B E T W E E N:

CARLETON UNIVERSITY ACADEMIC STAFF ASSOCIATION

("CUASA")

- and -

CARLETON UNIVERSITY

("THE EMPLOYER")

AND IN THE MATTER OF GRIEVANCES
FILED ON BEHALF OF SAMUEL BOTTOMLEY

O.B. SHIME, Q.C. SOLE ARBITRATOR

APPEARANCES:

Mr. Stephen Bird	Counsel and others for the Corporation
James McDonald	Counsel and others for the Association

A hearing was held at Ottawa in this matter on
November 6, 2009

AWARD

In this matter, the parties have agreed to the following statement of facts.

1. The Carleton University Academic Staff Association ("CUSAS") represents, inter alia, faculty members appointed to term appointments at Carleton University ("University" or "Employer"). At all material times, CUASA and the University were parties to a collective agreement for the period from May 1st, 2006 to April 30th, 2009 (the "collective agreement").

2. On or about September 7, 2008, CUASA filed a grievance on behalf of Professor Samuel Bottomley ("Professor Bottomley" or "the grievor) alleging that payment of sick leave benefits had not been made for the entire six month period after his absence on account of illness from June 11, 2008, as provided for by the collective agreement, and that the Employer had stopped payment of those benefits. The remedy sought was the provision of sick leave and related benefits retroactive to July, 2008, and the continuation of such benefits while Professor Bottomley was on long term disability.

Professor Bottomley's Employment History

3. Professor Samuel Bottomley accepted a one (1) year appointment as an Assistant Professor at Carleton University in 2004. He received successive one-year renewals of that appointment until he was advised by letter on or

about November 16, 2007 that his appointment would not be renewed and would end on June 30, 2008.

Benefit and Retirement Plan Language in the Collective Agreement

4. As a faculty member covered by the terms of the collective agreement, Professor Bottomley was a beneficiary in the University's Group Life Insurance Plan and its Long-Term Disability Plan (Articles 40.1(a)(i) and (ii) of the collective agreement).

5. Professor Bottomley was also a member of the Carleton University Retirement Plan throughout the course of his employment with the University (Article 40.8 of the collective agreement).

6. Professor Bottomley had opted out of other benefit plans such as the Dental Plan and the Extended Health Care Plan to which he would otherwise have been entitled.

Professor Bottomley's Sick Leave

7. By e-mail dated June 14, 2008 Professor Bottomley advised the University that he had been "incapacitated by a serious illness" and that he "applied for sick leave and long-term disability from the University".

8. On or about June 16, 2008, Professor Bottomley supplied medical information to the Employer supporting his claim for sick leave.

9. Professor Bottomley received sick leave benefits from June 10th until June 30th, 2008. He did not receive any sick leave benefits after June 30th, 2008, or for the balance of the one hundred and eighty (180) calendar days referred to in Article 20.5 of the collective agreement.

10. On or about June 25, 2008, Jacques Charron, Benefits Officer for the University advised Professor Bottomley as follows in an e-mail dated June 25th, 2008:

> Lori East informed me that she passed along to you the information regarding how the sick leave process works while you are still employed with Carleton vs. what happens to the sick leave and Long Term Disability after your term ends with Carleton. Unless the information she gave you is unclear, I will not get into this aspect of the leave.
>
> With respect to your benefits (Life Insurance, Extended Health Care, Dental Plan and Pension Plan) being reinstated if you are accepted on Long Term Disability, during our telephone conversation I mentioned that in my opinion they would probably be reinstated that I would verify all information before confirming it to you. After verification, I must inform you that because your term ends at the end of June 2008 and once there is no longer a relationship between the employee and Carleton University, the benefits are terminated and cannot be reinstated even if the ex-employee is accepted on Long Term Disability.
>
> Once your term ends with Carleton, there's no longer a relationship between yourself and Carleton. If you become eligible for LTD after your term has ended, the set relationship is then between yourself and the insurer, Great West Life. The reason that you still apply for LTD after your termination date with Carleton is that your sick leave started while employed with Carleton (entitled to the benefit) and your elimination or waiting period continues for 180 calendar days from day one of your illness

11. Following the termination of his appointment on June 30, 2008, Professor Bottomley was given the option of converting his Group Life Insurance Plan coverage to individual coverage, at his own expense, and he accepted that offer. Professor Bottomley paid $44.00 per month for that individual life insurance coverage but subsequently stopped payment and let the life insurance coverage lapse, rather than pay an increased premium after the first year.

12. In the period after June 30, 2008, the end of his final term appointment, and up until December 12th, 2008, when his LTD benefits commenced, Professor Bottomley:

    (1) did not receive any sick leave benefits;

    (2) did not continue to accrue service in the Carleton University Retirement Plan; and

    (3) received continued life insurance coverage at his own expense.

Professor Bottomley's LTD Benefits

13. By letter dated December 22nd, 2008, Professor Bottomley was approved for long-term disability benefits ("LTD benefits") from December 13th, 2008 to January 31st, 2009. Professor Bottomley continues to be in receipt of LTD benefits and is presently also in receipt of a CPP disability pension.

14. In the period after December 12th , 2008, when he was (and still is) in receipt of LTD benefits, Professor Bottomley:

(1) receives LTD benefits

(2) does not continue to accrue service in the Carleton University Retirement Plan; and

(3) did for a period of time continue to receive life insurance coverage at his own expense.

15. Article 20.5(a) of the collective agreement provides for Sick Leave as follows:

> 20.5
> (a) In cases where employees of the bargaining unit are legitimately absent from their duties because of illness, they shall be entitled to full salary and other benefits for a period of one hundred and eighty (180) calendar days or until benefits under the Group Long-Term Disability Plan come into effect, whichever may be the shorter of the two (2). The employer shall be entitled to request a medical certificate indicating that the employee is unable to fulfill his/her duties, in all cases of absence in excess of five (5) working days. Employees shall notify the appropriate dean of the University Librarian of their absence and its estimated duration. Insofar as reasonable, other employees shall assume the workload of persons on sick leave in order to ensure that scheduled academic activities need not be cancelled.

16. Professor Bottomley received a personal statement of benefits dated 2007 which provided (Tab 1, page 7, income protection) at no cost to you.

The Group Insurance Policy

17. The CUASA Benefits booklet provides as follows at page 27 –p Tab 3 (in file at 5. Section iii: income protection benefits

Long Term Disability Plan

18. The Carleton University Academic Staff (CUASA) Employee Benefits booklet dated June 17 (2008) "At a Glance" provides p. 22 chart and page 3 chart

Benefits	Which Covered	Who Pays	When Coverage Ends
Sick Leave	180 calendar days	Carleton U.	on the evidence of etc.

The Association acknowledged that there was no issue with respect to Professor Bottomley's (referred to as the grievor) termination. The grievor received sick leave benefits until June 30, 2008, the date his employment terminated. The grievor is entitled to and receives long term disability benefits from the insurer, but claims post termination sick leave benefits for the period July 1, 2008 until December 12, 2008 when he commenced receiving LTD benefits.

The Association submits that pursuant to Article 20.5(a), the grievor is entitled to full salary and other benefits for one hundred and eighty (180) calendar days and that full salary, in context, is the sick leave benefit. The Association further submits that the various benefit plans are consistent with Article 20.5 as well as the concept of maintaining benefits. For example, life insurance remains in force for 31 days past termination. Also, if a person qualified for LTD benefits, participation in other employee benefits continues "subject to eligibility rules of those plans".

The Association further submits that the Carleton University Benefit booklet is inconsistent with the language of the collective agreement. And, finally, the Association argues that Article 20.5(1) entitles the grievor to one hundred and eighty (180) days of sick leave as long as that person is legitimately absent and the Article does not specifically terminate the benefit when a person's employment ends. Also, relying on a number of cases, the Association contends that the grievor's status at the time of his termination was that of an employee receiving sick benefits and that his status prevailed and continued past the date of termination. The Association further argues that as the grievor was in receipt of benefits, his right to receive sick benefits became vested.

The University claims that when the grievor's employment was terminated, it constituted a change in status. The University submits that Article 20.5(a) of the collective agreement requires employees to be "legitimately absent from their duties" to be entitled to sick leave benefits, and since the grievor is no longer an employee he has no duties and therefore is not entitled to sick leave. According to the University, Article 20.5(a) also contemplates other employees assuming "the workload of persons on sick leave" to prevent scheduled activities from being cancelled, but the grievor does not have a workload. In sum, the University maintains that the grievor does not fall within the class of persons who are entitled to sick leave because he does not have any duties or workload. Also, the University claims that the Employee Benefits booklet demonstrates sick leave coverage for employees ends on "... the date your employment with Carleton University ends..." and that booklet is well known to the parties.

Further, the University argues that Article 40 is clear in extending health benefit plans to employees only and where the parties intended to extend health benefits beyond the period of employment, they did so in the case of retired employees pursuant to Articles 40.9 and 40.10, which suggests that the sick leave benefit for the grievor was not extended. Also under the Group Insurance Policy in order to become insured "... a person must be either employed by the employer or be a retired employee" and also employee insurance terminates. ".. The date [the employee] ceases to satisfy the activity at work requirement". Nor is the grievor insurable because he is not a full time employee. And, finally, the University argues that sick leave is, in effect, a leave provision and differs from other benefits which are insurable. The University also relies on a number of cases suggesting that benefits terminate when employment terminates.

By way of reply, the Association maintains that once the grievor, as an employee, commenced receiving sick leave benefits, his entitlement vested. The Association does not claim that the grievor remained an employee and although he is no longer covered his entitlement continues; there is a distinction between coverage and entitlement. The Association further argues that sick leave benefits are part of a large continuous insurance scheme and bridges the period until the grievor receives long term disability benefits.

Having regard to the submissions, I determine the collective agreement is not clear on its face because it provides that employees who are,

> "legitimately absent from their duties because of illness, .. shall be entitled to full salary and other benefits for a period of one hundred and eighty (180) calendar days or until benefits under the Group

> Long Term Disability Plan come into effect, whichever may be the shorter of the two (2)".

According to the plain wording of the collective agreement, once entitled, an employee shall receive benefits for 180 days or until benefits under the Group Long Term Disability Plan come into effect. The entitlement does not terminate as the result of the termination of an employee's contract, unless the language requires a person to be an employee in order to continue receiving the benefits.

The Association relied on a number of cases which apply the "fundamental reason for absence test", in order to determine the grievor's status. In those cases, arbitrators have considered what first caused the employee to be absent. Thus, in this case, the Association argued since the grievor was initially absent because of his illness or disability that reason for being absent prevails over his termination at a later date, and, accordingly, he is entitled to a continuation of his sick leave benefits. The grievor's status according to the fundamental reason for absence theory is that of a person receiving and entitled to sick benefits.

However, an examination of the cases indicates that the fundamental reason for absence test is designed to determine the status of "employees" and the majority of cases deal with competing concepts of employee status. .*Re Canadian Steelworkers Union and Atlas Steels Co.* (1972), 24 L.A.C. 171 (J. F. Weatherall). *(illness v.vacation),* Re *United Automobile Workers Local 112 and De Havilland Aircraft of Canada,* (1970), 21 L.A.C. 236 (J. F.W. Weatherall) *(illness or injury v layoff, Re City of Toronto and*

Canadian Union of Public Employees, Local 43 (1974), 7 L.A.C. (2d) 160 (G.W. Adams). *(illness v.layoff), Re City of London and Canadian Union of Public Employees, Local 107* (1988), 34 L.A.C. (3d) 92 (W. B. Rayner). *(WCB v.layoff). Re Government of Province of Alberta and Alberta Union of Provincial Employees (Conroy-Rossall)* (1991), 20 L.A.C. (4th) 318 (W. D. McFetridge). (*illness v. maternity leave). Re Carleton University and C.U.P.E., Local 2424* (1992), 26 C.L.A.S, 67; 1992, CLB. 11028 (Thorne). *(parental leave v.non worktime). Re The Brown Shoe Co. of Canada Ltd. and U.F.C.W. Local 175*, (1998), 71 L.A.C. (4th) 19. (D. Starkman). *(sick leave v.vacation shutdown). Re Toronto (City) and C.U.P.E., Loc. 79* (Deadman) (1999), 81 L.A.C. (4th) 315 (L. M. Davie). *(pregnancy-parental leave v. layoff. Re Foothills School Division No. 38 and Alberta Teachers' Association,* (2005), 142 L.A.C. 230, (A.C.L. Sims, Q.C.). *(sick leave, maternity leave v. strike.*

Indeed, in one of the seminal cases, *Canadian Steelworkers Union and Atlas Steels Co.,(supra),* the learned arbitrator stated that "... the real issue is as to the characterization, **from the point of view of the grievor's employment**, of his status during the period July 20th – August 2nd...". The arbitrator further stated:

> "... it is the fundamental reason for the employee's absence from work which must govern the characterization of that period of absence".

If the fundamental reason for the grievor's absence was to be applied here, it is arguable that he was terminated by notice prior to applying for and receiving sick benefits and thus the fundamental reason for his not being at work after June 30th, 2008, was because he had been terminated. However, it is not necessary to deal with that issue because it is

clear and acknowledged by the Association that the grievor is no longer an employee and therefore his employment status is no longer in issue. The grievor is clearly a former employee and there is no need to characterize his employment status which is defined. In these circumstances, the fundamental reason for absence theory is not applicable.

However, there are a number of cases where individuals continued to receive disability benefits even though there was no continuing work, as a result of a strike or a plant shutdown. And, in some of those cases the collective agreement had expired, and/or the collective agreement relationship had ended, which is analogous to this case, where the collective agreement relationship with the grievor had expired. These latter cases approach the issue differently, but for the most part are informed by the decision of the Supreme Court of Canada in *Dayco (Canada) Ltd. v. C.A.W. – Canada*, (1993), 102 D.L.R. (4th) 609, [1993] 2. S.C.R. 230 and I now turn to consider this matter in the light of the decision in *Dayco* and subsequent arbitration cases.

In *Dayco*, the Supreme Court found that the arbitrator was correct in finding that group insurance benefits for retirees could survive the expiry of the collective agreement, if those benefits had vested at the time the employees retired. In October 1983, the employer's Hamilton factory was shut down and then permanently closed in January, 1985. The Company advised all retirees that their benefits would terminate as of June 30, 1985. The Company maintained, as the University does in this case, that it had no obligation to retired employees. The Supreme Court found that it was possible for the retirement benefits to survive the expiry of the collective agreement. The Court stated

that a collective agreement is like a fixed term contract which expires at the end of the term by mutual agreement. However, the Court further stated at p. 635, D.L.R.:

> "But the contract is not thereby rendered a nullity. It ceases to have prospective application, but the rights that had accrued under it continue to subsist".

In the result, the Court concluded that although there was no subsisting or continual contractual or collective agreement relationship, that accrued rights that had vested continued beyond the expiry of the contractual or collective agreement relationship.

The Association referred to the decision in *Re: Foothills School Division No. 38 (supra)* and *Alberta Teachers' Association, (supra)* where that Board decided that employees receiving sick leave and maternity benefits which commenced prior to a strike were entitled to those benefits during the period of the strike. That Board, relied on the decision of the Supreme Court of Canada in *Dayco Canada Ltd. v. C.A.W.- Canada,* (*supra*), where the Supreme Court decided that group insurance benefits for retired workers survived after a plant shutdown. That argument is analogous to this case where the University argued that since the grievor's contractual relationship with the University had terminated, there was no obligation to pay him sick leave.

Based on the Supreme Court's decision, the arbitration board in the *Foothills School Division* case, rejected that employer's argument that sick leave and maternity leave benefits do not survive the expiry of the collective agreement. The learned arbitrator concluded that:

> "If the benefit has vested or is accrued, then termination, by whatever means, does not alter that fact. *Dayco* holds specifically that the

> termination of an agreement is not its rescission and does not terminate accrued benefits ex-post facto".

The arbitrator further concluded that whether a benefit has accrued or vested depends on the wording of the collective agreement and

> "it may not be sufficient for the (employee's) entitlement to have accrued, but that the contingency that triggers the right to draw down on that benefit must have occurred"

and, therefore the grievors were entitled to the benefits since their accrued rights had crystallized before the strike began and, accordingly, were vested.

A similar conclusion was reached in *Re: Columbia Forest Products and I.W.A. Canada, Local 2995*, (2003), 119 L.A.C. (4th) 214 (P. Haefling) where, also relying on the *Dayco case*, the arbitrator concluded that employees who were receiving weekly indemnity benefits at the time the collective agreement expired were entitled to a continuation of those benefits since they had crystallized and, accordingly. vested prior to the termination or the collective agreement and the subsequent strike.

Having regard to the submissions of the parties, I determine that I am bound by the decision of the Supreme Court of Canada and I find that although there was no continuing contractual relationship after June 30, 2008, that the grievor's accrued right to sick leave had vested. He was an employee who was legitimately absent from his duties, within the meaning of the collective agreement, prior to his termination, and, accordingly, he became entitled to benefits for a period of one hundred and eighty (180) days or until his benefits under The Group Long Term Disability Plan came into effect. His right to

sick leave had crystallized and therefore vested, and, as in *Dayco* and the arbitration cases that followed it, while the contractual or collective agreement relationship had expired, it did not render his vested entitlement right a nullity beyond the date of retirement.

I further find, that since there appears to be single year contractual or collective agreement relationships in this bargaining unit, it would mean that any employee with a single year contract, who became ill at any point after mid year could not avail himself/herself of the full one hundred and eighty (180) day entitlement under Article 20.5(a) of the collective agreement. Surely, that was not the intent of the parties. While prospective accrued rights may not have vested, I determine that there is a distinction between coverage and entitlement and that the additional supplementary documents referred to do not alter the grievor's entitlement, (as distinct from coverage), which had vested under the collective agreement.

The grievor was initially an employee covered by the collective agreement whose entitlement had crystallized and vested and that entitlement continued beyond the date of his termination. For these reasons the grievor shall be entitled to the balance of his sick leave benefits. If the parties are unable to agree on the amount, I will remain seized of that issue. The grievance is allowed.

Dated at Toronto this 16th day of March, 2010.

Owen B. Shime, Q.C.