IN THE MATTER OF:
An arbitration under the *Labour Relations Act, 1995,* and
An agreement dated November 3, 2014
re: EXPEDITED ARBITRATION, and

BETWEEN:

CUPE LOCAL 4400

the "Union"

- and -

TORONTO DISTRICT SCHOOL BOARD

the "Employer or the TDSB"

GRIEVANCES D-3401, 3402, 3427 – Employee K (the "grievor")

Date Heard: May 26, 2015

Decision Date: June 25, 2015

Appearances:

For the Union: Tim Gleason et al

For the TDSB: Tom Moutsatsos et al

This is a grievance referred to me as arbitrator under the parties expedited arbitration procedure. Under that scheme the parties have filed detailed written briefs including witness statements. Neither party sought to cross examine any of the witnesses for whom witness statements were filed. Both parties made extensive oral argument. This award determines the grievances.

The grievor is employed by the TDSB as a caretaker at W. Public School (WPS). She is represented in her employment relations by the Union. She has been an employee of the TDSB since 2007.

The circumstances which give rise to the grievance have their genesis in a concern raised by the grievor in December 2013 with respect to a fellow employee "X". It is unnecessary to detail the incident. Suffice it to say that the issue was dealt with informally by the TDSB, and to the grievor's satisfaction, by the employer agreeing to ask "X" to leave the school where the grievor was working, which "X" agreed to do.

In January 2014 the grievor made another complaint about a co-worker "E". The TDSB did not submit a witness statement in respect of "E" so the grievor's version of what occurred is the only evidence before me. The grievor alleges the following occurred:

> On January 6, 2014, another caretaker, E, who was not assigned to any particular school, was assigned to work a night shift at [WPS]. The grievor was assigned to the day shift that day and her shift overlapped with that of E by fifteen minutes.
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> The grievor knew E because they had worked some shifts together in the summer of 2013.
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> When E entered the caretakers' office, he said to the grievor, "It smells so good in here. Is that you? You always smell so nice."

> On January 8, E was absent from work. He told the grievor on the phone that his mother had passed away.
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> On January 16, E called the grievor and asked her to put his work boots aside because he would be picking them up later that night. When the grievor arrived for her evening shift, she called E and asked him to bring her a cup of coffee if he was stopping by to pick up his boots.
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> E arrived at the school at approximately 10:30 p.m., as the grievor was taking the garbage out. E opened up his arms as if to give the grievor a hug as he approached her. The grievor gave him a hug and expressed her condolences for his loss.
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> While E was hugging the grievor, he said, "I really need this hug." When E did not let go of the grievor, she tried to pull away, but E kissed her cheek. He then held her face and tried to kiss her on the mouth. The grievor managed to break away.
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> When she asked him if he was trying to kiss her, he admitted that he was. He explained that he had always had an attraction to the grievor and that the grievor smelled nice. He sheepishly apologized after the grievor told him he was disgusted with her.

The next day the grievor arrived early for her shift to tell her head caretaker, Mr. Mulani, what had happened the night before. Mr. Mulani contacted Ms. Smith, the assistant family team leader, who came to the school and asked the grievor how she wanted the situation handled. The grievor told her that she wanted the employer to make sure that E would not be assigned to WPS again.

Ms. Smith left and returned fifteen to twenty minutes later with the family team leader, Ralf Klopf. After the grievor explained the situation to Mr. Klopf, he advised the grievor that she had to make a formal complaint. The grievor asked whether it could be handled informally the same way as the incident with "X" had been handled. According to the grievor Mr. Klopf responded in a derogatory tone, "oh there is another one?" The grievor states that Mr. Klopf's response left the grievor with the impression that Mr. Klopf believed that she was making the incident up. Mr. Klopf's evidence is that he simply was unaware of the other incident and asked "What other guy?" in respect of "X".

Ms. Smith was concerned in hearing the grievor tell her story to Mr. Klopf that the grievor's version of events had changed in several ways from what she had told Ms. Smitheralier. Mr. Klopf again raised the issue of the grievor filing a formal complaint. The grievor advised that she did not wish to do so. Her evidence is that she was afraid to make a formal complaint.

Mr. Klopf and Ms. Smith interviewed "E". He provided a version of events that was quite different from the grievor's version. He denied assaulting or harassing the grievor. He said that he and the grievor were friends and that she had told him about what had occurred with "X". Ms. Smith and Mr. Klopf concluded that it was not clear whether the grievor had been sexually harassed as she claimed.

In or around February 2014, the grievor asked Ms. Smith for an update on the matter. Ms. Smith advised that it was still under investigation.

On March 5, 2014 Mr. Klopf and Ms. Smith met with the grievor. They advised her that they were concerned that she had spoken to "E" about the incident with "X" after she had agreed to keep it confidential. The grievor acknowledged she had made a mistake. Mr. Klopf told her that "E" gave a different version of events than the version she had provided. The grievor asked to know what he had said, but Mr. Klopf told her as this was an informal process they would not let her know. She could only know his version of events by filing a formal complaint.

Mr. Klopf and Ms. Smith advised that they would do their best not to assign "E" to work at WPS, but they made it clear there may be instances where "E" was the only person available to cover a staffing shortage at the school. The grievor was then provided with some general advice about how she might deal with fellow employees. The grievor felt that she was being blamed for what had occurred and became upset and left the school with permission.

The next day, on March 6, the grievor obtained a medical certificate from her family doctor, Dr. Jensen. The note stated that the grievor was totally disabled as of March 5, 2014. Dr. Jensen advised the grievor to make regular appointments so that Dr. Jensen could monitor her mental health.

On March 10 the TDSB wrote to the grievor to notify her that the note she had provided was insufficient and that she was required to have her doctor, among other things:

- Identify the specific physical, psychological or cognitive restrictions that she was experiencing
- Identify the treatment plans for these restrictions
- Identify the prognosis for recovery for each restriction identified including timelines

The letter advised the grievor that if the information was not provided by March 19 her employment could be terminated. The grievor states that she did not receive the letter until March 19.

The grievor returned to work on March 17 and 18. The grievor states that on those shifts she felt paranoid that "E" would visit the school while she was there or that Mr. Klopf would try to cover up what happened and fire her. She says the she felt extremely anxious. On March 19, the grievor commenced a short term disability leave after speaking with someone at the employee assistance program.

Pursuant to the letter, the grievor obtained a detailed medical certificate from her physician the next day. Dr. Jensen noted that the grievor was suffering from insomnia, anhedonia, anorexia, poor energy, poor concentration, and significantly compromised mental capacity, executive planning and strategizing. Dr. Jensen advised that the grievor was "in no condition to work", but she expected the grievor to return to work in 2-4 weeks.

From the employer's perspective the note merely outlined the grievor's symptoms but did not identify restrictions beyond stating that her mental capacity was compromised. Further, the note did not identify a treatment plan or the grievor's prognosis for recovery.

On March 27, 2014, Dr. Jensen cleared the grievor to return to work as of April 2.

On April 1, 2014 the TDSB received an Employee's Report of Accident/Injury form from the grievor, stating that she suffered an injury on March 5, 2014 that consisted of "inappropriate sexual advances by 2 co-workers, followed by a lack of action and misplacement of blame by superiors/management". In response to the question, "How did the accident occur?", the grievor wrote, "a meeting took place at WPS leaving me to feel unsupported and unsafe".

The grievor returned to work on April 2, 2014. At approximately 10:00 p.m. that night, she noticed a white SUV in the parking lot of the school. It left around an hour later when the grievor and her co-worker took the garbage out. The grievor noticed the same vehicle parked in the same spot on April 3 and April 4. A union representative advised the grievor to report the vehicle to the call centre. Security investigated and told her that there was nothing improper about the presence of the vehicle.

On April 11, the grievor attended a meeting with union officials. Re-telling her story triggered her depression and anxiety, so she booked off sick after that meeting.

On April 15, the grievor obtained a medical certificate from Dr. Jensen, who advised her to go on short-term disability. The note states:

> I have seen K today in regards to the recent stressors at work. While she had returned to work earlier this month she now presents with increased symptoms that make me concerned for her physical and mental health and it is my medical opinion that ongoing work attendance will be detrimental to her recovery. Specifically she has palpitations, hives (observed on exam today) and continues to be tearful and visibly agitated with any discussion of work. She has amplified panic and anxiety when driving to work to the point that she is requiring to take a sedative. For all these reasons she will refrain from working at this time and I have also recommended short term disability. She will continue to work with her psychologist and myself and I will keep you appraised of her situation. Should her condition improve we will reevaluate return to work.

Again the employer was and is concerned that no timeline, restrictions or prognosis were provided.

On April 29, Dr. Jensen reassessed the grievor and advised the employer that the grievor's symptoms were improving and that she could return to work within three to four weeks on a full time basis without restrictions.

On May 29, Dr. Jensen wrote another note and observed that the grievor demonstrated significant anxiety about who her supervisor would be. The note further stated:

> While I understand some of the political issues may take some time to sort out, in the interim it would be helpful for K to return to work under modified hours. Specifically if she were to limit to daytime hours this would provide a degree of security by the presence of others such that she would not feel as vulnerable. This would be my recommendation at this time and depending on how this goes we could potentially see a return to regular hours should the other issues be resolved. Should you be able to provide the accommodation in hours as suggested she should be well enough to return to work by next week.

There is no dispute that the accommodation requested poses a challenge for the employer. Schools require only minimal caretaking during regular hours and, as a result, generally only head caretakers work regular daytime shifts. The grievor is not a head caretaker.

The employer also notes that Dr. Jensen did not advise that assigning the grievor to a different supervisor was a necessary or even recommended accommodation.

On June 4, the grievor attended an accommodation meeting with John Long and Peter Starring from the TDSB and Mr. Randall and Shaun O'Gorman from the Union. The TDSB requested additional medical information and offered on a without precedent and prejudice basis a number of alternate assignments to address the grievor's concerns about reporting to Mr. Klopf and working alone. However, they were rejected, apparently because they did not involve daytime shifts.

On June 6 the TDSB wrote the grievor reiterating that the medical information provided to date was insufficient and, that having rejected the TDSB's proposals, she was required to return to work by June 9 or provide sufficient medical information from her doctor by June 11. The letter advised that new medical documentation need confirm that her doctor had read the TDSB's June 3 letter; why the employer's proposal that the grievor be moved to a school where she did not have to work alone (on the night shift) was not appropriate; and the medical contraindication that prevented the grievor from accepting the employer's proposal. The employer also indicated that if she did not do so she would be considered absent without leave.

On June 9, Dr. Jensen wrote a note which states in relevant part as follows:

> I have read your letter dated June 6, 2014.

> I understand that you have provided accommodation in terms of not requiring K to work under her current supervisors and in a different school and I am certainly in approval of this adjustment to her workplace. I also understand that she has been offered an afternoon shift which starts 3pm and finishes at 1`1pm. This would mean that K would be working in a school with just other custodians (sic) potentially from 4pm until 11 pm, which represents the majority of her shift. The very reason I requested daytime hours would be for the safety of non-TDSB employees to be present. Specifically- K would feel safer in an environment where inappropriate advances would be unlikely and easily witnessed by others (eg. teachers, students).
>
> Therefore- I stand by my prior recommendation that she be accommodated by providing daytime hours which I understand to be 6:45am to 3:15pm.

On June 11, the grievor was visibly distraught during her appointment with Dr. Jensen. She was not eating or sleeping. She reported feeling hopeless with decreased levels of energy and ability to concentrate. Dr. Jensen wrote to the TDSB again, recommending that it assign the grievor day shifts. It was Dr. Jensen's view that the grievor's mental health would continue to worsen if the employer forced her to work night shifts. Dr. Jensen wrote to the employer:

> K has come to see me today and I am very concerned about her mental health. She endorses all the symptoms of a major situational crisis. She is not eating, she hasn't been sleeping, she has poor energy and concentration and fells completely hopeless. The anxiety is at an all-time high- largely because of the manner in which her situation had been handled. Based on her presentation today-where she is visibly distraught, and extremely anxious I would again **strongly** recommend that her working hours be changed to daytime hours at least until she has her independent assessment with the psychiatrist/psychologist as requested by management. I feel that putting her back to work at this time will only worsen her mental health and may result in a more prolonged recovery. Furthermore, she will undoubtedly be a more effective and productive employee if her accommodations are met. Given her fears and apprehensions she will have difficulty or be unable to perform some of her tasks which require her to be outside at night in an unfamiliar environment working with unfamiliar people. While as you know I cannot state requirements as this area is certainly subjective and there are no objective measures or tests I can perform to substantiate my recommendations I would urge you to consider my advice on the basis of my long term knowledge of K as a patient and my experience with these sorts of cases.

The TDSB, the Union and the grievor agreed that the grievor would be assessed by an independent doctor. An appointment was scheduled for June 26, 2014 with Dr. Seon. However, when the grievor attended the scheduled appointment the grievor did not consent to the assessment and, as a result, it could not be completed.

The vast majority of caretakers are assigned day shifts in July and August each year. On June 30, 2014, the employer assigned the grievor day shifts at another school, thereby accommodating the grievor's restrictions.

In August the grievor requested that she be moved back to WPS because she was not getting along with a female caretaker at the new school. The TDSB agreed to the request but advised that at WPS she would be supervised by Mr. Klopf. The Grievor initially agreed, but later advised that her doctor did not support the arrangement.

At the end of the summer holidays the grievor was assigned to work afternoon shifts at WPS. The grievor did not report for work at the beginning of the school year. Dr. Jensen wrote the following to the TDSB:

> K came to see me today in regards to her mental health. While she has done well over the summer with her daytime hours I cannot endorse her working nights. There are underlying issues at play here in addition to the recent events that feed into her deep fear K has at returning to night shift. I will once again state that she can not work nights until she has had her independent medical assessment. I suspect you may think that K is "milking" the situation but the stress of the management of her case alone would drive most people back to work. There is no part of K that desires this ongoing conflict and her resistance to nights has nothing to do with being lazy or unmotivated. If you will not take my recommendations you need to set up the independent medical assessment prior to any changes in her work schedule. If following the IME there is a move to return to night shift I will support K through this and not put up any more barriers but to blindly ignore my advice is bordering on negligence.

A second IME was booked for the grievor on September 22, 2014 with Dr. West, a psychologist. In advance of the assessment the employer provided Dr. West with a list of questions regarding possible restrictions that would prevent the grievor from working her afternoon shift at WPS.

Dr. West administered a variety of tests and provided a very lengthy report including answering the questions that the employer asked of him. Among his findings was that there was an elevation on the subscale measuring depression, anxiety and anxiety related disorders "which would be suggestive of a diagnosis of Post Traumatic Stress Disorder (PTSD)". He also found that she was open to treatment and did not exhibit elevated levels of aggressions, suicidal tendencies, stress or perceived lack of support". As discussed below, he also noted, however, that her condition did not show all the hallmarks of PTSD.

Among the questions asked of Dr West was: "Does she have a documented medical condition/disability that legally requires to accommodate [her] in the workplace?". He replied in part: "No, K does not have a documented medical condition or disability that I believe would legally require her employer to accommodate her in the workplace, but I do believe she is evidencing some symptoms of a posttraumatic nature, as well as some generalized anxiety symptoms, although she may not meet full criterion for a diagnosis of PTSD or general anxiety disorder. And further: "…perhaps the best approach would be try to accommodate the employee to the degree possibly taking into consideration the posttraumatic stress symptoms and the symptoms of generalized anxiety…" Later he added: "…I believe this woman meets criterion for a mental health diagnosis…".

He was also asked to explain her medical limitations/restrictions. He answered in part: "…it is in the best interest of the employer and I believe the employee will likely function significantly better if she is in a workplace environment that allows for and takes into consideration the aforementioned mental health symptoms and

complaints due to ongoing post traumatic stress symptoms and ongoing symptoms of generalized anxiety, the etiology of which I have elaborated upon above"

He was later asked is working a day shift a medical necessity or a preference/recommendation that would be helpful. He answered:

> I do not believe this is a medical necessity, and instead I would suggest that I believe this is a preference/recommendation that would be quite beneficial/helpful; however, having said that I would suggest that on a balance of probabilities it is quite possible that if she were immediately returned to an afternoon/evening shift there might be an exacerbation of the mental health symptoms such that the employee might then have to book off sick and be unable to appropriately function in the workplace. Thus I do not believe that the distinction between medical necessity or preference/recommendation is overly important in this case and would suggest accommodation and compromise between the two parties…".

He was also asked about the grievor working under Mr. Klopf and he responded that it was not a medical necessity that she not do so, although initially she might function better if she was under a different supervisor. He also said that the grievor is not "actually strictly prevented from working the afternoon shift".

In light of the report the TDSB was of the view that the requested accommodations were not medically required and that the grievor should return to her regular shift at WPS.

On September 23, the grievor was assessed by a psychiatrist, Dr. Pham, who she was referred to by Dr. Jensen. Dr. Pham indicated a working diagnosis of PTSD and provided a number of treatment options. She gave the grievor a Global Assessment of Functioning score of 55, indicating moderate symptoms of mental illness are present, or that a person's functioning in school, work, or social

situations is moderate impaired. She did not comment on whether the grievor was capable of working the night shift under the supervision of Mr. Klopf.

On October 29 a meeting was held where the employer advised the grievor and the Union that it took the position that it was under no obligation to accommodate her and that if she did not return to work she would be considered absent without leave. The TDSB provided the grievor with a number of return to work options including working her regular shift at WPS, working afternoons at a different school with multiple caretakers, or working afternoons at a different school where she would be the only caretaker.

The grievor elected to return to work at WPS. Dr. Jensen advised, on November 27, that the current greatest threat to her mental health was the stress of the back to work process and therefore agreed that it was best for her to return to work. The grievor returned to work on December 1, 2014. As of April 16, 2015 she says that she continues to struggle with depression and anxiety. She takes anti- depressant and anti- anxiety medication. She has difficulty sleeping and feels fearful while at work. She is in therapy.

The grievor was on STD leave benefits from March 6 to June 30, 2014 but did not receive any pay from September 2 to November 30, 2014.

The Claim

In the grievance the union seeks:

1) Reimbursement of the grievor's sick leave credit from May 29, 2014 to June 30, 2014;

2) Compensating for lost wages and benefits from September 2, 2014 to November 30, 2014.
3) Reimbursing the grievor $500 for the cost of seeking her therapist;
4) Payment of general damages for pain and suffering the grievor suffered as a result of the employer's violation of the code.

Findings

Consistent with the expedited process adopted by the parties and applied to this case, I will make findings with a brief explanation of how I arrived at them. This is not case where I need to make credibility findings and, I add, there is no suggestion before me that the grievor is faking her symptoms or wishes an accommodation for an ulterior purpose.

First, I am satisfied that the employer's handling of the grievor's sexual harassment complaints was entirely appropriate, consistent with how the grievor wished her concerns to be handled. In this regard, the union takes no issue with how the first incident was dealt with. It was in the end easily resolved because X was prepared to agree to what the grievor asked for. The second incident was not so straight forward. The grievor consistently maintained that she did not wish to file a formal complaint but wished to have the matter dealt with informally. The difficulty arose because E did not agree with the grievor's version of events and was not so accepting of a resolution as X had been. Mr. Klopf appropriately advised the grievor that since there were differing accounts, he could not find wrongdoing absent a formal complaint and accordingly there was little he could do for the grievor. Mr. Klopf did the only thing he could do under the circumstances. He was entitled to come to the conclusion that the grievor's allegations were not obviously true. He was, in the circumstances, entitled to advise the grievor that in the absence of a formal complaint there was nothing else he could do for her. Nevertheless, he still offered to try to avoid scheduling E away from the grievor but he could make no guarantees.

It is hard for me to see how the employer could have done more. It appears what is sought is the benefit of a formal complaint process (the right to hear the other side's version, remedies etc.) without one actually being filed. I do not agree that the employer's conclusions were based on stereotypes as the union suggests. Management's conclusions were based on the facts before them, the most important being that there were significant differences in the stories told by each side and no process to resolve those differences.

Nevertheless, the case before me is not really about what happened in the two incidents, nor is it really about whether the employer investigated properly. That is because it is clear that whatever happened between the grievor and X, the grievor was affected by it. That may be because the grievor has a history which made her more likely to be susceptible to bad reactions to certain events. However, that does not change the fact that she was affected and there is no suggestion by any of the medical professionals that the effect on her is not real or is being exaggerated.

That leads to the second finding, which is that following the incidents and the school board's investigation of them, the grievor suffered a disability as that term is used in the Ontario Human Rights Code and the parties collective agreement or "handicap" as that term is used in the parties' collective agreement in Article L.2. Article EE of the collective agreement states:

> EE.1 The Employer and the Union both recognize their obligations under the *Human Rights Code* to attempt to accommodate, short of undue hardship, an Employee within the bargaining unit who is incapable due to disability to perform the essential duties or meet the essential requirements of his/her job. It is also recognized that the Employee has an obligation to provide satisfactory medical evidence to the Employer concerning his/her incapacity or restrictions. A request by the Employer that an employee be examined by the Employer's doctor shall not be made unreasonably. Accommodation may include assigning the Employee to an available vacant position in the bargaining unit, without posting, provided that the Employee has the qualifications, skills an ability to perform the regular duties of the position…

Disabilty is defined in the Code as follows:

> "disability" means,
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> (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
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> (b) a condition of mental impairment or a developmental disability,
>
> (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
>
> (d) a mental disorder, or
>
> (e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*; ("handicap")

In my view, taking into account all of the medical evidence before me, the grievor is suffering from a condition of mental impairment or a mental disorder. There is no doubt that the nature of the grievor's disability, being mental rather than physical, made and makes an assessment of her condition with certainty more difficult. There is obviously a degree of speculation in psychiatric diagnosis that can be far greater than that of physical diagnosis. It seems to me that an assessment of the symptoms are, from an employment and accommodation perspective, much more important than resolving what may the impossible task of a making a firm diagnosis.

Here from the start (April 15), the grievor's doctor was asserting the grievor had significant symptoms. It was her "medical opinion that ongoing work attendance will be detrimental to her recovery". She identified physical consequences to her mental health issue: palpitations and hives. She identified that the grievor was taking medication as a result of panic attacks and anxiety. She implicitly and explicitly declared her disabled as she recommended short term disability leave.

There followed a series of interactions between the employer and the grievor's doctor in which the employer tried to have Dr. Jensen identify a specific diagnosis and a specific treatment plan. The result was that by May Dr. Jensen had, for the first time, identified the accommodation she required. However, it is true that the doctor's words are somewhat ambiguous about whether the suggested accommodation was a medical necessity or a preference: "it would be helpful for [her] to return to work under modified hours", i.e. daytime hours.

Even if Dr. Jensen was somewhat ambiguous, there is in the end little real doubt about Dr. West's views, although his report has a tendency to vacillate. The employer focuses on some of Dr. West's specific statements ("not a medical necessity"), but read as a whole, his report convinces me that she had a mental impairment or mental disorder. First, he agreed that she was suffering symptoms of a "post traumatic nature" and generalized anxiety. Then he concluded that she "meets criterion for a mental health diagnosis" and repeatedly recommended that she be accommodated.

Further, he agreed with Dr. Jensen that the grievor's "limitations" and accommodation would be temporary and suggests that she could be moved to a different shift at a different school so that her symptoms could subside after, likely, a 6-12 month period. He notes that she is capable of working with or without persons present "so long as she is initially placed on a day shift and not at her previous school" until her symptoms subside. Dr. West believes that a trial of a different shift at a different school "should occur" for 6-12 months.

Finally, after noting that accommodation is not a "medical necessity", he goes on to say that if she was returned to her old shift, she would function better "it is quite possible" on a "balance of probabilities" that there might be an exacerbation of the mental health symptoms "such that the employee might then have to book off sick and be unable to appropriately function in the workplace". That is, in a sense, the definition of disability which attracts the duty to accommodate: if the employer

puts her on her normal shift her symptoms will get worse and she will no longer be able to work. I interpret Dr. West's report as stating that being placed on the afternoon shift is not a medical necessity for the grievor to live or be healthy, but it is a requirement if she is to continue to work.

Over and over again Dr. West repeated that the grievor should be given a trial of 6-12 months so that her symptoms could be treated and subside.

Accordingly, by this time, Dr. Jensen and the physician who the employer referred the grievor to, were both saying essentially the same thing: it would be better for the grievor to be put on a day shift at a different school and if she is forced back to her old shift at her old school she will probably have to leave work.

All of this was confirmed when Dr. Pham issued her report, dated September 23, 2014, in which she found the grievor was likely suffering from PTSD.

The employer did not file a will say statement from a TDSB employee who decided not to accommodate the grievor so it is somewhat difficult to understand the thought process. Obviously, I assume that the argument put before was the reason the TDSB did not act as requested. I disagree with that argument. Taken as a whole, the medical evidence is clear that the grievor either suffered from PTSD or the symptoms of it. Like Dr. West, I do not "believe the distinction between medical necessity or preference/recommendation is overly important in this case…". The medical evidence is clear that if the grievor was not accommodated she would suffer, likely to the extent that she would be forced to go off work.

It seems to me that one of the challenges the employer faced was not recognizing that the symptoms were, in a sense, the disability. They were a mental impairment. There is no doubt that the fact that this was a psychiatric issue, as opposed to a

physical issue, was also a challenge. In my view the employer would obviously have acted if this employee legitimately had a sore ankle (for unknown reasons) and the best medical advice was that periods of rest would help control the pain, but if no rest was given the employee was likely to go off work on STD benefits. I see the two situations as directly equivalent. There are many situations where the symptoms are effectively the disability. I am satisfied that the TDSB should have accommodated the grievor as Dr. West suggested.

The cases relied on by the employer all draw a distinction between accommodation which is a preference and accommodation which is a medical requirement. However, in none of those cases were, like on the facts before me, the claimant's/grievor's doctors saying that if the employee was not accommodated her condition would worsen and she/he would likely go off work. Unlike *Baber* [2011] HRTO 213 para 146, for example, this is not a situation where the grievor has failed to establish that the requirement to work her afternoon shift had an adverse effect on her because of her disability. Accordingly the requirement to work afternoons amounts to adverse effect or constructive discrimination contrary to the Code and the collective agreement and accommodation to the point of undue was required.

Having said that, I find little basis for a requirement that Mr. Klopf not supervise the grievor. There is no medical evidence that she could not have worked at a school and taken whatever supervision from him that was required, perhaps up to the point of dealing with another supervisor had there been another similar incident.

In coming to this decision I have considered all of the cases referred to by the parties although, given the parameters of this expedited process and the fact that these cases are, in any event, fact specific, I have not referred to them all.

Decision

Sick Leave Credit Claim

This claim is based on the premise that on May 29 the grievor should have been accommodated with a day shift and that the TDSB's failure to do so meant that the grievor was unnecessarily off work and in receipt of sick leave credits. The Union seeks the reimbursement of those credits.

In my view the Union's claim is excessive. First, there was no possibility that the employer could accommodate the grievor on May 29. It was entitled to reasonable time to assess the accommodation request and ascertain whether there was any accommodation available to her. It was not until June 9, 2014 that Dr. Jensen was not merely offering her opinion that it would be helpful for her to work the day shift and making it clear that it was her medical recommendation that she be so accommodated. At that point I believe the employer should have acted. It was reasonable for the employer to have accommodated the grievor on Monday June 16 and therefore the grievor lost 11 days of sick leave credits which I direct the employer to reimburse.

Lost Wages Claim

The Union claims lost wages for the period following the summer until the grievor returned to work on December 1, 2014.

I also have some difficulty with the extent of this claim. My concern is related to the right of the employer to request an IME under the collective agreement. There can be no argument that employer's request was a reasonable one. All three parties agreed that the grievor would see an independent doctor and an appointment was arranged for the grievor for June 26, 2014. The grievor attended the appointment

but refused to be examined. There is no medical or other explanation in her will say for this refusal. In my view, the failure to complete this appointment constituted a failure on the grievor's part to co-operate fully with the employer's accommodation efforts. When, in September, Dr. Jensen advised that the grievor was unable to work, the accommodation process was in a sense at square one. The IME could have been completed in plenty of time for the TDSB to consider accommodation for the new school year at a time when there would likely have been vacancies. However, the accommodation was now on hold.

Dr. West issued a report following the IME on October 3, 2014. Again, particularly, given the length and complexity of the report and the difficulty in locating a position for the grievor (although I note the employer did not try to do so), the employer was entitled to a reasonable amount of time to assess and consider its options. In my view, it should have acted by October 20, 2014 by placing the grievor in a position that met her medical needs. The employer is therefore responsible for lost wages from October 20 to November 30.

Damages for Breach of Human Rights

I am satisfied that the TDSB breached the grievor's human rights by not accommodating her in the way recommended by Dr. West and that she is entitled to be compensated as a result. The grievor notes that since the two incidents and "the employer's inadequate investigation" she has been struggling with depression and anxiety.

Normally, the employer is not responsible for the actions of fellow employees (as opposed to management employees), however, when Code covered events occur or may have occurred, the employer's response to allegations may itself constitute a breach of the Code. Here, as noted above, I have found the employer's response adequate and not in violation of the Code, given the grievor's insistence that the

matter be dealt with informally and given the differing versions of events between the grievor and E.

That leaves an assessment of damages for the employer's failure to accommodate, apart from the direct financial losses addressed above. It is difficult to assess this claim since, on her own evidence, the grievor has suffered as result of the two incidents themselves and her perception about the inadequacy of the employer's investigation. I also note that the grievor's failure to attend the first IME did not assist the situation. Further, despite its position on the grievor's right to accommodation, the TDSB offered the grievor alternate positions in an effort to assist her. My impression is that the employer wanted to do the right thing and wanted to do what was legally required of it, however, it truly did not understand the doctor's reports to require it to do more than it was doing. In part, it was thwarted by the messages given by the various doctors, which were not clear. On the other hand, on my assessment, the TDSB did not read Dr. West's report correctly and he was a doctor it had referred the grievor to. The employer's failure to accommodate the grievor caused injury to her. In these circumstances I find it appropriate to make an award of $5, 000 for general damages, breach of her human and collective agreement rights and for the failure to accommodate.

I shall remain seized if there are difficulties implementing this award.

Brian McLean

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Brian McLean

Toronto, Ontario

June 2015.