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IN THE MATTER OF AN ARBITRATION

B E T W E E N :

CARLETON UNIVERSITY
(the "University")

- and –

CARLETON UNIVERSITY ACADEMIC STAFF ASSOCIATION
(the "Association")

Accommodation Reconsideration Request

A W A R D

Paula Knopf – Arbitrator

For the University: Amanda Lawrence-Patel

For the Association: Alex Aucoin

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This Award is based on Written Submissions filed pursuant to the Parties' Memorandum of Settlement dated August 26, 2021 creating an expedited grievance resolution process for workload disputes.

The Grievor is a professor whose name has been anonymized to protect personal privacy.

Factual Background

The Memorandum of Settlement (MOS) created a process for faculty members to make pandemic-related family status accommodation requests and for those who received accommodations from March 16, 2020 to August 26, 2021, to have their accommodation plans reconsidered. The MOS also provided that the decisions regarding pandemic-related family status accommodation requests or reconsiderations could be reviewable by this Arbitrator.

On September 11, 2020, Dr. A requested a 0.5 course credit teaching workload reduction as a family status accommodation related to the COVID-19 pandemic. Dr. A sought the relief from teaching because of the cumulative challenges posed by the professional and personal demands of young children, teaching, service and research. Dr. A outlined those issues clearly in a detailed email, asking specifically for the "offloading" of a course assigned for the upcoming Winter semester. The request was articulated as a need to "reduce my workload (and stress-load)".

On September 17, 2020, the Dean of the Faculty approved the request, without a reduction in pay, on the basis that Dr. A would teach a 0.5 credit course "at some point in the future".

During the Winter 2021 academic term, the University applied the 0.5 credit teaching load reduction to Dr. A's schedule, relieving responsibility to teach the specified course in accordance with the request. This resulted in Dr. A teaching only one 0.5 credit course during that term. The University did not reduce Dr. A's compensation, or alter the expectation for research or service.

Dr. A was on medical leave from late August 2021 to April 30, 2022.

In the Spring of 2021, Dr. A requested a further accommodation for the Summer of 2021 due to ongoing childcare obligations coupled with academic responsibilities.

On April 23, 2021, the Dean proposed the following amended accommodation plan "in order to provide . . . flexibility in meeting both your caregiving obligations and your work requirement":

> 1. You will not be assigned to teach [the previously assigned] course for the Summer 2021 term; and,
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> 2. The remaining 0.5 credit from your 2020-21 academic workload will be deferred to a future semester, to be taught no later than August 31, 2023. The semester in which you teach this course shall be agreed to by you, the Co-Chair [of the department] and me. Please discuss with your Chair in which semester you will teach this credit (e.g., Summer 2022).

The email concluded with a reminder that Dr. A could reach out to the Association to seek advice and guidance. The Dean also indicated openness to discussing the plan further with Dr. A and the Association.

Dr. A responded by email the same day, with a copy to the Association saying: "Thank you for the accommodation in these difficult circumstances".

No grievance was filed in respect of the original or revised accommodation plan.

In early March 2022, the consultation processes for course assignments were beginning for the 2022-2023 academic year (per Article 13.2). On March 9, 2022, Dr. A made a request for reconsideration of the accommodation in accordance with item 10 of the Parties' MOS. Dr. A pointed out to the Dean that the original request was granted as a pandemic-related family status accommodation due to the "repeated and prolonged childcare interruptions [for a] toddler and a pre-schooler". The requested reconsideration was to relieve the requirement to teach the 0.5 credit course on an "ongoing" basis.

The request for the accommodation to be “ongoing” was denied by the Dean and explained as follows by email dated March 21, 2022:

> In the University’s view, the accommodation provided in Fall 2020 term, namely, a teaching release without a reduction in pay for a 2000-level 0.5 credit course in Winter term 2021 granted on the basis that you would teach a 0.5 course at some point in the future, was reasonable and consistent with the University’s duty to accommodate as well as the terms of the Memorandum of Settlement. As I noted at the time, there is flexibility about when you teach this credit and there certainly is no expectation that you would offer that course in the term in which you return to the University.

It is this decision that the Association is challenging.

The Parties’ MOS with respect to requests for workload accommodation and reconsideration includes the following provisions concerning how they must be considered:

> *3. The process set out in paragraphs 4 to 7 of this agreement is in addition to any other rights a faculty member or librarian may have pursuant to the collective agreement.*
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> *4. The Dean/University Librarian will consider all requests made pursuant to paragraph 1 in good faith taking into consideration the following criteria, among others, which may be relevant:*
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> > *(a) The faculty member or librarian’s current workload, taking into account their teaching, research and service obligations, as applicable, and the components thereof;*
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> > *(b) The specific adjustment, reduction or scheduling need requested;*
> >
> > *(c) The nature of the reason for the request, including any notices from schools, school boards, elder care facilities or childcare facilities and care programmes provided by the faculty member or librarian; and*

> *(d) The operational burden of implementing the request, including the cost and impact on program and service delivery.*
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> *In considering the above-noted factors the Dean/University Librarian may speak to the unit Chair or Director to provide input on feasibility and if the faculty member or librarian's request can be supported at the unit level.*
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> *5. The Dean/University Librarian will, at their discretion, grant the request, deny the request, or propose a reasonable alternative consistent with any obligations which may exist pursuant to the Ontario Human Rights Code, including the provision of additional supports. Where feasible, a Dean/University Librarian will propose reasonable alternatives that will not result in a reduction in salary.*
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> *6. In the event of a denial, the University will provide the faculty member or librarian with a reason for the denial. The response will be copied to the Association. Best efforts will be made to provide the response within 14 working days of the request.*
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> *7. In the event of a denial the Association will inform the University of its intent to seek an expedited review and decision within 10 working days. The process for any expedited review shall be defined by Paula Knopf.*
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> *…*
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> *10. The University agrees that any faculty member or librarian who is currently in receipt of a family status accommodation plan related to the COVID-19 pandemic that was made from March 16, 2020 to the date of this Memorandum of Settlement may submit a request to their Dean/University Librarian to have their plan reconsidered on a go-forward basis in accordance with the process outlined in this Memorandum of Settlement.*

The Association's Submissions

The Association asserts that the MOS was "in essence an agreement between the parties to limit managerial discretion" regarding pandemic-related family status

accommodation requests and any reconsideration requests. In that context, the Association challenged the University's denial of Dr. A's reconsideration on the basis of the following claims:

- There was no explanation of how the criteria set out in the parties' MOS was considered.
- There was no explanation of whether there were reasonable alternatives to requiring Dr. A to work a 0.5 future course credit overload.
- There was no mention of any reconsideration of other "relevant factors" or of the impact that the original accommodation plan would have by requiring Dr. A to teach an overload in the future.
- The denial was arbitrary and failed to fully consider "how" the Dean initially made the first accommodation request conditional on Dr. A agreeing to work a future overload.
- The denial of the request did not explain whether reasonable alternatives were considered.
- The denial did not mention reconsideration of other relevant factors or of the impact that the original accommodation plan would have on Dr A by being required to teach an overload.

It was also asserted that the outstanding issue of what is reasonable for an accommodation plan under the Parties' MOS is still unresolved. The Association submitted that since Dr. A's entire workload consists of teaching, research and service, the University failed to identify what workload adjustments it fairly considered in all of the circumstances and in combination with Article 5.

The Association also asserted that requiring Dr. A to teach on an "overload" basis in a future academic year was not a fair option because it would make Dr. A bear the cost of a family status accommodation in an unpredictable pandemic situation, with ever changing protocols that were beyond Dr. A's control.

The University's Submissions

The University asserted that the decision to deny Dr. A's reconsideration request was reasonable and consistent with the Collective Agreement and made in good faith, pursuant to the Memorandum of Settlement that gives a Dean the discretion to allow or deny a request. It was submitted that the decision should only be subject to arbitral review on the basis of a standard of reasonableness, and not the standard of correctness or perfection.

Further, the University pointed out that the duty to accommodate only requires an employer to provide reasonable accommodation that meets the employee's needs and does not require the University to provide the particular form of accommodation demanded by an employee.

Further, the University stressed that an employee requesting accommodation must be cooperative and reasonable throughout the accommodation process. On that issue, it was suggested that Dr. A has a duty to implement the revised accommodation plan that she requested and has already received the benefit, without the loss of any compensation. It was stressed that the University's duty to accommodate does not involve payment for work not done or courses not taught. Given that the University has already compensated Dr. A for the 0.5 credit course at issue, the University submitted that is was not unreasonable to require Dr. A to teach the course at a future time that is mutually agreeable to the Parties.

The University acknowledged that while the requirement to teach the 0.5 course credit in the future may involve some "inconvenience", it complies with the Memorandum of Settlement, the Collective Agreement and the caselaw pertaining to the *Human Rights Code*. It was argued that Dr. A should not be able to "belatedly seek the benefit of compensation for work not performed."

The University argued that the Dean's discretionary decision to deny Dr. A's reconsideration request was reasonable in all of the circumstances, took into consideration matters of workload allocation and the operations within the Faculty, applied the enumerated criteria in the Memorandum of Settlement and provided Dr. A with the rationale for the decision.

In support of these arguments, the University relied on the following authorities: *United Parcel Service Canada Ltd. v Teamsters, Local 141*, [1981] O.L.A.A. No. 81 (Burkett); *Laurentian University v L.U.F.A.,* 2011 CarswellOnt 7914, (Surdykowski); *Faculty Association of the University of St. Thomas v. St. Thomas University*, 2015 CanLII 154112 (CanLII), (Breen); *Nespolon and Veltri Canada – Howard*, 2016 HRTO 204 (CanLII); *Renaud v. Central Okanagan School District No. 23,* [1992] 2 S.C.R.; *Hydro-Quebec v Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ),* [2008] 2 R.C.S.; *ONA v Orillia Soldiers Memorial Hospital*, 1999 CanLII 3687 (ON CA); *CUPE Local 4400 v TDSB,* [2008] O.L.A.A. No. 692, (Whitaker).

The Decision

The case law cited by the University was quite appropriately not challenged by the Association because it is a fair representation of the accepted principles of arbitral review and accommodation. They have been applied in the following analysis.

The situation facing Dr. A in 2021-2022 would be an enormous challenge for anyone. It is hard to imagine how anyone coped during those years, trying to fulfill the teaching, research and service requirements of a professor while dealing with a toddler and pre-schooler during a pandemic while child care was constantly being interrupted. Without family help to rely on and without any accommodation relief, the situation would be overwhelming. Accordingly, it made complete labour relations sense and it was an act of human decency for the first accommodation request to be granted.

The real issue is whether the reconsideration request to permanently waive the requirement to teach the .05 course should have been granted. To assess that question, the MOS and the duty to accommodate come into play. The MOS sets out a series of criteria that the Dean/University "will consider" when accommodation requests are received, paragraph 4(a-d), although the list is clearly not exhaustive. It is a list of criteria "among others" that may be considered. It further requires that the faculty member be provided with the "reason" for the denial.

While the University has argued that the Dean took into consideration matters of workload allocation and the operations within the faculty and applied the enumerated criteria in the MOS, there is nothing to indicate that in the Dean's correspondence with Dr. A. This dispute might have been avoided if the Dean had been more transparent and explained the operational burden the request might impose or the effect it might have on financial or staffing concerns. However, the Dean's note does refer to Dr. A's specific request and the reason it was granted in compliance with the MOS.

The rationale was simply that the University expected to have the work that had been paid for performed, but it was stressed that this could be arranged at a time of mutual convenience. While that rationale essentially echoed the original decision, it emphasized that the timing of the make-up teaching could be arranged with flexibility. The rationale was sparse and unsatisfying. However, it was an explanation.

Therefore, the real question is whether the denial of the reconsideration was a reasonable exercise of managerial discretion.

In that regard, it cannot be forgotten that the original request was simply to be relieved of teaching one assigned course. The condition of granting that relief was agreed to by the faculty member. Perhaps this agreement was given under difficult circumstances, but the condition was accepted and not grieved. The imposition of the condition itself was not unreasonable because the established caselaw makes it clear that an accommodated employee who cannot work a full schedule is not entitled to be paid for

hours not worked. In this case, the hours associated with a .05 course were paid, but the teaching "work" remains undone. Both the Collective Agreement (Article 13.5) and the caselaw allow for pay adjustments consistent with workload adjustments. The fact that a pay adjustment was not imposed on Dr. A as a financial burden at the time amounts to a form of accommodation in itself. Therefore, it was not unreasonable for the University to expect Dr. A to teach the course in the future. While other alternatives might have been possible, none were requested or suggested.

It must also be said that it was understandable for Dr. A to ask for ongoing relief from having to teach the outstanding .05 workload. By March 2022, the pandemic was still a factor, and the problems of sporadic daycare for the "toddler and a pre-schooler" continued. The reasons for the original request were still in place. However, the duty to accommodate does not extend to relieving a workload requirement indefinitely with no adjustment in pay. The duty to accommodate does not require the University to provide exactly what Dr. A wanted or preferred, or even what might have been ideal. An employer only needs to meet the requirement of a "reasonable" accommodation.

In this situation, Dr. A's need for relief from teaching a .05 course due to the stressors caused by Covid on the family and work challenges were met. Therefore, it cannot be said that it was unreasonable to impose and maintain the requirement to make up for the course relief that had been given. That was the reason given to Dr. A for refusing to relieve her completely from the requirement to teach it in the future. As such, the reason provided in this case satisfies the expectations of paragraph 4(a-d) of the MOS.

Accordingly, while it may have been possible for the University to waive the requirement to make up the .05 credit indefinitely, it was not unreasonable for it to decline to do so. It is significant that the Dean has made it clear that there is "flexibility" about when Dr. A is expected to make up the .05 teaching workload and that it will not be imposed in the term following a return from medical leave. That too was a reasonable response and allows the department and the professor to work together to find a way that makes the most sense for all concerned. The promise of flexibility is one that is expected to be

fulfilled. A failure to do so may prompt further concerns. Accordingly, I have interpreted the Dean's response to the reconsideration request as a removal of the expectation that Dr. A work on an overload basis by teaching the course no later than August 31, 2023 and instead allowing the time to be made up at "some point in the future" in consultation with the department. I am confident that the faculty and Dr. A will be able to agree upon a mutually appropriate and reasonable time for this to happen as the Covid challenges ease for both the University and Dr. A.

I am mindful of the Association's allegations that the original accommodation plan and the reconsideration did not appear to take into consideration factors such as the impact on the professor's research and service expectations, nor is there any evidence that other kinds of accommodation were being explored. Those are factors that are often important in crafting an accommodation plan. However, it cannot be forgotten that the original accommodation plan was what Dr. A requested. That plan was later revised at Dr. A's request in April 2021. The revised terms were suggested to Dr. A by the Dean along with a reminder that Dr. A could reach out to the Association for advice and that the plan could be discussed further. Dr. A then accepted the Dean's suggested revisions and received relief from teaching the course that Summer. None of that process was grieved. When the reconsideration request under scrutiny in this case was made, nothing new was added by Dr. A to support the request, nor were there any suggestions offered for a different type of accommodation, other than to remove overload teaching expectation in the future altogether. Therefore, it was not unreasonable for the University to look for alternative forms of accommodation when nothing else was being requested or suggested. The fact that hindsight might suggest that an alternative plan might have been available does not make the granting of the requested and accepted plan unreasonable.

Another person may not have made the same decision as the Dean made in this situation. But that does not give an arbitrator the right to overturn the exercise of managerial discretion unless it was arbitrary, discriminatory, made in bad faith or contrary to the Parties' Collective Agreement or their MOS. There is no suggestion of

bad faith, nor was there a breach of the MOS or Collective Agreement. The reasons given were sparce, but rational. Therefore, they cannot be found to be arbitrary. While the decision could have been different, it was not unreasonable. For all these reasons, I can find no reason to interfere with the University's denial of the reconsideration request. However, I remain seized with this matter if there is a conflict in the future over when the .05 course load will ultimately be taught.

Dated at Toronto this 28th day of July, 2022

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Paula Knopf – Arbitrator