LABOUR RELATIONS CODE
(Section 84 Appointment)
ARBITRATION DECISION

BRITISH COLUMBIA TEACHERS' FEDERATION /
DELTA TEACHERS' ASSOCIATION

UNION

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION /
BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 37 (DELTA)

EMPLOYER

(Re: Melissa Robertson – Later Return From Parental Leave Within 35 Weeks)

Arbitration Board:	James E. Dorsey, Q.C.
Representing the Union:	Jessica L. Burke
Representing the Employer:	Lindsie M. Thomson
Dates of Hearing:	January 25 and 30, 2018
Date of Decision:	February 20, 2018

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1. Request for Later Return from Leave, Denial, Grievance and Jurisdiction

[1] Before the expected birth of her second child in October 2015, Melissa Robertson, a continuing contract 1.0 FTE primary grade teacher at Brooke Elementary School, decided in August 2015 to start her 17-week pregnancy leave on Thursday, October 1, 2015 followed by parental leave to end the beginning of the next school year.

[2] Ms Robertson knew she could take her full 35-week parental leave entitlement and return to teaching at the end of September 2016. She decided to return earlier because it would be easier for both her students and her to be in the classroom at the start of the school year "rather than have a teacher in the class for September and then me come back in October."

[3] On August 31, 2015, she requested both pregnancy and parental leave on an employer supplied form with a "start back to work for September 2016." Her request was reviewed and granted the same day. The approval letter states:

> In accordance with Article G.26 of the current teacher's contract, you are granted Maternity Leave without pay (17 weeks) and Parental Leave without pay (35 weeks) effective as above. …
>
> Please note that six weeks prior to your return, you are responsible for confirming in writing or by email to Human Resources that you are returning on the stated date. Any early or late return will only be approved for a natural break in the school year such as after Winter or Spring Break.

[4] Ms Robertson gave birth on October 16th. In March 2016, she decided she wanted to return October 1, 2016, after 35 weeks parental leave. She emailed: "I have a question that I feel I may already know the answer to but feel it was worth a shot. … I'm starting to rethink things though, as I would obviously love to stay home with the new baby for the full year – since we actually have this luxury!! :)" She would return on a job share at 0.8 FTE as she had worked before. How would it work?

> So I am wondering – when I come back, I want to work 4 days a week like I was previously. My job would get posted for September – but what I am curious about would be, if somehow, the teacher who takes my mat leave for September, is there a way that they could (if they wanted to) also continue on with me for the rest of the year doing 1 day a week?? If it's possible I figured this would be best for students to have 2 teachers, rather than 3, if I was to have to then find a job share partner upon my return in October. I'm assuming a mat leave can't be combined with a job share?
>
> I hope I make sense :)?

[5] To change her return date, did she need to submit another form or could she do it by email to District Administrator, Human Resources (Teaching) Richard Kirincic with whom she was exchanging emails? He replied she is permitted to change her return date, but it "must coincide with a natural break in the school year." For her, this meant returning as requested and approved at the start of the school year or in January after winter break. "You wouldn't be permitted to change your date to anything in between."

[6] The final email exchange was:

> Ms Robertson: "So I couldn't come back October 1st even though that's technically my 1 year return date??"
>
> Mr. Kirincic: "Unfortunately, that is correct."

[7] Ms Robertson spoke to a union representative. After discussion with the employer, the union grieved April 20, 2016 that the employer contravened the collective agreement and the *Employment Standards Act* incorporated into the collective agreement. "The employer's requirement to have employees designate the end date to their parental leaves before they have even initiated their pregnancy leaves is unreasonable and contrary to Sections 50 and 51 of the BC Employment Standards Act." The union sought approval of return on October 1st and changes to the employer's procedures, forms and information documents.

[8] The employer denied the grievance saying there is no employee right to unilaterally change the end date of the parental leave for which the employee gave

written notice and that the employer acted reasonably by giving Ms Robertson "specific information and options with regard to changing her date of return."

[9] The union disagrees. It says Ms Robertson's reasonable and timely request was denied by "an unreasonable exercise of management rights or management discretion and in doing so has violated both the collective agreement and the Employment Standards Act." The union referred the grievance to arbitration in May 2017.

[10] The union and employer agree I am properly appointed as an arbitrator under their collective agreement and the *Labour Relations Code* with jurisdiction to finally decide the merits of the grievance. The employer submits management's decision not to permit the later return as requested is not a decision subject to review at grievance arbitration, but, if it is, the employer's policy on later return from requested parental leave for less than 35 weeks is reasonable and the decision on Ms Robertson's request was not unreasonable.

2. School Year Organization and "Natural Breaks"

[11] Although there are summer school sessions and year-round adult education services, year-round schooling is not the norm in the British Columbia Kindergarten to Grade 12 public education system. The school year organization for the delivery of educational services is from September to June and includes break periods in winter and spring when schools are closed for instruction. The instructional days and breaks each year are identified in a school district's calendar for the year.

[12] In addition to the curriculum in the program of studies for each grade, there are co-curricular activities, programs and experiences for students that are separate from but complement student learning. An example is the Christmas school concert in elementary schools, for which planning, preparation and rehearsal might begin before December and happen over several weeks.

[13] There is a cycle of instruction, student learning, teacher evaluation and assessment and the three mandatory reporting periods in elementary grades within the linear school year. A course semester system organization is used in secondary grades. There is an established process to enable school districts to migrate to more continuous communication and reporting to parents of elementary school students. The

best practice of continuous assessment, and communication throughout the school year with less emphasis on pre-set times in the school calendar is an ongoing active topic of discussion among administrators in the Delta school district. The trend is toward assessment "for", not "of", learning.

[14] Whether in a continuous reporting cycle or one with pre-set reporting intervals, the students' awareness and attentiveness to assessment and reporting is a factor of their age, learning progression and interest. The range is from no awareness in early grades to intense attention at the highest grades.

[15] Union President Paul Steer, Director of Human Resources Rob Allnutt, Mr. Kirincic and Ms Robertson have decades of experience teaching and serving in other roles in public education. Each testified that the winter and spring breaks in the school year upset established routines with varying consequences for student learning at each grade level and cause a disruption in the education program and student learning. It is noticeable and common that after breaks some students have to relearn and resettle into the classroom routine.

[16] Winter and spring breaks and the transition between semesters in the school year are referred to as "natural breaks." When possible, discretionary changes in classroom teachers during a school year are scheduled to coincide with these events to limit the incidents of disruption for students during the school year. The premise is that it is better to have two contemporaneous disruptive events than two disruptive events at different times. It is believed principals and teachers have a better opportunity to achieve a smoother transition at the time of natural breaks than other times. This does not overcome the fact the teacher starting after the winter break will have to report on student learning over a period that encompasses weeks before the break when the teacher was not in the classroom or the burden to minimize the disruption caused by a change in classroom teacher at any time.

[17] Some reasons for this operational approach were summarised in my 2013 arbitration decision on earlier, not later, return from parental leave.

> Director of Learning Services Nancy Gordon testified that any transition during the school year is disruptive to learning and new learning is slowed after a vacation because of the transition. Retention, recollection and routine or structure issues have to be addressed. Extra-curricular activities, especially sports, rotate around

> the winter and spring vacations. Co-curriculum events, such as concerts, generally are concluded before a vacation break.
>
> Ms Gordon testified interruptions adversely affect teacher-student relationships, which are critical to learning, especially for more vulnerable students. Instruction time is lost while new relationships have to be established. This extends to relationships that have to be established among the team supporting students in a school. Of course, it is situationally dependent on the needs of the individual.
>
> Ms Gordon testified there is recapturing for students associated with returning from a vacation break. For this reason, it is overall less disruptive to minimize the number of disruptions and have a change in teacher transition at the same time.
>
> Despite awareness of the disruptive nature of transitions and the need for conversations between incoming and outgoing teachers and among team members, there is no budget to fund overlapping time in the school. Consequently, most teachers do it on their own time and arrange situations to meet one another and be introduced to the students.[1]

[18] In 2005, Arbitrator Colin Taylor in an arbitration in another school district concluded: "In the school setting, there are compelling reasons in favour of leaves that end at a 'natural break': reasons pertaining to planning, continuity, and the quality of educational services the schools are mandated to provide."[2]

[19] This operational approach to leaves is recognized and included in some collective agreement provisions. For example, the date of leaving for parenthood (not maternity or parental) leave, unless otherwise approved by the Board "shall coincide with December 31, September 1, the end of a semester or quarter, or Spring Break."[3] Adoption leave is to terminate at one of these times.[4] Wherever practicable, union leave is to be "for a term which coincides with a natural school break."[5] Early retirement is to be at "Christmas Break, Semester Break, Spring Break, or at the end of the school year."[6]

[20] A "quarter" referred to in the parenthood and adoption leave articles is also referred to in the education leave article: "Educational Leave shall normally commence

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[1] *British Columbia Public School Employers' Assn. (Hope Grievance)*, [2013] B.C.C.A.A.A. No. 17 (Dorsey), ¶ 113-116
[2] *British Columbia Public School Employers' Association (School District No. 61 (Greater Victoria))*, unreported, December 5, 2005 (Taylor), ¶ 40
[3] Article G.26.3.a.(iii)
[4] Article G.28.2.b
[5] Article G.32.2
[6] Article H.1

in September and be for one (1) year. A lesser duration such as a semester, or quarter, may be considered."[7]

[21] Mr. Allnutt testified the quarter system has a specific meaning in education and, like semester term organization, is primarily used in secondary grades. In a quarter term organization, like the Copernican scheduling system, there are fewer courses and more time for each course in each term. There is no quarter term organization in the schools in the Delta school district. Mr. Allnutt is unaware of there ever having been this method of organization in the district.[8]

[22] With valiant effort and creativity, Mr. Steer and the union sought to infuse meaning into "quarter" by characterizing the three reporting periods in elementary grades as quarters. The union submits a quarter is 13 weeks, not ¼ of the school year. In the 2016-17 school year, which began September 6th, the first quarter would end December 2nd. If it were 10 weeks, it would be November 11th and not coincide with the reporting period. With 13 weeks, the second quarter would end on March 3rd; the third on June 2nd; and the fourth on September 1st.

[23] Apart from the problem with reconciling the fractions ¼ and ⅓, specific reporting dates in the periods mandated by the Ministry of Education (September – November; December – February; and March – June) are determined by each school. Reporting consumes a teacher for at least a week before the deadline and is to be done with minimal disruption to ongoing instruction and student learning. There is no logical correlation between the 13-week or reporting dates and other events in the school year.

[24] The employer's opinion as stated by Mr. Allnutt is that the reporting time is an inopportune and illogical time to transition to a new classroom teacher. There is no break in school attendance and a change at this time would not be in the best interests of the students. A change in classroom teacher at these times would be a more disruptive event than a change after a winter or spring break or the beginning of a semester when there has been a winding down before the break or the end of the

[7] Article G.29.2.c
[8] He was not questioned about "quarters" in the earlier return arbitration. See *British Columbia Public School Employers' Assn. (Hope Grievance)*, [2013] B.C.C.A.A.A. No. 17 (Dorsey), ¶ 111

previous semester. At these times, there is no need to re-establish routines and behaviours as there is when returning from a break.

[25] Mr. Kirincic agrees that maintaining as much classroom continuity as possible is the preferred approach to supporting the interests of the students. Any or lengthy prior knowledge by administration through notice of a new return date from a birth mother on parental leave does not minimize the disruption in continuity for the students.

[26] Perhaps understandably, there is no agreement in the collective agreement on pregnancy and parental leave return dates. The maximum duration and individual start dates are agreed by incorporating provisions of the *Employment Standards Act*. Whether the employer used the agreed times for beginning parenthood leave in the past[9] is not determinative of what it must do at the end of parental leave or what it must do after clear notice of change to the union.[10]

[27] I conclude there is no "quarter" in the maternity or parental leave provisions of the collective agreement to be infused with any meaning, let alone an illogical one in the workplace context. The employer's "failure" to consider a later return from parental leave at some unspecified date in November 2016 was not acting inconsistent with the collective agreement and does not highlight or otherwise indicate there was unreasonableness or arbitrariness in its decision.

[28] In the specifics of Ms Robertson's circumstances, she did not testify she could identify a natural break time after reporting student progress in November at which she could return with a transition with her replacement teacher that would facilitate student-teacher bonding or that she would have regarded an extended parental leave with loss of income between October 1st and some date in November an acceptable substitute for her desire to return on October 1st.

3. Background to Difference on Later Return from Requested Parental Leave

[29] Many teachers take pregnancy and parental leaves. Most request them at the same time for an unpaid leave period up to 52 weeks of which 17 consecutive weeks is

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[9] See *British Columbia Public School Employers' Assn. (Hope Grievance)*, [2013] B.C.C.A.A.A. No. 17 (Dorsey), ¶ 45

[10] The union does not raise any issue of the employer being estopped from changing its approach.

the entitlement for pregnancy leave and 35 weeks is the entitlement for parental leave under the *Employment Standards Act*.[11] The collective agreement provides the pregnancy and parental leave entitlement and provisions of the *Act* are guaranteed and apply to teachers.[12] For pregnancy leave, there are agreements on partial salary continuance, a Supplemental Employment Benefit Plan and use of sick leave.[13]

[30] In addition, the collective agreement provides for maternity related and non-maternity related parenthood leave.[14] There are agreed provisions on applying, leaving for and returning from parenthood leave.

- "Unless otherwise approved by the Board, the date of leaving shall coincide with December 31, September 1, the end of a semester or quarter, or Spring Break."[15]
- "The date of return shall be September 1."[16]
- "If an application for early return to duty is received by the Board, the request for return shall be granted when a suitable position is open."[17]

[31] There are no similar agreements for pregnancy and parental leave. There is no agreement the end of leave is to coincide with any time or event in the school year.[18] In the past, the employer used the agreement on parenthood leave start dates as a guide for requests to change parental leave return dates.[19]

A. Earlier Return from Parental Leave Arbitration (2013)

[32] Over the years, the employer did not have a distinct administrative process for pregnancy and parental leaves. There are provisions on employee request for pregnancy and parental leave in the *Employment Standards Act* that apply. The

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[11] RSBC 1996, c. 113, sections 50 and 51. If a child requires a period of additional parental care, this parental leave can be extended an additional 5 weeks.
[12] Articles G.26.1 and 2
[13] Article G.26.1
[14] Article G.26.3
[15] Article G.26.3.a.(iii)
[16] Articles G.26.a.iv and b.iii
[17] Article G.26.3.c
[18] See *British Columbia Public School Employers' Association (School District No. 61 (Greater Victoria))*), unreported, December 5, 2005 (Taylor)
[19] *British Columbia Public School Employers' Assn. (Hope Grievance)*, [2013] B.C.C.A.A.A. No. 17 (Dorsey), ¶ 45

employer's practice on requests for early or later return from parental leave was not published or recorded in any policy or other statement.

[33] From 2007 to 2015, the practice was administered by Mr. Kirincic's predecessors.

> Morgan Kyle was District Administrator, Human Resources (Teaching) from July 2007 to January 2010. Rod Allnutt, … succeeded Ms Kyle in this position, which he assumed in February 2010. He came to the position from Principal at North Delta Secondary School. He had previously been Vice-Principal at North Delta and Seaquam Secondary Schools.
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> **********
>
> Ms Kyle and Mr. Allnutt testified that in their experience requests to change the duration of the parental leave are usually to extend the leave to a following Monday, the next school year, after winter vacation and, less frequently, to after spring vacation. It is infrequent that birth mothers request a parental leave shorter than 35 weeks.[20]

The unwritten practice was not readily available to a new incumbent in the District Administrator, Human Resources (Teaching) position and there were exceptions to consistency in practice.[21]

[34] The union grieved two separate decisions Mr. Allnutt made in 2010 on requests to return early from parental leaves. The union asserted that with reasonable notice teachers on unpaid parental leave have "the unilateral right to identify the date they will return to work from leave"[22] regardless of the impact an earlier date might have on the plan the school had in place to cover the initially chosen leave period, on students or on replacement teachers. The interests and choice of the teacher on leave were paramount.

[35] I decided teachers do not have this unilateral right under the *Act* or collective agreement.

> I find that under the *Employment Standards Act* an employee has the continuity of employment status and right to return to work protections provided in section 54, including not changing "a condition of employment without the employee's written consent." It is part of the legislative scheme and intention that once a parental leave for a fixed duration commences, an earlier return to work requires the agreement of the employee and the employer. There is no employee right to

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[20] *British Columbia Public School Employers' Assn. (Hope Grievance)*, [2013] B.C.C.A.A.A. No. 17 (Dorsey), ¶ 30; 34

[21] See *British Columbia Public School Employers' Assn. (Hope Grievance)*, [2013] B.C.C.A.A.A. No. 17 (Dorsey), ¶ 47-51

[22] *British Columbia Public School Employers' Assn. (Hope Grievance)*, [2013] B.C.C.A.A.A. No. 17 (Dorsey), ¶ 17

> unilaterally change the end date of the leave to an earlier or later date than the period of the leave for which the employee gave written notice.
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> **********
>
> There is no statutory or collective agreement entitlement for a teacher to unilaterally change the duration of a parental leave. The past inconsistent administration of parental leave did not create any right.[23]

[36] The grievances were allowed because, despite there being "compelling reasons" to limit changes in classroom teachers, when it can be controlled, to times that are natural breaks in the school year, there was not "a universal understanding that a discretionary return from leave must, for pedagogical reasons, coincide with a natural break in the school year to minimize disruption in instructional and classroom continuity and in relationships between teachers and students."[24] The employer's communications to the grievers was "regrettably ambiguous." And for the two grieving teachers, the employer had "reneged on what it had communicated to them. This was not a matter of exercising a managerial discretion. It was a complete change in the terms on which they could return and a breach of the promise it had made to them." The employer did not "have a continuing residual discretion to simply, without any notice or discussion, revoke its first exercise of discretion."[25]

[37] The decision was very specific to the factual circumstances of the two teachers.

> The real substance of what the union seeks in this grievance is to have the employer abide by its initial exercise of managerial discretion in the administration of parental leave in the specific situations of Ms Hope and Ms Dhillon as communicated to them in the employer's initial leave letters. It seeks enforcement of the administration of their leaves as the employer said they would be administered and as Ms Hope and Ms Dhillon accepted it would be administered.
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> The employer's exercise of discretion in the initial leave letters to Ms Hope and Ms Dhillon gave them an entitlement to return at a date they chose with the requisite written notice. It crystallized the terms of parental leave for each of them in their parental leave entitlement under the collective agreement.
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> These leave terms created an employer endowed entitlement that flowed from the parental leave provision of the collective agreement because of the manner in which the employer chose to administer the leave and communicate to each of them the terms for early return from their parental leaves. The employer was in

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[23] *British Columbia Public School Employers' Assn. (Hope Grievance)*, [2013] B.C.C.A.A.A. No. 17 (Dorsey), ¶ 25; 127

[24] *British Columbia Public School Employers' Assn. (Hope Grievance)*, [2013] B.C.C.A.A.A. No. 17 (Dorsey), ¶ 126

[25] *British Columbia Public School Employers' Assn. (Hope Grievance)*, [2013] B.C.C.A.A.A. No. 17 (Dorsey), ¶ 130; 136; 137

> breach of the collective agreement by later unilaterally revoking this term and the accompanying entitlement for each of them.[26]

B. Developing and Implementing Leave Information Sheet and Form (2013)

[38] Mr. Allnutt, who continued as District Administrator, Human Resources (Teaching) until February 2015 before becoming Director of Human Resources, took the experience of the arbitration proceeding and the February 15, 2013 decision as instruction the employer needed to have a more formalized leave request process supported by better information for teachers and consistent employer administration.[27]

[39] He drafted a single information sheet on leave entitlement and the administrative process for pregnancy and parental leaves and a new leave request form. Because of the experience that teachers overwhelmingly request both leaves at the same time, he drafted one information sheet for both leaves and one form on which teachers could request either or both leaves by selecting the appropriate box or boxes.

[40] He asked the union for its comments. The union carefully reviewed the drafts and Mr. Steer sent detailed written comments on March 15, 2013. He requested drafts of the form letters intended to be sent to teachers granting leave requests.

[41] One theme of the union's comments is that it must be clear that requests for pregnancy and parental leave are separate requests that may be made at different times. Mr. Steer wrote:

> This part of the Info Sheet also presents an issue in that it requires that parental leave is requested at the same time as pregnancy leave (for pregnant mothers, but not for other employees). This is inconsistent with the ESA, which requires only 4 weeks' notice of a request for parental leave (by birth mothers/fathers), and does not require any minimum notice of a request for parental leave in the case of adoption. Section 51(3)(b) of the Act indicates that the Employer may require that in certain circumstances a request for parental leave be made 4 weeks' notice prior to the date that the employee proposes to commence the leave. See also paragraph 14 of Arbitrator Dorsey's position. Requiring more than 4 [weeks'] notices is inconsistent with the Act. In this regard, the Info Sheet and Request Form should be revised so as to be consistent with the Act. We don't object to Members being given the option to request both leaves at the same time – but we do object to it being required.

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[26] *British Columbia Public School Employers' Assn. (Hope Grievance)*, [2013] B.C.C.A.A.A. No. 17 (Dorsey), ¶ 138-140

[27] It had previously revised its form letter confirming leave. See *British Columbia Public School Employers' Assn. (Hope Grievance)*, [2013] B.C.C.A.A.A. No. 17 (Dorsey), ¶ 109

[42] Consistent with this, the union wanted greater separation between the two leaves for pregnant mothers with explicit communication that parental leave did not have to be requested at the same time as pregnancy leave. The union's opinion was that, in effect, the employer was imposing a longer minimum notice period for parental leave because a request for parental leave at the same time as pregnancy leave, at least 4 weeks before the start of pregnancy leave, was 17 weeks ahead of the time required for notice of parental leave.

[43] Mr. Steer agreed in his testimony that the employer does not require teachers to request both leaves at the same time. Mr. Allnutt recognizes teachers have the right to make separate requests for pregnancy and parental leave.

[44] Another theme of Mr. Steer's comments is that the information should communicate there is some leeway in process timelines. For example, he wrote:

> While clarity may be provided to the Employer's request that 6 weeks notice be provided to return at different dates, it is our position that requests provided with less notice must not be unreasonably denied. The same goes for all other notice periods specified in the Info Sheet and Request Form.

[45] A third union theme is that the employer should give more importance to the individual interests and circumstances of teachers requesting changes to confirmed leave periods. Mr. Steer wrote:

> We object to the comment on the Info Sheet that requests to return earlier or later will "normally be approved only if it coincides with the start of the school year, the end of Winter or Spring Break …." It's our position that the Employer's interest in classroom continuity is only one factor to be weighted in determining whether a given request should be granted. While returns at natural breaks may be the Employer's preference, and that preference may be stated, it should not be the only factor, or a paramount factor.

Further: "An incumbent teacher's return, whether it coincides with a natural break or not, should be contiguous with the departure of the term teacher." There was no suggestion the information should reference "quarters."

[46] Mr. Allnutt decided to amend the draft information sheet to provide leeway for the employer to approve a return date other than at a natural break and to reference the collective agreement leave article so teachers would know where to find it. He would balance the circumstances presented by the teacher or union with the disruption for students and consider whether steps could be taken to mitigate the disruption. This

would be an exception and he would not be required to identify any circumstance not brought forward by the teacher or union. He would address situations as they arose. He rewrote the information sheet as follows:

> Request for a return later or earlier than originally confirmed will be governed by article G.26 of the collective agreement. An altered return date will be approved only if it coincides with the start of a new school year, the end of Winter or Spring Break or the start of semester 2 at a semestered secondary school. The Board may make exceptions where it considers appropriate and in the best interest of students.

[47] There is no mention of a "quarter" or example of an acceptable exception. One early return exception identified in the 2013 arbitration was "an alternate teacher for some of the most vulnerable and at risk students whose early return was desired by a principal concerned about the students."[28] A later return exception could be the following Monday.[29]

[48] An information point that was not changed from the draft or commented on by the union is: "Teachers requesting return earlier or later than originally confirmed are advised not to make childcare or other significant decisions related to a return to work until they have confirmation from the district of its agreement to the return date."

[49] Teachers returning from parental leave later than requested had not requested the full 35-week entitlement. If they decide while on leave to take all or more of their leave entitlement and they have the unilateral right to do so, as the union advocates, then they do not require employer agreement to return on the specific date they choose and may make any arrangements without fear of not receiving employer confirmation, which will be simply employer acknowledgement of what they choose, as it is when leave is initially requested.

[50] Mr. Allnutt amended the leave request form to include a first sentence to indicate both leaves do not have to be requested at the same time. "This form must be completed and submitted to Delta School District Human Resources Department at least 4 weeks prior to the start of a requested Pregnancy or Parental Leave." He added the second sentence to each of the following:

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[28] *British Columbia Public School Employers' Assn. (Hope Grievance)*, [2013] B.C.C.A.A.A. No. 17 (Dorsey), ¶ 38

[29] *British Columbia Public School Employers' Assn. (Hope Grievance)*, [2013] B.C.C.A.A.A. No. 17 (Dorsey), ¶ 34

> Human Resources sends a confirmation letter outlining the leave terms and approving the requested dates. (Please contact HR within two weeks if dates on the letter are other than what you requested.)
>
> **********
>
> **PLEASE NOTE: Request for a return later or earlier than originally confirmed will be approved only** if it coincides with the start of a new school year, the end of Winter or Spring Break or the start of semester 2 at a semestered secondary school. The Board may make exceptions where it considers appropriate and in the best interests of student.

The first sentence ("Please contact …") is to provide a check that the dates in the letter are the dates the teacher requested. The second ("The Board may make …") is to inform teachers of the presumptive time for changed dates and the dominant factor the employer will consider if there is a request for an exception.

[51] The goal was to make sure teachers who read the information sheet and request form, posted as a single document, make informed decisions which the employer confirms by letter allowing a time to correct any errors. He sent the new drafts and a copy of the employer's standard confirmation letter to the union in April. The union is sent a copy of each confirmation letter sent to a teacher.

[52] The union was disappointed Mr. Allnutt had not embraced more of its concerns and suggestions. Perhaps after further discussion, Mr. Allnutt wrote the union on June 12, 2013 with additional changes. The information sheet was redrafted to clarify birth mothers may request pregnancy and/or parental leave by adding: "These may both be requested at the start of the leave or separately."

[53] Mr. Allnutt revised the leave request form to present five options for when the teacher wanted leave to end.

> I want my leave to end:
>
> ☐ After 17 weeks (birth mother requesting Pregnancy Leave only)
>
> ☐ After 35 weeks (birth mother requesting Parental Leave only)
>
> ☐ After 52 weeks (birth mother requesting Pregnancy AND Parental Leave)
>
> ☐ After 37 weeks (birth father/adoptive parent/ birth mother not requesting pregnancy leave)
>
> ☐ **Or** on: _____ _____ _____
>
> Day Month Year

[54] The information sheet separated information points on later and earlier return.

> A return later than originally confirmed will be approved if it complies with G.26 and the date coincides with the start of a new school year, end of Winter or Spring

> Break or start of semester 2 at a semestered secondary school. Exceptions may be made appropriate and in the best interest of students.
>
> A return earlier than originally confirmed will be approved only if it coincides with the start of a new school year, end of Winter or Spring Break or start of semester 2 at a semestered secondary school. Exceptions may be made appropriate and in the best interest of students.

[55] The revised information sheet and leave request form were posted during the summer on the employer's intranet in both a section for departmental forms and in the FirstClass portal specifically designed for and accessible to teachers. They were posted as a single 2-page document.

[56] The pregnancy and parental leave dates Ms Robertson requested on one form were confirmed. Her request was one of the infrequent requests for less than the full 35-weeks parental leave. She decided not to request her full parental leave entitlement until October 1st and, perhaps, at a later date, request an earlier return at the beginning of the school year. That request would not be an exception. Instead she decided to request a shorter leave because it would be "best for students to have 2 teachers, rather than 3" if she was to have a job share partner when she returned October 1st.

[57] The union believes there should be greater congruence between the provisions of the *Employment Standards Act*, collective agreement and the administrative process. A request for parental leave must be made "at least 4 weeks before the employee proposes to begin leave."[30] It believes the employer's administrative process prompts the request at the same time as the request for pregnancy leave, which is many weeks earlier than four weeks before the beginning of parental leave.

[58] Consistent with this belief, since 2013 in its annual Maternity/Parenthood Leave Workshops[31] the union has promoted that birth mothers make a separate parental leave request at a date later than the time pregnancy leave is requested. It could be as late as in the 12th week of the pregnancy leave. At that time, the teacher might be in a more informed position about her situation. Messrs. Allnutt and Kirincic have attended these workshops.

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[30] *Employment Standards Act*, RSBC 1996, c. 113, s. 51(3)(b)

[31] See *British Columbia Public School Employers' Assn. (Hope Grievance)*, [2013] B.C.C.A.A.A. No. 17 (Dorsey), ¶ 43

[59] Mr. Allnutt knows of only one teacher who has done this since 2013. It appears birth mothers value certainty more than the flexibility to decide during pregnancy leave to take the full or a shorter parental leave with the unilateral right to extend it to the full leave entitlement during the requested parental leave. It might be that, like Ms Robertson at the time of her request, teachers want to balance their entitlement with the interests of students, school administrators and colleagues. Because parental leave is to begin "immediately after the end" of pregnancy leave "unless the employee and employer agree otherwise,"[32] expectant birth mothers might prefer to plan ahead and not have to make a second request during the weeks after giving birth which might be a challenging time.[33]

4. Ms Robertson's Later Return Request and Grievance (2016)

[60] Two years later in August 2015, two things happened that are relevant to this grievance. As of August 1st, Mr. Kirincic became District Administrator, Human Resources (Teaching). He began the assignment in the third or fourth week of August. He returned to a secondary school Vice-Principal assignment in 2017.

[61] Ms Robertson submitted a leave request form received by Human Resources on August 31, 2015. The administrative routine is for an Executive Assistant to review the request and identify if there is any issue requiring attention, such as a requested leave period longer than the maximum period. If there is none, a form letter confirming the requested leave periods restated in the letter is printed for signature by the District Administrator, Human Resources (Teaching). There is no evidence there were any administrative problems with the language of the information sheet or the format of the leave request form from August 2013 to August 2015.

[62] Ms Robertson had been teaching elementary school classes in the school district since 2007. Her comfort zone is teaching Grades 1 to 4. In 2008, she obtained a 1.0 FTE continuing contract. She took pregnancy and parental leave from September 2012 to September 2013. Before taking those leaves, she attended the union's annual maternity leave workshop.

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[32] *Employment Standards Act*, RSBC 1996, c. 113, s. 51(1)(a)
[33] See *British Columbia Public School Employers' Assn. (Hope Grievance)*, [2013] B.C.C.A.A.A. No. 17 (Dorsey), ¶ 94 (sleep deprivation)

[63] In the 2014-15 school year, she had a 0.8 FTE assignment because she job shared her 1.0 FTE contract. Her assignment for the 2015-16 school year when she job shared was 0.8 FTE in a Kindergarten/Grade 1 class.

[64] All the 2013 iterations of the information sheet begin with the same first "District Process" point: "At least 4 weeks before requested leave commences, teacher submits Request for Pregnancy/Parental Leave form with: physician's note advising of due date **or** birth certificate **or** adoption papers (depending on type of leave requested)."

[65] Ms Robertson obtained a letter stating her expected delivery date was October 13, 2015. She downloaded and printed a leave request form through the FirstClass portal or perhaps elsewhere which she completed and submitted with the delivery date letter. This form was not current because it identified Mr. Allnutt as the District Administrator, Human Resources (Teaching) and employer contact person. She marked two boxes requesting both pregnancy and parental leave. There was no ambiguity in when she was to return from parental leave, which she identified in writing as follows:

> ☑ **Or** on: 31 (Day) 08 (Month) 2016 (Year)
>
> (start back to work for September 2016)

[66] While it is not relevant for this arbitration, for an inexplicable reason there were four not five boxes on the form Ms Robertson submitted.[34] It was Mr. Allnutt's April 2013 draft form, but it contained the statement about exceptions to natural break dates.

> **PLEASE NOTE: Request for a return later or earlier than originally confirmed will be approved only** if it coincides with the start of a new school year, the end

[34] When this was drawn to the employer's attention in November 2016, it learned this earlier iteration of the form was among the departmental forms on line, but not in the FirstClass portal. It posted the correct form at all locations. The request form in the union's booklet for its November 3, 2016 Maternity/Parental Leave Workshop identifies Mr. Kirincic as the District Administrator, Human Resources (Teaching). Although this form was prepared in or after August 2015, it is the same form submitted by Ms Robertson in August 2015 with Mr. Allnutt's name on it and with four not five leave ending options. The employer did not choose to use a form different than the one Mr. Allnutt sent to the union in 2013 as its final iteration with five end date options. The wrong iteration was posted in some locations. No one noticed until sometime in November 2016. Similarly, the information sheet in the union booklet is not the iteration Mr. Allnutt sent to the union in June 2013 or the final August 2013 iteration posted online. No one changed the final 2013 iteration of the information sheet and form without notice to the union, which has in its booklet a sample of the confirmation letter dated December 2015 sent to the teacher on receipt of a leave request. The text of this letter is the same as that in the letter sent to Ms Robertson on August 31, 2015. There was no unilateral change in the form without notice to the union after consultation with the union as asserted in the Union's Written Argument, ¶ 12; 127.

> of Winter or Spring Break or the start of semester 2 at a semestered secondary school. The Board may make exceptions where it considers appropriate and in the best interests of student.

[67] The same day the request was received, an Executive Assistant printed a confirmation letter with the pregnancy and parental leave dates requested. All the 2013 iterations of the information sheet contain a District Process point stating: "Contact HR by email or in writing at least 6 weeks prior to the approved return date to confirm your return to the District or to request a later return date." No one had suggested in 2013 that "request" was not appropriate if a teacher initially requested less than the maximum leave, as Ms Robertson did, and later decided she wanted to take the maximum leave entitlement, as Ms Robertson did.

[68] Ms Robertson testified she knew she could request leaves totalling 52 weeks. Despite the language of the form and information sheet, which she testified she might not have read, she did not know she could make separate requests for pregnancy and parental leaves at separate times on two separate forms.

[69] Ms Robertson's second pregnancy and parental leave would be different from the first. She would be on leave with a newborn and a pre-school child who would be adjusting to having a sibling. She chose to request 11, not 12, months for the benefit of both her and her unassigned and unknown group of students in the 2016-17 school year. She knew if she chose to return in October there would be a disruption in routines and student-teacher bonding, which enhances teaching and learning. A new student-teacher bonding would have to be established. She knew there was risk there could be a difficult transition for her and the students if there had been one or more teachers in the classroom in September. She knew continuity could be adversely affected if she did not have communication during or after her leave with the one or more teachers in the classroom in September.

[70] She testified she thought she could extend the total leave period to 12 months, but not longer. She did not testify that she thought about who would teach during the one month extended leave period if she had a job share partner in the 2016-17 school year as she had the previous school years.

[71] The confirmation letter dated August 31, 2013 with Mr. Kirincic's signature block was signed by him as a routine part of his administrative duties. The form letter told Ms

Robertson she was granted 17 weeks pregnancy (maternity) leave and 35 weeks parental leave, although it was from Saturday, January 28, 2016 to Thursday, August 31, 2016 (30.7 weeks). She did not read this as granting her longer leave than she requested because the dates were the ones she requested.

[72] The letter advised:

> Please note that six weeks prior to your return, you are responsible for confirming in writing or by email to Human Resources that you are returning on the stated date. Any early or later return will only be approved for a natural break in the school year such as after Winter or Spring Break.

Ms Robertson did not read this to mean she could unilaterally change her return date from parental leave simply by confirming a new date within 35 weeks.

[73] By early March 2016, Mr. Kirincic had settled into his new responsibilities with ongoing support from and communication with Mr. Allnutt. Early in his tenure they talked about each leave request and Mr. Allnutt spoke frequently about the 2013 arbitration which was "still very fresh for Rod."

[74] Ms Robertson's experience on leave was different than her first parental leave. She decided she would like to have more time on leave for her and her children. Teaching assignments for the 2016-17 school year would be made in May. She planned to job share as she had in the prior two school years and wondered if she could have her class covered in September by a job share partner. On Friday afternoon, March 4, 2016 she sent an email to Mr. Kirincic.

> I have a question that I feel I may already know the answer to but feel it was worth a shot :)
>
> I am currently on maternity leave (as of Oct 1) and originally had stated my return as Sept 2016.
>
> I figured even though I technically have until October 1st for my full year that it would be easier on myself and students if I were to start in September, rather than have a teacher in the class for September and then me come back in October. I'm starting to rethink things though, as I would obviously love to stay home with the new baby for the full year – since we actually have this luxury!! :)
>
> So I am wondering – when I come back I want to work 4 days a week like I was previously. My job would get posted for September – but what I am curious about would be, if somehow, the teacher who takes my mat leave for September, is there a way that they could (if they wanted to) also continue on with me for the rest of the year doing 1 day a week?? If it's possible I figured this would be best for the students to have 2 teachers, rather than 3, if I was to have to then find a job share partner upon my return in October. I'm assuming a mat leave cannot be combined with a job share?

> I hope I make sense :)
> Thanks for your time
> Melissa Robertson
> Grade 1/2 Teacher, Brooke Elementary

[75] Ms Robertson was focused on the organization of her later return and her responsibility as the 1.0 FTE teacher to find a job share partner and plan. She was assuming she could unilaterally extend her parental leave to the maximum 35 weeks. She was also assuming she could find a job share partner that would work on Wednesday each week, which she had in previous job share agreements.

[76] Mr. Kirincic's reply late Monday afternoon focused only on the job share organization. There could not be a job share during any of the time Ms Robertson was on leave. He wrote:

> I hope that I am understanding what you would like to do - you are looking to come back from your Mat leave at a .8, correct?
> If that is what you are trying to accomplish, you could do that via a job share. Your job would be a 1.0 while you are finishing your mat leave. At that time, you would return to your position and be 1.0 as well. You could then submit a job share application for you and the person that had your job while you were on Mat leave (or any other eligible person for that matter). If it is approved, you then share the job the rest of the year.
> Here are a couple things to be aware of:
> – you own the 1.0 job and are expected to work full time until you find a job share
> – the onus to find a job share is on you, not the school or District - job shares need to be approved by the Principal and the District
> – the person in your job while you are on Mat leave may not want to work 1 day/week

[77] Later that afternoon, because Mr. Kirincic had not said anything about a new return date, Ms Robertson emailed a response assuming she could postpone her return to October and asking how she made the change.

> Thanks for the reply. You did understand me correctly :)
> So originally my mat leave I said I was returning September 2016. Can I change my return through you or would I need to resubmit a form?

[78] Mr. Kirincic was aware of the policy on early and later return requests. He had discussed it with Mr. Allnutt and he and Mr. Allnutt had attended a union workshop. He knew from the signature block on Ms Robertson's email that she is a primary teacher. He did not think the reason she stated warranted an exception in light of the disruption for students, his experience discussing leaves with Mr. Allnutt and his knowledge of the 2013 earlier return from parental leave arbitration.

[79] He replied by email at 10:00 am on Tuesday morning addressing her request without any further communication with Ms Robertson.

> I was so focused on the job share portion of your question that I didn't pick up on the change from your original September dates. While you are permitted to change your return date, it must coincide with a natural break in the school year. For you, this would mean a return on your original date or in January after the Winter break. You wouldn't be permitted to change your date to anything in between.

[80] The final email exchange is quoted above. Ms Robertson did not offer Mr. Kirincic any additional reason for a later return and he did not inquire if there were any circumstances prompting a desire to return later than originally requested and granted other than the reason stated in her initial email. Neither the advance notice nor any potential teacher salary cost saving was a factor in his decision.

[81] He did not take steps to build a case for an exception. He did not, as he was asked on cross-examination, inquire about the newborn, Ms Robertson's health, her coping or whether she was qualified to teach in secondary classes. He did not speak to her principal or inquire about what assignment she might have in September. He did not consider delaying a response until after assignments were made for the next school year.

[82] Rather than challenge Mr. Kirincic, Ms Robertson spoke to a union representative about extending her leave for one month to October 1st and not until January with the attendant loss of three month's income.

[83] Spring break intervened and the union placed Ms Robertson's request for a later return from parental leave on the March 31st agenda of the weekly Personnel, Issues and Grievances Meeting attended by Messrs Allnutt, Steer and Kirincic and 1st Vice President Arabella Devlin. Ms Robertson's request and Mr. Kirincic's response were discussed.

[84] The union believed the early notice before the March 31st deadline for education, deferred salary and other leave requests and well before the May school staffing process for the next school year favoured approving the requested one-month extension. The union thought it reasonable to have the 19 teaching days in September 2016 covered by one or more other teachers. Mr. Steer testified the union's position stated by Ms Devlin was that Ms Robertson had the right to extend her parental leave to

35 weeks and the employer had no discretion to disagree. The union did not identify any of Ms Robertson's life circumstances that the employer should consider if it did have a discretion. There was no resolution. The union was to seek advice from the British Columbia Teachers' Federation.

[85] There is no evidence anyone spoke to Ms Robertson after the first meeting. Her request for a later leave return date and the employer's response were discussed again at the April 6th weekly meeting. The union told the employer it could not deny Ms Robertson her full parental leave entitlement and the union was intending to grieve the employer's failure to recognize and accept her right to extend her parental leave to her maximum entitlement.

[86] There was no discussion about Ms Robertson's personal or professional circumstances. No new information to support an exception was given to the employer by Ms Robertson or the union and none was presented at the arbitration. What Mr. Kirincic knew about Ms Robertson's circumstances in March 2016 when he decided they did not warrant an exception is all the relevant information there was to know.

[87] The grievance filed on April 20, 2016 by 2nd Vice President Susan Yao states: "The employer's requirement to have employees designate the end date to their parental leaves before they have even initiated their pregnancy leaves is unreasonable and contrary to Sections 50 and 51 of the BC Employment Standards Act." The remedy requested was approval of Ms Robertson's later return on October 1st and:

> 2. that all teacher requests to alter their return date from parental leave received by the Board with reasonable notice be approved; and
> 3. that the employer's pregnancy/parental leave forms and information provided to teachers be amended so that teachers are not required to select a return date from parental leave at the same time as they are requesting pregnancy leave.

[88] In May, Ms Robertson learned her teaching assignment was a Grade 2 class with the possibility it would change to a Grade 2/3 class, which she had taught before. It did change. There were more Grade 3 than Grade 2 students, who were highly independent. She had a job share partner who was 0.9 FTE and taught on Wednesdays. Ms Robertson believes if she had been on leave in September, her partner could have taught the four Wednesdays and an additional 0.5 day per week. The partner would have provided continuity and been a liaison between Ms Robertson

and the teacher or teachers the employer arranged to have in her place for the other 13.5 days in the month.

[89] Because classes started Tuesday, September 6th, at a 0.8 FTE assignment Ms Robertson would be absent 15 days in September. The salary cost for that replacement teacher or teachers would be less than Ms Robertson's salary and provide a cost saving for the employer. The employer says that cost saving would never be a consideration or provide the basis for an exception in administering return from parental leave.

[90] Mr. Kirincic cannot fathom how there could be a job share teaching partnership in September when one partner is on parental leave. Leaves are not job shared. Ms Robertson's position is not less than 1.0 FTE until she is at work and teaching with a job share partner. A teacher is either on leave or teaching in an assignment. A job-sharing plan could not begin until both partners are at work.

[91] The employer wonders how other teachers would react to the speculated job share while one partner is on parental leave or to assigning Teachers Teaching on Call for the full and half days not covered by Ms Robertson's job share partner.

5. No Requirement to Designate Parental Leave End Date before Pregnancy Leave

[92] The grievance states the employer was requiring teachers to "designate the end date to their parental leaves before they have even initiated their pregnancy leaves." This is not supported by the employer's policy, practice or the evidence.

[93] Mr. Steer testified he recognizes it is not required by the employer. The union encourages teachers to make separate requests at separate times. The employer agrees teacher may. At least one teacher has.

[94] Teachers are not misled or in any way deceived into thinking they must designate the end date of parental leave before initiating pregnancy leave. Nothing in the information sheet or leave request form suggests they must. The information sheet or leave request form are explicit that teachers do not.

6. Leave Policy Unambiguous and Clearly Communicated

[95] The union submits, regardless of the content of any policy that the employer may make to administer pregnancy and parental leaves, the existing employer's policy is so

ambiguous and not clearly communicated that the employer cannot claim to have reserved any discretion to deny a teacher's request to extend parental leave up to the maximum entitlement of 35 weeks if it is made with reasonable notice.

[96] The union submits the employer's communications do not clearly stipulate that the end date for parental leave requested by a teacher and granted in an employer letter is not "confirmed." As Ms Robertson reasonably believed, the employer's publications and letter leave it open to a teacher on parental leave to change the end date six weeks before the approved end date. The date is not finalized until the teacher confirms it six weeks before the requested end date.

[97] The union cites all the cautionary statements in the employer's publications to support its submission that the leave end date is not confirmed when requested, but six weeks before the requested end date. These statements include with union emphasis:

> - Contact HR by email or in writing at least 6 weeks prior to the approved return date to <u>confirm</u> your return to the District <u>or to request a later return date</u>.
> - A return later than <u>originally confirmed</u> will be approved if it complies with G.26 and the date coincides with the start of a new school year, end of Winter or Spring Break or start of semester 2 at a semestered secondary school. Exceptions may be made where appropriate and in the best interest of students.
> - Teachers requesting earlier or later return are advised not to make childcare or other significant decisions related to a return to work until they have confirmation from the district of its agreement to their return date.

[98] I disagree. To begin, there is some semantic legerdemain that needs to be clarified. The teacher "requests" leave. The employer "grants" leave to an approved return date in a form or standard letter that is referred to as a "confirmation letter." The employer asks that any error in the dates, which are in its system on which the employer will rely, be identified so they can be corrected.

[99] The request and granting exchange "finalizes" the leave period and dates. Both the teacher and employer can rely on there being a leave for the period. Six weeks before the leave end date the teacher is to contact Human Resources to "confirm" return from leave as requested and granted or to request a different date. This process does not "finalize" the leave granting process. It simply confirms return from leave as

granted or starts a new process, which might or might not change the return date. It is a generous opportunity for a teacher to take extended leave beyond the 35 weeks.

[100] The union's submissions characterizing the 6-week notice event as "finalizing" is a creative artifice that seeks to move unilateral teacher control to months after the leave requesting stage and to remove employer decision-making authority from any process changing the return date. It is creative, but not rooted in the collective agreement, the *Employment Standards Act* or the employer's published documents.

[101] The entirety of the information sheet and leave request form emphasizes that the leave request and granting process is driven my teachers making timely requests for pregnancy/parental leave together or separately and the employer granting the leave periods requested. Once the parental leave with the end date requested is granted and confirmed by letter, the employer and the school can act to organize a replacement for the teacher.

[102] The fact the employer's confirmation letter speaks of 35 weeks of parental leave does not extend the leave period requested or inferentially confirm a right to return later within 35 weeks than the leave return date requested and "granted as above" where the dates of the leave period are stated.

[103] The employer's publications are clear that teachers may change their return dates to an earlier date or a later date. If it is an earlier date, teachers will forfeit some period of their parental leave entitlement. If it is a later date, it might be to extend the usage of their entitled leave up to the maximum 35 weeks, as Ms Robertson requested, or it might be for a period beyond their entitled period of leave with financial or other consequences for the teacher.

[104] In any of these scenarios, the teacher is asking the employer to adjust the organization of their replacement during leave with consequences for replacement teachers and students. The contact 6 weeks before the "approved return date" which was the teacher's chosen date, like the contact 6 weeks prior to a requested early return date, which will be more than 6 weeks before the approved return date, is to allow an opportunity for an orderly and timely return and classroom transition for the students and replacement teacher.

[105] The employer is forthright with its notice that a later return "will be approved" if it complies with Article G.26 which includes up to a 5-week extended unpaid parental leave in some circumstances[35] and parenthood leave[36] and at certain dates in the school year calendar. "Exceptions may be made where appropriate and in the best interest of students." Similar dates and a provision for exceptions apply to early returns without any reference to Article G.26 because there is no statutory or collective agreement right to return early from a requested and approved parental leave.[37]

[106] Further the employer cautions a teacher should be aware a new earlier or later return date is not guaranteed. Teachers are advised not to make commitments until a new return date is agreed to by the employer.

[107] The communications are clear and a teacher who takes the expected time to read the information sheet and leave request form will understand she cannot unilaterally change her chosen return date even if that date is earlier than the 35-week parental leave entitlement. There is a process to be followed and the outcome is neither preordained nor the exclusive decision of the teacher. No new form is to be submitted as Ms Robertson asked Mr. Kirincic.

[108] The approved return date was finalized before the leave began and is to be confirmed by the teacher for organizational and operational reasons. The employer wants to hear from a teacher who has been on leave, and perhaps out of contact with the employer, for as many as 46 weeks. However, if a teacher wants a later date, the teacher must make a request by email or in writing. The information sheet clearly states: "Contact HR by email or in writing at least 6 weeks prior to the approved return date to confirm your return to the District or to request a later return date."

[109] The 6-week period coincides with the 6-week period to apply for parenthood leave.[38] It is not intended to mark a time before which the employer must consider, act

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[35] *Employment Standards Act*, RSBC 1996, c. 113, s. 51(2)
[36] Article G.26.3
[37] "There is no statutory or collective agreement entitlement for a teacher to unilaterally change the duration of a parental leave." *British Columbia Public School Employers' Assn. (Hope Grievance)*, [2013] B.C.C.A.A.A. No. 17 (Dorsey), ¶ 127
[38] Article G.26.3.c.i

reasonably and entertain exceptions and after which the employer may arbitrarily deny or accept the request.

7. Policy Consistent with *Employment Standards Act*

[110] The union observed in its March 15, 2013 letter that Mr. Allnutt's initial draft of the information statement and leave request form "requires" a pregnant teacher to request parental leave at the same time as pregnancy leave. Mr. Allnutt revised the information sheet to add what is double underlined below:

> **LEAVE ENTITLEMENT**
> **Birth Mother** may request **up to**:
> - 17 weeks Pregnancy Leave to begin no earlier than 11 weeks prior to the due date and no later than the actual birth date; and/or
> - 35 weeks Parental Leave (immediately following Pregnancy Leave)
> - These may both be requested at the start of the leave or separately.

[111] The leave request form completed by the teacher includes the statement "I have read the Delta School District Pregnancy/Parental Leave Information Sheet and am now requesting:" followed by three boxes of which one or two can be checked. A leave start date is to be written in by the teacher. Following this, the form states "I want my leave to end" and the teacher chooses one of the listed periods identifying the maximum number of weeks for pregnancy leave (17 weeks), the maximum number of weeks for parental leave (35 weeks), the maximum number of weeks for both "Pregnancy AND Parental Leave" (52 weeks) and 37 weeks for "birth father/adoptive parent/ birth mother not requesting pregnancy leave." The teacher has a fifth choice of writing a different leave end date.

[112] Ms Robertson checked the two boxes for Pregnancy and Parental Leave. The leave request form she used had only four choices for a leave end date. She passed over the listed choice of 52 weeks composed of 17 weeks pregnancy leave and 35 weeks parental leave and wrote the date of August 31, 2015. She also wrote "(start back to work for September 2016)."

[113] The union submits the employer's leave request form required or made it "practically obligatory" for Ms Robertson in August 2015 to request her parental leave 4 weeks before commencing her pregnancy leave or 21 weeks before commencing her parental leave, rather than giving her the choice to wait until the end of December 2015

to decide and request the length of parental leave she wished to take. The union submits a request in December is more consistent with the scheme of the *Employment Standards Act*. After this employer compulsion, it was unfair for the employer in March 2016 to refuse her request to extend her parental leave to 35 weeks, the full length of her entitlement.

[114] In support of its submission, the union dissects the language of the leave request form Ms Robertson completed and submits the form is inadequate.

> As Ms. Robertson has testified, she did not know that she could apply for the two leaves separately; the District did not communicate that to her. It was her understanding that the Leave Request Form encompassed both her pregnancy and parental leave. She further testified that no one ever explained to her that she could apply separately for each leave. She stated that there is only one space on the form to indicate a return date. She believed, based on the wording of the form, that she was required to indicate at that time that she would be taking both pregnancy and parental leave, and so her return date would pertain to the end of the parental leave. Furthermore, Ms. Robertson did not understand at that time that she was setting her return date in stone, and waiving her statutory right to take the full 52 weeks of leave.[39]

[115] The union submits:

> The Union says that it is unreasonable for the Employer to require that the members give so many months, maybe even a year's notice for their parental leave return. Ms. Robertson was not in a position to know what her needs and the needs of her family would be so far in the future, specifically with regard to childcare arrangements that according to the Employer's direction, cannot be confirmed until much closer to the time that the child will actually enroll. Once that did become clear, quite close to the time that she should have been permitted to apply for parental leave, the Employer should have acknowledged that her initial request was made so early, and given her the opportunity to make the change she wanted to make.[40]

[116] I conclude the information sheet and leave request form, including the one completed by Ms Robertson, reasonably impose an obligation on a teacher requesting leave to inform herself. The teacher states she has read the information sheet, which states a birth mother may request pregnancy and parental leave separately, and the teacher is given choices to request either or both leaves. The leave request form does not limit and did not limit Ms Robertson to the single option of making a request for a parental leave return date at the time of requesting pregnancy leave.

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[39] Union's Written Argument, ¶ 123
[40] Union's Written Argument, ¶ 130

[117] It is clearly stated in the language and format of the information sheet and leave request form that pregnancy and parental leaves do not have to be requested at the same time. For a birth mother, parental leave may be requested before or after birth. She does not have to request parental leave before the start of pregnancy leave.

[118] Ms Robertson could have requested parental leave in December. At that time, she might have chosen a different return date than she did in August, but she chose to make the request in August. Her leave was granted as requested.

[119] The fact a birth mother chooses to request parental leave earlier than she has to is not a factor the employer need consider if the birth mother later wishes to change the leave end date she requested, the employer granted and the employer confirmed in a letter.

[120] There is no inconsistency between the flexibility the employer gives birth mothers to request all or partial parental leave entitlement at the same time or later than when pregnancy leave is requested and the *Employment Standards Act* or the collective agreement.

[121] Several grounds of the union's challenge to the employer's parental leave policy have been addressed above: the employer's failure to consider the time of student progress reporting as a "quarter" and a natural break time at which Ms Robertson could return; the employer's "obligatory requirement" that requests for parental leave must be made earlier than required under the *Employment Standards Act* and collective agreement; the passage of time and change in circumstances between the "required" request time and a date after the birth when the request is permitted to be made under the *Employment Standards Act*; and ambiguity and lack of clarity in the employer's communications in its information sheet and leave request form.

[122] With my determinations on those grounds, there is no basis to conclude the employer's unilateral policy is inconsistent with the collective agreement, unreasonable, not clear and unequivocal or has not been brought to the attention of the teachers.[41]

[123] Posting the information sheet and leave request form on the employer's intranet as a single document with the information sheet referenced in the leave request form is

[41] *KVP Co. (Veronneau Grievance)*, [1965] O.L.A.A. No. 2 (Robinson)

adequate to bring its policy to the attention of employees. It is not necessary in this workplace environment to distribute or post paper copies on bulletin boards or email a copy to every current or newly hired teacher. It is not necessary for the employer to check in with birth mothers on pregnancy leave four or more weeks before the commencement of their parental leave to have them renew their request, affirm their leave period or ask to change their leave period. It is not necessary, as the union submits, for the employer to provide greater clarity by having separate request forms for pregnancy and parental leave.[42]

[124] I conclude the employer's policy is not "inconsistent with both the *Act* and the Collective Agreement, rife with ambiguities, and its application, particularly with regard to the Employer's 'natural breaks' rule, is opaque and unduly rigid."[43]

8. Reasonable Exercise of Management Rights and Discretion

[125] An employer objection that its denial of the request to change the approved date of return from parental leave to a later date is not reviewable at grievance-arbitration is addressed later in this decision.

[126] The real difference between the union and employer is whether greater importance is to be given to the individual circumstances of the teacher or to classroom continuity and the employer's assessment of the best interests of students. This difference is captured in Mr. Steer's March 15, 2013 letter to Mr. Allnutt: "While returns at natural breaks may be the Employer's preference, and that preference may be stated, it should not be the only factor, or a paramount factor."

A. Union and Employer Submissions

[127] This difference is embodied in the main ground of the union's challenge to the denial of Ms Robertson's request for a later return from parental leave within the 35-week entitlement. The union submits the employer did not review Ms Robertson's request in a reasonable manner because it did not fairly consider her request and, consequently, made an unreasonable decision.

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[42] Union's Written Argument, ¶ 12
[43] Union's Written Argument, ¶ 75

[128] The employer's policy and leave request form expressly state the employer will make exceptions "where it considers appropriate and in the best interests of students." The union submits, despite this statement, the employer refuses to consider any leave extension request that does not coincide with a natural break. On Ms Robertson's request to return one month later than approved, the employer "failed to exercise its discretion reasonably, and rendered an unreasonable decision."[44] The union submits:

> Ms. Robertson had the right to have her request to extend her unpaid parental leave to 35 weeks fairly considered. While the Union acknowledges that the Employer has some discretion upon receiving a request to change a previously submitted return date, the Employer must not exercise that discretion in a way that is arbitrary, unreasonable and unfair. That the Employer must exercise its discretion reasonably and fairly is all the more necessary given that Ms. Robertson's rights are derived from statute.[45]

[129] The union submits the employer's preference that a change in return date coincide with a natural break in the school year is an employer "operational requirement" which the employer must establish[46] with reference to the several factors arbitrators consider when reviewing a management denial of a leave request.[47]

[130] The union submits the employer did not consider the merits of Ms Robertson's request "whatsoever" and did not consider the "circumstances of her request." In effect, the employer simply applied a blanket rule. This is an arbitrary and unreasonable exercise of managerial discretion.

> The evidence makes clear that at no point did Mr. Kirincic make any consideration whatsoever of Ms. Robertson's request. Indeed, at no point did he request any further information from Ms. Robertson as to *why* she was requesting a longer leave or what impact it might have. He simply refused to consider her request on the basis that it did not coincide with a natural break in the school year. The fact that his initial email did not even address the question is further evidence of the fact that he did not make careful consideration of her request, given that he hardly took the time to appreciate the nature of her inquiry.
>
> … Rather, the Employer ought to have considered Ms. Robertson's request at the time she made it on an individual basis, having regard to all of the circumstances and factors associated with the request. Not only did the Employer fail to consider

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[44] Union's Written Argument, ¶ 3
[45] Union's Written Argument, ¶ 74 (original emphasis)
[46] *Government of Nova Scotia*, [1983] N.S.L.A.A. No. 3 (Christie); *Simon Fraser University (Dobb Grievance)*, [1993] BCCAAA No. 269 (Bruce), ¶ 30-31
[47] E.g., see *Atco Lumber Ltd. (Kucher Grievance)*, [2005] B.C.C.A.A.A. No. 204 (Foley), ¶ 33 review dismissed *ATCO Lumber Ltd.,* [2005] B.C.L.R.B.D. No. 334; *Intercon Security Ltd. (Kailly Grievance)*, [2011] B.C.C.A.A.A. No. 24 (Steeves), ¶ 35. See also the decisions cited in *British Columbia (Liquor Distribution Branch) (Durikova Grievance)*, [2016] B.C.C.A.A.A. No. 145 (Bell)

her request at first instance, it further failed to request and/or consider any associated circumstances and factors.

In particular, as testified to by Ms. Robertson, as of August 2015 when Ms. Robertson initially requested leave, she could not have possibility imagined what the year ahead would entail. She did not, at that time, appreciate how quickly the 48 weeks she initially requested would disappear. By March, five months into her leave, she reassessed her situation. This was a once in a lifetime experience – she would never again have the opportunity to spend this time on leave with her infant son.

She made sure to contact the Employer well ahead of time, so as to allow the Employer to have a reasonable amount of time to consider her request and to make whatever arrangements would be required to permit her to return in October, should her request be approved.[48]

[131] The union submits:

a) The employer did not "fairly and adequately consider her wish to spend more time with her baby, a purpose wholly consistent with the object and purpose of Part 6 of the *Act*, and balanced her interests against the extent of any resulting disruption." It submits:

- At no point did the Employer ask Ms. Robertson what an additional month of leave would mean to her or what the impact would be.[49]
- Further, once Mr. Kirincic understood the request being made by Ms. Robertson, his hasty response makes obvious, that he did not consider what implications, if any, extending Ms. Robertson's leave would have on the District's operations. Indeed, in order to make such an assessment, the Union contends that Mr. Kirincic ought to have consulted with the District's accounting department to get a fair sense of any financial impacts granting Ms. Robertson's request may have.[50]
- Importantly, he did not contact anyone at Brooke Elementary School. A reasonable response would have been to contact the principal to determine what sort of arrangements could be made to accommodate Ms. Robertson's request, or at least to ask for some time for those circumstances to coalesce. As of March 4, 2016, the Employer was not in a position whatsoever to say with authority what grade Ms. Robertson would be assigned for the 2016-17 school year, as it had not yet made staffing determinations for that year.[51]
- Moreover, the Employer was aware that Ms. Robertson would have a job share upon her return. At no point did the Employer consider the fact that a job share partner would bring continuity to the classroom even if Ms. Robertson was on leave for September.[52]

b) The employer

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[48] Union's Written Argument, ¶ 88-91 (original emphasis)
[49] Union's Written Argument, ¶ 92
[50] Union's Written Argument, ¶ 92
[51] Union's Written Argument, ¶ 94
[52] Union's Written Argument, ¶ 95

> … should have considered its responsibility to administer the provisions of the *Act* and contract fairly, and considered the extent of any possible disruption and how such might be mitigated, giving specific consideration in particular to the ample notice given by the Grievor; the fact that the extension sought was actually very short; the fact that a job share partner would ensure greater continuity of instruction, and furthermore might fill some or all of the absence, thereby further fostering continuity; the fact that she had set her parental leave return date much earlier than was required under the statute; and the fact that in its approval letter, the Employer had told her that 52 weeks of leave were approved.

c) The employer "could have asked her whether she would consider teaching an upper primary grade to minimize the possible impact of her absence" and "could have asked whether she would consider returning at the end of the first academic quarter/term in late November."

d) The employer "should have considered the circumstances, and weighed its actual operational needs against the Grievor's request. It should not have refused to consider her request based on a blanket rule."

e) Once the employer "had refused the request, which it did almost immediately, the onus was on the Employer to provide written reasons for its denial; not on the Grievor to launch an appeal to the Employer about its own decision."[53]

[132] Through the lens of what actually happened with a job share in September, the union submits the need to replace Ms Robertson for 13 days at a teacher salary cost saving was not outweighed by her leave rights and her request with 6-months notice to take all of her leave entitlement.

[133] The union submits a return after winter break would have been more disruptive to continuity of learning, which includes evaluation and reporting, than at the end of the first quarter.

[134] The core of the union's submissions is that Ms Robertson was simply asking for a return date that she could have initially requested and which would have saved the employer some cost and caused no greater disruption than if it had been originally requested and granted.

> The arbitrary nature of the Employer's approach is exposed when you consider that Ms. Robertson's real misfortune was that instead of asking for 52 weeks, thereby reserving the right to come back on September 1, she instead asked for

[53] Union's Written Argument, ¶ 81

> 48 weeks and thereby unknowingly waived the statutory right, in the Employer's view, to return on October 1.[54]

[135] Finally, the union submits the employer was "not just hasty in rendering its decision, but was unreasonably steadfast once that decision was made."[55]

[136] The employer submits the place to begin a review of Ms Robertson's request is the fact teachers choose the length of their parental leave. If the requested leave is not more than 35 weeks, the employer grants the request and approves the return date chosen by the teacher regardless of the disruption it might cause for students. The employer fully accepts it is the teacher's right to choose a leave duration up to 35 weeks and the employer "cannot and does not prevent that from happening."[56]

> However, once the leave is set, it has been determined that the employee has no unilateral right to alter the leave either under the statute or the collective agreement, and the Employer has a say in when it will agree to a new date of return. At this point, the Employer says it is perfectly entitled to take the interests of students … into account at this second stage.
>
> Thus, the Employer is entitled to weigh a request for an altered return against the best interests of students. It did that in this case.[57]

[137] Ms Robertson chose September 1st as her return date because it was better than October 1st for her students. Later, she decided it would be better for her and her children if she had a longer leave. She gave the employer no reason for the later date other than she changed her mind. She did not give any reason for not wanting January 1st, which Mr. Kirincic offered. The union did not tell the employer there was any change in her life circumstances in its two meetings with the employer. It did not suggest a November return date. Its position was simply the employer could not deny Ms Robertson's change of return date.

[138] The employer submits it acted on the information provided by Ms Robertson and the union. Now the union seeks to hold the employer to a higher standard of inquiry and disclosure than the union undertook. The union worked with the information it had. As did the employer.

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[54] Union's Written Argument, ¶ 99
[55] Union's Written Argument, ¶ 107
[56] Employer's Outline of Argument, ¶ 76
[57] Employer's Outline of Argument, ¶ 77-78

[139] The employer submits that when an employer is under an obligation to consider the circumstances or perspective of an employee in making an exception, the employee has a responsibility to provide information to support a request for an exception.[58] The employer was open to making an exception as stated in the policy and it balanced the only reason offered, which the evidence shows was the only reason at the time, against operational requirements.

> The Employer's view is that a school break is generally a better time to have teacher transition occur than the end of a reporting period as it is less disruptive to student learning. While it is open to considering exceptions, the Employer was presented with the Grievor wishing to take her 52 weeks because that was her full entitlement against the impact on student learning. There were no additional factors to consider in terms of the Grievor's request.
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> **********
>
> The Employer weighed the Grievor's request against the best interests of students and made its determination that it would not agree to a return on October 1st and it would agree to extend her leave to after Winter Break. The Grievor did not raise any concern that this would cause financial hardship. The Union did not raise any concern that this would cause financial hardship. There was nothing further put forward for the Employer to consider and it made its decision.
>
> This displays a rational and *bona fide* decision making process where the interests of the employee is balanced against that of the Employer. As long as the employer has articulated its reasons for its decision, "the question of whether the union or an arbitrator would have made a different decision is irrelevant."
>
> **********
>
> The Employer submits that it did consider the factors put before it and made a *bona fide* decision based on a legitimate operational concern and therefore its decision should not be overturned.
>
> One might ask, if this situation is not a situation where the Employer can put the interests of students first, then when can there be such a situation?[59]

[140] The employer submits if it must agree to a later date within a teacher's parental leave entitlement then this reverses the decision in the earlier return arbitration that: "There is no statutory or collective agreement entitlement for a teacher to unilaterally change the duration of a parental leave."[60]

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[58] *Shoppers Drug Mart*, [2006] BCCAAA No. 59 (Hall), ¶ 44

[59] Employer's Outline of Argument, ¶ 91; 93-94; 96-97; *Health Employers Association of British Columbia (Fabrick Grievance)*, [1997] B.C.C.A.A.A. No. 812 (Hope), ¶ 15

[60] *British Columbia Public School Employers' Assn. (Hope Grievance)*, [2013] B.C.C.A.A.A. No. 17 (Dorsey), ¶ 127

B. Discussion, Analysis and Decision

[141] In this arbitration, it is not necessary for the employer to establish or prove the date on which a teacher returns with an accompanying change in classroom teachers is a legitimate operational concern. The collective agreement recognizes this in the parenthood and education leave provisions[61] and the union specifically concedes:

> The Employer's interest in having a teacher return after a school holiday, is that both the holiday and the change in teachers are potentially disruptive, and that having those events coincide minimizes disruption. The Union does not dispute that is a legitimate operational concern.[62]

The union goes farther and offers examples of when the employer might reasonably consider its preferred return times.

> And were the teacher requesting a significant change in the duration of scheduled leave with little notice; were the class she was returning to comprised of particularly vulnerable students; had there been other interruptions that school year; were a replacing teacher prejudiced by the change, indeed, had the Employer asked the Grievor whether her request was driven by extenuating circumstances, and/or whether she had any proposal to mitigate the impact of the change, and had there been no response, etc., etc., the Employer would be within its rights to factor its preference for return after the holidays into its decision addressing a teacher's response to extend or shorten their leave.[63]

[142] The employer's written policy is not intended to be administered as a blanket rule and the union is not, in effect, arguing for a blanket rule entitling teachers to extend parental leaves up to 35 weeks when the requested and granted leave was less than 35 weeks.

[143] It is useful to recall that a birth mother is not obliged to take 35 weeks parental leave. She is entitled to "up to 35 consecutive weeks of unpaid leave" provided she makes a timely written request. Section 51(1)(a) of the *Employment Standards Act*, which the collective agreement states is "guaranteed and applies" and describes as "Short Term Parental Leave (inclusive of adoption)",[64] states:

> 51(1) An employee who requests parental leave under this section is entitled to,
>
> (a) for a parent who takes leave under section 50 in relation to the birth of the child or children with respect to whom the parental leave is to be taken, up to 35 consecutive weeks of unpaid leave beginning

[61] Article G.26.3.a.iii and G.29.2.c
[62] Union's Written Argument, ¶ 101
[63] Union's Written Argument, ¶ 101
[64] Article G.26.2

> immediately after the end of the leave taken under section 50 unless the employer and employee agree otherwise,

The written request for leave must be made "at least 4 weeks before the employee proposes to begin leave."[65]

[144] The decision to take leave and the length of the leave taken is exclusively the choice of the employee. She can take "up to" 35 weeks. Whatever length she decides to take must begin "immediately after" pregnancy leave. The employer has no discretion whether she takes leave or for how long regardless how her leave might impact the employer's operational requirements, the service it provides or those who consume or depend on that service.

[145] Except for one circumstance, there is no statutory or collective agreement provision addressing whether, after the initial written request, a birth mother may request to extend her leave up to 35 weeks or to shorten her leave or the factors the employer must or may consider in responding to a request. The exception is: "If the child has a physical, psychological or emotional condition requiring an additional period of parental care, the employee is entitled to up to an additional 5 consecutive weeks of unpaid leave, beginning immediately after the end of the leave taken under subsection (1)."[66]

[146] The employer's policy does address a request to change the length of absence. If the request is to return earlier it will be to shorten the duration of the parental leave. If it is to return later, it will be to extend the leave to 35 weeks, as in Ms Robertson's situation, or to take an additional unpaid leave which will not be parental leave. The policy on a return at a date later than originally confirmed is not limited to administration of parental leave. It recognizes some birth mothers while on parental leave for 35 weeks might wish to have an additional period of continuous leave.

[147] The published policy alerts birth mothers that, regardless whether they made their initial request 4 weeks before they plan to begin parental leave immediately after pregnancy leave or any time prior to the 13th week in pregnancy leave, a new return date will be approved "only if it coincides with the start of a new school year, the end of

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[65] *Employment Standards Act*, RSBC 1996, c. 113, s. 51(3)(b)
[66] *Employment Standards Act*, RSBC 1996, c. 113, s. 51(2)

Winter or Spring Break or the start of semester 2 at a semestered secondary school." The policy also informs birth mothers that the employer "may make exceptions where it considers appropriate and in the best interest of students."

[148] These policy provisions are equally applicable to birth mothers wishing to extend parental leave to 35 weeks; birth mothers wishing to extend parental leave to 35 weeks and take additional leave to postpone their return; and birth mothers with a return date at 35 weeks who wish to take additional leave to postponement their return.

[149] This advance notice to birth mothers in the policy gives them an opportunity to reflect on the consequences of the choice they make in requesting parental leave for 35 consecutive weeks or less than the 35 weeks and to plan if they wish to have more than 35 weeks unpaid leave after pregnancy leave.

[150] Ms Robertson chose less than 35 weeks with a return date of September 1st because she placed the interests of her future, unassigned students and herself as a teacher ahead of her right as a birth mother to take all 35 weeks of parental leave. Like the employer, she recognized student learning and teaching would be enhanced if she were in the classroom at the beginning of the school year rather than on October 1st. In balancing her interests as a mother and those of her children with her interests as a teacher and those of her students, she chose a return date that shortened her parental leave at home with her children and minimized the impact of her absence from the classroom on her students.

[151] She changed her mind 6 months later and decided she would like to take the full 35 weeks to spend more time at home with her children. At that time, she decided to put her interests as a mother and those of her children ahead of the interest of her future students. The employer did not oppose a later return at the next date in its policy, which was after winter break. Neither she nor the union proposed any earlier date other than October 1st, which was the end of the 35-week period she initially chose not to request.

[152] In email exchanges and two face-to-face meetings with the employer neither she nor the union gave any reason why the employer should make an exception to what the employer, Ms Robertson and the union recognize is a legitimate operational concern in

a K-12 educational system. The evidence establishes there was none. The discussion at that time was about rights, not balancing interests.

[153] The employer had all the information there was to know when it decided it would agree to a return date later than the originally confirmed date, but not the October 1st date requested by Ms Robertson and the union. The length of notice and the unknown primary grade assignment Ms Robertson would receive in May had no relevance to the continuity of learning interests of the students. The potentially small cost saving flowing from agreeing to October 1st did not trump the interests of the students. The potentially larger cost saving was not a factor in offering the date after winter break. The possibility of the impact of a job share in September while Ms Robertson was on leave was too remote and perhaps improbable or impermissible to be a consideration.

[154] The employer's policy provides for a later return. A birth mother having time with a newborn is always a factor in the length of leave she initially chooses and having more time with a newborn will be a factor in a request for longer leave. However, it is not the only factor the employer must consider. The employer must consider the interest of students and other teachers when a postponed return date is requested whether it is for a postponement up to 35 weeks or later.

[155] Mr. Kirincic offered Ms Robertson more time on leave. Other than the important consideration of loss of income, no facts related to her circumstances were disclosed in the evidence and none was told to the employer to support consideration of an exception. There is loss of income in every unpaid leave beyond the 35 weeks, but it is not imposed by the employer. It is chosen by the birth mother considering her circumstances and the available options.

[156] The employer quickly and clearly communicated its decision to Ms Robertson and later to the union. It was not required to be more elaborate in its explanation. Ms Robertson was given options or could establish a case for an exception.

[157] Perhaps for Ms Robertson being at home with her newborn for 15 days in September was a once in a lifetime experience, but not being home was, as the union says, a consequence of the misfortune of having chosen to request parental leave for

31 rather than 35 weeks and waiving entitlement to the additional 4 weeks. It was not a choice and waiver the employer had a responsibility to redress.

[158] I conclude the employer fairly and adequately considered Ms Robertson's request for a change in her requested and confirmed date of return from parental leave. It balanced the purpose of parental leave entitlement "up to 35 weeks" with the employer's responsibility to act in the best interests of students. The length of notice of the request was not relevant in these circumstances. There were no cost benefits for the employer in its consideration and none affected its decision. Unlike private sector employers, the decision was not based on any disruption in operations or production or operational needs. It was based on a balance between the interest of a teacher and her students. After fairly considering the request, the employer's decision to give greater weight to the interest of students was not unreasonable.

9. Grievance is Arbitrable and Dismissed

[159] The employer's objection to the authority of a grievance arbitrator to review the employer's decision to deny an early return from parental leave was not decided in the 2013 earlier return arbitration.

> There is no need to address the employer proposition that it can exercise its discretion to agree or refuse to disagree to an early return from a scheduled parental leave "in any way it pleases." Or its further submission that:
>
> > ... the Collective Agreement does not fetter the Employer's management rights or create a contractual discretion so as to require the Employer to act reasonably in determining whether to agree to a teacher's request to end parental leave earlier than originally scheduled. The Employer's discretion, in this respect, remains unrestricted.[67]

[160] Because of my dismissal of the union's challenges to the employer's response to Ms Robertson's request to postpone her return from parental leave, I could take the same approach to the employer's renewed objection in this arbitration. However, because of the extensive submissions by the union and employer on this objection, I consider it incumbent on me to make a decision.

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[67] *British Columbia Public School Employers' Assn. (Hope Grievance)*, [2013] B.C.C.A.A.A. No. 17 (Dorsey), ¶ 135

A. Background to Arbitral Review of Managerial Decisions

[161] In the early decades of grievance arbitration, the debate on the source of an arbitrator's jurisdiction and authority to review employer decisions was focused on whether the authority was expressly given or necessarily implied from the collective agreement under which the arbitrator was acting. Some of the decisions seem foreign today.

[162] For example, in 1954 Arbitrator Bora Laskin decided he had no power to review the discharge of an employee. Because a first collective agreement between the union and employer did not "contain any specific provisions respecting discharges or remedies therefor," he concluded the collective agreement "does not give me any jurisdiction to make any binding decision in this case."[68] He referred to the employee's remaining common law rights and offered the following:

> While my conclusion as to jurisdiction disposes of the legal rights of the parties so far as they arise out of the Collective Agreement, Oakes is entitled to rely on his common law rights before the courts. Since he was an hourly-rated worker, although paid weekly, it is doubtful that he would gain anything more than token redress if he were able to prove that he was not given reasonable notice of dismissal.
>
> *The Arbitrator then went on to state that*, "despite my incapacity to make a binding decision in this case, I feel that the parties are entitled to have my views on the merits of the allegation of unjust discharge", *and after reviewing the evidence, concluded as follows*: "I would find, accordingly, that Oakes' discharge was not for just cause; and, had I jurisdiction to make a final and binding decision, I would order reinstatement without loss of seniority or other rights, if any, and with money compensation for time lost, less any money earned, or that ought to have been earned in mitigation since the date of discharge. Lacking jurisdiction, my finding can have only the force that the Company may wish to give it as a matter of moral compulsion."[69]

[163] In 1956, an arbitration board unanimously dismissed a discharge grievance because there was no collective agreement provision under which it could decide whether the discharge was unjust.[70] And in 1957, a grievance under a collective agreement which provided the employer could discharge for cause was dismissed because: "The collective agreement did not require that the cause be a just cause, and the arbitrator did not have jurisdiction to consider whether there was just cause."[71]

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[68] *A. C. Horn Co. Ltd.*, [1954] O.L.A.A. No. 5 (Laskin), ¶ 2; 7
[69] *A. C. Horn Co. Ltd.*, [1954] O.L.A.A. No. 5 (Laskin), ¶ 8-9
[70] *Dominion Magnesium Ltd.*, CD-LAD 11196; 7 L.A.C. 40 (Curtis)
[71] *English Electric Co. Ltd.*, CD-LAD 11145; (1957), 7. L.A.C. 203 (Clark)

[164] Other Ontario arbitrators were less restrained in finding jurisdiction. In 1951, a majority of an arbitration board held it had implied power to review a discharge although the collective agreement did not speak of just or reasonable cause. The board wrote:

> It will be noted that the usual words which occur after the phrase "discipline and discharge any employee", such as "for just cause" or "for reasonable cause" do not appear in this Contract and therefore it was argued there is no basis on which a Board of Arbitration can overrule the Company's decision to discharge this employee. However, the Board cannot agree with that view. If there is no provision in the Contract then we must fall back on the English Common Law to find out whether the Company was justified in discharging the employee or not. [72]

[165] This was in contrast to Arbitrator Laskin's reticence in 1954 to reach beyond the words or absence of words in a collective agreement.

> It may well be urged that it is unthinkable that a Collective Agreement should fail to contain a clause respecting grievance rights to challenge a discharge. Such rights stand in the very forefront of Collective Bargaining understandings, and are among the basic guarantees that Unions seek in Agreement negotiations. This being so, an arbitrator (so it may be argued) should be astute to find these guarantees somewhere within the terms of the Agreement, or perhaps he should imply them as basic presuppositions of the Agreement. There is a limit, however, to the extent to which words may be tortured into a meaning they do not ordinarily bear, and it would only bring the arbitration procedure into disrepute (as well as make a mockery of the Collective Agreement itself) if terms were read into the Agreement without some firm foundation in other words set out therein. Occasions do arise when in the course of interpretation it becomes necessary to spell out effective meanings from words or phrases which would otherwise be innocuous. But this is a different thing from what would be necessary in this case if I am to find jurisdiction to deal with unjust discharges. The fact that express provision for discharge cases is so common makes it all the more difficult to read such a provision into terms which cannot reasonably be said to include it. Perhaps the parties meant to provide for review of discharges through the grievance procedure but they have not done so either expressly or through any reasonable implication which can be found in any of the express terms of the Agreement, and in such circumstances, an arbitrator cannot himself rectify the omission. To do so, in the absence of evidence indicating that the omission was the result of mutual mistake, would be to act outside the very frame of reference by which his selection and his jurisdiction is governed. True, the Ontario Labour Relations Act, R.S.O. 1950, c. 194, provides that an arbitrator may determine whether or not a matter is arbitrable, but this necessary authority was not intended to give him the right to pull himself up by his own bootstraps. It assumes a sense of responsibility in the arbitrator and a due appreciation of the fact that the Agreement under which he acts is the Agreement of the parties.[73]

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[72] *Peterborough Lock Mfg. Co. Ltd.*, (1951), 3 L.A.C. 935, p. 936 (Lang). See this quotation in *KVP Co. (Veronneau Grievance)*, [1965] O.L.A.A. No. 2 (Robinson), ¶ 16

[73] *A. C. Horn Co. Ltd.*, [1954] O.L.A.A. No. 5 (Laskin), ¶ 6

[166] Embracing Arbitrator Laskin's admonition, a majority of an arbitration board in 1968 concluded an employer's decision to discharge an employee who was the local union president "cannot be reviewed for cause because of the absence of any such limitation [on the employer] in the agreement."[74] This strictest approach was endorsed by the Supreme Court of Canada.[75]

[167] In the 1970's, British Columbia enacted comprehensive legislation on the authority of arbitrators. On discharge, the Labour Relations Board wrote in 1974 that: "Arbitrators are now free to develop jurisprudence in the matter of discharges, having regard to the realities of the conditions in today's work place."[76] In Ontario, while defining their role and approach as distinct from that of a judge with inherent jurisdiction interpreting a contract, arbitrators reached a consensus that all enforceable claims must be traced back to the written collective agreement,[77] which can consist of more than one document.

[168] Since the 1970s, an expanding jurisdiction beyond the written collective agreement has been conferred on arbitrators by legislation and judicial decisions. Today, although arbitrators have a broad exclusive jurisdiction, its anchor continues to be the collective agreement even when an arbitrator has a jurisdiction that might be concurrent or overlapping with the jurisdiction of the courts or another tribunal.[78]

[169] In the period before 1992 when the British Columbia Labour Relations Board had an original jurisdiction in grievance arbitration in addition to its reviewing jurisdiction, the Board's arbitration decisions provided leadership and sometimes direction to arbitral consensus. One directing view that emerged was that the role and responsibility of grievance-arbitration is broader than industrial peacekeeping. It is a creative, active role

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[74] *Canadian Gypsum Co.*, [1968] O.L.A.A. No. 19 (Weiler), ¶ 23
[75] *Port Arthur Shipbuilding Co. v. Arthurs et al.*, [1969] S.C.R. 85
[76] *Hiram Walker & Sons Ltd.*, [1976] B.C.L.R.B.D. No. 38
[77] See *City of Toronto* (1967), 18 LAC 273 (Arthurs), pp. 276 – 278 and the review in *TFL Forest Ltd. (Estoppel Representation and Duration Grievance)*, [2008] B.C.C.A.A.A. No. 36 (Dorsey), ¶ 20-22
[78] In managing concurrent jurisdiction between grievance arbitration and the courts or other tribunals, the Supreme Court of Canada's recognition of a broad exclusive jurisdiction in grievance arbitration has limits. See *Weber v. Ontario Hydro* [1995] 2 SCR 929; *New Brunswick v. O'Leary* [1995] 2 SCR 967; and the discussions in the several articles in Elizabeth Shilton and Karen Schucher (eds), One Law For All? *Weber v. Ontario Hydro* and Canadian Labour Law (2017, Irwin Law Inc.)

sanctioned by legislation and supported by a body of principles and precedents respecting industrial citizenship.[79]

[170] At the same time, the statutory foundation for grievance arbitration remains the requirement that:

> Every collective agreement must contain a provision for final and conclusive settlement without stoppage of work, by arbitration or another method agreed to by the parties, of all disputes between the persons bound by the agreement respecting its interpretation, application, operation or alleged violation, including a question as to whether a matter is arbitrable.[80]

[171] In 1983, the Labour Relations Board reconsidering an original Board arbitration decision wrote: "…an arbitration board has no inherent jurisdiction to imply terms into a collective agreement. An arbitration board's jurisdiction is derived from the collective agreement and the Labour Code."[81] There was nothing in the *Labour Code* or the collective agreement giving an arbitrator jurisdiction to imply terms into a collective agreement.

[172] In 1983, the Board reviewed an employer's appointment of a semester instructor and decided:

> In our opinion, a clear principle which arises from Part 6 of the Code may be expressed as follows: within the context of a collective agreement, a party who has a discretion must exercise it "reasonably" so as not to defeat the legitimate rights and expectations of the other parties to the collective agreement. A party who, in the exercise of its discretion, acts in a manner that is arbitrary, discriminatory or in bad faith, does not act reasonably. Reasonableness also includes, by its very nature, an element of fairness. This principle is all pervasive in the arbitrable jurisprudence which has developed throughout Canada over the last 30 years. A lengthy line of arbitral jurisprudence has noted a general presumption that in organizing the work force, including the assignment of work, filling of vacancies, making of transfers, promotions and demotions, management initiative is subject to an overriding qualification that its decisions be in good faith, and not be arbitrary or discriminatory. This presumption exists notwithstanding management's ability to be fettered only by clear and express language.[82]

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[79] See James E. Dorsey, "The Remedial Role of Arbitrators: Private Peacekeeper to Public Institution", *Labour Arbitration Yearbook 1998* (Toronto, Lancaster House, 1998), p. 29; James E. Dorsey, "Leadership And Law Reform: Stimulation And Stamina - a federal perspective of the B.C. Labour Code" in J. Weiler and P. Gall eds, *The Labour Code of British Columbia in the 1980's* (Carswell, 1983), p. 241; Joseph M. Weiler, "Grievance Arbitration: The New Wave", in J. Weiler and P. Gall eds, *The Labour Code of British Columbia in the 1980's* (Carswell, 1983), p. 159

[80] *Labour Relations Code*, RSBC 1996, c. 244, s. 84(2)

[81] *Simon Fraser University*, [1983] B.C.L.R.B.D. No. 169

[82] *Simon Fraser University*, [1983] B.C.L.R.B.D. No. 169, p. 16; See also *British Columbia Institute of Technology*, [1983} B.C.L.R.B.D. No 226

[173] In that decision, the basis for review of the employer's appointment selection was a specific collective agreement provision, Article XVIII(E): "The contents of the employment file shall be among the matters considered in semester appointment and semester course assignment of bargaining unit employees."[83]

[174] In a 1985 decision, the Board clearly stated its decision did not establish "that a blanket principle of fairness will be applied to review all actions of an employer."[84]

[175] It is from this juncture that the employer makes its objection there is no collective agreement basis for arbitral review of its response to Ms Robertson's request for a later return from parental leave.

B. Employer and Union Submissions

[176] The employer submits the collective agreement is "completely" silent on a teacher's request to extend requested and granted parental leave. "There is no language at all on this subject."[85] There is no management rights clause in the collective agreement and no other clause that says management must exercise its rights in a reasonable or any other manner. There is no provision that could be rendered a nullity or subverted by the employer's policy.

[177] The teacher has no right to unilaterally change her return date and the employer's right to respond to a request for a change is unfettered. The collective agreement expressly states arbitrators have no jurisdiction to alter or change the provisions of the collective agreement or "to substitute new ones."[86] An employer decision on a birth mother's request for a later return date from parental leave cannot be a breach of the *Employment Standards Act* or the collective agreement.

[178] The employer submits a grievance-arbitrator does not have an "at large" free-wheeling jurisdiction over all employer actions. An arbitrator's jurisdiction is dependent on there being a matter involving the interpretation, application, operation or alleged violation of the collective agreement. The Supreme Court of Canada clearly stated in 1993 and affirmed in 2003 that "… the collective agreement is the 'foundation' of a

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[83] *Simon Fraser University*, [1983] B.C.L.R.B.D. No. 169, p. 16
[84] *British Columbia (Ministry of Finance)*, [1985] B.C.L.R.B.D. No. 19, p. 6
[85] Employer's Outline of Argument, ¶ 23
[86] Article A.6.d.ii

grievance arbitrator's jurisdiction. Absent a violation of the collective agreement, a grievance arbitrator has no jurisdiction over a dispute; if the alleged misconduct does not constitute a violation of the collective agreement, there is no basis on which to conclude that a dispute is arbitrable."[87]

[179] Therefore, the employer submits, "the bare assertion that management has acted unreasonably in an area in which the Collective Agreement is silent is not sufficient to make the grievance arbitrable."[88] This is consistent with the Board's 1983 decision in which it agreed with an Ontario Court of Appeal judgement:

> Where, as in *Metro Toronto Police*, *supra*, the collective agreement is silent on the issue in dispute, or where the agreement provides an unfettered discretion to management with respect to the issue in dispute, management may exercise its rights in any way it pleases. The arbitrator could not review the employer's exercise of its discretion, even if the discretion was exercised unfairly, unreasonably, discriminatorily, arbitrarily or in bad faith. That is so because the arbitrator could not add to the collective agreement, words that would mandate the employer exercising its discretion in a reasonable or fair manner.[89]

[180] The employer cites British Columbia arbitration decisions that affirm "the test of reasonableness does not apply beyond the confines of the collective agreement"[90]; "cannot be used to create rights"[91]; and requires there be "a potential violation of a substantive provision of the collective agreement by management."[92]

[181] The employer submits the analysis required is exemplified by a 1997 decision by Arbitrator Allan Hope dismissing a grievance that the employer contravened a management rights provision when it applied its policy not to allow an employee to reschedule vacation time to cover a period of unpaid leave resulting from illness or disability. He wrote:

> There is no general arbitral principle that requires employers to act reasonably in the exercise of rights which exist external to the collective agreement. The Union conceded in this dispute that there was no provision in the master collective

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[87] *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U.*, Local 324, 2003] 2 SCR 157, ¶ 19; *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 SCR 230, p. 251
[88] Employer's Outline of Argument, ¶ 31; *Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association* (1981), 124 D.L.R. (3d) 684 (Ont. C.A.), leave to appeal dismissed [1981] S.C.C.A. No. 96; *Toronto (Metropolitan) v. CUPE, Local 43*, [1990] O.J. No. 537 (Ont. C.A.)
[89] *Simon Fraser University*, [1983] B.C.L.R.B.D. No. 169, p. 17
[90] *Shaughnessy Hospital*, [1987] B.C.C.A.A.A. No. 179 (Hope), ¶ 45
[91] *Shaughnessy Hospital Society*, [1988] B.C.C.A.A.A. No. 64 (McPhillips), ¶ 65; *Delta School District*, [1999] B.C.C.A.A.A. No. 526 (McPhillips), ¶ 42
[92] *Brewers' Distributers Ltd.*, [2004] B.C.C.A.A.A. No. 54 (Moore), ¶ 32

> agreement that requires member employers to grant or review requests to reschedule vacations. Moreover, this collective agreement contains specific provisions with respect to the scheduling of vacations and the rights of employees who wish to divide their vacations. Those provisions do not recognize any express or implicit right in employees to change vacations which have been scheduled in accordance with the collective agreement. Hence, the Employer is not compelled by any provision of the collective agreement to consider or grant a request to change a scheduled vacation.
>
> In short, in my view of the facts and the arbitral authorities, the Employer has a unilateral discretion external to the provisions of the collective agreement to grant or refuse requests to reschedule vacations. The "doctrine of fairness" as it is sometimes described, does not apply to every exercise of discretion by an employer. Management must, of course, have acted genuinely. They must not have manipulated the terms of the agreement to defeat the legitimate rights of employees. In making that assessment, however, the arbitrators must not infringe upon the right of management to assess a given situation and to make a business judgment. The arbitrators must not weigh the evidence and substitute their own opinion for that of management. If management has ignored the provisions of the agreement, then, although it might be appropriate to characterize such conduct as arbitrary or discriminatory, the decision would be reversed only because there has been a breach of the agreement.
>
> There is recognized in the arbitral authorities an implied term that an employer will act reasonably with respect to the exercise of discretionary rights which impinge upon rights arising under the collective agreement, such as seniority rights. See: *Photo Engravers & Electrotypers Ltd.*, (1980 25 LAC (2d) 88 (Adams), rev'd February 18, 1982 (Ont. Div. Ct.) (aff'd June 15, 1983 (C.A.), (unreported) [[1983] O.J. No. 3099]. However, as stated, there is no general obligation on the part of management to act reasonably with respect to every decision that impacts upon its employees. In particular, the rescheduling of vacation is not a right vested in employees under the agreement and does not fall within the reasoning in that decision. The Employer's policy with respect to changes in scheduled vacations is not contractual in origin and does not create rights in bargaining unit employees.[93]

[182] The employer submits the same result follows on this grievance.

> … there is no applicable provision of the collective agreement that was breached or is triggered here. The collective agreement refers to parental leave but it does not contain any language relating to the revision of a parental leave once it has been set.
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> **********
>
> … the Employer's decision concerning the Grievor's request to change a scheduled parental leave is also not subject to review on a standard of reasonableness.
>
> Since there is no collective agreement provision which can be identified as being breached, and it is not appropriate to review the Employer's decision on the basis of reasonableness, there is nothing properly before this arbitration board and the Grievance ought to be dismissed as inarbitrable.[94]

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[93] *HEABC and HEU*, [1997] B.C.C.A.A.A. No. 812 (Hope), ¶

[94] Employer's Outline of Argument, ¶ 59; 61-62

[183] The union submits the agreement that guarantees and applies the parental leave provisions of the *Employment Standards Act* is an agreement that the employer's administration of the leave is governed by the collective agreement. The employer's administration was reviewed in the 2013 earlier return arbitration and is equally reviewable in this arbitration. It submits:

> While there is no express Collective Agreement provision for every possible scenario that could arise with respect to parental leaves, and in particular no provision specifically addressing late returns from parental leave, the Employer communicated to Ms. Robertson, and indeed communicates to the membership at large, the terms on which it will accept a late return from leave. Its right to administer leave extensions flows from the parental leave provision of the Collective Agreement.[95]

[184] The union submits the "heightened status" given to parental leave under the *Employment Standards Act* by its express incorporation into the collective agreement includes dispute resolution through grievance arbitration expressly addressed in section 3(7) of the *Employment Standards Act*:

> If a dispute arises respecting the application, interpretation or operation of
> (a) a Part or provision of this Act deemed by subsection (3) or (5) to be incorporated in a collective agreement, or
> (b) a provision specified in subsection (6),
> the grievance procedure contained in the collective agreement or, if applicable, deemed to be contained in the collective agreement under section 84(3) of the *Labour Relations Code*, applies for the purposes of resolving the dispute.

[185] The union submits if the collective agreement or deemed inclusion of the statutory parental leave[96] does not give a foundation for jurisdiction, this grievance is arbitrable because "the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement."[97]

[186] The union submits the jurisdictional reach of grievance-arbitration has been broadened with Supreme Court of Canada judgments[98] and is accurately summarized recently by Arbitrator George Surdykowski who favours a textualist over an intentionalist approach to agreement interpretation and concludes it is no longer the "four corners" but the "borders" of a collective agreement that determine jurisdictional boundaries. He

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[95] Union's Written Argument, ¶ 46
[96] *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U.*, Local 324, 2003] 2 SCR 157
[97] *Weber v. Ontario Hydro* [1995] 2 SCR 929, ¶ 52
[98] *Weber v. Ontario Hydro* [1995] 2 SCR 929 and *Bhasin v. Hrynew*, [2014] 3 S.C.R. 494

wrote: "Where the essential character of an employment-related dispute falls fully within the borders of a collective agreement, it is covered by the collective agreement and subject to arbitral review unless it is excluded, either specifically or by necessary implication."[99] Therefore, he concludes:

> 1. a grievance arbitrator has not only jurisdiction, but exclusive jurisdiction which the arbitrator must exercise, to hear a grievance which raises an issue concerning the interpretation, application, administration, or alleged contravention of a collective agreement in a timely way;
> 2. a collective agreement "occupies the field" with respect to employment-related matters, whether or not the subject of an express provision in the agreement, unless the matter is expressly excluded from the scope of the agreement, either expressly or by necessary implication;
> 3. a grievance need not have a specific collective agreement "hook" in addition to a management rights clause, so long as it raises an issue which in its "essential character" is factually and functionally connected to the operation of the agreement;
> 4. the exercise of management rights, both with respect to a provision in a collective agreement or generally, is an exercise of discretion which lies at the core of collective agreement rights and obligations; that is, the exercise of management rights is fundamental to the operation of a collective agreement;
> 5. as a matter fundamental to the operation and functioning of a collective agreement, any exercise of management rights discretion must be subject to challenge on the basis of reasonableness, or perhaps more specifically on the basis that the management right was exercised in an arbitrary, discriminatory or bad faith manner (which I believe effectively covers the field unreasonableness and good faith);
> 6. a grievance arbitrator therefore has not only the exclusive jurisdiction (subject to a possible concurrent jurisdiction of the appropriate human rights tribunal with respect to an allegation that the management right was exercised in a manner contrary to the applicable human rights legislation), but the obligation to hear and determine a grievance which alleges an improper exercise of management rights, whether or not with respect to an express collective agreement provision.[100]

[187] Arbitrator Surdykowski continues:

> This approach does not permit an arbitrator to alter or amend a collective agreement. But it recognizes that collective agreements do not come out of or exist in the air. A collective agreement must be interpreted and applied with due regard for the statutory framework from which it derives and the bedrock of the common law of contract.
>
> Counsel for Bell expressed the concern that taking this approach would open the door to challenges of every management collective agreement decision and interfere unduly with the Bell's employer right to manage its enterprise. I agree that it means that any exercise of management rights discretion is open to

[99] *Bell Canada v Unifor, Local 34-0*, 2016 CanLII 11573 (CA LA) (Surdykowski), ¶ 44
[100] *Bell Canada v Unifor, Local 34-0*, 2016 CanLII 11573 (CA LA) (Surdykowski), ¶ 46

> challenge on the basis that Bell has acted in a manner that is arbitrary, discriminatory or bad faith. So what? If Bell acts reasonably there won't be an issue. If Bell does not act reasonably it is properly called to task.
>
> I also note in that respect that honest good faith performance is a mutual obligation. That is, the Union has the same obligation. Accordingly, there is no obvious reason why Bell cannot file a grievance and seek an appropriate remedy if the Union uses the grievance process to harass or otherwise improperly interfere with Bell's rights under the collective agreement.
>
> Finally, for those who remain married to the specific collective agreement "hook" theory, the Union's claim in this case is not completely divorced from express non-management rights provisions in this case. There is a clear connection between the exercise of the management right in issue and the application of the "Attachment Grievor" wage grid at page 158 of the collective agreement.[101]

He concluded he had jurisdiction under the parties' first collective agreement over the union's grievance that the employer acted unreasonably by unnecessarily and arbitrarily using a testing process and an arbitrary passing grade to select employees for a reassignment.[102]

[188] The union submits the exercise of the employer's discretion to deny Ms Robertson's requested return from parental leave can be reviewable to decide whether the employer acted reasonably.[103]

> Based on the foregoing, we submit that this Board has jurisdiction to hear the matter at hand. Not only is parental leave a deemed provision of the Collective Agreement, it is expressly included in same. The Parties have agreed that the application and operation of the Agreement is subject to the grievance arbitration procedure, and the *Act* also provides that disputes concerning these rights are arbitrable. The Employer has an obligation to exercise its management rights in a reasonable manner. The evaluation of that exercise, and enforcement of that responsibility falls rightly within the authority of this Board.[104]

[189] The union submits an expansive approach to finding arbitral jurisdiction is mandated by the current law and any employer exercise of discretion on an employee's request concerning her parental leave entitlement flows from the *Employment Standards Act* incorporated into the collective agreement.

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[101] *Bell Canada*, CanLII 11573 (CA LA) (Surdykowski), ¶ 47-50
[102] A similar approach was adopted by a majority in *Unimin Canada Ltd.*, 2016 CanLII 51075 (ON LA) (Steinberg), ¶ 101
[103] See *Simon Fraser University*, [1983] B.C.L.R.B.D. No. 169; *Re Meadow Park Nursing Home*, [1983] O.L.A.A. No. 103 (Swan); *Toronto District School Board (Positions of Responsibility Grievance)*, [2008] O.L.A.A. No. 506 (Craven); *0698698 B.C. Ltd. (c.o.b. Shoppers Drug Mart Store No. 251)*, [2006] B.C.C.A.A.A. No. 59 (Hall); *British Columbia (Government Employee Relations Bureau)*, [1983] B.C.L.R.B.D. No. 324 (Moore);*Canada Valve Ltd.*, [1975] O.L.A.A. No. 152 (Shime); *Kerrobert Integrated Health Centre*, 2011 CarswellSask 370, 106 CLAS 130 (Zuck)
[104] Union's Written Argument, ¶ 72

C. Discussion, Analysis and Decision

[190] In the 2013 earlier return arbitration I found jurisdiction because as a result of ambiguous employer communication the employer had "reneged on what it had communicated" to the two affected teachers. I expressly said the factual situation was not a matter of exercising a managerial discretion. There had been a complete change in the terms on which the teachers could return and a breach of a promise the employer made to them. I wrote:

> This is not a situation of a teacher request and employer refusal. This is a situation in which the employer promised Ms Hope and Ms Dhillon that it would accept their notice of early return from parental leave and then refused to do so.
>
> The employer has a discretion in the administration of parental leave in the matter of a teacher's early termination of an agreed to accepted leave duration. In the case of Ms Hope and Ms Dhillon, the employer exercised that discretion when it sent the letters to each of them saying they could with written notice choose an early return date. Having exercised that discretion, the employer does not have a continuing residual discretion to simply, without any notice or discussion, revoke its first exercise of discretion.[105]

[191] Once the employer had granted parental leave on conditions that included promises about earlier return, those promises were enforceable conditions of the teachers' parental leave. In this manner, the "employer endowed entitlement" flowed from the parental leave provisions of the collective agreement for those teachers.[106]

[192] After that arbitration the employer took steps to make and publish a policy and procedure. It consulted, but did not negotiate with the union. The unilateral employer policy and procedure applies to more than parental leave. It is not necessary, or appropriate, for me to decide if every exercise of discretion under its policy is subject to review at grievance-arbitration. Some employer responses will be to requests for return beyond 35 weeks parental leave and, therefore, be requests for unpaid leave that might or might not be addressed in the collective agreement. These and other circumstances were not explored in this arbitration.

[193] Despite the various alternative arguments by the union focused on the employer's response to Ms Robertson's request, the real substance of the matter in

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[105] *British Columbia Public School Employers' Assn. (Hope Grievance)*, [2013] B.C.C.A.A.A. No. 17 (Dorsey), ¶ 136-137

[106] *British Columbia Public School Employers' Assn. (Hope Grievance)*, [2013] B.C.C.A.A.A. No. 17 (Dorsey), ¶ 140

dispute in this arbitration and its essential character is whether the employer could refuse to allow Ms Robertson to take her full 35 weeks of parental leave under the *Employment Standards Act* and collective agreement when she originally requested and was granted a shorter leave period. When Ms Robertson emailed Mr. Kirincic, she believed the employer could not. The union originally advocated on her behalf with the employer that, subject to reasonable notice, which she gave, the employer could not refuse her later return date at 35 weeks.

[194] Entitlement to up to 35 weeks unpaid leave is the core element of a birth mother's parental leave. It is not something external to the collective agreement. The dispute is whether a birth mother who has waived some of this parental leave entitlement may be denied a later request for leave for all or some of the leave time she waived. The union's claim she may not be denied is firmly founded on parental leave entitlement in both the collective agreement and *Employment Standards Act*.

[195] Characterising the issue as the employer does - "a request to change a return to work from parental leave to a later date than was initially set" – and pointing to the absence of express collective agreement language about the administration of the leave entitlement, camouflages or deflects from the real substance of the matter in dispute. I conclude this grievance is arbitrable.

[196] In summary, the employer has a managerial discretion on a birth mother's request to change her previously requested leave period to extend the leave up to 35 weeks. In Ms Robertson's circumstance, the employer acted on an unambiguous and clearly communicated published policy which Ms Robertson stated she had read when she submitted her original leave request. When she requested a change to a later return date, there were no circumstances unknown to the employer because of any failure by Ms Robertson to disclose to the employer or the union or any employer failure to make any reasonably expected inquiry.

[197] The employer applied its published policy, which is not inconsistent with the collective agreement or the *Employment Standards Act*, and offered her a later return date at the next natural break, which is a reasonable operational requirement for classroom continuity. There was no basis advanced or existing to support an exception.

The employer did not act unreasonably in applying or exercising its discretion under its policy. The grievance is dismissed.

FEBRUARY 20, 2018, NORTH VANCOUVER, BRITISH COLUMBIA.

James E. Dorsey

James E. Dorsey