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EDUCATION LAW NEWSLETTER

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ARBITRATOR RULES THAT SICK LEAVE ENTITLEMENT REQUIRES ACTIVE WORK

On February 20, 2018 Arbitrator William Kaplan issued a decision with respect to the entitlement of a teacher to the sick leave and/or short term leave and disability plan when he or she is unable to return to work following a voluntary, unpaid, non-statutory leave of absence because of an intervening illness or injury.

The decision confirms that sick leave benefit is inextricably tied, not to status, but to performance of work.

Sick leave is compensated as follows: the first 11 days at 100 per cent, then the next 120 days at 90 per cent.

The Kaplan decision arose from the central dispute resolution process set out in the *School Boards Collective Bargaining Act, 2014,* and so will directly impact all 29 Catholic school boards represented by the Ontario Catholic School Trustees' Association ("OCSTA"). The decision is significant to the other 43 school boards in Ontario in affirming that sick pay benefits in the education sector remain a work-based benefit, except where otherwise expressly specified.

BLG represented OCSTA at this hearing.

SUBMISSIONS BY OECTA

The Ontario English Catholic Teachers' Association ("OECTA") initiated a central grievance alleging that a teacher on a voluntary, unpaid, non-statutory leave of absence is entitled to sick leave if she does not return to work on her scheduled return date because of intervening illness or injury. Under the central resolution process in the collective agreement, the Crown is also a party to the proceeding.

When a teacher takes a voluntary, unpaid, non-statutory leave of absence, she assumes the financial risks of the illness.

OECTA argued that the central terms of the collective agreement require the applicable board to provide sick leave and that the language was mandatory, such that entitlement – "will be" – allocated on the first day of the school year for full-time teachers regardless of start date. OECTA took the view that the collective agreement did not require a return to work as a precondition for entitlement.

OECTA argued that where a teacher was on a voluntary, unpaid, non-statutory leave of absence with a scheduled return date, and she became ill or was injured, she was entitled to access to sick leave. OECTA stated that the purpose of the plan was to provide the teacher with income protection, and if she was unable, by illness or injury, to return to work as scheduled she should be able to avail herself of the benefits of the sick leave provision. The fact that a teacher had previously been on a voluntary, unpaid, non-statutory leave of absence was, in OECTA's submission, irrelevant when a purposive approach was taken.

OECTA conceded that some sick leave plans required entitlement to be earned through attendance at work, but not this plan. OECTA argued that this plan did not impose any requirement that sick leave benefits be earned by attendance at work.

SUBMISSIONS BY OCSTA AND THE CROWN

Both OCSTA and the Crown argued that a teacher on a voluntary, unpaid, non-statutory leave had no entitlement to access sick leave until a bona fide return to work had occurred. Sick leave was work-based, reserved for employees at work and not employees on voluntary, unpaid, non-statutory leaves of absence. OCSTA and the Crown submitted that this conclusion flowed from an interpretation of central and local provisions, from the case law and from sound public policy, not to mention avoidance of absurd results.

A careful review of the central terms led to the conclusion that the allocation was to full-time teachers at work: they received complete coverage, no matter when they actually returned to work, and that part-time teachers received pro rata coverage. The conclusion that inevitably followed was that teachers who were not at work received no entitlement until they actually returned to work. Until the teacher returned to work during the year, there was nothing to allocate. And, if no allocation was made, there was no corresponding entitlement to access benefits under the plan. OCTSA and the Crown took the view that if the teacher returned to work, making a *bona fide* return, then she was eligible for her full allocation.

OCSTA and the Crown argued that no other interpretation made any sense. How could it be, for example, that a full-time teacher on a voluntary, unpaid, non-statutory leave of absence who did not return to work on her scheduled date could receive complete sick leave coverage *(i.e.* 131 days), while a part-time teacher who had actually been at work only received a *pro rata* portion of that amount?

Likewise, a teacher who had a change in status during the year from full to part-time would have her allocation appropriately adjusted. OCSTA and the Crown argued that this signaled a shared understanding that presence at work mattered, and that eligibility was contingent on actual work.

DECISION AND ANALYSIS

In dismissing the grievance, Arbitrator Kaplan affirmed the crux of the OCSTA and Crown's submissions that sick leave remains a work-based benefit in the education sector, and that a teacher must be actively at work in order to receive the benefit. He stated:

> The scheme of the provision, considered in the overall, is to marry allocation and access tying both to attendance. You get it on the first day of the school year, or when you return to work. Your presence in the workplace is what makes you eligible. Other provisions in the collective agreement

> support this interpretation. It would, as OCSTA and the Crown argue, be a somewhat surprising outcome to conclude that a teacher on a voluntary unpaid non-statutory leave who does not return to work is nevertheless entitled to 131 days of generous compensation while, by way of one example, a part-time teacher who is at work receives only her pro rata entitlement.
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> Individuals who decide to take a voluntary unpaid non-statutory leave of absence are not working – that is the decision they have made – and until they return to work they are not eligible for sick leave. Once they actually return to work, they receive their full allocation and entitlement. The sick leave benefit is inextricably tied, not to status, but to performance of work.

Arbitrator Kaplan confirmed that the sick leave plan does not specifically set out either the entitlements or restrictions applicable to a teacher on a voluntary, unpaid, non-statutory leave of absence who does not return on her scheduled return to work date.

He stated: "The purpose of sick leave is to compensate people who cannot work because they are sick or injured: it is most definitely not to compensate people who have chosen to take an unpaid leave and who unfortunately become ill or injured before they return to work."

The Arbitrator further stated that under this collective agreement, sick leave is not available to employees on voluntary, unpaid, non-statutory leaves of absence. When a teacher takes a voluntary, unpaid, non-statutory leave of absence, she assumes – until she returns to work – the financial risk of the illness. "Just because a teacher becomes ill or injured close to the projected return dates does not confer either allocation or access. Once they make their *bona fide* return to work, they receive their allocation and access."

Arbitrator Kaplan indicated that there is nothing unreasonable *per se* in applying such a work-based precondition for access.

He also confirmed the generally accepted jurisprudential principle that clear language is required to confer an economic benefit, especially one that would be "non-normative." The parties can decide to provide sick leave to employees on voluntary, unpaid, non-statutory leaves of absence, but they should do so directly. He stated:

The Arbitrator confirmed that sick leave is designed to compensate employees who cannot work, not employees who are unable to return from a voluntary, unpaid, non-statutory leave of absence. He stated that it is hard to imagine anyone going away on an unpaid leave and believing that they can access the sick leave plan if they are unable to return to work. He concluded that "someone who provides no services whatsoever cannot come within the scope of the benefit."

The determination that sick leave remains a work-based entitlement in the education sector is notable as it bridges earlier case law – which applied to a context where sick leave entitlements were tied to compensation through retirement gratuities – to the current context where retirement gratuities have been phased out. As now recognized by Arbitrator Kaplan's decision, the elimination of the connection to retirement gratuities did not alter the fundamental nature of sick leave in the education sector as a benefit tied to the performance of active work.

This decision represents a significant step forward regarding the interpretation and application of sick leave entitlements under the relevant teacher collective agreements.

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Clear language is required to confer an economic benefit, especially one that would be non-normative.

CANNABIS LEGALIZATION LIKELY DELAYED TO END OF SUMMER 2018

The path to legalization of cannabis in Canada will likely be delayed to the end of summer 2018. Although the federal government passed the *Cannabis Act* on November 27, 2017, it will not be in force until it has been passed by the Senate, and on a date that the federal cabinet will select and announce. Recent reports indicate that the federal government will not declare the *Cannabis Act* in force until late summer, rather than by July 2018 as anticipated.[1]

Minimum age to use, buy, possess and cultivate cannabis will be 19.

Part of the delay can be attributed to the Senate, which has been engaged in vigorous debate about the legalization of cannabis, raising such issues as a potential rise in youth consumption, drug-impaired driving and the potential legalization of edible cannabis products.[2] During a recent Senate session, federal Health Minister Ginette Petitpas Taylor said the provinces and territories would need two to three months to get ready for legalization, which largely is a ramp-up of capacity to sell cannabis in retail stores.[3]

Meanwhile, the province of Ontario continues to prepare for the legalization of cannabis. On December 12, 2017, the Ontario government passed legislation which will give effect to the federal government's corresponding de-criminalization of cannabis in the *Cannabis Act.* The *Cannabis, Smoke-Free Ontario and Road Safety Statute Law Amendment Act, 2017* will implement a significant number of changes to the use, sale and regulation of cannabis in Ontario. These new laws are not yet in force, but are expected to be proclaimed in force concurrently with the federal *Cannabis Act.*

ONTARIO'S CANNABIS REGIME

The *Cannabis Act, 2017*, when it comes into force, will treat non-medical cannabis use more strictly – like alcohol – in that it can only be purchased by adults over age 19 in government-run retail stores and consumed only in private residences.

Below are the key elements of Ontario's regulated access to cannabis:

1. Minimum age to use, buy, possess and cultivate cannabis will be 19.
2. Non-medical cannabis use is restricted to private residences.
3. Adults over age 19 may grow up to four plants.
4. Cannabis use will be prohibited in public places, workplaces, motor vehicles and boats. This prohibition would include schools.
5. The Liquor Control Board of Ontario will oversee the retail sales of cannabis in Ontario by establishing the Ontario Cannabis Retail Corporation. There will be at least 150 standalone retail stores by 2020, and online

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[1] Daniel Leblanc, The *Globe and Mail* February 15, 2018, Federal government still not ready to launch marijuana legalization, online: https://www.theglobeandmail.com/news/politics/liberal-bid-to-hasten-senate-debate-on-marijuana-fails/article37994091/.

[2] Daniel Leblanc and Christine Pellerin, The *Globe and Mail* February 6, 2018, Regulatory lag to push legal marijuana to late summer: online: https://www.theglobeandmail.com/news/politics/regulatory-lag-to-push-legal-marijuana-to-late-summer/article37871180/.

[3] *Supra* note 1.

retail sales facilitated through Shopify.[4] All cannabis sold in Ontario will be obtained from the federally-licensed commercial cannabis producers who are authorized to sell cannabis to individuals with a legal prescription under the federal *Access to Cannabis for Medical Purposes Regulations* ("ACMPR").

6. Police will continue to shut down illegal cannabis "dispensaries" and "clubs." They are not included in Ontario's retail framework for legal access to cannabis.

STRICT PROHIBITIONS ON SMOKING OR VAPING CANNABIS

The *Smoke-Free Ontario Act, 2017* the ("SFOA") will regulate the smoking aspect of cannabis, and it will also address the issue of vaping (electronic cigarettes or e-cigarettes) as a method of using cannabis and other tobacco products.

The following will be strictly prohibited in enclosed public places, enclosed workplaces and schools within the meaning of the *Education Act:*

1. Smoke or hold lighted tobacco.
2. Smoke or hold lighted medical cannabis.
3. Use an electronic cigarette.

Employers will be obligated to ensure compliance with the SFOA, for example by posting prescribed signs and removing ashtrays from enclosed public places. There is a new reprisal section which prohibits an employer from taking action against an employee who acts in accordance with the SFOA or seeks the enforcement of it, including dismissing or threatening to dismiss an employee, disciplining, or suspending an employee, or threatening to do so, imposing a penalty or intimidating or coercing an employee.

The SFOA contains exemptions for medical cannabis users that live in a residence which is also an enclosed workspace. These exemptions are very narrow and unlikely to apply to a school context. For example, limited medical cannabis use may be permitted in a long-term care home that has an indoor room designated as a controlled area for smoking or use of electronic cigarettes.

STRICT PROHIBITIONS FOR YOUTH ACCESS TO CANNABIS

Under the *Cannabis Act, 2017*, youth under age 19 will be prohibited from possessing, consuming, attempting to purchase, purchasing or distributing cannabis. Further, no one under age 19 will be permitted to cultivate, propagate or harvest cannabis (or offer to do any of those activities for others). While youth will not be subject to criminal offences for breaching the *Cannabis Act, 2017*, police and prosecutors have the authority to issue a fine of up to $200. Further, police will be permitted to seize cannabis in connection with an offence, including any cannabis that is found in the possession of youth under age 19.

Non-medical cannabis use is restricted to private residences.

Police will also have the authority to refer a potential young offender to an "approved youth education or prevention program." Prosecutors will have a similar authority when exercising their power to stay a provincial offences proceeding or in withdrawing a charge. The *Cannabis Act, 2017* authorizes the attorney general to approve education or prevention programs and will list such programs on a publicly available website.

MEDICAL CANNABIS USERS REMAIN REGULATED

The current medical access regime will remain in place for medical cannabis users. The federal

[4] The Canadian Press, *The Toronto Star,* February 12, 2018 "LCBO announces deal with Shopify to run online cannabis sales platform", online: https://www.thestar.com/news/canada/2018/02/12/lcbo-announces-deal-with-shopify-to-run-online-cannabis-sales-platform.html.

Access to Cannabis for Medical Purposes Regulations (ACMPR) allows possession of cannabis for medical purposes if obtained:

(i) from a licenced producer;
(ii) from a health care practitioner in the course of treatment for a medical condition; or
(iii) from a hospital.

Individuals who claim to be medical cannabis users must show supporting documents to police on demand. It is also reasonable for schools to request such documents in connection with the duty to accommodate a student or staff disability.

There have been reports in the media of benefit providers offering to extend coverage to medical cannabis for specific conditions and symptoms associated with cancer, rheumatoid arthritis, multiple sclerosis, HIV-AIDS and palliative care.[5] Where such extended coverage is offered, employees will be subject to the terms of the applicable benefit plans, including the requirement to provide supporting documentation to the insurer.

Smoking or vaping cannabis will not be permitted at schools, even for medical cannabis users.

IMPAIRMENT STILL NOT ACCEPTABLE AT SCHOOL OR WORK

Educators and employers can continue to take the position that impairment at school or in the workplace is not acceptable. The legal access regime described above does not provide anyone in Ontario with a legal right to consume or possess cannabis on school premises, or to be impaired at school without any recourse to the school or employer. If a student or an employee is a medical cannabis user, the matter will be treated like any other accommodation of a disability.

In the accommodation process, cannabis will be considered like any other medication. Employers, whether in the school setting or otherwise, will need to undertake an individual assessment of an employee's disability and the options for reasonable accommodation, including where a person may be impaired due to medical use of cannabis. Students and employees must participate in the accommodation process by providing information, including medical information, about their cannabis use and level of impairment (if any).

Schools will have to decide, on an individual basis, whether accommodating a student or employee with a disability requires tolerating a certain level of impairment during the school day. As noted above, smoking or vaping cannabis will not be permitted at schools, even for medical cannabis users.

The Ontario government proposes to amend the *Education Act* concurrent with the *Cannabis Act, 2017* to include the definition of "medical cannabis user": "a person who is authorized to possess cannabis for the person's own medical purposes in accordance with applicable federal law." The Provincial Code of Conduct section will be revised to state that one of the purposes of the Code of Conduct is to discourage the use of alcohol and illegal drugs, except by a medical cannabis user. Section 306 of the *Education Act,* which deals with suspensions, will be revised to prohibit possession of cannabis, except for a student who is a medical cannabis user. These amendments are consistent with the treatment of medical cannabis use as a disability accommodation, rather than disciplinary, matter.

The amendment to section 310 of the *Education Act* will include giving cannabis to a minor as

[5] Armina Ligaya, Canadian Press, *Financial Post,* February 15, 2018, "Sun Life Financial to add medical marijuana option to group benefits plans" http://business.financialpost.com/news/fp-street/sun-life-financial-to-add-medical-pot-option-to-group-benefits-plans.

one of the activities leading to suspension. This amendment is consistent with the federal government's introduction of new offences for giving cannabis to youth.

We will continue to monitor the federal and provincial governments' evolving efforts to provide adults with legal access to cannabis. Schools boards and independent schools should be reviewing relevant policies and procedures in anticipation of implementation by late summer 2018.

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ARBITRATOR FINDS THAT UNDER THE RESTRAINT LEGISLATION, A DIRECTOR'S COMPENSATION PLAN IS FROZEN

In a decision released on January 22, 2018, Arbitrator William Kaplan ruled on whether the provisions of the *Broader Public Sector Accountability Act, 2010* ("BPSAA") applied to an employment agreement entered into between Superior-Greenstone District School Board (the "Board") and its director of education, David Tamblyn.

Mr. Tamblyn entered into an employment agreement with the Board on June 15, 2011. The agreement provided for an annual salary of $151,950.00 in the first year and significant staged increases every year thereafter ending on August 31, 2016. During this term, Mr. Tamblyn's compensation remained at the start rate. Mr. Tamblyn alleged that had the agreement been given effect, he would currently be enjoying a salary of $192,550. He alleged that his total loss amounted to $154,131 from September 1, 2012 to January 1, 2018 and that is still continued.

The BPSAA was proclaimed on April 1, 2012. The effective date of the legislation was March 31, 2012. The BPSAA applied to "every school board" and to "designated executives." The dispute between the Board and Mr. Tamblyn concerned the interpretation and application of certain BPSAA provisions, including:

No increases under compensation plan

7.6 No designated employer shall, before the end of the restraint period, amend the compensation plan that is in effect on the employer's effective date for the position of a designated executive or the office of a designated office holder, in any manner that would increase the salary, the salary range,

The Board argued that the clear purpose of the BPSAA was to restrain broader public sector spending.

or any benefit, perquisite or non-discretionary or discretionary payment that is required to be, or that may be, provided to a holder of that position or office under the compensation plan.

No increase in salary

7.7 The salary of a designated executive or designated office holder under the compensation plan that is in effect for the position or office on his or her effective date cannot be increased before the end of the restraint period.

No increase in benefits, perquisites and payments, etc.

7.8 (1) Subject to subsection (3), a benefit, perquisite or payment provided to a designated executive or designated office holder under the compensation plan that is in effect for the position or office on his or her effective date cannot be increased before the end of the restraint period, and no new or additional benefits, perquisites or payments may be provided to a designated executive or designated office holder before the end of the restraint period.

The Arbitrator noted that pre-existing entitlements are not grand-parented.

SUBMISSIONS OF THE APPLICANT

It was Mr. Tamblyn's submission that there was nothing in the BPSAA that required the Board to freeze his salary. It was argued that absent clear and unambiguous language to the contrary, legislation must be interpreted so as to avoid interference with vested contractual rights.

Mr. Tamblyn submitted that the legislature had the power to deprive persons of their civil rights without being heard, but could only do so with express language. Such language was alleged to be absent in this case.

The applicant argued that this outcome was consistent with *Picard and Windsor-Essex Catholic District School Board,* which was an unreported award of Arbitrator Keller, dated September 12, 2016. The applicant stated that all the legislation intended to do was to prohibit further increases and not interfere with those already contractually agreed upon.

SUBMISSIONS OF THE RESPONDENT

The Board stated that the situation was truly unfortunate. The Board indicated that it would like nothing more than to honour the employment agreement with Mr. Tamblyn, but as a matter of law, its hand were tied.

The Board argued that the clear purpose of the BPSAA was to restrain broader public-sector spending. Section 7.6 prohibited changes to compensation plans that would increase compensation of designated executives. Section 7.7 was the operative provision. It prohibited any increases to salaries in compensation plans that were in effect on the effective date and left those salaries frozen until the end of the restraint period. The Board argued was that in light of this provision, the staged increases of the compensation plan set out in the employment agreement, cannot be given effect. Mr. Tamblyn was a designated executive and his salary would stay frozen until the legislature decided otherwise.

The Board also argued that the *Picard* case was factually distinguishable from the case before Arbitrator Kaplan, as the circumstances of the Picard case took place while under ministry supervision and certain increases were paid by the school board, which later sought to recapture them.

ARBITRATOR'S DECISION

Arbitrator Kaplan confirmed that the purpose of the BPSAA is comprehensive salary restraint across the broader public sector. The Arbitrator ruled that read together, sections 7.6, 7.7 and 7.8 of the BPSAA make manifest that compensation,

salaries and benefits are frozen on the effective date and stay frozen until the legislature decides otherwise.

The Arbitrator held that under the legislation, with limited and inapplicable exceptions, the entire compensation field is covered. The legislative objective is "categorical." He stated:

> The Legislature has clearly evidenced its objective to freeze the applicant's compensation, meaning in his case, the salary in place on the effective date. There is no construction of the legislation that would admit any outcome other than a finding that the applicant's salary was, and remains, frozen.

Arbitrator Kaplan indicated that it is hard to imagine how the Legislature could have more unambiguously frozen salaries, including increases to salaries previously provided for in Mr. Tamblyn's employment agreement. The legislation clearly states that as of the effective date the "salary of a designated executive … under the compensation plan that is in effect for the position or office on his or her effective date cannot be increased before the end of the restraint period."

Arbitrator Kaplan ruled that compensation plans cannot be changed. He stated that compensation and salaries cannot be increased. Pre-existing entitlements are not grand-parented. The salary in place on the effective date is frozen. He stated, "whatever was in place on the effective date remains in place during the restraint period."

On March 31, 2012, Mr. Tamblyn's salary under the compensation plan was $151,950.50. The Arbitrator ruled that even though the employment agreement provides for salary increases – they cannot be given effect as they have been nullified by act of parliament. Arbitrator Kaplan held that future scheduled salary increases are prohibited by operation of law. The Arbitrator concluded that the provisions of the BPSAA override the director's employment agreement.

With respect to the *Picard* case, Arbitrator Kaplan stated that it was factually distinguishable and, in any event, legally unpersuasive.

LOOKING BEYOND

In 2014, the Ontario government began the process of developing public sector compensation frameworks to ensure a consistent approach to executive compensation. The *Broader Public Sector Executive Compensation Act, 2014* (the "BPSECA") applies to all Ontario public sector employers, including school boards. In compliance with the BPSECA, all 72 Ontario school boards developed a comprehensive Executive Compensation Program to support executive compensation management across the province. This new legislation applies to all directors of education, superintendents and other designated executives.

Under the BPSECA, all Ontario school boards were required to conduct a 30-day public consultation on their draft Executive Compensation Program. The legislation provides that if a school board's Executive Compensation Program is finalized before February 28, 2018, the school board may select a date that is as early as September 1, 2017 for the purpose of administering increases to its pay envelope.

The Arbitrator ruled that the provisions of the BPSAA override the director's employment agreement.

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SUPPORTING CHILDREN AND STUDENTS WITH PREVALENT MEDICAL CONDITIONS

Beginning September 1, 2018, school boards and school authorities across Ontario will be required to develop and maintain a policy or policies to support students in schools who have asthma, diabetes, epilepsy, and/or are at risk for anaphylaxis ("Prevalent Medical Conditions"). Policy/Program Memorandum No. 161 ("PPM 161"), prepared by the Ministry of Education, provides direction to schools regarding the components that should be included in their policy or policies to support students with Prevalent Medical Conditions.

School policies should outline expectations for school staff responses to medical emergencies at school.

PPM 161 sets out the expectation that all school board policies on Prevalent Medical Conditions will include, at a minimum, the following components:

1. **Policy Statement**: The school board policy should include the following goals:
    - To support students with Prevalent Medical Conditions to fully access school in a safe, accepting, and healthy learning environment that supports well-being, and
    - To empower students, as confident and capable learners, to reach their full potential for self-management of their medical condition(s), according to their Plan of Care (further detail below).

2. **Roles and Responsibilities**: The school board policy should clearly lay out the roles and responsibilities of students, parents, school staff, principals, and school boards in supporting students with Prevalent Medical Conditions. These roles and responsibilities should be communicated by schools to parents, students and school staff.

3. **Plan of Care**: School board policies should include a Plan of Care form to assist in developing individualized information for a student with a Prevalent Medical Condition. The Plan of Care should include preventative strategies, identification of school staff with access to the Plan of Care, daily management activities, accommodations, notes and instructions from the student's medical care professional, identification of symptoms, emergency contact information, details related to medication, and parental consent to share information on signs and symptoms with other students.

4. **Facilitating and Supporting Daily or Routine Management**: School boards should outline expectations for providing supports to students with Prevalent Medical Conditions, such as supporting inclusion by allowing students with Prevalent Medical Conditions to perform daily or routine management activities in a school location (*e.g.* within the classroom).

5. **Emergency Response**: School policies should outline expectations for school staff responses to medical incidents and/or medical emergencies at school in accordance with any existing school board medical emergency procedures or plans of care.

6. **Raising Awareness of Board Policy and Evidence-Based Resources**: School boards should raise awareness of their policies on Prevalent Medical Conditions, existing

resources, signs and symptoms characteristic of medical incidents/emergencies, and school emergency procedures. Awareness for students may also be included in curriculum content in classroom instruction or other related learning experiences.

7. **Training**: School policies should provide for annual training related to Prevalent Medical Conditions for school staff who have direct contact with students with medical conditions. Appropriate training should also be provided for occasional staff. PPM 161 clarifies that the scope of training provided to support the implementation of the policies should be developed in consultation with teachers' federations, principals' associations, and education workers' unions.

8. **Safety Considerations**: School policies should allow for students to carry their medication(s) and supplies, as outlined in the Plan of Care, set expectations for schools to support the storage and safe disposal of medication, and include supports for students with Prevalent Medical Conditions in the event of a school emergency or offsite activities.

9. **Privacy and Confidentiality**: School boards should have a policy in place regarding the confidentiality of students' medical information within the school environment and should inform parents and school staff of the measures in place to protect students' confidentiality.

10. **Reporting**: Subject to relevant privacy legislation, school boards should develop a process to collect data regularly, including, but not limited to, data on the number of students with Prevalent Medical Conditions at their schools and the number of occurrences of medical incidents. Such data should inform cyclical policy reviews.

School boards should already have policies in place to support students at risk for anaphylaxis and students with asthma, in accordance with *Sabrina's Law, 2005* and *Ryan's Law, 2015* respectively. Some school boards may also have policies or procedures in place for students who have diabetes or epilepsy. Any existing policies should be reviewed to ensure that, at a minimum, they meet the requirements outlined in PPM 161 as well as any other prescribed requirements.

PPM 161 recognizes that supporting students with Prevalent Medical Conditions is complex and requires the co-operation of education and community partners, including health-care professionals.[1] The PPM emphasizes collaboration among members of the education community and expresses the goal of self-management for students with Prevalent Medical Conditions to the extent possible. With these goals in mind, school boards should begin to review any existing policies related to Prevalent Medical Conditions and to develop a new policy in accordance with the requirements under PPM 161 by September 1, 2018.

School policies should allow for students to carry their medication as outlined in the Plan of Care.

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[1] The Ministry of Education has developed resources, including a Prevalent Medical Conditions web portal, to support school boards: http://www.edu.gov.on.ca/eng/healthyschools/medicalconditions.html.

ARBITRATOR RULES THAT TEACHERS ARE NOT ENTITLED TO ADDITIONAL PAID DAYS FOR RELIGIOUS OBSERVANCES

In *Limestone District School Board v Elementary Teachers' Federation of Ontario Limestone Local,* a decision released on November 14, 2017, Arbitrator William Kaplan stated that providing a number of paid Personal/Family Leave days per school year to all teachers constituted reasonable accommodation for teachers requiring leave for religious holidays on scheduled school days. The teachers were not entitled to paid time off without drawing from their Personal/Family Leave bank.

The Board's position was time taken off for religious holidays constituted Personal/ Family Leave under the collective agreement.

BACKGROUND

The Elementary Teachers' Federation of Ontario ("the Federation") filed policy and individual grievances regarding leave for religious holidays on behalf of elementary teachers employed by the Limestone District School Board ("the Board").

The Board had previously permitted teachers to take paid time off for religious holidays scheduled during school days, without deduction from personal leave or any other type of leave under the collective agreement.

However, around the time of the 2015/2016 round of local collective bargaining, the Board changed its practice. The Board's new position was that time taken off for religious holidays would now constitute Personal/Family Leave under Article L18.1.0 of the collective agreement, which provided: "Personal/Family leave may be granted for reasons which are unavoidable or extraordinary to total of five (5) days per school year."

While there was a dispute about whether the Board had advised the Federation of this upcoming change, the Board's position became clear when one teacher was required to take a day of Personal/Family Leave in order to observe Diwali. The Federation filed policy and individual grievances as a result.

SUBMISSIONS OF THE PARTIES

Federation

The Federation argued that the Board's policy amounted to adverse impact discrimination, and that the duty to accommodate triggered by this discrimination had not been satisfied.

The Federation argued that while the Board's school calendar was neutral on its face, like all public school calendars it was built around Christian holidays, and this resulted in an adverse impact on teachers who wished to take time off for non-Christian religious observances.

According to the Federation, providing Personal/ Family Leave days under Article L18.1.0 was not a reasonable accommodation because it required teachers belonging to religious minorities to deplete their Personal/Family Leave bank for religious reasons, leaving them with fewer Personal/Family Leave days available for emergencies in comparison to Christian teachers.

Board

The Board did not dispute that Federation teachers were entitled to take time off for religious observance, but argued that the existing collective agreement entitlement to Personal/Family Leave in Article L18.1.0 constituted reasonable accommodation.

In the Board's view, the Board was not required to pay for work that would not be performed when a teacher took time off for religious reasons during a scheduled school day. The Board argued that the Federation was seeking a result unrecognized by law in asking for payment for no work and that the parties had specifically negotiated Article L18.1.0 as a mechanism for accommodating individuals who would require paid leave on a regularly scheduled school day.

DECISION AND ANALYSIS

Arbitrator Kaplan concluded that while adverse impact discrimination had been established, the paid leave available through Article L18.1.0 constituted reasonable accommodation because it appropriately balanced the Board's duty to accommodate against a teacher's obligation to attend work in return for remuneration. Accordingly, he dismissed the Federation's grievances.

In coming to his conclusion, Arbitrator Kaplan found that the flexible language of Article L18.1.0 was clearly drafted and designed to make up to five paid days off available for a wide variety of accommodation purposes, including religious observances.

Since it was not possible for the teachers to make up the work at another time (because the school day scheduled is fixed), the teachers were effectively asking to be paid for not working. Arbitrator Kaplan noted that it is well-accepted that employees should be paid for working, and not paid for not working – and therefore, the Board was not obliged to follow its past practice of allowing teachers to take paid time off for religious observances. There is no authority for the proposition that an employer must provide paid leave for religious observance.

He also commented that there was no jurisprudence to support the idea that requiring employees to deplete a leave bank, designed to provide paid time off in various accommodation circumstances, was a violation of the Ontario *Human Rights Code*.

As a final remark, Arbitrator Kaplan stated that while it is conceivable that a case might arise where a teacher requires more than five days of paid leave for religious reasons during a school year, that case should be decided on a different day, if and when it does arise.

Arbitrator Kaplan's decision confirms that reasonable accommodation does not always require placing an employee who experiences adverse effects in the exact same position as other employees. In the factual context of this case, it was sufficient for the Board to provide paid Personal/Family Leave days to be used for religious accommodation purposes, even if it meant that their Christian co-workers did not use as many Personal/Family Leave days for religious observances.

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The Arbitrator concluded that it was sufficient for the Board to provide paid Personal/Family Leave days to be used for religious accommodation purposes.

THE IMPACT OF BILL 148 ON ONTARIO SCHOOLS

After nearly two years of consultation with stakeholders, Ontario's legislature passed the *Fair Workplaces, Better Job Act, 2017* ("Bill 148") on November 27, 2017. This legislation included numerous amendments to both Ontario's *Employment Standards Act, 2000* (the "ESA") and *Labour Relations Act, 1995* (the "LRA"). Bill 148 includes a range of significant changes to employment and labour laws in Ontario, creating substantial compliance obligations for all Ontario employers, including school boards and independent schools.

Among other things, practical issues for Ontario schools include:

- Changes to personal emergency leave
- New leaves of absence
- Equal pay for equal work
- New scheduling rules
- Minimum wage increases

Employers may require an employee to provide evidence reasonable in the circumstances that they are entitled to take Personal Emergency Leave.

With respect to school boards and independent schools with collective agreements, some of the changes contain transition rules that will allow the employer to rely on collective agreement provisions until the earlier of the expiry of the collective agreement or, at least January 1, 2020. For school boards, this should mean that they can rely on relevant provisions in their respective collective agreements until their expiry on August 31, 2019. However, these amendments should be reviewed by school boards during the next round of bargaining, because, at that time, they will come into effect.

CHANGES TO PERSONAL EMERGENCY LEAVE

Changes to Personal Emergency Leave ("PEL") came into effect on January 1, 2018.
Prior to the passage of Bill 148, employees in workplaces with more than 50 employees had the right to take up to 10 days of unpaid, job-protected leave, each calendar year due to illness, injury, or medical emergency, and urgent matters concerning specified family members.

As of January 1, 2018, the ESA requires employers to give employees two paid PEL days and eight unpaid PEL days in each calendar year, if the employee has been employed for one week or longer. The paid PEL days must be taken first in a calendar year before the unpaid PEL days are taken. PEL pay is defined in the ESA as the wages the employee would have earned had they not taken the leave. The ESA also contains some new instructions on how to determine PEL pay when there are performance-related wages (such as commission), overtime, shift premiums or public holidays.

The ESA states that employers may require an employee to provide evidence reasonable in the circumstances that they are entitled to take PEL. Typically, employers have requested a note from a physician. As of January 1, 2018, the ESA prohibits an employer from requiring an employee to provide a certificate from a physician, registered nurse or psychologist as evidence of

entitlement to take PEL. This prohibition has raised concern with employers who view it as a restriction on their ability to detect improper use of PEL days and manage absenteeism.

However, the ESA also contains subsection 5(2), known as the "greater benefit" section. Where an employment contract (including a collective agreement) directly relates to the same subject matter as an employment standard, and provides a greater benefit than the employment standard, the contract supersedes the ESA in that particular respect.There may, therefore, be circumstances in which an employer can argue that the paid time off provided under a contract or collective agreement is a greater benefit, and that the PEL standard does not apply. Employers may also have a reasonable argument that PEL days can be deducted from existing entitlements to paid and unpaid time off under employment contracts and collective agreements. A detailed review of the particular facts and applicable law is necessary in each case.

We also note that the Ministry of Labour has stated in its online document "Your Guide to the Employment Standards Act"[1] that there may be some situations outside the scope of PEL where an employer needs medical documentation in order to, for example, accommodate an employee or satisfy return to work obligations. According to the ministry guide, the ESA does not prohibit employers from requiring a medical note for these purposes.

NEW LEAVES OF ABSENCE

As of December 3, 2017, Critical Illness Leave replaced Critically Ill Child Care Leave. It consists of two components:

1. Care or support provided to a critically ill minor child family member for up to 37 weeks in a 52-week period.
2. Care or support provided to a critically ill adult family member for up to 17 weeks in a 52-week period.

On January 1, 2018, an amendment to the Family Medical Leave came into force. The Family Medical Leave increased from 8 weeks to 28 weeks of leave in a 52-week period. A qualified medical practitioner who may issue a certificate necessary to take Family Medical Leave now includes a physician and a nurse practitioner.

There are a number of new unpaid leaves that came into force on January 1, 2018.

There are a number of further new unpaid leaves that came into force on January 1, 2018. They include:

- Child Death Leave for up to 104 weeks for the death of a minor child for any reason.
- Crime Related Child Disappearance Leave for up to 104 weeks if a child disappears as a probable result of a crime.
- Domestic and Sexual Violence Leave for employees that have been employed for at least 13 consecutive weeks, which provides up to 10 individual days of leave and up to 15 weeks of job protected leave when an employee or their child has experienced or is threatened with domestic

[1] Ministry of Labour, Your guide to the *Employment Standards Act,* online: https://www.ontario.ca/document/your-guide-employment-standards-act-0.

or sexual violence. The first five days of leave each calendar year would be paid, and the remainder would be unpaid.

The new legislation requires employers to put mechanisms in place to protect confidentiality of records they receive or produce in relation to an employee taking Domestic and Sexual Violence Leave.

EQUAL PAY FOR EQUAL WORK

As of April 1, 2018, there will be two new equal pay provisions under the ESA. The one which will apply in most workplaces is section 42.1 of the ESA: An employer will be prohibited from paying a "rate of pay" which is less than the rate of pay provided to another employee because of a "difference in employment status" when the following conditions are met:

(a) they perform substantially the same kind of work in the same establishment;

(b) their performance requires substantially the same skill, effort and responsibility; and

(c) their work is performed under similar working conditions.

The term "difference in employment status" is now a defined term in the ESA. It means:

(a) a difference in the number of hours regularly worked by the employees; or

(b) a difference in the term of their employment, including a difference in permanent, temporary, seasonal or casual status.

An employee who believes his or her employer has not complied with equal pay provisions under section 42.1 may request a review of their rate of pay by the employer. In response, the employer is required to either adjust the employee's pay accordingly, or give a written response setting out the reasons why the employer disagrees with the employee.

Compliance with the new equal pay provisions will require information about particular positions, rates of pay, job descriptions, and the factors that explain the difference in the rates of pay.

Section 42.1 has a transition period for unionized employees. In this regard, if there is a conflict with a collective agreement provision, the equal pay provisions will only come into force upon the expiry of the school board collective agreements on August 31, 2019. For non-union employees, these changes come into effect on April 1, 2018.

The ESA also contains section 42.2, which prohibits temporary help agencies from paying a lower rate of pay to assignment employees than the rate of pay of an employee of the client who performs "equal work." Schools boards and independent schools should review whether they have contracts with any temporary help agencies, and seek legal advice on how Bill 148 applies to their particular circumstances.

NEW SCHEDULING RULES

New scheduling rules will come into effect on January 1, 2019. Some of these changes contain transition rules that will allow an employer to rely on collective agreement provisions until the earlier of the expiry of the collective agreement and January 1, 2020.

An employee may request a schedule or location change once he/she has been employed for three months.

The scheduling rules are as follows:

- An employee may request a schedule or location change once he/she has been employed for three months. The request can be granted or denied, but the employer must provide reasons for the denial. This comes into effect January 1, 2019.
- An employee who regularly works more than three hours a day, reports to work but works less than three hours will be entitled to three hours' pay at their regular rate. This comes into effect January 1, 2019.
- Employees may refuse to work or be on call if the request is made by an employer with less than 96 hours' notice. There are some narrow exceptions relating to "emergency" as defined in the legislation. Although this comes into effect on January 1, 2019, collective agreements will prevail until their expiry, but no later than January 1, 2020.

Subject to certain exceptions, employers will also be required to pay wages to employees for three hours' work at the employee's regular rate, if the employee:

- has a shift cancelled within 48 hours of its scheduled start time.
- is scheduled to be on call, but despite being available to work, is either not called in to work or works less than three hours. This is required for each 24-hour period that the employee is on call.

These latter requirements come into effect on January 1, 2019; however, collective agreements will prevail until their expiry, but no later than January 1, 2020.

MINIMUM WAGE INCREASES

On January 1, 2018, the general minimum wage increased to $14 per hour. An exception where a special minimum wage would apply are students under 18, who are entitled to a minimum wage of $13.15 per hour.

On January 1, 2019, the general minimum wage increases to $15 per hour. The exception where a special minimum wage would apply are students under 18, who will be entitled to a minimum wage of $14.10 per hour.

SPECIAL RULES

With respect to the education sector, a number of special rules and exceptions impact how the changes made under Bill 148 will play out in Ontario's school boards and independent schools. In particular, educators should take note of the following:

- Under Regulation 285/01 to the ESA, a teacher as defined in the *Teaching Profession Act*[2] is not permitted to take PEL in circumstances where taking such leave would constitute an act of professional misconduct or a dereliction of professional duty.
- Persons employed as students at a camp

Persons employed as students at a camp for children will continue to be exempt from entitlements to minimum wage, overtime and public holiday provisions.

[2] Section 1 of the *Teaching Profession Act,* R.S.O. 1990, c. T.2 defines "teacher" as a person who is a member of the Ontario College of Teachers and is employed by a board as a teacher but does not include a supervisory officer, a principal, a vice-principal or an instructor in a teacher-training institution.

for children, or to instruct or supervise children, will continue to be exempt from entitlements to minimum wage, overtime and public holiday provisions. Changes to each of these provisions under Bill 148 will have no impact on individuals who are employed in this capacity.

- Under amendments to Regulation 285/01 that will come into force on April 1, 2018, the equal pay provisions in section 42.1 of the ESA will not apply to an employee who is a student under 18 years of age who works no more than 28 hours per week or who is employed during school holidays.

In light of the amended provisions of the ESA that have been ushered in by Bill 148, Ontario's Ministry of Labour has committed to hiring 170 new Employment Standards Officers, and has promised to inspect one in every 10 workplaces in 2018. While the impact of these enforcement measures on schools remains to be determined, any Ontario school board or independent school dealing with an employment standards matter over the coming year can likely expect more active involvement from the Ministry of Labour than in years past.

Alongside the changes to employees' minimum entitlements under the ESA, Bill 148 has brought about numerous changes and additions to Ontario's labour relations regime under the LRA. School boards and independent schools operating in a unionized context or facing the possibility of unionization should take note of new provisions under the LRA that include the following:

- A union attempting to become certified may apply to the Ontario Labour Relations Board to have an employer school disclose names and contact information for employees in a proposed bargaining unit.
- If a union is certified, the parties will have access to mediation and arbitration overseen by the Ontario Labour Relations Board to facilitate the negotiation of a first collective agreement.
- During periods falling between the commencement of a legal strike/walkout and a new collective agreement, or between certification and a first collective agreement, employer schools are no longer permitted to discharge employees, except with cause.
- A union and employer school may agree in writing to have the Ontario Labour Relations Board review and change their bargaining unit structures.
- Maximum penalties for contravention of the LRA have been increased to $5,000 for individuals and to $100,000 for organizations.

The Ontario Labour Relations Board has new broad powers to consolidate existing non-teacher bargaining units after certification.

In the school board context, it should be recognized that the Ontario Labour Relations Board has new broad powers to consolidate existing non-teacher bargaining units after certification or on application by the school board or the union. This new power could apply in circumstances where a union represents employees in a number of small bargaining units and there is a common interest to place them in a single collective agreement.

Now that Bill 148 has passed into law, the hard work of putting its provisions into effect has just begun for employers throughout Ontario. It is

recommended that schools boards and independent schools update their employment policies and procedures to ensure compliance with the recent changes to the legislation. It is also recommended that prior to collective bargaining, employers understand the relevant new provisions that apply and when they will come into force.

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TRIBUNAL FINDS THAT SCHOOL BOARDS ARE NOT REQUIRED TO GIVE PARENTS "ABSOLUTE POWER" TO MAKE DECISIONS ABOUT EDUCATION

On December 29, 2017, the Human Rights Tribunal of Ontario (the "Tribunal") released its decision in *U.M. v. York Region District School Board.* In this case, the Tribunal addressed two applications against a school board in which a parent alleged discrimination and failure to accommodate his children's respective disabilities under Ontario's *Human Rights Code* (the "Code").

The parent alleged discrimination and failure to accommodate his children's disabilities under the *Human Rights Code*.

The Tribunal found that the school board had offered reasonable and appropriate accommodations to the students, even though their father clearly did not agree with many of the accommodation decisions. Further, the Tribunal made a number of statements confirming that parents do not have the "absolute power" or "control" to make all decisions about education, nor are school boards required to implement wishes or preferred choices about accommodation.

BACKGROUND

The two human rights applications were filed by W.P.M., the father and Litigation Guardian for U.M., Grades Two and Three, and M.M., Senior Kindergarten, (the "Applicants"). The Applicants had both been diagnosed with Autism Spectrum Disorder ("ASD"). Based on the definition of "Disability" in section 10(1) of the Code, there was no dispute between the parties regarding ASD's classification as a disability. Therefore, the Applicants had a right under the Code to equal treatment with respect to educational services, along with accommodation of their disability to the point of undue hardship.

The Tribunal ruled that not being able to go outside during recess on one day is not a denial of meaningful access to education.

The father alleged that the York Region District School Board (the "Board") did not accommodate the Applicants to the point of undue hardship. Specifically, the Tribunal addressed the following allegations:

(a) U.M.'s exclusion from school between January and June 2014;

(b) The contravention of parental wishes, awareness and rights, regarding U.M.'s and M.M.'s educational placement in the "community class";

(c) The initial exclusion of M.M. from the summer camp program offered by the school; and

(d) The respondent ignoring U.M.'s and M.M.'s educational needs.

After sixteen days of hearings, the Tribunal issued its decision to dismiss the applications.

TRIBUNAL APPLIES "MEANINGFUL ACCESS TO EDUCATION" TEST

The Tribunal applied the test for discrimination in the provision of educational services set out in *Moore v. British Columbia (Education),* 2012 SCC 61. In *Moore,* the Court held that to demonstrate discrimination, applicants must show:

1. that they have a characteristic protected from discrimination;
2. that they have experienced an adverse impact with respect to their education, *i.e.,* that they have been denied a meaningful access to an education; and
3. that the protected characteristic was a factor in the adverse impact.

The Court in *Moore* concluded that special education is not the service in and of itself; rather, it is primarily the means by which certain students get meaningful access to the general education services that are available to all students.

The Tribunal was asked in this case to decide that the Board had failed to provide "meaningful access" because it did not implement all of the father's wishes nor did the Board grant him absolute power over how his children should be educated. The father's allegations ranged from not allowing him to stand outside the classroom, to his desire that the children not be withdrawn from the regular classroom. The Tribunal declined to make this conclusion, stating as follows:

> …While the *Education Act* and the Regulations related to it acknowledge the importance and relevance of considering

parental preferences and encourages communication with parents before implementing certain decisions, the legislation does not give parents the absolute power to make all decisions about the education of their children within the public education system, especially in the areas of curriculum and other related aspects of programming, such as teaching methodology.

ANALYSIS OF THE BOARD'S EVIDENCE

The Tribunal's decision contains a detailed review of the allegations and clear statements about why there was no discrimination under the Code in each instance. To begin with, the Tribunal decided that U.M. was not excluded from school at any time. The father had agreed to a gradual transition from U.M.'s full-time autism therapy program to full-time attendance at school, and there was no factual basis to conclude that U.M. was denied meaningful access to education due to his exclusion.

Similarly, the Tribunal concluded that M.M. was not excluded from attending the Board's summer camp program and that she had the support of an Educational Assistant ("EA") on a one-to-one basis. The Tribunal found that there were no grounds for concluding that M.M. had experienced discrimination.

The Tribunal stated that the allegation that the Board had limited M.M.'s attendance had to do with one specific day where there was no one-to-one EA support for M.M. during recess and her father had to take her home. The Tribunal decided that even if the allegations were true, a school board is required to offer reasonable and appropriate accommodation, but not "perfect accommodation" or what the father might deem as the "preferred accommodation." The Tribunal rejected the argument that the Board had discriminated against M.M. within the meaning of the Code. Furthermore, the Tribunal stated that recess is not an instructional period and that not being able to go outside for recess on one day is not a denial of meaningful access to education.

The father had alleged that the Board contravened his parental wishes, awareness, and rights by placing U.M. and M.M. in a "community class," which denied them meaningful access to education. The Tribunal reviewed the evidence and determined that the school had been building a self-contained autism class. The teacher who would eventually teach in the autism class was working with U.M. and M.M., along with two EAs, outside their regular classroom. While the Tribunal agreed with the father that this situation amounted to withdrawal from a regular class, which was not in line with the Identification, Placement and Review Committee ("IPRC") placement of regular class with indirect support, the Tribunal did not agree that the Board had denied the students meaningful access to education.

School board personnel gave evidence that U.M. and M.M. were doing well with the level of support from the autism teacher, and from their perspective this was exactly the meaningful access that U.M. and M.M. needed. The Tribunal ruled that the Board was acting in the best interest of the children, and that the children had a meaningful access to education in accordance with their strengths and needs. U.M. and M.M. were thriving and benefiting from the community

The Tribunal held that the children had a meaningful access to education in accordance with their strengths and needs.

class. Varying the IPRC placement before implementing an actual change of placement did not amount to a breach of the Code. Furthermore, the Tribunal is not charged with ensuring full compliance with the IPRC process.

COMMENTARY

Ultimately, the evidence heard by the Tribunal did not support the father's allegation that his children were denied access to a meaningful education. Rather, the Tribunal held that the Board cooperated with the father and accommodated his requests by varying the student's attendance; changing their placement from special education classes to regular classes; substituting the EAs working with the children; providing EA support during the summer camp program; and by allowing the father a significant level of involvement, and even control, beyond what the relevant legislation normally calls for and which most parents expect and receive.

The Tribunal concluded that the Board provided reasonable and appropriate educational services to U.M. and M.M., even though their father had different ideas and wishes about the education he preferred for his children.

The Tribunal concluded that the Board provided reasonable and appropriate educational services to U.M. and M.M.

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