IN THE MATTER OF AN ARBITRATION

BETWEEN

LONDON CATHOLIC DISCTRICT SCHOOL BOARD

AND

ONTARIO ENGLISH CATHTOLIC TEACHERS ASSOCATION

GRIEVANCE OF MYRIAM MICHAIL

Arbitrator:	Richard Brown
For the Union:	David Bloom
For the Employer:	Chris White
Hearing:	May 25 and June 15, 2012; April 4 and 5, May 23 and June 27, 2013 London, Ontario

Myriam Michail is a teacher with the London District Catholic School Board (LDCSB). Since childhood she has suffered from a cardio-vascular illness, vasovagel syndrome, and her symptoms have worsened over time. They include dizziness, fatigue, stress and occasional fainting. The Ontario English Catholic Teachers' Association (OECTA) filed a grievance, dated April 13, 2011, alleging the LCDSB had failed to accommodate Ms. Michail's disability. The parties later agreed to expand the scope of the grievance to include certain events occurring in the following school year. This agreement is recorded in a letter dated January 17, 2012.

The hearing began with the grievor's testimony and she completed her examination-in-chief on the second day. Before the hearing resumed, the parties were able to fashion a settlement on a number of issues, including full compensation for Ms. Michail's loss of earnings and an arrangement for ongoing accommodation in a guidance position that is less physically demanding than classroom teaching. This award deals with the questions of whether the LCDSB violated the *Human Rights Code* and, if so, whether she is entitled to damages for non-monetary injury and reimbursement of monies spent on psychological services.

An expedited procedure was adopted to address the outstanding issues. A number of documents were submitted in evidence including commendations, medical reports, clinical notes, emails, contemporaneous notes made by the grievor and an impact statement prepared by her. When the hearing resumed, Ms. Michael was cross-examined. There were five additional witnesses. The union called Patricia Bourke who adopted a will-say statement before being cross-examined. The employer called Rick Sheardown, Amie Davis and Rita Haill, each of whom likewise adopted a

will-say statement and then were cross-examined. The union also submitted a will-say statement signed by Shelly Malone who was unable to attend the hearing.

I

Ms. Michail taught French for many years, first in elementary schools and then in secondary schools. She moved to Regina Muni College (RMC) in September of 2007. She was off work from March of 2010 until the end of that school year because her illness had entered an acute phase.

Ms. Michail returned to work in the fall of 2010 with one-third of the normal workload as recommended by her family physician. In a note dated July 5, 2010, Dr. Horne suggested she teach in the "mid-morning" and "recommended" her class be at an academic level requiring less stamina to deal with disciplinary problems. The grievor had been assigned to teach a grade-nine French class during the first period of the school day. She spoke to Rick Sheardown who was then in his first year as a vice-principal. He offered to change her assignment to applied French in the third period. She declined this offer to avoid disciplinary challenges and asked for another class at the academic level in the second period. Mr. Sheardown asked the second-period teacher to switch, the teacher said no and the grievor's request was denied.

That semester Ms. Michail remained in the classroom where she had previously taught full-time, sharing it with another teacher who regularly moved the desks into a different configuration. She raised this issue with the Principal, Nick Vecciho, who refused to intervene. Ms. Michail testified her

students rearranged the furniture for her because she was unable to perform this task.

Planning for the next semester began in the late fall. In November Ms. Michail met with Rick Sheardown and Heather Gabel from human resources to discuss possible assignments other than classroom teaching. A letter dated January 13, 2011 from Ms. Michail's specialist, Dr. L. Patrick, recommended she continue to work part-time, teaching one class per day and doing some work in guidance. Dr. Patrick's letter indicated he hoped the grievor's medical restrictions would be temporary but only time would tell.

On January 20, 2011 Ms. Michail again met with Rick Sheardown and Heather Gabel. The grievor was offered a choice between two assignments: (1) one section of French and one of guidance; or (2) two sections of guidance. She chose the latter in part because she would have had to change classrooms if she continued to teach French. She did not feel up to the physical challenge of setting up a new classroom. She had the formal qualifications to be a guidance counselor but had not previously held this position. The grievor testified she was told she would not have direct responsibility for students but would be able to observe other counselors at work. Ms. Gabel said the grievor would be mentored by a colleague in the guidance department. Mr. Sheardown suggested the mentor be Patricia Bourke because he thought she and the grievor were friendly with one another. The grievor indicated she would be happy to be mentored by Ms. Bourke or by Sandra Chevalier-Fell who was then head of the department. When the grievor asked if her assignment in guidance would affect any of the existing counselors, Ms. Gabel answered in the negative, saying two extra sections would be added to get the grievor back to work.

Ms. Michail worked in the guidance department from the beginning of February until the 25th of that month when her assignment ended prematurely. The other guidance counselors that semester were Sandal Chevalier Fell, Rita Haill and Patricia Bourke. Ms. Bourke was one of two OECTA representatives at the school.

Ms. Michael felt welcomed by Ms. Bourke. The grievor testified Sandra Chevalier-Fell was unwelcoming and told her guidance work should not be used as an accommodation for a disabled teacher. According to the grievor, Ms. Chevalier-Fell also said she and Rita Haill had raised their concern about such accommodation with the school administration. Ms. Bourke's will-say indicates they raised the same concern with her, saying she would be "pushed back into a classroom" if guidance was used to accommodate the grievor permanently. Ms. Michail felt shunned by Ms. Haill. When she testified, Ms. Haill denied being concerned about the grievor's accommodation but admitted having questions about it. Ms. Haill also denied saying anyone would be pushed back into a classroom. Ms. Chevalier-Fell was not called as a witness because she was on sick leave at the time of the hearing.

Ms. Chevalier-Fell also decided the grievor should not be allowed the same level of access to electronic student records as other guidance counselors, saying she should have only the level of access permitted to the secretary.

When Patricia Bourke met with a student and parent, she allowed Ms. Michail to observe. After learning what had happened, Sandra Chevalier-Fell said the grievor should not attend a student interview again for reasons of confidentiality.

Ms. Michael was excluded from meetings attended by all other guidance counselors. In her impact statement, the grievor recounted being denied permission to attend a credit recovery meeting on February 4. Ms. Bourke testified the other two counselors told her not to invite the grievor to a student success meeting. This testimony was not contradicted.

Ms. Michail spent most of her time in the guidance department doing a range of clerical and administrative tasks, such as counting forms, making packages for course selection and tracking community service. On days with no work to do, the grievor studied for an advanced guidance qualification.

Before beginning the guidance assignment, Ms. Michail had been offered a choice between two workspaces: a room in the main administration area to be shared with two commissionaires and a police officer; or a room in the guidance department containing a large number of filing cabinets. The former already had connections for phone and computer but the latter did not. The grievor chose the workspace in the guidance department in order to be closer to the action there. The computer wiring was not installed until February 23 and the phone connection was not yet in place on February 25, the grievor's last day of work in guidance that semester. The evidence leads me to conclude this work was delayed because the guidance secretary, a member of the CUPE bargaining unit, had filed a grievance about Ms. Michael's use of the room where the secretary did filing. The grievor made a note on February 17 indicating Mr. Sheardown said he had not yet submitted an order to have the computer hooked up because he was waiting to meet with CUPE. Mr. Sheardown did not recall this comment but he did not deny making it. The vice-principal testified he did not view the secretary's concern as legitimate and told her the room was an appropriate place for the grievor.

The notes made by Ms. Michail on February 17 also record other things she discussed with the vice-principal that day. The grievor made a comment about her quarters being cramped because filing cabinets had not yet been moved as promised. When Mr. Sheardown asked if she would like some cabinets moved, she answered in the negative, saying she was afraid of retaliation from others in guidance. She added that the situation was already "really bad" with only Ms. Bourke speaking to her.

On February 23 Ms. Michael did ask Mr. Sheardown to have some cabinets moved because she was having difficulty opening the window behind the desk. She testified he "made a face" and asked why she wanted to open the window when the temperature was 15 below. She then "reminded" him of her need for fresh air due to her medical condition. He asked if she could move the cabinets. She declined based on her physical condition and he then emailed Ms. Chevalier-Fell about moving them. When Mr. Sheardown learned on February 23 that the grievor's work room had been wired for a computer connection, he offered to connect her computer but was unable to find the cables required to do so.

The conversation about moving filing cabinets on February 23 was followed by a brief discussion of how the grievor was being treated by her colleagues. According to a note made by Ms. Michail that day, she told the vice-principal that other counselors were "not happy" about her presence and were "taking it out" on her. When the grievor recounted having told them that extra sections had been created to accommodate her medical condition, the vice-principal replied maybe they needed to hear it from the board, saying he would talk to Ms. Gabel.

Later the same day Mr. Sheardown again spoke to Ms. Michail, saying he and Ms. Gabel planned to convene a meeting of the grievance

counselors on February 25. According to the notes made by the grievor on February 23, she mentioned to the vice-principal having already told the other guidance counselors that her placement was temporary. The grievor also told Mr. Sheardown she did not want to attend the proposed meeting, crying as she did so. The vice-principal conceded in cross-examination it was reasonable to assume the grievor was reluctant to go to the meeting because she did not want to confront the other counselors. Heather Gable subsequently persuaded the grievor to attend the meeting scheduled for February 25.

Mr. Sheardown had known from the outset that some in guidance were opposed to Ms. Michail being accommodated there. When he first told Ms. Chevalier-Fell that the grievor would be working in guidance, the department head expressed concern that a long-term accommodation would displace someone already working in guidance. According to Mr. Sheardown, Ms. Chevalier-Fell reiterated this concern to him on subsequent occasions and the same concern was raised with him by Ms. Haill.

Mr. Sheardown also knew Ms. Michail felt poorly treated by Ms. Chevalier-Fell and Ms. Haill. The grievor's notes about what she told the vice-principal on February 17 and 23 are summarized above. Mr. Sheardown testified the grievor also complained about other counselors not saying "good morning." Moreover, he was aware Ms. Chevalier-Fell did not want the grievor to have full access to student data. In particular, he understood the grievor was being denied access to information relating to course changes. In cross-examination, the vice-principal conceded there was no reason Ms. Michail should not have full access to student data. He also acknowledged she spoke to him about being excluded from certain activities in the guidance department and about not seeing students.

In cross-examination Mr. Sheardown was asked about what directions he gave to other members of the guidance department relating to Ms. Michail's role there. The vice-principal replied he told Ms. Chevalier-Fell at the outset to find some guidance-related duties for the grievor to do. He conceded no written directions had been issued. Asked in re-examination about whether written directions were part of normal practice, he replied directions were normally given face-to-face. Having reviewed Mr. Sheardown's testimony in its entirety, I conclude there is no evidence he ever gave any directions, verbal or written, that the grievor should be allowed to participate in the activities from which she had been excluded to the knowledge of the vice-principal.

On February 25 Ms. Gabel and Mr. Sheardown met with the four guidance counselors. With the exception of Ms. Gabel and Ms. Chevalier-Fell, everyone present at this meeting gave evidence about it. Ms. Gabel chaired the meeting. The way it started is described in Patricia Bourke's will-say:

> Heather Gabel opened the meeting. She explained that a workplace accommodation was for medical reasons, but she did not disclose anything about Myriam's medical condition. She said the goal was to return Myriam to health and to work in the classroom as a French teacher. She said this accommodation in guidance would not be continuing in September of 2011. She said Myriam was to be given tasks and work to do. She said the sections came from a bank of sections and that the Board does this sort of thing. She assured us that none of the sections were coming out of the guidance allotment at RMC.

Both Ms. Haille and Ms. Bourke responded to these opening comments by saying it would have been helpful to have heard them sooner. Ms. Gabel responded with an apology for the delay.

There was a discussion about mentorship at some point in the meeting. Ms. Michail stated she had been promised a mentor and Ms. Gabel agreed with the grievor's statement. Ms. Chevalier-Fell replied the other counselors did not have time to mentor anyone. Mr. Sheardown made a comment about mentorship, prompting Ms. Chevalier-Fell to ask if he was ordering her to mentor the grievor. The vice-principal replied that he was not in a position to order anyone to mentor a co-worker.

Towards the end of the meeting, Ms. Michail said something about her work that elicited a reaction from Mr. Sheardown. Two things about this exchange are undisputed. The vice-principal admits having said Ms. Gabel might "slap his hand" later for what he was saying. By the time Mr. Sheardown stopped speaking, Ms. Michail was in tears and Ms. Gabel called an end to the meeting. The rest of what occurred at this stage in the meeting is hotly contested.

The grievor testified she began to say something about not being "given any work" and was interrupted by the vice-principal who, ignoring her attempts to finish her statement, proceeded to list all of tasks that had been assigned to her and ended by saying "what more do you want." In her testimony Ms. Michail's described Mr. Sheardown as "yelling" in a "very angry" tone" and "moving on his chair." Her contemporaneous notes are somewhat different, saying he made "facial expressions" and "raised his voice."

In his will-say statement signed on December 12, 2012, Mr. Sheardown offered a very different account of this exchange. He denied raising his voice, leaving his chair or displaying anger or shock but admitted being frustrated. According to his account, he made a "surprised face" in response to the grievor's comment. When she asked why he had reacted that

way, he initially declined to discuss it. After the grievor asked the same question twice more, he listed nine or ten tasks that have been assigned to her. In cross-examination, Mr. Sheardown did not recall saying "what more do you want" but he conceded it was possible that he did pose this question.

Ms. Bourke's will-say statement, dated December 17, 2012, describes the vice-principal as interrupting the grievor and "yelling" at her in a "rant-like" tone. When interviewed in June of 2011, Ms. Bourke mentioned neither the vice-Principal's tone nor any interruption by him. She initially described him as "speaking in a loud voice." In response to a question from the interviewer, she said perceptions differ but the vice-principal was speaking loud enough to be described as yelling. Ms. Bourke's will-say describes the vice-principal as ending by saying "what more do you want."

Ms. Haille's will-say statement, dated March 28, 2013, indicates Mr. Sheardown did not raise his voice or use a tone that was inappropriate. She made no mention of tone or volume when interviewed in June of 2011. At that time, Ms. Haill described Mr. Sheardown as being "shocked" when the grievor said she had not been given work to do. Ms. Haill added the grievor "called" the vice-principal on his facial expression and was "quite persistent" with him.

Weighing all of this evidence, I conclude Ms. Michail did not finish her comment because she was side-tracked by Mr. Sheardown reacting with a look of surprise, not because he interrupted her by speaking. Patricia Bourke made no mention of an interruption in June of 2011when her memory was relatively fresh. Both Mr. Sheardown and Ms. Haill offered accounts not involving an interruption, the latter's explanation also being offered in June of 2011. In the absence of an interruption, the most likely

explanation for the grievor not finishing her statement is that she was side-tracked by Mr. Sheardown's look of surprise.

I also conclude Ms. Michail asked Mr. Sheardown to explain his facial expression and she continued to press for an answer when he initially offered none. This conclusion is supported by Mr. Sheardown's will-say and Ms. Haill's statement in June of 2011. They are the only two witnesses to provide evidence about how the grievor reacted to Mr. Sheardown's surprised look.

There is conflicting evidence as to whether Mr. Sheardown replied to the grievor in a raised voice but the freshest evidence indicates he did. I note a raised voice is what Ms. Michail recorded in her contemporaneous note and a loud voice is what Ms. Bourke first reported in June of 2011. The will-says of Ms. Haille and Mr. Sheardown, stating his voice was not raised, were provided much later, roughly two years after the events in question. Based on the evidence of Ms. Michail and Ms. Bourke, I conclude the vice-principal ended his comments by asking the grievor what more she wanted, something he does not deny. This rhetorical question was inappropriate, given that the employer had failed to deliver the type of guidance assignment initially promised to the grievor. Mr. Sheardown's raised voice and inappropriate question amounted to a scolding, one delivered in front of the grievor's fellow counselors.

My conclusion the vice-principal scolded the grievor is consistent with his comment about his hand being slapped. His explanation for this comment is that he and Ms. Gabel had agreed before the meeting to keep it "positive." It is not obvious to me why a polite discussion about the tasks assigned to the grievor would not have been positive. In my view, the more likely explanation for Mr. Sheardown's comment about having his hand

slapped is that he realized he was out of line in the way he was speaking to the grievor.

Patricia Bourke's will-say statement describes Rita Haill's assessment of the February 25 meeting. According to Ms. Bourke, immediately after the meeting Ms. Haill described it as "good." This evidence was not contradicted.

The association contends the meeting of February 25 was called to address the concerns of Ms. Chevalier-Fell and Ms. Haill and not to assist the grievor. In my view, the evidence does not support this contention. The grievor complained to Mr. Sheardown on February 23 about how she was being treated by some members of the guidance department, and he responded the same day by talking to Heather Gabel and then proposing that all concerned meet on February 25. This sequence of events leads me to conclude the primary motivation for the meeting was to address the grievor's concerns. In coming to this conclusion, I have not overlooked the fact that part of the meeting was devoted to addressing the concerns of Ms. Chevalier-Fell and Ms. Haill. In my view, alleviating their concerns could be reasonably expected to improve their treatment of the grievor. However, as discussed below, Mr. Sheardown should not have asked the grievor to face her antagonists and he should ordered them to start including her in meaningful guidance activities.

The association contends Mr. Sheardown's conduct at the end of February 25 meeting was intended to silence Ms. Michail. In my view, the evidence does not support this contention. His comments were spontaneous and not premeditated. The vice-principal lost his temper but he did not intentionally set out to silence the grievor.

II

In July of 2011 Ms. Michail underwent major surgery unrelated to her cardio-vascular illness. In a letter dated August 19, 2011, Dr. Horne noted there had been complications related to the grievor's surgery and stated she would not be able to return to work "until approximately mid-October." He went on the say:

> When she returns to work she would benefit from working half days for the fall semester. I think she would be able to do guidance work but not classroom teaching. …
>
> She should start later in the morning at perhaps 9:00 a.m. She should limit standing, lifting, bending and limit physical exertion. She should have rest breaks as required and should have access to fresh air in the work area. She should avoid on call assignments. She should avoid stressful situations where possible. Teaching students with learning and behavioral challenges would be an additional stressor and thus should be avoided.

In this letter, Dr. Horne suggested the grievor's restrictions should be reviewed at the end of the 2011-12 school year.

On September 26 Heather Gabel mailed to Ms. Michail a return-to-work form to be completed by her doctor. Ms. Gabel's covering letter stated a return-to-work meeting would be held five to ten business days before the grievor's return. Dr. Horne completed the form on October 4, indicating the grievor would be able to resume working 2/3 of normal daily hours effective October 13. The form records a number of physical restrictions: walking, stair climbing and working above shoulder height as tolerated; standing for no more than 15 minutes; and not lifting more than 5 kilograms. The form also contains the following comments by Dr. Horne:

> Rest breaks as required. Requires access to fresh air in the work area. Avoid stressful situations where possible. Please see my note of Aug. 19/11. Avoid on call assignments. Avoid teaching students with learning or behavioral problems.

Dr. Horne indicated these restrictions would remain in effect for three months.

In a letter to Ms. Michail, dated October 13, Ms. Gabel summarized the restrictions contained in Dr. Horne's letter of August 19 and characterized them as not allowing the grievor to meet the essential duties of a teacher. Ms. Gabel went on to say the employer did not have a position that met these restrictions. She also contended the employer never received a response to a request for medical information dated Dec 17, 2010, apparently overlooking the letter from Dr. Patrick dated January 13, 2011. Ms. Gabel ended her letter by posing a series of questions to be answered by the grievor's doctor:

- Does Myriam have a diagnosable medical condition or disability that requires accommodation?
- If so, what are the objective medical precautions/limitations in relationship to the diagnosis?
- Are the restrictions temporary or permanent?
- Noting the duration of illness has Myriam reached maximum medical recovery?
- Does Myriam have a permanent impairment?
- Is Myriam seeing a specialist?
- Is Myriam involved in a treatment program?
- What is the expected duration and outcome of the treatment program?

The letter from Ms. Gabel also suggested the grievor should apply for LTD benefits if she was not able to resume working, noting she had only eight days left in her sick bank.

These questions were addressed by Dr. Horne in a letter dated October 31, by Dr. Patrick in a letter dated November 2 and by Dr. Reist, the grievor's psychologist, in a letter dated November 4.

Apparently satisfied with the medical information provided at this stage, the employer convened a return-to-work meeting on November 15. The meeting was called by Amy Davis, the LDCSB's new Manager of Health Promotion and Wellness. Heather Gabel also attended for the employer. Ms. Michail was accompanied by Sheila Bresica, president of OECTA's London unit, and Shelley Malone, vice-president. Ms. Gabel presented two possible placements, an administrative support position at the Centre for Lifelong Learning and a temporary position in the guidance department at RMC.

Ms. Michail expressed an interest in the guidance position. It was available temporarily because Ms. Chevalier-Fell had left on long-term sick leave during the first week of November. The grievor also stated she was concerned about not having been considered for a permanent position at RMC resulting from the departure of Ms. Haill who had transferred to Woodstock in September of 2011. In her testimony, the grievor conceded assignments for September are normally made in May and June of the preceding school year.

At the meeting on November 15, there was a discussion about whom Ms. Michail would report to at RMC. She asked to report to the other vice-principal there, and not to Mr. Sheardown. Ms. Davis said this might be an issue and the others present told her about what had transpired between Ms. Michail and Mr. Sheardown the proceeding February. In her testimony, Ms. Davis described Ms. Michail's demeanor during this discussion:

> The grievor began crying, placed her face in her hands and appeared extremely shaky, depressed and fragile. She continued to cry on an intermittent basis throughout the balance of the meeting.

In cross-examination, Ms. Michail conceded she had been emotional and had cried.

At the end of meeting on November 15, Ms. Davis undertook to schedule a meeting, to be held at RMC on November 17, between Ms. Michail and school administrators. The meeting planned for November 17 never occurred. Soon after the November 15 meeting, Ms. Davis had a conference call with two administrators at RMC, Nick Vecchio and Rick Sheardown. Having heard their concerns, Ms. Davis advised Ms. Michail she would not be returning to RMC that semester. Ms. Davis testified she made the decision not to proceed with a placement at RMC based on two factors: organizational issues identified during the conference call; and concern for the grievor's health. In her will-say, Ms. Davis recorded her assessment, based on the grievor's demeanor at the November 15 meeting, that she was "not able to report to Mr. Sheardown" at that time. Ms. Davis has a post-graduate degree in social work but no medical training.

The organizational issues are succinctly summarized in Ms. Davis' will-say statement. Some of those concerns led the employer to determine whoever replaced Ms. Chevalier-Fell would have to report to Mr. Sheardown:

> The students at RMC were divided alphabetically with each of the two Vice-Principals having responsibility for one half. Similarly, the students at RMC were divided alphabetically amongst the guidance counselors. The guidance counselor who was absent due to long-term illness handled the same students as Sheardown. It was extremely important to maintain continuity as much as possible and it would not

> be feasible to have the group of students in question dealing with both a new guidance counselor and a new Vice-Principal.

In cross-examination, Ms. Michael conceded maintaining continuity was "recommended."

Ms. Davis cited other organizational concerns in her will say statement:

> At the same time, RMC was dealing with a number of other challenges in the guidance department given that the Head of the department was on sick leave and there were new staff in one of the guidance counselor positions and the administrative assistant role within the department.

There is no evidence suggesting these concerns weighed in favour of denying the vacant position to the grievor and giving it instead to Marcelea Kartye, the teacher who actually assumed it.

When Ms. Davis informed Ms. Michail there would not be a placement at RMC, the grievor offered to work with Mr. Sheardown. Ms. Michail testified she had already made the same offer at the meeting on November 15, but Ms. Davis had a different recollection. In my view, nothing turns on this factual dispute as to when the grievor first expressed a willingness to work with Mr. Sheardown.

Ms. Michail remained off work until almost the end of November. From November 28 until the Christmas break, she held an over-complement assignment in the guidance department at Holy Cross School in Strathroy, some 40 kilometers from London, for two-thirds of normal daily hours. Ms. Michail testified that commuting by car to Strathroy added to her "load" in terms of both physical effort and stress. Ms. Davis conceded in cross-examination that she knew in November of 2011 that the grievor was nervous about driving to Strathroy in winter conditions. According to Ms.

Davis, the grievor was assigned to Holy Cross School because someone there could show her the technical aspects of being a counselor. Ms. Michail testified she never received the training promised. Ms. Michail described her duties at Holy Cross as demeaning secretarial work.

For almost all of the Christmas break, Ms. Michail did not know whether she would be returning to work on January 9, 2012 when school resumed. On January 6 she was given a temporary placement, again over complement, at John Paul II in London. The grievor testified her experience there was positive, saying the department head was a wonderful mentor. Her hours were increased to full-time while at this school.

Ms. Michail returned to RMC on February 27 and assumed the position she had sought in November, temporarily replacing Ms. Chevalier-Fell and reporting to Mr. Sheardown. The grievor remained in the RMC guidance department for the remainder of the school year, working full-time.

On May 24, 2012, Dr. Horne provided a letter indicating Ms. Michail required a "permanent workplace accommodation" as a guidance teacher. This was the first medical report received by the employer to indicate her restrictions were permanent. She has been appointed to a guidance position for subsequent years.

III

Dr. Reist, the grievor's psychologist, provided a written assessment of the impact on her of what had happened during the accommodation process. Ms. Michail first saw Dr. Reist on March 30, 2010, several months before any of the events recounted above. The grievor had asked her family doctor for a referral to a psychologist. Dr. Reist's intake form contains check marks indicating the grievor was experiencing difficulties both at work and outside

of work. According to notes made by Dr. Reist on March 30, the problem about which the grievor spoke at length was a "horrible" principal at RMC, who was sarcastic, turned the staff against her and attacked her identity. That principal was identified in the grievor's testimony as Claudio China, Ms. Michael testified she had left another school to escape him only to find that he transferred to RMC for the 2009-10 school year.

Ms. Michail saw Dr. Reist twice during the second semester of the 2009-10 school year. There were five appointments in the first semester of the 2010-11 and eight in the second semester. In 2011-12, there were four visits during the first semester and nine during the second. The employer first learned Ms. Michail was seeing a psychologist when it received Dr. Reist's letter dated November 4, 2011.

In a letter dated May 15, 2012, Dr. Reist summarized the impact on the grievor of events during the 2010-11 and 2011-12 school years which are described above. Dr. Reist described the grievor as "distressed" during the first semester in 2010-11 because she was required to teach during the first period and to share her classroom with another teacher who rearranged the furniture. As to the impact of the treatment Ms. Michail received from her colleagues in guidance during the second semester, Dr. Reiss wrote:

> Ms. Michail's sense of confidence and self-worth deteriorated, she felt rejected and ostracized and became increasingly anxious and depressed.

Dr. Reiss made the following comment about the February 25 meeting which she understood to involve the vice-principal yelling at the grievor:

> Unfortunately this incident further intensified Ms. Michail's psychological symptoms. Specifically she experienced persistent feelings of sadness, frequent crying, reduced interest in typically enjoyable activities, withdrawal from daily activities and social

> connections, lethargy and reduced energy and sleep disturbance. She also reported a worsening of her physical symptoms of anxiety including chest pains and palpitations, dizziness and shortness of breath. Furthermore, her perception of self-worth deteriorated and she struggled with considerable self-doubt. Indeed, during treatment sessions following the February 25, 2011 meeting, Ms. Michail frequently became tearful, required guidance and reassurance, and felt hopeless to change her situation.

As to the delay in the grievor's return to work in the fall of 2011, Dr. Reist wrote:

> Ms. Michail became increasingly and significantly anxious and depressed regarding the fact that she was not being accommodated at work, that she was not being permitted to resume working, and that she was no longer receiving salary or health benefits.

Dealing with the RMC placement discussed on November 15, 2011 but not implemented, Dr. Reiss commented:

> Unfortunately, this situation caused her significant stress and perpetuated her emotional distress and sense of feeling rejected, which impaired her sense of self-worth and intensified her depression symptoms.

Dr. Reiss also addressed the grievor's Strathroy assignment in late November and December:

> [S]he struggled physically to drive back and forth … [T]he impact of …relocating to a new school … caused her significant stress and anxiety…

Dr. Reiss went on to note that further anxiety was caused by the uncertainty faced by the grievor during the Christmas break.

IV

The association alleges the employer's treatment of the grievor contravened the *Human Rights Code*. The employer concedes I have jurisdiction to determine whether the *Code* has been contravened.

In particular, the association alleges contraventions of the following sections of the *Code*:

> 5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.
>
> (2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.
>
> 8. Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing.

The right created by s. 5(1) is qualified by s. 17 relating to disability and undue hardship.

> 17.(1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability
>
> (2) No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

In relation to the 2010-11 school year, the association contends the employer contravened the right to equal treatment conferred by section 5(1) during February of 2011 in the following ways:

- failing to provide a telephone and computer in the grievor's workspace;
- failing to recognize the grievor's need for fresh air; and
- failing to ensure the staff in the guidance department allowed the grievor to access student data, observe interviews and participate in staff meetings.

The association also contends Mr. Sheardown's treatment of the grievor at the meeting on February 25, 2011 violated not only s.5(1) but also constituted harassment under s.5(2) and reprisal under s. 8.

The employer denies Mr. Sheardown did anything inappropriate on February 25. As to the grievor's other complaints about her guidance assignment, while acknowledging there were problems with the implementation of that assignment, the employer contends it was not legally obliged to offer a guidance assignment in early 2011, because the medical information then provided by the grievor disclosed only temporary restrictions, and because there was no vacancy in the guidance department. The employer also submits the duty to accommodate required it to provide a "reasonable accommodation" and not a "perfect" one. In this regard, I was referred to the following passage from the judgment of the Supreme Court of Canada in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970:

> The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in O'Malley. The complainant cannot expect a perfect solution. (para. 44)

As to the 2011-12 school year, the association contends the employer contravened s. 5(1) in the following ways:

- failing to offer to the grievor the vacancy in guidance created by the departure of Rita Haill at the end of the preceding school year
- failing to address in a timely fashion the grievor's application to return to work in October and suggesting she apply for LTD benefits;
- failing to allow her to return to work at RMC in November, as a temporary replacement for Sandra Chavlier-Fell, as initially proposed by Amy Davis; and
- assigning the grievor to work at Holy Cross in Strathroy.

The employer contends the employer acted properly based upon the medical information available and given the grievor's distress on November 15 when faced with the prospect of working with Mr. Sheardown.

V

I begin my analysis with the employer's contention that it was not obligated to offer Ms. Michail an over-complement assignment in the guidance department in February of 2011. The general proposition that the duty to accommodate does not require the creation an over-complement position for a disabled employee is trite law. Creating an unneeded job to accommodate a disabled employee would constitute undue hardship. On the other hand, if a vacancy is anticipated in a position that a disabled person, having permanent restrictions, is capable of doing and qualified to hold, and if anyone assuming that role for the first time would normally begin by shadowing an incumbent for an extended period, an employer might well be obliged to offer the shadow assignment as an accommodation, even though it would be over-complement in a sense. On the other hand, in my view,

there is no obligation to offer an extended shadow assignment to someone with temporary restrictions because that person would be expected to resume the pre-disability job when able to do so. In a case where the duration of restrictions is uncertain, they should be treated as temporary until medical evidence indicates they are unlikely to end in the near future.

An employer may decide to offer an over-complement assignment to an employee with temporary restrictions in circumstances where there is no legal obligation to do so. In my view, making such an offer and then implementing it in a manner that undermines a disabled employee's dignity and self-respect constitutes a contravention of s. 5(1).

In the months preceding Ms. Michail's initial assignment to the guidance department at RMC, neither her family doctor nor her specialist had characterized her restrictions, precluding classroom teaching, as permanent. In these circumstances, the employer was not obliged to offer her an over-complement assignment in the RMC guidance department.

As events transpired, the employer did offer the grievor such an assignment. Moreover, the employer promised her a mentor, leading her reasonably to believe she would be given an opportunity to gain practical experience about guidance work under the tutelage of a seasoned counsellor.

Unfortunately, the implementation of this commendable plan was foiled in a number of ways. Ms. Michail moved to the guidance department at the beginning of February but her workspace was not wired for computer access until February 23 and her workspace still lacked telephone wiring on February 25, the last day she worked in guidance that semester. Mr. Sheardown did not place an order to have wiring installed until after February 17. He delayed placing this order because the guidance secretary had objected to the grievor's assignment, an objection which the vice-

principal conceded was not legitimate. This unjustified delay violated s. 5(1) of the *Code* because it contributed to undermining the grievor's sense of dignity and self-respect.

As Mr. Sheardown was part of the management team at RMC, the employer is strictly liable for this violation along with any other contravention he committed. See *Janzen* v. *Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, at pages 1292 to 1294.

I find no violation of the *Code* in relation to access to fresh air in the grievor's workspace. Her request that filing cabinets be moved to allow her to open the window more easily was made on February 23, 2011 and Mr. Sheardown took steps that same day to fulfill her request. Before taking those steps, he made a face, asked why the grievor wanted to open a window at minus fifteen degrees and inquired whether she could move the cabinets herself. As Ms. Michail did not specify the nature of the vice-principal's facial expression, it cannot support a finding that the *Code* was violated. Given that prompt action was taken to have the cabinets moved, I do not view Mr. Sheardown's questions as constituting a violation of s. 5(1). Moreover, I note none of the medical documents provided to the employer at the relevant time, either before or during the 2010-11 school year, made any mention of fresh air. Dr. Horne first mentioned it in a letter dated August 19, 2011.

Aside from the meeting of February 25, the rest of the grievor's complaints about her experience in the guidance department relate to the way she was treated by others working there, primarily Sandra Chevalier-Fell and Rita Haill. The association contends the employer contravened the *Code* by failing to control their conduct. As a matter of law, an employer is not strictly liable for the conduct of employees who are not managers.

Nonetheless, an employer is required by the *Code* to take reasonable steps to ensure such employees do not interfere with anyone's right to equal treatment under s. 5(1).

I conclude the employer did not take reasonable steps in this case. Ms. Chevalier-Fell refused to allow the grievor to observe student interviews and denied her full access to electronic data on students. Both Ms. Chevalier-Fell and Ms. Haill made it clear the grievor was not welcome at departmental meetings. The activities from which the grievor was excluded are among those in which she reasonably expected to participate, based on the promised mentorship. Mr. Sheardown conceded he was aware in February of 2011 that certain members of the guidance department were excluding the grievor from activities there. In my view, these facts are sufficient to shift the burden of proof onto the employer, requiring it to prove the school administration took reasonable steps to end the obstruction. As noted above, there is no evidence anyone in authority ever told those excluding the grievor that she should be included. The employer's abdication of responsibility for controlling the grievor's fellow counsellors violated s. 5(1).

The meeting on February 25 was convened by Mr. Sheardown and Ms. Gabel with the intention of assisting Ms. Michail. But once again good intentions went awry. As the association suggests, rather than asking the grievor to confront her antagonists on February 25, Mr. Sheardown should have met with them and directed them to cease excluding her from departmental activities. Having called the meeting, he issued no such direction there. To make matters worse, he scolded the grievor in a raised voice and in front of her fellow counsellors. Any provocation provided by the grievor's persistent demands for the vice-principal to explain the

surprised look on his face did not justify the public scolding she received. His conduct on February 25 contravened s. 5(1) of the *Code*.

The association contends the same conduct constituted harassment under s. 5(2) and reprisal under s. 8. In my view, this single and spontaneous incident of intemperate remarks falls short of harassment. Having already concluded Mr. Sheardown did not intend to silence the grievor, I do not view his conduct as a reprisal for her seeking accommodation.

I now turn to the violations alleged by the association to have occurred in relation to the grievor's assignment for the 2011-12 school year. Did the employer violate s. 5(1) by not offering Ms. Michail the vacancy created by Rita Haill's departure? The position she vacated was assigned to Colette McNally, apparently toward the end of the preceding school year, when assignments are normally made. At that time, Ms. Michail was on sick leave and the employer had no indication as to when she would return to work. Nor had the employer yet received any indication her restrictions were judged by her doctors to be permanent. In my view, s 5(1) did not require the employer to hold open a permanent position for an employee known to have only temporary restrictions for whom there was no medical documentation specifying a return to work date.

The circumstances were very different when a temporary position came open in the guidance department at the beginning of November as a result of Ms. Chevalier-Fell's departure on long-term sick leave. The employer had learned in August that Dr. Horne expected Ms. Michail to be fit for work by mid-October. In his letter of August 19, Dr. Horne stated she would be able to do guidance work but not classroom teaching. Ms. Gabel waited until September 26 before sending the grievor a return-to-work form to be completed by her doctor. The completed form is dated October 4. Then

on October 13 Ms. Gabel wrote to the grievor, asserting her restrictions rendered her unable to perform the essential duties of a teacher and providing further questions to be answered by her doctors. In my view, if these questions remained unanswered at that stage, they should have been posed weeks earlier, shortly after receipt of Dr. Horne's letter of August 19. The employer's delay in seeking clarification occurred when there was no vacant guidance position, but the result of the delay was the employer's assessment of the grievor's restrictions had not been completed when a temporary vacancy did arise at RMC in the first week of November. In these circumstances, I conclude the employer's delay contravened s. 5(1).

On November 15 Ms. Davis discussed this temporary vacancy with Ms. Michail. The fact this position was discussed on the initiative of Ms. Davis indicates she had initially determined the grievor's restrictions did not preclude guidance work. Ms. Davis later decided the RMC guidance assignment was not suitable. She determined the grievor would have to report to Mr. Sheardown, so that his cohort of students would not have to deal with both a new guidance counsellor and a new vice-principal. Ms. Davis was of the view that the grievor was not able to report to Mr. Sheardown, based on the distress she displayed on November 15 when faced with the prospect of working with him.

Ms. Michail's distress about reporting to Mr. Sheardown was largely a result of the way he had previously treated her. I have already concluded some of his acts and omissions in February of 2011, including his public scolding of the grievor, violated s. 5(1) of the *Code*. Her subsequent distress over the prospect of working with him might well have been alleviated if he had apologized and undertaken to mend his ways. In the absence of such an apology or undertaking, I conclude a fresh violation occurred in November

of 2011 when the employer withheld an RMC guidance assignment from the grievor and offered her only work in Strathroy requiring a commute that aggravated her stress and fatigue.

VI

The association seeks the following monetary awards: (1) $25,000 in general damages; (2) $10, 000 in special damages; (3) an additional $10,000 in punitive damages; and (4) compensation for the cost of psychological counselling by Dr. Reist and medical reports prepared by her for the purpose of this arbitration.

The claim for what are characterized as general damages is based on s. 45.1(2) of the *Human Rights Code*:

> On an application under section 34, the Tribunal may make one or more of the following orders if the Tribunal determines that a party to the application has infringed a right under Part I of another party to the application:
>
> 1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.

The employer concedes I have the remedial authority to award relief under this section.

The claim for what are characterized as special damages is based on s. 48 of the *Labour Relations Act*, conferring a broad remedial authority on arbitrators, combined with the decision of the Supreme Court of Canada in *Fidler* v. *Sun Life Assurance Co. of Canada*, [2006] S.C.R. 3. Faced with a wrongful denial of disability benefits under a group insurance policy in *Fidler*, the Supreme Court held damages for mental distress, flowing from a

breach of contract, may be awarded where such distress was within the reasonable contemplation of the parties at the time they made the contract.

In my view, the coupling of s. 48 of the *Labour Relations Act* with *Fidler* does not enlarge the remedial jurisdiction already conferred on me by s. 45.1(2) of the *Code*. The "injury to dignity, feelings and self-respect" contemplated by that section is sufficiently broad to encompass the sort of "mental distress" addressed in *Fidler*. It would be improper for me to award damages for such harm once under the *Code* and then again pursuant to *Fidler*. That would amount to double recovery of damages for the same injury.

The association relies upon three arbitration decisions awarding between $18,000 and $30,000 for injury to dignity, feelings and self-respect: (1) *National Grocers Co. and United Food and Commercial Workers* (2010), 103 C.L.A.S. 266 (Armstrong) with an award of $20,000; (2) *Toronto District School Board and Ontario Secondary School Teacher's Federation*, [2011] O.L.L.A. 461 (Knopf) with an award of $30,000 and (3) *Cyr and Treasury Board* (2011), 105 C.L.A.S. 288 (PSLRB) with an award of $18,000.

In the first two cases, the employer's failure to accommodate, and associated mistreatment of, a disabled employee brought the employment relationship to an end. In *National Grocers*, the grievor was discharged for reasons related to his disability. Arbitrator Armstrong wrote:

> [His] wrongful termination was the culminating event in the Employer's unsympathetic and disputative responses to the grievor's assertion of disability over an extended period, and as a result the grievor suffered and continues to suffer from anxiety, stress and general psychological trauma, the cumulative effect of which has had a seriously negative impact, both on his personal life and his capacity to engage in productive employment. (para. 93)

The grievor was awarded $20,000 for the trauma associated with his mistreatment on the job, his wrongful termination and the impairment of his prospects for future employment.

In *Toronto Board of Education*, the grievor eventually elected to retire early because the employer refused to take steps to accommodate her disability. Her principal had sent a long email to his superiors about the grievor and Arbitrator Knopf characterized this email as a sarcastic and mean-spirited diatribe. Another manager wrote an email described by the arbitrator as having a tone of derision and cynicism. Having denied the grievor's request to rescind her retirement, Arbitrator Knopf awarded $30,000 for the emotional trauma resulting from premeditated mistreatment that had prematurely ended the employment relationship.

The grievor in *Cyr* was not discharged and did not leave her job. Her disability initially had been accommodated by allowing her to work from home, but a new manager ended this accommodation because she was opposed to any employee doing this sort of thing. The grievor's health suffered as a result. Section 53(2)(e) of the *Canadian Human Rights Act* allowed an award for pain and suffering and s. 53(3) allowed an additional award where discrimination occurred "wilfully or recklessly." Adjudicator Paquet awarded $8,000 for pain and suffering and $10,000 for being the victim of wilful or reckless discrimination. In other words, only $8,000 was awarded for pain and suffering, with the balance of the award being akin to punitive damages.

The employer contends the dollar amount any damage award in this case, for injury to dignity, feelings and self-respect, should fall somewhere between zero and 5,000. In support of this contention, I was referred to *City*

of Ottawa and Civic Institute of the Professional Service (2010), 197 L.A.C. (4th) 369 (P.C. Picher) where the arbitrator carefully reviewed the amount awarded in a large number of decisions. In the *City of Ottawa* case itself a medical specialist had recommended moving the grievor to a less stressful job, because stress was aggravating the symptoms of her fibromyalgia. The employer refused for three months to act on this recommendation. The arbitrator's award of $6,500 was based on the $5,000 granted in an earlier case, increased to reflect inflation during the intervening seven years.

In the case at hand, Mr. Sheardown allowed an illegitimate complaint by a CUPE member to delay the installation of computer and phone wiring in February of 2011. He also failed to take reasonable steps to ensure Ms. Michail was treated with dignity and respect by some of her fellow counsellors. At the end of February, she received a public scolding from Mr. Sheardown. This scolding was obviously improper, but it was not pre-meditated and occurred during the course of a well-intentioned, albeit ill-conceived, attempt to assist the grievor. She was absent from work between the end of February and June of 2011. From one perspective, this absence could be attributed to the preceding violations of the *Code*. On the other hand, the grievor might have been absent, perhaps for a period that included all of February, if the employer had not offered her an over-complement assignment in guidance, something it was not obligated to do and deserves credit for doing. In November of 2011, the employer's improper delay, in responding to Ms. Michail's request for accommodation, prevented her from returning to work in a timely fashion. By November her sick credits had run out, leaving her without income. She was denied a placement at RMC because of her concerns about reporting to Mr. Sheardown who had neither apologized nor undertaken to mend his ways. Upon returning to work at the

end of November, she was required to make the tiring commute to Strathroy for a month. The psychological impact of these events is fully documented in Dr. Reist's report. In my view, the instant facts are much more analogous to the scenario in *City of Ottawa* than in any of the other cases cited. Bearing in mind inflation since that decision was made, I award $7,500 as damages for injury to dignity, feelings and self-respect.

The association also seeks an award of punitive damages. While conceding I have the authority to award such damages in appropriate circumstances, the employer contends the facts at had do not warrant such damages. In *Honda Canada Inc.* v. *Keays*, [2008] S.C.R. 362, the Supreme Court ruled punitive damages should be awarded as a remedy only for misconduct that is malicious and outrageous. As the employer's transgressions in this case do not rise to that level, I decline to award punitive damages.

Finally, the association seeks reimbursement for monies Ms. Michail paid to Dr. Reist for counseling and medical reports utilized in this proceeding. An arbitrator has no authority to order one party to reimburse the other for costs incurred in the course of the arbitration. For this reason, I decline to make any award in relation to the medical reports.

As to the counseling sessions, I note the grievor began seeing Dr. Reist before the events giving rise to this grievance and some of the issues they discussed were not work related. In these circumstances, I conclude the *Code* violations set out above gave rise to some, but not all, of the counseling sessions occurring between the first such violation, in early February of 2011, and her return to duty at RMC in February of 2012. In relation to one-half of the sessions during this period, I direct employer to

compensate the grievor for expenditures in excess of the amount already covered by the benefit provisions found in the collective agreement.

Richard M. Brown

Ottawa, Ontario
August 2, 2013