

# **ACCRUED SICK LEAVE GRATUITY**

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## **Introduction**

Most teachers, and some other employees, receive an amount on retirement to compensate or reward them for the fact that they were not absent from work as much as they were legally allowed to be. This special payment is generally covered by an agreement between the employee and the employer. It could be a part of their collective agreement.

Generally the agreement provides that the employee is allowed a certain number of sick days each year. Any sick days not used are accumulated until retirement. At that time the employee often has a choice of taking the accumulated time off, or a payment of a lump sum. The lump sum is sometimes calculated as: the employee's daily pay rate at the time of retirement, times the total accumulated sick leave days not taken (to a maximum number of days) divided by two. This can mean receiving a lump sum payment of up to six months' salary.

## **Case Law**

The courts have dealt with this matter separately from any pension plan entitlements and there are several reported cases that deal with it. Care must be taken when searching for case law on this matter as the sick leave gratuity is sometimes referred to by other terms, such as "retiring allowance".

### **Gasparetto v. Gasparetto<sup>1</sup>**

Mr. Gasparetto worked as a teacher for the Department of National Defense. As such he was entitled to both an early retirement incentive that was discretionary and a retirement gratuity based on accumulated sick leave credits that were his entitlement as part of the collective agreement.

Campbell J. first considers the early retirement incentive and concludes that, in this particular case, "there is no present right to any payment and no vested or contingent interest in any future payment. That being the case, the early retirement incentive plan is not property within the meaning of s. 4 (1) (a) or (c) of the Family Law Act." He seems to have decided this because in this case the payment was discretionary.

Campbell J. then goes on to say,

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<sup>1</sup> (1988) 15 R.F.L. (3d) 401 (Ont. H.C.J.)

The retirement gratuity is another matter. It is provided as an entitlement in the collective agreement and does not depend on the discretion of the board or the Department of National Defense. It is an entitlement as of right, on retirement, to a certain proportion of annual salary depending on number of years of service and remaining accumulated sick leave credits. It does not depend on any contributions by the board or the employee. Although it is called a gratuity it is not a gratuity but a payment as of right based on the collective agreement. It is a future interest in a sum of money and is therefore property within the meaning of the Act.

It was suggested that the “wait and see” approach be adopted so that Mr. Gasparetto would pay to Mrs. Gasparetto one-half of the net gratuity when he receives it. Campbell J. refused to do this.

### ***Alger v. Alger***<sup>2</sup>

Mr. Alger was a school teacher and under the terms of his collective agreement he had the right to receive a sick leave gratuity payment on retirement. McDermid L.J.S.C. determined that this was property as defined by Section 4(1) of the Ontario Family Law Act and referred to the case of *Gasparetto v. Gasparetto*. Opposing counsel suggested discounts for several contingencies (including the risk that Mr. Alger might terminate employment or transfer to another school board before retirement, the possibility that he may use up the sick credits before retirement, and the possibility that the benefit could be eliminated from the collective agreement) which he did not allow, based on the evidence presented.

Justice McDermid also considered the possibility that, when he retired, Mr. Alger might roll this payment into an RRSP, and therefore, not pay any immediate income tax on it. He then said, “However, since the discount for income tax was not opposed in principle, I permit it.”

This seems to be a case where better evidence or somewhat different facts could have changed the decision or reduced the value of the accrued sick leave gratuity.

### ***Hilderley v. Hilderley***<sup>3</sup>

Mr. Hilderley was a school principal. Osborne J. in considering the matter, had this to say:

The Oxford Board of Education has a sick leave plan from which the

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<sup>2</sup> (1989) 21 R.F.L. (3d) 211 (Ont. Supreme Court)

<sup>3</sup> (1989) 21 R.F.L. (3d) 383 (Ont. High Court)

defendant can accumulate 20 days sick leave each year to a maximum of 240 days. Upon retirement the defendant is entitled, if eligible, to be paid one half his last year's salary. Eligibility depends on the defendant having earned at least 200 sick leave days. The defendant must have been employed for 20 years and the beneficiary of the sick leave plan to be eligible, must be eligible for and receive pension benefits within the prescribed time. Mr. Clayton, for Mr. Hilderley, takes the position that, on the valuation date, the defendant was not eligible for pension and that the right to the sick leave gratuity had not crystallized to the point so as to permit the right to be viewed as property under the Family Law Act.

It seems to me the observations of Campbell J. in Gasparetto apply to the retirement gratuity issue in this case. Although Mr. Hilderley's access to the retirement gratuity had not crystallized on 9<sup>th</sup>, July 1987, the defendant's future access to the gratuity was something, which on the evidence had an economic value as of July 1987 and was property as defined in the Family Law Act. There were some obvious contingencies. The defendant had to work to a point where he could retire on full pension. At the valuation date, that time would arrive when the defendant was 62. The evidence now discloses, as I have said, that the defendant has access to retirement at age 55. The defendant has to in fact have 200 sick leave days as of the time he is otherwise eligible for this retirement gratuity. Illness in the period between the valuation date and retirement would compromise the benefit accruing to the plaintiff. The benefit must still exist on retirement. Mr. Clayton dealt with this in cross-examination and fairly conceded in argument that although this is a contingency, it is a modest one. No doubt the collective agreement could be changed. I agree with that in the real world, that as related to Mr. Hilderley, that is unlikely. As I mentioned earlier in another context, the defendant might change jobs. That would severely compromise, if not eliminate, the defendant's access to the sick leave gratuity.

The actuaries are not far apart on the gross value of the retirement gratuity. The value according to Mr. Rudd was about \$15,000. Tax would reduce that to \$11,000. Mr. Aseltine for the defendant set his approach out in Ex.13. I agree generally with Mr. Aseltine's approach as set out in Ex. 13, particularly at pp. 4 and 5.

It seems to me that if it is assumed that the gratuity will not be taxed that assumption obviously will increase the value of the gratuity. If the gratuity could be rolled over into an RRSP, tax will at least be deferred. If it cannot be rolled over, the gratuity will be viewed as income in Mr. Hilderley's hands when it is received.

There is a provision for the gratuity to be paid in two taxation years, thus potentially reducing the impact of income tax. In these circumstances,

that benefit is marginal, but I would think particularly if Mr. Hilderley were to retire on full pension, as he said he intended to do at age 55, and if he were to obtain other employment, the gratuity would then be taxed at Mr. Hilderley's marginal rate, if it were viewed for purposes of this analysis as his last income.

In the circumstances, having in mind the taxation uncertainty, which I view as something akin to a contingency, I assess the value of the sick leave gratuity at \$13,000.

In doing so, Osborne J. recognizes that the accrued sick leave gratuity is subject to equalization. However, he refuses to allow a deduction for contingencies because he decided there was little chance of Mr. Hilderley not collecting the money. He also cuts the income tax allowance in half because the rate of tax Mr. Hilderley will pay is uncertain.

### ***Rickett v. Rickett***<sup>4</sup>

Mr. Rickett was a school teacher. Granger J. considers Alger but mentions that if Mr. Rickett terminated employment at the date of valuation, he would not receive any sick leave gratuity, as he must remain until retirement in order to collect it. He therefore concludes that placing a value on the sick leave gratuity would be allowing Mrs. Rickett to benefit from Mr. Rickett's employment after the separation of the couple.

Granger J. obviously believes in a strict interpretation of the term "termination method". He seems to be alone in this, as later cases allow for valuations that take into consideration the early retirement provisions of a pension even though the person must continue employment in the future in order to meet the necessary requirements to qualify for early retirement. In fact, the current Standards of Practice of the Canadian Institute of Actuaries require that the early retirement provisions be valued even though the requirements for early retirement have not been met as yet. If Granger J's view holds, then the sick leave gratuity has absolutely no value right up until the day the person retires. Then, all of a sudden, on retirement day the sick leave gratuity is received and its entire value is earned that day. This is not a very reasonable view to take.

### ***Deroo v. Deroo***<sup>5</sup>

This case does not involve sick leave gratuity, but the comments of Misener L.J.S.C. are useful in considering this matter.

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<sup>4</sup> (1990) 25 R.F.L. (3d) 188 (Ont. Supreme Court)

<sup>5</sup> (1990) 28 R.F.L. (3d) 86 (Ont. Supreme Court)

Misener L.J.S.C. considers *Hilderley*, applies *Alger*, but does not follow *Rickett*. He says,

Although I am not at all sure how Osborne J. arrived at the valuation he did in *Hilderley*, I think that the views he expresses in that case on this issue are correct. I think that Judge McDermid has adopted the right approach (in *Alger*). He considers Section 52 of the regulations under the Pension Benefits Act (even though they don't apply). He goes on to say, 'It follows that if in fact the pension benefits acquired up to valuation date become payable at age 55 if the employee continues in his present employment up to that age, the valuation of the pension benefits must be made on the basis that they will in fact become so payable.'

Many cases have followed this same principle in deciding to accept the value of a pension based on the earliest date of unreduced pension. The same principle should apply to accrued sick leave gratuity.

### ***Belyea v. Belyea***<sup>6</sup>

This case did not involve sick leave gratuity either but the principles developed are the same.

Guerette J. considers numerous reported cases and says,

To cut off the benefits as at the date of separation without making allowances for considerations arising beyond that date is no more realistic than dividing the marital home by ordering carpenters to saw it down the middle. All these assets have fundamental characters, which must be taken into account when a division of marital property is effected.

### ***Cliche v. Cliche***<sup>7</sup>

The Ontario Court of Appeal supports the reasoning in *Hilderley* and *Alger*. The court concluded that Mr. Cliché's accumulated sick leave credits should have been considered a property interest. They then ruled that the payment be shared when it is received.

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<sup>6</sup> (1991) 30 R.F.L. (3d) 414 (N.B.)

<sup>7</sup> (1991) 36 R.F.L. (3d) 297 (Ont. C.A.)

### ***Mcintosh v. McIntosh***<sup>8</sup>

Forestell J. included the value of Mr. McIntosh's accumulated hours of sick leave at separation in Mr. McIntosh's property for purposes of calculating the equalization payment. He did not allow any further discount for contingencies that could arise between separation and retirement, when the sick leave gratuity would be paid, because:

1. The husband's income would increase between the date of separation and the date of retirement and the banked sick leave would therefore increase in value;
2. The contingency of an early death would be compensated for through term insurance, and
3. Any other contingency, which would reduce the value of the banked sick leave, would be within the control of the husband in any event.

### ***Tanouye v. Tanouye***<sup>9</sup>

Mr. and Mrs. Tanouye separated in 1991 and their case was heard in 1994. In January of 1990 Mr. Tanouye retired and received \$14,400 for accumulated sick pay. He rolled this payment into an RRSP. Mr. Tanouye accepted the fact that this was an asset in the equalization calculation but sought to have it reduced for the portion earned before the marriage, on a pro rata basis. The court refused any deduction since no evidence was presented to support the value of this asset at the date of marriage.

### ***Levac-Vicev v. Vicev***<sup>10</sup>

Mrs. Levac-Vicev, a school teacher had accumulated sick leave at the valuation date. However, under the terms of her contract with the school board that was in effect as of the valuation date, there was no provision for payment of compensation in lieu of sick leave still unused at the time of the teacher's retirement. Subsequent to the separation, but before the trial, a new contract between the school board and the teachers came into effect, which allowed for the payment of compensation for unused sick leave benefits accumulated during a period, which fell, in part, prior to the valuation date. In that the existence of the new contract was not known as of the valuation date and in that it was possible the new benefit could be withdrawn in subsequent contracts, Doyle J. excluded the sick leave benefits from the equalization of assets. This decision is appropriate since there was no property of any value in connection with the

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<sup>8</sup> (1993) O.J. # 3020 (Gen. Div.)

<sup>9</sup> (1994) 10 R.F.L. (4<sup>th</sup>) 135 (Sask. C.A.)

<sup>10</sup> (1994) O.J. No. 17 (Gen. Div.)

accumulated sick days at the date of separation. The withdrawal of the plan in a subsequent contract would be a post separation event that should not be considered.

### ***Ramsay v. Ramsay***<sup>11</sup>

Halvorson, J. determined that accrued sick leave credits were property if the employee was contractually entitled to the benefit, even though the benefit was not payable until retirement.

### ***Offet v. Offet***<sup>12</sup>

In this case Wiemer J. explained that in *Ramsay v. Ramsay* Justice Halvorson did regard the value of unused sick leave as divisible matrimonial property. He then went on to say, however, that the right to that benefit must be shown to have existed at the date of the application and its values must be calculable. He noted that in the case of *Offet v. Offet*, there was no evidence as to how much unused sick leave Mr. Offet had accumulated at the date of division. He also noted that it had no crystallized value as of that date, and that Mr. Offet could not have insisted upon payment for it. He concluded that if Mr. Offet had continued to be employed, he might well have, (and probably would have) used it up. Wiemer J. said that the unused sick leave credits of a person in employment are akin to expectation of the payment of future salary. He stated that the unused sick leave credits have no realizable value unless the employment ceases before they are exhausted. He therefore determined that they have no value in marriage breakdown. Wiemer J. really had little alternative since no evidence was provided regarding the value, if any, of this possible asset.

### ***Sousa v. Sousa***<sup>13</sup>

Metivier J. ruled that this Teachers' accrued sick leave gratuity was to be included in the equalization calculation. He then chose to ignore the actuary's present value calculation and valued it at the current value at the date of separation. He also reduced the income tax allowance because he assumed that half of the gratuity would be rolled into an RRSP and not attract tax. His reasons for ignoring the actuary's report are not clear.

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<sup>11</sup> (1994) 1 R.F.L. (4<sup>th</sup>) 447, 3 W.W.R. 562, 2 C.C.P.B. 120, 111 D.L.R. (4<sup>th</sup>) 312, 119 Sask. R. 81 (Q.B.)

<sup>12</sup> (1995) 17 R.F.L. (4<sup>th</sup>) 357 (Sask. Ct. Q.B.)

<sup>13</sup> (1998) Ottawa Doc. No. 51085/95 and 27702/95 (Ont. Gen. Div.)

## ***Leavoy v. Leavoy***<sup>14</sup>

The Ontario Court of Appeal upheld the lower court decision to include the value of Mr. Leavoy's accrued sick leave gratuity and refused to allow him a contingency discount since he led no evidence to support such a discount.

### **Conclusions**

Sick leave gratuity is a contractual future interest in a sum of money, and therefore, there is no doubt that it is property under the Family Law Act. The possibility of receiving it on retirement causes it to be of value. Any problems seem to be in connection with valuing the asset.

The method of valuation should be based on the terms of the particular Sick Leave Gratuity Plan. If the money cannot be received until retirement, the value should be present valued. There should be a proper income tax allowance deducted based on detailed calculations. There may even be the need for a contingency discount.

There are often arguments presented for not placing any value on this asset. There are strong arguments to refute these considerations.

### **Arguments**

#### **Sick Leave Gratuity as an Asset**

1. It is an entitlement under a collective agreement (or other contract).
2. It is a future interest in a sum of money and is therefore property within the meaning of the Ontario Family Law Act.
3. It is earned equally over the years, not just when the person retires and receives it.
4. If the person uses up accumulated sick leave credits, or terminates employment between the date of separation and the date of retirement, these are post-separation events that should not be considered with hindsight.
5. If the program ceases, that is also a post-separation event and in all likelihood earned benefits would be grandfathered and would not be wiped out.

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<sup>14</sup> (2000) CarswellOnt 3185, Docket CAC 31154 (Ont. Ct. of Appeal)

## Cases Supporting Sick Leave Gratuity as an Asset

- *Alger v. Alger* (1989) 21 R.F.L. (3d) 211 (Ont. H.C.)
- *Bellemare v. Bellemare* (1990) CarswellNS 50, 28 R.F.L. (3d) 165, 98 N.S.R. (2d) 140, 263 A.P.R. 140 (N.S.S.C.)
- *Belyea v. Belyea* (1990) 30 R.F.L. (3d) 407 (N.B.)
- *Cliché v. Cliché* (1991) 36 R.F.L. (3d) 297 (ON C.A.)
- *Deroo v. Deroo* (1990) 28 R.F.L. (3d) 86 (ON Supreme Ct. H.C.J.)
- *Farrar v. Farrar* (2001) CarswellOnt. 3999
- *Gasparetto v. Gasparetto* (1988) 15 R.F.L. (3d) 401 (ON. H.C.J.)
- *Gibson v. Gibson* (2005) CarswellOnt. 860. Docket: 35/38/101754/03
- *Hartnett v. Hartnett* (2000) CarswellOnt 3688, Docket: 99-FL-25521
- *Henry v. Henry* (1992) CarswellBC 1218
- *Hilderley v. Hilderley* (1989) 21 R.F.L. (3d) 383 (ON H.C.J.)
- *Hutchison v. Hutchison* (1992) CarswellOnt 1544
- *Leavoy v. Leavoy* (2000) CarswellOnt 3185, Docket CA 31154 (Ont. Ct. of Appeal)
- *McIntosh v. McIntosh* (1993) O.J. No. 3020 (ON. Gen. Div.) 1994 W.D.F.L. 240
- *Ostapyk v. Ostapyk* (1993) *CarswellOnt* 1687
- *Ramsay v. Ramsay* (1994) S.J. No. 49 (Q.B.)
- *Sousa v. Sousa* (1998) *Ottawa Doc. No. 51085/95 and 27702/95* (Ont. Gen. Div.)
- *Stapleton v. Stapleton* (1990) *CarswellNB* 80, 112 N.B.R. (2d) 181, A.P.R. 181
- *Tanouye v. Tanouye* (1996) 10 R.F.L. (4<sup>th</sup>) 135 (SK C.A.)
- *Woodman v. Duremo* (1995) W.D.F.L. 1785 (ON Gen. Div.), (1997) W.D.F.L. 063 (Ont. C.A.)
- *Yaschuk v. Logan* (1992) CarswellNS 64, 39 R.F.L. (3d) 417, 110 N.S.R. (2d) 278, 299 A.P.R. 278

## Arguments Against Sick Leave Gratuity Being An Asset

1. The person may use up the sick leave credits or terminate employment before retirement, and therefore never receive the amount.
2. In the light of current cutbacks in education costs, the program may be cancelled and the amount not be received.

Both of these would be post separation events and should not be considered.

## Cases Against Sick Leave Gratuity Being an Asset

- *Levac-Vicev v. Vicev* (1994) O.J. No. 17 Action No. 43152/92, *Doyle J. W.D.F.L.* 352, (Ont. Gen. Div.)
- *Offet v. Offet* (1995) 17 R.F.L. (4<sup>th</sup>) 352 (SK Ct. Q.B.)

- *Rickett v. Rickett* (1990) 25 R.F.L. (3d) 188, 72 O.R. (2d) 321, 67 D.L.R. (4<sup>th</sup>) 103 (ON. H.C.J.)