# SUPREME COURT OF NOVA SCOTIA

**Citation:** *Conseil Scolaire Acadien Provincial v. Nova Scotia Teachers Union*, 2024 NSSC 113

**Date:** 20240425
**Docket:** 521491
**Registry:** Halifax



**Between:**

Conseil Scolaire Acadien Provincial

*Applicant*

v.

Nova Scotia Teachers Union and Sacha Morisset, Arbitrator

*Respondents*

## JUDICIAL REVIEW APPLICATION

**Judge:** The Honourable Justice Pierre Muise

**Heard:** December 11, 2023, in Halifax, Nova Scotia

**Counsel:** Noella Martin, KC, and André Goguen for the Applicant
Joël Michaud, KC, for the Respondent

**By the Court:**

## BACKGROUND

[1] A teacher employed by the Conseil Scolaire Acadien Provincial (CSAP) was put on leave with pay pending investigation into allegations of misconduct and inappropriate conduct against him. The CSAP contacted his representative in the Nova Scotia Teachers Union (NSTU) to arrange a meeting with the teacher to discuss the allegations. A date was selected.

[2] However, before the meeting date, the teacher, who had a history of illness, including mental illness, went on sick leave. The note from his family physician, dated June 9, 2022, indicated he "required 6 weeks of medical leave". The union representative advised the CSAP that the teacher would not be able to make the meeting because he was on sick leave. The CSAP responded that a meeting was required before they could consider his return to work and asked for suggestions regarding arranging such a meeting. The union representative replied that he could meet with them in September, after his sick leave and summer vacation.

[3] His bank of sick days was all used up at the end of June. Therefore, the CSAP noted him as being on medical leave without pay starting July 1. As a result, the Department of Education and Early Childhood Development ("Department") stopped paying the teacher's salary as of August 1. (It appears that the July salary is considered to have been earned as part of the salary for the preceding teaching days in that year.)

[4] The union representative contacted the CSAP on August 12 regarding that stoppage. The CSAP responded that the teacher had to meet with them, as soon as possible, to discuss the allegations, so that it could assess what measures, if any, to take. It highlighted that: the medical leave letter did not extend into August, so there was no reason the teacher could not meet with them; and, it was imperative they meet before September to avoid disruption of the school schedule.

[5] No meeting occurred.

[6] In early September, the teacher's family physician provided an opinion that the teacher was unable to work until early December 2022. He later extended that to February 2023.

[7] The parties were unable to agree on whether the teacher was entitled to continue receiving his salary, nor on whether he was entitled to a renewed bank of 20 sick days effective August 1.

[8] The NSTU filed two grievances. One was under the Agreement between the Minister of Education and Early Childhood Development ("Minister") and the NSTU, cited as the Teachers' Provincial Agreement ("Provincial Agreement"). The other was under the "Convention entre Le Conseil scolaire acadien provincial et Le NSTU" ("Regional Agreement").

[9] Arbitrator Sacha Morisset was assigned to hear the grievance under the Regional Agreement. In his decision, he articulated that he recognized salary is a matter governed by the Provincial Agreement and he did not have jurisdiction to hear the grievance filed under that Agreement.

[10] However, he found that: the CSAP had violated the Regional Agreement by erroneously showing the teacher as having been on unpaid medical leave after July 21 (ie. the end of the six weeks specified in the physician's note) and by failing to replenish his bank of 20 sick leave days effective August 1; and, those actions resulted in the Department stopping the teacher's salary starting August 1.

[11] Relying on a further opinion from the teacher's family physician, the arbitrator concluded that the CSAP's actions triggered the teacher's relapse, rendering him unable to return to work in September, and significantly contributing to his continued illness.

[12] He ordered the CSAP to pay the teacher's salary from August 1 to the date of the decision, and continuing, on a periodic basis, until the return-to-work date indicated in the physician's medical note, or such earlier time as the teacher was able to return to work. He stated this was in the form of reparation for the CSAP's violation of the Regional Agreement.

[13] The CSAP filed this Application for Judicial Review alleging that the Arbitrator committed a reviewable error in ordering it to pay the teacher's salary.

[14] It submits that he did not have jurisdiction to do so, and, even if he did, it was unreasonable for him to do so.

[15] The NSTU submits that the Arbitrator acted within his jurisdiction and his decision was reasonable.

## ISSUES

[16] This Application raises the following issues:

1. What is the standard of review for determining whether the Arbitrator exceeded his jurisdiction?
2. Did the Arbitrator exceed his jurisdiction?
3. If the Arbitrator did not exceed his jurisdiction, was his decision to order the CSAP to pay the teacher's salary reasonable?

## LAW AND ANALYSIS

### ISSUE 1: WHAT IS THE STANDARD OF REVIEW FOR DETERMINING WHETHER THE ARBITRATOR EXCEEDED HIS JURISDICTION?

[17] The CSAP submits that the correctness standard of review applies to the question of whether the Arbitrator exceeded his jurisdiction. In support, it notes the following:

- *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at paragraph 63, directed that the "correctness standard be applied in order to resolve questions regarding jurisdictional boundaries between two or more administrative bodies".
- The *Teachers' Collective Bargaining Act*, S.N.S. 1989, c. 460 ("TCBA") imposes a two-tiered bargaining system whereby grievances related to the Regional Agreement are conducted using a procedure and arbitral body that is different from that used for grievances related to the Provincial Agreement.

[18] The NSTU submits that the reasonableness standard of review applies. In support, it notes the following:

- *Vavilov* "cease[d] to recognize jurisdictional questions as a distinct category attracting correctness review" [para 65] and limited correctness review to situations where you have competing tribunals.
- The two-tiered bargaining situation in the case at hand is not what the Supreme Court of Canada in *Vavilov* had in mind as being such competing tribunals.

[19] The NSTU submits that the same tribunal is created whether a grievance is filed under the Regional Agreement or the Provincial Agreement. The CSAP disagrees. No evidence or authority was submitted to support the NSTU's position on that point.

[20] Section 2(h) of the TCBA defines "employer" as meaning:

i. the Minister of Education and Early Childhood Development "in respect of" a specific list of subject matters and expressly includes "any other matters that are ancillary to or incidental to [them] or that may be necessary to their implementation"; and,

ii. the "education entity" (which in this case is the CSAP) "in respect of" a different specific list of subject matters, which list includes "terms and conditions of employment or any other matters, not included in a professional agreement with the Minister of Education and Early Childhood Development", but does not expressly include ancillary or incidental matters, nor matters that may be necessary to implement the listed subject matters.

[21] As already mentioned, the Provincial Agreement is between the NSTU and the Minister, and the Regional Agreement is between the NSTU and the CSAP or the "educational entity". Section 28 of the TCBA provides that both Agreements are binding on, among others, the NSTU and the CSAP.

[22] Each agreement has its own grievance procedure that applies only to disputes regarding matters dealt with in that agreement. The matters dealt with under each agreement conform with the lists of subject matters ascribed to each "employer" in the section 2(h) definition. For example, Article 5 of the Regional Agreement deals extensively with sick leave, a subject matter ascribed to the CSAP in the section 2(h) definition of employer. In contrast, Article 43 of the Provincial Agreement deals extensively with salaries, a subject matter ascribed to the Minister in the section 2(h) definition of employer.

[23] There are some similarities between the two grievance procedures. However, there are also notable differences. The following are examples. Some of the timelines are different. The Provincial Agreement provides for different procedures depending on the subject matter of the grievance. The Regional Agreement has one procedure for all types of grievances. The Provincial Agreement only refers to

appointing a single arbitrator. Under the Regional Agreement, if the parties agree, they may use a three-person arbitral board.

[24] Therefore, the TCBA, combined with the respective Agreements reached in conformity with it, establish two separate arbitral or administrative bodies, each with its own procedure and potential composition. The wording of the section 2(h) definition of "employer" makes it clear that there is no overlap in the subject matters to be decided by the arbitrator or arbitral board established under each Agreement. If some overlap had been intended, section 2(h)(ii), which defines the educational entity, ie. the CSAP, as the employer, would also have expressly stated that ancillary or incidental matters, or matters necessary to implementation, were included, and it would not have expressly excluded matters that are included in the Provincial Agreement.

[25] Consequently, I agree with the CSAP that whether the Arbitrator exceeded his jurisdiction must be assessed using a correctness standard of review.

**ISSUE 2: DID THE ARBITRATOR EXCEED HIS JURISDICTION?**

[26] The CSAP submits that the Arbitrator exceeded his jurisdiction in dealing with payment of the teacher's salary and with his entitlement to benefits. In support, it advances the following:

- The grievance the NSTU filed under the Provincial Agreement alleged, among others, breaches of the section of that Agreement dealing with salary and insured benefits, more specifically access to medical benefits. The Arbitrator knew that.

- He also knew that the grievance it filed under the Regional Agreement did not allege breaches related to non-payment of salary or entitlement to benefits. Rather it alleged breaches of the section dealing with sick leave and entitlement to pay during sick leave. It requested, as a remedy, that the CSAP be ordered to pay the teacher's sick leave and any other remedial measures available under the Regional Agreement.

- The grievance procedure under each Agreement is completely separate from that under the other. Therefore, the Arbitrator "could only deal with items in the" Regional Agreement, which do not include salary and benefits.

- Section 2(h) of the TCBA expressly defines the Minister as being the "employer" in respect of "the salaries of teachers" and "medical care plans for teachers".

- The Provincial Agreement contains provisions related to salary. The Regional Agreement does not.

- Article 26.01 of the Regional Agreement provides that the grievance procedures in that Agreement are to deal with disputes regarding matters covered in that Agreement. Similarly, Article 42.01 of the Provincial Agreement provides that the grievance procedures in that Agreement are to deal with disputes regarding matters covered in that Agreement.

- Even the NSTU knew that salary grievances were to be directed to the Minister, as, in its September 7, 2022 email to Shirley Nevo, of the Department of Education and Early Childhood Development ("Department"), it asked that the non-payment of the teacher's salary be rectified. The Arbitrator referred to that email in his decision.

- The Arbitrator knew he only had jurisdiction to deal with the issue raised in the Regional Grievance, ie. the sick leave issue. However, "he considered evidence related to salary and made a decision on it", thus exceeding his jurisdiction.

[27] The NSTU submits that the Arbitrator did not exceed his jurisdiction. In support, it advances the following :

- He was within his jurisdiction in determining that the CSAP wrongfully informed the Department that the teacher was on sick leave without pay. That made it such that the teacher did not receive his August pay and caused his relapse. He merely ordered the remedy that would put the teacher back in the financial position he would have been in but for the CSAP's wrongful act. He made it clear in his reasons that he was ordering the CSAP to pay the teacher's salary as a remedy.

- The Arbitrator in Northside-Victoria District School Board and NSTU, Re, 1995 CarswellNS 652, ruled that the NSTU could refer to both

levels of Agreements in establishing a breach by the Board. It noted that the Agreements had to be read together and complemented each other. The decision was upheld on judicial review: NSTU v. Nova Scotia (Minister of Education), 1995 CarswellNS 465 (N.S.S.C.).

- Section 28(1) of the TCBA provides that the Provincial Agreement is binding on the CSAP. Article 5.03 of the Provincial Agreement requires the CSAP to enter into specified employment contracts with its teachers, which all include a requirement that the CSAP pay its teachers their salary under the Provincial Agreement, in proportion to the number of days they teach, or are deemed to have taught, compared to the total available teaching days in the year. Paragraph 2.01(j) of the Regional Agreement defines an "enseignant", ie. a teacher, as being a person defined as a teacher in the Provincial Agreement who is employed by the CSAP under a contract. So, those contracts are incorporated by reference into the Regional Agreement, including the obligation to pay the teacher.

- Arbitrators have jurisdiction to remedy breaches of collective agreements by granting awards that put the non-breaching party or parties in the position they would have been in if there had been no breach. That is what occurred in Blouin Drywall Contractors Ltd. v. C.J.A., Local 2486, 1975 CarswellOnt 827 (C.A.), and in Labourers International Union of North America, Local 61 v. Stavco Construction Limited, 2019 NSCA 53.

[28] The NSTU's submission that the Arbitrator was not dealing with a question of salary but was merely ordering the CSAP to pay the salary the teacher would have earned had it not improperly shown him as being on sick leave without pay, is a distinction without a significant difference.

[29] The Arbitrator, in addressing the issue of sick leave, could determine that the teacher was wrongly classified as being on sick leave without pay. He could also determine that the teacher ought to have been given his yearly allotment of 20 paid sick days starting August 1, and ordered payment for those sick days. However, other factors may have affected whether the teacher was entitled to receive his salary during August and the rest of the period ordered by the Arbitrator.

[30] Not all factors relevant to salary entitlement were before the Arbitrator, or the Arbitrator did not find it necessary to determine them. That appears to be

because the grievance was in relation to sick leave, not salary. Examples include the following:

- He did not address whether the teacher may be disentitled to some of his August pay if he did not return to work after the expiry of the period of sick leave specified in the September 2022 opinion of his family physician.
- He did not find it necessary to determine whether the teacher could refuse the CSAP's request to meet during July or August to discuss the allegations against him.
- The CSAP challenged the opinion of the teacher's family physician based on his lack of specific expertise. Had it understood that payment of the teacher's salary was being determined, it may have sought to provide an opinion from its own expert.

[31] An Arbitrator appointed to hear the grievance filed under the Provincial Agreement may have considered and determined such other factors or evidence. That is where they would have been properly considered, as that grievance focussed specifically on salary.

[32] Similarly, there were other factors to consider in determining whether the CSAP's actions caused the teacher to lose his medical benefits. For, example, there was evidence that he could have paid the premiums himself and the coverage would have continued. The question of the lost medical benefits was not fully addressed by the Arbitrator, likely because it was a subject matter raised in the Provincial Grievance, not the Regional Grievance.

[33] The Arbitrator in this case found breaches of the sick leave provisions in the Regional Agreement, noted that the teacher's salary stopped flowing as a result, then leap-frogged to a finding that the sick-leave breaches caused the relapse because it caused the cessation of salary. He did so, knowing he could not address, nor hear full evidence on, whether the teacher would otherwise have been entitled to his salary during the relevant time.

[34] Only an arbitrator hearing the Provincial Grievance could hear full evidence on salary entitlement and fully address the issue, to determine whether the teacher would otherwise have been entitled to receive his salary. If not, then the Arbitrator could not find that the sick-leave breaches caused the relapse because he found that it was the cessation of salary that caused the relapse.

[35] I agree with the NSTU that such a bifurcation of arbitral avenues can be cumbersome, especially considering that grievances under either Agreement would be likely to involve the CSAP, as it is bound by the Provincial Agreement. However, it and the CSAP created the two-tiered grievance process by agreeing on different grievance procedures under each Agreement. They could just as easily have adopted the grievance procedures under the Provincial Agreement and expressly specified that the same arbitrator would hear grievances under both Agreements at the same time.

[36] Despite this bifurcation, neither Agreement expressly forecloses the possibility of the parties agreeing to the same arbitrator hearing a Provincial Grievance and a Regional Grievance, arising from the same circumstances, concurrently. However, that is not what happened in this case. In this case, the Arbitrator was selected to deal only with the Regional Grievance regarding sick leave.

[37] *Labourers International* and *Blouin Drywall* both held that arbitrators can grant such remedies as are necessary or required to give meaningful effect to the collective agreement and avoid a remedy that would be meaningless for the aggrieved party in the circumstances. For example, as stated at paragraph 102 of *Labourers International*, the remedy imposed was required to "put 'teeth' in the certification process". Both cases involved construction projects where non-unionized workers were hired in contravention of the collective agreement. A mere declaration would have been meaningless as the time for hiring the unionized workers had already passed by the time the grievance dispute was determined. There was a concern that the employer could contest a grievance or certification process hoping to "run out the clock". That is not a relevant concern in the case at hand, as no legitimate obligation of the CSAP regarding salary would disappear with the passage of time.

[38] Also, neither case involved a situation where there was another grievance outstanding which focussed squarely on the issue of concern. In the case at hand, the non-payment of salary was the very issue the Arbitrator addressed in the "remedy" he imposed. The Provincial Grievance focussed squarely on that issue.

[39] In *Blouin Drywall*, at paragraph 11, the court stated that an effective remedy may be "by way of declaration of rights or duties, in order to provide benefits or performance of obligations or a monetary award required to restore one to the proper position he would have been in had the agreement been performed".

[40] In the case at hand, the remedy requiring payment of amounts equivalent to salary was not necessary as there was another grievance outstanding which specifically focussed on non-payment of salary (as well as on benefits). A declaration that the teacher ought not have been shown as on sick leave without pay and an order requiring CSAP to rectify the teacher's records to show that he was not on sick leave, and that he had been given his yearly 20-day sick leave allotment effective August 1, would have paved the way for the issue of salary and benefits to be determined by an Arbitrator appointed to hear the grievance under the Provincial Agreement. By ordering the payment of salary, the Arbitrator short-circuited and rendered moot the Provincial Grievance dealing squarely with salary.

[41] Another distinguishing feature is that, in the case at hand, the Arbitrator's finding of causation was indirect. He found that the CSAP wrongfully showed the teacher as being on sick leave without pay, which caused his pay to stop in August, which, in turn caused him to relapse and be unable to report for work in September, which in turn meant that he was not able to work and earn the salary he would have earned otherwise. In *Blouin Drywall* and *Labourers International*, the breach by hiring non-unionized employees directly removed work and pay from unionized employees.

[42] In relation to the NSTU's submission that, based on the *Northside-Victoria* case, both levels of Agreements can be referred to in a single grievance, I note that which follows.

[43] Paragraph 45 of the arbitration decision in that case states:

> "Although it was the position of the Board that the Provincial Agreement was not applicable and that this grievance really engaged only the provisions of the Local Agreement, the Board made no objection to the manner in which the grievance had progressed to arbitration and in particular, was not raising as an objection to the hearing of this grievance the fact that the Union had based its position throughout solely on the Provincial Agreement."

[44] Therefore, that was a situation where the parties, at least impliedly, agreed that the same arbitrator could hear and determine the grievance, irrespective of which Agreement was applicable, including that the arbitrator could determine which Agreement was applicable.

[45] In the case at hand, the grievance the Arbitrator was hearing was clearly limited to the Regional Grievance dealing with sick leave. The Provincial Grievance relating to salary and benefits was separate and still outstanding. Also,

the CSAP made it clear that they saw his role as being limited to determining issues of sick leave under the Regional Agreement. It gave no indication it consented to him dealing with alleged breach of the Provincial Agreement.



[46] I also note that the issue in that case related to the hiring of substitute teachers. Though the Provincial Agreement made that a responsibility of the Board, it also specified that the methods and procedures to be followed in exercising that responsibility were to "be the subject of bargaining between the Union and the School Board". The arbitrator concluded that, therefore, the hiring of substitutes was amongst the "subjects for a Local Agreement".

[47] As the question of which Agreement governed was a preliminary question, it made sense that the parties would agree that the same arbitrator determine that question and go on to determine the grievance, irrespective of the applicable Agreement.

[48] In the case at hand there was no dispute before the Arbitrator regarding which Agreement the sick-leave grievance fell under, nor regarding which Agreement the questions of salary and benefits fell under.

[49] In addition, I agree with the following points raised in the Crown response regarding the *Northside-Victoria* case:

- Article 3.03 of the Provincial Agreement provides that if any of its provisions conflict with the Regional Agreement, the provisions of the Provincial Agreement prevail.
- Article 4.01 of the Provincial Agreement provides that if any of its provisions conflict with any law passed by the Nova Scotia Legislature, that law shall prevail. Therefore, if the Provincial Agreement conflicts with the TCBA, the TCBA prevails.

[50] In the case at hand, both the Provincial Agreement and the TCBA clearly make salary and benefits a Provincial Level matter. So, there was no preliminary question regarding which Agreement governed the matter in dispute.

[51] I disagree with the NSTU's submission that the teachers' employment contracts are incorporated into the Regional Agreement, making the CSAP's obligation to pay the teacher's salary a matter that can be addressed under a Regional Grievance. Rather, Article 5.03 of the Provincial Agreement forces the CSAP to use the preset employment contract established under the Provincial

Agreement. The definition of teacher in Paragraph 2.01(j) of the Regional Agreement, as being a teacher according to the definition in the Provincial Agreement who is employed by the CSAP under a contract, is merely a convenient and succinct way of making it clear who is considered a CSAP teacher. The requirement and method for the CSAP to pay its teachers is clearly described in Article 66.01 of the Provincial Agreement. So, the non-payment of salary is a breach of the Provincial Agreement, to be addressed under a Provincial Grievance.

[52] Article 5 of the Regional Agreement deals with sick leave. Article 5.01 provides that each full-time teacher is entitled to 20 days sick leave starting August 1 each year. Article 5.02 creates an exception to the entitlement to those 20 days of sick leave where the teacher has been on unpaid sick leave. In that situation, the teacher's entitlement is prorated based on the number of teaching days remaining from the date the teacher resumes their duties to the end of the year. It is calculated using the percentage that those remaining days are of the total number of teaching days for the whole year.

[53] There was evidence that the last day remaining in the teacher's sick leave bank was June 30, 2022. The Arbitrator did not state whether he accepted or rejected that evidence. He did not mention that evidence in the portion of his decision explaining his conclusions. He relied on the June 9, 2022 physician's note stating the teacher was on a six-week medical leave, and the lack of any letter extending that leave, to conclude that the teacher was no longer on medical leave as of July 22, 2022. Therefore, the CSAP erred in categorizing him as having been on unpaid medical leave as of August 1, 2022. Instead, his status should have been shown as active. As such, he should have received his allotment of 20 sick leave days August 1.

[54] He also found that, though the CSAP pays its teachers through the Department, the teacher in question did not get paid his August salary because the information the CSAP sent to the Department was that he was on unpaid medical leave, as opposed to being an active employee.

[55] As already noted, once the Arbitrator had determined that the teacher was wrongfully categorized as being on unpaid medical leave, he could have remedied that error by directing the CSAP to correct that information with the Department. That would have removed the hurdle to determining his entitlement to August salary created by the sick leave characterization error. Directing the CSAP to grant

the teacher his 20 days' sick leave effective August 1 would have rectified that question.

[56] That would have left questions of entitlement to salary to be fully determined by an arbitrator appointed under the Provincial Agreement. As I have already discussed, such an arbitrator would have been able to consider other factors, including factors this Arbitrator determined he need not decide, and also consider more fulsome evidence focussed directly on the issue of salary entitlement. That would likely have included whether the cutting of pay caused the relapse and inability to return to work in September.

[57] Further, I agree completely with the CSAP's submissions regarding:

- The Arbitrator knowing what issues the respective grievances raised and that he was limited to determining sick-leave issues;
- The Regional Grievance procedure being completely separate from the Provincial Grievance procedure;
- The grievance procedure in each Agreement being to deal with grievances under that agreement;
- The subject matter of salaries being addressed in the Provincial Agreement, not the Regional Agreement; and,
- That being consistent with the subject matters assigned to the Minister under the definition of employer in section 2(h) of the TCBA.

[58] For these reasons, I find that the Arbitrator did exceed his jurisdiction in ordering payment of salary amounts as a remedy.

[59] Further, questions regarding "medical care plans for teachers" are part of the subject matters for which the Minister is the "employer" pursuant to s. 2(h) of the TCBA, and are included in the Provincial Agreement, but not in the Regional Agreement. The grievance filed under the Provincial Agreement included a complaint that the teacher had been denied his medical benefits. The grievance under the Regional Agreement did not include a complaint of denial of medical benefits. So, the Arbitrator exceeded his jurisdiction in making a finding that the teacher would have been entitled to have his medication covered, even though he did not grant a specific remedy for it.

**ISSUE 3: IF THE ARBITRATOR DID NOT EXCEED HIS JURISDICTION, WAS HIS DECISION TO ORDER THE CSAP TO PAY THE TEACHER'S SALARY AMOUNTS REASONABLE?**

[60] In light of my conclusion that the Arbitrator exceeded his jurisdiction, it is unnecessary for me to determine whether his decision to order the CSAP to pay the teacher's salary was reasonable. However, I make the following comments on this issue.

[61] A failure to consider relevant factual and legal points can render a decision unreasonable: *Yatar* v. *TD Insurance Meloche Monnex*, 2024 SCC 8, paras 71 to 76.

[62] The Arbitrator found that the teacher might have relapsed for reasons other than his pay being cut off, such as because of the stress and anxiety associated with the investigation into the allegations against him or that associated with his personal circumstances. However, he did not deduct any percentage of the salary amounts payable to account for that contingency.

[63] He said he considered it in declining to make an order as broad as that requested by the NSTU. However, the only additional relief requested by the NSTU was an order requiring the CSAP to pay the value of the medication that the teacher would have purchased if his health plan benefits had been continued but did not purchase because he could not afford it. That amount is not noted. There is nothing to indicate how it could reasonably be seen as a substitute for the negative contingency that the teacher may have relapsed in any event for such other reasons.

[64] The Arbitrator did not consider whether there should be any reduction in his award to account for the teacher's failure to mitigate by not finding the means to take the medications in question.

[65] The Arbitrator knew that the teacher had applied for long-term disability benefits. However, he did not consider whether the salary amounts to be paid by the CSAP would be reduced to account for such disability benefits received by the teacher.

[66] These are points that might, cumulatively, render the Arbitrator's decision unreasonable, except for his decision regarding sick leave, which the CSAP does not seek to overturn on this review.

## CONCLUSION, ORDER AND REMEDY

[67] For these reasons, I conclude and grant an order as follows.

[68] I set aside the portions of the Arbitrator's order dealing with payments equivalent to salary and with benefits. Those portions are contained in Subparagraphs 171 (b) to (d) of his decision.

[69] As the Arbitrator did not have jurisdiction to determine whether there were other factors which would have resulted in the teacher's salary being stopped or suspended, besides him being shown as being on unpaid sick leave, and his determination that the sick-leave breaches caused the salary loss is premised on that, the portion of his decision finding that the sick-leave breaches caused the salary loss is also set aside.

[70] Similarly, as he did not have jurisdiction to deal with benefits, any finding in his decision relating to benefits is set aside.

[71] The NSTU submits that, if the decision is quashed, the matter should be remitted back to the Arbitrator "for redetermination in accordance with the Court's directions". It argues that *Vavilov*, at paragraph 141, noted that this was the normal remedy.

[72] However, what *Vavilov* said at paragraph 141 is that, "where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision-maker to have it reconsider the decision, this time with the benefit of the court's reasons". [Emphasis by underlining added] In the case at hand, the Arbitrator's decision to order payment of salary and address benefits was reviewed on a correctness standard and it was determined that he exceeded his jurisdiction in doing so. Therefore, the portions of his decision quashed are not matters he has jurisdiction to determine. So, it is pointless to remit them back to him. Consequently, I will not do so.

[73] The CSAP submits that the teacher should be ordered to repay the salary paid to him pursuant to the Arbitrator's order. However, the issue of whether or not he was entitled to receive that salary, apart from payment having been stopped because he was shown as being on unpaid sick leave, has not been determined. I do not have a proper evidentiary or factual basis to determine it and it would be improper for me to do so.

[74] An Arbitrator hearing the Provincial Grievance could determine that issue. Alternatively, the parties may reach agreement on the issue.

[75] Therefore, I will not order repayment of those equivalent to salary amounts at this time.

[76] Should an Arbitrator with jurisdiction determine, or the parties agree, that the teacher was not entitled to receive a portion, or any, of those salary amounts, he shall be required to repay that portion, or all, of the salary amounts paid, as applicable.

[77] Should the NSTU not reinstitute the Provincial Grievance filed, or file a new one, by August 1, 2024, the teacher shall be required to repay the total equivalent to salary amounts in full by September 1, 2024, unless the parties reach an alternate agreement.

[78] Should the NSTU be unable to validly reinstitute the Provincial Grievance, or file a new one, despite having made all reasonable efforts to do so, I reserve the right to revisit the question of remedy in this judicial review and to receive further submissions from the parties on that issue.

[79] The NSTU submits that I cannot order repayment by the teacher because he is not a party to this judicial review. However, as noted by the CSAP, the NSTU filed the grievances on his behalf. It also contested this judicial review on his behalf. He is the one to whom the payments were made pursuant to an order that has now been set aside.

[80] It would be inequitable, and effectively render this judicial review meaningless for the CSAP, if he could not be ordered to repay something he ought not have been ordered to receive.

[81] Therefore, I find that I can order repayment as a remedy on this judicial review.

[82] I ask Counsel for the CSAP to prepare the Order and to include the following Costs.

## COSTS

[83] The CSAP submitted at the hearing that the successful party should receive costs in the $750 to $1,000 range based on Tariff C. The NSTU did not dispute

that. In the circumstances, an amount in the middle of that range will do justice between the parties. Therefore, I order Tariff C Costs of $875, plus reasonable disbursements, payable forthwith. If the parties are unable to agree on disbursements, I will receive written submissions on that point.

Muise, J.