IN THE MATTER OF AN ARBITRATION
(Policy Grievances dated May 22 and September 27, 2019)

BETWEEN:

NEAR NORTH DISTRICT SCHOOL BOARD
(the "Employer")

- and -

ELEMENTARY TEACHERS' FEDERATION OF ONTARIO
(the "Federation")

<u>PRELIMINARY AWARD</u>

Sole Arbitrator: Marilyn A. Nairn

Hearing held: August 26, 2020

APPEARANCES

For the Federation: Mark Wright

For the Employer: Dirk Van de Kamer

PRELIMINARY AWARD

[1] In these policy grievances, the Elementary Teachers' Federation of Ontario ("ETFO" or the "Federation") challenges the manner in which Near North District School Board ("NNDSB" or the "Employer") pays supplementary employment benefits ("SEB") to teachers on maternity leave. The Employer raised a preliminary objection. It asserted that the Federation is precluded from proceeding with these grievances on the basis that the issues that they raise have already been resolved. This decision deals with that issue.

[2] The Employer has administered the collective agreement such that it pays the SEB based on the number of teaching days that fall during the period of the maternity leave. It does not pay the SEB for non-teaching days such as summer vacation or March break. It then deducts the amount of Employment Insurance ("EI") benefit received, regardless of whether that EI benefit was payable for a teaching day or a non-teaching day. In the result, the overall amount of the maternity benefit can vary quite significantly between teachers, depending on when a teacher takes maternity leave, and even while the overall length of the leave may be the same.

[3] Through these grievances, the Federation seeks to establish that the provisions of the collective agreement provide that the SEB benefit is payable regardless of whether the leave falls on a teaching day or a non-teaching day. Inherent in this position is also the issue of how the EI benefit is subtracted from the SEB payment made.

[4] The parties prepared an agreed statement of fact for purposes only of this preliminary issue. The referenced documentary material was also filed. That statement of fact provides:

Overview

1. At the time the herein grievances were filed, the Board and the Federation were parties to a collective agreement ("the collective agreement") with a term of September 1, 2014 to August 31, 2017, which was then extended to August 31, 2019 (**Exhibit 1**).

2. This Agreed Statement of Facts pertains to the arbitration of two policy grievances filed May 22, 2019 and September 27, 2019 (**Exhibit 3 and 8** respectively**)**.

3. The grievances allege, on behalf of the Federation and of all affected members, that:

   the employer had failed to uphold its obligations under the Collective Agreement by its failure to pay the Supplemental Employment Benefit ("SEB") Plan in accordance with the Collective Agreement. This includes, but is not limited to, the manner in which the Board calculates the SEB and makes inappropriate deductions of the Employment Insurance amount the member receives from the SEB amount the member is eligible to receive.

4. The Employer denies that there has been a breach of the Collective Agreement.

How SEB benefits are currently administered

5. The Board currently administers SEB benefits for pregnancy leave in a lump sum or bi-weekly payments, depending on the teachers' preference. SEB payments are calculated using the following formula.

   SEB Calculation:

   - SEB at 100% (6 weeks):
     Teaching Days in 6 week period (max 30 days) x Daily Teaching Rate x 100%

   - SEB at 95% (11 weeks) :
     Teaching Days in 11 week SEB eligibility period x Daily Teaching Rate x 95%

   Deductions from SEB Calculation:

   - **Less: Total EI Received during 17 week period**

   - **Less: Any overpayment owing if teachers has [sic] already been paid in excess of the number of days worked.**

6. There are approximately 194 teaching days in the school year. The Board calculates a teacher's pro-rata SEB entitlement based on the number of teaching days missed during the leave period. Where a teacher's leave includes non-teaching days (statutory holidays, March break, summer break, etc.), she receives no SEB benefits for those days (See **Tab 7** and **Tab 9**).

7. Teachers receive Employment Insurance ("EI") benefits directly from Service Canada on a bi-weekly basis. The Board deducts the total amount of EI benefits received by a teacher in the 17 week pregnancy leave period from that teacher's lump sum SEB amount, regardless of whether a teacher has received a SEB top-up for all 17 weeks. For example, if a teacher's pregnancy leave starts at the end of June, the Board will not provide any SEB top up for the 8 summer weeks when school is not in session. The Board will however, deduct the total amount of EI, including the amount received by the teacher from Service Canada during those 8 summer weeks, from the SEB lump sum awarded to that teacher (See **Tab 7** and **Tab 9**).

8. The Board provides six weeks of SEB top up at 100% of the teacher's salary. However, the teacher is not always paid this amount for the first six weeks of their leave, nor for 30 consecutive days. If a teacher's first six weeks of leave occur during a non-teaching period such as summer break, the teacher will be given 100% SEB benefits for a later 6 week period that occurs during the school year and will receive correspondingly fewer weeks of 95% SEB benefits (See for example, Laura Hudson, Cassandra McCarron SEB payment calculations at **Tab 7**; and Rebecca Thompson, Sam Loreto, Ashley Tran, Rachelle Gorecki at **Tab 9**).

Collective Agreement Language and Bargaining Context

Local Supplementary Employment Benefit Language

9. The language of Article 19.05 to 19.08, which is now part of the Part B-Local portion the Collective Agreement, has remained largely unchanged since at least September 1, 2001.

10. In the 2004-2008 collective agreement, the parties agreed to the addition of paragraphs 2 and 3 in Art. L19.05.02, which clarified how the SEB was to be administered, but did not substantially change members' entitlement under that provision.

11. Under the current collective agreement, L19 also makes note of the additional provisions related to SEB benefits under Part A of the Collective Agreement. For our purposes, the relevant sections of L19 are as follows:

L19.05 <u>SEB Plan</u>

[Additional provisions for SEB Plan are included in article C11.00 and Letter of Agreement #8 in Part A-Central Terms]

During a period of Pregnancy Leave, or Short-term Parental Leave involving the adoption of a child who has not attained school age, payments made according to the Supplementary Employment Benefit Plan will consist of the following:

L19.05.01 The Board will pay 95% of the Teacher's regular salary for the first two weeks of either Pregnancy or Short-term Parental Leave but not both.

L19.05.02 During this leave, the Teacher shall receive 95% of full pay minus Employment Insurance Pregnancy or Parental benefits for the next 15 weeks in the case of Pregnancy Leave and for the next 10 weeks in the case of Short-term Parental Leave but not both. The combined weekly level of Employment Insurance benefits, SEB payments and other earnings shall not exceed 95% of the Teacher's full salary during the time period covered by the SEB Plan.

The entitlement in L19.05.01 and L19.05.02 will be paid in one lump sum when proper documentation has been received and processed by the Board. The Board shall pay out the SEB as quickly as possible.

Dependent on the date of leave, a teacher may have already been paid in excess of the number of days worked. The Board will advise the employee if any overpayment has occurred. Any overpayment will be deducted from the SEB and where the overpayment exceeds the entitlement under SEB, the additional amount will be repaid during the 1st calendar year of the leave. The Board and the teacher will mutually agree to the repayment plan, provided the entire amount is repaid by the end of the calendar year.

[....]

L19.05.04 The Teacher must apply for Employment Insurance benefits before

95% of salary becomes payable.

L19.05.05 No monies will be paid to a Teacher who is not entitled to Employment Insurance benefits or who is excluded from said benefits. Monies owing will only be paid once the Board has been assured that the Teacher has applied for Employment Insurance benefits and is entitled to said benefits. The only exceptions are:

i) serving the Employment Insurance waiting period;
ii) Employment Insurance benefits entitlement have been exhausted;
iii) insufficient insurable weeks to qualify for Employment Insurance.

L19.05.06 Teachers do not have a right to SEB payments except for supplementation of Employment Insurance benefits during the unemployment period as specified in the plan.

L.19.05.07 Payments in respect of guaranteed annual remuneration or in respect of deferred remuneration or severance pay benefits are not reduced or increased by payments received under the SEB plan.

2008-2013 Collective Agreement and Bargaining Context

12. On September 11, 2012, the Government of Ontario introduced (and subsequently enacted) the *Putting Students First Act, 2012* ("Bill 115"), which set out the terms under which education sector collective agreements were to be negotiated or, if negotiations were not achieved, imposed on education sector workers for the period of September 1, 2012 to August 31, 2014.

13. On June 12, 2013, the Government of Ontario and ETFO reached a Memorandum of Understanding ("2013 MOU") that would override and improve the terms imposed by Bill 115 in regard to several bargaining issues, including Maternity Benefits (**Tab 2**). Upon the completion of Local bargaining, which the 2013 MOU determined would conclude no later than August 29, 2013, the terms agreed to in the MOU were to be appended to, and form part of the existing local collective agreement. Any terms agreed to by the local could not be inconsistent with the terms contained in the MOU.

14. According to the 2013 MOU, Maternity Benefits were to be as follows for all eligible members who begin a pregnancy leave no earlier than May 1, 2013:

Maternity Benefits

Eligible Employees

Effective May 1, 2013, employees previously entitled to maternity benefits under the 2008-12 collective agreement or the last collective agreement concluded between the parties will continue to be entitled to these benefits. In addition, the benefits are also available to:

- Employees hired in a term position or filling a long-term assignment, with the length of the benefit limited by the term of the assignment and commencing with the birth of the child
- Any other full-time employee (for this purpose defined as greater than 24 hours per week)

Employees on daily and/or casual assignments are not entitled to maternity benefits unless they were previously entitled under the provisions of the 2008-12 collective agreement or the last collective agreement concluded between the parties.

Benefit Entitlement

Notwithstanding any provision in the collective agreement to the contrary, all "eligible employees" as set out herein on pregnancy leave shall receive 100% of their salary for not less than the eight (8) weeks of pregnancy leave less any amounts received under the Employment Insurance Act during such period. Such payments shall be made without deduction from sick leave or the Short Term Leave Disability Program (STLDP) under the collective agreement.

For clarity, eligible employees shall receive the pregnancy leave benefit payments herein for the entire eight (8) week period throughout the course of the entire calendar year regardless of whether the employee would otherwise be required to work during the eight (8) week period (i.e. during summer, March and Christmas breaks etc.). Payment shall be made to the employee in accordance with the Board's payroll procedure.

It is further understood that, where superior entitlements exist in the 2008-2012 Collective Agreement or the most recent collective agreements entered into by the parties, those superior entitlements shall apply.

Notwithstanding the above, where a bargaining unit so elects, the SEB or salary replacement plan noted above will be altered to include six (6) weeks at 100%, subject to the aforementioned rules and conditions, plus meshing with any superior entitlements to maternity benefits contained in the 2008-2012 collective agreement. For example, a 2008-2012 Collective Agreement that includes 17 weeks at 90% pay would result in 6 weeks at 100% pay and an additional 11 weeks at 90%.
In order to be eligible to the maternity benefits herein, an employee must commence a pregnancy leave no earlier than May 1, 2013.

15. Sometime before August 29, 2013, the effect of the 2013 MOU was that the 2013 MOU was incorporated into the Local 2008-2012 Collective Agreement.

16. After its coming into force, the Board began to provide 6 weeks of SEB benefits at 100% and 11 additional weeks of SEB benefits at 95% as per paragraph 4 of the "Benefits" section of the 2013 MOU. However, the Board continued its practice of calculating a teacher's SEB entitlement based on the number of teaching days within the pregnancy leave period.

17. The Federation filed three policy grievances dated September 26, 2013, December 11, 2013, and October 17, 2014 respectively alleging that the Board had violated the Collective Agreement, which was not amended to include the 2013 MOU, by failing to remit all SEB benefits owing to members and had improperly calculated and deducted Employment Insurance payments from members on pregnancy and parental leave. It was the Federation's position that the 2013 MOU significantly modified the local collective agreement with respect to SEB benefits. Specifically, it was the Federation's position that paragraph 2 and 4 of the "Benefits" Section entitled members to at least 17 weeks of SEB benefits (6 weeks at 100% top up and 11 weeks at 95% top up) "throughout the course of the entire calendar year regardless of whether the employee would otherwise be required to work [...] (i.e. during summer, March and Christmas breaks etc.)."

18. During the course of arbitrating these grievances, the Board brought to the Association's attention a Letter of Understanding dated November, 2001 ("2001 LOU") between the Board and the Near North Locals of ETFO and the Ontario Secondary School Teachers (OSSTF) (**Tab 12**). As specified in that LOU, the calculation of SEB benefits for maternity leave was to be "based on the actual number of teaching days" during the period of SEB eligibility.

19. On May 4, 2018, the parties entered into Minutes of Settlement in relation to the three above-noted grievances detailing the manner in which SEB benefits would be administered under the 2008 – 2012 collective agreement (**Tab 11**). The parties agreed, *inter alia,* that:

> The Board confirms that notwithstanding the Minutes of Settlement from November, 2001, which it continues to apply, it administers the Supplementary Employment Benefit consistent with the Memorandum of Understanding between the Government of Ontario and the Elementary Teachers' Federation of Ontario from June 12, 2013, to ensure that all members on pregnancy leave receive six weeks of salary replacement at 100% of salary, which benefit is then meshed with the superior entitlements to maternity benefits contained in the 2008-2012 Collective Agreement;

Current Collective Agreement and Bargaining Context

20. In April 2014, with the passage of the *School Boards Collective Bargaining Act*, 2014, SO 2014, c 5 ("*SBCBA*"), the collective bargaining structure between ETFO and the School Boards of Ontario changed from a decentralized system to a multi-tiered system of bargaining, with a mandatory role for the Crown at the central table. Under the system put in place through the *SBCBA*, every collective agreement between ETFO

and a School Board now consists of two parts: Part "A" includes those terms which are central terms, and Part "B" comprises those terms which are local terms.

21. As made clear in C1.00 of the current Collective Agreement, provisions in "Part A" of the collective agreement are binding on the Board and ETFO. Furthermore, "[s]hould a provision in the Central Agreement conflict with a provision in the Local Agreement, the provision in the Central Agreement, Central Term will apply."

22. In addition to the Local provisions concerning SEB benefits (L19.05-19.08 outlined above), the 2014-2017 [collective agreement] contained the following relevant Central provision:

C11.2 Pregnancy Leave

a) The Employer shall provide for permanent and long-term occasional teachers a SEB plan to top up their E.I. Benefits. The teacher who is eligible for such leave shall receive 100% of salary for not less than (8) weeks of pregnancy leave less any amount received under the *Employment Standards Act* [sic] during such period. There shall be no deduction from sick leave or the Short Term Leave Disability Program (STLDP).

[...]

f) Eligible teachers shall receive the pregnancy leave benefits herein for the entire eight (8) week period throughout the course of the entire calendar year regardless of whether the teacher would otherwise be required to work during the eight (8) week period (i.e. during summer, March and Christmas breaks etc.). Payment shall be made to the teacher in accordance with the Board's payroll procedure.

23. The Collective Agreement also contains Letter of Understanding #8 (LOU #8) which stipulated that in regard to some specific central bargaining issues, including Pregnancy Leave Benefits, the status quo established by the 2013 MOU would remain in place and should be meshed with local provisions:

LETTER OF AGREEMENT #8

RE: Status Quo Central Items Requiring Amendment and Incorporation

The following four central issues have not been modified during this round of collective bargaining and remain status quo. These provisions must be incorporated by local parties to align the terms of the 2012-14 MOU provisions with previously existing local terms. Below please find specific direction for local parties to ensure that the entirety of the provision is contained in the collective agreement, eliminating the need to refer to previous source documents.

[...]

Pregnancy Leave Benefits:

Where superior provisions exist, as a result of the meshing of the 2012 [sic] MOU with any superior provisions that existed in the 2008-2012 collective agreements, they must be incorporated into the common central provisions in Article 11.2 of Part A of this agreement and the resulting article placed in Part B of this agreement.

24. The central bargaining table reached an agreement in regard to Part-A of the 2014-2017 collective agreement on November 2, 2015. Part-B Local bargaining concluded and the collective agreement was agreed to in its entirety by the local parties on November 7, 2016.

Federation's Argument

25. The Federation filed the herein policy grievances alleging that the Board's method of calculating SEB benefits as described above constitutes a [breach of] the collective agreement.

26. It is ETFO's position that as stipulated in Letter of Understanding #8, superior provisions did exist in Near North District School Board as a result of the meshing of the 2013 MOU with the superior provisions in the 2008-2012 collective agreement. It follows, therefore that Article 11.2 of Part A of the Near North District School Board collective agreement must be amended to incorporate the superior provisions from the meshing of the 2013 MOU and the 2008-2012 collective agreement (6 weeks at 100% top up; 11 weeks at 95%) and the resulting article placed in Part B of that agreement.

27. The portion of Article C11.2 which stipulates that "Eligible teachers shall receive the pregnancy leave benefits herein for the entire eight (8) week period throughout the course of the entire calendar year regardless of whether the teacher would otherwise be required to work" should be applied to the entirety [sic] 17 week period of superior benefit resulting from the meshing of the 2008-2012 agreement with the 2013 MOU. As a result, the MOS from November 2001 no longer has any application and members are entitled to their full pregnancy leave entitlement regardless of when that leave commences.

28. As such, the Association [sic] alleges that:

- the Board has been improperly withholding SEB benefits for non-teaching days as required by Letter of Understand #8 and Article C11.2;
- the Board has been providing less than 17 weeks of SEB top-up as required by Letter of Understand #8 and Article C11.2;
- the Board has improperly deducted the total amount of EI received by a teacher from her SEB lump sum regardless of whether she was actually provided with a SEB top-up for the corresponding weeks, contrary to Letter of Understand #8 and Articles C11.2 and L19.05.02;

29. As confirmed by email on February 24, 2020, the parties agreed that all SEB matters that are similar in scope and substance to those raised in the herein policy grievances will be consolidated under the existing grievances and the Federation need not file further individual grievances (**Tab 6**).

(all emphasis in original)

[5] The 2018 Minutes of Settlement ("2018 MOS") cited at paragraph 19 of the agreed statement of facts further provide as follows:

WHEREAS the Federation filed three policy grievances ...alleging that the Collective Agreement was violated insofar as a number of members were not properly compensated pursuant to the [SEB] plan as set out in the Collective Agreement;

AND WHEREAS the Board does not admit having violated the collective agreement;

AND WHEREAS the parties are desirous of settling all of the issues arising under the Grievances fully and finally;

[para 1 as cited at para 19 of the agreed statement of fact]

2. The Board recognizes that the Federation intends to propose such language or changes to the collective agreement in the next round of bargaining as are necessary to ensure that the Minutes of Settlement from November 2001 are no longer relevant to the calculation and payment of pregnancy leave under the Collective Agreement;

3. The Grievances are hereby withdrawn without prejudice or precedent to any other matter between the parties.

[6] There is no dispute that the reference in the 2018 MOS to the "Minutes of Settlement from November 2001" is the same document that the parties have identified here as the 2001 LOU. The 2001 LOU is titled "Parental/Maternity Leave" and provides, in part:

<u>Part A</u>
<u>That the following interpretation shall apply as of Sept. 1, 2000.</u>

1. The first 2 weeks:
   The Board shall pay 95% of full salary...
   Note: This calculation is based on the actual number of teaching days during this time period.

2. Up to the next - 10 weeks for Parental Leave
   or -15 weeks of Maternity Leave
   The Board will pay 95% of full salary minus any E.I. for this period of time.
   Note: This calculation is based on the actual number of teaching days during this time period.

(italics in original)

* * *

[7] It is the position of the Employer that the three earlier grievances raised the same issues as the current grievances. During those proceedings, it argued, the Board produced the 2001 LOU, ETFO considered its position, and eventually the 2018 MOS was signed by the parties on May 4, 2018.

[8] That 2018 MOS, argued the Employer, resolves the issue of how the SEB is to be calculated and resolves any issue as to whether the SEB plan in this collective agreement provides income replacement or an income as asserted by the Federation. The calculation is the same for teachers represented by both OSSTF, the secondary teachers' federation, and ETFO, argued the Employer, and has been in place at NNDSB for decades.

[9] The 2018 MOS does not purport to change the SEB calculation, argued the Employer. It reflects a meshing of the superior benefit found in the local collective agreement between these parties with the central provisions, it argued. The Employer acknowledged that a teacher who takes maternity leave in the summer may receive less SEB benefit than a teacher who takes maternity leave during the school year. While it understands that some view this as unfair, it argued that income lost is replaced, also a fair result, and one it argued that the parties have bargained. If the Federation seeks to change the terms of the SEB plan, argued the Employer, it is free to raise the matter in bargaining as it indicated it intended to so do in the 2018 MOS.

[10] To allow ETFO to proceed with these grievances, argued the Employer, would render the 2018 MOS ineffective and of no consequence, a result contrary to sound labour relations. Any arguments could and should have been made in the context of the earlier grievances, it argued, and nothing has changed either with respect to the issues or the language under consideration to warrant allowing these grievances to proceed. The Employer asked that the grievances be dismissed at this preliminary stage.

[11] ETFO disagreed with the Employer's characterization. It argued that it was not seeking to advance the same argument as in the earlier grievances. In the earlier grievances, it argued, ETFO took issue with the Employer's practice and was met with the 2001 LOU. ETFO maintained its argument that the 2013 MOU modified the 2001 LOU at least to the extent of providing six weeks of benefit at 100% and, ETFO argued, the Employer did not disagree, noting that the Employer does ensure that six weeks are paid out at 100%.

[12] Where ETFO modified its position in the earlier grievances, it argued, was with respect to whether that six weeks had to be paid out as the first six weeks of leave. The Federation acknowledged that it conceded that the remaining eleven weeks would be subject to the 2001 LOU and practice. It did not however, it argued, rely on the central language agreed to in November 2015, including LOU #8 or Article C11.2 because that language did not exist at the time

the earlier grievances were filed. Further, argued ETFO, Article C1.00 of the central language provides that local provisions cannot conflict with central provisions and, to the extent they do, are overridden by the central language.

[13] In the result, argued the Federation, whereas the earlier grievances were subject to the language of the 2008-2012 collective agreement as supplemented by the 2013 MOU, these grievances must now consider Article C11 and Letter of Understanding #8 which, it asserts, once implemented, render the 2001 MOU and any resulting practice obsolete.

[14] Further, argued the Federation, in the 2018 MOS the Board acknowledges that ETFO intended "in the next round of bargaining" to propose language or changes as necessary to render the 2001 LOU irrelevant. Yet, argued the Federation, by the time that MOS was signed, the next round of bargaining had already happened.

[15] ETFO argued that the difference in maternity benefit paid based on when one takes the leave strikes members as manifestly unfair and reflects an outdated appreciation of the purpose of a maternity benefit. In these grievances, it argued, it intends to pursue that issue based on an argument now available under new collective agreement language that did not exist in the context of the earlier grievances. ETFO argues that it is entitled to have the opportunity to make that argument such that these grievances cannot be dismissed on a preliminary basis.

[16] ETFO also argued that, because these grievances were filed before the expiry of the 2019 extension to the collective agreement, putting the Employer on notice of the Federation's position, there can be no estoppel. The Board, argued ETFO, is unwilling to acknowledge that the superior conditions are incorporated into the central language and become part of the central language taking it outside the realm of local practice under the 2001 LOU.

[17] In reply, the Employer argued that it was clear when the 2018 MOS was signed that it did not just deal with life under the 2012 collective agreement. Rather, it argued, the MOS was signed at a time when Article C11 and LOU #8 had been part of the collective agreement landscape for years. Yet ETFO agreed in the 2018 MOS that the status quo would continue subject to changes made in bargaining. In the result, argued the Employer, ETFO ought properly to be held to its agreement.

[18] Neither party referred to any caselaw.

* * *

[19] The issue before me at this stage is whether the circumstances leading up to the filing of these grievances preclude ETFO from now pursuing them at arbitration. Have the issues raised by these grievances been resolved by the 2018 MOS that settled the earlier grievances? Regardless of the answer to that question, does the 2018 MOS otherwise interfere with ETFO's right to pursue these grievances to arbitration?

[20] ETFO acknowledged that if it were trying to advance the same argument that it had or could have advanced in the earlier grievances, it would "be a problem". That acknowledgment gives substance to the principle that a settlement is final and binding on the parties, a principle spelled out in the preamble in the 2018 MOS. However, the question of what has been settled requires review. The preamble to the 2018 MOS states that it is a settlement of "all of the issues arising under these Grievances".

[21] What were the issues in the earlier grievances? According to paragraph 17 of the agreed statement of fact, ETFO alleged that the Employer had violated the terms of the 2008-2012 collective agreement as supplemented by the 2013 MOU by failing to remit all SEB benefits owing and by improperly calculating and deducting EI payments. The Federation took the position that members were entitled to SEB throughout the course of the calendar year regardless of whether the employee would otherwise be required to work.

[22] As set out in paragraph 27 of the agreed statement of fact, the result sought by these grievances is the same. ETFO again seeks to have the SEB benefit payable for non-teaching days. If successful in that argument the EI benefit would then be deducted from days where the SEB was also received, satisfying the EI issue.

[23] The difference asserted by ETFO in these grievances is its reliance on collective agreement language that it argues was not available to it at a hearing of the earlier grievances. That much is technically true. Had the three earlier grievances gone to a hearing, the issue for determination would have been the proper interpretation of the language of the 2008-2012 collective agreement as amended by the 2013 MOU. In these grievances, ETFO relies on the 2014-2017 collective agreement as extended, and specifically central provisions Article C11.2 and LOU #8. It seeks to argue, *inter alia,* that this central language renders the 2001 LOU and the Employer's associated practice obsolete.

[24] However, the language relied on by ETFO in Article C11.2 is virtually identical to the language found in the 2013 MOU regarding maternity benefits. The 2013 MOU provided for a SEB plan to top up E.I. benefits to not less than 8 weeks at 100% salary regardless of when the leave was taken, subject to superior local entitlements. Article C11.2 also provides for a SEB plan to top up E.I. benefits to not less than 8 weeks at 100% salary, regardless of when the leave is taken. LOU #8 gives recognition to pre-existing superior local entitlements.

[25] In addition, although negotiated prior to the formal introduction of central bargaining, the 2013 MOU was also negotiated directly between the Government of Ontario and ETFO. Although structured differently from defined Parts A (central) and B (local) of the subsequent collective agreement, the 2013 MOU provided that the SEB benefit therein prevail "notwithstanding any provision in the collective agreement to the contrary". Although specific to pregnancy leave, that language mirrors Article C1.00 of the subsequent central language that stipulates that central provisions will prevail in any conflict with local provisions.

[26] There is no dispute that this collective agreement provides a superior benefit with respect to maternity leave beyond the 8 weeks at 100% salary established provincially by the central language. Superior local entitlements were addressed by these parties following the 2013 MOU by utilizing the option provided by that MOU. These parties implemented a SEB plan of 6 weeks leave at 100% salary with an additional 11 weeks at 95% salary less E.I. received. However, the Employer administered, and continues to administer that benefit taking into account the 2001 LOU. In the result, those weeks remain attributable to teaching days with the results set out at paragraph 8 of the agreed statement of fact.

[27] Whether or not those results are considered "fair' may well depend on who is asking the question. This collective agreement does provide a greater maternity leave benefit than the centrally bargained minimum. However, the task at arbitration is not, strictly speaking, to assess fairness, but to interpret the terms of the bargain reached between an employer and a union, being the result of collective bargaining, an imperfect yet ongoing process.

[28] ETFO asserts that the 2014-2017 collective agreement, as extended, provides an argument not available to it in the earlier grievances in that Article C11.2 provides for 8 weeks of pregnancy leave at 100% regardless of whether the employee would otherwise be required to work during that period and without regard to any election in that any superior condition "must be incorporated into the common central provisions in Article 11.2 of Part A of this agreement". This argument asserts an enhanced central benefit over what existed in the 2008-2012 collective agreement as modified by the 2013 MOU. Yet LOU #8 stipulates that the central issue as it pertains to pregnancy leave benefits has "not been modified during this round of collective bargaining and *remain status quo*" (emphasis added). Thus, a provision upon which ETFO now seeks to rely to argue for a different result expressly stipulates that no different result was achieved from what existed in the 2008-2012 collective agreement as amended by the 2013 LOU.

[29] This analysis previews and compares the very language and arguments that ETFO seeks to pursue on the merits and I appreciate that it walks a fine line close to an assessment of the merits. That comparison is necessary however and, ultimately, is not persuasive of a conclusion that ETFO has different arguments available in the instant case, or that it now has arguments available to it that were not available in the context of the earlier grievances. The clear substantive parallels in the bargaining processes and the language in the 2013 MOU compared with the language found in Article C11.2 and LOU #8 of the collective agreement before me cannot be ignored.

[30] There is the additional fact that, by the time the parties executed the 2018 MOS, the language of the 2014-2017 collective agreement upon which ETFO now relies was available and known to the parties and had been known since at least November 2016 when local bargaining concluded. Unlike arbitration, where the role of the arbitrator is to interpret the terms of the parties' bargain at the time the grievances were filed, a settlement is a direct agreement between the parties made at the time that settlement is reached.

[31] The review above leads to a conclusion that, although couched under different articles in the two collective agreements, the fundamental issue sought to be raised in the instant grievances is the same as that raised in the earlier grievances. The collective agreement language relied on for both these and the earlier grievances is virtually identical substantively, and the result and remedies sought here are the same as those pursued by ETFO in the earlier grievances. ETFO ought not to be allowed to proceed with these grievances without regard to the settlement of the earlier grievances.

[32] Paragraph 1 of the 2018 MOS records the Employer's confirmation that it is administering the SEB benefit in a manner consistent with the 2013 MOU, and which benefit is meshed with the superior entitlement in the 2008-2012 collective agreement. In effect, the Employer confirmed its view that it was complying with the 2008-2012 collective agreement and the 2013 MOU, even while continuing to apply the 2001 LOU. It is the 2001 LOU (and its resulting practice) that ETFO was and is seeking to overcome and "render obsolete". When it settled the earlier grievances, ETFO had knowledge that the Employer considered its interpretation of the relevant provisions to be correct; knowledge of the Employer's continued application of the 2001 LOU; and knowledge of the language of the collective agreement upon which it now seeks to rely.

[33] Having accepted that confirmation, the only reservation claimed by ETFO in the 2018 MOS is its statement of intention to propose changes to the collective agreement "in the next round of bargaining" so as to render the 2001 LOU "no longer relevant to the calculation and payment" of pregnancy leave benefits. While ETFO argued that the next round of bargaining had already ended by the time the 2018 MOS was signed, rendering it unable to raise the issue, such is not the case. The words "*next* round of bargaining" are clear and unambiguous. On May 4, 2018, when the MOS was signed, the "next" round of bargaining between these parties was the round of bargaining to renew the 2014-2017 collective agreement after the expiry of its extension to 2019. The use of the word "next" cannot reasonably be interpreted as referring to the 2014-2017 round of bargaining that had already been completed in 2016, such that ETFO somehow lost an opportunity to advance its position at the bargaining table. That opportunity remains, as it always does, to make proposals and seek changes to the collective agreement through bargaining.

[34] The 2018 MOS effects the withdrawal of the earlier grievances without prejudice or precedent to any other matter between the parties. The grievances were withdrawn with prejudice to the matters raised by those grievances. While the parties did not expressly agree to an interpretation of the collective agreement language at issue, the Employer confirmed how it was calculating, and how it intended to calculate and pay the SEB benefit - by continuing to apply the terms of the 2001 LOU during the ongoing operation of the 2014-2017 (to 2019) collective agreement. The language used by the parties in the 2018 MOS speaks to the present and to the future, and not solely to the time when the earlier grievances were filed. The grievances were withdrawn. ETFO reserved no right to argue that a different result ought to apply in light of the 2014-2017 language then in place. Nor am I persuaded that there is an argument available to it that would not have been available in the context of the earlier grievances. The implication of the 2018 MOS is that ETFO would not challenge the Employer's continuing application of the 2001 LOU, but instead, would seek to change that language in bargaining.

[35] Having regard to all of the above, I am persuaded that the 2018 MOS prevails over these grievances. I therefore allow the preliminary objection and find that ETFO is precluded from pursuing these grievances on their merits.

[36] There remains a consideration as to whether the grievances raise a question as to any drafting failure so as to meet the direction in LOU #8 to have the "meshed" maternity leave provision in its entirety placed in Part B of the collective agreement. I remit that aspect to the parties and remain seized in that regard.

[37] Subject to paragraph 36 above, these grievances are otherwise dismissed.

Dated at Toronto, Ontario this 13th of November, 2020.

Marilyn A. Nairn, Arbitrator.