IN THE MATTER OF THE LABOUR RELATIONS CODE
OF BRITISH COLUMBIA

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN:

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION
[BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 45 WEST VANCOUVER]

(the "Employer")

AND:

WEST VANCOUVER MUNICIPAL EMPLOYEES' ASSOCIATION

(the "Union")

Grievor:	Clare Broomfield
Date of Grievance:	October 19, 2018
CAAB Case No:	72976/19T

ARBITRATOR:	Dalton L. Larson
COUNSEL FOR THE EMPLOYER:	Jessica S. Fairbairn
COUNSEL FOR THE UNION:	Theodore Arsenault Ben Arsenault
PLACE OF HEARINGS:	Vancouver, British Columbia
DATES OF HEARINGS:	May 21, 22 and 24, 2019
DATE OF AWARD:	July 2, 2019

AWARD

1. **Background**

[1] This was a case referred to me under the terms of Section 104 of the Labour Relations Code on May 6, 2019. All persons called as witnesses were issued summonses to appear. No objection was taken to my jurisdiction to hear the matter in dispute which involves an allegation that the Employer failed to accommodate the grievor's return to work following a lengthy absence from work.

[2] The grievor has at all material times been employed as an Education Assistant becoming a permanent full-time employee in 2009. The collective agreement refers to it more generically as a Teacher Assistant which it defines as a para-professional employee who works with a classroom teacher to support the students assigned to the teacher. The teacher does not provide formal supervision to the Teacher Assistant but sets the parameters by which they may work cooperatively together. The job description summarizes the work as follows:

> Reporting to the District Administrator/Designate, the Education Assistant-Individual(s) participates as a member of a team and assists in the ongoing planning and implementing of adaptations and strategies as outlined in the student Individualized Education Plan (IEP), primarily within the classroom or learning support room, under the direction of the classroom teacher/Learning Support Teacher (LST). These positions may require the maintenance of a constant state of vigilance in order to ensure the personal safety of student(s) and/ or staff. Certain positions may also be required to provide personal assistance and care and/ or position, wheelchair transfer and implement behaviour safety plans. The requirements will vary depending on the individual student(s) assigned.

[3] In January 2014 she was in an automobile that was rear-ended by a truck which resulted in her sustaining serious injuries affecting her mobility. This resulted in her being off work for a period just over 1½ years. There is a problem in the evidence relating to the timing of her return to work, but the precise date is not relevant to the issue in these proceedings and I see no reason to attempt resolve it. Jennifer Paddock, a Rehabilitation Specialist for the insurer, Desjardins Financial Security Life Assurance Company, issued an undated report in which she said that the anticipated date of her return to work was March 23, 2015 but Dr. Ellison, her family physician wrote on the document that she would start on September 6, 2016. What is important for our purposes, however, is that her activities were strictly confined by strict specified restrictions. These restrictions imposed significant limitations on both her physical and mental activities:

- from impact activities such as running and jumping
- from overly stressful or threatening situations
- to light duties and to performing any medium duties on a rare basis.

[4] No heavy duties were permitted. Amongst other things, this precluded her from doing student transfers without assistance. In addition, she was instructed to take short three to five minute mini-breaks every hour, or as required, to rest or relieve any mental or physical stressors. All medical or personal appointments were to be booked outside of the parameters of the GRTW plan.

[5] In anticipation of her return to work, she wrote to Bruce Scott, the Business Manager of the Union, to advise him that she had a meeting with David Platt in early May to express her concern about what he told her. At the time, Mr. Platt was the Administrator of the West Vancouver School District. It was his responsibility in that capacity to determine the staffing requirements of each school. She felt that the approach that Mr. Platt took would preclude her from coming back to work at all. He told her that she would not be able to return to work unless she was given 100% clearance from her doctor and that he could not customize a position for her. He said that she would have to be prepared to take on any challenges such as the "possibility of being whacked by a student or having to chase a child".

[6] However, while that conversation adequately exemplifies the strict approach taken by one member of the management team towards rehabilitation, that is not what happened. In the course of those events the grievor experienced a relapse or "symptom flare-up resulting in Jennifer Paddock, a Rehabilitation Specialist at Desjardins, requesting an extension of her return to work. While it would appear that the extension was granted, on May 7, 2015 Amy Yu, a Human Resources Advisor for the West Vancouver School District, wrote an email to Ms. Paddock saying that they had at first considered that the restrictions would only apply during her GRTW. However, she said that if her restrictions and limitations were permanent, they had concerns about accommodating her in her EA position and that in her view they would eventually need to consider accommodating her in some other job in the school district. She elaborated her thinking as follows:

> "Every year the students' needs and dynamic changes and it's very difficult for us to predict the students coming in/leaving and whether this position will exist next year. The Education Assistants are required to be able to provide personal assistance care, transferring, lifting and restraining students and are typically handling stressful situations due to the nature of the job. Further, EA's will provide break coverage and support for each other and she will not be able to provide support.
>
> With her restrictions and limitations, her inability to perform the full scope/duties set out as an EA poses safety concerns for other employees and the students she works with. With limited medical information and operational concerns identified, we will need to consider the permanent accommodation will be in another position in the school district that is more suitable given her permanent medical limitations."

[7] Nonetheless, Ms. Yu wrote to the grievor a few days later on May 13, 2015 advising her that the Employer would be able to accommodate her in the short term because they were able to match her restrictions with some of the students in that school year but that it might not be possible to continue doing it in the future. She copied all of the individuals who had major roles in this arbitration: Bruce Scott, Jennifer Paddock, Stephanie Mascoe and David Platt. She concluded by advising them that in the future, "We will need to explore how the district can accommodate on a long term, permanent basis including looking at other positions that better suit Clare, given her medical limitations."

[8] It is at this point that the evidence becomes confusing making it appear that perhaps Dr. Ellison was correct and that the grievor returned to work on September 6, 2016. The fact is when the new school term commenced in the fall, she was continued on a GRTW program where she ended up working a four day week with Wednesdays off at 5.62 hours/day for a maximum of 22.48 hours. She eventually was assigned to the Sentinel Secondary School where she was able to work with "high functioning" students who did not require academic or physical supports but rather only supports involving the social interactions of the students. Nor is the evidence completely clear on precisely when that assignment was made. The grievor testified that she worked in that capacity at Sentinel for one entire school term from September 2016 until the end of the school year in 2017.

[9] In the course of that school year, the Employer submitted a request for medical information from her attending physician, Dr. Gerald Mittler, explaining that she had been working four days/week and that she was "looking to work only 4 days a week on a permanent ongoing basis." The Employer stated that it was seeking confirmation that she is fit and able to work as an Education Assistant on a regular and consistent basis.

[10] The response was that she was not able to return to her full duties and that she would continue to require a reduced work schedule with duty restrictions. The doctor said he saw her on March 8, 2017 and that it was his opinion that she would not be able to work in threatening or stressful situations or to engage in moderate to high physical impact activities and, in particular, no swimming, running or jumping, with mini breaks every hour. He also said that she would require knee braces but that one could expect that she would be able to attend at work consistently once she became medically well. In other words, Dr. Mittler considered that her medical condition continued to be essentially the same as it had been immediately following her return to work after the car accident.

[11] At that point there occurred a supervening event, when the grievor sought a medical leave of absence in order to undergo surgery, presumably relating to the injuries she sustained in the earlier accident. As a consequence, she was off work for the entire ensuing school term from September 2017 through the following summer. During this period off work it is not without relevance that she suffered a considerable degree of financial hardship. She had no income other than some accumulated sick days that she was able to draw upon. Under Article 216 of the collective agreement employees accumulate one and two-thirds days per month or 20 days per calendar year in sick leave with pay to a maximum of 200 working days. The evidence did not disclose the amount of sick leave she had accumulated although it is probably appropriate to observe that it could not have been a lot given the amount of time that she had been off work. In the end she said she had to move in with her father because she could not pay her bills.

[12] On May 25, 2018 Amy Rafuse, who had succeeded Amy Yu as a Human Resources Advisor for the District, wrote to the grievor requesting that she provide them with information on whether she was planning to return to work that fall. The grievor replied a few days later saying that she had started a new treatment and was waiting for the tests. She said that she should have more definitive information before the end of the current school year and that she would let them know if she would need to continue on medical leave during the upcoming school year.

[13] There was then no further communication with the Employer by the grievor until just before the commencement of the new term. On August 23, 2018 she wrote to Ms. Rafuse to advise her that she was going to be seeing her doctor on August 29 at which time she expected to get a clearance to return to work in September. Ms. Rafuse followed that communication up by forwarding her a medical form that she said should be completed by her doctor. She concluded by saying:

> Your return to work process will depend on a variety of factors including, but not limited to: the return to work date your (doctor) provides, what assignments we have available (if any) that can accommodate your last minute return to work, and renewed confirmation of your limitations and restrictions.
>
> Due to the length of your medical leave of absence and the scope of your previous limitations, we generally require more notice to make suitable arrangements for a return to work plan.

[14] The grievor then forwarded a copy of the completed Medical Ability to Work Form that had been completed by her doctor, Dr. C.A. Ellison, on the same day as the appointment. He reiterated all of the same restrictions that Dr. Mittler had prescribed a year earlier, with a graduated return to work commencing September 4, 2018 on a four day per week schedule. I see no need to reiterate those same restrictions here.

2. **Duty to Accommodate**

[15] It is not disputed that over the following months the Employer attempted to find gainful work that the grievor could do. I will review those attempts momentarily. What is disputed is the manner in which the search was conducted. Although the Employer communicated with Bruce Scott from time to time to advise him what steps were being taken to find work for her, he was not involved in any strategic planning to measure her functional capacity or to map out possible placements. He was, however, involved in several meetings to talk about jobs or other work that might be available that the grievor could do, including modifying her work functions as an Education Assistant. Eventually she was placed in a position that meets her restrictions. The real issue in dispute is whether it took too long resulting in the grievor suffering damages that would not have been incurred, had the process been more efficient.

[16] What can be said about the duty of accommodation is that it has dramatically transformed the workplace for disabled employees by the development of new legal duties on both employers and unions in ways that were essentially non-existent prior to the turn of the century. To that point, if an employee suffered a physical or mental disability it would often mean that the employee would end up without a job. The development of the law, however, did not occur overnight but took considerable time to reach its current state.

[17] The basic principle from which all other rules are derived was established by the Supreme Court of Canada in *Central Okanagan School District No. 23 v. Renault* [1992] 2 SCR 970 that an employer must take reasonable measures short of undue hardship to accommodate an employee's disabilities. These measures are not of a passive nature but rather the employer must actively seek to accommodate any such disability. The court held that private contractual arrangements made independently or in a collective agreement must give way to the discrimination provisions of the human rights legislation.

[18] Based on the presumption that the legislation has priority over a collective agreement, the court reasoned that it must follow that unions must share a joint responsibility with the employer to seek to accommodate a disabled employee. If nothing is done, both are equally liable. At para. 39 it qualified that principle by saying that, "Nevertheless, account must be taken for the fact that ordinarily the employer, who has charge of the workplace, will be in the better position to formulate accommodations. The employer, therefore, can be expected to initiate the process. The employer must take steps that are reasonable."

[19] Following that theme, it said that the search for accommodation is a multi-party one. It is not just a duty that falls upon the employer and the union but there is also a duty on the employee to search for an appropriate accommodation as was found in a rather more earlier case of *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.* [1985] 2 SCR 536. In that case the tribunal held that the employee must also act reasonably to accept an appropriate offer of accommodation and this may even involve some level of personal sacrifice. However, an employee should not normally be expected to originate a solution. As the court said at para. 44:

> When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant caused the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in O'Malley. The complainant cannot expect a perfect solution."

[20] This multi-party duty to participate actively in an accommodation has both procedural and substantive aspects. In *McDonald v. Mid-Huron Roofing* [2009] OHRTC No 1277 (Ont. HR Tribunal) the evidence was that the Company employed 12 – 14 persons. Shortly after the applicant was hired he advised his employer that his wife was pregnant with their first child but that she was having health complications. One of her kidneys had become essentially non-functional with associated pain. Later in the pregnancy her other kidney was in the process of failing and she developed gallbladder problems. The applicant attended to several of his wife's appointments and took full or partial days off work to attend to other of her health events on approximately 13 occasions. The time was not paid time off.

[21] On the day in which he was terminated his wife was suffering severe pain from gallstones. He advised his supervisor that he had to leave work to deal with a family medical emergency. He was told that if he was not back in 20 minutes that he would be terminated. When he did not return by the designated time, he was fired.

[22] Upon review, the Tribunal held that while the applicant's absences most certainly caused some inconvenience and frustration, no objective evidence of real hardship had been presented by the employer. It held that to meet the procedural part of the duty to accommodate, the employer must take adequate steps to determine what accommodation is needed and reasonably assess what accommodation options are available. A failure to meet the procedural dimensions of the duty to accommodate is a form of discrimination in and of itself because it denies the affected person the benefit of the prohibition against discrimination.

[23] Another important way in which the law of accommodation developed derived from an early premise that was quickly dispelled, that an employer was not obligated to create a new job for a disabled employee or to modify an existing one. This was essentially the position taken by Mr. Platt in this case. He told the grievor, that in order for her to return to work she would have to be able to demonstrate that she was capable of doing 100% of

the duties of an Education Assistant but the context of that was the she was equally adamant that she be returned to that job.

[24] Mr. Platt did not say that they would not consider putting her in another job. Moreover, the restrictions prescribed by her attending physician left little room for functions that she could perform. The evidence was that the great majority of special needs students require support that her restrictions do not permit her to perform. She cannot work with students that require physical support such as wheelchairs or strollers or those who have potentially physically aggressive or emotionally disruptive behaviors. Nor can she provide support to them for toileting or to do lifts or transfers without assistance. Mr. Scott expressed no sympathy for the plight of the District in finding work for her that did not involve her restrictions. The fact is that Mr. Platt left the door open to the possibility she could work with some students but that it might be difficult to arrange such placements. He estimated that she was capable of working with 5% to 10% of the special needs students in the District. Moreover, in the actual process of finding work that she could do no one refused to consider whether the job could be adapted to her restrictions. Nor was Mr. Platt the driving force in finding an accommodation.

[25] A fundamental principle underlying the duty to accommodate is that the right of an employee to equal treatment must always be balanced with the right of the employer to operate a productive workplace. It is not required to accommodate an employee where it would create an undue hardship which, by definition must include the creation of an unproductive position, whatever modifications might be involved. Any new or modified position must be meaningful or productive or contribute to the essential purpose of the workplace. How far an employer must go when modifying jobs for disabled employees is always an issue.

[26] In *City of Winnipeg v. Canadian Union of Public Employees Local 500 (Derbitsky Grievance)* [2-14] MGAD No. 14 (Werier) the grievor had been working as a full-time swimming instructor/guard. However, he was also going to university attending classes in the evenings and on his days off. A problem arose when he severely injured his knee in a skiing accident. He received sick benefits during the time that he was recovering from his injury but when the benefits were just about to expire, he asked to be returned to work in an accommodated capacity.

[27] As it turned out, a clerical position was available that he had previously worked in a relief capacity. However, the City advised him that in order to obtain the position he would have to take a computer course the following week. The problem was that he had several university assignments and exams scheduled at the same time as the course. In the circumstances, the City took the position that he could not be accommodated. Accordingly, he remained off work for another seven weeks until he could return to his regular position.

[28] The matter was then referred to arbitration where the union argued that the City had failed to meet the standard of undue hardship because it had summarily ended the accommodation process. The City, however, took the position that the blame should be laid at the feet of the grievor because he refused its offer to accommodate him. It argued that since he refused a reasonable offer the City was entitled to end the search for accommodation.

[29] The arbitrator correctly held that proving undue hardship is a rigorous standard and employers should not apply rules with rigidity. Instead, flexibility and common sense must be used when facilitating a solution. He also said that a touchstone of accommodation is collaboration between the employer, the union and the employee. This requires open and frank discussions. In order to establish hardship, the employer must demonstrate that it made genuine bona fide efforts to explore options and alternatives to facilitate the process. He held that the City ought to have considered that many of its employees were students and that a requirement to attend a training course on short notice could be particularly problematic during examinations. In the end he concluded that the City had been unduly rigid and inflexible in refusing to consider other alternatives for the grievor.

[30] In *Holmes v. Attorney-General of Canada* (1997) 97 CLLC 230-022 (FCTD) upheld on appeal (1999) 42 CCEL (2d) 165 (FCA) a pay clerk working for the federal government developed severe numbness and pain in her right shoulder, making it difficult for her to perform her clerical duties. Other assignments such as receptionist and special projects clerk proved equally demanding. All of the other positions that the employer identified within her

skill level also required the use of the same damaged muscles. It eventually determined that she could not perform the essential components of her job duties, nor could she be retrained. Therefore, it released her.

[31] She then filed a complaint with the Canadian Human Rights Commission which found that the employer had taken reasonable steps to accommodate her and declined to refer her complaint to the Human Rights Tribunal. On judicial review, the Federal Court, Trial Division, upheld the decision on the basis that the hardship standard does not require that a special position be created for a disabled employee comprising duties that were previously non-existent and that do not serve a meaningful or productive purpose. It said that the obligation is to make a genuine effort to accommodate the employee with duties that are consistent with the work for which the employee was hired.

[32] By contrast, in a case closer to home, between *Royal Columbian Hospital v. British Columbia Nurses' Union (Brown Grievances)* [2005] BCCAAA No. 287 (Sullivan) a nurse suffered a back injury while lifting a patient. She was then off work for a while and notwithstanding many efforts to return to work she was unable to do so because of pain. It was not until some four years later until a crisis occurred resulting in surgery that she began to recover from her earlier injury. During her time off work, she had reached a decision that she no longer wished to do bedside nursing and accessed the rehabilitation programs offered by WorkSafe BC to complete her nursing degree. In August 2001 she was declared fit to return to work by her physician provided that it did not involve strenuous or extremely stressful work. The doctor specified restrictions similar to those prescribed in this case for the grievor that she should not do any heavy lifting or any repetitive pushing, pulling or lifting.

[33] The evidence was that the grievor applied for a number of internal posted vacancies and with other employers within the Fraser Health Authority. In the course of those events she received a call from a WCB Rehabilitation Consultant who told her about an available teaching position for the Residential Care Aide Program at the Sprott Shaw College in Langley for which she applied successfully. However, it did not pay as much as she had been earning as a nurse or in benefits from the WCB. Therefore, she filed a grievance alleging that the hospital had failed to accommodate her disability.

[34] During the time that the grievance was being processed she was offered a series of choices that she could exercise which included, in descending order of importance, that she might take any vacant position for which she was qualified, or bump a less senior employee, or transfer to casual status or chose a layoff/recall. She was told that if she chose none of the above, she would be deemed to be laid off. During the same time period the Employer completed a Job Demands Analysis for a Clinical Products Coordinator position and compared it with a Functional Capacity Evaluation that had been done earlier.

[35] On November 26, 2002 it was determined that she could perform the required duties of the Clinical Products Coordinator position and in January was awarded the position. She gave a resignation notice to the Sprott Shaw College she was then teaching at and commenced her new position at the Royal Columbia Hospital on January 20, 2003.

[36] The question then arose whether the failure to accommodate her between the date of her injury in 1996 and the time she commenced her new position in 2003 was unreasonable. Arbitrator Sullivan held that it did not meet the test of reasonableness even though the search for accommodation had extended over many potential positions and options because it focused primarily on attempts to find existing jobs without investigating whether something could be done to those jobs to enable to employee to perform them. At para 39 he said:

> Having determined that the grievor could not perform any existing job, the employer was obligated to turn its attention to whether, and in what manner, existing nursing jobs could have been adjusted, modified or adapted, short of undue hardship to the hospital in order to enable the grievor to return to work despite her physical limitations. The duty to accommodate obligates the employer to diligently examine the possibility of adapting the work place in order to enable the grievor to work.

[37] In the result, the arbitrator issued a declaration that the grievor was entitled to the Clinical Products Coordinator position and that she should be made whole for any wage or benefit loss incurred between certain dates. However, he held that it was not appropriate to award tort damages against the Hospital based on workplace discrimination, hurt feelings or loss of self-respect although it would appear that his decision in that respect was not based on any general rule. Nevertheless, a similar approach is being taken in this case that the remedy being sought is limited to a declaration that the grievor was not properly accommodated and an order for all lost wages that resulted from the failure.

[38] More recently, the Federal Court of Appeal held that a breach of the procedural requirement to accommodate disabled employees does not attract separate remedies. In *Canada (Human Rights Commission) v. Canada (Attorney General)* [2014] FCA 131; Federal Court of Appeal May 20, 2014. In that case the grievor had Type 1 diabetes and was insulin dependent. She worked for the Canadian International Development Agency ("CDIDA"). While she was in Afghanistan she suffered a reaction and was required to return to Canada against her wishes. Nor was she able to convince CIDA that she could safely return to Afghanistan so she filed a complaint with the Canadian Human Rights Tribunal.

[39] The Tribunal held that while the refusal constituted prima facie discrimination, it would cause undue hardship to CIDA to accommodate her. However, it found that CIDA had not satisfied the procedural duty to accommodate her. That decision was then appealed to the Federal Court that held that once there was a finding of undue hardship that should have been the end of the matter. The case was then appealed to the Federal Court of Appeal that upheld the decision of the Tribunal. It held that the procedural duty does not give rise to a separate remedy if the employer satisfies all three parts of the test for determining whether a prima facie discriminatory standard is a bona fide occupational requirement established in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees Union (Meiorin)* [1999] 3 SCR 3.

3. T**he Role of an Education Assistant**

[40] Earlier in this award I quoted the summary of the work of an EA which is set out in the job description. It is important that under Article 406.1 of the collective agreement job descriptions accord a form of tenure to the incumbents. It prohibits any innovations, alterations, or changes in the descriptions or the creation of new departments without consultation between the parties.

[41] The Education Assistant job is absolutely unique, not involving a teaching function. That is exclusively the function of the classroom teacher or Learning Support Teacher. What incumbents are expected to do is to facilitate an environment in which learning can most readily occur by managing the physical and mental requirements of special needs students. Under the terms of the job description they are part of a team led by a classroom teacher and/or Learning Support Teacher (LST). The LST is responsible for designing and implementing individualized programs for each special needs student, called an Individualized Education Plan (IEP). The EAs participate in planning the strategies and implementing any adaptations required to manage the learning and behaviours of the students.

[42] They provide assistance to the teachers but it does not take the form of academic support in anything more than an incidental way. This is made clear in a handbook published by the West Vancouver Public School District. They are not required to have any education beyond Grade 12 graduation and post-secondary training such as a Special Education Assistant Certificate. Nor are they expected to physically participate in student activities. Their work can be described as being more in the nature of environmental support where they provide personal assistance such as hygienic care, transport, movement and positioning of students and the facilitation of communications and other social interactions of the special needs students assigned to their care.

[43] An on-call book is maintained for each student in which is recorded all material events and care protocols implemented by the EA for each student. This serves as a reporting or communications device that can be accessed by all pedagogical providers. This is important because EAs are not assigned to individual special needs students

but rather to classrooms. Within a classroom, there may be multiple EAs assigned to a single student or only one assigned to several students, depending upon the needs of the students. They routinely accompany the students to participate in community activities such as swimming but they do not directly participate in those activities. Quite apart from the on-call book EAs report to the IEP team on the progress of individual students and communicate with the teacher at regular intervals.

[44] Mr. Platt testified that the supports provided by the EAs may be very physical in nature. This may include intimate personal care such as toileting, wheelchair transfers and more generally they are responsible for implementing measures required to ensure the safety and well being of the students. He said they are required to maintain a constant state of vigilance because a number of students tend to be prone to engage in physical and aggressive behaviors such as biting, hitting, kicking or what he called elopement or running from the classroom. They may also engage in loud and disruptive behaviors that must be managed with great sensitivity and care. Some of these behaviors may even require restraints on occasion. These can pose significant risks to the safety of the EA, district staff and other students.

[45] He said their role can be extremely stressful. On the other hand, there are special needs students who require a minimum of support. These are high functioning individuals who may have special physical or academic skills and abilities. However, even they must be carefully managed so that they do not develop an acquired dependence upon the supports available to them. He said the goal of the District is to allow them to function as independently as possible.

[46] The Required Qualifications and Experience section of the job description stipulates that certain individual postings may require specialized courses or skills but the evidence does not indicate that the position of the grievor was specialized in any manner. It also indicates that some postings may require the ability to facilitate the movement and positioning of students, which most certainly would adversely affect the ability of the grievor to perform such work except for the fact that it leaves open the possibility that other positions may not require physical intervention or effort. The mental and physical components of each position vary depending upon the requirements of the special needs students to whom they have been assigned to support. The system is purposefully designed to be flexible to permit individual employees to be assigned as may be required by the Employer except that all vacancies are normally regulated through a mandatory posting procedure under the terms of Article 400.1 of the collective agreement. Any movement outside of that procedure must be done through an accommodation requiring the mutual agreement of all of the parties.

4. **Student Support Services**

[47] Mr. Platt testified that he is responsible for managing support services within the West Vancouver School District including supervising the para-professional staff and the management of programming and compliance. He said that his role in dealing with special needs students was to establish standards and protocols for the support required to assist them to interact effectively with other students. For that purpose, he described a comprehensive system that they developed which categorizes an incredibly wide range of behaviors and requirements of special students who potentially could be supported. He indicated that by assessing each individual against the various categories, they are easily able to identify the nature and scope of supports that will be required for that student, as follows

(a) **Category A - Dependent Handicapped:** challenges with toileting, communication, mobility and feeding;
(b) **Category B - Deaf-Blind**: student's vision and hearing are impaired from moderate to profound hearing and vision loss;
(c) **Category C - Moderate to Profound Intellectual Disability**: the student's IQ is at or below 60 and the student has struggles with adaptive skills;

(d) **Category D - Physical Disability/Chronic Health Impairment**: includes disabilities such as diabetes or epilepsy and the disability seriously impacts the student's education and achievement. The student's functioning and education is significantly impacted by the disability or chronic health impairment;

(e) **Category E/F - Visual Impairment or Deaf/Hard of Hearing**: the student's vision or hearing is substantially impacted;

(f) **Category G - Autism Spectrum Disorder (ASD)**: the student has received a diagnosis of ASD by a qualified medical professional;

(g) **Category H - Behavioral or Mental Illness**: students requiring intensive behavioral intervention or student has serious mental illness meaning that the student has received outside support for the illness and the student has significant behavioral issues;

(h) **Category K - Mild Intellectual Disabilities**: the student's intellectual function is at an IQ of 70;

(i) **Category P - Gifted**: student meets the criteria of exceptionally high capability with respect to intellect, creativity or skills associated with a specific discipline;

(j) **Category Q - Learning Disabilities**: the student's academic performance is below what would be expected for the student's cognitive abilities. This can include difficulties with language, memory or processing speed;

(k) **Category R - Moderate Behavioral or Mental**: students with moderate intellectual or behavioral disabilities.

[48] Mr. Platt said that while EAs are not assigned to individual students but rather to classes, they are obviously aware of which students are in each class and are enabled to assign employees who will be able to provide the required support. There are fully 145 EA positions in the District.

[49] He agreed that the needs and behaviors of the students can change over time. In fact, he said that the designations are reviewed every year which sometimes results in students becoming delisted when their conditions change sufficiently that they no longer meet the designated criteria. Moreover, the composition of the student body changes every year through the enrolment and registration of new students.

5. **Accommodation of the Grievor**

[50] The evidence was that notwithstanding the short notice that the grievor gave to come back to work in late August 2018, Amy Rafuse set about immediately to see if there was any work available that she could do. She is a Human Resource Advisor who succeeded Amy Yu. This is not unimportant under the circumstances because it was the start of the school year. It is a busy time for the school administrators because that is when all the students register. As I observed above, until that process is completed, they cannot be certain how many special needs students are going to enrol, the schools they wish to attend and the nature and scope of their disabilities that require support. It is also a time when there is a large migration of Education Assistants between schools. Once the student registration is completed, vacant positions are posted to meet the needs of the student population. On the evidence, this typically involves several rounds of general postings.

[51] A Medical Ability to Work Form had been completed by Dr. Ellison on August 29 which indicated that the grievor could go back to work, but with restrictions. Those restrictions were essentially that she would be required to take regular mini-breaks, she could not do student transfers without assistance or engage in any impact activities or stressful or threatening situations. The doctor said that she should generally be confined to light duties but on rare occasions might perform medium duties. He said that under no circumstances would heavy duties be permitted. On the other hand, she would have no restrictions on thinking/ reasoning, interpersonal contacts or operating a vehicle and could work a maximum of 4 days/week up to 22.8 hours with Wednesdays off.

[52] Ms. Rafuse wrote an email to Mr. Platt on the same day to find out if he knew whether there was anything that would meet the restrictions set by Dr. Ellison. Apparently, Mr. Platt did not respond to the email but when he was asked by Counsel why he thought Ms. Rafuse directed her enquiry to him, he replied that she probably felt that he was the best resource available on whether the grievor would be able to perform the work of an EA. Stephanie Mascoe testified that, in turn, Mr. Platt sought her out and both of them decided that the best thing to do at that point would be to talk to Mr. Scott. They set up a meeting with him, which occurred on August 31.

[53] Mr. Scott took relatively extensive notes of the meeting, setting out the gist of what was said by each individual. Ms. Mascoe also took notes, but they do not address the content of the conversations. Attending the meeting were Stephanie Mascoe, Dave Platt and Bruce Scott. Ms. Mascoe is recorded as saying that there was "nothing really in the EA world she can do" but that comment should not be taken to mean that she had closed her mind in the matter. She went on to say that she had looked at options in office settings but that the grievor did not have office skills. She said she had also given consideration to custodial work but concluded that it clearly would not meet her restrictions. She then asked the others if they had any ideas. Bruce Scott replied that she was in a better place to know what options were available and that he would talk to the grievor to let her know that there was no place for her yet and that they were going to set another meeting to talk about it.

[54] The next meeting occurred shortly thereafter on September 5. This time Mr. Platt did not attend. Those attending on this occasion were Stephanie Mascoe, Bruce Scott and the grievor. Ms. Mascoe commenced the meeting by saying that she and Mr. Platt had discussed the matter and were not able to identify a place they thought would be appropriate for the grievor given her medical limitations. She again asked the others if they had any ideas. Mr. Scott replied by asking the question whether there was any work that was specific to just learning support for students. Ms. Mascoe said not in the elementary schools and that the grievor does not have the "background" to assist High School students with their academic studies.

[55] Mr. Scott then suggested working as a Teaching Assistant in the school library, which was also rejected. He then asked if the District could create a job for her doing meaningful work, even moving from school to school. Ms. Mascoe replied that the accommodation process does not require an employer to create a job, which is not entirely correct. Nevertheless, I accept that in the context of that particular meeting her answer was simply a shorthand way of saying that they were having trouble placing the grievor. She exhibited a willingness to discuss any suggestions.

[56] Mr. Scott said that he was looking at his notes from a meeting in 2016 when Mr. Platt offered to talk to each school to let them know what the grievor's restrictions were. He asserted that the District could rearrange the work and asked if she could look into it. Ms. Mascoe replied that Mr. Platt had already done that and that there was nothing. On the evidence, however, Mr. Platt admitted that he had not called each school and that Ms. Mascoe's statement was not correct. Nevertheless, even if he had, it referred to the earlier absence of the grievor. Any information that he might have garnered at that time would have been essentially irrelevant, not because her medical conditions had changed but because the student enrolment would have changed substantially in that period of time.

[57] The discussion then turned to two positions that she had held while she was under similar medical restrictions, the one at Hollyburn and the other at Sentinel. On the evidence, the position at Sentinel was particularly relevant because it succeeded in meeting all of her restrictions. She was able to support high functioning students who presented no mental or physical risks to her. Her support in that position was limited to social interactions. Nonetheless, the evidence was that the students to whom she had been assigned had moved on. They were no longer there. Ms. Mascoe also testified that even then there had been a good deal of complaining from the other EAs in the school because they had to pick up the duties that she could not do.

[58] Mr. Scott then asked if there was clerical work that she could do even if it might involve job training. He said that he thought that training could be part of the accommodation process, which is true unless, of course, it were to reach a point of undue hardship, which is always a relevant consideration. Ms. Mascoe replied that they might consider accessing SSEAC funding which refers to a government program that is specifically designed to provide independent funding for Education Assistants who are functioning within the system. I will describe the program in somewhat greater detail a little later in this award. Ms. Mascoe said that the District was going to have some funds left over from an allocation made earlier that year that could be used for the grievor. Mr. Scott replied that he did not remember but, in any event, the meeting concluded by Ms. Mascoe saying that she would set up a time to test her office skills. The grievor said that would be great but expressed concern that she had not yet been put back to work.

[59] It was at that point that Mr. Arsenault said that the parties entered into a "dark period", referring to the fact that no formal meetings were scheduled between them for another two months, as if nothing else occurred in that period to advance the process of accommodation. The fact is that there was a stream communications and other events by which the parties sought to find work for the grievor that she could do.

[60] The first event that occurred was that a test of her office skills was set up for the next day, September 10 and she was offered a Supervision Aide position at Rockridge. It is true that the latter position met her restrictions since it was purely supervisory, but the problem was that it involved a long drive for her to get to the school and would only provide one hour of work each day. In an email that the grievor wrote to Ms. Mascoe on September 7 she declined the offer saying that "it simply doesn't work for me to drive into West Vancouver to work for one hour a day at Rockridge as a lunch time supervisor." Ms. Mascoe testified that her intention was just to get the grievor back to work, even though it was only part time. In my view, however, while the attempt was laudable it was not a practical solution for the grievor because it would not have provided her with a net benefit after deducting the cost and time required to travel to the school.

[61] Clerical work was another matter altogether. The evidence was that Ms. Mascoe prepared a spread sheet on which she listed all jobs in the District including administrative, clerical, custodial, technical and trades positions amounting to 56 different jobs. She analyzed each job breaking out all of the medical restrictions that would apply to each job and established three general assessment categories: (a) whether it would be suitable accommodation, (b) if she was qualified for the position and (c) if the position was available. Of those, she identified four jobs that she thought would constitute possible accommodation, if the grievor could meet the office skills qualifications. These were: (a) Office Support Clerk, (b) Special Education Assistant-Secondary, (c) TA-General/Languages and (d) Office Assistant-Facilities.

[62] The problem with that initiative was that the grievor failed the testing. She was tested specifically on MS Word and Excel achieving only 35% on the former and 30% on the latter where a pass is set at 70%. That pretty much took care of any further attempts to accommodate her in any clerical or administrative positions. Nor did the Union pursue any further attempts to obtain further training for that purpose. A second more important problem was that Ms. Mascoe did not share her analysis with the Union although she did share the results of the testing. Mr. Scott did not see the spread sheet until the hearings.

[63] At that point the parties pursued a matter of principle commencing with an enquiry made by Mr. Scott whether the Vancouver School District had a formal accommodation policy. He told Ms. Mascoe that he would like to have a copy so that they could both work within the same parameters. Ms. Mascoe replied in an email on September 12 that they did not have a formal policy. She explained that they just worked through each instance as they occurred and that it only became problematic with the grievor because of the exceptional nature of her medical restrictions. In addition, she said that the timing of her notice to return to work was a problem because the staff was busy with the start of the new term.

[64] The only thing I would say about that is that it is precisely for that reason why a definitive accommodation policy is an important element to consider, not for the purpose of establishing the principle rules of accommodation but to establish a structure or protocol to follow in such circumstances. Once a policy is properly established the application of it will invariably reduce or even eliminate any disputes relating to accommodation. However, I am not prepared to find that the failure to adopt a policy constitutes prima facie discrimination.

[65] In her email to Mr. Scott above, Ms. Mascoe pursued the suggestion that she had floated earlier in the meeting on September 5 that they might set the grievor up in a supernumerary position using LIF funding. She described it as "extra staffing" explaining her view that it would allow her to be an extra set of hands at a site and follow the terms of her accommodation plan. In other words, similarly to the TA Supervision proposal it would be temporary saying that, "We could do this for a period of time while we work through the plan. Please let me know your thoughts on this."

[66] At first Mr. Scott reacted to that proposal with a degree of curiosity. He asked questions such as, what kind of work would she do, how many hours would she work, would her benefits be maintained and what is the overall plan. On the other hand, he expressed concern about its viability because any LIF funding would be temporary. It would have to be renewed every year. He explained that it would be inconsistent with the goal of the Union which was to establish a permanent career plan for her. When he did not get the answers he wanted, his reaction became vehemently negative.

[67] He testified that SSEAC funding is provided through the Support Staff Education and Adjustment Committee that has both union and employer representation. It is designed to support the development and maintenance of a qualified and sustainable support staff in the public education system by providing an independent source of funding outside of local school board budgets.

[68] It is not clear to me on the evidence precisely how decisions are made by the Committee but it would appear that the employer and union in each School District are expected to collaborate together to make an application to the Committee each year for funding for one of three defined purposes:

1. Increasing weekly EA hours to enhance special education to provide increased time for consultation, collaborative planning and meetings. There is a box explanation that describes the effect of electing this purpose which is to increase the hours worked by all EAs at both the elementary and secondary levels to 28.5 hours per week;
2. Creating new full time or part time EA positions; and
3. In support of innovative practices aimed at supporting EAs who deliver special education.

[69] Both Stephanie Mascoe and Bruce Scott signed the application completed in July 2018. It is not disputed that they jointly elected Option No. 1. Mr. Scott said that prior to him signing off, the matter was discussed and voted on by all the Education Assistants in the District. He said that the same procedure is followed every year and generally speaking the Union supports more hours although he admitted that in some years it had been used to create new positions.

[70] In addition to the application form submitted to me in evidence, documentation was included on how the decision was implemented. It included a spread sheet showing the names of all of the EAs in the District, the School in which they work, their start date, their end date, if any, and whether they were permanent and temporary. In addition, a chart was appended showing that the allocation made by the Committee was $232,999 of which a total amount of $198,261 was required to fund the increase leaving a surplus amount of $34,738.

[71] Mr. Scott vigorously resisted the attempt to use the surplus amount to fund a position for the grievor. He testified that to use the LIF funds to finance a position for the grievor was out of the question because the membership had voted to use the funds to provide increased paid time for all EAs. In fact, he argued that there

should not have been a surplus and that the entire allocation should have been divided to increase all of their hours even more.

[72] I was not accorded any evidence on how the Committee viewed the situation and, in particular, whether there is a rule governing the disposition of surpluses. What is clear to me, however, is that the surplus was created simply by the application of the formula that had been agreed by the parties to increase the working time of EAs up to 28.5 hours per week. It is simply wrong to now say that the hours should have been increased sufficient to eliminate any surplus. The surplus was created by a straight application of the agreed formula. The Union does not take the position that the calculation was wrongly made, only that the surplus that it produced should not be used to create a new position.

[73] I agree with the Union to this extent that the surplus could not be disposed of unilaterally by the Employer. At a minimum, it required that both parties agree on how it should be used, but that is what the Employer was seeking to do by its offer to create a new position to accommodate the grievor. It is equally possible that they were not entitled to agree on another use for the monies once the election had been made to increase the working hours to a specific level. If that is the case, the monies ought to have been returned to the Committee but that is not a determination that I am in a position to make.

[74] If the surplus was still available to the parties to dispose of, however, as I think it was, one of the specifically authorized purposes of the funding was to create new full time or part time EA positions. In those circumstances, it was hardly open for the Union to adamantly refuse to consider such a possibility particularly in view of the tripartite duty that reposes on all the parties to accommodate disabled employees. If the protocols of the Union required that it take another vote of the Education Assistants, that could have been done but to reject the proposal essentially without any further discussion was wrong. See *Ontario Public Services Employees Union v. Ontario (Human Rights Commission) (Kerna Grievance)* [2005] OGSBA No. 30. If one takes the amount of the surplus as $34,738 and divides it by the hourly rate applicable to the Education Assistant job of $28.08/hr it would yield 1,237 hours that would have been available to fund such a job, which is well in excess of the total hours that would be required for an entire year. Moreover, it could have been done without affecting the mutual agreement of the parties to increase the paid hours of all EAs to 28.5 hours/week.

[75] It is true, as Mr. Scott vociferously argued, that the LIF funding would not have been sufficiently reliable upon which to establish a new permanent EA position. But it would have been more than enough to fund a full year of an accommodated position. Moreover, there have been circumstances in the past where the Union agreed to use LIF funds for the same purpose. The grievor had previously held a partially LIF funded position in 2013 prior to her sustaining the injury which was the source of the current dispute. Certainly, I agree with Mr. Scott that it is always preferable that permanent positions be funded out of the regular budget but if funding is available from an independent source to commence an accommodation, it is most certainly a relevant consideration. His concern, which he expressed in an email to Ms. Mascoe dated September 27, 2018 was whether additional monies would be available after the current collective agreement expires but, on the evidence, it was never the intention of the Employer to continue the funding of the proposed position indefinitely. This was conceded by Ms. Mascoe in an email to Mr. Scott dated October 22 in which she said that they wanted to be able to find her a position that "is within the scope of the regular operating funds so that it is a longer term solution".

[76] It was at that point that the Union filed its grievance on October 19, alleging that the Employer had failed to accommodate the grievor. I am unable to discern whether that had a beneficial or adverse effect on finding an accommodation for her. In the meantime, Mr. Scott floated the idea that perhaps she could be used as a note taker which, on its face, seems to have a degree of utility because many of the special needs students are physically impaired and theoretically could benefit from someone else taking notes for them. The response of the Employer was that it did not think that the grievor would be able to do it and, in any event, it was not a service that the District offered. Most teachers use Google Classroom which permits them to manage virtually all classroom and other pedagogical activities on line.

[77] In the meantime, it was discovered that a new EA position at Hollyburn was going to come available but, although it was discussed between the parties, it was not pursued because it was considered to be too stressful for the grievor. The Union did not take issue with that position. However, on October 30 Ms. Mascoe sent an email to Mr. Scott saying that a part time position was also coming available at Westcot which the Employer thought would fit her restrictions.

[78] It then became the subject of a meeting held on November 8 with the same participants as the previous meeting on September 5. This time, the proposal was rejected by the grievor who said that she knew the principal of the school, Kathy Ratz and found her difficult to work with saying, "My doctor does not want me in an environment where it is overly stressful." She did not, however, elaborate why she felt that way or otherwise attempt to describe the alleged difficulties that she experienced.

[79] The position taken by Ms. Fairfield was that the job would have aligned well with the restrictions on the grievor and that the suggestion that she might have problems working with the principal was only theoretical. She made the point that there is no credible evidence that it would have been a working environment inconsistent with her medical limitations. There had been no complaints filed against the principal. While the Union claimed that several EAs expressed preferences to leave Westcot when Ms. Ratz was appointed principal, Mr. Scott admitted on cross examination that he had not spoken to any of the EAs to find out why they left. Also, the grievor only worked with her for a short time many years before and did not explain why she felt that they were incompatible. Nor was any evidence submitted that would tend to support that it would be too stressful to work with the principal.

[80] In spite of the problems with the Westcot position, the meeting ultimately led to an agreed accommodation. At the meeting a suggestion was made that perhaps the grievor could be put on the casual list for two days per week with a guaranteed call out and on the other two days she would be assigned to a regular EA position at the West Vancouver Senior Secondary School. The suggestion was that it could commence with the casual work of two days per week and then transition her through a gradual return to work into the EA position until she was working the full four days per week.

[81] In fact, the parties agreed to start the program the very next day but there was some kind of a misunderstanding resulting in the grievor missing the start date. Over a short period of time thereafter she was accommodated in the position although it was not without problems. The principal expressed concern about finding meaningful work that she could do which was discussed firstly in a meeting on November 14 and then two subsequent meetings on November 19 and December 20. At the meeting on November 19 Jenn McCulloch, another Education Assistant, was invited to talk about those students that the grievor would be able to work with without physical risk and how she might support them. Ms. McCulloch suggested that this could be done in some cases using cue cards, pictures and other aides while in other cases she could be assigned to students who she named who could function at levels that do not pose significant risks.

6. **Conclusions**

[82] It is important that in the course of the hearings Counsel properly agreed that it would not be appropriate under the circumstances to permit the Employer to take the position that the grievor's placement constitutes an undue hardship. It would be inconsistent with the agreement made to accommodate her and at the same time argue that it was an undue hardship particularly in view of the things that were necessary to be done to accomplish it.

[83] The unique feature of the accommodation was that the job duties assigned to the grievor are entirely within the requirements of the Education Assistant – Individual(s) job description. Notwithstanding that most incumbents provide support that involves physical duties and mental stress, it leaves open the possibility that some students may not require that kind of support. Mr. Platt estimated that there may be as many as 5% to 10% of the students in any year in that category. Therefore, what the parties must be seen to have done in this case is

to arrange to assign the grievor to a school that currently has students who require support that does not involve physical duties and mental stress but that permits her to function within the terms of the job description doing productive and meaningful work.

[84] If the job description were to require that all incumbents would have to be ready, willing and able to meet all of the physical and mental requirements it would most certainly have given rise to considerations whether the job duties could have been modified to fit the restrictions of the grievor as was found in *Calgary District Hospital Group v. United Nurses of Alberta Local 121-R (Roy Grievance)* [1994] AGAA No. 1 (Ponak). But in this case the evidence was that the Education Assistant job is already structured to accommodate incumbents who may have physical and mental limitations. Each position differs depending upon the requirements of the various special needs students. Each incumbent must be seen to occupy different positions within the same general class but regardless of whether it involves light or heavy duties, they all come within the Education Assistant job description. The EA position that was found for the grievor at the West Vancouver Senior Secondary School is such a position. There are currently a sufficient number of students in that category that permit her to function within the terms of the job description without modifying the prescribed duties and responsibilities.

[85] Where modifications come into the accommodation in this case lie in the fact that the assignment required the agreement of both parties to accomplish it. This is because under Article 400.1 of the collective agreement all job vacancies, including casual positions, must be posted and offered to all employees equally. Under Article 401.2 such vacancies are subject to competition and must be awarded to the employee who has the most skill, knowledge and efficiency of all the candidates provided that where such qualifications are equal, length of service is to be the determining factor. What had to happen in this case, therefore, was the parties agree to waive the normal contractual requirements to move the grievor to the West Vancouver Secondary School without a posting and, in addition, to assign casual work to her even if it did not involve substituting for an absent regular employee. But the point is, that no modifications were required to be made to her job.

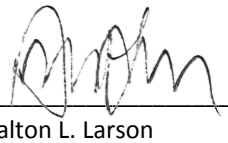
[86] By agreeing to waive the requirements of the collective agreement, the parties must be seen not to have exercised their discretion arbitrarily but rather pursuant to their joint duty to accommodate the disability of the grievor. On that reasoning, it is true that the Employer might have been able to structure a job that the grievor could do at an earlier point in time but could not move her without the agreement of the Union. That agreement did not occur until the meeting on November 8.

[87] Most certainly, there were ways in which the matter could have been better handled by the Employer. The fact that it does not have a policy that sets out a protocol by which discrimination cases should be processed is of considerable concern. It is a prescription for further disputes. The role of the Union in such cases should not be seen to be mere a sounding board for placement suggestions generated by the Employer but the Union should be involved in the strategic planning of them. There should be a joint accommodation committee that monitors both accommodation planning and implementation. If there is going to be testing, as there was in this case, the parameters of the testing should be agreed to between the parties to ensure the validity and relevance of the testing. In some cases, consideration should be given to functional evaluation through an independent agency. Nevertheless, even if it were the case that the absence of a policy might be seen to constitute a procedural breach of duty it would not give rise to a separate remedy as was held by the Canada (Human Rights Commission) v. Canada (Attorney General) case where there is no breach of the substantive duty to accommodate.

[88] I find that both parties acted with considerable dispatch throughout the process and that the time that it took was not unreasonable. This did not involve a situation similar to the British Columbian Hospital case where a nurse injured her back and was not able to go back to her regular nursing duties. She was off work for 7 years during which time the accommodation offered to her was primarily limited to applying for other existing jobs. While I accept that the grievor in this case suffered hardship because she was without gainful work, it cannot be laid entirely at the feet of the Employer. All the parties bear some responsibility for the time that it took. The notice that the grievor gave that she was ready to return to work did not recognize the complexity of fitting her

back into the workforce and that she bore a considerable part of the responsibility to reach a reasonable accommodation. In the end, the job found for her required the cooperation of everyone which cannot justifiably trigger the damages sought by the Union under the circumstances.

Dated this 2nd day of July, 2019 at Delta, British Columbia.



Dalton L. Larson
Arbitrator