LABOUR RELATIONS CODE
(Section 84 Appointment)
ARBITRATION AWARD

BRITISH COLUMBIA TEACHERS' FEDERATION / DELTA TEACHERS' ASSOCIATION

UNION

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

EMPLOYER

(Re: Early Return from Parental Leave – Mareva Hope and Jasvinder Dhillon)

---

| | |
|---|---|
| Arbitration Board: | James E. Dorsey, Q.C. |
| Representing the Union: | Jessica L. Burke |
| Representing the Employer: | Lindsie M. Thomson |
| Dates of Hearing: | October 18; November 6 and 7; December 10, 2012; and January 24, 2013 |
| Date of Decision: | February 15, 2013 |

James E. Dorsey, Q.C. • 3380 Redfern Place, North Vancouver, B. C. V7N 3W1 • Tel 604-980-7225 • Fax 604-909-2755 dorseyj@shaw.ca • www.adrweb.ca/james-dorsey

Contents



## 1. Grievance and Jurisdiction

[1] Mareva Hope and Jasvinder Dhillon, two elementary teachers on parental leave, each gave the employer notice of the date they wished to return to work and terminate their leaves. Applying an unpublished practice it is infrequently required to apply, the employer denied each request to return to work on the teachers' chosen dates because the dates did not coincide with a "natural break" within the school year. The employer allowed Ms Hope to return at a later date before the end of her full leave entitlement.

[2] The union grieved that the employer's refusal to allow Ms Dhillon and Ms Hope to return to work and terminate their parental leave on the dates they chose contravened both the *Employment Standards Act* and the collective agreement.

[3] The union and employer agree I am properly appointed arbitrator under the collective agreement and the *Labour Relations Code* to finally decide the merits of the grievance.

## 2. Early Return from Parental Leave under *Employment Standards Act*

[4] Pregnancy and parental leave are separate and distinct leaves under the *Employment Standards Act* and the collective agreement. Under s. 51(4), a birth mother is entitled to take both unpaid leaves for a total of 52 consecutive weeks plus any additional weeks allowed because of reasons related to the birth or a child's needs.

[5] Under s. 50 of the *Employment Standards Act*, a pregnant employee may request pregnancy leave and is entitled to up to 17 consecutive weeks of unpaid leave.

The leave must begin no earlier than 11 weeks before the expected birth date and no later than the actual birth date.

[6] A request for pregnancy leave must be given in writing to the employer. If it is made during a pregnancy, the request must be given at least 4 weeks before the date the employee proposes to begin leave.

[7] Pregnancy leave ends no earlier than 6 weeks after the actual birth date "unless the employee requests a shorter period" and no later than 17 weeks after the actual birth date. A request for a shorter period must be given to the employer in writing "at least one week before the date the employee proposes to return to work."

[8] If, for reasons related to the birth, the employee is unable to return to work at the end of the leave, she is entitled to up to 6 additional consecutive weeks of unpaid leave.

[9] Unpaid pregnancy leave entitlement, anchored on the expected or actual date of birth, is restricted to birth mothers, the only category of parent who experiences pregnancy and postpartum recovery. An employee may or may not request leave, but an employer must grant the leave when a request is given in writing during a pregnancy at least 4 weeks before the date the employee proposes to begin the leave. This notice allows an employer to plan for the employee's absence and to maintain operations during the employee's leave. An actual birth at an unexpected time is to be accommodated and will require an employer to alter its plans.

[10] The earliest and latest date for return from up to 17 consecutive weeks of unpaid pregnancy leave, calculated from the actual birth date, also give an employer an opportunity to plan for the employee's return. A request for a shorter period of leave must be given in writing at least one week before the employee's proposed return to work date. The Employment Standards Branch of the Ministry of Jobs, Tourism and Skills Training and Responsibility for Labour publishes an Interpretive Guidelines Manual: British Columbia *Employment Standards Act* and Regulations with a clear caution: "Note: This manual is not a legal document and is meant to serve as a guideline only. It should not be used as a substitute for professional legal counsel."[1]

[1] http://www.labour.gov.bc.ca/esb/igm/welcome.htm.

[11] This Guidelines Manual addresses an employee request to return early from pregnancy leave as follows: "If the employee wants to return earlier, the employer and employee are encouraged to reach an agreement. This agreement should meet the employee's needs and also allow the employer to accommodate business needs and to treat the employee's temporary replacement fairly."[2]

[12] Birth mother, birth fathers and adoptive parents are entitled to 35 or 37 consecutive weeks of unpaid parental leave under s. 51 of the *Employment Standards Act*. For birth fathers and adoptive parents, up to 37 consecutive weeks of unpaid parental leave may be taken within 52 weeks after the date of the child's birth or placement.

[13] A birth mother, who has taken pregnancy leave, is entitled to take up to 35 consecutive weeks of unpaid parental leave beginning immediately after the end of the pregnancy leave, "unless the employer and employee agree otherwise." A birth mother, who has not taken pregnancy leave, is entitled to take up to 37 consecutive weeks of unpaid parental leave within 52 weeks after the date of the child's birth.

[14] A birth mother or father must give the employer a written request for parental leave at least 4 weeks before the employee proposes to take the leave.

[15] An employer's obligation at the end of a leave to which an employee is entitled is stated in s. 54 of the *Employment Standards Act* as follows:

> (1) An employer must give an employee who requests leave under this Part the leave to which the employee is entitled.
> (2) An employer must not, because of an employee's pregnancy or a leave allowed by this Part,
> (a) terminate employment, or
> (b) change a condition of employment without the employee's written consent.
> (3) As soon as the leave ends, the employer must place the employee
> (a) in the position the employee held before taking leave under this Part, or
> (b) in a comparable position.
> (4) If the employer's operations are suspended or discontinued when the leave ends, the employer must, subject to the seniority provisions in a collective agreement, comply with subsection (3) as soon as operations are resumed.

[16] The statute has no provision for early return from parental leave by a birth mother or father or an adoptive parent. The Guidelines Manual states: "Employees may not

[2] http://www.labour.gov.bc.ca/esb/igm/esa-part-6/igm-esa-s-50.htm.

change the duration of parental leave without the employer's agreement once leave has commenced. The director has no authority to require an employer to return an employee to the job before the leave expires. Any such change must be by agreement with the employer."[3]

[17] The union submits this is an incorrect interpretation of the legislation. The correct interpretation is that employees on parental leave have the unilateral right to identify the date they will return to work from leave. A birth mother who has taken pregnancy leave initially decides the length of parental leave she will take and in doing so decides when the leave will end because she is entitled to "up to 35 consecutive weeks of unpaid leave beginning immediately after" the pregnancy leave. For other eligible parents, it is up to 37 consecutive weeks. The union submits:

> The statute provides a right to be enjoyed at the election of the employee. The purpose of Section 51 is to give new parents relief from work if they can afford to take it and wish to take it for the purpose of caring for an infant or newly adopted child. It is not intended that the right to unpaid parental leave should serve to prevent a new parent who wants to work from doing so. (*Union's Written Argument*, p. 23)

[18] The employer disagrees for several reasons:

> First, the fact that an employee can elect to take a leave of "up to" 17 or 35 weeks is not connected to whether the employee has the right to alter the duration of the leave once it starts. The employee can elect to take 10 weeks, 17 weeks, 23 weeks, 35 weeks or any other number of weeks of pregnancy or parental leave, but that right does not dictate whether the employee can change the leave once the leave is set and begins.
>
> The fact that an employee can elect to take a leave of "up to" a maximum amount does not mean that the Act gives the employee the right to leave the end date unstated, or undetermined, or allows the employee to unilaterally alter the end date of the leave.
>
> Put another way, the employee is not deprived of choosing the length of the leave by virtue of being required to make that choice before the leave starts. Therefore, the phrase "up to" still has meaning even if the Union's position is rejected. (*Employer's Argument*, ¶ 88 - 90)

[19] The union refers to a decision on a dispute in the Greater Victoria School District over whether a teacher could return from leave on December 1, 2003, which was 52 weeks after her maternity leave began. The employer said her return should be in January at a natural break in the school year. The collective agreement provided short term maternity leave of absence in accordance with the *Employment Standards Act* (Article G.2.1(i)) or "for a stated period of time so that the return to duty may coincide

[3] http://www.labour.gov.bc.ca/esb/igm/esa-part-6/igm-esa-s-51.htm.

with the commencement of the following term or semester of following the spring break." (Article G.2.1(ii)) The union argued the leave taken was in accordance with the former. The employer argued it was the latter.

[20] Arbitrator Taylor concluded the dispute over the return date was governed by the collective agreement not the *Employment Standards Act* (¶ 39) and dismissed the grievance. He decided:

> In the case at hand I find that the Grievor elected maternity leave in excess of her entitlement in the *Act*, under the "natural break" provision in Article G.2.1(ii). The Employer was therefore entitled to insist she return at a "natural break" as provided in that Article. (*British Columbia Public School Employers' Association (School District No. 61 (Greater Victoria))*), unreported, December 5, 2005 (Taylor), ¶ 42)

[21] The union relies on statements made by Arbitrator Taylor about employee pregnancy and parental leave entitlements under the *Employment Standards Act*. His complete statements are:

> 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. Under the Act, however, employees have certain fundamental rights pertaining to leave in order to have children and to care for them after they are born. The Act does not balance the timing of that leave against the needs of the employer's operation.
>
> In this context, the "natural break" leave provisions in Article G.2.1(ii) and G.2.4(ii) of the collective agreement cannot be substituted unilaterally by the Employer for the leave to which the employee is entitled under ss. 50 and 51 of the Act. They can be used only where that is what the employee has elected. (¶ 40 - 41)

[22] Because Arbitrator Taylor decided the natural break provisions applied, the teacher was not entitled to return to work from parental leave December 1st. Although he was not required to address an employee's unilateral right to return early from parental leave under the *Employment Standards Act*, his interpretation accords with the employer's submission in this grievance. He wrote:

> Once an employee has set the period of leave, the *Act* does not generally give the employee the right to then elect to return at a sooner date. The *Act* requires the employer to grant the leave requested by the employee. It does not give the employee a further general right to unilaterally change it afterwards: see ss. 50 and 51 and the *Interpretation Guidelines Manual*. (¶ 32)

[23] Unpaid parental leave is to be requested in writing four weeks in advance of the leave beginning. This is the date the leave begins and the date it ends. Both dates are necessary for there to be a leave for which the employer can plan for the employee's

absence and its operational requirements. The scheme of the legislation does not intend an employee simply request a leave beginning at a date four weeks in the future for an indefinite period up to 35 or 37 consecutive weeks.

[24] As in other provinces, parental leave entitlement applies in most workplaces and for most employees and employers under provincial jurisdiction. An employee right to unilaterally advance the expiration date of a planned parental leave for which four weeks' notice was given would operate with disparate prejudice to employers and replacement employees. Consistent with the scheme of the legislation, a right to unilaterally advance the end of a planned parental leave for which four weeks' notice is required would require some employee notice to the employer as is the case in legislation in Ontario[4] and Alberta[5] where four weeks' written notice is required.

[25] 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 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.

[26] While this decision on the difference over the interpretation of the parental leave provisions of the *Employment Standards Act* rejects a major underpinning of the union's grievance, it does not resolve the grievance. The union advances other grounds.

### 3. Employer's Recent Administration of Early Return from Parental Leave

[27] Under the collective agreement, pregnancy leave is called maternity leave. For pregnant employees, the employer administers and grants maternity and parental leave at the same time. Employer communication to the pregnant teacher and leave administration is done by persons in the Human Resources department. A pregnant

[4] *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 49.
[5] *Employment Standards Code*, R.S.A. 2000, C. E-9, s. 53.

teacher commonly informs the department the date she expects to deliver her child. This is subsequently confirmed by a document from a physician or midwife.

[28] The employer's experience is that most teachers take the full 52 week leave entitlement. For this reason, unless otherwise requested by a teacher, the Human Resources department issues a form letter identifying the 17 week period of maternity leave and the 35 week period of parental leave ending 52 weeks after the expected birth date. The dates are adjusted if the delivery date is different than the expected delivery date.

[29] Once the leave dates are entered in the payroll and any other systems, the leave will trigger staffing and postings for term specific assignments for the duration of the leave in successive school years. Extensions of leaves for additional personal, medical or parenthood leave may affect replacement staffing. Shortening leaves within a school year will impact the assignment term of a teacher replacing a teacher on leave.

[30] Morgan Kyle was District Administrator, Human Resources (Teaching) from July 2007 to January 2010. Rod Allnutt, who made the decisions being grieved, 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.

[31] The form letters used to communicate employer acknowledgment of maternity and parental leave are inherited by successive incumbents in Human Resources positions. The letter used in 2009 and 2010 included the following paragraph:

> Please note that six weeks prior to your return, you are responsible for confirming in writing (email is sufficient) the exact date of your return to your teaching duties, with the Human Resources Department. Keeping us informed enables us to correctly record your date of return for payroll purposes.

[32] Ms Kyle testified she never regarded this as communicating to a teacher that she could shorten the leave by giving six weeks' written notice. If a teacher called to inquire about an early return, she would advise it would have to coincide with a natural break in the school year. She did not question the form letter and presumed teachers would know that any return would have to coincide with a natural break.

[33] The collective agreement provides for parenthood leave, which can be in addition to maternity and parental leave or as an alternative to maternity leave. It can be from five to sixteen months and extended for an additional school year. Articles G.26.3.a (iii) and (iv), which address aspects of "Maternity-Related Parenthood Leave", state: "(iii) 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. (iv) The date of return shall be September 1." For Non-Maternity Related Parenthood Leave, the date of leaving and return is September 1. (Articles 26.b(ii) and (iii))

[34] 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.

### A. Nine Day Early Return Not Identified (May 2009)

[35] The union adduced evidence of four instances it could find. In 2008, the employer granted a teacher maternity and parental leave from May 25, 2008 to May 24, 2009. The letter included the following:

> Please note that six weeks prior to your return, you are responsible for confirming **in writing** the exact date of your return to your teaching duties with the Human Resources Division. Keeping us informed enables us to correctly record your date of return for payroll purposes.

[36] In March 2009, the teacher gave notice to Ms Kyle that she intended to return nine days early on Monday, May 15, 2009, which was not at a natural break in the school year. Ms Kyle testified this early return was not identified for her and she signed a letter to the teacher in March 2009 confirming the return date. Ms Kyle was not aware it was an early return from parental leave until this arbitration.

### B. Alternate Program Teacher's Early Return Approved (May 2009)

[37] In October 2008, the alternate program teacher at a secondary school wrote Ms Kyle that she would begin her maternity leave at the end of October and planned to be on leave until "at least the end of February", but planned to return before the end of the school year. Ms Kyle wrote back granting maternity and parental leave from November 3, 2008 to November 2, 2009.

[38] The teacher wrote Ms Kyle on April 16, 2009 "confirming" she would be returning May 1st. This was not six weeks' written notice. There is no evidence about earlier discussions or oral notice. The same day, April 16th, Ms Kyle wrote confirming the return on May 1st, which was not at a natural break in the school year. Ms Kyle recalls this was a unique situation involving 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.

**C. One Day Early Return Denied and Grieved (December 2009)**

[39] In January 2009, Ms Kyle wrote a teacher granting maternity and parental leave from December 18, 2008 to December 17, 2009. The last instructional day before the winter vacation was Friday, December 18, 2009. In April, the teacher requested and was granted a 0.43 FTE leave for the 2009-10 school year to facilitate shared child care with her parents. A Human Resources Administrative Assistant, who was preparing the letter, wrote the teacher asking: "Your Maternity/Parental leave ends on Thursday, December 17 – I just wanted to confirm if you were planning on returning after Christmas break, since you will be part time?" The teacher replied:

> I'm not sure what the exact date will be for my return to work. I'm thinking I'll likely start before the end of the year parental leave. That way, I would have a chance to connect with the students before the break and then hit the ground running in January. I will give six weeks' notice when I've picked the exact date for my return to work. Would the job posting read, December 17th or return of incumbent?
>
> Please let me know if I need to do anything else.

[40] Sometime in the fall, the teacher gave notice of a return one day early on December 15th. Because of her 0.57 FTE status, she would work December 15th and 17th and not work December 16th and 18th. On November 13th Ms Kyle denied this early return.

> Thank you for notifying me of your intention to return to your position however returning early from a leave must be approved by the District as per the Collective Agreement G26:3.a(iii) which states "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." I will be able to approve your return effective Dec 17 but will not approve December 15 as it is not in the students' best interests for a "new" teacher to come 2 days prior to the Christmas break. Having said that I would like to suggest that you TOC for Dec 17 and 18 thereby providing you two days of work and we would pay you at scale. This would allow the present teacher to complete the term before the Christmas break and provide continuity for the students as well. We would do our best to provide a TOC

> assignment that would best suit your qualifications. Please let me know if this is acceptable to you and I will have you activated as a TOC for those two days.

[41] The teacher, who was also a union staff representative, replied pointing out that Ms Kyle had mistakenly referred to Article G.26.3.a (iii), which deals with parenthood leave. She was not taking an extended leave, but in accordance with the *Employment Standards Act*. "It is well within my rights to request an early return to my position having given notice indicating my desire to do so. I've included documentation to support my request found in four places: …."

[42] The first was the BCTF's 2007/08 Benefits Binder: "The employee may request an earlier return to work in writing, at least 1 week prior to the proposed date of return to work." This did not apply. It is a reference to a birth mother's right as an employee on pregnancy leave under s. 50(5) of the *Employment Standards Act*. It does not apply to parental leave.

[43] The second was an item in the Delta Teachers' Association (DTA) Maternity Leave Checklist: "Notify Human Resources about your return to work (please give 4 to 6 weeks) prior to anticipated return." This checklist was distributed at an annual Maternity Leave Workshop presented by the DTA. One was held on February 5, 2009. The workshop typically begins at 4:00 p.m. and lasts for one and one-half to two hours.

[44] The third and fourth were letters of September 16, 2008 and November 18, 2008 to the teacher that included the following:

> Please note that six weeks prior to your return, you are responsible for confirming in writing the exact date of your return to your teaching duties with the Human Resources Division. Keeping us informed enables us to correctly record your date of return for payroll purposes.

The teacher concluded her reply:

> I would like to return to my teaching position on December 15th to meet my students before the break. I would then have two weeks to prepare for teaching them throughout the remainder of the year. I'm aware that it is well within my rights to request that I return to work early, and I've given six weeks' notice. I would prefer not to involve the union on the issue of me returning to my position one day before the end of my leave.

[45] Ms Kyle affirmed her decision in her response to the teacher on December 4th:

> I want to clarify the practice of returning early from a leave so that we are all under the same understanding.

> Early returns from leaves are possible if it is at a natural break or term break. We use the language in G.26:3.a.iii to guide us as to times when it is the most natural break. That clause does not really reflect a teacher coming back from a leave but it is what the district has used as "its practice" over the years and therefore must continue to do so.
>
> If we were to follow the CA exactly clause G.26:3.a.iv indicates that a teacher's date of return "...shall be September 1."
>
> I don't doubt that it would be beneficial for you to return to the classroom on Dec 15 but that would be considered an early return and I must administer the CA and our "past practices" consistently for all teachers and not be in a position to pick and choose when to administer the clause and when not to. Therefore I will not be approving an early return from your leave.
>
> If you would like to TOC prior to your official return you are able to do so by emailing ….too set yourself as a TOC.
>
> If you have any further questions or concerns please feel free to contact me.

[46] The teacher worked one day as a TOC in December and grieved in January that her early return was a right under the collective agreement. In February, she was compensated for the difference between her regular pay and the TOC pay she received in December for one day. The evidence is unclear whether this was because the DTA resolved the grievance through discussions with the employer or the teacher pursued Ms Kyle's offer to pay her at scale.

### D. Two Week Early Return Approved (November 2010)

[47] A teacher was granted maternity and parental leave from November 19, 2009 to November 18, 2010. In September, she gave notice to Mr. Allnutt that she wished to return two weeks early on November 8th, which was not at a natural break in the school year. He immediately adjusted her return date without comment.

[48] Mr. Allnutt testified he simply approved the request in September 2010 because he had no knowledge at the time that there was an employer practice restricting early returns from parental leave.

[49] After he approved the early return to duties at his former school, the replacing teacher on a term specific assignment who was displaced early expressed displeasure to Mr. Allnutt about this happening. Mr. Allnutt then spoke to Joe Strain, Director of Personnel, who informed him of the "natural break" practice and that he should not have approved the teacher's early return from parental leave.

[50] Mr. Strain is unclear when and from whom he first learned about the employer's unwritten practice of limiting early return from parental leave to times that coincide with a natural break in the school year. He thinks he might have heard it first when he was employed with another school district.

[51] With this newly acquired knowledge, Mr. Allnutt denied the next early return request he received, which was from Ms Hope.

### 4. Denial of Ms Hope's Request to Return on December 6, 2010

[52] On February 5, 2009, before becoming pregnant, Ms Hope attended the annual union workshop on maternity leave, which is regularly attended by employer representatives as onlookers. Ms Hope wanted to become as informed as she could about her entitlements so she and her husband could plan and organize when they had their first child.

[53] This workshop led by DTA President Val Windsor had three presenters. Mr. Strain and Ms Kyle attended as union guests, but were not presenters. They sat at the back of the room and did not participate. They attended so the teachers would have a face to put to their names as the employer administrators of maternity and parental leave and to demonstrate that the union and employer work together on leave issues. The focus of the workshop was the sources of income continuity during leave and pension considerations. Ms Kyle has the clearer recollection of the meeting. She is certain neither she nor Mr. Strain answered any questions. She did not hear any statement about early return from parental leave.

[54] The workshop materials included the DTA Maternity Leave Checklist, which includes: "Notify Human Resources about your return to work (please give 4 to 6 weeks) prior to anticipated return." They included a copy of form letters from the employer, including the paragraph on giving six weeks' notice prior to return from leave.

[55] DTA President Paul Steer attended several of these workshops since he became 1st Vice-President in 2005 and has been on full-time release on union duties. He does not recall Ms Kyle or Mr. Strain speaking at the February 2009 workshop.

[56] Ms Hope recalls that she asked at the workshop if it were possible to return early from parental leave. She understood she could by making a written request and that the interest of the replacement teacher and continuity for the students should be considered in choosing the return date. No one identified for her that she should make the request at the beginning of the leave or that there was a limit on the times when she could return. She did not know who was a union or employer representative at the workshop and recalls she asked the question when everyone was taking snacks, which is usually at the end of the workshop. She recalls the person who answered her question was a female presenter and acknowledges her question and the response may not have been heard by everyone still in the room.

[57] Ms Hope's assignment for the 2009-10 school year was a 1.0 FTE continuing contract at Pebble Hill Elementary School. In November she gave notice she was expecting to give birth to her first child on January 28th. Her 52 week maternity and parental leave would be from January 28, 2010 to January 27, 2011. On December 11, 2009, the employer confirmed the leave and wrote to her, in part:

> Please note that you are responsible for confirming in writing / email (at least 6 weeks prior to) the exact date of your return to your teaching duties, with the Human Resources Department. Keeping us informed enables us to correctly record your date of return for payroll purposes.

[58] At that time, Ms Hope intended to take the full 52 weeks of leave with their first child and, perhaps, extend the leave if she loved being at home. If not possible, she could shorten the leave. Either way, she believed she simply had to give six weeks' notice.

[59] She had worked as a replacement for teachers on medical leave and experienced the uncertainty of when they would return to their assignments and notices of planned return dates that were delayed. Six weeks' notice seemed consistent with that experience.

[60] Her assignment for the 2010-11 school year was a 0.8 FTE term specific until June 30th or the return of the incumbent at Hawthorne Elementary School teaching a combined Grades 5/6 class. The 0.8 FTE term was available to cover for Connie Matisz who had a 0.8 FTE medical leave and was working 0.2 FTE or one day a week.

[61] Ms Hope testified this was the best she could do. She was able to secure a 1.0 FTE position. She wanted a position to ensure continuity of benefits during her leave, but her tenure in this position that she obtained in July was dependent on the incumbent teacher's medical leave. If Ms Matisz returned full-time then Ms Hope would be laid off.

[62] In August, Ms Hope was given parental leave from this 0.8 FTE position until January 28, 2011. Her position was posted and awarded to Darren R. Karpluk for a term specific to January 27, 2010 or until the return of the incumbent.

[63] Ms Hope organized a meeting at the school on September 3rd with Ms Matisz and Mr. Karpluk. Ms Matisz had prepared the classroom and Ms Hope had prepared drafts of an overview for the year and term previews. At the meeting, Ms Matisz chose the 20% she wanted to teach. She introduced the two new teachers to the school culture and the December play to be worked into the curriculum. Mr. Karpluk, who had experience teaching Science, chose what he would teach in the first term. He also chose the Language Arts unit he preferred to teach. There was ability level platooning in the school for Mathematics.

[64] Ms Hope told Mr. Karpluk that's she believed she would be returning early. Her husband was interning at a minimum wage rate and they had financial concerns. Depending on finding child care, she would likely be returning for the second term in early December.

[65] They lived in North Delta with one vehicle and her husband worked in Vancouver. They had help from her in-laws in Richmond, but were searching for child care that would allow her to return to work in December.

[66] In addition, Ms Hope expected to have an evaluative review in this school year and she wanted to have more time in her class to provide a broader base for the review. January 27th was near the end of the second term and not a good transition point in the school year for her, her replacement teacher and the students.

[67] In mid-October, they obtained a child care placement in North Delta beginning December 1st in a licensed facility with which they felt confident entrusting their daughter. They paid a deposit to hold the position, provided all the documentation

required and committed to the placement. As soon as it was settled, Ms Hope emailed her school administrators on October 15th that she was returning to work Monday, December 6th.

> I just wanted to update you regarding my return from maternity leave. After much deliberation and researching all my financial and child care options I have made the decision to return to work for the first Monday in December, the sixth and will be advising HR of my decision this coming Monday. I am aware that it could be a difficult week to make the transition due to report cards and "Scrooge" with Al Pitcher. Thankfully, I am familiar with all of the music for the play and have seen his version presented at various schools in the North end. I have also made arrangements to procure a DVD version from Jarvis in order to learn all of the choreography in advance, which is in part why I feel confident that I will be able to meet the students' needs at that time. I am hoping that you will support my decision to do so as I am now looking forward to returning to work, to the class and to getting to know everyone at Hawthorne.
>
> Thank you for your time, have a wonderful weekend!

The response was: "No problem at all." The replacement teacher would be informed and Ms Hope should contact Ms Matisz.

[68] The same day, Ms Hope sent a letter to "Whom It May Concern" at Human Resources, which it received October 21st.

> After much consideration I, Mareva Hope, have made the decision to end my maternity leave early and start the Gr. 5/6 .8 (Mon. – Thurs.) position awaiting for me at Hawthorne Elementary School beginning Monday, December 6th, 2010.
>
> Please advise if this notification of my intent to return early is acceptable.
>
> Thank you for your time.

[69] She did not explain that she gave eight weeks' notice she was returning December 6th because that was the beginning of the thirteenth week and second term. She did not choose December 1st so she would disrupt the first terms and would have chosen a later date if the term started later.

[70] She believed a new term with new units, projects and presentations was an appropriate transition time. She could begin immediately to start second term evaluations and markings. She could be prepared for the school performance in the second week of December. It was a good time to meet and interact with the students and colleagues. The next parent interviews were not until the end of February.

[71] Mr. Allnutt did not speak to her about why she chose December 6th to return from leave or speak to the school administrators. He replied by email on October 21st:

> Thank you for your correspondence regarding an early return from parental leave. It is district practice to approve early returns from leave only at a natural break in the school year. As such, I would be prepared to approve your early return effective January 4, 2011. Please let me know if that is how you would like to proceed.

[72] Ms Hope was dismayed. She believed she had chosen an appropriate time to return. She believed she was "super on top of it" by giving eight weeks' notice and giving Mr. Karpluk this notice to act. She believed she had been diligent in planning for both her family and her class. This was the first time she heard early return had to coincide with a natural break in the school year. She spoke to a vice-principal friend who told her a natural break was usually winter or spring vacation.

[73] Ms Hope responded to Mr. Allnutt that the child care opening could not be held until January; no other space was available; and she is the primary household income earner. She concluded: "I made the best arrangements possible for my family with the understanding that I would be able to return to my position provided that I gave the appropriate notice. Please let me know if there is a chance I may return to work on my requested date."

[74] Mr. Allnutt replied she could not return from leave earlier than January 4th, but she could work as a TOC beginning December 6th.

[75] Ms Hope had not worked as a TOC in this school district. She did not accept to work as a TOC because TOC work is a "lottery" and there was no assurance of work in December, when she understood absenteeism is usually lower than other months; they were a one vehicle family; she did not know what benefit coverage she would have; she did not know if accepting TOC work would affect her seniority accumulation and she is in a teacher cohort for whom a minor difference in seniority can affect access to a continuing contract; and TOC earnings would cause her to lose Employment Insurance benefits on parental leave.

[76] On November 8th she informed her school administrators, Ms Matisz and Mr. Karpluk that she had been denied early return in December and the union was looking into it. She had emailed Mr. Steer asking if she had missed or misunderstood something about parental leave.

[77] Mr. Steer, who has taught in this district since 1995 and has been active with the union since 1997, testified he had not heard about an employer practice of denying early return from parental leave other than at a natural break in the school year until he heard from Ms Hope.

[78] Mr. Steer grieved by letter dated November 1, 2009 that the employer had unreasonably denied Ms Hope's timely request. Messrs Steer and Allnutt discussed a couple of times and Mr. Allnutt had asked questions about child care and the costs. On November 30th, Mr. Steer sent Mr. Allnutt answers he received from Ms Hope:

> 1) My plan for childcare has always been to locate and secure childcare for my daughter that would be not only accessible to my family in regards to location as we only have one vehicle, but also as neither my husband and will be working more than 80%.
>
> My primary reason for wanting to return to work early has been and remains due to financial strain, as expressed to Mr. Allnutt in my early email correspondence. Securing childcare earlier was secondary and corresponded with the circumstances.
>
> 2) Infant care, as she is under 12 months, for my daughter would be at the cost of $55 per day.

[79] During the first week in December, Ms Hope took her daughter to school and met with Mr. Karpluk to review the class. At that time, he had secured a position to go to after Christmas. He used a paper marks book. They spoke about a couple of students who needed help. There was a back and forth book used by Mr. Karpluk and Ms Matisz in which she kept her marks for the students.

[80] Ms Hope and her husband relinquished the child care spot and forfeited the $800 deposit to avoid paying for the full month. She emailed Mr. Allnutt on Sunday, December 5th:

> In reference to my denied request to return from leave early on December 6th, I want to return to my position for the first day of school on January 4th, 2011. I am choosing not to TOC from December 6-17th, despite the personal financial hardship the district has placed me in, as I am not willing to lose two weeks of seniority from Dec. 18 – Jan 3.
>
> I trust that this serves as appropriate notice, please advise if you would like a copy via post.

He replied that evening:

> This email is sufficient notice. We will take care of the technicalities related to your January 4 return.
>
> I would like you to know that TOCing for the next two weeks will not impact your seniority. Whether you choose to TOC or not, your parental leave continues to January 3 with

> seniority calculated accordingly. If this new information changes your decision about being active as a TOC until December 17, please let me know.
>
> Thank you.

[81] Mr. Allnutt testified the employer allows teachers on parental leave to work as TOCs and continue to buy benefits and accumulate seniority as entitlements while on parental leave. He testified December is a busy month for TOCs. It is flu season; students are more stressed; teachers' stress levels are up; teachers have had a long stretch without a break and are tired. It seems the demand cannot be met. He did not hear further from Ms Hope about working as a TOC. He did not check before testifying to determine whether demand and availability of TOCs in December 2009 accorded with his impression.

[82] On December 6th, Mr. Karpluk was given notice his assignment replacing Ms Hope would end on January 3rd when he would be placed on the recall list.

[83] Ms Hope sent an email to Mr. Karpluk on December 16th:

> Best of luck to you on your last day! It would be great if you could let me know where you left off with the subjects and the novel study and if you could please leave me any notes or codes (for photocopiers etc) that you might think I would need that would be brilliant. Did you use gradekeeper or marks book? If I could also get a copy of first term marks it would be helpful for future reference.
>
> Have a great day and a wonderful Christmas.

[84] She did not receive a reply. She and Mr. Karpluk did not speak before or after the winter vacation to facilitate a smooth transition for the class.

[85] She had the back and forth book, but no marks book was left for her. She did not receive any evaluation for the work in the first two December weeks of the second term or any marks for the weekly Spelling and Mathematics tests. There was no record for her of what had happened in the second term in December. There were no marks or records to explain why some students were reassigned in the Mathematics platooning. Presumably, the reassignments included Mr. Karpluk's input.

[86] In the cleanup before winter break all tests and projects were put in files that the students took home with all their notebooks. Ms Hope testified the cleanup was more extensive than will normally happen because Mr. Karpluk was not returning in January.

Most students lost them and had to redo them with Ms Hope. Three high achieving students had their work.

[87] Three international students had come to the class at the start of the second term. No ESL support, schedule or rotation was in place for them. Ms Hope had to attend to that in January and apply for more Education Assistance time to support them.

[88] Although Ms Hope had met with Mr. Karpluk in the first term, she was unable to plan to meet the needs of the ESL students, those on individual education plans and one student who had been held back a grade. She had to get to know their abilities. She saw the individual education plans in January and met with the Learning Assistant and ESL teachers to review the plans. She did not have a school laptop in December and no home computer because of household finances and could not access electronic copies of the IEPs.

[89] In September, she had planned to teach the full second term. Mr. Karpluk had not planned to teach any of the second term, but did subject and unit introduction in December. She was unable to report on the full twelve weeks of the second term. That year the principal announced retirement and there was a change in school administration. Ms Hope was not evaluated.

[90] At home, no organized child care was found in January or for the remainder of the school year. Her husband took parental leave in January and then rearranged his schedule to work 10 to 12 hour days Friday and Saturday when she was not at school. Occasionally, he worked Thursdays. Because of his junior status and the requirements to complete courses, his options were limited. Friends, family and others assisted with child care.

[91] Ms Hope completed the term specific assignment in June. She acquired another term specific assignment before she secured a continuing contract after six years teaching in the district.

### 5. Denial of Ms Dhillon's Request to Return on December 13, 2010

[92] Ms Dhillon's 2009-10 school year assignment was 0.6 FTE at Heath Elementary as librarian. In August, while preparing the library for the school year, she hurt her

back. She was pregnant and began medical leave in September until the birth of her child on December 17th.

[93] On January 13, 2010, the employer wrote Ms Dhillon, in part:

> Please note that six weeks prior to your return, you are responsible for confirming in writing (email is sufficient) the exact date of your return to your teaching duties, with the Human Resources Department. Keeping us informed enables us to correctly record your date of return for payroll purposes.

Her 17 week maternity leave ended April 15th. Her 35 week parental leave extended to December 16, 2010. By coincidence, her first day back to work, Friday, December 17th was the last instructional day before winter vacation.

[94] Ms Dhillon intended to take the full 52 weeks of leave, but understood if she gave six weeks' notice she could return at a date before December 17th that she chose. She understood the replacement teacher was assigned for a specific term or until the return of the incumbent teacher. She testified she was so sleep deprived when she received the letter that she simply noted she could give six weeks' notice and put the letter away.

[95] For the 2010-11 school year, Ms Dhillon moved to a new school because of concerns Heath Elementary would be closed. Her continuing assignment was 0.8 FTE (Tuesday to Friday) as librarian at Jarvis Elementary.

[96] During her leave, a term specific assignment was given to another teacher until December 17th. That teacher was informed by the employer that the term specific assignment "will end upon the return of the incumbent, or the end date as above, whichever occurs first."

[97] Winter vacation was from December 20th to January 3rd. Ms Dhillon was to return from her leave on Friday, December 17th, the last instructional day before vacation.

[98] Ms Dhillon decided it would be beneficial to return earlier than the last day before winter vacation to have additional days to become familiar with a new school and staff. She could learn the units planned for January and plan her support for student assignments over the winter vacation. She could be introduced to the students in the more relaxed pre-vacation atmosphere and become acquainted with their ability levels and interests, which would help focus her preparation. She believed the transition for her, the students and her colleagues would be better than during the first week in

January when classroom teachers have high demands on their time and are re-establishing structure and routine and students are making a transition back from vacation. In addition, returning for only the last day before the vacation was not likely to be productive for anyone.

[99] Her choice of the return to work date was motivated, in part, by a plan to have her husband take a week away from his work and spend the time with their new daughter while she was at work. In her household circumstances with her in-laws living with them, child care was not an issue. Making additional earnings was not a factor in her decision to return early. Nor was it a factor that the per diem pay in December is higher than other months because of the smaller number of instructional days. She testified her husband manages the household finances. She does not pay attention to the details of her pay cheque and was unaware of the manner of payment for December. The additional earnings were less than the costs to her husband to have a locum cover his medical practice for the week. In the end, he was unable to arrange to take the week off and attended at his practice.

[100] In early November, Ms Dhillon emailed notice that she wished to return Monday, December 13th. With her assignment she would have started work on Tuesday, December 14th. No one asked her the reason she wanted to return early.

[101] An Administrative Assistant in the Human Resources Department working with Mr. Allnutt responded on November 4th. This is a different person than the Assistant who worked with Ms Kyle in 2008 and 2009. The response states, in part:

> Hello Jasvinder,
>
> I spoke with Rod Allnutt about your request to return to work early from your current leave. It is not district policy to approve an early return to work, for teachers on approved leaves, during term time.
>
> If your early return was at a "natural break" in the school year, that would be permitted. (i.e. at the beginning of a new term). As your return is scheduled for December 17, 2010 we cannot at this time approve an early return on December 13, 2010, as this is not at a natural break in the school year.

[102] Ms Dhillon testified it was her upbringing to respect authority. She regarded Mr. Allnutt as her boss and did not challenge him.

[103] On November 9th, after the union learned Ms Dhillon had been refused early return for parental leave, it enlarged the grievance on behalf of Ms Hope to include Ms Dhillon.

[104] Ms Dhillon contacted the replacement teacher and in early December went to the school to meet her, to see the library and its collection and to bring to the school resources she intended to use when she returned.

[105] On cross-examination, Ms Dhillon acknowledged that had she returned Tuesday, December 14th she would not have known the students, their abilities or the projects they were completing before winter vacation.

[106] Ms Dhillon returned December 17th. All library classes had been cancelled for the day. Classroom teachers kept the students in their classes to finish projects and hold class concerts. The replacement teacher was in a classroom. Ms Dhillon had no opportunity to meet teachers or students. She culled books, organized the library and became familiar with the collection.

[107] Her first opportunity to speak to teachers and learn the support they wanted from the teacher-librarian was in the second week of January. She testified this was stressful and hard on her.

### 6. Grievance Response, Form Letter Change and Reason for "Natural Break"

[108] The grievance was not resolved at meetings on November 22nd and December 6th. Mr. Allnutt made a written response denying the grievance on December 6th in which he states, in part:

> The District position is that early return from a parental leave requested subsequent to the initially requested and approved leave is not a right and that the District can continue to follow a practice of approving those changes of return date only for a natural break in the school year.

The union referred the grievance to arbitration January 10, 2012. I was notified of my appointment April 19th.

[109] The employer revised its initial letter informing a pregnant teacher about the period of her maternity and parental leave to include the following:

> Please note that six weeks prior to your return, you are responsible to confirm in writing or by email to Human Resources that you are returning on the stated date. Any earlier or

> later return will only be approved for a natural break in the school year such as after Winter or Spring Break.
>
> *********
>
> For additional information, contact the Human Resources Department or Delta Teachers' Association. Information is also available at the annual DTA Maternity Leave Workshop.

[110] Mr. Allnutt testified this change was made in response to the employer learning that teachers did not understand what the employer thought it was communicating in the previous language of the form letter. He does not know why the employer originally chose six weeks. He speculates that it is because applications for parenthood leave must be made six weeks prior to the leave date under Article G.26.3.c(i) and six weeks seems to be a reasonable time to confirm what will happen.

[111] Mr. Allnutt identified natural breaks as the beginning of the school year and after winter and spring vacations, which students will recognize more than primary and secondary reporting periods. Perhaps the end of semester in secondary school is a natural break. He was not asked about the end of a quarter referred to in Article G.26.3.a(iii). He would not identify "the beginning of a new term" as an example of a natural break as was done by the Human Resources Administrative Assistant who replied on his behalf denying Ms Dhillon's request.

[112] On cross-examination, Mr. Allnutt testified a teacher could choose to take a shorter parental leave following maternity leave if she identified the end date within a reasonable time after receiving the initial letter granting the 52 week leave. He thinks a response with an earlier return date within a couple of weeks is reasonable. This would be during the 17 week maternity leave period and before the parental leave began. If he received such notice, he would accept a date, such as December 6$^{th}$, that coincided with the end of a term. Perhaps it would be reasonable to extend the time if the teacher gave birth early.

[113] 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.

[114] 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

[115] 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.

[116] 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.

## 7. Submissions, Discussion, Analysis and Decision

[117] In the alternative to its submission on the interpretation of s. 51 of the *Employment Standards Act*, with which I have not agreed, the union submits as follows:

1. Ms Hope and Ms Dhillon were treated unfairly compared to colleagues who were permitted to give notice and return early from their scheduled parental leave by both Ms Kyle and Mr. Allnutt.
2. Ms Hope and Ms Dhillon did not lose their right to determine the duration of their parental leave simply because they did not set the duration of their parental leave when they began their maternity leave. There is no such restriction in the *Employment Standards Act*. Each gave adequate notice in accordance with what the employer told them was adequate. The employer cannot impose and enforce a secret limitation under the collective agreement.
3. While Ms Hope and Ms Dhillon accepted the leave term initially set unilaterally by the employer, the employer cannot unreasonably and improperly exercise its discretion to refuse a request to shorten the duration of the leave.

4. The employer failed to inquire or investigate the reasons each had to shorten her assigned leave; failed to weigh their interests and any competing operational interests; failed to consider and defer to their professional judgments; and rigidly applied a policy without making individualized decisions in each circumstance.

[118] The employer made submissions in reply to each alternative and subsidiary submission by the union.

[119] The combined 89 pages of written submissions and accompanying books of references to arbitral, tribunal and judicial decisions were presented and supplemented in a full day of oral submissions. I have carefully read and reviewed the entirety of the submissions to identify what need not be summarized and addressed and the matters that must be addressed to give a reasoned analysis and decision on this grievance.

[120] The employers' communications to teachers taking maternity and parental leaves, reinforced by information distributed in the union workshop and the terms of appointment of teachers on term assignments filling in for them during their parental leave ("until return of the incumbent"), was unequivocal. Teachers were assigned a 52 week leave period commencing with the date of birth and not told they must affirm the period or select a shorter period. They were told their only responsibility was to give the Human Resources Department six weeks' written notice by letter or email of their return date. If they fulfilled this responsibility, then they could return to their teaching duties. They were not told they also had a responsibility to select specific dates in the school year or could not select specific dates in the school year.

[121] There was no communication to Ms Hope or Ms Dhillon that the return date had to be any more convenient for students, administrators or colleagues than the date that fell exactly 52 weeks after the date of birth of their child or the date on which a teacher on medical leave is well enough to return to teaching duties.

[122] They were not told that the employer had an unwritten and not well known practice of requiring the teacher on parental leave who is giving six weeks' notice for an early return to select a date that coincides with a natural break in the school year. And they did not know and were not told that it is unclear when natural breaks occur in the various organizations of educational programs at grade levels in the schools. Are there

natural breaks other than December 31st, September 1st, the end of a semester or quarter or spring break? Does it include the beginning of a new term in elementary grades, which is when Ms Hope chose to return? Ms Kyle wrote in December 2008 that it does. Ms Dhillon was told in November 2010 that it does.

[123] How were Ms Hope and Ms Dhillon to know what Mr. Allnutt did not know? How were teachers taking their first maternity and parental leaves to know what senior administrators and experienced union officials regularly dealing with leave issues did not know?

[124] Their misfortune was to give notice to Mr. Allnutt in mid-October and early November 2010. Mr. Allnutt, who had been District Administrator, Human Resources (Teaching) since January, had accepted notice on September 20th from another teacher of an early return from parental leave on November 8th, which did not coincide with a natural break in the school year. He did so without thinking anything unusual about it.

[125] Mr. Allnutt's reaction to the notice, with his decades of teaching and administrator experience, was similar to the reaction of Ms Hope's school administrators when she gave them notice of her early return – "No problem at all." Perhaps their reaction was because they share the opinion that the beginning of a term is a natural break. Or perhaps, they were unaware of the practice.

[126] Perhaps if the term assignment teacher displaced on November 8th had not spoken to Mr. Allnutt he would not have learned about this unwritten practice whose origins Mr. Strain did not know. And, if, as Ms Gordon testified, there is 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, why was this not self-evident to the teacher who returned in December 2009, to Mr. Allnutt, to the teacher who returned on November 8, 2010, to Ms Hope, to Ms Dhillon, to Mr. Steer and to Ms Windsor? And parenthetically, as the union identified, why in another school district in 2000, did the elementary school principal, with staff support, choose to schedule mid-year class reorganization at the end of term in early December because

"it comes a natural break in the school year"? (see *Burnaby School District No. 41* [2000] B.C.C.A.A.A. No. 502 (Kelleher), ¶53; see also ¶ 56)

[127] 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.

[128] The collective agreement addresses the extension of leave through the parenthood and other leave provisions. It does not address the early termination of parental leave either by the teacher's election or a change in circumstances such as child death, placement for adoption, loss of guardianship (under the new *Family Law Act*) or other changes that might affect entitlement to parental leave.

[129] In the absence of a collective agreement provision governing early return from parental leave whose duration was set by default by the employer to end 52 weeks after the birth of the child, the employer established and communicated to Ms Hope and Ms Dhillon the terms on which it would accept an early return from leave. It did this as an exercise of its residual management rights.

[130] The employer submits the language of its letters to Ms Hope and Ms Dhillon was "regrettably ambiguous" and has been changed. The employer submits:

> Further, nothing stops the Employer from altering the letter in the future. The fact that it has used a certain wording in its letters in the past does not mean it is required to use that wording in the future. It could clarify its expectations set out in the letter in the future so long as the letter is consistent with the Act. (*Employer's Argument*, ¶ 144)

[131] In addition to the clear language of the letters to Ms Hope and Ms Dhillon, this change acknowledges that the communication to them was unequivocal – "Please note that you are responsible for confirming in writing / email (at least 6 weeks prior to) the exact date of your return to your teaching duties, with the Human Resources Department." and "Please note that six weeks prior to your return, you are responsible for confirming in writing (email is sufficient) the exact date of your return to your teaching duties, with the Human Resources Department."

[132] Without notice to either, the employer imposed additional requirements in the application of its unwritten practice unknown to them and the union. The employer submits it can act in this manner:

> Moreover, no requirement to act reasonably in determining whether to consent to return an employee from parental leave earlier than scheduled flows from the wording of the *Act*.
>
> Thus, the Employer says its rights in this regard remain unfettered and management may exercise this right "in any way it pleases".
>
> In any event, the Employer submits that its approach in deciding whether it will give its agreement to an early return is reasonable. Rather than acting in an arbitrary fashion, the Employer's approach is to consider factors such as the impact of the early return on students. Even if a reasonableness standard applied, an approach which the Employer says is not supported by the case law, it has met this standard because it has taken the interests of students into account. (***Employer's Argument***, ¶ 157 - 159)

[133] This is not a situation of an employee requesting and the employer responding to a change to a scheduled parental leave. This is a situation of the employer telling an employee she may determine when the leave will end if she provides the requisite notice. Both Ms Hope and Ms Dhillon did. They chose dates that they concluded served their personal interests and the interests of the students they would be teaching. Ms Hope chose the beginning of a new term, which was a time she had previously discussed with Mr. Karpluk and Ms Matisz. Ms Dhillon chose a date that, in her opinion, would provide more opportunity to make a meaningful contribution than the scheduled last instructional day before the winter vacation.

[134] After choosing the dates and making arrangements to accommodate their return on those dates, they gave the written notice. The employer then 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.

[135] 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. (***Employer's Argument***, ¶ 187)

[136] 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.

[137] 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.

[138] 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.

[139] 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.

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

[141] Therefore, the grievance is allowed. Despite the submissions of the union that there could be further proceedings or submissions to address matters of remedy, I agree with the employer that the organization of the arbitration, the evidence and the submissions on remedies sought and mitigation have been thorough and provide the basis for an enforceable remedy without further proceedings or submissions.

[142] With respect to Ms Hope's situation in December 2010, the employer submits:

> Ms. Hope was offered the opportunity to work as a TOC in December. She admitted that she would only have needed to work 4 days as a TOC to cover her child care costs for the month. Rather than explore this option, she let go her childcare spot without taking steps to check whether her assumptions regarding seniority and the availability of TOC work were true. As it turned out, her assumptions were not true. The Employer cannot be held responsible for her loss of pay from December 6 to January 4 as a result. Further, it cannot be held responsible for her loss of the childcare deposit. (*Employer's Argument*, ¶ 182)

[143] I disagree. There is no employer evidence that either by name request for Ms Hope or otherwise there were any specific assignments that Ms Hope would have been offered or that she would have the opportunity to work four or more days from December 6th to 17th. While the employer states certain of Ms Hope's assumptions about the operation of the collective agreement to her situation were incorrect, this is not certain. The union and employer did not explore whether they share the same interpretation and application of the collective agreement and the union indicates there might be some disagreements with the employer's view of how the collective agreement would have applied to Ms Hope had she returned from unpaid parental leave to pursue the opportunity to work as a teacher on call.

[144] I find the uncertainty of the "opportunity to work" unspecified assignments as a teacher on call in December 2010; the need for predictability for income to pay for child care and arranging her husband's schedule; and the accompanying issues over accumulating seniority, maintaining benefits and loss of Employment Insurance benefits was a reasonable basis for Ms Hope to decline the employer's generalized offer to be available to work as a teacher on call for the ten days from December 6th to 17th.

[145] The employer is ordered to compensate Ms Hope for her lost salary and benefits for the instructional days December 6 to 17, 2010, inclusive. In addition, the employer is ordered to pay Ms Hope $800.00 as compensation for her forfeited child care deposit. While there might be other losses and hardships that Ms Hope suffered after December that flowed from the employer's breach, I find that they would have to be offset by the difference in child care cost she would have paid had she not had to relinquish the placement and the child care cost she did pay and other losses are likely too remote to be quantifiable or compensable.

[146] With respect to Ms Dhillon's situation in December 2010, the employer submits:

> Ms. Dhillon on the other hand, gave evidence that the extra money had nothing to do with wanting to return early. She simply wanted to be out of the house so her husband could care for her child. She admitted on cross examination that she did not have to be at work for him to be at home alone with their child. Ms. Dhillon did not take any steps to talk to the Employer about her desire to return early and this deprived the Employer of the opportunity to help address any concerns she may have had. (*Employer's Argument*, ¶ 184)

[147] Whether Ms Dhillon needed the salary for the days she wished to teach is nor relevant. She gave the notice she was told to give and was refused. She cannot be faulted for having accepted Mr. Allnutt's authority. The grievance gave the employer every opportunity to inquire and to revert to the original of the exercise of discretion it communicated to Ms Dhillon and upon which she relied.

[148] The employer is ordered to compensate Ms Dhillon for her lost salary and benefits for three instructional days in December 2010.

[149] I retain jurisdiction over the implementation and application of this decision and to resolve any matters that cannot be agreed with respect to the compensation to be paid to Ms Dhillon and Ms Hope.

FEBRUARY 15, 2013, NORTH VANCOUVER, BRITISH COLUMBIA.

*James E. Dorsey*

James E. Dorsey