IN THE MATTER OF AN ARBITRATION
UNDER THE *LABOUR RELATIONS CODE*, RSBC 1996 c. 244

Between

CITY OF BURNABY
and
THE BURNABY PUBLIC LIBRARY BOARD

(the "Employers")

-and-

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 23

(the "Union")

(Vacation Pro-Rating Grievances)

ARBITRATOR:	John B. Hall
APPEARANCES:	Bruce R. Grist and Jacqueline Gant, for the Employers Devyn Cousineau, for the Union
HEARING:	December 9, 2015 Burnaby, BC
AWARD:	December 31, 2015

AWARD

I. INTRODUCTION

The Union has brought two grievances challenging two provisions in each of its Collective Agreements with the Employers. Article 8.5(e), which I will refer to as "the medical leave provision", prorates vacation entitlement where an employee is absent for more than 60 working days due to sick leave or WCB:

> (e) Effective 2013 January 01:
>
> Where an employee is absent as a result of sick leave or WCB for a period exceeding sixty (60) accumulated working days within twelve (12) consecutive months the employee will have their vacation entitlement prorated.

Article 11.2(c), which I will refer to as "the parental leave provision", prorates the vacation pay of employees who take maternity and parental leave:

> (c) Return to Work
>
> On resuming employment an employee shall be reinstated in their previous or a comparable position and for the purposes of pay increments and benefits, referenced in (e) herein, and vacation entitlement (but not for public holidays or sick leave) maternity and parental leave shall be counted as service. *Vacation pay shall be prorated in accordance with the duration of the leave and an employee may elect not to take that portion of vacation which is unpaid*. (italics added)

The Union maintains these provisions violate Section 13 of the *Human Rights Code* (the "Code"). It submits that vacation entitlement and vacation pay are "status-driven" benefits under the Collective Agreements. That is to say, receipt of the benefits is not dependent on the actual performance of work by employees. Provided that someone is a full-time employee, vacation is based on length of service. Therefore,

reducing entitlement under the medical leave provision constitutes discrimination on the basis of disability, and prorating vacation pay under the parental leave provision constitutes discrimination on the basis of sex and family status.

Alternatively, if the vacation benefits are "work-driven" or "work-related", the Union accepts it is not a violation of the Code to distinguish between employees who are actively working and those who are not working. However, it points to other types of leave from the workplace which do not result in an employee's vacation entitlement being reduced under the Collective Agreements. It submits the provisions in issue are therefore discriminatory because the parties cannot make arbitrary distinctions between employees on grounds protected by human rights legislation.

By way of remedy, the Union seeks: declarations that Articles 8.5(e) and 11.2(c) violate the Code; an order that all of Article 8.5(e) and the last sentence of Article 11.2(c) be severed from the Collective Agreements; and, orders that all affected employees be made whole for their losses with interest.

The Employers' arguments proceed from the premise that vacation is a "compensation-based" benefit; more specifically, they maintain the purpose is to compensate employees for active service and provide time away from work with pay. They submit it is not discriminatory to suspend a compensation-based benefit when an employee is not working.

The Employers say further that it is not discriminatory to provide different levels of compensation and/or compensation-based benefits to employees who are actively working as compared to those who are not at work, regardless of the reason for an employee's absence from work. They rely as well on more recent authorities which hold that "not every difference is discrimination" and recognize that parties may negotiate "trade-offs" in collective bargaining which differentiate the type and level of benefits provided to employees absent on leave. Such distinctions are not discriminatory, as the differential treatment is not based on protected grounds; rather, they are part of larger

benefit packages provided to different groups of employees under a collective agreement based on the particular needs of the groups. Under this approach, the Employers maintain Articles 8.5(e) and 11.2(c) do not contravene the Code, with the consequence that the Union's grievances should be dismissed.

The Employers do not advance a *bona fide* occupational requirement defence in the alternative should the Union establish a *prima facie* case of discrimination under the prevailing framework for adjudicating human rights issues. However, if the provisions in issue are found to be discriminatory, the Employers submit any declaration should be suspended temporarily, and the subject should be remitted to the parties to address in collective bargaining.

II. AGREED FACTS

The case was argued based on an Agreed Statement of Facts and Joint Book of Exhibits. Neither party called additional evidence.

Parties and Collective Agreements

1. The Canadian Union of Public Employees, Local 23 ("Local 23") is the certified bargaining agent representing employees of the City of Burnaby and the Burnaby Public Library Board.

2. Local 23 and the City of Burnaby are parties to three separate collective agreements as follows:

    (a) Collective Agreement respecting the Outside Workers' Division, attached as Exhibit 1;
    (b) Collective Agreement respecting the Inside Workers' Division, attached as Exhibit 2; and

(c) Collective Agreement respecting the Foreman and Other Working Supervisory Personnel, attached as Exhibit 3.

3. Local 23 and the Burnaby Public Library Board are parties to a Collective Agreement respecting the Library Workers' Division, attached as Exhibit 4.

4. These four collective agreements will be referred to collectively as the "Collective Agreements".

5. The Collective Agreements each have a term from January 1, 2012 to December 31, 2015.

6. The parties agree that Arbitrator Hall has jurisdiction to hear and resolve Policy Grievances 14.01 and 14.02. Those grievances are attached as Exhibit 5.

Relevant Collective Agreement Provisions

7. The Collective Agreements address vacation entitlement in Article 8.

8. Effective January 1, 2013, the parties added the following language as Article 8.5(e):

> Where an employee is absent as a result of sick leave or WCB for a period exceeding sixty (60) accumulated working days within twelve (12) consecutive months the employee will have their vacation entitlement pro-rated.

9. Prior to this provision, employees absent as a result of sick leave or WCB for any length of time received no reduction in their vacation entitlement.

10. Article 11 of the Collective Agreements governs leaves of absences. It contemplates the following types of leave: absence from duty of union officials (11.1); maternity and parental leave (11.2); compassionate leave (11.3); and jury and witness duty

(11.4). In addition, a Letter of Understanding provides for a Sabbatical Education Leave Program.

11. Absences from duty for union officials is set out in Article 11.1, which provides employees must apply to and receive permission from the Employer for the leave. Such leaves are typically of a short duration, with the exception of union leave for the union president and leave to work for C.U.P.E. National. Both leave for the union president and leave for working with C.U.P.E. National affect a small number of employees and provide for cost recovery to the Employer.

12. Maternity and parental leave is set out in Article 11.2. Subsection (c) provides that vacation pay for employees resuming work after a maternity or parental leave shall be pro-rated:

> On resuming employment an employee shall be reinstated in their previous or a comparable position and for the purposes of pay increments and benefits, referenced in (e) herein, and vacation entitlement (but not for public holidays or sick leave) maternity and parental leave shall be counted as service. Vacation pay shall be prorated in accordance with the duration of the leave and an employee may elect not to take that portion of vacation which is unpaid.

13. This language was bargained by the parties and has been effective in the Collective Agreements since April 9, 1992. Prior to this date this matter was covered by City Policy since December 16, 1983. The Maternity Leave of Absence Policy and Leave Request Form are attached as Exhibit 7.

14. Compassionate leave is set out in Article 11.3, which provides employees may receive leave for between one-half (1/2) day to five (5) days compassionate leave, depending on the circumstances.

15. Leave for jury and witness duty is set out in Article 11.4, which provides employees receive a leave for the period of their duty. In 2013, such leaves affected 10

employees for a total of 68.59 hours absent from work. In 2014, such leaves affected 19 employees for a total of 123.04 hours absent from work. In 2015, up to December 1, such leaves affected 5 employees for a total of 79.54 hours absent from work.

16. A Letter of Understanding provides for a Sabbatical Educational Leave Program. Benefits and vacation entitlement during such leave is set out in Appendix "A", which states public holidays and vacation entitlement will be "based on gross salary less deferred amount" during the deferral period and "there is no coverage, nor credit for service" during the educational leave period. Participation in the Sabbatical Educational Leave Program is subject to approval by the Employer. To date there have been no requests for leave under this provision.

17. In addition, the Employer has a General Leave of Absence policy that provides "where an approved General Leave of Absence exceeds five (5) working days, vacation entitlement will be pro-rated and adjusted for the period of the leave of absence." The General Leave of Absence Policy and Leave Request Form are attached as Exhibit 8.

Collective Bargaining History

18. The Employers proposed vacation pro-ration in numerous rounds of bargaining with Local 23 prior to the 2012 collective bargaining and Local 23 never agreed to it.

19. The parties were in collective bargaining from October 25, 2012 until December 5, 2012.

20. At the outset of bargaining the parties agreed they would negotiate the bargaining proposals as a package; the parties would sign off on the package as a whole as opposed to a sign off on individual proposals. This is consistent with a longstanding practice between the parties. A copy of Bargaining Notes, prepared by Edel Toner-Rogala for October 25, 2012 is attached as Exhibit 9.

21. The first round of bargaining took place on October 25, 2012. At this meeting, the Employers presented their proposals in two documents dated October 23, 2012 ("2012 Employer Proposals"). One of the 2012 Employer Proposals was to "add a new provision to Article 8 which provides that where an employee is absent as a result of sick leave or WCB for a period exceeding 20 accumulated working days per year the employee will have their vacation entitlement prorated" (the "Pro-Rating Proposal"). A copy of the 2012 Employer Proposals for the City of Burnaby is attached as Exhibit 10. A copy of the 2012 Employer Proposals for the Burnaby Public Library is attached as Exhibit 11.

22. On October 25, 2012, the Employer expressly stated their disability plans would be a focus of bargaining. The Employer's position was that their disability plans had come under increasing scrutiny and they were outside of the norm for the region.

23. The parties bargained again on November 5, November 13, November 15, November 20 and November 22. The Pro-Rating Proposal remained on the bargaining table. On November 5, the Employer stated that the current provisions were too generous and created scheduling issues.

24. On November 13, 2012, the Employers made an offer for settlement to Local 23 (the "Offer for Settlement #1"). In the Offer for Settlement #1 the language concerning the vacation pro-ration provision remained the same as in the 2012 Employer Proposals. Local 23 did not respond to the Pro-Rating Proposal in the Offer for Settlement #1. A copy of the Offer for Settlement #1 respecting the Inside Workers, Outside Workers and Foremen is attached as Exhibit 12. A copy of the Offer for Settlement #1 respecting the Library Division is attached as Exhibit 13.

25. On November 22, 2012, the Employer made a second offer for settlement to Local 23 (the "Offer for Settlement #2"). In the Offer for Settlement #2 the language concerning the vacation pro-ration provision remained the same as in the 2012

Employer Proposals. A copy of the Offer for Settlement #2 respecting the Inside Workers, Outside Workers and Foremen is attached as Exhibit 14.

26. On December 3, 2012, the spokespersons for the parties met during bargaining and discussed the Pro-Rating Proposal. The Employers proposed to increase the threshold for pro-rating the vacation from 20 working days to 60 working days within the twelve previous consecutive months, and the parties agreed on the language for Article 8.5(e). Local 23 raised a concern about the legality of the vacation pro-ration language, specifically that it may be discriminatory.

27. On December 5, 2012, the parties agreed that the Employers would seek a legal opinion about whether the Pro-Rating Proposal was discriminatory. If the legal opinion concluded that the Pro-Rating Proposal was not discriminatory, the parties would implement the vacation pro-ration provision as agreed to in the Memorandum of Agreement. If the legal opinion raised concerns about discrimination, then the parties agreed that a committee would be struck to remedy the issue.

28. On December 5, 2012, the parties signed a Memorandum of Agreement, agreeing to recommend the new Collective Agreements to the Burnaby City Council, Burnaby Public Library Board and Local 23 membership. The Collective Agreements included the Pro-Rating Proposal. A copy of the Memorandum of Agreement for the Inside, Outside and Foremen Collective Agreements is attached as Exhibit 15. The Memorandum of Agreement for the Library Board is attached as Exhibit 16.

29. The Collective Agreements were ratified on December 12, 2012.

Legal opinion

30. On March 6, 2013, the Employer sent Local 23 the legal opinion written by the Employer's legal counsel, Bruce Grist. Mr. Grist concluded that Article 8.5(e) was

not discriminatory. A copy of the legal opinion, with the Employer's covering letter, is attached as Exhibit 17.

31. In the Employer's covering letter, Pat Tennant explains:

> With the receipt of the legal opinion, the City will be proceeding with the implementation of the prorating of annual vacation entitlement as outlined in the Memorandum of Agreement(s) – Item #26, City and Item #21, Library.

Grievances

32. In April 2013, Local 23 held its Annual General Meeting, in which the membership elected a new Executive. Union president Rick Kotar, a member of Local 23's 2012 collective bargaining team, was replaced by Simon Challenger.

33. Vacation pro-ration was implemented on the payroll dated May 10, 2013.

34. On June 24, 2013, Local 23 filed a grievance concerning the vacation pro-ration language, alleging:

> … that the Employer has acted in an arbitrary manner by imposing a Vacation Pro-rating claw-back process that was not discussed or agreed to by the parties at the bargaining table; that the process is unreasonable and unfairly penalizes employees by taking excessive amounts of their vacation entitlement; that the Employer is being unreasonable by not meeting with the Union to resolve this matter.

A copy of this grievance is attached as Exhibit 18.

35. Local 23 filed policy grievances 14.01 and 14.02 on April 8, 2014.

Size of the bargaining unit and cost

36. Effective December 7, 2015, the number of employees within the bargaining units is:

Personnel Subarea	Regular Full Time	Temp Full Time	Reg PT Total	Job Share total	Auxiliary total	TOTAL
Foremen	56					56
Inside	601	69	61	6	1,296	2,033
Library	58	1	129	6	37	231
Outside	302	37			120	459
Overall Result	1,017	107	190	12	1,453	**2,779**

37. In 2013, Article 8.5(e) saved the Employer $156,064.65. 85 members of Local 23 were affected.

38. In 2014, Article 8.5(e) saved the Employer $196,999.61. 112 members of Local 23 were affected.

39. In 2015, up to November 2, Article 8.5(e) saved the Employer $161,157.97. 89 members of Local 23 were affected. The costing estimates for vacation pro-ration for Article 8.5(e) for years 2013 to November 2, 2015 are attached as Exhibit 19.

40. In 2013, 2014 and up to November 30, 2015, Article 11.2(c) saved the City $126,682.46, and affected 52 members of Local 23.

Burnaby Municipal Benefit Society Disability Plan

41. Attached as Exhibit 20 is the Burnaby Municipal Benefit Society Disability Plan Document and the Burnaby Municipal Benefit Society Constitution and Bylaws.

III. ANALYSIS - DISCRIMINATION

A number of recent cases have considered whether the denial of collective agreement benefits to employees having a characteristic protected by human rights legislation constitutes discriminatory treatment. The outcome typically depends on the underlying purpose for the benefit in question. More specifically, is the collective agreement entitlement based on the performance of work or does it relate to access or status as an employee?

I reviewed the development of the case law at some length in *Okanagan College -and- Okanagan College Faculty Assn. (Maternity/Parental Leave Grievance)*, [2012] BCCAAA No. 137 (appeal quashed for lack of jurisdiction in 2013 BCCA 561; application for review dismissed by BCLRB No. B67/2014), and will not repeat all of that analysis. A frequent starting point for any discussion of the topic in this jurisdiction is *Vancouver School Board -and- BCTF* (1998), 72 LAC (4th) 192, where Arbitrator Munroe made these observations:

> There are certain basic assumptions underlying the employer-employee relationship. The core assumption is that the employee will render service in exchange for which employer will pay wages and benefits. This core assumption is of course capable of modification both by contract and by statute as employers and unions struggle with the competing interests arising from the human condition, and as legislatures may intervene in the public interest. But I think the normal understanding is that where something happens to an employee which altogether prevents her from working, certain of the incidents of the employment relationship become inapplicable - without that reality alone giving rise to a claim that the employee has been "discriminated against". One of the incidents of the employment relationship which normally becomes inapplicable - which is suspended, in effect - is the employer's obligation to pay wages and such other employment benefits as are commonly accepted or negotiated to be service driven. (para. 52)

Perhaps the seminal authority informing the current state of the law is *Ontario Nurses' Association v. Orillia Soldiers Memorial Hospital et al.* (1999), 42 O.R. (3d) 692 (CA), application for leave to appeal denied, [1999] SCCA No. 118. The *Orillia Soldiers*

judgment was reviewed in *Okanagan College* (see paras. 62-66), and more recently in *Canadian Union of Labour Employees -and- Public Service Alliance of Canada (Urrutia Grievance)*, [2015] OLAA No. 157 (Lynk). The latter award canvasses a number of subsequent decisions by the courts, arbitrators and human rights tribunals that were cited by counsel during argument in this proceeding. The recent award also contains an instructive "… set of principles to apply when dealing with the question of whether the denial of benefits … to an employee who has claimed protection on a human rights ground is … discriminatory" (at para. 51):

> i. The three step *Meiorin* test is the usual analytical starting point.
>
> ii. When assessing whether a particular form of compensation, whether wages or benefits, is consistent with human rights obligations, the purpose of the compensation item must be determined.
>
> iii. If the purpose of the compensation item is to provide an equitable exchange for an active work status, then tying the availability of the compensation item to maintaining that status is consistent with human rights. Employer payments for benefit insurance premiums would be an example of this.
>
> iv. If, however, the purpose of the compensation item is linked to an employee's general employment status, then the availability of the compensation item is to be extended to any employee, whether on active work status or not, as long as he or she maintains the employment status. Seniority accumulation is an example of this.
>
> v. On its face, discrimination would exist if the employer provided different levels of compensation for work because of disability or another human rights protected ground. Likewise, it would constitute discrimination if the employer provided different levels of compensation for not working because of disability or another human rights protected ground.
>
> vi. If the purpose of the compensation was the same, but the compensation differed as to the type of disability or other protected human rights ground, or differed for a reason that was not tied to the purpose where a human rights ground was involved, then discrimination may well exist.

> vii. Caution should be employed in the use of comparator group analysis. Experience has shown that the analysis can be applied in a mechanical and rigid fashion that belies the objective of human rights. The real question to ask in a human rights case is whether the law, rule or collective agreement provision disadvantages the employee, or perpetuates a stigmatized view of him or her.

The benefits examined in past decisions include vacation entitlement and vacation pay, although not all of the decisions referred to during argument arose in the human rights context. The outcomes have varied depending on the purpose of the relevant language and, more particularly, whether the benefit was tied to employee status or whether it was work-driven.

For instance, the Union cites *Federated Cooperatives Ltd. and Miscellaneous Employees Teamsters Local Union 987* (2004), 130 LAC (4th) 185 (Ponak), where an employer policy prorating vacations for parental leaves violated the collective agreement under the *KVP* principle because vacation with pay was based on years of continuous service. See also *Barrie (City) and Canadian Union of Pubic Employees Local 2380 (Policy-Pregnancy Leave Grievance)* (1994), 40 LAC (4th) 168 (M.G. Picher), where prorating vacation leave credits for employees on pregnancy leave infringed the *Employment Standards Act* which protected the accrual of seniority (and therefore seniority or service-related vacation) during such leaves. On the other hand, the collective agreement in *Halton (Regional Municipality) and O.N.A.* (1995), 48 LAC (4th) 301 (Burkett), made entitlement to vacation pay "subject to time actually worked" (para. 29). The Employer relies as well on *K. v. L. (District)*, 2013 BCHRT 233. The complaint in that proceeding was dismissed on a preliminary basis because the tribunal member found "… the Respondents will be able to establish that providing vacation pay is such an entitlement that requires earning income and, accordingly, it is not discriminatory not to provide vacation pay to those who are on unpaid leaves of absence" (para. 55). In this category, see also *Canada Safeway Ltd. And United Food and Commercial Workers, Local 401 (Comin Grievance)*, (2000) 86 LAC (4th) 200 (P. Smith).

As illustrated by this non-exhaustive survey, vacation benefits may be predicated on either employee status (including seniority) or on the performance of work. This state of the "arbitral jurisprudence" was recognized many years ago in *Rahey's Supermarket and RWDSU, Local 596* (1989), 3 LAC (4th) 311 (MacDonald), which adopted the following excerpt from *Canadian Labour Arbitration*:

> Thus ... where the amount of vacation pay or duration of vacation is calculated on the period of time a person has been "continuously employed" or "in service", in the absence of some clear expression of intention to the contrary, most arbitrators have held that employees who have engaged in a lawful strike, *were off work because of illness, disability, leave of absence, maternity leave*, or because they had been laid off during the course of the year, were entitled to count such time that they were not at work. Where, by contrast, the agreement makes the accumulation of vacation credits conditional upon actual performance of work, active employment, or upon being on the payroll, working a specific number of the available working hours, or where it limits the accumulation of vacation credits to specific instances the resolution would likely be otherwise. (Brown & Beatty, at para. 8:3220; italics added)

In *Rahey's*, the arbitrator went on to state that the "… arbitral jurisprudence generally supports the position that vacation entitlement which is predicated upon 'length of service' is not affected by an employee's involuntary absence unless there is clear language in the collective agreement which explicitly or by implication purports otherwise" (para. 15). It was similarly held in *Federated Cooperatives* that "… restrictions on vacation pay based on years of employment or service should be specified in the agreement" (para. 36).

It is accordingly necessary to ascertain the basis for vacation entitlement and vacation pay under the present Collective Agreements. This question is fundamentally a matter of contract interpretation having regard to the usual "canons of construction".

For consistency, I will refer throughout to provisions found in the Collective Agreement for the Outside Workers' Division. Apart from one clause identified below,

there are no material differences between the terms found in all four Collective Agreements. Article 8 deals with Vacations and the initial clause sets out the entitlement:

> 8.1 Annual Vacation Entitlement
>
> Paid annual vacation for Regular Full-Time and Temporary Full-Time Employees shall be allowed as follows:
>
> (a) In the first (1st) part calendar year of service, vacation will be granted on the basis of one-twelfth (1/12) of fifteen (15) working days for each month or portion of a month greater than one-half (½) worked by December 31st.
> (b) Fifteen (15) working days of annual vacation during the second (2nd) up to and including the seventh (7th) calendar year of service.
> (c) Twenty (20) working days of annual vacation during the eighth (8th) up to and including the fifteenth (15th) calendar year of service.
> (d) Twenty-five (25) working days of annual vacation during the sixteenth (16th) up to and including the twenty-third (23rd) calendar year of service.
> (e) Thirty (30) working days of annual vacation during the twenty-fourth (24th) and all subsequent calendar years of service.
> (f) Employees who leave the service after completion of twelve (12) consecutive months of employment shall receive vacation pay for the calendar year in which termination occurs on the basis of one-twelfth (1/12) of their vacation entitlement for that year for each month or portion of a month greater than one-half (1/2) worked to the date of termination, or at that percentage of wages earned during the calendar year set by the "Employment Standards Act", whichever is greater.
> (g) "Calendar year" for the purposes of this Agreement shall mean the twelve (12) month period from January 1st to December 31st inclusive.

This language is potentially ambiguous in that it refers both to "years of service" (suggesting seniority or employment status) and to periods of time "worked". Indeed, the Union and the Employer both argue that the plain wording supports their respective positions.

I digress only somewhat to observe that the authorities have used the word "service" (or sometimes "services") to describe both status-based and work-based entitlements under a collective agreement. See, for example, the discussion at paragraph 50 of *Urrutia* where a "service driven" benefit was earned by attendance at work as opposed to employment status, and paragraph 29 of *Halton* where a vacation entitlement subject to time actually worked was distinguished from vacations that are "service- or seniority-driven". Any potential confusion in relation to the Outside Workers' Collective Agreement is dispelled entirely when one turns to definitions in the Seniority provisions:

> 6.1.1 Definitions
>
> (a) "Service" shall mean continuous employment *including authorized leave of absence*, *sick leave* and vacation. (italics added)

This definition is the one difference between the four Collective Agreements challenged by the Union's grievances. The same definition is found in the Foremen/Supervisor Collective Agreement but it is omitted from the two other Collective Agreements. I find this distinction should not lead to divergent interpretive conclusions when there is no material difference in the vacation provisions themselves, and when other common language points even more convincingly to vacation being based on continuous employment status. One of the other provisions is the Supplementary Vacation benefit:

> 8.4 Supplementary Vacation Entitlement
>
> Each employee shall be entitled to the following paid vacation [supplementary vacation] in addition to the annual vacation to which the employee is entitled under Clause 8.1:
>
> (a) Each employee upon commencing the eleventh sixteenth, twenty-first, thirty-first, thirty-sixth, forty-first or forty-sixth calendar year of service in 1978 or in any subsequent year, shall thereupon become entitled to five (5) working days of supplementary vacation.

> (b) It is understood between the parties that each employee shall become entitled to the supplementary vacation under this Clause 8.4 on the first day of January in the year in which the employee qualifies for such supplementary vacation. An employee shall retain the supplementary vacation entitlement notwithstanding that such employee's employment is terminated prior to the end of the period to which the entitlement applies. [An explanatory note and table is annexed hereto as Schedule "E" for the purposes of clarification].

While Article 8.4(a) grants "working days" of supplementary vacation (i.e., the same words found throughout Article 8.1 respecting annual vacation) the entitlement is plainly based on "service"; moreover, there is no loss of entitlement even if an employee is terminated before the end of the period to which the entitlement applies.

The linkage between annual vacation and supplementary vacation is reinforced by Schedule "E" to the Collective Agreement. It contains a table showing regular annual vacation and supplementary vacation entitlement according to "Year Hired", and explains:

> In the table the figure to the left of the oblique stroke shows the number of working days of regular annual vacation.
>
> The figure to the right of the oblique stroke shows the number of working days of supplementary vacation, and appears in the calendar year in which they are credited to an employee. These supplementary vacation days may be taken in any of the years beginning with the one in which thy ware credited but prior to the one in which the next 5 days are credited.
>
> Example:
>
> > An employee hired in 2002 is in their 11th calendar year during 2012. The employee in 2012 will be credited with 5 supplementary working days which may be taken at any time between 2012 and 2016, both years included. In 2017 the employee will be credited with a further 5 supplementary working days, etc.
>
> *The working day entitlement is based upon a five-day work week.

I find the Schedule "E" table and explanation unambiguously tie vacation entitlement and vacation pay to year of hire -- meaning continued employment status or continuous employment -- and neither benefit is subject to the actual performance of work. This interpretation is consistent with how the vacation language was applied prior to negotiation of the medical leave provision. It is no small signal that employees absent as a result of sick leave or WCB for any length of time received no reduction in their vacation entitlement (Agreed Facts at para. 9). I agree with the Union's argument that the inclusion of Article 8.5(e) should not be viewed as having completely transformed the nature of a fundamental benefit accruing to employees. Accordingly, and adopting what was written by Arbitrator Ponak in *Federated Cooperatives*, "… restrictions on vacation entitlement must be plainly set out in the collective agreement and in the absence of any restrictive language it can be inferred that no restrictions were intended" (para. 34).

As noted, Article 8.1(a) and (f) restrict vacation during an employee's first and final year of service by granting a reduced entitlement. The Employers seek to rely on the references to months "worked" during those years, but the calculations are clearly directed to special circumstances as opposed to the norm; moreover, as the Union points out, the calculations are equally consistent with an individual's period of employment (i.e. employment status). Even then, some retiring employees receive their full annual vacation on termination of employment in accordance with Article 8.5(d). The remaining restriction found in Article 8.5 (headed "Vacation Pay Rates and Adjustments") is the medical leave provision in dispute:

> (e) Effective 2013 January 01:
>
> Where an employee is absent as a result of sick leave or WCB for a period exceeding sixty (60) accumulated working days within (12) consecutive months the employee will have their vacation entitlement prorated.

Under the prevailing human rights analysis, the Union must demonstrate that this provision is *prima facie* discriminatory on the balance of probabilities. Paraphrasing the test articulated in *Moore v. British Columbia (Education)*, 2012 SCC 61, it must be

shown: the employees affected have a characteristic protected under the Code; they experienced an adverse impact; and, the protected characteristic was a factor in the adverse impact (at para. 33). Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice within the parameters of exemptions available under human rights legislation. However, as recorded above, the Employers deny discrimination and do not seek to defend the impugned language as a *bona fide* occupational requirement. It was explained more recently that the third element of the *prima facie* test requires a complainant to show "… that the ground in question was a *factor* in the distinction": *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 (para. 52; italics in original).

The Union notes that the Collective Agreements contemplate full time employees being absent from work for various reasons without any reduction in their vacation entitlement. The provisions include Union Leave (Article 11.1), Compassionate Leave (Article 11.3), and Jury and Witness Duty (Article 11.4). And, of course, employees absent "as a result of sick leave or WCB" suffer no loss of vacation entitlement if the period does not exceed 60 working days over 12 consecutive months. The Employers seek in part to distinguish some of these leaves by pointing to their considerably shorter duration. A somewhat analogous argument was rejected by Arbitrator Lynk in the *Urrutia* award:

> It is not uncommon in collective agreements for some benefits that are tied to an active work status to continue for a short, defined period after an employee has gone on leave (for example, see the facts in *Orillia Soldiers Memorial Hospital* with respect to employer premium contributions). Several reasons can explain this short-term continuation of a benefit tied to an active work status. First, this ensures some compensation stability for the employee going on a longer term leave as she or he adjusts to the new state of affairs. Second, it protects employees whose leave may only be a few weeks or months long from benefit disruption. And third, it can be administratively convenient for the employer to wait and see whether the employee will be back at work within a short period of time, before having to trigger the procedures and paperwork required to change the employee's status. *However, none of*

> *these reasons offer an explanation or a justification for why one group of protected employees would be treated differently from another group of employees with respect to access to a workplace benefit.* (para. 63; italics added)

But even if absences of only a few days are removed from the field, the Union can still point to Article 11.2(c) which counts maternity and parental leaves as service for purposes of vacation entitlement. Both of those leaves may extend well beyond 60 days for birth mothers (up to 17 consecutive weeks of maternity leave plus up to 35 consecutive weeks of parental leave), and for birth fathers and adoptive parents (up to 37 consecutive weeks). There are further provisions allowing either form of leave to be extended under special circumstances.

I return once again to *Urrutia* where the benefit in question was a car allowance "tied to an employee's active work status" (para. 54). However, this distinction does not remove the award's utility to the present circumstances. While it is not discriminatory to have a rule requiring actual attendance at work to earn a benefit, where that type of benefit is extended to some non-working employees then other employees absent from work may not be excluded in a discriminatory fashion: *Brooks v. Canada Safeway Ltd.*, [1989] 1 SCR 1219; and *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 SCR 566. Thus, the same three-step discrimination analysis will arise in respect of both types of benefits, although alleged discrimination respecting a work-driven benefit potentially includes a modified comparator group analysis within the confines of *Withler v. Canada (Attorney General)*, 2011 SCC 12, and subsequent judgments.

In *Urrutia*, the work-related car allowance was continued when employees were absent for up to four consecutive months but discontinued thereafter. One employee had the allowance "clawed back" when his disability leave lasted more than four months. Another employee's car allowance was stopped as soon as she began a maternity/parental leave because it was clear the combined period would exceed four consecutive months. This treatment was held to be discriminatory:

> … [T]here is no evident or justifiable difference between the needs and conditions of those employees on leave for a short-term period and those on leave for a longer-term period that would explain why one group of employees would receive the car allowance for the first four months and the other group would not. … Employees on long-term disability leave are disadvantaged in a way that employees on short-term disability leave are not, and no justifiable reason has been presented to defend this disadvantage.
>
> It was not argued before me that any meaningful difference exists between the situation of [the first employee], who was on a disability leave, and [the second employee], who was on a maternity and a parental leave. Accordingly, they are entitled to the same ruling.
>
> To be clear, having an end date for the payment of an active work status benefit is consistent with human rights law. The end date could be when the leave begins, or at some defined period after the start of the leave. What is required, however, is that the employees entitled to the active work status benefit be treated in a manner that is non-discriminatory: *Orillia Soldiers Memorial Hospital, Gibbs*. Any differential treatment must be strictly justified according to the allowable defences under human rights law. (paras. 64-66)

Another "compensation case" is *Cameco Corporation -and- United Steelworkers of America, Local 13173*, 2007 CanLII 37669 (Surdykowkski), where the grievance challenged the prorating of an incentive payment program for employees on maternity, parental or short term disability leave. The arbitrator compared employees on those types of leaves to "all other employees temporarily away from the workplace", even though the leaves might be longer than a temporary layoff where employees continued to receive the incentive payment:

> Employees on a maternity, parental or STD leave receive a prorated [incentive] payment which excludes any calendar month in which the employee did not perform any days of work. Employees who are temporarily laid off as a result of a Company initiated shutdown remain eligible to receive full payout with no prorating. The Company has not offered any basis for treating temporarily laid off employees differently from employees on a maternity, parental or STD leave. It seems likely that employees who are temporarily laid off due to shutdown are viewed differently because they are away from work at the Company's instance and are expected to return to work after a relatively short absence. Although I can understand why the Company would want to view them

> differently, the fact is that temporarily laid off employees do not perform work and provide no more service than employees who are away from work (it is expected) temporarily on a maternity, parental or STD leave to which they are entitled, and I am unable to discern any basis for treating them differently for [incentive pay] purposes.
>
> As the Ontario Court of Appeal pointed out in *Orillia Soldiers Memorial Hospital, supra*, differential compensation treatment is not necessarily discriminatory within the meaning of human rights legislation. Prohibited discrimination occurs only when the differential is based on a prohibited ground.
>
> In this case, employees on maternity leave are being treated differently from temporarily laid off employees on the basis of sex (per section 3 of the *Canadian Human Rights Act*). Employees on parental leave are being treated differently because they are exercising a right under the *Canada Labour Code* (per section 206.1) and on the basis of family status. Employees absent from work on STD leave are being treated differently on the basis of disability. In each case, this is differential treatment on the basis of a prohibited ground. (paras. 24-26)

The relevance of *Urrutia* and *Cameco* to the present grievance is this: even in respect of benefits tied to the performance of work, the arbitrators did not draw distinctions between the durations of temporary absences from the workplace, and rejected seemingly arbitrary delineations between employees sharing a "protected characteristic" (e.g., short term disability versus long term disability).

In any event, based on my interpretation of the Collective Agreements, vacation entitlement depends on "service" or continuous employment, and is not a work-driven benefit. Therefore, absent a clear expression of intent to the contrary, regular employees absent from work should receive the full entitlement as part their employment status. Applying the three-part test for *prima facie* discrimination to the medical leave provision, I find Article 8.5(e) affects employees protected from discrimination by reason of disability (i.e., sick leave or WCB absence exceeding 60 days); such employees experience an adverse impact by having their vacation entitlement and vacation pay prorated for the entire period of their absence; and, the disability is a factor in the adverse treatment. Although not required by the final part of the test, the plain wording of Article 8.5(e) reveals that disability is *the factor* which results in the benefits being prorated.

The discriminatory nature of the provision is heightened by the apparent lack of any justification for the 60 day period; moreover, it seems completely arbitrary given that both the 59th and 61st days of disability are covered by Medium Term Disability benefits for qualifying employees under the Collective Agreements and Benefit Plan. As set out *Moore*:

> The inquiry is into whether there is discrimination, period. The question in every case is the same: does the practice result in the claimant suffering arbitrary -- or unjustified -- barriers on the basis of his or her membership in a protected group. Where it does, discrimination will be established. (para. 60)

It will be recalled that the Employers' defence to the grievances is premised on the assertion that vacation is a work-driven or compensation-based benefit. I have not accepted that categorization of vacation under the parties' Collective Agreements, and my conclusion is a complete answer to most of the Employers' arguments. It serves as well to distinguish many of the authorities cited in furtherance of those arguments. The Employers rely additionally on a now familiar passage from the concurring judgment in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employes de l'Hopital general de Montreal*, 2007 SCC 4, as well as the reasoning in *Saanich School District No. 63 and BCTF* (2013) 228 LAC (4th) 227 (Gordon). In *McGill*, Madam Justice Abella quoted the definition of discrimination articulated in *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, before writing:

> At the heart of these definitions is the understanding that a workplace practice, standard, or requirement cannot disadvantage an individual by attributing stereotypical or arbitrary characteristics. The goal of preventing discriminatory barriers is inclusion. It is achieved by preventing the exclusion of individuals from opportunities and amenities that are based not on their actual abilities, but on attributed ones. The essence of discrimination is in the arbitrariness of its negative impact, that is, the arbitrariness of the barriers imposed, whether intentionally or unwittingly.
>
> *What flows from this is that there is a difference between discrimination and a distinction. Not every distinction is discriminatory.* It is not enough to impugn an employer's conduct on the basis that what was

> done had a negative impact on an individual in a protected group. Such membership alone does not, without more, guarantee access to a human rights remedy. It is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact, that triggers the possibility of a remedy. And it is the claimant who bears this threshold burden. (paras. 48-49; italics added)

This approach has been adopted by our Court of Appeal, and represents the current law in British Columbia: see *Armstrong v. British Columbia (Ministry of Health)*, 2010 BCCA 56; *International Forest Products Ltd. v. Sandhu*, 2008 BCCA 2014; and, *British Columbia (Public Service Agency) v. British Columbia Government and Service Employees Union*, 2008 BCCA 357. It was applied (along with later authorities) in Arbitrator Gordon's extensively reasoned *Saanich School District* award. In that proceeding, the issue was whether a failure to credit an employee with "experience" increments for salary purposes related to a period when he was off work due to disability violated the Code. The experience credits were held to constitute "a type of service or work-driven entitlement related to compensation" (para. 123). Applying the traditional three-step test for *prima facie* discrimination, Arbitrator Gordon found the first and second steps were satisfied (paras. 124-128). She then turned to address whether it was reasonable to infer that the grievor's disability was a factor in the differential treatment, and opined:

> … I find there is a measure of arbitrariness in the Employer's practice under the Collective Agreement. As the facts establish, although teachers on personal leave do not accumulate experience credits during their leave, other teachers who do not satisfy the basis on which experience credits are achieved nonetheless accumulate experience credits during their leaves -- i.e., employees on WCB leave and extended maternity/parental leave. *However, I find the evidence does not support an inference that this distinction is linked to the Grievor's disability*.
>
> There is no evidence the distinction is due to the Employer's attribution of stereotypical characteristics to the Grievor, and there is no evidence that the suspension of experience credit accumulation during the Grievor's medical leave risks perpetuating any historical disadvantage or prejudice, or any exclusion from the workplace. *The evidence instead establishes that the distinction arises from the fundamental employment bargain and the operation of the material parts of the Collective*

> *Agreement*. As to the former consideration, the accumulation of experience credits was suspended during the Grievor's absence on extended medical leave because he did not achieve his side of the bargain: he did not achieve the type and duration of experience to qualify for experience increments. As to the latter consideration, the Grievor's disability was accommodated with an extended leave of absence during which his workplace access and participation rights, job security, economic well being and personal dignity were protected under the Collective Agreement. The Grievor's employment status, seniority accrual and fringe benefits were protected under the Collective Agreement, and he was paid SIP and LTD benefits instead of wages.
>
> * * *
>
> Thus, when the distinction arising under the Collective Agreement is viewed in its overall employment and Collective Agreement context, the evidence does not support a reasonable inference that the element of arbitrariness as between the Grievor and employees on WCB leave and maternity/parental leave is either linked to the Grievor's disability, based on any preconceived ideas concerning his personal characteristics, or perpetuates any historical disadvantage, prejudice or negative stereotyping about disabled individuals. *On the evidence, the distinction is linked to negotiated trade-offs under the Collective Agreement. The distinction arises out of differences in the type and level of negotiated benefits to which the Grievor and employees absent on other leaves would not have access save for the terms of the Collective Agreement. In my view, the distinction is therefore not* prima facie *discriminatory*. (paras. 137-138 and 140; italics added)

The Employers urge a similar conclusion in this case. They acknowledge the differential vacation treatment of employees, but submit the distinctions are linked to negotiated trade-offs under the Collective Agreements:

> It is clear from the Collective Agreement provisions that there is differential treatment with regards to vacation pro-ration of employees on leaves of absences under the Collective Agreements. Generally, employees on absences of a short duration, such as compassionate leave, jury duty or union leave, do not have their vacation pro-rated. Employees absent or more lengthy leave, such as sick leave or WCB leave exceeding 60 working days, maternity or parental leave and lengthy general leaves of absence, have their vacation pro-rated. Employees absent on WCB or sick leave, who have their vacation prorated following an absence of 60 working days are treated differently than employees on maternity and

> parental leave, who have their vacation pay prorated from the beginning of the leave.
>
> However, such distinctions are not discriminatory as they are not based on protected grounds but rather are part of the larger benefit packages provided to different groups of employees under the Collective Agreements based on the particular needs of the groups. To briefly recap, as part of the benefit packages bargained for between the City and Union, employees absent on maternity and parental leave receive a "top up" of their Employment Insurance benefits up to 95% of their gross weekly earnings for 17 weeks while on leave, as well as continued coverage under the City funded Medical Services, Dental Services, Extended Health Service and Group Life Insurance plans. Employees absent on the statutorily mandated, City funded WCB leave continue to receive the equivalent of regular take home pay and applicable benefits, subject to conditions. Employees absent from service on sick leave receive 85% of their "after tax" salary while on STSA and 90% of their regular gross earnings while on MTD.
>
> * * *
>
> Although the treatment of the Absent Employees concerning vacation pay differs to employees on other leaves of absences, the Absent Employees are also receiving benefits not available to employees on other leaves of absences. Likewise, employees on maternity leave are under a different insurance scheme and receive different benefits to those on WCB leave. It is not discriminatory to pro-rate vacation for those on WCB leave after 60 days and vacation for those on maternity leave from the start of the leave, as they are governed by separate schemes, require different protections, and have received diverse benefits from negotiations between the parties. (written argument at paras. 61-62 and 68)

The insurmountable obstacle faced by these submissions is my finding that neither vacation entitlement nor vacation pay constitutes a compensation-based benefit under the present Collective Agreements. I have not been directed to any authority where a status-based benefit has been denied for reasons related to a protected characteristic and there has been no finding of discrimination. Indeed, if one returns full circle to *Orillia Soldiers*, the answer to the Union's grievances becomes readily apparent: it was not discriminatory to deny service accrual or employer benefit contributions to nurses absent on disability leave because the applicable provisions related to compensation, but it was discriminatory to deny seniority accrual because that provision was triggered simply by

the status of being an employee. The same conclusion must follow here, with the result that Article 8.5(e) discriminates against employees absent due to disability.

I accordingly find Article 8.5(e) violates Section 13(1)(b) of the Code. The appropriate remedy will be considered below after examining the parental leave provision challenged by the Union's second grievance. In that regard, Article 11.2(c) provides:

> (c) Return to Work
>
> On resuming employment an employee shall be reinstated in their previous or a comparable position and for the purposes of pay increments and benefits, referenced in (e) herein, and vacation entitlement (but not for public holidays or sick leave) maternity and parental leave shall be counted as service. *Vacation pay shall be prorated in accordance with the duration of the leave and an employee may elect not to take that portion of vacation which is unpaid*. (italics added)

The Union's second grievance challenges the sentence in italics, and seeks to have it severed from the Collective Agreements.

The parties' arguments regarding Article 11.2(c) have been addressed in the main by what has been said above regarding the medical leave provision. I reiterate my interpretative conclusion that vacation pay under the Collective Agreements is an incident of employment status and is not dependant on the actual performance of work. Having determined that Article 8.5(e) violates the Code, it is only employees absent on maternity leave and parental leave who have their vacation pay prorated under the Collective Agreements. This directly engages the protected grounds of sex and family status. For reasons analogous to those set out above, I find this proration also violates Section 13(1)(b) of the Code.

IV. ANALYSIS - REMEDY

The specific remedies sought by the Union were summarized in the first part of this award. In general, it submits there must be a meaningful remedy which focuses on "the victims of discrimination" and it relies on what was stated in *Doucet-Boudreau v. Nova Scotia (Minister of Education),* 2003 SCC 62, at para. 55:

> In the context of s. 24 of the *Charter of Rights and Freedoms,* the Supreme Court of Canada has explained:
>
> > … an appropriate and just remedy in the circumstances of a *Charter* claim is one that meaningfully vindicates the rights and freedoms of the claimants. Naturally, this will take account of the nature of the right that has been violated and the situation of the claimant. A meaningful remedy must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied. An ineffective remedy, or one which was "smothered in procedural delays and difficulties", is not a meaningful vindication of the right and therefore not appropriate and just…

The Union notes as well the statement in *Moore* that the Code is remedial legislation encompassing two main aspects: "… the removal of arbitrary barriers to participation by a group, and the requirement to take positive steps to remedy the adverse impact of neutral practices" (para. 61), and says it is a "simple matter" here to correct the Collective Agreements by severing all of Article 8.5(e) and the last sentence of Article 11.2(c). In that regard, the Union submits removing the offending language would reverse the full effects of the discrimination; moreover, this is a case where a relatively small portion of the bargaining unit has been deprived of the vacation benefits. It also seeks compensation for the monetary losses suffered by employees who have been subject to the prorating language.

I accept the indisputable point that human rights remedies must be meaningfully responsive to demonstrated violations of the Code. At the same time, there is respectable authority for the proposition that the collective bargaining context is a valid consideration where a contractual term is found to discriminate against employees in a bargaining unit. A case in point is *Re Ontario Power Inc. and Society of Energy Professionals* (2000), 92

LAC (4th) 240 (M.G. Picher), where the arbitrator had previously issued a ruling that a collective agreement provision was discriminatory because it granted a top-up for parental leave that was not available to biological mothers and fathers. After a thorough and considered examination of past authorities, he reasoned:

> In approaching this problem it is fair to ask what can the parties be said to have intended, and to reasonably expect? In my view they must be taken to have understood at the time they made the collective agreement, which I have found to violate the Code, that its provisions could be reviewed and found wanting by a board of arbitration or by a human rights board of inquiry appointed under the Code. They then knew, or reasonably should have known, that they could become subject to the remedial discretion of a tribunal exercising the full scope of remedial jurisdiction available to a board of inquiry under Section 41(l)(a) of the Ontario *Human Rights Code*, as was acknowledged by Arbitrator Adams in the *University of Ottawa* case. They expected, or reasonably should have expected, that a finding of a violation of the Code could result in a board of arbitration directing them to do, in the words of the Code's Section 41 (1)(a),
>
> > "anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices..."
>
> I am satisfied that that is the remedial jurisdiction which I must exercise. . . .
>
> * * *
>
> In the case before me there is compelling evidence that reading in would cause grave prejudice to the employers. In addition, the Society stands as an equal partner in the drafting of the offending collective agreement provision, as it never proposed or otherwise sought equal benefits for birth parents. I am therefore persuaded that the remedy should be fashioned differently in this case than in those cited above. In my view it is most appropriate in these circumstances to direct the employers and the Society to renegotiate the terms of their collective agreements governing maternity and parental leave in a manner which results in the elimination of the discrimination which I have found to exist in the present language and application of Article 41.4(a)(iii) of the Hydro collective agreement. They are to do so within the freely negotiated or arbitrated constraints of the overall cost of the wage and benefit package of their collective agreements, unless they should agree otherwise. . . .

> The matter is therefore remitted to the parties to renegotiate and appropriately amend the maternity/parental leave provisions of their collective agreements, as directed above. . . . (paras. 31-35)

The Union correctly argues that the present situation is the obverse of *British Columbia Public School Employers' Assn. -and- British Columbia Teachers' Federation (Supplemental Employment Benefits Grievance)*, [2012] BCCAAA No. 138 (Hall), where extending to birth mothers a supplemental employment benefit available for both adoptive parents and birth fathers would have granted a significant monetary benefit to a much larger group than had been negotiated by the parties. Nor is it argued that the Employers would suffer a "grave prejudice" if the impugned provisions are severed from the Collective Agreements. Nonetheless, there is a factual element to the present dispute which lends determinative support to the Employers' alternative position that the matter should be remitted for renegotiation: that is essentially the route chosen by the parties if Article 8.5(e) was found to be discriminatory.

To elaborate, in the last round of negotiations, the Employers expressly stated that their disability plans would be a focus of collective bargaining. Their Pro-Rating Proposal was part of the package being negotiated, and was contained in the settlement offers. The parties agreed on language for Article 8.5(e) when the Employers proposed increasing the threshold for pro-rating from 20 to 60 working days. At that point, the Union raised a concern that the language might be discriminatory, and the parties agreed on how the question would be addressed:

> On December 5, 2012, the parties agreed that the Employers would seek a legal opinion about whether the Pro-Rating Proposal was discriminatory. If the legal opinion concluded that the Pro-Rating Proposal was not discriminatory, the parties would implement the vacation pro-ration provision as agreed to in the Memorandum of Agreement. *If the legal opinion raised concerns about discrimination, then the parties agreed that a committee would be struck to remedy the issue.* (Agreed Facts at para. 27; italics added)

The Memorandum of Agreement was signed two days later, and the Collective Agreements were ratified a week later.

Adopting the approach taken in *Ontario Power*, "… it is fair to ask what can the parties be said to have intended, and to reasonably expect?" As set out above, they "agreed that a committee would be struck to remedy the issue". The concept of a committee has perhaps been overtaken by the stipulation at arbitration that the parties are about to begin negotiations for renewal Collective Agreements. But that distinction does not affect the basic nature of the appropriate remedy; namely, the discrimination resulting from Article 8.5(e) should be remitted to the parties for resolution.

On the other hand, I do not accept the Employers' further submission that there should be a temporary suspension of a declaration that Article 8.5(e) is discriminatory until the date the present Collective Agreements cease to have effect. It is apparent from the parties' agreement during negotiations that, if the legal opinion raised concerns about discrimination, the new language would not be implemented while the committee worked to remedy the issue. The same state of affairs should exist while the parties address the subject during negotiations for renewal Collective Agreements. And, due to the jurisdictional concern expressed in *BCPSEA -and- BCTF (Supplemental Employment Benefits Grievance)*, I am not prepared to direct the parties to negotiate a solution providing the same cost savings that accrued to the Employers under the current prorating language.

In my view, although Article 11.2(c) was not a product of the last round of negotiations, the same remedy should flow. The Union's challenge to the long-existing provision was clearly triggered by its concerns over Article 8.5(e). Further, the initial grievance dated June 24, 2013 appears to have raised only the prorating of vacation entitlement implemented in May of that year. The policy grievance challenging "the pro-rating of vacation for employees who are on parental leave" was filed as a companion to the grievance challenging "the pro-rating language resulting from the 2012 negotiations" on April 8, 2014. Given this linkage, I see no basis for fashioning a different remedy.

V. CONCLUSION

I hereby declare that Articles 8.5(e) and 11.2(c) of the parties' Collective Agreements violate Section 13(1)(b) of the *Human Rights Code*. The foregoing declaration is effective as of the date of this award, and coincides with the expiry date of the four Collective Agreements. The discriminatory nature of the two provisions is remitted to the parties for resolution during their pending round of negotiations. In the unlikely event that appropriate amendments prove elusive, I retain jurisdiction to consider other remedies after hearing further submissions.

DATED and effective at Vancouver, British Columbia on December 31, 2015.

JOHN B. HALL
Arbitrator