School Employers' Association v. British Columbia Teachers' Federation/Surrey Teachers' Association (Severance Pay Grievance)* [2009] B.C.C.A.A.A. No. 27 (Korbin); *Catalyst Paper (Elk Falls Mill) v. Communications, Energy and Paperworkers Union of Canada, Local 1123 (Grievance 2010-3 Retiree Benefits)* [2012] B.C.C.A.A.A. No. 73 (Hall); and *Catalyst Paper Corp. v. Communications, Energy and Paperworkers Union of Canada, Local 1123 (Long Term Disability Benefits Grievance)* [2013] B.C.C.A.A.A. No. 28 (Pekeles). The Employer is not "paying twice for benefits". TTOC'S are not getting double benefits. They receive $3. over the daily rate in lieu of benefits. The Employer is paying Canada Pension Plan, Employment Insurance, and teacher pension plan contributions, not double benefits. When the Employer's concern regarding double benefits is brought to the Union's attention President Lambert says let's wait and see the Employer proposals. This is not

representation that the Union agrees with the Employer's interpretation, asserts the Union.

The Union asks that I dismiss the grievance. Finally, the Union seeks an order that any additional costs paid by some locals be reimbursed to the Union.

ANALYSIS AND DECISION

It is trite law that the objective of Collective Agreement interpretation is to discover the mutual intention of the parties. In so stating, I shall reiterate the rules of interpretation as defined in Arbitrator Bird's decision *Re Pacific Press v. Graphic Communications International Union, Local 25-C,* [1995] B.C.C.A.A.A. No. 637, and referenced in many awards including those cited herein such as *Superior Propane, supra* and *British Columbia Institute of Technology, supra* :

1. The object of interpretation is to discover the mutual intention of the parties.

2. The primary resource for an interpretation is the collective agreement.

3. Extrinsic evidence (evidence outside the official record of agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention.

4. Extrinsic evidence may clarify but not contradict the collective agreement.

5. A very important promise is likely to be clearly and unequivocally expressed.

6. In construing two provisions, a harmonious interpretation is preferred rather than one that places them in conflict.

7. All clauses and words in a collective agreement should be given meaning if possible.

8. Where an agreement uses different words, one presumes that the parties intended different meanings.

9. Ordinary words in a collective agreement should be given their plain meaning.

10. Parties are presumed to know about relevant jurisprudence.

Although these principles were issued in 1995, nineteen years ago, they have become the guiding principles behind most Collective Agreement language interpretations. Arbitrator Glass in *Superior Propane, supra,* reviewed these principles and the manner in which many arbitrators have utilized them. According to these principles the primary resource is the language in the Collective Agreement, but extrinsic evidence has been utilized to find mutual intention of the parties or to provide some clarity to the language itself. Consequently faced with two different interpretations of a Collective Agreement provision, extrinsic evidence such as bargaining evidence or evidence of past practice, can be utilized to assist in the arbitral deliberations. *University of British Columbia, supra,* long established the usage of extrinsic evidence as a tool to interpretation, not alteration, of the language of a Collective Agreement provision.

Charts were introduced into evidence which indicated that the practice was not consistent. Further, the discrepancies in the interpretation and application of the Articles came to light in the school year following the renewed Collective Agreement so there is not much past practice upon which to rely. Consequently, the only extrinsic evidence which can assist me in my deliberations would be the bargaining and mediation notes, as well as the accompanying language proposals, in order to determine how the language evolved.

Counsel for the Employer argued that the Union's bargaining notes indicate that the Union constantly represented its proposal as a "non-cost item" for the Employer and repeatedly emphasized that the Union would reimburse the "cost" of a TTOC or "100%" of the costs. Counsel for the Union disagreed as to this representation but

stated that regardless, the usage of the notes was limited since the only valid notes are those taken from face to face bargaining meetings. I disagree with that premise. Mediation notes may be less helpful than face to face representation but they are still helpful in terms of how the proposal was characterized during mediation and to the mediator. The ultimate value of such extrinsic evidence is where the bargaining notes are mutually agreed to by the parties but in my experience that rarely occurs. John Baigent as a Vice-Chair at the Labour Relations Board characterized the overall limitations of such extrinsic evidence as follows:

> Secondly, there is extrinsic evidence of various types and value. At one end of the spectrum is objective evidence such as negotiating minutes signed by both parties or the past practice of parties. Such evidence must be given considerable weight because in both examples it reflects a mutuality of intent measurable by objective standards. At the other end of the spectrum is subjective evidence of a party's intentions or impressions of what in fact was achieved at a bargaining session. Unless such impressions are supported by evidence validating those impressions, they are of no value. The intent of one party is only significant when the extrinsic evidence allows an arbitration board to attribute it to the other party.
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> (page 6 of *Board of School Trustees, School District No. 67, Prince George, supra)*

Although I recognize that the extrinsic evidence may be of little value according to the above spectrum, I have nevertheless scrutinized the notes and the evolution of the language. The notes indicate, as do the proposals, that when the proposal regarding leave for Union business was first introduced by the Union on June 1, 2011 the replacement reimbursement costs were characterized as the "salary amount "of the TTOC or the non-certified replacement for short term leaves. For long term leaves the Union would reimburse the Employer for salary, benefits both internal health benefits and statutory contributions such as Canada Pension Plan and Employment Insurance contributions.

In the first Union proposal, the Employer was to pay all costs of the leave for contract negotiations – with no reimbursement. The Employer responded and

proposed the following for reimbursement: "The BCTF will reimburse the employer for the employer's cost of salary, medical, dental, extended health, and group life benefits, the Teachers' Pension Plan and statutory deductions (Employment Insurance and Canada Pension Plan) upon receipt of a monthly statement". On January 17, 2012 the Union countered and eliminated the proposal to have the Employer pay for contract negotiations. It proposed that for long term leaves it would reimburse the Employer for salary and benefits (both internal and statutory). The Union began to characterize the reimbursement for long term leaves as "100% reimbursement of all costs". The language remained the same for short term leaves – "salary amount", but the phrase was never discussed in those early bargaining sessions. When the proposal was tabled initially, the Union notes indicate Mr. Iker used the term "salary" and the Employer's note characterized this reference as "wage costs". Neither note indicated that there was ever a discussion as to what else would be covered by the term "salary amount", or that the salary included anything additional.

There were no other counter proposals on leaves for Union business until mediation. In the Union's meetings with Dr. Jago the Union drew a differentiation between the kinds of reimbursement and continued to talk about the "cost of the TOC" for the short term leaves or "100% reimbursement" for the long term leaves – indicating that there were two kinds of reimbursement. This differentiation in reimbursement between short term and long term leaves remained consistent throughout the mediation. Wherever the short term leaves were discussed, the "cost" of the TTOC was referred to. Wherever the long term leaves were discussed, the concept of "100% reimbursement" was referenced.

The notes reveal, as does the testimony of Jim Iker and Jacquie Griffiths, that there was not a lot of discussion regarding "salary" versus "full costs". The discussion centered around the differentiation between the various kinds of leaves – long and short term, elected officer leaves, contract negotiation leaves.

In and around June 12, 2012 the focus on the language shifted to the "suitability" of the replacement. The Employer countered with the notion of granting the leave if a "suitable replacement" was found and the "operational needs of the board" were met. The discussions then shifted to those two concepts. The Employer also eliminated the notion of 100% reimbursement for long term leaves only – implying a more general application. However, the Employer kept the "salary amount" language in relation to the TTOC or non-certified replacements for the teachers on leave for Union business. It made no comment about the phrase "salary amount".

The Union countered with the elimination of "suitability" and "operational needs" and again included 100% reimbursement of "salary, benefits and statutory benefit costs" for the long term leaves only. The Employer replied with what is now clause 2 in Article G.6. The language in clause 2 had been taken from the Union's language on long term leaves. The Employer left in clauses 3 and 4 with the reference to "salary amount" if a TTOC or non-certified replacement replaced the employee on leave. Later discussions and proposals regarding the suitability of the replacement indicated that the parties finally agreed to "qualified" rather than "suitable" replacement. During this timeframe as well, discussions began as to what length of time constituted a short term versus a long term leave.

On June 20, 2012 the Union tabled a proposal which continued to differentiate between short and long term leaves and what would be reimbursed by the Union to the Employer in each kind of leave; "salary amount" remained the same for short term leaves. The proposal also added a reference to "Union officer release" and like the long term leave reimbursement the release was listed as "100% reimbursement of salary and all benefits". On June 20th as well there was another exchange of proposals and the Union left clause 2 as proposed by the Employer and inserted "Notwithstanding 2, above" as the introductory phrase to both clauses 3 and 4. This indicates to me that the Union continued to view this as a different level of reimbursement. Typically the term

"notwithstanding" is referenced in a Collective Agreement provision which contradicts a previous provision. The Employer removed the "notwithstanding" phrases claiming that clause 2 was the general clause and clauses 3 and 4 would constitute the exceptions to the general clause. Again no attempt was made by the Employer to clearly identify what "salary amount" would mean.

In caucus with Dr. Jago, the Union's President at the time, Susan Lambert, addressed Dr. Jago again drawing a differentiation between the "cost of the TTOC" and "100% reimbursement". Ms. Lambert stated: "So they [i.e. the Employer] intend that 2 and 3 are not in contradiction, that where a TOC replaces a member, the reimbursement will be the cost of the TOC; and when it's long term then it's the 100% reimbursement". Dr. Jago, according to the Union's notes, replied: "That's my understanding, though we didn't get into it".

The issue of paying "twice for benefit costs" was referenced by Dr. Jago later on June 20, 2012, once the language in question had been merged into Articles G.6.2 through G.6.4. This was the first time that the Employer raised a concern about the lack of reference regarding benefits in clauses 3 and 4. Dr. Jago stated to the Union that the Employer "wants to make sure that they're not paying 'twice for benefits' ". Dr. Jago did not request a reply from the Union and stated that "we can deal with the issues later". Hence, he left the concern with the Union team but requested no response from the Union.

The parties never returned to the language in Article G.6. Based on the language in the last Employer counter on June 20, 2012, the Union prepared a sign off sheet and the issue of paying "twice for benefits" went unanswered as far as the notes reveal. The language was signed off on June 26, 2012 along with the balance of the outstanding items.

It is not unusual for a misunderstanding to occur in collective bargaining whether that be at the face to face stage or, in some cases, the mediation stage. The Employer was primarily concerned with its obligation to grant the leave, the suitability of the replacement and meeting the school districts' operational needs. If the Employer had looked at how the language was progressing, some red flags may have gone up. However, there were other outstanding issues and the deadline of June 30th, at which point Dr. Jago had to issue his recommendations to the provincial government, was looming. Consequently the Employer did not realize the possibility of a larger monetary gain by the Union than it had envisioned. The Employer admitted that even in the Employer's interpretation there was a monetary gain for the Union since the rate used for the reimbursement would be at the TTOC or non-certified rate, not the employee's rate requesting the leave.

After careful scrutiny of the notes taken during the entire bargaining process, including mediation, the proposals and the counter proposals and how the language developed, I can find no mutual intention which would assist me in the interpretation of Article G.6. I do find that there was no misrepresentation of the language by the Union. From the initial days of bargaining and throughout mediation, the Union continued to draw a differentiation in terms of reimbursement between the long term and short term leaves. The Employer attempted to merge the two kinds of leaves in terms of reimbursement but kept the differentiation in language between Articles G.6.2 and Articles G.6.3 – G.6.4. At no time did the Employer say to the Union face to face or via the mediator that, in its view, "salary amount" meant the rate of pay upon which the reimbursement costs would be based; or in clauses 3 and 4 the full costs at the TTOC or non-certified rate would be reimbursed to the Employer. Consequently, there is no indication that the Union recognized the Employer had a different interpretation than did it; nor did the Union keep silent to the detriment of the Employer. The phrase "salary amount" had been used in the proposals from the beginning of bargaining with

no questions asked about the phrase. I am therefore left with the Collective Agreement language itself.

The rules of interpretation dictate that where there is a monetary benefit the language needs to be clearly and unequivocally expressed – see *Superior Propane, supra; British Columbia Institute of Technology, supra*. The Employer has characterized the Union's interpretation as a "windfall" – which the Union disagreed with. Not having seen it quantified, out of an abundance of caution, and because there may be a monetary benefit to the Union in some circumstances, I have viewed the language according to the rules of interpretation, as a significant or "very important promise" and therefore likely to be clearly and unequivocally expressed.

Although I understand the necessity to view the Article and indeed the Collective Agreement as a whole, I will concentrate initially on the introductory clauses of Article G.6. Article G.6.1 refers to the Union member on leave. Clause 2 indicates the Union will reimburse the school board in question for "**such** salary, benefits, pension contributions and all other contribution costs upon receipt of a monthly statement". The usage of the word "such" makes reference to clause 1 and thus creates a nexus between the two clauses – indicating that this is what will be reimbursed by the Union to the Employer for the original leave for the teacher in question. The "reimbursement costs" language found in clauses 3 and 4 of Article G.6 qualifies the general reimbursement costs found in clause 2. The reimbursement costs of the TTOC and/or a non-certified replacement are limited to "salary amount". In all other circumstances, clause 2 of Article G.6 would apply for reimbursement under the terms of that Article. I find the language is clear and unequivocal in this regard.

The parties throughout the bargaining have demonstrated that they are quite capable of defining just what the costs are under certain circumstances such as in clauses 1 and 2 of Article G.6. It is my view that these parties would have literally

defined what "salary amount" meant in Articles G.6.3 and G.6.4 if it had mutually meant anything additional to salary. When one reviews Article G.7 for example the reimbursement is defined for TTOCs conducting Union business as "salary and benefit costs".

If the Employer on June 20th was still concerned about the term "salary amount" not including the cost of the benefits, then they should have pursued it. The language had remained the same throughout bargaining and mediation. However, there were much larger issues still looming in front of them and they chose to move on to these items. The shift in focus is entirely understandable but it does not negate the language that remains – just as in the Taylor award where the Union representative did not review what he signed (*Teck Cominco Metals Ltd., supra)* and in the previous Taylor case from this sector, *British Columbia School District No. 39 (Vancouver), supra,* in which an assumption was made about the language without ever expressing that assumption to the Union. In both cases, the language stood. I agree with the Union that the circumstances found in *British Columbia School District No. 39 (Vancouver), supra,* are similar to the ones at hand. This was not a case of mutual mistake as found in *Westfair Foods Ltd., supra.* This was a case of a unilateral misunderstanding.

I therefore accept the Union's interpretation of the language. The Employer grievance is dismissed. If the Union has overpaid any school district based on this interpretation, the Employer is obligated to reimburse the Union for the overpayment. The Employer has proposed new language for Article G.6 in the current set of bargaining. This is where the issue should be dealt with - at the bargaining table.

As for the Employer's submission that the doctrine of estoppel should apply to curtail the Union from exercising its legal rights during the life of the Collective Agreement, there must be a number of factors present including detrimental reliance on a particular representation before the doctrine of estoppel is established. In this regard,

Employer counsel relies on Arbitrator Hall's decision in *Insurance Corporation of BC, supra* at page 35:

> The purpose of the modern doctrine [of estoppel] is to avoid inequitable detriment. An estoppel may arise where: (a) intentionally or not, one party has unequivocally represented that it will not rely on its legal rights; (b) the second party has relied on the representation; and (c) the second party would suffer real harm or detriment if the first party were allowed to change its position. The requirement of unequivocal representation or conduct is a question of fact, and may arise from silence where the circumstances create an obligation to speak out.

I can find no such representation by the Union, nor a reliance on said representation to the detriment of the Employer. At no time did the Union represent that the language was anything more than the "salary amount". The Employer relied on its own interpretation and did not express this interpretation to the Union – to its own detriment.

I remain seized of any issues arising from the implementation of this award, including the calculation of any monetary obligations related to overpayments or underpayments of the reimbursement costs.

Awarded this 29th day of January 2014 in the City of Vancouver, British Columbia.

IRENE HOLDEN, Arbitrator