IN THE MATTER OF AN ARBITRATION

BETWEEN:

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

(the "Employer" or "BCPSEA")

AND:

BRITISH COLUMBIA TEACHERS' FEDERATION

(the "Union" or "BCTF")

Re: Reimbursement and Retroactivity for Union Leave
(Article G.6 of the Provincial Collective Agreement)

ARBITRATOR:	Irene Holden
COUNSEL:	Delayne Sartison, Q.C. For the Employer
	Craig Bavis For the Union
HEARING DATES:	October 15 & 16, 2014
DATE OF AWARD:	December 15, 2014

1407.1

INTRODUCTION

In 2013 the Labour Relations Board appointed me as sole arbitrator to hear and decide an Employer initiated policy grievance regarding an interpretation of Article G.6 of the 2011-2013 provincial Collective Agreement between the British Columbia Public School Employers' Association (hereinafter referred to as the "Employer" or "BCPSEA") and the British Columbia Teachers' Federation (hereinafter referred to as the "Union" or "BCTF"). I issued my award in January of 2014. In May of 2014 the parties referred two issues to me which were impeding implementation of the award and the implementation of the Collective Agreement provision.

BACKGROUND

I will not go into the details of my January 2014 award but there is a necessity to provide some background since the issues currently before me relate in part to my findings in the previous award. My intent is not to regurgitate my full findings but only as they relate to the current issues.

The parties had negotiated a new provincial Article G.6 entitled "Leave for Union Business" for the 2011-2013 Collective Agreement. In 2011, the parties had been bargaining for a renewed Collective Agreement since March of that year. In September of 2011 the Union commenced job action. In March of 2012 the provincial government passed legislation to suspend the job action and appointed a mediator, Dr. Charles Jago, to assist the parties in reaching a negotiated agreement. Dr. Jago was given a deadline of the end of June 2012 to conclude the dispute with a signed Memorandum of Agreement or provide non-binding recommendations to the provincial government for an imposed Collective Agreement. An agreement was reached by the parties on June 26, 2012 and Article G.6 formed part of the agreement. The new Collective Agreement was ratified on July 4, 2012.

Much of the discussion regarding the Article in question took place via the mediator who would meet, in the main, with the parties individually. This is not uncommon for mediated settlements but as a result, there were a number of unanswered questions and at times misunderstanding regarding some of the language utilized in Article G.6.

Article G.6

The new Article G.6 of the provincial Collective Agreement between BCPSEA and BCTF read 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.

   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.

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.

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.**

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.**

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.

Implementation: The parties will develop a schedule of articles that are replaced by this article. Where a superior provision is identified in the previous collective agreement, this provision will not apply and the superior provision will continue to apply.

(emphasis added)

Reimbursement Issue in 2013

In 2013 the issue before me related to an interpretation of the reimbursement provisions found in Article G.6 – in particular clauses 3 and 4 highlighted above and the meaning of the term "salary amount" in each clause. The Union and Employer had a different understanding as to how the reimbursement clauses were to inter-connect, if at all, and the meaning of the "salary amount" phrase. In an effort to assist me in the interpretation, I reviewed the extrinsic evidence which consisted of bargaining notes taken by each party in face to face negotiations and mainly in mediation. I also reviewed the evolution of the language via the bargaining proposals and the counter–proposals in conjunction with the caucus notes and discovered that the term "salary amount" had not been discussed in collective bargaining and/or bargaining mediation.

There was no mutual intent on the part of the parties regarding the reimbursement issues before me in 2013. I was therefore left with an interpretation of the language itself.

At paragraph 48 of my previous award I provided my interpretation of the reimbursement provisions as follows:

> 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.
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> (emphasis in January 2014 award)

On a plain reading of the language and the construction of the reimbursement provisions I found that the interpretation of "salary amount" was limited to salary and not inclusive of benefits. I found if the parties had intended something different then they were quite capable of using the kind of language found in Article G.7 for example (TTOCs Conducting Union Business) which included "salary and benefit costs".

Ultimately I accepted the Union's interpretation of "salary amount" found in clauses 3 and 4 of Article G.6 as a limited form of reimbursement and did not include all

costs of the replacement such as benefit costs. I dismissed the Employer policy grievance.

THE CURRENT ISSUES

The parties have referred two issues to me for determination. They entail retroactivity for Article G.6 of the Collective Agreement and reimbursement for the leave when a TTOC is not hired to replace the teacher on leave. The parties agreed to the following characterization of the issues:

1. Is the application of Article G.6 retroactive to the date of ratification of the collective agreement or the beginning of the term of the 2011-2013 collective agreement?

2. Does Article G.6 require the union to pay salary, benefits and pension costs of a teacher on union leave when there is no TTOC or non-certified replacement hired to replace the teacher on leave?

I shall deal with the issues in the order and the manner in which they were posed.

RETROACTIVITY ISSUE

The Union

The Union submits that the answer to the first issue is that the application of Article G.6 should be retroactive to the commencement of the 2011-2013 Collective Agreement – i.e., July 1, 2011. The Union further submits that the starting point for an analysis of retroactivity is the presumption that collective agreement provisions are retroactive to the date expressed in the duration clause of the collective agreement. However, this presumption is rebuttable by either express language to the contrary or if retroactivity would lead to an absurd, impractical, and unintended result (see *Penticton*

and District Retirement Service and Hospital Employees' Union, Local 180 [1977], 16 L.A.C. (2d) 97 (Weiler); as well as subsequent British Columbia authorities which have adopted *Penticton and District Retirement Service, supra* such as Arbitrator Taylor in *Jim Pattison Sign Co. v. Sheet Metal Workers International Association, Local 280 (Frustagli Grievance*) [1993], B.C.C.A.A.A. No. 123.

According to the Union, the presumption of retroactivity was confirmed in a letter from BCPSEA's Executive Director to the then President of the BCTF dated September 13, 2012 which read as follows:

> This letter is further to our recent telephone conversations and is meant to clarify BCPSEA's view about the principles that apply when assessing whether the amended provisions in our recently concluded renewed collective agreement apply retroactively to July 1, 2011.
>
> BCPSEA's understanding is that except as otherwise provided, there is a presumption of retroactivity unless the results would be absurd, impractical, unintended or unfair.
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> As you are aware, the recently renewed collective agreement was concluded within very tight time frames and with limited discussion around specifics and/or implementation of the newly amended provisions. We would appreciate further discussion with the BCTF as the parties become aware of specific issues or situations so that we can collectively resolve any problems that arise. Please contact me as soon as possible so we can arrange a meeting.

The Union contends that the preceding letter confirms the presumption of retroactivity and does not identify the retroactivity of Article G.6 as an issue. Furthermore, the duration clause of the provincial Collective Agreement indicates that all provisions are effective July 1, 2011 "except as otherwise specifically provided".

The Union submits that the reimbursement issue in Article G.6 is purely a monetary issue and the benefit costs of TTOCs are calculated on most invoices and

easily separated. Further, the Union contends that leaves generally get approved so it would not be necessary to look at a particular day and determine whether or not the leave would have been approved at that time. Hence, the results of full retroactivity for Article G.6 would not be impractical or illogical as they would in promotions for example. Also, the Union asserts that there is a certain amount of retroactivity implied in my previous award and the melding of provincial Collective Agreement language with local language under the superior provisions implementation process has not occurred as yet, so the determination of the amount of compensation could be easily achieved.

Finally the Union argues the onus is on the Employer to persuade me that the presumption of retroactivity does not apply. Such a presumption of retroactivity can be rebutted by contract language which precludes full retroactivity. There is no such language in this case, asserts the Union.

The Union also relies on a number of awards which have held that monetary provisions are more likely to be retroactive than non-monetary provisions such as promotions or job postings (see *Accenture Business Services of British Columbia Limited Partnership v. Canadian Office and Professional Employees Union, Local 378* [2007], B.C.C.A.A.A. No. 38 (Taylor); and *Bearskin Lake Air Service Ltd. and United Food & Commercial Workers International Union, Local 175* [1997], C.L.A.D. No. 769, 69 L.A.C. (4th) 421 (Bendel)). According to the Union, the nature of the benefit in this case is the payment for a leave – a purely monetary object. Hence, the application of Article G.6 should be retroactive to the commencement of the 2011-2013 Collective Agreement – i.e., July 1, 2011.

The Employer

The Employer contends that Article G.6 should be applied effective the date of ratification of the Collective Agreement (i.e., July 4 of 2012) and not retroactively to the commencement of the Collective Agreement as argued by the Union. The Employer agrees that there is a presumption of retroactive application, particularly for monetary provisions but the presumption needs to be applied with common sense. It submits that it would be impractical, absurd, unintended and unfair to apply Article G.6 retroactively to the beginning of the term (i.e., July 1, 2011) since the leaves were granted and taken based upon the local agreement language then in place, including reimbursement obligations. In the majority of cases the leaves were expressly subject to employers receiving reimbursement for the "cost" of the TTOC or non-certified replacement, not just the "salary amount" as per the current Article G.6. It would therefore be unfair, contends the Employer, to apply Article G.6 monetary provisions in a manner that would reduce Union reimbursement obligations retroactively for leaves granted on a different basis. The Employer relies on *Penticton and District Retirement Service, supra,* as well as *Jim Pattison Sign Co., supra,* in which new wage rates and a severance clause were properly deemed and applied retroactively as monetary benefits in each of the cases cited.

According to the Employer, Article G.6 is not purely a monetary benefit which can be applied to previous events in the same manner. Rather, it provides for an entire system of reimbursed Union leave which did not exist prior to ratification. For this argument, it relies on *Penick Canada Ltd. v. International Chemical Workers, Local 412* [1996], O.L.A.A. No. 2, 17 L.A.C. 296 (Weatherill) in which it was held that it would be "absurd" to conclude that, by virtue of a duration clause, the Collective Agreement should be considered in effect during a strike.

Analysis and Decision

Penticton and District Retirement Service, supra, has been the seminal Labour Relations Board decision regarding the presumption of retroactivity of Collective Agreement provisions unless the results would be absurd, impractical or unintended. The parties agreed with that principle and with other arbitral authorities such as Arbitrator Taylor in *Jim Pattison Sign Co., supra,* who found that the presumption must be applied with common sense and according to the expectations of the parties. If retroactive application has an absurd or impractical or unintended effect, then the presumption in favour of retroactivity is rebutted. Finally, subsequent to *Penticton and District Retirement Service, supra,* many arbitration awards have distinguished between monetary and non-monetary provisions and held that purely monetary provisions can be more easily applied retroactively than job postings or promotions, for example.

A review of the arbitral authorities however indicates that it is not as simple as saying the collective agreement provision is a monetary benefit and therefore should be subject to full retroactivity. Each case appears to be judged on the specific facts and there is often a measure of complexity in applying the presumption of retroactivity in the circumstances before the arbitrator. So for example in *Jim Pattison Sign Co., supra,* the issue was new severance provisions applying to an employee on layoff. Arbitrator Taylor found that the new severance provisions should apply to the "employee" on layoff since he continued to be an employee of record and was entitled to certain rights, such as accrual of seniority and recall rights. The new severance provision was but another "right" in the arbitrator's view.

In *Accenture Business Services of British Columbia Limited Partnership, supra,* retroactivity of "probationary periods" was determined to be the date of ratification for all employees. The issue in this case was the inequities of those hired prior to ratification of the new Collective Agreement as temporary employees as opposed to

those employees hired after date of ratification. Those hired prior to ratification would only become full time regular after three years, as opposed to those temporary employees hired after date of ratification who would become full time regular after eighteen months. The language of the Memorandum of Settlement read "Unless specifically stated otherwise, all items contained in this MOS will become effective on the date of ratification" but the absurd result and the inequities between employees hired at different times became obvious to Arbitrator Taylor and he ruled that the new article would become effective on the date of ratification but would be applicable to all employees, regardless of date of hire.

In *Bearskin Lake Air Service Ltd., supra,* the issue was job postings being revisited in a first collective agreement where the postings had occurred prior to the effective date of the collective agreement. Arbitrator Bendel ruled that such retroactivity could not possibly have been the intent of the parties. Consequently, a review of these authorities offered limited assistance in my deliberations since the facts in the cases were typically quite different than the facts before me.

The Union argues that the letter sent on September 13, 2012 from BCPSEA's Executive Director to the BCTF President is evidence that the presumption of full retroactivity applies to Article G.6 since it is not specifically mentioned in the letter as being problematic. In my view, the letter merely states the legal principles associated with the presumption of retroactivity and indicates in the final paragraph that there may be issues not identified to date which warrant further discussion regarding the applicability of full retroactivity. It should be noted that neither the Executive Director nor the former BCTF President testified in these proceedings. Therefore, a determination cannot be made as to whether Article G.6 was part of the discussions regarding retroactivity.

Further, I do not agree with the Union that Article G.6 is purely a monetary benefit such as wage rates for example. There is an element of discretion as to when the leave will be granted or not granted. Discretion is very difficult to duplicate retroactively. Exercising discretion implies that judgment calls will need to be made and hence I find the language in Article G.6 more akin to job posting provisions and/or promotions in which there is a monetary factor especially in the case of an increase in salary associated with a promotion, but very difficult to reconstruct the decisions on a retroactive basis. As Arbitrator Bendel stated in *Bearskin Lake Air Service Ltd., supra,* referring in general to the difficulty with job postings being deemed retroactive:

> The second fact is that a provision relating to the posting of jobs is not the sort of provision one would normally expect to have retroactive effect. In a usual case, it would be absurd to tell an employer that a job competition had to be re-done because of its failure to respect procedures or criteria that had not been agreed upon at the time of the competition. I am aware of no award holding that such a provision should be given retroactive effect.
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> (para. 20)

The issue is further complicated by the fact that Article G.6 is new language and the previous leaves of absence were granted based on local language. The evidence indicates that there was little or no discretion being exercised in the application of the local language. I accept the Union's submission that in the past leaves for Union business were rarely rejected based on the local language. However, a review of the local Collective Agreement language indicates that in the majority, the granting of the leave was subject only to the Employer being reimbursed for the cost of the teacher's replacement.

Currently, Article G.6 references short term leaves being granted subject to "the availability of a qualified replacement", not just a replacement. Further, Article G.6

language regarding long term leaves makes the granting of the leave subject to the "availability of a qualified replacement" and the "educational needs of the school district" being met. This language lends itself to operational decisions being made before the leaves are granted. As a result, it becomes more difficult to define Article G.6 as purely a monetary benefit which can easily be reconstructed and applied retroactively.

I therefore find that to apply Article G.6 back to the beginning of the Collective Agreement, July 1, 2011, would create an impractical and unintended effect. A common sense application dictates that it should have become effective the date of ratification – July 4, 2012.

REIMBURSEMENT WHEN NO TTOC OR NON-CERTIFIED REPLACEMENT UTILIZED

The reimbursement issue currently before me is whether or not the reimbursement clauses of Article G.6 allow for the school districts to be reimbursed for the costs of the leave, such as salary, benefits and pension costs, if a TTOC or non-certified replacement is not utilized to replace the teacher on leave.

Evidence

Mr. Richard Hoover, the BCTF Field Services Director, who has as one of his responsibilities the approval and administration of Union leave, testified that rarely is a teacher on leave not replaced. Typically a teacher on short term leave is replaced by a TTOC. He testified that in rare cases a teacher is not replaced if the leave is on a professional development day, or within a teacher's preparation block, or the teacher on leave is a non-enrolling teacher such as a teacher librarian, or when a TTOC is not available. Evidence of past practice was introduced by Mr. Hoover which indicated

that where teachers on leave were not replaced with a TTOC or non-certified replacement, the Union did not reimburse the school districts with any costs. He testified that in his experience there was no reimbursement if no replacement. Those teachers on long term leave are typically replaced via the post and fill provisions of the Collective Agreement, according to Mr. Hoover. The post and fill provisions apply after 20 days.

Mr. Jim Iker, the current BCTF President, testified that it was clear to the Union that the differentiation between short term and long term leaves was maintained during the 2011-2013 set of negotiations regarding Article G.6. The school district would be reimbursed for the salary costs of the TTOC or non-certified replacement. If no replacement was utilized, then in his view there was no cost to the Employer and no reimbursement by the local. In cases of long term leave, the Union would reimburse the school districts for all costs associated with the leaves.

When asked about the Union's bargaining objectives associated with the introduction of Article G.6 in 2011, Mr. Iker testified that the Union wanted to standardize the leave provisions across the province. Initially the Union wanted the Employer to pay for Union leave for contract negotiations but withdrew that proposal. Mr. Iker testified that the Union wanted to ensure a granting of the longer leaves so the Union would pay for the full costs of the leaves. He claimed that there was never an indication that the Employer would be charging the BCTF when the teacher was not replaced by a TTOC.

Mr. Iker stated that the Union was fully aware in 2011 bargaining of the past practice which Mr. Hoover addressed in his testimony and that the Union would not reimburse if the costs of a replacement were not incurred. He testified that the Employer appeared to understand that during bargaining. He finally testified that provincial language typically provided for the "best of the best" in terms of language,

but that the superior provisions implementation clause was introduced to ensure that result. It was not until after the Holden award in January of 2014 that the Employer seemed to adopt a new interpretation regarding reimbursement if the teacher on leave was not replaced, stated Mr. Iker.

Under cross examination, when asked if the Union had maintained the differentiation in the reimbursement provisions between short and long term leaves in the 2011-2013 Collective Agreement, Mr. Iker claimed that in his view Article G.6 provided for the differentiation. He stated Mediator Jago understood the differentiation at the time of mediation in 2012. Mr. Iker referenced a conversation the Union had with Dr. Jago after the Employer had eliminated the Union's insertion of "notwithstanding 2 above" at the beginning of both clauses 3 and 4. The Union caucus notes indicate that prior to Dr. Jago presenting the Employer's counter proposal, he stated in the Union caucus: "#2 [i.e., clause 2 of Article G.6] remains the same because they [i.e., the Employer] see it as applying generally, and 3 for short term". Susan Lambert, BCTF President at the time then replies: "So they intend that 2 and 3 [i.e., clauses 2 and 3 of Article G. 6] 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. " To which Dr. Jago replies "That's my understanding, though we did not get into it."

Mr. Renzo Del Negro, the current Associate Executive Director for BCPSEA and a member of the Employer's bargaining team for the 2011-2013 provincial Collective Agreement, testified as to how the Employer interpreted clauses 2, 3, and 4 of Article G.6. He testified that when a teacher was on leave clause 2 would apply and the school district would be reimbursed with the full cost of the leave. The exceptions were found in clauses 3 and 4 in which the reimbursement would be associated with the TTOC or non-certified replacement. He does not recall any discussion with BCTF regarding BCTF only reimbursing the Employer if a TTOC was utilized.

In Mr. Del Negro's view, "suitability" of the replacement became the issue regarding Article G.6 at that point in mediation. Mr. Del Negro explained that it was the Employer's belief that any Union leaves should be paid by the Union. He verified this belief in the Employer's mediation notes taken on June 20, 2012. In Mr. Del Negro's view the reimbursement in clause 2 applied to both short and long term leaves – as opposed to Mr. Iker's belief. The notes reveal that Mr. Del Negro, when providing Dr. Jago with the Employer's revisions to Article G.6, stated that he wanted clauses 2, 3 and 4 to remain "in the stem" of the Article. Mr. Del Negro testified that having the clauses "remain in the stem" meant that the provisions would apply to all leaves.

The Union

The Union maintains that the proper interpretation of Article G.6 is that reimbursement for Union leave is not paid when the school district in question does not incur replacement costs. This interpretation is based on a review of the parties' practice and the intent of the provisions. Thus, according to the Union, it is appropriate for me to review the extrinsic evidence regarding the bargaining notes and the practice.

The Union submits that this is not the case where the Union did not enquire as to the implications of the language, as was the case with BCPSEA in my last award. The Union sought assurances from the mediator and received them that this was the understanding, according to the Union.

The Union contends that the issue of reimbursement when no replacement is provided is a "windfall" to the Employer and provides compensation under the new Collective Agreement where none has been payable in the past. The construction of Article G.6 as a whole only contemplates that Union leave will be granted when there is a replacement – as the Employer bargained that short and long term leave was subject

to the availability of a qualified replacement. The Union relies on *University of British Columbia and Canadian Union of Public Employees, Local 116* [1976], B.C.L.R.B.D. No. 42 and *British Columbia School District No. 39 (Vancouver) and Vancouver Teachers' Federation* [1996], B.C.C.A.A.A. No. 203 (Taylor) in this regard.

In the alternative, the Union argues if the arbitrator does not find mutual intent as to how the reimbursement language would apply when no replacement was provided, then the arbitrator must apply the "gap principle" as found in *Andres Wines (B.C.) Ltd. and Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 300* [1977], B.C.L.R.B.D. No. 73, 16 L.A.C. (2d) 422. The proper application of this principle leads to the conclusion that the parties would not have agreed to reimburse the school districts when no replacement was provided. The gap exercise involves looking at related provisions of the Collective Agreement, arbitral jurisprudence, past practice, and practical implications and constructing a hypothetical intent if mutual intent is not found. It is highly unlikely that the Union would have agreed to a superior benefit for the Employer, contends the Union.

The Employer

The Employer argues that the Collective Agreement language is the primary focus of the interpretation process – see *Mission School District No. 75 v. Canadian Union of Public Employees, Local 593* [2002], B.C.C.A.A.A. No. 399 (Foley) in which Arbitrator Foley reiterates those principles set out by Arbitrator Bird in *Pacific Press and GCIU Local 25 C,* unreported, but concentrates on the Collective Agreement as the primary focus. Most arbitrators follow these principles of interpretation, asserts the Employer.

The Union is seeking a substantial benefit according to the Employer – that where a TTOC or non-certified replacement is not hired to replace the teacher on leave, the school district would continue to pay the costs of the teacher on leave with no

reimbursement for any of that cost. This is something Mr. Del Negro testified in these proceedings that the Employer would never have agreed to. If the parties had intended to confer such a benefit, they would have more clearly expressed that intention in the language of the Collective Agreement – see *Health Employers Association of British Columbia v. Hospital Employees' Union* [2002], B.C.C.A.A.A. No. 130 (Gordon). This approach has been followed in *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).

The Employer claims that this is a significant monetary benefit and the onus falls to the Union to establish that the monetary benefit was mutually intended by both parties. Simply put, Article G.6 clearly contemplates reimbursement in all cases of Union leave, according to the Employer, with reimbursement linked to the full cost of the teacher on leave except where the teacher is replaced by a TTOC or non-certified replacement.

Since extrinsic evidence is of limited use in this case, the Employer emphasizes Mr. Iker's unilateral intention or views as to the meaning of the language in Article G.6 do not constitute mutual intention. Mr. Iker understood the language to mean that reimbursement was subject only to replacement costs but BCPSEA never understood that and that interpretation was not conveyed to BCPSEA during bargaining and/or mediation. According to the Employer, Mr. Iker claims to have expressed the Union's interpretation to Dr. Jago but Dr. Jago only admitted to his own understanding and not that of the Employer. Further, Dr. Jago acknowledges his understanding was not discussed with the Employer.

The Employer contends that, as with the previous interpretive issue of "salary amount", the concept got lost when the deadline was nearing and there were larger issues to be addressed before the imposition of a Collective Agreement. As a

consequence, Employer Counsel claims that BCPSEA came out of the 2012 mediation believing that Article G.6 was a non-cost item and that all Union leaves would be fully reimbursed.

The same reasoning I utilized in paragraph 48 of my award should be used in this case, argues the Employer. BCPSEA did not misrepresent its intention with respect to the language it had countered with, nor remain silent in the face of any express clarification from BCTF that its proposal limited reimbursement to the costs of a replacement. Neither could BCPSEA have reasonably discerned in the final days of bargaining that the continuing reference to TTOC's in clause 3 of Article G.6 was meant by BCTF to apply only to short term leaves.

In summary, BCPSEA submits that the bargaining evidence is irrelevant in the face of the clear and unambiguous language of Article G.6. In the alternative, Mr. Iker's evidence does not disclose a mutual intention consistent with the Union's interpretation and therefore is of no assistance. Nor is the evidence of past practice helpful since local past practice was relied upon. The practice did not occur pursuant to Article G.6. The local language in roughly 47 of 60 school districts expressly limited reimbursement obligations to replacement costs, according to the Employer.

Even if such extrinsic evidence were to be considered together with the plain reading of the Collective Agreement, an ambiguity does not remain. This should be the end of the analysis according to *Health Employers' Association of British Columbia, supra*. If an ambiguity did remain, the evidence presented does not establish mutual intention, asserts the Employer.

As for the "gap analysis", BCPSEA submits that there is no gap as alleged given the clear and unambiguous reimbursement obligations already interpreted in my previous award. If there is any gap it is not appropriately remedied by adopting the

Union's interpretation, submits the Employer. The evidence demonstrates that BCPSEA would not have agreed to any Union leave which was not reimbursed had the Union properly explained its position in bargaining. The Employer references Arbitrator Fleming's decision in *Sofina Foods Inc. v. United Food and Commercial Workers Union, Local 1518* [2014], B.C.C.A.A.A. No. 28 in which the arbitrator concluded that he must give meaning to the bargain struck by the parties and not give an interpretation based on the equities or inequities of the bargain or its results. The Employer urges that I adopt this approach.

Analysis and Decision

It is not my intent to regurgitate my analysis that I utilized in my previous award and how I reached my conclusion as to the structure of the reimbursement provisions found in the initial clauses of Article G.6. Suffice it to say that I have followed and continue to follow the interpretation principles found in Nicholas Glass' unreported decision in *Pacific Press, supra,* and reiterated in countless arbitrations such as Arbitrator Foley's decision in *Mission School District, supra,* and summarized in Arbitrator Gordon's award in *Health Employers Association of British Columbia, supra,* as:

> The primary resource for interpretation is the collective agreement. The search for the purpose of a particular provision may serve as a guide to interpretation. Significant benefits and obligations are likely to be clearly and unequivocally expressed in the language used by the parties. When interpreting two provisions, a harmonious interpretation will be preferred to a conflicting one. Wherever possible, all words and provisions should be given meaning. Words in the agreement should be viewed in their normal and ordinary source unless that would lead to some uncertainty or inconsistency with the rest of the collective agreement or unless the context establishes the words were used in another sense. The words used in the agreement should be read in the context of the phrase, sentence, provision, and collective agreement as a whole. When faced with the choice between two linguistically permissible interpretations, the reasonableness and administrative feasibility of each may be considered.

> Additionally, the parties are presumed to be aware of relevant jurisprudence.
>
> (para. 14)

Out of an abundance of caution, I have again reviewed the extrinsic evidence which consists mainly of the caucus notes of both BCPSEA and BCTF during bargaining and mediation for the 2011-2013 Collective Agreement and can find no mutual intention to limit full reimbursement to long term leaves and TTOC replacement salary costs to short term leaves, as suggested by Mr. Iker. When I review the evolution of the language I find that in January of 2012 the Union proposed that it would reimburse the Employer for salary and benefits for long term leaves, but the reference to reimbursement regarding the short term leaves remained the "salary amount paid" to the replacement. Eventually the Employer, in its counter proposals, disconnected the reimbursement provisions from the lengths of the leave, long term versus short term, and combined the reimbursement language in clauses 2 through 4 of Article G.6.

On June 20, 2012 the Union continued to differentiate reimbursement between the short and long term leaves. At some point on June 20, 2012 the Union accepted the language in clause 2 but inserted a phrase at the beginning of clauses 3 and 4 which read: "notwithstanding 2 above". The evidence further reveals that when Dr. Jago was questioned about the Employer's response to eliminate "notwithstanding 2 above" he explained to the Union that the Employer saw clause 2 "applying generally and 3 for short term". Susan Lambert, the BCTF President, pressed the mediator on this point and sought clarification: "So they 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 replied "that's my understanding, though we did not get into it".

With this last reply Dr. Jago acknowledges that his understanding was not discussed with the Employer. In my view, the preceding exchange between Ms. Lambert and Dr. Jago is not confirmation that the Employer and the Union had a mutual understanding about the way the clauses would intersect and be applied. Ms. Lambert does not mention the fact that the Employer views clause 2 as "applying generally". She does not explore that phrase at all and tries to confirm with Dr. Jago that the only time the Union would provide "100% reimbursement" would be for long term leaves. However, the clause which houses 100% reimbursement is clause 2 which the Employer has just finished saying would be "applied generally". Consequently, this exchange is not indicative of a mutual understanding or intention.

The Employer's view was confirmed when Mr. Del Negro stated that he wanted clauses 2, 3 and 4 of Article G.6 to remain "in the stem" so that the clauses would apply to all the leaves. Did the Employer put its mind to what the reimbursement, if any, would look like if the teacher on leave would not be replaced by a TTOC? There is no evidence that either party put their minds to that level of detail during collective bargaining.

Having said that, however, I find that there was an understanding by both parties of the practical implications of the language. In the main full reimbursement of the leave would take place mostly with long term leaves and the cost of the TTOC would take place mostly with short term leaves – since TTOC services would be used mostly with the shorter leaves. Both parties understood that non-replacement of teachers on leave would be a "rare occurrence" and then typically only for a day, according to the evidence of Mr. Hoover.

Mr. Hoover, in his evidence, outlined the circumstances which would typically call for a non replacement of a teacher on Union leave – leave on a professional development day; leave taken by a non enrolling teacher; leave taken during

preparation time; or non-availability of a TTOC. I accept that evidence not only because Mr. Hoover has a lot of experience with TTOC replacement costs and reimbursement regarding same, but it also makes sense when one considers that a school cannot afford not to replace a teacher for much longer than a day.

The parties describe each other's interpretation as being a "windfall" for the other party and thus a "superior benefit". There is no doubt that a reduction in reimbursement in clauses 3 and 4 is a benefit to the Union; and conversely the possibility of 100% reimbursement for some leaves is a benefit to the Employer.

In my view, the language of Article G.6 was clear when interpreting the "salary amount" issue and it is just as clear when interpreting the reimbursement issue currently before me. I have heard nothing in these proceedings which would make me want to resile from my interpretation of the reimbursement provisions of Article G.6 from my previous award even though my primary focus was the meaning of "salary amount". Hence paragraph 48 from my previous award is worth repeating as follows:

> 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.
>
> (final emphasis added)

The construction of the language in the reimbursement provisions of Article G.6 indicates to me that the above interpretation would apply when no TTOC or non-certified replacement is used to relieve a teacher granted a leave for Union business. Clauses 1 and 2 apply to the original leave. The only two exceptions to clauses 1 and 2 can be found in clauses 3 and 4 when a TTOC or non-certified replacement is employed. In all other cases, including when a replacement is not employed, clauses 1 and 2 apply.

The language is clear and there is no need for me to apply a "gap analysis" as found in *Andres Wines, supra.* The Union argues that it would never have agreed to a windfall for the Employer and I should not grant the Employer's interpretation on that basis. However, as Arbitrator Fleming so aptly stated in *Sofina Foods Inc., supra,* at paragraph 71: "My role is, as best I can, to give meaning and effect to the bargain struck between the parties and not to provide an interpretation based on my view of the equities of this case".

Furthermore, the Union's own evidence indicates that in all likelihood there will be no windfall for the Employer. The Union knows that the chances of not bringing in a replacement for the short term leaves of 1-10 days are slim and it is even more unlikely that a teacher on a 10-19 day leave will not be replaced. The long term leaves beyond the 19 days will be filled by the post and fill provisions of the Collective Agreement(s). Consequently the Union's risk is minimized by the very nature of the educational system and the necessity to replace teachers in the classroom.

The frequency of not replacing the teacher is further reduced by the Employer's option to deny the leave if a qualified replacement is not available or, in the case of long term leaves, if the educational needs of the school district cannot be met. Consequently, the Union would be reimbursing the Employer occasionally whereas under the

language of Article G.6 the "cost" of the reimbursement when a TTOC is involved has been reduced from "full costs" in some local language to "salary amount" – this gain is considerably higher than the so-called occasional gain which the Employer would receive. If I am wrong about this, the locals have the option not to accept Article G.6 (subject to the provisions in the Mark Brown award dated February 24, 2014) and can keep their local language under the superior provisions implementation language. It is my understanding that the melding/interface process in that regard has not been concluded.

The answer to issue # 2 is if a TTOC and/or non-certified replacement is not hired to replace the teacher on leave for Union business, the Union is required to reimburse the school district for the costs outlined in clauses 1 and 2 of Article G.6.

CONCLUSION

In answer to the two issues posed to me, I conclude the answers to be as follows:

1. Is the application of Article G.6 retroactive to the date of ratification of the collective agreement or the beginning of the term of the 2011-2013 collective agreement?

The application of Article G.6 of the parties' Collective Agreement is retroactive to the date of ratification of the 2011-2013 Collective Agreement – July 4, 2012.

2. Does Article G.6 require the union to pay salary, benefits and pension costs of a teacher on union leave when there is no TTOC or non-certified replacement hired to replace the teacher on leave?

It is confirmed that Article G.6 requires the Union to reimburse the Employer and ultimately to pay the salary and benefits outlined in clauses 1 and 2 of Article G.6

when no TTOC and/or non-certified replacement is employed to replace the teacher on leave. Such benefits include the salary, benefits and pension costs of the teacher on Union leave.

This award should be taken into consideration in the determination of the reimbursement costs associated with the implementation of my previous award dated January 29, 2014 – specifically "any monetary obligations related to overpayments or underpayments of the reimbursement costs".

I remain seized of any issues which arise regarding the implementation of this award including the calculation of these, and any other, monetary obligations.

It is awarded this 15th day of December, 2014 in the City of Vancouver, British Columbia.

IRENE HOLDEN, Arbitrator