IN THE MATTER OF AN ARBITRATION
UNDER THE *LABOUR RELATIONS CODE*, RSBC 1996 c. 244

Between

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION (on behalf of all Boards of Education established under the British Columbia *School Act*)

("BCPSEA")

-and-

BRITISH COLUMBIA TEACHERS' FEDERATION

(the "BCTF")

-and-

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 5523

("CUPE")

(*Employment Standards Act* – Personal Illness or Injury Leave)

ARBITRATOR:	John B. Hall
APPEARANCES:	Lindsie Thomson and Daniel Heath, for BCPSEA Michael Shapiro and Erica Sandhu, for the BCTF Natasha Morley and James Richardson, for CUPE
WRITTEN SUBMISSIONS:	February 23, March 15, and March 25, 2024
ORAL ARGUMENT:	March 27 & 28, 2024
AWARD:	August 19, 2024

AWARD

I. INTRODUCTION

I have been appointed to hear two grievances which the parties agreed to consolidate in order to adjudicate a common issue. The first grievance was filed by the BCTF on June 13, 2022. It is a provincial grievance and raises numerous issues regarding the ability of teachers in all school districts to access paid illness or injury leave under Section 49.1 of the *Employment Standards Act* ("Paid Leave" under the "*ESA*"). The second grievance was filed by CUPE on June 24, 2022. It alleges that School District No. 22 (Vernon) improperly denied Paid Leave to a casual Educational Assistant ("EA") by the name of Alyssa Clark (the "Grievor").

Section 49.1(1) of the *ESA* provides in part:

> 49.1(1) After 90 consecutive days of employment with an employer, an employee, for personal illness or injury, is entitled, in each calendar year, to
>
> (a) paid leave for up to the number of days prescribed, …

The number of days for the purpose of this provision is currently five (5) as prescribed under Section 45.031 of the *Employment Standards Regulation*.

According to the BCTF and CUPE (collectively "the Unions"), the common issue is whether Teachers Teaching on Call ("TTOCs") throughout British Columbia are entitled to Paid Leave when they become ill or injured before being offered a work assignment which they would otherwise have worked; and similarly, whether the Grievor was entitled to paid leave for some or all of the period May 9-14, 2022, when she was unable to work due to a Covid-19 diagnosis.

TTOCs provide coverage for the absences of regular teachers. They generally indicate their availability to work in advance and are offered assignments to cover for those absences. The work opportunities are typically offered to TTOCs on the evening before, or on the morning of,

the assignment. As a casual EA, the Grievor provides coverage for regular EAs when they are absent from work. She provides her general availability to her employer at the start of the school year. The expectation is that, subject to illness, she will be available for temporary work on those days for which she has indicated a willingness to accept an assignment. Put simply, the Unions maintain that TTOCs and casual EAs like the Grievor are entitled to Paid Leave when they become ill or injured before being offered a work assignment which they would have worked "but for" their illness or injury.

BCPSEA frames the issue differently. It says the question is whether TTOCs and the Grievor, who work on a casual basis, must be scheduled for an assignment before they can take Paid Leave from that assignment; and further, whether casual employees must be hired for work for which they are unavailable. In this regard, BCPSEA argues that Section 49.1 does not require employers to offer a work assignment to a casual employee who, *at the time the offer is made*, is already unavailable to perform the assignment, even if that unavailability is due to illness or injury.

As will be seen, the parties' differing descriptions of the common issue essentially reflect their divergent legal positions. There is no dispute that TTOCs and casual EAs are not entitled to Paid Leave on days when they are not offered a work assignment or when they are not available due to reasons other than personal illness or injury. On the other hand, BCPSEA agrees that casuals who have already been assigned work and who later become too ill or injured to perform the assignment are eligible for Paid Leave. The Unions maintain that the timing of an illness or injury is irrelevant if the individual would have been offered and accepted the assignment. Thus, and to reiterate, the dispute centres on the entitlement of TTOCs and casual EAs who test positive for a contagious disease, develop symptoms of an illness or are injured *before* they are offered an assignment and scheduled to work.

II. AGREED FACTS

The grievances were argued largely on the basis of a comprehensive Agreed Statement of Facts (the "Agreed Facts"), a Joint Book of Documents and two books of documents that were

entered by agreement (the Unions' Book of Documents and the Combined School District Documents). I commend counsel for their extensive pre-hearing preparation. The Agreed Facts are now reproduced with minor formatting changes.

1. The facts set forth in this Agreed Statement of Facts are admitted as proven as if those facts had been established in evidence, subject to their relevance to the issues and to their weight being determined by the Arbitrator.

2. The Parties may assert additional relevant facts during the submission and hearing process, based on documents entered into evidence, which include the documents set out as Tabs below and also the documents in the "Combined School District Documents" book dated November 7, 2023.

(a) Introduction

3. Pursuant to section 4 of the *Public Education Labour Relations Act* ("*PELRA"*) the British Columbia Public School Employers' Association ("BCPSEA") is the accredited bargaining agent for the province's public boards of education (also referred to herein as school districts) in relation to both the teacher bargaining unit and support staff bargaining units.

4. Sections 5 and 6 of the *PELRA* provide that the British Columbia Teachers' Federation ("BCTF") is the certified bargaining agent for the teacher bargaining unit which includes all public school teachers in British Columbia and certain additional employees included in the teacher bargaining unit by the Labour Relations Board.

5. BCPSEA and the BCTF are bound to a Collective Agreement with a term from July 1, 2022, to June 30, 2025. The Collective Agreement is comprised of 60 working documents, one for each school district in British Columbia containing common provincial articles and provisions unique to the school district. The 60 working documents can be found here: School District Working Documents - BC Public School Employers' Association (bcpsea.bc.ca). A compilation of the common provincial articles can be found here: PROVINCIAL COLLECTIVE AGREEMENT (bcpsea.bc.ca).

6. The Canadian Union of Public Employees British Columbia Local 5523 ("CUPE") is the certified bargaining agent for support staff for School District No. 22 (Vernon). The Collective Agreement covering support staff in Vernon has a term of July 1, 2022, to June 30, 2025. A full copy of the Collective Agreement can be found here: INDEX (cupe.ca).

(b) Background Facts

7. On May 1, 2021, the Office of the Premier issued a statement which included the following comments [Union documents, Tab 1]:

> The pandemic has highlighted that workers who are sick should not have to choose between supporting their families and staying home. For the past year, we have developed new measures to better support working people, including amending B.C.'s laws to make sure workers cannot be fired for staying home when they're sick and providing paid time off for people to get vaccinated.
>
> B.C. was a leader in advocating on behalf of all workers across Canada for a national paid sick leave program. While we were pleased to see the federal government take up the challenge, we were disappointed this effort fell short of a comprehensive plan to benefit all Canadians. Our government will move to fill the gaps left behind by the federal program to ensure workers in B.C. will not have to choose between a paycheque and staying home when they are sick.

8. On May 11, 2021, the Office of the Premier and the Ministry of Labour issued a news release which included the following statements [Union documents, Tab 2]:

> VICTORIA - Workers will soon have access to a made-in-B.C. paid sick leave program that will support workers to stay home when they are sick during the pandemic and afterward, including permanent paid sick leave, as a result of legislation tabled Tuesday, May 11, 2021.
>
> To better support workers during the pandemic, amendments to the Employment Standards Act will bring in three days of paid sick leave related to COVID-19, such as having symptoms, self-isolating and waiting for a test result. Employers will be required to pay workers their full wages and the Province will reimburse employers without an existing sick leave program up to $200 per day for each worker to cover costs.
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> …
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> The legislation will also create a permanent paid sick leave for workers who cannot work due to any illness or injury beginning Jan. 1, 2022. The number of paid sick

> days and other supports will be determined following consultations with the business community, labour organizations, Indigenous partners and other stakeholders.

9. On May 20, 2021, Bill 13 – 2021 *Employment Standards Amendment Act (No.2), 2021* ("Bill 13") [[Tab 3]] received Royal Assent and became law. It amended section 49.1(1)(a) of the *Employment Standards Act* (the "*ESA*") to, among other things, create paid personal illness and injury leave for eligible employees, effective January 1, 2022.

10. Bill 13 listed paid personal illness and injury leave in section 3(2) of the *ESA*, making it subject to what is commonly referred to as the "meet or exceed" provisions of the *ESA*.

11. On August 5, 2021, the Ministry of Labour issued a news release which included the following statements [Union documents, Tab 4]:

> No one should have to choose between going to work sick or losing wages, Bains said. Paid sick leave is good for businesses, good for workers and good for our communities. By supporting people and businesses, we will help B.C.'s economy recover faster.
>
> In May 2021, amendments to the Employment Standards Act laid the groundwork for establishing minimum standards for a permanent paid sick leave entitlement. Following the public engagement process, paid sick leave will be established through a regulation, and come into effect on Jan. 1, 2022.

12. On November 24, 2021, the Office of the Premier issued a news release which included the following statements [Union documents, Tab 5]:

> "Beginning in the new year, workers will no longer lose pay for making the responsible choice of taking a sick day," said Premier John Horgan. "The pandemic has highlighted that when workers don't have paid sick leave, it's bad for them, it's bad for their co-workers and it's bad for their employers."
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> …
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> "We have learned in this pandemic how important it is for workers to be able to stay home if they are sick. Paid sick leave is one more way we can support workers and help prevent the transmission of disease," said Dr. Bonnie Henry, provincial health officer. "It gives people the means to stay away from work if they're sick and reduces the risk to their co-workers or others they come in contact with through their jobs."

13. On December 6, 2021, BCPSEA issued guidance to school districts regarding its interpretation of the application of the *ESA* paid personal illness and injury leave [Tab 6]. BCPSEA advised as follows:

> The new paid personal illness or injury leave (section 49.1(a)) is subject to a "meet or exceed" test under s. 3 of the Act. This means if the collective agreement's paid illness or injury leave provisions, when considered together, meet or exceed the five (5) days paid illness or injury leave requirements of the Act, the collective agreement replaces the requirements of the Act.
>
> It is not necessary to show that all employees covered by the collective agreement are eligible to receive benefits at least as generous as those set out in the Act in order to establish that collective agreement provisions "meet or exceed" the Act. A collective agreement can still be found to "meet or exceed" the Act where some employees receive less than the Act provides, provided other employees receive more than what the Act requires.
>
> Teachers and support staff are covered by collective agreements containing paid illness or injury leave entitlements far greater than five (5) days per year. These collective agreements typically contain lengthy paid sick leave and short-term and long-term disability benefits for all regular employees. Where all regular employees receive benefits far greater than the Act and part-time and casual employees receive no paid sick days, it remains BCPSEA's view that the collective agreement provisions "meet or exceed" the Act.
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> **The result is that the new paid personal illness or injury leave under the Act would not be applicable to any employee covered by the collective agreement.**

14. On March 28, 2022, The Ministry of Labour issued an information bulletin regarding proposed amendments to the *ESA* which included the following comments [Union documents, Tab 7]:

> Harry Bains, Minister of Labour, introduced changes to address two issues that have been raised since the five days of employer-paid sick leave came into effect on Jan. 1, 2022.
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> …
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> In the second case, there were concerns that some employees were excluded from the full five paid sick days due to existing language in collective agreements. To ensure government's intent that the paid sick leave entitlement is applied to all employees in B.C., the clause that relates to collective agreements is being amended.

> After an extensive public consultation process, B.C. became the first province in Canada to implement a minimum standard of five days of paid sick leave every year. Research and experience in other jurisdictions has shown that most workers do not take their full entitlement of the sick days. It has also been shown that cost increases for most companies were less than expected while significant benefits resulted, including increased productivity and retention of trained staff, reduced risks of injury, improved morale and increased labour force participation.

15. On March 31, 2022, Bill 19 – 2022 *Employment Standards Act, 2022* ("Bill 19") [Tab 8] received Royal Assent. It removed section 49.1(1)(a) from section 3(2) of the *ESA* (the "meet or exceed" provisions). As a result, section 49.1(1)(a) of the *ESA* now applies to all eligible employees regardless of the provisions of the collective agreement.

16. In addition, Bill 19 amended section 49.1(1) of the *ESA* to provide paid personal illness and injury leave based on a calendar year (rather than employment year) basis.

17. Section 49.1 of the *ESA* [Tab 9] currently provides as follows:

> 49.1
>
> (1) After 90 consecutive days of employment with an employer, an employee, for personal illness or injury, is entitled, in each calendar year, to
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> (a) paid leave for up to the number of days prescribed, and
>
> (b) unpaid leave for up to 3 days.
>
> (2) If requested by the employer, the employee must, as soon as practicable, provide to the employer reasonably sufficient proof that the employee is entitled to leave under this section.
>
> (3) Subject to subsection (4), an employer must pay an employee who takes leave under subsection (1) (a) an amount in money equal to at least the amount calculated by multiplying the period of the leave and the average day's pay, where the average day's pay is determined by the formula
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> amount paid ÷ days worked
>
> where
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> amount paid — is the amount paid or payable to the employee for work that is done during and wages that are earned within the 30 calendar day period preceding the leave, including vacation pay that is paid or payable

for any days of vacation taken within that period, less any amounts paid or payable for overtime, and

days worked is the number of days the employee worked or earned wages within that 30 calendar day period.

(4) An employer must pay an employee in a prescribed circumstance who takes leave under subsection (1) (a) an amount in money equal to at least the amount calculated in accordance with the regulations.

18. Section 45.031 of the *Employment Standards Regulation*, B.C. Reg. 396/95 [Tab 10] provides as follows:

45.031 For the purposes of section 49.1(1)(a) of the Act, the prescribed number of days is 5 days.

19. In response to Bill 19, on May 4, 2022, BCPSEA issued guidance to school districts regarding its interpretation of the application of paid personal illness and injury leave under the *ESA* [Tab 11]. With respect to the entitlement of casual on-call employees to paid personal illness and injury leave under the *ESA*, BCPSEA stated:

18. How do casual on-call employees access the ESA sick leave?

It is only when a casual employee has already been scheduled to work, or has accepted a call-in, and later becomes ill or injured that they are entitled to ESA illness or injury leave. Casuals who are not scheduled to work on a specific day cannot claim paid leave for personal illness or injury for that day.

If an employee is sick when they receive a call-in, they cannot accept the shift because they are not fit to work nor have they been scheduled to work. They are expected to decline the shift and will not be entitled to a sick day. For clarity: a casual employee may not turn down an offer of dispatch and then take a paid day for illness or injury.

19. If a casual employee is called-in to work and calls back a half-hour later saying they are sick, are they able to collect this benefit? Is there anything preventing them from accepting an assignment via an automated booking system and then booking off sick immediately thereafter?

It depends. There are situations where an employee could legitimately accept a call or dispatch, but then later come down ill. The closer the acceptance is to the request for a sick day, the more questions the district may have.

> There is nothing in the legislation to prevent an employee from accepting an assignment and then immediately booking off thereafter; but such may constitute sick leave fraud.
>
> As with all situations where an employee requests leave, districts have the ability to (1) discuss any concerns they have with an employee regarding absences from work; and (2) request reasonably sufficient proof that an employee is entitled to the requested leave. This may include medical documentation to support the request for leave, where such is reasonable and/or expressly provided for in the collective agreement.

(c) The BCTF Grievances

20. On March 16, 2022, before Bill 19 was brought into force, the BCTF filed a provincial grievance (BCTF File No. 99–2022–0001 [Case ID 9093]) ("Grievance #1") [Tab 12] stating:

> School Districts are failing to provide sick leave for teachers who do not have access to sick leave credits that meet or exceed those provided by section 49.1(1) of the *Employment Standards Act*, such as Teachers Teaching on Call and some teachers working a partial assignment. It is the Federation's position that this is a violation of the *Employment Standards Act*. The provincial parties have discussed this at labour management and been unable to resolve this issue.

21. In its April 7, 2022, response to Grievance #1 [Tab 13], BCPSEA stated:

> 1. Between January 1, 2022, and March 30, 2022, inclusive, the "meet or exceed" test was met for all bargaining unit employees and the ESA paid sick leave provisions did not apply to any bargaining unit employees during that time. As a result, there was no breach of collective agreement or statute during this period.

22. By this time, Bill 19 had been brought into force on March 31, 2022, and it was recognized by the parties that Grievance #1 was limited to the January 1 – March 31, 2022, time period.

23. On June 13, 2022, after Bill 19 was brought into force, the BCTF filed another provincial grievance (BCTF File No. 99-2022-0002 Case ID 92321) ("Grievance #2") [Tab 14] which alleged:

> School Districts are implementing policies that prevent teachers from accessing the *Employment Standards Act* Illness and Injury leave. This means that Teachers Teaching on Call and some teachers working a partial assignment are not able to access this leave when they are ill or injured.

24. On July 5, 2022, BCPSEA denied the Grievance #2 [Tab 15]:

> BCPSEA denies that any employees that are entitled to *Employment Standards Act* Illness and Injury Leave are being prevented access to such leave.
>
> BCPSEA further denies that School Districts are "implementing policies" for such a purpose. Rather, BCPSEA and School Districts rely on the long-standing interpretation and practice that, in order to be eligible to access illness and injury leaves provided by statute or collective agreement, an employee must be scheduled to work on the day in question.

25. On July 11, 2022, the BCTF referred the Grievance #2 to arbitration [Tab 16]:

> This provincial grievance concerns school districts implementing policies that prevent teachers from accessing the *Employment Standards Act* Illness and Injury Leave. This is a violation of the *Employment Standards Act*.

26. The BCTF has also filed a number of other grievances with respect to certain individual school districts' application of section 49.1 of the *ESA*.

27. The only BCTF grievance to be adjudicated in these proceedings is Grievance #2.

(d) Teachers Teaching on Call

28. Each school district maintains a list of qualified individuals willing to be assigned on a daily or short-term basis to cover teacher absences which are not required to be posted under the post-and fill provisions of the Collective Agreement. These individuals are referred to as Teachers Teaching on Call ("TTOCs").

29. TTOC assignments can be for as short as a half day and as long as several days, or possibly weeks, depending on the collective agreement's threshold requirement for posting vacancies.

30. TTOCs are paid 1/189 of their category classification and experience to a maximum of the rate at Category 5 Step 8 for each full day worked (Article B.2.6), plus $11 over the daily rate in lieu of benefits (Article B.2.5).

31. TTOCs may be required to maintain a minimum level of availability or work a minimum number of days (see for example, Employer documents, page 158 and Union documents, Tab

24), as a condition of remaining on the TTOC list in a school district. However, the existence and/or content of these or other conditions vary by school district.

32. Subject to due process requirements under the collective agreement, TTOCs who fail to meet the conditions of being placed on the TTOC list in a school district may be subject to removal from the TTOC list.

33. TTOCs are often required to advise school districts in advance as to their availability to work. This is typically done through the call-out system used by the school district. A TTOC who has indicated that they are unavailable on a particular day will typically not be offered work on that day.

34. In some districts, a TTOC who becomes ill after indicating that they are available to work is required to revise their availability and mark themselves as "unavailable" so that they will not receive a call out on the day in question.

35. TTOC assignments are typically assigned the morning of the assignment or the night before. However, TTOCs can also be assigned several days before the assignment is scheduled to begin where, for example, there is a pre-planned teacher absence.

36. The order in which TTOCs are offered assignments varies by school district and the system used for call outs.

37. If a TTOC has accepted an assignment but then becomes unavailable for the assignment, the TTOC is expected to notify the district as soon as possible so that another TTOC can be dispatched.

(e) Description of Different Call-Out Systems for TTOCs Used by School Districts

38. There are a variety of different methods used by school districts to offer assignments to TTOCs.

(i) *Automated Call-Out System*

39. Many school districts use an automated dispatch system which automatically calls out to TTOCs via telephone or text.

40. Under this system, TTOCs typically have the opportunity to mark themselves as "unavailable" on certain days, in which case the automated system will not call out to them on those days.

41. When a call is received, the TTOC has the option to accept or decline the offer.

42. If, after accepting an assignment, a TTOC becomes unavailable for the work, they may cancel the assignment, However, there is usually a time period after which they cannot cancel the assignment through the system and must contact the school district by phone. See, for example, page 1 of the Combined School District Documents book.

43. Examples of school districts using an automated dispatch system are at pages 42 and 75 of the Combined School District Documents book.

(ii) *Manual Call-Out*

44. Many school districts use a manual call-out system, in which they use live calls, usually, but not always, the night before or morning of the assignments, to attempt to fill absences in time for the start of the school day. If the TTOC does not answer their phone or cannot commit to the shift, dispatch will proceed to the next person on the list.

45. Examples of this system are at pages 293 and 312 of the Combined School District Documents book.

(iii) *Hybrid Approach with Automatic and Manual Call Outs*

46. Some school districts use a hybrid approach which includes both an automated call out and manual call out.

47. Under this system, the automated call-out generally occurs first and if there are unfilled positions remaining, manual calls are made to attempt to fill the absence before the start of school.

48. An example of this system is at page 1 of the Combined School District Documents book.

(iv) *School or Teacher Request*

49. Some school districts permit schools or teachers to request that the school district dispatch a specific TTOC. If that TTOC is not available, the school district may proceed to use another established dispatch system.

50. Examples of this system are at pages 17 and 333 of the Combined School District Documents book.

(v) *Open Job Board*

51. A few school districts have a job board system through which TTOCs can view open assignments and accept dispatches on a first-come, first-served basis.

52. An example of this system is at page 160 of the Combined School District Documents book. The job board system requires TTOCs to input any periods of unavailability (page 158). The job board will provide TTOCs with a list of available assignments based on their qualifications and availability (page 160).

(f) <u>The Approach of School Districts to Eligibility for Paid Personal Illness and Injury Leave under the *ESA*</u>

53. School Districts provide paid personal illness and injury leave to eligible TTOCs who are already scheduled for, or already working in, a TTOC assignment prior to becoming ill. Some examples are found at pages 3, 10, 32, 42, 187, 220, 237, 282 of the Combined School District Documents book.

54. This can occur when an eligible TTOC is working in a multi-day assignment or has been offered and accepted the assignment in advance of becoming ill.

55. School districts do not provide paid personal illness and injury leave to TTOCs who have not been scheduled for a TTOC assignment prior to becoming ill. Some districts achieve this by requiring TTOCs who become ill to mark themselves as "unavailable" in the call out system so that they will not receive call outs on those days.

56. School Districts have also refused to assign work to TTOCs who indicate they are unavailable to work the assignment, including if their unavailability is due to illness or injury.

57. TTOCs who have marked themselves "unavailable" due to an injury or illness and those who receive a call out while injured or ill are not scheduled for work and not provided with paid personal illness and injury leave under the *ESA*.

(g) The CUPE Grievance

58. Article 9 of the Collective Agreement between CUPE and School District No. 22 (Vernon) defines "Regular Employees" and "Temporary Employees". Temporary Employees are defined as "…those employees who replace regular employees on leave or who are hired for specific projects."

59. The term "Casual Employees" is not defined in the Collective Agreement but is often used to describe employees who do not hold a regular position but rather obtain work through the back-fill of short-term absences of regular employees.

60. Temporary vacancies in excess of eight (8) weeks are posted and filled pursuant to Article 12(b) of the Collective Agreement.

61. The call out procedure (also referred to by the parties as the "call in system") for unposted temporary work is outlined in Letter of Understanding #17 [Tab 17]. However, LOU #17 does not apply to the Transportation Department, which follows the procedure outlined in LOU #11: Transportation Services Bus Drivers- Assignment Process [Tab 18].

62. In practice, the procedure for filling unposted temporary vacancies can be summarized as follows:

    a. Regular Employees who are ill or can otherwise not attend work are required to advise the designated appropriate School District department "dispatcher" as soon as possible in advance of, or on the morning of their shift.

    b. Dispatchers for the departments (Education Assistants/Clerical, Custodial and Transportation) will then call the list of available casual/auxiliary employees in order of seniority, and based on previously indicated availability, to offer work for the available shifts.

63. The time during which the dispatch calls are made differs depending on the department.

    a. Casual Education Assistants and Clerical employees are typically called on the morning of an available shift between 7:15-8:00 am.

    b. Casual Custodial employees are typically called on the morning of an available shift between 10:00-11:00 am.

    c. Casual Transportation employees are typically contacted immediately upon an absence being reported during the designated hours of 5:00 pm-9:00 pm (Sunday to Thursday) and 5:00 am-6:00 am (Monday to Friday).

64. The vast majority of casual "call in" assignments are provided on the day of the shift. However, where absences are known in advance, the dispatcher will offer them in advance.

65. At the start of each school year, Education Assistants are required to provide their general "availability" to the dispatcher for the entire year, in terms of which days of the week they are willing to accept work. The expectation is that, absent illness, they will be available to work on those days if work is offered. If they become unavailable to work on a day that they previously indicated they would be generally available, they are asked to call the dispatcher before 7:00 am to advise as such, so they can be removed from the schedule for that day [Tab 19].

66. On May 4, 2022, Erica Schmidt (Assistant Director, Human Resources) emailed CUPE to clarify the District's position on the application of ESA illness and injury leave to "casual" employees [Tab 20]:

> It has come to my attention that EA staff are receiving information that is not aligned with our understanding of EA sick leave for casual on-call employees accessing ESA sick leave.
>
> The Employer understands the application of ESA sick leave to apply only when a casual employee has already been scheduled to work, or has accepted a call-in, and later becomes ill or injured that they are entitled to ESA illness or injury leave. **Casuals who are not scheduled to work on a specific day cannot claim paid leave for personal illness or injury for that day. If an employee is sick when they receive a call-in, they cannot accept the shift because they are not fit to work nor have they been scheduled to work. They are expected to decline the shift and will not be entitled to a sick day.**
>
> For clarity: a casual employee may not turn down an offer of dispatch and then take a paid day for illness or injury.

67. As a result of Ms. Schmidt's email, the parties met to discuss the issue on May 16, 2022.

68. Alyssa Clark ("Alyssa") has been employed with School District 22 (Vernon) as a casual/auxiliary Educational Assistance (EA) since September 2021.

69. On the weekend prior to Monday, May 9, 2022, Alyssa became ill and tested positive for COVID-19.

70. On the morning of Monday, May 9, 2022, at approximately 7:30-7:45 am Alyssa received a phone call pursuant to the call out procedure in LOU #17 from Michelle Skillnik (District Secretary-Personnel Support), who is the dispatcher for the Education Assistants. Michelle asked Alyssa how she was doing, and Alyssa advised that she was sick and had tested positive for COVID-19 over the previous weekend and would therefore not be able to work for the remainder of the week.

71. The school district did not dispatch Alyssa on May 9, 2022, and did not provide Alyssa with paid personal illness and injury leave.

72. On June 24, 2022 CUPE filed a grievance relating to the denial of Alyssa's ESA paid sick days (the "CUPE Grievance")[Tab 21]:

> The Employer (SD22) did not compensate the employee for sick days she was entitled to when absent from work due to illness.

73. CUPE and the District met on June 27, 2022, and September 9, 2022, as part of the grievance process.

74. On September 14, 2022 the District responded to the grievance and denied that there had been any violation of the *ESA* or the collective agreement, and maintained the position that to be entitled to a paid sick day under the *ESA* the Grievor must have already been scheduled to work, or accepted a call-in, and then later become ill or injured [Tab 22]:

> The district is committed to comply with the ESA and to provide up to 5 paid sick days to eligible employees who have been employed for 90 days and are ill and not able to work on days when they are scheduled to work. In this grievance there is common ground that the grievor was employed for 90 days and that she was ill during the week of May 9-13, 2022. The difference between the employer and union position is largely related to whether it is required that a day be scheduled to generate a paid sick day. In our meetings the union expressed the view that the district would be obligated to pay for a sick day any time that a casual employee was called in and was unable to work due to illness, and that additional calls would be made, and sick days could be paid, until such time as an employee is able to accept the shift. The employer disagrees.
>
> In the case of the grievor, she was not previously scheduled to work on the week of May 9-13. She did work the week prior, but it was in a different assignment. On the morning of May 9th, 2022, the grievor was called by dispatch to see if she was able to accept an assignment. On that morning the grievor was ill and was unable to accept the assignment. She continued to be ill for the remainder of the week and therefore was unable to accept any assignments.
>
> The district maintains that there has been no violation of the ESA nor the collective agreement and that to be entitled to a paid sick day under the ESA the grievor must have already been scheduled to work, or accepted a call-in, and then later become ill or injured. Therefore the grievance is denied.

75. On October 12, 2022, CUPE responded by referring the grievance to arbitration [Tab 23]

III. THE STATUS OF TTOCS

The role of TTOCs and the manner in which they are offered work assignments was set out at paragraphs 28 through 37 of the Agreed Facts. This basic background was expanded by counsel through references to various documents in evidence and case authorities.

The BCTF maintains that TTOCs have collective agreement rights to be offered work assignments and the extent of these rights varies by school district. It rejects BCPSEA's position that TTOCs have free rein to set their preferred availability and refuse offers of work even on days when they have said they are available, as well as the suggestion that TTOCs can reject dispatches "without consequences". In this regard, the BCTF cites *Qualicum School District No. 69 -and- Mount Arrowsmith Teachers Assn. (Sort Grievance)*, [2004] BCCAAA No. 237 (Kinzie). While acknowledging that TTOCs have the ability to limit and revise their availability, the BCTF contends they are nonetheless required to be generally available for work and to accept work assignments.

BCPSEA contends that TTOCs are "true casuals" who can accept or refuse assignments "however they want". While acknowledging that there is an employment relationship, it submits TTOCs do not hold a position from which they can take paid leave. In summary, BCPSEA says that: TTOCs are clearly put on a list; can set their own availability (in large measure without any restrictions); are offered work when they have not said they are unavailable; and, in many school districts, can decline an assignment on a particular day and still receive other offers of work. BCPSEA contends the latter happens with sufficient frequency that school districts ask TTOCs to avoid unnecessary calls so the call-out system can be more efficient.

I find there is some support for all of the foregoing submissions but that they tend to generalize what, in fact, is a myriad of TTOC arrangements throughout the Province. The common element is that each school district maintains a list of qualified individuals willing to be assigned on a daily or short-term basis in order to cover teacher absences (Agreed Facts at para. 28). The nature of the relationship varies according to the local hiring language. For instance, and without being exhaustive:

- The School Board "will give hiring priority to certified TTOCs" providing there is a reasonable match between the TTOC and the teaching assignment (SD 5 Southeast Kootenay).

- A TTOC is a teacher "hired on a day-to-day basis" (SD 10 Arrow Lakes, SD 39 Vancouver, and several other districts); "called for day-to-day services" (SD 67 Okanagan Skaha); "employ[ed]" on a day-to-day basis (SD 22 Vernon); "assigned on a day-to-day basis" (SD 36 Surrey); "deployed" to take the place of a teacher who is absent "on a day-to-day basis" (SD 5 Rocky Mountain); or "dispatched for day-to-day services" (SD 23 Central Okanagan).

- Where no preference is indicated, the administrator "will hire [TTOCs] in an attempt to provide them an equal opportunity for employment at that school" (SD 19 Revelstoke).

- "Every attempt will be made to provide equal employment opportunities to those on the [TTOC] list" (SD 33 Chilliwack and SD 35 Langley).

- "[E]very attempt will be made to ensure that all [TTOCs] receive equal call-out privileges" (SD 37 Delta).

- Subject to specific requests, there is a "rotation system" (SD 38 Richmond, SD 73 Kamloops, and SD 75 Mission).

- The Board shall first offer assignments to TTOCS on the list "with the necessary qualifications for the assignment" (SD 45 West Vancouver).

- When qualifications are equal "TTOC Seniority" with the district will determine the order of call out (SD 49 Central Coast).

- TTOCs residing in the district should be given preference (SD 70 Pacific Rim).

The Combined School District Documents were produced to the Unions pursuant to a request for documents relating to the call-out systems for TTOCs across the Province. I accept BCPSEA's review of these documents and they reveal the following:

- TTOCs are asked to make themselves unavailable for days they do not wish to work so that the call-out system does not call them unnecessarily for those days. Districts note this will help with efficiency of the system and avoid unnecessary calls. There is no minimum requirement for availability or requirement to accept calls on a day of availability (a total of 22 such examples are found in the Combined School District Documents).

- TTOCs who also hold temporary or part-time teaching assignments must make themselves unavailable for the days they are working those other assignments (four examples).

- TTOCs are told how to accept or reject an offer. This includes the option of refusing just the particular offer and allowing other offers to be made that day, or marking themselves unavailable so they do not receive further offers (12 examples).

- TTOCs who accept an assignment and later become ill and unable to work the assignment (or become unavailable for other reasons) can cancel the dispatch in advance of it beginning (over 50 examples).

- Minimum work requirements are rare and not onerous (for example, in one district TTOCs "are expected to work a minimum of 50 days per school year"; another allows TTOCs "to accept or refuse call outs as they see fit" but they "must accept at least one call out" between each of the months of September to January and January to June).

- Availability requirements are rare and relatively minimal (for example, general availability of three days per week but no requirement to accept work on all of those days; speak to Human Resources if unavailable for more than 10 consecutive days).

BCPSEA maintains further that the Combined School District Documents show that TTOCs are generally offered assignments based on their availability and qualifications. There are some exceptions as indicated by the examples of local hiring language recorded above; however, they comprise a definite minority of school districts in the Province.

BCPSEA describes TTOCs as "people on a list" who are "hired" day-to-day, with school districts by and large having the ability to decide who will be called out for available assignments. It therefore rejects the Unions' argument that TTOCs hold a position. BCPSEA's contention that TTOCs do not hold a position is undermined by other documents in the record. For example, one of the districts with local language stating that TTOCs are hired day-to-day is SD 39 Vancouver. Yet, a job posting entered by the BCTF from SD39 is headed "Elementary Teachers – TTOC (On-Call)" and begins: "The Vancouver Board of Education (VSB) welcomes applications for *the position* of: On-Call Elementary Teachers" (italics added).

BCPSEA also points to the "Best Practice" in the Vancouver Smart Find Express (SFE) Handbook for On-Call Employees which states: "It is the expectation and your responsibility to maintain accurate availability on SFE". This is one of several examples which BCPSEA characterizes as school districts "pleading" with TTOCs to be more accurate. BCPSEA maintains this shows a problem with TTOCs saying they are available but not actually being available. It urges an inference that TTOCs are not accepting assignments when they are called and, accordingly, it cannot be assumed that TTOCs would have accepted a work assignment if they do not make themselves unavailable.

In response, the BCTF asserts that these reminders cannot be accepted as evidence of a problem. Instead, it says one should infer that TTOCs are doing what is expected by the school districts – otherwise, those would be "memos and paper galore". CUPE likewise contends that, if there was a significant problem with TTOCs not updating their availability, then such evidence would have been led at arbitration.

In my view, the various reminders by school districts for TTOCs to maintain an accurate record of their availability cannot be used to support an inference in favour of either side. Further,

BCPSEA's argument is based, in part, on an incorrect description of the Unions' position. The Unions do not maintain there is an entitlement to Paid Leave when TTOCs and casual EAs have indicated they are "available" for work because it should be assumed that they would have accepted the offer of an assignment but for an illness or injury. This is a subtle but critical miscasting of what the Unions advocate. As clarified in the BCTF's reply submission, the Unions' position is not predicated on an assumption that the casual employee would have worked the assignment:

> … *We say that the entitlement to Paid Leave is triggered in circumstances where but for the injury or illness a TTOC would have been offered a work assignment and would have worked the assignment. To the extent that a legitimate question may arise as to whether a particular TTOC would have accepted and worked a particular work assignment but for the injury or illness, that question can be addressed on a case by case basis.* The suggestion that a "but for" test is a fallacy because TTOCs sometimes turn down offered assignment (BCPSEA submission, para. 15) should be rejected. It should also not be assumed that TTOCs will claim Paid Leave with respect to an offered assignment that they had no intention of working to begin with – particularly in the absence of any evidence establishing that abuse of sick leave is an issue in this sector. (para. 5; italics added)

More broadly, there is simply insufficient information on the record to make any determination regarding the extent to which TTOCs (or casual EAs) turn down offers of assignments when they have previously indicated availability to work.

There are, however, circumstances where TTOCs (and casual EAs) must decline work assignments. As set out in the Unions' joint submission:

> It is important to note that TTOCs and casual EAs are often required to refuse work assignments and suffer financial harm after testing positive for a contagious disease and while injured or ill notwithstanding the fact that they may be willing and able to work. That is because the BC Centre for Disease Control Public Health Communicable Disease Guidance for K-12 Schools provides that staff who are exhibiting symptoms of illness, such as respiratory illness, should stay home until they are well enough to participate in regular activities or otherwise advised by a healthcare provider. (para. 42)

School Districts may similarly require employees to remain at home when they are ill. Under the Vancouver School District "Communicable Disease Prevention Plan" for 2023, the primary responsibility for staff/employees was to "[r]emain home if sick and away from others until your fever, vomiting or diarrhea has resolved without the use of medicines and you feel well enough to participate in daily activities" (p. 6).

I find as well that some of the examples put forward by the Unions to demonstrate greater rights and/or more rigorous requirements for TTOCs are clearly outliers. This includes SD 57 Prince George, where TTOCs are removed from the list for one month after three call-out refusals or call outs with no answer. Given what is found in the Combined School District Documents, this isolated guideline does not support the Unions' contention that "… it is not uncommon for School Districts to sanction TTOCs for not working assignments" (joint submission at para. 49). Moreover, a subsequent "Fact Sheet" in the Prince George School District clarified that TTOCs who have missed a call can phone back to advise they are available, and TTOCs may decline work in an area outside their "comfort zone" without it being considered a refusal.

I also reject the Unions' reliance on the *Qualicum* award for the unqualified proposition that a TTOC's failure to be available for work could lead to discipline. A closer reading of Arbitrator Kinzie's analysis shows the outcome turned on a combination of: provisions in the parties' collective agreement; terms of the applicable TTOC handbook; and, of course, the facts of the case. To begin, the collective agreement precluded the school board from removing a person from the TTOC list "save for just and reasonable cause" (award para. 5). Under the handbook, the grievor had an express "responsibility to be available to the district" (para. 70). Further, the grievor did not live up to this responsibility and did not accept call-outs because he was otherwise involved in building his house (para. 71). Arbitrator Kinzie held the district had just and reasonable cause for some form of discipline. He set aside the district's decision to remove the grievor from the TTOC list and substituted a suspension from the list for the balance of the school year.

What "common threads" can be distilled from the foregoing review concerning the status of TTOCs? While many terms and conditions vary between school districts, there is essentially universal language to the effect that districts "shall maintain" a list of qualified individuals who

are placed on a TTOC list and offered assignments to cover the absences of temporary and continuing teachers. There are different call-out systems used to offer assignments as described in the Agreed Facts and, for the most part, school districts have the discretion to offer assignments based on qualifications and availability. In some districts, the local hiring language contains restrictions (e.g., offers are made under a "rotation system" or there must be "equal opportunities" for assignments). TTOCs are largely able to determine their own availability and decide whether to accept offered assignments, albeit with some exceptions and limitations. There is unquestionably a form of employment relationship so long as a TTOC remains on the district's list. I therefore reject BCPSEA's submission that TTOCs are truly "hired" for each individual assignment. I find as well that this ongoing relationship inherently involves the mutual expectations that school districts will offer work assignments when available, and that TTOCS will accept assignments in accordance with the conditions established by their employers. Finally, TTOCS who fail to meet the conditions of being placed on the list may be removed subject to due process requirements under the applicable collective agreement (para. 32 of the Agreed Facts). For instance, some language provides that TTOCs will not be "unreasonably removed" while other districts have a "just and reasonable cause" standard.

IV. SCHOOL DISTRICT NO. 22 (VERNON) & CUPE

The Agreed Facts beginning at paragraph 58 describe the call-out procedure under the CUPE Collective Agreement in the Vernon School District and the circumstances relevant to the Grievor's claim for Paid Leave. Section 2 in Letter of Understanding #17 ("LOU #17") deals with "Availability for Work". An employee who will not be available for call-out for more than five working days must notify the employer and failure to do so may result in removal from the list. Employees who are not on an approved leave and who do not accept offered work for a minimum of 12 offered shifts per half-year will lose their seniority. Under Section 3, employees are called in the following order: (a) laid off employees with seniority; (b) qualified temporaries with seniority and qualified regular employees with seniority; and, (c) qualified temporaries without seniority. Paragraph 70 of the Agreed Facts stipulates that the Grievor received a phone call

pursuant to the procedure in LOU #17 but does not clarify whether she received the call under Section 3(b) or (c).

V. PRINCIPLES OF STATUTORY INTERPRETATION

All counsel refer to *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, as a leading authority regarding the interpretation of statutory language although, not surprisingly, they place prominence on different passages. Mr. Justice Iacobucci delivered the Court's judgment. He relied on the following statement by Elmer Driedger in *The Construction of Statutes* (2nd ed. 1983), which recognizes that statutory interpretation cannot be founded on the wording of the legislation alone:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. (*Rizzo* at para. 21)

The foregoing statement was adopted in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, where the majority explained:

> This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context: Sullivan, at pp. 7-8. Those who draft and enact statutes expect that *questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker*. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law -- whether courts or administrative decision makers -- will do so in a manner consistent with this principle of interpretation. (para 118; italics added)

The following comments by the majority in *Vavilov* are also applicable in the present context:

> Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. As discussed above, formal reasons for a decision will not always be necessary and may, where required, take different forms. And even where the interpretive exercise conducted by the administrative decision maker is set out in written reasons, it may look quite different from that of a court. The specialized expertise and experience of administrative decision makers may sometimes lead them to rely, in interpreting a provision, on considerations that a court would not have thought to employ but that actually enrich and elevate the interpretive exercise.
>
> * * *
>
> The administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior -- albeit plausible -- merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome. (paras. 119 and 121)

The admonishment against "reverse-engineering" a desired outcome is highlighted here by BCPSEA. It submits that extrinsic sources such as the legislative history and Hansard cannot override the ordinary words in Section 49.1 of the *ESA* which require an employee to "leave" work in order to become eligible for Paid Leave. As stated in *R. v. Khill*, 2021 SCC 37, "… extrinsic evidence is not more important than legislative text" (para. 111). A statute must be interpreted in a manner consistent with the words chosen by the legislature and "… the interpretation ultimately adopted must be one that the words of the text can reasonably bear": *The Construction of Statutes*, 7th ed. (Sullivan), at para. 7.02[1].

It is important to recall that the judgment in *Rizzo* concerned an interpretation of the Ontario *Employment Standards Act*. At issue was whether the termination of employment caused by the bankruptcy of an employer gave rise to a claim provable in bankruptcy for termination pay and severance pay under provisions of the Act. The Court of Appeal's judgment was set aside because it "… did not pay sufficient attention to the scheme of ESA, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized" (para. 23). Iacobucci J. continued:

> *In Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the ESA as being the protection of ". . . the interests of employees by requiring employers to comply with certain minimum standards, including minimum periods of notice of termination". Accordingly, the majority concluded, at p. 1003, that, ". . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, *and so extends its protections to as many employees as possible, is to be favoured over one that does not*". (para. 24; italics added)

And later:

> Finally, with regard to the scheme of the legislation, since the ESA is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. *As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant* (see, e.g., *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2, at p. 10*; Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40a of the ESA, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act. (para. 36; italics added)

The Unions rely additionally on Section 8 of the *Interpretation Act* which requires that every enactment to be construed as remedial:

> 8. Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

Finally, I note CUPE's reference to numerous statements in *Sullivan on the Construction of Statutes* (Sixth Edition 2014), including the proposition that "[i]n so far as the language of the text permits, interpretations that are consistent with or promote legislative purpose should be adopted, while interpretations that defeat or undermine legislative purpose should be avoided" (para. 9.3).

VI. LEGISLATIVE HISTORY (HANSARD)

As just explained, the purpose of legislation may be ascertained by referring to extrinsic material such as Hansard and government publications, provided it is reliable and not assigned undue weight. Consistent with this approach, several British Columbia arbitration awards that have considered the intent behind Section 49.1 have looked to statements by the Minister of Labour as recorded in Hansard. Some of those awards were summarized in *Canadian Maritime Engineers (Alberni) -and- Marine Workers and Boilermakers Local 1 (ESA Paid Sick Days Grievance)*, [2024] BCCAAA No. 32 (Hall)[1]. See also *FG Deli Group Ltd. -and- UFCWU, Local 247 (ESA Sick Leave)*, [2023] BCCAAA No. 102 (Brown). In general terms, arbitrators have held that the intent of the Act is to put employees in a make-whole position by avoiding financial harm due to illness or injury. As such, Section 49.1 provides a form of wage indemnity and the provision is not intended to create a "financial windfall".

The legislative history regarding Paid Leave was outlined in the Agreed Facts. When introduced in Bill 13 during 2021, the entitlement was subject to the "meet or exceed" test under Sections 3(2) and 3(3) of the *ESA*. Hansard contains numerous statements regarding the purpose of the legislation, and there is no need to reproduce all of the references found in the parties' submissions. The repeated theme is more than adequately conveyed in the following passages, beginning with the opening remarks by the Minister when moving that Bill 13 be read a second time:

> Many workers wake up in the morning with a sore throat and a difficult choice. On the one hand, if they feel sick, they could stay home. This would be the right thing to do for their own health and the health of their co-workers and could help stop the transmission of COVID-19 at the workplace.
>
> Or they could push through and head into work because they just can't afford to stay home. They can't just stay. *They just can't afford to lose a day's pay*. This, of course, puts their co-workers at risk and could lead to an outbreak. This is what we are discussing today with Bill 13.

[1] The summary in *CME (Alberni)* included Arbitrator Gregory's *City of Vancouver* award which has since been upheld on review by the Labour Relations Board: 2024 BCLRB 56.

> Since the beginning of this pandemic, we have been lobbying the federal government to bring a paid sick leave program for all workers in Canada. … *No worker should have to choose between going to work sick or staying home, losing pay*. We're stepping up and providing what is needed now and for the future for the workers of British Columbia.
>
> There are two significant improvements under this bill amending the Employment Standards Act. First is an immediate measure, on a short-term basis, to support workers as we continue to battle COVID-19.
>
> * * *
>
> *This will mean that the employees who do not currently have access to paid sick days will be able to take days off to get tested without losing pay when they have COVID-19 symptoms, for the duration of this pay leave, from royal assent until December 31, 2021*. (Hansard, May 11, 2021 at p. 1769; italics added)

In later explaining "the second improvement under this bill" that would come into effect on January 1, 2022, (i.e., the paid illness or injury leave under Section 49.1), the Minister stated:

> Among other things, the pandemic has highlighted just how difficult it is for many workers in our society to stay afloat and thrive. *Our government believes that no worker should have to choose between staying home when sick or getting paid, during a pandemic or any time*. So to better support workers and healthy workplaces in the long term, the second improvement under this bill lays the groundwork for permanent paid sick leave for those who cannot work due to personal injury or illness.
>
> It is estimated that 50 percent of British Columbia employees *do not have access to paid sick leave and must choose between going to work sick so they could support their families, possibly infecting others, or staying home and losing pay*. That means that upward of one million workers could benefit from the improvements we are introducing today.
>
> We know that many vulnerable and low-wage workers, who are often women and migrant workers, lack benefits. *The ability to take employer-paid leave will especially be beneficial to them*. Many of these workers are essential workers, who have delivered goods, who have made food for pickup or who have been working, fearlessly, in grocery stores to make sure we can all get the supplies we need, get the services we need. (Hansard, May 12, 2021, at pp. 1770-71; italics added)

When Bill 19 became law during March of 2022, paid personal illness or injury leave was removed from the "meet or exceed" provisions. As a consequence, Section 49.1 now applies to all eligible employees regardless of the terms in a collective agreement. Thus, Paid Leave is a statutory minimum entitlement regardless of whether contractual terms meet or exceed the Section 49.1 requirements.

The Minister spoke to the purposes underlying Bill 19 at Second Reading, and began:

> Over the past two years, the pandemic has made it very clear just how important it is to protect the health of workers, their families and B.C.'s workplaces. A critical part of protecting the health of workers is the ability for workers to stay home when they are sick and not to lose wages.
>
> *Nobody should be forced to make that decision to go to work sick or stay home and lose wages*. That's why last May we passed legislation to ensure that all workers covered by the Employment Standards Act could take paid sick days when they need them.
>
> * * *
>
> Since coming into effect, we have heard from business groups and labour organizations and workers regarding two specific concerns about implementation of the legislation. We have listened closely to those concerns, examined the issues that have been raised, and we are now proposing two amendments to the Employment Standards Act to address the concerns, through Bill 19. (Hansard, March 29, 2022, at p. 5411; italics added)

The first amendment involved changing Section 49.1 to read "calendar year" instead of "employment year" because of administrative challenges faced by employers, and that change is not material to the present grievances. The second amendment was explained in this manner:

> The second amendment is a little more complicated, and frankly, it is disappointing to me that we need to do this. The standards laid out in the act, for the most part, are the minimum requirement that employers and workers are expected to follow. Usually collective agreements have built on those standards, improved upon them, through the bargaining process. A number of provisions are listed in the act under a meet-or-exceed clause.
>
> * * *

> Effective January 1, this year, permanent paid sick leave was added to the meet-or-exceed clause as one of those main provisions. But we have recently heard concerns that there are employers who are taking the position that since their existing collective agreement paid-sick-leave provisions, when considered together, meet or exceed the act's minimum entitled five days, then the sick leave provisions of the act do not apply, even if some workers are receiving less than five days of paid sick leave or none at all.
>
> There are two or three different examples that come to my mind. There are employers who are taking the position that since they have long-term disability, short-term disability plans, they believe that they are meeting or exceeding, although in order to qualify for either one of those benefits, there is a waiting period for three to five days. I think that defeats the purpose of the act that we brought in January 1.
>
> The second example is sometimes called 90/10 – that if the majority of the workforce enjoy five days or better under the collective agreement but there are 10 percent who do not, *who could be casual employees who come in to replace those full-time workers*, they are arguing that their collective agreement language meets or exceeds the Employment Standards Act, leaving a number of workers without paid sick leave.
>
> That was not the intention. *We were very clear that all workers in British Columbia under the Employment Standards Act are entitled to five days*. The reasons were very clear. We have seen the importance of having workers stay home when they are sick, during the pandemic. I think those are some of the real issues that we are trying to deal with, with this.
>
> * * *
>
> To strengthen the paid sick leave entitlement and ensure that all workers covered by the Employment Standards Act receive that benefit, the second part of these legislative changes will remove paid sick leave from the meet-or-exceed clause in section 3 of the act. That way, eligible workers who do not currently receive at least five paid sick days under their collective agreement will now be entitled to this benefit.
>
> This is the right thing to do. The benefit of paid sick leave – we have canvassed this in this House quite a bit – includes a healthier, happier and more productive workforce. Those benefits far exceed the modest cost of the workers taking a sick day when they need it. (Hansard, March 29, 2022, at pp. 5411-12; italics added)

As BCPSEA's position depends, in part, on whether TTOCs and casual EAs have been "scheduled" to work before becoming ill or injured, I note a further exchange in the Hansard

debates regarding Bill 19. The Opposition critic raised the scenario of a part-time employee who may be working for two or three different employers, and thus be is entitled to 10 to 15 days of paid sick leave, as compared to an employee who works for a single employer and is only entitled to five days. The critic faulted the legislation because "that inequity continues to exist" (Hansard, March 29, 2022, at p. 5413). The Minister responded as follows:

> … I just want to address that we canvassed that particular area, I recall clearly, about part-timers working for more than one employer. *I made it clear, but I want to make it clear again today, that you are entitled to your paid sick day only on a day that you take off when you are scheduled to work.*
>
> If you're working at employer A and you work one day there and you become sick the next day, *if you were not scheduled to work, then you are not entitled to the sick pay*. If they go and work at employer B, where they are working part-time, the same thing applies there. If they are sick, they're staying home. *But if they were not scheduled to work at employer B, C or a number of employers where they were working, they are not entitled to it. I just want to make that clear*. (*ibid*; italics added)

The foregoing exchange undoubtedly served as the basis for an example found in the Ministry of Labour's online *Guide to the Employment Standards Act and Regulations* regarding "Illness or Injury Leave":

> More than one employer
>
> If an employee works 2 part time jobs at the same time, they get 5 paid sick days per job. If they work multiple part time jobs throughout the year, they get 5 paid sick days per job (after 90 days of employment with each job). This is no different from eligible part-time or casual employees being entitled to an average day's pay for statutory holidays or to vacation pay from each employer they are employed with. Employment entitlements and obligations are specific to each employment relationship.
>
> Example: An employee has been employed for longer then 90 consecutive days by Top Choices Restaurant, ABC Hotel and Coffee Time Café. The employee has worked shifts for all three employers in the last 30 days. On January 8th, the employee was scheduled to work 8 hours for Top Choices Restaurant and afterwards, 4 hours at Coffee Time Café. The employee called in sick to both employers for both of January 8 shifts.

> The employee is entitled to an average day's pay (based on the formula set out in section 49.1) from both Top Choices Restaurant and Coffee Time Café. The amount of wages each employer owes is not based on the hours of work the employee was scheduled for on January 8. Rather, each employer owes an average day's pay based on the wages earned or paid to the employee in the previous 30 days and the number of days worked. ABC Hotel does not owe the employee any wages, because the employee wasn't scheduled to work and didn't need to call in sick with them. The employee has now used up one paid sick day from Top Choices Restaurant and one paid sick day from Coffee Time Café. The employee is still entitled to 5 paid sick days from ABC Hotel.

VII. ANALYSIS

The Unions submit that TTOCs and casual EAs are entitled to Paid Leave with respect to a work assignment where, but for the illness or injury, the TTOC or the casual EA would have been offered and accepted the assignment[2]. They say that an interpretation which requires employees to have been scheduled for the assignment before their illness or injury began should be rejected.

BCPSEA submits that Section 49.1 provides for a paid leave, and such leaves are provided to employees who wish, or need, to be excused from an obligation to perform work. Thus, TTOCs and casual EAs who have already been assigned to work, and who later become ill or injured, are eligible for Paid Leave. However, Section 49.1 does not require employers to offer a work assignment to an employee who, at the time of the offer, is already unavailable to perform the assignment, even if that unavailability is due to illness or injury. BCPSEA says the Unions are seeking to establish an entitlement to Paid Leave before they have established an entitlement to work from which the leave is taken. Further, it says the Unions seek to have employers offer work to casuals who cannot actually perform the work, for the sole purpose of obtaining Paid Leave from the work they were never going to perform. As a result, BCPSEA says the grievances seek something "greater than leave".

[2] The Unions also maintain that directives by school districts to TTOCs and casual EAs to mark themselves "unavailable" when they are ill or injured so they will not receive a call-out, when they would have worked but for the illness or injury, breach Section 49.1(1)(a) of the *ESA*. However, by agreement, that issue is not being addressed in this award.

BCPSEA also maintains that the Unions' position "hinges on an assertion that 'but for the illness', a casual *would have* worked" (submission at paragraph 15; italics in original). However, simply because a casual is offered work does not mean they would have accepted the offer. BCPSEA maintains casuals routinely do not accept assignments that are offered to them. Therefore, a blanket statement that "but for the illness" a casual who is offered work would have accepted the offer and performed the work is a fallacy. It characterizes this as a "fundamental flaw" in the Unions' position.

The foregoing précis is intended to capture only the core elements of the parties' respective positions. There are numerous arguments advanced on both sides in furtherance of those positions, and I will begin with BCPSEA's contention in oral argument that TTOCs do not hold a "position" from which they can take leave. Based on the local hiring language, BCPSEA characterizes TTOCs as "people on a list" who are hired on day-to-day basis as casuals.

There are several problems with this line of argument. First, it reads in words not found in the legislation; namely, "leave *from a position*". Second, I do not accept that the local hiring language should be relied on for purposes of interpreting the statutory leave provision and determining legislative intent. Next, this line of argument is inconsistent with BCPSEA's acknowledgment that TTOCs are entitled to Paid Leave in circumstances where they have been scheduled to work before becoming ill or injured. Finally, and in any event, a finding that TTOCs hold a position does not alone establish an entitlement to paid leave. Nor do the Unions maintain that holding a position on a list and being available for work is sufficient.

Following the direction in *Rizzo & Rizzo Shoes Ltd*., the words in Section 49.1 of the *ESA* should be read "in their grammatical and ordinary sense" harmoniously with the scheme and object of the Act and the intention of the Legislature. The *Concise Oxford English Dictionary* defines "leave" in part as meaning "cease attending or working for (an organization, school, etc.)". I accordingly find that the plain meaning of the words "paid leave" in Section 49.1 is paid leave

from work or from a work assignment[3]. An obvious example is an employee who regularly works Monday to Friday and becomes ill on a Friday morning. Assuming they have more than 90 consecutive days of employment and have not taken any paid leave in the calendar year, they would be entitled to Paid Leave on the Friday. However, even if they remain ill, they would not be entitled to Paid Leave for the ensuing Saturday and Sunday because they would otherwise not have been at work.

This hypothetical situation highlights what ultimately becomes a rather narrow divide between the parties' positions. The Unions do not assert an entitlement to Paid Leave where a TTOC or casual EA would not have worked an assignment if the illness or injury did not occur, including "where a TTOC is unavailable for a reason unrelated to injury or illness, where a work assignment would not have been offered to them if they were healthy, or where they would not have accepted the work assignment if they are healthy" (BCTF reply submission at para. 42). The Unions acknowledge there is no entitlement to Paid Leave in those circumstances because it would result in a "windfall". Once again, the Unions contend the entitlement "… is only triggered in circumstances where but for the injury or illness a TTOC would have been offered a work assignment and would have worked the assignment" (*ibid*; underlining in original). BCPSEA does not agree, although its position is only slightly removed when it argues that "… the intent of Section 49.1 is to replace wages, income, or pay, that an employee would otherwise receive from a *scheduled* assignment" (submission at para. 79; italics added).

Therefore, the difference between the parties effectively reduces to the question of whether paid leave from work (or from a work assignment) requires the work (or work assignment) to have been "scheduled"? The immediate answer is that this is not an express requirement in the statute. There is, accordingly, merit to the BCTF's submission that BCPSEA is urging an interpretation of Section 49.1 that would effectively rewrite the statute to introduce the "scheduled" pre-requisite to claiming Paid Leave. Nor, with one exception, was there any mention of the word "scheduled" in the lengthy Legislative Debates. One instead finds numerous statements regarding the dilemma which Paid Leave under Bill 13 was intended to avoid: "No worker should have to choose between

[3] BCPSEA essentially agrees with this interpretation when it says "leave" means "leave from the obligation to perform work" (submission at para. 64).

going to work sick or staying home, losing pay" (Hansard, May 11, 2021, at p. 1769). The purpose was reiterated by the Minister of Labour when he spoke to Bill 19: "Nobody should be forced to make that decision to go to work sick or stay home and lose wages" (Hansard, March 29, 2022, at p. 5411). And it is critically important to recognize that the "meet or exceed" test was removed under Bill 19 so that "*all workers* in British Columbia under the Employment Standard Act are entitled to five days [of Paid Leave]"; moreover, there was an explicit reference to "*casual employees* who come in to replace those full-time workers" being covered (*ibid*, at p. 5412; italics added).

In my view, there is no material distinction between a casual employee who accepts an offer of a work assignment on the evening before the assignment and then wakes up ill the next morning, and a casual employee who becomes ill early in the morning and receives an offer for an assignment that day. Both employees must decide whether to go to work sick or to stay home and lose pay – that is, unless they are both entitled to Paid Leave. The dilemma faced by the employee called in to work on the morning of the assignment is succinctly captured in the BCTF's reply submission:

> … A TTOC who is injured or ill when they receive a call out faces precisely this choice. They can either tell the dispatcher that they are sick and lose wages or they can accept the work assignment and go to work sick. The fact that school districts advise employees to not report to work sick does not somehow mean that the TTOC does not have any wages to lose by not accepting the assignment. (para. 50)

The interpretation urged by BCPSEA would create divergent outcomes depending on when employees are contacted in relation to their illness or injury, as opposed to the actual date of the assignment. This is contrary to the presumption that the Legislature did not intend unjust or inequitable results: *Ontario v. Canadian Pacific Ltd.*, [1995] SCJ No. 62, at para. 65.

BCPSEA argues at several junctures that employers are not required to offer assignments to employees who "are unavailable for work". That may be true in a general sense although I will address the authorities it advances later in this award. At this juncture, the actual circumstances at issue should be examined more closely.

TTOCs are contacted by school districts "to offer assignments" that the TTOCs may "accept or decline" (Agreed Facts at paras. 39 and 41). Thus, what is at issue is whether school districts can withdraw the offer that is being made because TTOCs properly (and consistent with the Legislature's objective) disclose that they are ill or injured, with the resulting consequence that the TTOCs will not be entitled to Paid Leave. In effect, by withdrawing or otherwise not continuing with an offer that is being advanced, a school district is denying access to the statutory benefit.

I agree additionally with the Unions' arguments that BCPSEA's position of requiring a work assignment to be "scheduled" creates unjust and arbitrary outcomes[4]. When casual employees were expressly included Section 49.1, one can presume the Legislature knew that such employees are typically called to work on an irregular and "last minute" basis. The Unions legitimately argue that entitlement should not depend on when the offer of work is made. If that is determinative, then "… whether you receive paid sick leave depends on when you accepted work in relation to your illness, rather than on the existence of the illness itself at a time when the employee otherwise would have worked" (joint submission at para. 89). Once again, there is no express requirement that an illness or injury develop after an employee has been scheduled to work. This brings to mind a distinction noted by the trial judge in the *Rizzo* proceeding[5]:

> The trial judge properly noted that, if the ESA termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees "fortunate" enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on day the bankruptcy becomes final would not be so entitled. … (para. 28)

In overturning the Court of Appeal's reversal of the trial judge, the Supreme Court found it unacceptable "… to distinguish between employees *merely on the basis of the timing of their*

[4] One can readily envisage any number of arbitrary outcomes resulting from BCPSEA's position. Take, for instance, an asymptomatic TTOC whose partner has Covid. If the TTOC tests positive and then receives a call out, BCPSEA would deny access to Paid Leave. However, if the TTOC accepts the call out and then, out of an abundance of caution, tests before leaving for school, receives a positive result and advises the school district that they are ill, the claim would presumably be allowed.

[5] The trial judge would have allowed the claims under the Ontario *ESA* as unsecured claims provable in bankruptcy.

dismissal" (para. 29). One can substitute the phrase "merely on the timing of their offer of a work assignment" for the italicized words in the foregoing quotation. I likewise find that one should not distinguish between an employee who is fortunate enough to receive an offer on the day before an assignment when they are healthy, and an ill or injured employee who receives an offer on the morning of the assignment, where both employees are unable to work on the actual day of the assignment due to illness or injury.

The timing of an illness or injury in relation to when an offer of work is made should be irrelevant – the proper inquiry is whether an employee is ill or injured at a time when they otherwise would have worked. This is a factual inquiry that can be addressed on a case-specific basis if there is a legitimate reason to question whether an employee would have accepted and worked a particular assignment. Where the record shows that a TTOC has routinely accepted work assignments of the nature being offered by a school district, but declines a specific opportunity on the grounds they are ill, then there should not be any controversy. Conversely, when the offer is made on a day when a TTOC often has other commitments (e.g., child care), the circumstances may warrant closer scrutiny. But these potential evidentiary challenges should not be raised as a basis for precluding access to the statutory benefit from the outset. Moreover, the *ESA* provides a measure of protection for employers against illegitimate claims. Under Section 49.1(2), "… the employee must, as soon as practicable, provide to the employer reasonably sufficient proof that the employee is entitled to leave under this section".[6]

In my view, the Unions' interpretation of Section 49.1 extends Paid Leave to as many employees as possible and is consistent with the stated intention of the Legislature. As written by Arbitrator Knapp in *Tech Highland Valley Copper Partnership*, the intent "… is to provide employees with wage replacement to take leave when ill, so they do not have to struggle financially with the decision to go to work ill while at the same time helping to minimize transmission of the virus [and] … to put employees in a make whole position by avoiding financial harm due to illness or injury" (para. 21).

[6] Other than this observation, I make no determination regarding who may bear the evidentiary onus where there is a factual dispute over whether a TTOC would have accepted a work assignment but for their illness or injury.

On the other hand, accepting BCPSEA's interpretation limits the scope of the statutory entitlement. As stated in *Sullivan On The Construction of Statutes* (Sixth Edition), an interpretation that would frustrate or defeat the Legislature's purpose should be rejected if there is a plausible alternative (para. 9.67). The approach propounded by BCPSEA is exacerbated by the fact that the various call-out processes are largely controlled by the school districts and the vast majority of work assignments are offered on the morning of, or the evening before, the assignment. This means that there is a much higher probability that TTOCs and casual EAs who will be ill on the day the work is to be performed will be ill at the time the assignment is offered. And, once again, the intent behind the enactment of Paid Leave was to provide financial support for workers who have the difficult choice to make between going to work sick or not being paid.

BCPSEA's argument that employers are not required to offer assignments to employees who are "unavailable for work" relies in part on the analysis in *UNA, Local 115 -and- Calgary Health Authority* (2001), 102 LAC (4th) 385 (Smith). The case concerned a complaint that the employer had discriminated against a pregnant employee when it failed to offer her a temporary part-time position at a medical centre. The employer said the grievor had not been denied the position because she was pregnant, but because there was a reasonable certainty that she would not be able to fulfill the term of the position. The issue addressed by the arbitration board was whether "… a core component of the [temporary] position is availability for the term posted …" and, if so, whether the employer's failure to grant the position to the grievor because she was unavailable due to pregnancy constituted prohibited discrimination (para. 18). BCPSEA relies on broad statements by the majority of the arbitration board to the effect that availability is an implied condition in any offer of employment (see also *UNA, Local 115 v. Calgary Health Authority*, 2004 ABCA 7, citing *Mongrain v. Canada (Department of National Defense)*, [1992] 1 FC 472 (Fed. C.A.), which upheld the trial judge's decision to quash the majority award). However, a closer reading of the award demonstrates that the outcome was premised on the majority's finding that "availability" was a "relevant attribute" to be considered pursuant to article 14.04 of the parties' collective agreement (paras. 25 and 26). Moreover, it was agreed by the parties that, had the grievor been applying for a permanent position (rather than the temporary position), she would have been awarded the position (para. 2).

Thus, the majority award in *Calgary Health Authority* can be quickly distinguished because the outcome turned primarily on specific contractual language. Further, TTOCs are not filling a posting or being hired into a position when they are called with the offer of a work assignment. Additionally, the statement from the Court of Appeal's judgment relied on by BCPSEA must be considered in its broader context:

> Availability is an implied condition in any offer of employment and contract for service: *Mongrain* at para. 35. However, the right of an employer to require availability must be balanced against the employee's right to not have availability requirements result in prohibited discrimination. …
>
> * * *
>
> [The grievor] would have been available for at least three months of the temporary position. This case falls squarely within the circumstances contemplated by the Collective Agreement, where the parties agreed the Hospital would provide maternity benefits, including leave. A finding of undue hardship to the Hospital, meaning that it could insist that pregnant applicants for temporary positions commit to being available for the whole term of a position, would bring into question when maternity benefits would ever be payable by the Hospital to a temporary employee. (paras. 32 and 34)

The present discussion is likewise not advanced materially by BCPSEA's reliance on the general statement in *Alman Publishers and Printers (Espanola) Co. -and- USWA, Local 7282* (1995), 39 CLAS 56 (Satterfield), that "… an employment relationship places a fundamental obligation on an employee to be available to work for his/her employer" (para. 12). The award concerned the discharge of an employee for excessive absenteeism, and the arbitrator continued:

> ... It is inherent in that obligation that an employee has a responsibility to keep his/her employer informed when circumstances arise which prevent the employee from fulfilling that fundamental obligation. One arbitrator described it in the following terms in *Re Stauffer Chemical Co. of Canada Ltd. and Int'l Union of District 50, Local 13286*, (1970), 22 LAC 42 (Brown) at p. 44, as quoted in *Re MacMillan Bloedel Industries Ltd., Harmac Division and Pulp, Paper and Woodworkers of Canada, Local 8* (1979), 22 L.A.C. (2d) 259 (Slutsky), at p. 264:
>
> > An employee's obligation is to keep himself available and able to work for his employer, *and while recognizing that emergencies or illness may prevent an employee from working*, there remains a responsibility on the employee, regardless of shop rules, to keep his employer informed. If the

> employer does not accept the explanation, then that may be another matter, but certainly an employee must advise the company if he is to be absent from work. The need for this is obvious for the efficient operation of a plant. An employee who relies on others to carry out his responsibilities does so at his peril, as the prime obligation is on him alone and he must answer for any failure by his agent for that purpose. (*ibid*; italics added)

In this regard, CUPE does not dispute that, when sick or injured casual employees are called with the offer of a work assignment, they typically need to advise the employer that they are unavailable, as opposed to simply ignoring the call or failing to show up for work.

The question here is whether unavailability *due solely to illness or injury* should preclude access to Paid Leave. In my view, the two awards cited immediately above demonstrate that "availability for work" is not absolute. It is subject to exigencies such as illness or injury, and it must also be balanced against the rights of employee to access benefits. I find the latter can include the right of all employees, including casuals, to access Paid Leave under the *ESA*.

As recounted already, there is one passage in the Legislative Debates where the Minister stated that "… you are entitled to your paid sick day only on a day that you take off *when you are scheduled to work*" (Hansard, March 29, 2022, at p. 5413; italics added). During oral argument, all counsel proffered various interpretations of what was intended by this statement. In my view, the complete passages quoted earlier in this award demonstrate that the Minister was concerned solely with the circumstances of "part-timers working for more than one employer" (*ibid*), and his response to the Opposition critic should not be given any broader construction. The statement is not incongruent with the Unions' position that there is an entitlement to Paid Leave where employees would be scheduled to work but for their illness or injury. Nor should this isolated statement somehow diminish the unequivocal Legislative intent that "Nobody should be forced to make the decision to go to work sick or stay home and lose wages" (Hansard, March 29, 2022, at p. 5411).

I have not overlooked BCPSEA's submission that Section 49.1 is "placed in Part 6" of the *ESA* and should be given an interpretation which aligns with other provisions in the same Part.

There is certainly merit to his contention; however, I do not perceive any inconsistency with what has been written to this stage and the other leave provisions in the statute.

To elaborate, I have found that Section 49.1 contemplates Paid Leave from work or from a work assignment. Part 6 provides for various types and durations of leave[7]. Thus, the bare word "leave" does not necessarily have the same meaning throughout Part 6 and the precise context must be considered. Nonetheless, as BCPSEA accurately observes, Section 54 applies to all leave requests to which an employee is entitled under the *ESA*. Under Section 54(3)(a), as soon as a leave ends, the employer must place the employee "… in the position the employee held before taking leave under this Part". When the Paid Leave of a TTOC under Section 49.1 ends, they remain on the school district's TTOC list for future call outs. This complies with Section 54(3)(a). There is likewise no incompatibility with Section 56 of the *ESA* which deems the services of an employee on leave to be continuous for the purposes of certain calculations (including annual vacation entitlement) and benefits.

BCPSEA relies as well on Section 2(b) of the *ESA* which states that the purposes of the Act include "promot[ing] the fair treatment of employees and employers". It says the Unions' position that casuals are entitled to Paid Leave without having a scheduled assignment results in the unfair treatment of employers and a windfall of benefits to employees. It maintains further that the Unions' position creates an incentive for casuals to accept work they would not otherwise have accepted solely for the purpose of receiving the statutory pay, and "… requires a school district to hire the casual for an assignment and subsequently provide [Paid Leave] to a casual who has no intention or ability to perform the work of the assignment" (submission at para. 69). BCPSEA's submission continues:

> This position [of the Unions] results in clear and obvious absurdities, particularly with respect to fairness and the purposes of the ESA. It is absurd to find that a school district is required to hire a casual who has no intention, or ability, to work the assignment.

[7] The fact that Part 6 includes, for example, parental leave of up to 62 consecutive weeks further undermines BCPSEA's position that leave can only be taken from previously "scheduled" work.

> Further, the unfairness to the employer is manifold; if the employer is required to hire casuals into assignments they cannot work for the sole purpose of giving them a leave from the entire assignment, there is no restriction on the number of times this may happen in respect of a single absence. If a regular teacher is absent due to illness and a TTOC who is also unable to work due to illness must be hired for the assignment and then given [Paid Leave] from the assignment, the regular teacher's absence remains unfilled. The district must move on to offer the assignment to a second TTOC, who, according to the Unions, must also be hired for the assignment despite being too ill to work and must also be paid [Paid Leave]. The regular teacher's absence is still unfilled. The district must keep offering the assignment to TTOCs until it is filled. The Unions' position would require districts to hire multiple TTOCs for the single absence, none of whom are actually able to perform the work, and pay them all [Paid Leave] for the day. It is hard to imagine a more unfair scenario for employers in relation to [Paid Leave].
>
> In other words, put in the framework of the Unions' argument, if a casual is offered an assignment but they decline due to illness, then the first casual will receive [Paid Leave] without ever accepting the assignment and a second casual will then be offered the assignment. If the second casual declines due to illness, then under the Unions' submission, the second casual would also be provided [Paid Leave] under the ESA, and so on. There is no end to the scenario, and a school district would be obliged to offer the assignment to a limitless number of individuals and provide them all with [Paid Leave] notwithstanding their lack of intention or ability to work the assignment at the time the offer of work is made. (paras. 70-72)

It will be immediately apparent that these submissions are premised on the now-rejected argument that TTOCs are "hired" for a particular work assignment. Further, BCPSEA's arguments inherently impugn the integrity of TTOCs and casual EAs; namely, that they will accept assignments that they would otherwise have no intention of working in order to claim Paid Leave. While that potential must be acknowledged, it is not an outcome condoned by the Unions. As reiterated in the BCTF's reply submission, the Unions do not assert an entitlement to Paid Leave where a TTOC would not have worked an assignment if the injury or illness had not occurred, including where "… they would not have accepted the work assignment if they were healthy" (para. 5). If there is a suspected situation of misuse, it can be addressed specifically by the school district.

BCPSEA's concern that school districts will be required "to hire multiple TTOCs for [a] single absence" is somewhat speculative. Further, to the extent that this risk exists, CUPE fairly

points out in its reply that the prospect is not restricted to circumstances where a casual employee is offered a shift on the day it becomes available. For instance, where a casual employee is assigned to cover a longer absence of a regular employee, the casual may become ill (and eligible for Paid Leave), and another casual employee will be called as a replacement (who might also have a potential claim if they too become ill).

In any event, I do not regard the hypothetical events postulated by BCPSEA as creating a "windfall" for casual employees or placing an unfair burden on employers that was not intended by the Legislature. The competing interests are succinctly addressed in CUPE's reply submission:

> The Union acknowledges that the introduction of Paid Leave for illness and injury into the ESA will have a cost for Employers, and there may be some unusual situations that arise where the burden of that cost seems unfair. However, prior to the introduction of paid leave, the unfairness fell on a worker who, through no fault of their own fell ill, and lost the ability to earn wages during the time of their illness (unless of course they chose to attend work despite their illness). The Union submits that the legislature clearly chose, for policy reasons we have already discussed, to shift that burden onto the Employer, at least for the first five days of illness. (para. 9.1)

The concept of "fairness" in relation to Paid Leave was also canvassed in *Canadian Maritime Engineering Ltd*.:

> … this subjective assessment [of fairness] has limits and cannot avoid an obligation that arises from the plain operation of the statute. The Opposition critic accurately observed that Bill 19 "… does put a cost burden directly on the backs of B.C. employers". … (para. 59)

While much of the analysis to this point has considered the ability of TTOCs to claim Paid Leave under Section 49.1 of the *ESA*, the reasoning applies at least equally to casual EAs such as the Grievor who is covered by the CUPE, Local 5523 Collective Agreement. If anything, her circumstances are stronger because temporary employees have certain contractual rights to be placed on the seniority list and, under Article 10(c)(iii), "… for the purpose of call-ins to relief or temporary work, seniority will be recognized for temporary employees". Pursuant to LOU #17, "[e]mployees on the call-out list are agreeing to be available for all un-posted temporary work for

which they are qualified unless they state a specific restriction which is agreed upon by the employer". Further, if an employee is not on an approved leave and does not accept offered work for a minimum of 12 offered shifts per half-year, they lose their seniority. As conceded by BCPSEA in oral argument, there is more in the CUPE Collective Agreement to support the Union's position, including the expectation that casual EAs will accept work assignments unless they are on "leave".

VIII. DECISION

In answer to the common issue presented by the Unions' grievances, I have concluded and declare that TTOCs and casual EAs are entitled to claim Paid Leave under Section 49.1(1)(a) of the *Employment Standards Act* where they are called by their school district with the offer of a work assignment, and they would have accepted the assignment "but for" an illness or injury. This interpretation accords with the express intentions of the Legislature that all workers, including casual employees, are entitled to five days of paid leave for personal illness or injury after 90 consecutive days of employment, and that "[n]obody should be forced to make [the] decision to go to work sick or stay home and lose wages". Whether an employee would otherwise have worked a particular assignment is a question of fact that may need to be determined on a case-by-case basis.

I hereby order school districts to comply with the foregoing interpretation of the *ESA* and retain jurisdiction to address any remedial issues that cannot be resolved by the parties. This includes, without limitation, the entitlement of TTOCs who were improperly denied Paid Leave and any difference regarding the Grievor's entitlement under the CUPE Local 5523 Collective Agreement.

I have continuing jurisdiction as well to determine the remaining issues raised by the BCTF's policy grievance that have been held in abeyance pending this award.

Finally, I acknowledge with appreciation the thorough and thoughtful presentations of all counsel in what was aptly characterized as “a challenging case”.

DATED and effective at Vancouver, British Columbia on August 19, 2024.

JOHN B. HALL
Arbitrator