

IN THE MATTER OF AN ARBITRATION

BETWEEN

THE CORPORATION OF THE TOWN OF OAKVILLE

AND

OAKVILLE PROFESSIONAL FIREFIGHTERS ASSOCIATION

GRIEVANCE OF ERIN MCNALLY

AND POLICY GRIEVANCE CONCERNING

ACCOMODATION OF PREGNANT FIREFIGHTERS

Arbitrator: Richard Brown

For the Union: Cynthia Petersen

For the Employer: Stephen Bird

Hearing: Oakville, Ontario
May 9, July 20, 21 and 21, Sept. 19
and Nov. 7, 2016

The association has referred to arbitration an individual grievance and a policy grievance concerning the accommodation of pregnant firefighters. These grievances were prompted by the employer's response to the pregnancy of Erin McNally who works in the suppression division. After requesting accommodation, she initially was assigned to "alternative non-hazardous duties" at Station 3 and continued to be counted as part of the minimum complement. The grievances contend the safety of other firefighters and the general public was jeopardized by treating her as part of the minimum complement, when she was not performing the full range of normal duties. The grievances also allege some of the "non-hazardous" duties proposed by the employer are in fact not safe for a pregnant firefighter. At the conclusion of the hearing, the parties agreed I should issue an award addressing the first issue and remained seized of the second.

Ms. McNally did not testify. The association called two witnesses: Chuck Lewis and Carmen Santoro. Chuck Lewis is an assistant platoon chief (A.P.C.) and president of the association. He was hired in 1988 and has spent his entire career in suppression, including more than eight years as captain and five years as assistant platoon chief. He has held this position on two platoons, 1B and 2B. As assistant platoon chief, he has been based at Station 3. Carmen Santoro was hired in 1993 after spending 10 years as a part-time firefighter in Welland. He was an acting captain for 5 years and has been a captain for the last 13 years, including eight years as an officer at Station 3. As well as being president of the association from 2004 to 2014, he has served on the executive of the Ontario Professional Firefighters Association, four years as vice-president and two years as president. As a result of these responsibilities, the number of shifts he has worked in recent years ranges from a high of 35 in 2013 to a low of 9 in 2015.

Brian Durdin is the only witness called by the employer. He was deputy chief (D.C.) in charge of suppression at the time of the events giving rise to the grievances in early 2016. He assumed the position of fire chief in May of 2016. He has worked in the fire department for 35 years, spending almost all of that time in suppression, including two years as captain, six years as platoon chief and 8 years as deputy. He visited three or four fire scenes between January and September of 2016, typically within the first thirty-minutes after the first truck had arrived.

I

A meeting was held on January 8, 2016 to discuss Ms. McNally's recently announced pregnancy. She attended the meeting along with D.C. Durdin, a representative from human resources and A.P.C. Lewis as association president. There was a preliminary discussion of the options open to Ms. McNally, including remaining "on shift" (i.e. working twenty-four hour shifts), perhaps performing some but not all suppression duties, or switching to non-suppression work on days. A.P.C. Lewis addressed the issue of minimum staffing, saying Ms. McNally should not be counted as part of the staffing complement if she remained "on shift" with less full duties, just as she would not be counted if she switched to days. The meeting ended with D.C. Durdin undertaking to respond to this concern.

Ms. McNally made no election until January 21. She then submitted a signed "acknowledgement form" saying: she had received the "Alternative Non-Hazardous Duty Policy"; she was aware of the "full range of exposures and risks during pregnancy" that may occur in the performance of her job; and she voluntarily accepted those risks and released the employer from liability. In short, she elected to continue performing all of her normal duties, at least for the immediate future.

In early February D.C. Durdin, in consultation with human resources, prepared a letter setting out three options open to Ms. McNally. The relevant part of the letter stated:

1. You can continue to perform all of the duties of your current position with no change.
2. You can request an accommodation to your current duties. A medical certificate confirming your pregnancy and outlining your medical restrictions is required.
3. You can request to be provided with alternative non-hazardous duties. A medical certificate confirming your pregnancy is required.

A copy of this letter was sent to A.P.C. Lewis on February 8. Ms. McNally received the letter the next day.

Chief Durdin testified option two allows a pregnant firefighter to continue “on-shift” (i.e. on twenty-four hour shifts) working in the “hot zone” at fire scenes, but with some accommodation based on medical restrictions, for example no heavy lifting. Option three allows a pregnant firefighter to request removal from the hot zone. Under this option, she may continue working twenty-four hour shifts in the suppression division, performing alternative non-hazardous duties, or may change to working the day shift only outside suppression.

In late February Ms. McNally informed the employer she no longer wished to remain on full duty. Electing to stay in the suppression division under the third option, she presented to the employer a medical note, dated February 23, stating she was pregnant but indicating no specific restrictions.

On February 24, while on vacation, D.C. Durdin sent an email to A.P.C. Lewis, confirming Ms. McNally had chosen option three. The email went on to describe a “proposed” accommodation at Station 3 with a list of duties including

mail delivery, hospital runs and public education. Of the duties listed, only one involved work at a fire scene: “Scribe/FIT for Platoon Chief ONLY if able to remain in the cold zone (travel to and from calls in a separate pick-up).” D.C. Durdin wrote: “I would suggest we code this 62.” It is common ground that a firefighter coded as 62 is not counted as part of the minimum complement. This was the proposal put to the union by D.C. Durdin. I read his use of the word “proposed” to mean he was making an offer to the association on behalf of the employer as the senior officer in the suppression division. Nothing in his email suggested his proposal was subject to ratification by the then chief or any other management representative.

The association was satisfied with the offer made by D.C. Durdin. Ms. McNally worked on February 25 in accordance with his proposal. She was not counted as part of the complement, resulting in another firefighter being called in on overtime. The next day A.P.C. Lewis learned the employer was revoking one component of its offer. In future, Ms. McNally would be treated as part of the complement while performing alternative non-hazardous duties on twenty-four hour shifts. As D.C. Durdin was on vacation, A.P.C. Lewis emailed then Fire Chief Lee Grant, indicating he was confused by the employer’s apparent change of position. Chief Grant responded by email: “The issue at this point is that HR has not to this point approved any option.”

In an email dated February 29, Mr. Lewis reiterated his position that a pregnant firefighter, who requested accommodation, should be not be counted as part of the complement, regardless of whether she worked twenty-four hour shifts in suppression or day shifts elsewhere. This email also mentions an arbitration award in a case involving the City of Windsor which is discussed below.

In a series of emails dated March 1 to A.P.C. Lewis, Chief Grant wrote: he had “provided HR” with a list of on-shift non-hazardous duties; “HR does not intend that she [i.e. Ms. McNally] will be replaced” during the time she is on non-hazardous duties on-shift; and she would be the third firefighter on “the platform” [i.e. the ladder truck designated as 232].

On March 2 Lyn Hunt, Labour and Employee Relations Manager, emailed A.P.C. Lewis, sending copies to Chief Grant and D.C. Durdin. The relevant part of the email states:

At this time the town can provide the following non-hazardous duties on shift and given that there are not medical restrictions in place:

- Accountability Officer
- Rehabilitation Officer
- Fire Incident Technician (scribe for P.C.)
- Safety Officer

This would necessitate a transfer to Station 3 and an assignment to the Aerial device [i.e. Ladder 232].

Of the four tasks listed in Ms. Hunt’s email, FIT is the only one to appear on the list of duties proposed by D.C. Durdin on February 24. Chief Durdin testified that the other three tasks mentioned in Ms. Hunt’s email were “additional” to those on his list.

A.P.C. Lewis responded to Ms. Hunt’s email by asking Chief Grant if he agreed with it. Replying in the affirmative, the chief wrote:

[S]o long as the employee is on shift and doing the work normally done by a FF there was no need or requirement to also provide another FF. When the employee can no longer be on shift clearly a replacement will be needed.

Ms. McNally’s platoon chief at the time was Bill Forbes. In an email to Chief Grant, dated March 4, 2016, P.C. Forbes objected to her being counted as

one of the three staff assigned to Ladder 232 when it served as the first responding truck. He wrote:

Chief, I am not sure that it can work as 3rd person on L232 as it is used to backfill when needed. So there will be times when they are first in coverage for a station. This happens many times for #3 area when P231 is moved for coverage.

The first two sentences of this email address the scenario where Ladder 232 serves as first responder while backfilling outside of District 3 where it is normally based. (The practice relating to backfilling is described below.) The last sentence addresses the scenario of Ladder 232 providing first response in District 3 when Pump 231 is not present at Station 3.

The then chief's reply, also dated March 4, is very brief and not entirely clear as to whether it addresses both scenarios raised by P.C. Forbes. Chief Grant wrote:

Well I think the (sic) during the period of accommodation the use of the Platform [i.e. Ladder 232] to cover areas may have to be suspended.

This response was copied to D.C. Durdin who forwarded it to all platoon chiefs for their direction. He testified Ladder 232 was not used to backfill other stations when Ms. McNally was part of the crew during her accommodation. Asked whether Ladder 232 had acted as first responder in its own district during that period, with her on board, while Pump 231 was backfilling elsewhere, he said Ladder 232 should not have been used in this fashion but admitted he is not sure what had actually happened.

The employer's decision to treat Ms. McNally as part of the minimum complement, after she requested assignment to non-hazardous duties, prompted three officers to lodge protests concerning safety. Deputy Chief Birtig listed these

concerns in a document dated March 21, 2011 and entitled Response to Safety

Concerns:

1. Concern over Non-Hazardous Duty Accommodation (NHDA) firefighter assigned as part of the minimum staffing on Ladder 232. (Fullerton)
2. Concern over the potential for Ladder 232 to be the first rescue on scene in an emergency where every firefighter is required to perform hazardous tasks and maintain scene safety. (Forbes)
3. Concern over the impact of NHAD firefighter on first response and depth of response capacity. (Williamson)

The name in brackets is that of the officer raising the particular concern. Fullerton is an acting captain. As already noted, Forbes is McNally's platoon chief.

Williamson is a captain and co-chair of the joint health and safety committee.

D.C. Birtrig responded to these safety concerns in on April 1, 2016 as follows:

Ladder 232, with a minimum complement of less than 4 firefighters, is already limited in its initial response capacity. With less than 4 firefighters, the crew is not capable of conducting interior firefighting operations. The same situation exists with both rescue trucks (R254/R274). Until additional resources arrive on location, these crews are limited to conducting exterior operation, if arriving first on scene. Exterior operations include assuming command, initial size-up, establishing a water supply (if capable), securing the scene etc. Company officers and incident commanders are required to ensure that operations fall in line with the resources available in order to ensure the safety of all firefighting personnel. [emphasis in original]

Ms. McNally subsequently presented to the employer a note from her mid-wife, dated April 19, recommending that she work day shifts in a non-hazardous environment for the duration of her pregnancy. She was then reassigned in accordance with this recommendation.

II

An employer policy, entitled “Alternative Non-Hazardous Duties—Pregnant Firefighter”, contains the following provisions:

The Town of Oakville and the Oakville Fire Department recognize pregnancy as a normal occurrence in a woman’s life. This policy meets the requirements of the Ontario *Human Rights Code* and provides temporary employment in alternative duty assignments for pregnant firefighters (hereinafter referred to as “employee”) until the employee begins medical or other approved leave.

Alternative Non-Hazardous Duties—Means meaningful work that does not penalize an employee and involves no loss of pay, seniority or benefits and will not preclude an employee from any promotion. The nature of alternative non-hazardous duties will be assigned in a manner that is consistent with the medical and physical limitations of the individual firefighter in consultation with the Association and Fire Management. These alternative non-hazardous duties may be performed on-shift. ...

The employee is responsible, with advice from her physician, to determine how long she will continue in her regular or temporarily accommodated position. Temporary accommodation to Alternative Non-Hazardous Duty will be granted upon written request to the Deputy Chief (or designate) by an employee.

When testifying, Chief Durdin confirmed “on-shift” at the end of the second paragraph means while working twenty-four hour shifts. He also testified the policy was amended to allow accommodation on such shifts after the settlement of a human rights complaint lodged by a pregnant firefighter who wished to remain in the suppression division.

The appendix to the policy is entitled “Hazards of Firefighting on Pregnancy.” The pertinent passages are set out below:

While the presence of certain chemicals at a fire scene depends on the types of fuels that have burned, some toxic gases are common to most fires. These include carbon monoxide, hydrogen cyanide, acrolein, formaldehyde, benzene, acetaldehyde and formic acid. ... The most prevalent of these gases is carbon monoxide. ...

Carbon monoxide gas is a chemical asphyxiant that deprives the body of oxygen. ...

Oxygen delivery to the tissues is vital to the normal development of the fetus, especially in the first trimester, when vital organs and limbs are forming. Although the mother may be asymptomatic following a small exposure to carbon monoxide, the developing fetus has a greater risk ...

It is important to note the danger is considerable even when the mother doesn't present clinical symptoms...

Pregnant firefighters operating in the overhaul phase can put their fetus at risk if proper protective equipment is not worn. In a 2001 study published in the Journal of Occupational and Environmental Medicine, the authors concur that using positive pressure SCBA during overhaul can reduce a firefighter's amount of contaminant exposure by 10,000-fold

To lessen the risk of carbon monoxide poisoning to the fetus, a pregnant firefighter should wear full turnouts and SCBA while working in an around an overhaul atmosphere.

The term "overhaul" as used in this appendix refers to a process conducted by firefighters, after a fire is largely extinguished, to root out and fully extinguish any buried hot spots that pose a risk of re-ignition.

III

Firefighters responded to a total of 6,117 calls in 2015. There were 215 fire calls and 5902 non-fire calls. The 215 fire calls included 112 outdoor fires, 60 structure fires and 31 vehicle fires. Asked about outdoor fires, A.P.C. Lewis testified garbage fires pose a carbon monoxide risk but grass fires do not. Among the largest categories of non-fire calls were medical/resuscitator (3111), false fire (861), rescue (626) and false carbon monoxide (369). There were also an unspecified number of calls relating to hazardous materials.

There are approximately 204 firefighters in the suppression division, nine of whom are women. The division is divided into four platoons. Members of each platoon work seven shifts of twenty-four hours each over the course of four weeks. Most platoons have 51 members but Platoon 1B has 49 and 2A has 53. The members of the platoon on duty on any given day staff all eight fire stations in the town. (Stations are number 1 to 7 and 9; there is currently no Station 8.)

The apparatus (i.e. trucks) primarily used by the suppression division are of four types: pump, ladder, rescue and hazmat. Only pumps and ladders can pump water. Station 4 has one ladder. Stations 2 and 6 have one pump. Stations 1, 5, 7 and 9 have a pump and rescue or hazmat. (These numbers of apparatus do not include spare trucks which are not staffed in the normal course.) Station 3 has both a pump and a ladder; it is the only station with two trucks capable of pumping water. Pumps and ladders serve as first responders to fire scenes because of their capacity to pump water.

When 51 members of a platoon are on duty at the same time, all but two first-response trucks are staffed with five firefighters. The two exceptions are Pump 211 at Station 1 and Ladder 232 at Station 3, both with four firefighters at full staffing.

The minimum number of firefighters on duty at any time is 40. When absences of various sorts reduce the available members of the on-duty platoon below 40, firefighters from other platoons are called in on overtime to maintain the minimum. In this scenario, the number of firefighters on each pump or ladder is four, subject to one exception. There is a minimum staffing of three on Ladder 232, the truck to which Ms. McNally was assigned when performing non-hazardous duties on twenty-four hour shifts.

Minimum staffing for all ladder trucks and pump trucks, except Ladder 232, was increased from three to four by a new Fire Master Plan introduced in 2007 to enhance the safety of firefighters and the general public. The National Fire Protection Association, an American organization, recommends a minimum staffing of four. Brian Durdin testified this recommendation was taken into account during the review leading to the 2007 master plan. Noting NFPA recommendations apply to large cities as well as smaller towns, he stated a town the size of Oakville is not able to meet all NFPA recommendations.

When the platoon on duty can provide more than 40 firefighters, but less than 51, the staffing policy determines the order in which particular trucks are selected for a reduction in staffing. Ladder 232 is the last truck to have its staff complement reduced to the minimum, presumably because it is the only first-response truck with a minimum of three rather four. The staffing of Ladder 232 is reduced to three only when eleven members of a platoon of normal size do not report for duty. A.P.C. Lewis testified Ladder 232 operates with just three firefighters about half the time, during periods when firefighters are most likely to take vacation or lieu days.

Chief Durdin testified the standard response to a house fire is to dispatch three pump trucks, one ladder truck and one rescue truck. Ladder 232 would be

one of the trucks dispatched for a fire in any of the four districts south of the QEW. The ladder on such a truck, with a hose attached, can be used as suppression device to drown a fire.

The captain of the first truck to arrive at a scene initially acts as incident commander. Once all trucks are on scene, the platoon chief has the authority to take over incident command. In the absence of the platoon chief, the assistant platoon chief has the same authority. When both of these officers are on duty, command may be shared between them, with the chief assuming the command role for districts on one side of the QEW and the assistant doing the same for districts on the other side. Sharing command in this way removes the assistant platoon chief from active firefighting. Captain Santoro testified command is not shared unless ladder 232 is staffed with four firefighters. Notwithstanding the authority of the most two senior officers in a platoon to act as incident commander, either of them may elect to leave incident command with the captain of the first arriving truck to allow that person to gain experience. Captain Santoro testified he has continued to act as incident commander many times after the arrival of a more senior officer.

In the normal course, when no-one is being accommodated for pregnancy, Ladder 232 is sometimes the first vehicle responding to a fire. If both Pump 231 and Ladder 232 are at Station 3 when an alarm comes in for a fire in this district, Pump 231 is dispatched first with Ladder 232 right behind. If Pump 231 is not in the station at the time of an alarm, Ladder 232 serves as first responder. A.P.C. Lewis testified it is not unusual for Pump 231 to be out of the station because the truck's crew is doing public education within its district or practical training at the campus adjacent to Station 5. He also testified out-of-station training is "quite common in warm weather." According to Chief Durdin, most practical training occurs out-of-station, including: rope rescue with rappel (once a month); live

burning (once a year); self-rescue (less than once a year); ice and water rescue (frequency unspecified); and forcible entry (frequency also unspecified).

Stations other than Station 3 have only one apparatus capable of providing first response, a pump truck or a ladder truck. If such a truck is out of its home district, while the crew is at the training campus, Pump 231 or Ladder 232 is typically moved to back-fill as the first-response truck in that district for the day. When Pump 231 is used to back-fill, Ladder 232 becomes the first-responding truck in its home district.

In short, Ladder 232 sometimes serves as first responding truck in its home district and sometimes plays the same role in other districts. According to Captain Santoro, Ladder 232 is designated as first responding truck fifty per cent of the time.

Whenever staffed with the minimum crew of three, Ladder 232 is not able to provide the same sort of first response as other trucks with a minimum crew of four. A standard operating procedure (SOP) entitled “Initial Fire Attack” states in relation to three-person crews: “Interior rescue and suppression operation should not be attempted except in limited circumstances (see note).” The note referenced in this quotation states:

In certain circumstances, interior rescue and suppression operations may be achievable (such as a victim collapsed in close proximity to a window or exterior doorway, or where the fire is confined to a very small, readily accessible area). For interior fires rapidly gaining in intensity, crews of less than four firefighters should not attempt interior suppression or rescue operations.

The SOP lists several critical tasks that can be accomplished by a three-person crew, comprised of a captain and two firefighters, arriving first on scene. These tasks include: establishing command; completing initial size-up; establishing a

water supply from a hydrant; establishing pumper operations; laying a hose to the point of entry into the structure; performing limited exterior firefighting including raising a ladder; conducting external rescues using a ladder for those persons in the building capable of self-help; and conducting forcible entry operations.

Witnesses testified about how the first response of a three-person crew would be affected if one of them is being accommodated with non-hazardous duties and cannot enter the hot zone. A.P.C. Lewis stated such an accommodation would delay getting water, performing rescues and possibly mitigating the fire, perhaps until arrival of a second truck. He explained the captain would be tied up doing a 360 degree tour of the scene to size-up the fire and communicating with incoming crews about their assignment. The accommodated firefighter would be able to establish a water supply from a hydrant but unable to lay a hose to the point of entry to the burning structure or participate in exterior rescue or firefighting. During examination-in-chief, A.P.C. Lewis said external rescue would not be possible, because it requires two crew members to enter the hot zone, and the driver of the truck (i.e. the firefighter not being accommodated) would be required to remain with the truck to monitor the pump and thereby protect anyone operating a hand-line from the danger of a pressure surge. He also testified external firefighting using a hand line would not be possible, at least until the captain had completed his size-up, because the use of a line requires the driver to monitor the pump. Asked in cross-examination why the captain would not pull the driver from the truck to assist in an exterior rescue, when no hand line was operating, A.P.C. Lewis replied that he could not answer for every captain.

Chief Durdin conceded the accommodation of a pregnant firefighter, on a truck with a three-person crew, limited the truck's response capacity, making it preferable that this truck not serve as a first responder in these circumstances. He

testified: two firefighters, in the hot zone, are required to do an external rescue or forcible entry; and two firefighters are required to raise a twenty-four foot ladder although one person can raise a shorter ladder. He conceded, with one member of a three-person crew being accommodated, the captain would have to suspend his size up in order for two firefighters to perform a ladder rescue.

As noted above, the use of Ladder 232 to backfill as first responding vehicle outside District 3, its home district, was suspended during the period Ms. McNally requested accommodation with non-hazardous duties in suppression. The evidence does not indicate whether Pump 231 continued to be used for such backfilling, and if it did, whether Ladder 232 sometimes served as first responder in its home district. Even if not formally designated as first responder in District 3 when Pump 231 was backfilling elsewhere, Ladder 232 typically would be one of the trucks dispatched to any structure fire in its district and would be the first to arrive, as the only truck coming from that district.

If the use of Pump 231 to backfill was suspended to minimize the chance of Ladder 232 being first responder in District 3, the result would be that some other station would occasionally be left without a truck capable of pumping water. In this scenario, coverage of the district lacking a first-response truck would be provided by two adjacent stations, with each of them providing coverage for half the district in question.

There are other circumstances, not involving a pregnant firefighter, where first-response coverage for a district is provided by two adjacent districts in the same fashion. When pump or ladder crews from two or more districts attend out-of-station training on the same day, it is not possible to backfill all stations temporarily lacking a truck capable of pumping water, because the number of such trucks with a crew exceeds the number of districts by only one. The evidence

indicates that a station occasionally has been left without a truck capable of pumping water as a result of training, but there is no evidence as to the frequency with which this scenario occurs.

Splitting coverage for a district between two adjacent stations increases response time. According to the association's witnesses, a truck coming from within the district where a fire scene is located can arrive 3 or 4 minutes sooner than a truck sent from an adjacent district. A.P.C. Lewis testified whenever possible he endeavours to avoid this sort of delay by backfilling a station which would otherwise not have a truck capable of pumping water. Chief Durdin testified whenever one station must be left without such a truck, the station selected is one with a history of relatively few alarms. He described Station 3 is one of the busier stations but not the busiest.

The NFPA publishes recommendations for response time. It recommends a maximum turn-out time of 80 seconds between receipt of an alarm and trucks in motion. Defining travel time as the interval that begins when a truck is on route to an emergency and ends when it arrives at the scene, the NFPA recommends a travel time of 240 seconds or less for the first-responding vehicle at least 90% of the time. When Chief Durdin testified in July of 2016, he reported the standard of 240 seconds had been met for 74% of calls during the current calendar year to date. The NFPA recommends a travel time of 480 seconds, at least 90% of the time, for all vehicles responding to a fire. Chief Durdin testified this standard was met 93% of the time during the first half of 2016.

Captain Santoro testified fires burn hotter and faster today than they did ten years ago because of the types of fabrics and construction materials now being used. He stated response times are measured in seconds because seconds matter. Chief Durdin conceded a fire could have been burning for a number of minutes

before the first-responding truck leaves its station. He also conceded, in the event of a delayed arrival, a fire is more likely to be burning hotter and out of control, creating a greater risk of structural collapse. As to the presence of environmental toxins, he stated a fire produces lots of toxins early on and might be producing fewer toxins later. Explaining flashover occurs when all of the contents of a room simultaneously reach ignition temperature, creating a room full of fire, he noted flashover conditions can be reached with ten minutes of a fire starting. He acknowledged seconds can make a difference in preventing death or injury.

IV

During the accommodation of a pregnant firefighter, she could be assigned at a fire scene to any of the tasks listed in Ms. Hunt's email, so long as she is qualified. Any firefighter has the qualifications to act as accountability officer, rehabilitation officer or FIT. Special qualifications are required to act as safety officer. In the winter of 2016, the association promptly protested that Ms. McNally lacked the qualifications to work as safety officer. Faced with this objection, the employer undertook not to assign her to this position.

The employer contends a firefighter performing any of these roles should be counted as part of the minimum complement because this is work normally done by someone included in the complement. The association witnesses disputed the premise underlying the employer's contention.

A FIT works beside the officer acting as incident commander at a fire scene, monitoring radio communications, communicating with dispatch and documenting what transpires. The appointment of a firefighter to work as FIT is very rare. A.P.C. Lewis testified he has had such an assistant only once in five years. The firefighter acting as FIT on that occasion was performing modified duties in the

course of returning to work after an injury. Captain Santoro has never served as FIT, nor seen anyone else serve as one, in more than twenty years.

Rehabilitation is the term used to describe the rest and recuperation that firefighters require to recover from the stress of fighting a fire. A.P.C. Lewis testified they need to go to a safe area where they can remove their self-contained breathing apparatus (SCBA) and bunker gear and drink water and electrolytes. In hot weather firefighters may use fans to cool-off in the shade. Cooling chairs are used when it is very hot. In cold weather firefighters may take shelter in a bus. Rehabilitation is a standard requirement at fire scenes but a rehabilitation officer is not always appointed to oversee it. A.P.C. Lewis testified in his experience there is a rehabilitation officer at less than 50% of fire scenes. According to him, the firefighter appointed as rehabilitation officer is not among those on the first or second truck to arrive. Captain Santoro initially said he had never seen a formal rehabilitation sector established, but in cross-examination he said a proper rehabilitation centre is set up at a major incident. Chief Durdin testified having a rehabilitation officer less than half the time is not in accordance with policy. He agreed someone arriving on the first or second truck should not be selected for this role. He stated the factors that determine whether a rehabilitation officer should be appointed are heat, cold and duration of fire.

An operating guideline entitled “Rehabilitation” contains the following direction as to when a rehabilitation sector should be established and a rehabilitation officer appointed:

The Incident Commander shall consider the circumstances of each incident and make adequate provision for rest and rehabilitation of all personnel operating at the scene. (page 1)

The Fire Department Incident Commander, in conjunction with the Crew Officer shall establish a Rehab Sector when conditions indicate that rest and

rehabilitation is needed for personnel operating at an incident scene or training evolution. Rehab shall be set up when the ambient temperature reaches 29 C or 32 C with the humidex; or below -5 C with a wind-chill of -12 C. The Rehab Sector Officer shall report to the incident commander.
(page 2)

However, the climatic and environmental conditions of the emergency scene should not be the sole justification for establishing Rehabilitation. Any activity/incident that is large in size, long in duration and/or labour intensive will rapidly deplete the energy and strength of personal and therefore merits consideration for Rehabilitation. The Incident Commander shall decide what level of Rehabilitation is required and the appropriate measures to be taken.
(page 4)

I read this policy as requiring rehabilitation at every fire scene but granting a discretion to the incident commander to decide, based upon the factors mentioned, whether to appoint a rehabilitation officer.

The duties of a safety officer are briefly described in an operating guideline entitled “Incident Safety Officer”:

1. Evaluate the risk of incident, such as activities to personnel and civilians, building conditions, environmental conditions and advise Command and Sector Officers of any safety hazards observed.
2. Evaluate resources and advise Command of any recommendations.
3. Ensure all personnel comply with health and safety measures.
4. Assist in monitoring and rotation of crews on the fireground.
5. Shall rectify any immediate safety hazard through coordination with Command.

The guideline contemplates that these duties may be performed by the incident commander or assigned to some-one else:

The responsibilities of an Incident Safety Officer shall be a function of Command, or if the incident requires, shall be specifically assigned to personnel.

A.P.C. Lewis testified, when acting as incident commander, he almost always keeps the role of safety officer for himself. On the less than five occasions when he has appointed someone else, that person did not arrive on the first or second truck. He has observed other incident commanders appoint a safety officer less than five times. According to Captain Santoro, the only time he has ever witnessed an incident commander appoint an safety officer was when the chief training officer was called to a fire after it had been burning for five or six hours. Chief Durdin has seen a safety officer appointed “a few times.”

Throughout the hearing, the terms “entry control” and “accountability officer” were used interchangeably. I shall use the term accountability officer. An operating guideline entitled “Accountability System and Entry Control” states the driver of the third truck arriving at an incident shall be assigned the duties of this position. There is an accountability officer at every fire scene to track the location of firefighters by using an accountability board mounted on a tripod. The board has slots for the green and red tags assigned to firefighters, each bearing a unique identifier. The presence of a green tag on the board indicates the associated firefighter is on the scene; the presence of a red tag indicates that person is in the hot zone. As well as monitoring the placement of tags, an accountability officer adds notations to the board using a grease pencil. For those in the hazard zone, the following information is recorded on the board: the time of entry into the hot zone; the expected time out (after 15 minutes using SCBA); location; and task. In case a tag falls off the board, the guideline directs an accountability officer to “write the number of the tag on the board surface on top of the inserted tag.”

The guideline also grants an incident commander the discretion to appoint an accountability sector officer. Little evidence was led about the associated duties. The evidence indicates they are typically combined with entry control. A.P.C. Lewis testified he has appointed someone to serve exclusively as accountability sector officer only once, at a fire in an apartment building. Captain Santoro has never attended a fire scene where such an appointment was made.

V

The parties agree an arbitrator has jurisdiction to apply the *Human Rights Code*. Section 5 of the Code creates a right to equal treatment with respect to employment without discrimination based upon several prohibited grounds including sex. Section 10(2) defines the prohibited ground of sex to include pregnancy.

Section 11 is entitled “constructive discrimination. According to s. 11(1), a right under s. 5 is infringed where a requirement exists that is “not discrimination based on a prohibited ground but results in the exclusion or restriction or preference of a group of persons who are identified by a prohibited ground.” The parties join issue as to whether the employer’s approach to pregnancy amounts to constructive discrimination within the meaning of this section.

Section 11(1) goes on to say there is no infringement where the requirement is “reasonable and bona fides in the circumstances.” Section 11(2) states a requirement is not “reasonable or bona fide” unless the needs of the group “cannot be accommodated without undue hardship.” As the employer has not raised a defense of undue hardship in this case, I need not consider the exception in section 11(1) or the concept of undue hardship in section 11(2).

The association contends the fetus of a pregnant firefighter is placed in jeopardy by normal firefighting duties. Having called no expert evidence about this

risk, the association contends the employer has conceded this point by adopting a policy implicitly acknowledging the risk.

The association submits requiring a pregnant firefighter to continue with her normal duties in suppression, if she requests accommodation, would constitute constructive discrimination, by treating a pregnant firefighter less favourably than one who is not pregnant. According to this line of argument, a pregnant firefighter is entitled to accommodation, based upon risk to her fetus, even if she is physically able to do all of her normal duties. Drawing a parallel between religion and pregnancy, counsel for the association notes a person seeking to be accommodated based on religious belief is not disentitled to accommodation merely because he or she is physically able to do the job without modification.

Turning to the accommodation with “alternative non-hazardous duties” offered by the employer, the association argues it is not an appropriate form of accommodation. According to this line of argument, treating such a firefighter as part of the minimum complement is not an appropriate form of accommodation because it endangers other firefighters and the general public. The case law cited in support of this proposition is set out in the next section of this award.

Noting a firefighter who elects to leave the suppression division during her pregnancy is not counted as part of the complement, association counsel contends a pregnant firefighter who opts to remain in the suppression division with modified duties should be treated in the same way. This contention applies not only to a firefighter who elects to remain in suppression without entering the hot zone but also to a firefighter who elects to remain in the hot zone with a restriction such as no heavy lifting. In support of this argument, the association relies upon a line of authority holding the duty to accommodate obliges an employer to consider modifications relating to the grievor’s existing position before offering

accommodation in some other position. The case law cited in support of this proposition is also set out in the next section of this award.

The employer notes there is no evidence to suggest the grievor was not physically able to perform all of her regular duties and contends its obligation under the Code is to “look at the job, look at what a pregnant firefighter can do and facilitate what she can do.”

The employer also contends the grievances should be dismissed because the association has failed to prove firefighting poses a risk to the fetus of a pregnant firefighter. In support of this contention, employer counsel suggests the appendix to its policy dealing with carbon monoxide risk indicates it can be reduced to an acceptable level by using personal protective equipment. Counsel submits the policy itself does not acknowledge any risk when such equipment is utilized. The employer also noted that 96% of all calls to which firefighters responded in 2015 did not involve a fire.

Turning to the issue of whether a pregnant firefighter on modified duties in the suppression division should be treated as part of the minimum complement, employer counsel contends the association’s claim about risk to other firefighters and the general public is based on speculation. The suppression division responded to 212 fire calls in 2015. Noting there are four platoons and eight stations, counsel submitted the number of times members of the grievor’s platoon from her station provided a first response each year would be approximately seven—i.e. 212 divided by the product of 4 x 8 or 32. Counsel noted Pump 231 would be first responder on most of these calls and when Ladder 232 provided first response it would often have a crew of four rather than three. Counsel noted there is no evidence the grievor was ever part of a first-response crew during the period she was assigned to “alternative non-hazardous duties.” If she was part of such a crew

during this period, there was no evidence a member of the public was in need of rescue when the grievor was on the scene.

The employer contended the motivation for filing these grievances arose from a hidden agenda of maximizing overtime and denigrating the contribution of pregnant women by treating them as less than full-fledged fighters.

VI

I begin my analysis with the threshold issue of whether firefighting poses a fetal risk that triggers a duty on the part of the employer to accommodate a pregnant firefighter.

The association contends the employer's policy entails an implicit concession that full firefighting duties pose such a risk. The first paragraph of the policy says it "*meets the requirements of the Ontario Human Rights Code* and provides temporary employment in alternative duty assignments for pregnant firefighters ... until the employee begins medical or other approved leave." After defining alternative non-hazardous duty, the policy states: Temporary accommodation to Alternative Non-Hazardous Duty *will be granted upon written request* (emphasis added). I read these provisions as implicitly acknowledging a right to be accommodated with modified work during pregnancy. With this policy in force, there was no need for the association to lead evidence on this point.

In coming to this conclusion I have not overlooked the appendix to the policy upon which the employer relies. It notes use of a SCBA "during overhaul can reduce a firefighter's amount of contamination by 10,000-fold. The appendix goes on to say "to lessen the risk of carbon monoxide poisoning to the fetus, a pregnant firefighter should wear full turnouts and SCBA working in and around an overhaul atmosphere." These passages address the overhaul phase after a fire is

mostly extinguished and say nothing about the risk associated with fighting an active fire.

VII

The association contends counting a pregnant firefighter, assigned alternative non-hazardous duties, as part of the minimum complement is not an appropriate form of accommodation, because it would endanger other firefighters.

The leading case about the impact of one person's accommodation on other employees is *Renaud v. Central Okanagan School District*, [1992] 2 S.C.R 970, where the Supreme Court of Canada ruled the "representative nature" of a union entitles it to object to an accommodation producing "any significant interference with the rights" of other employees (page 991) . The court went on to say:

Although the test of undue hardship applies to a union, it will often be met by a showing of prejudice to other employees if proposed accommodative measures be adopted. (page 992)

The union's objection to the accommodation in *Renaud* was that it contravened the collective agreement; the objection had nothing to do with the safety of other employees. In the circumstances of that case, the court concluded there was no significant interference with the rights of other employees. The ruling in *Renaud* was applied in *Roosma and Ford Motor Company of Canada Ltd.* (Ont. Div. Ct.) to allow a union to block an accommodation of a disabled employee that would have over-ridden the seniority rights of fellow workers with consequent negative impact on their morale. (See paragraphs 147 and 148.) I have no hesitation in concluding the ruling in *Renaud* also allows a union to block an accommodation that would significantly endanger co-workers and, thereby, lessen their morale.

The association also advanced arguments based on public safety and public perception. Public safety and the safety of firefighters are closely connected. When a delayed response to a fire increases risk to a member of the public in need of rescue, because the fire burns hotter with the passage of time, the same delay increases the risk to firefighters attempting to perform a rescue. Accordingly, I need not decide whether a union would be entitled to block an accommodation based upon public safety, or public perception, where there is no corresponding concern about the safety of union members. I do not view the Supreme Court's decision in *Renaud*, based upon the "representative nature" of a union, as relevant to a scenario where the public is endangered but the security of union members is not threatened. In *Renaud*, the court's decision was based on a union's mandate to represent its members. I also note the cases cited by association counsel are ones where the safety or perception of the public was invoked, in the context of accommodation, by a public sector employer whose primary mandate is to serve the public, not by a union whose primary mandate is to represent its members.

Does the evidence indicate the safety of other firefighters would be significantly compromised by counting as part of the minimum complement a pregnant firefighter performing alternative non-hazardous duties as part of the crew of Ladder 232?

Ladder 232 has a crew of three firefighters about half of the time. Some of the tasks that can be performed simultaneously by a first-responding crew, none of whom have any restrictions, cannot be done at the same time if one member of the crew has limited duties. In particular, without any restrictions, the captain can size-up a structure fire while the other two firefighters begin attacking it from the exterior with a hand line. If no hand-line is in operation, the driver and second firefighter could carry out a ladder rescue while the captain was doing a size-up. In

contrast, if a pregnant firefighter is barred from the hot zone, neither exterior firefighting nor ladder rescue can be conducted at the same time as the size-up, because one member of the crew cannot enter the hot zone. One of these activities would have to be delayed.

The association contends the inclusion of such a firefighter in the complement could have a negative impact on safety that extends beyond the response time and capability of the first arriving crew, despite the employer's contention the accommodated firefighter would be doing something normally done by a firefighter. There is an accountability officer at every fire scene and the evidence indicates there is a rehabilitation officer about 50% of the time. However, these roles are not filled by a crew member on the second arriving truck, let alone the first, because there are much more important things to do at this stage in order to bring a fire under control. There is rarely a FIT and the role of safety officer is almost always combined with incident commander. In short, none of these alternative non-hazardous duties are typically assigned to a firefighter before the arrival of a third truck, if at all. Assigning any of these duties to a pregnant firefighter, arriving on the first or second truck, means there would be one less person available to enter the hot zone. When ladder 232 is one of these trucks, and both trucks have minimum staff, the total number of firefighters present would be seven at most—i.e. three on Ladder 232 and 4 on the other truck. In the normal course six out of seven, all but the driver of one truck, would be available to enter the hot zone. When a pregnant crew member on Ladder 232 cannot go into the hot zone, the number of firefighters able to enter there would be reduced by 1/6 or 16.6%. Common sense suggests a reduction of this magnitude, at this crucial stage, could increase the time required to bring a fire under control.

Ladder 232 operates with a crew of four about half of the time. A crew of four with no restrictions on entering the hot zone has the capacity to bring a fire under control more quickly than a crew of the same size with one member barred from the hot zone. The SOP relating to initial fire attack acknowledges a crew with only three firefighters able to enter the hot zone is generally unable to carry out rescue or suppression operations inside a burning structure.

The evidence indicates even a brief delay in attacking a fire increases the risk of it burning out of control and of the structure collapsing, with resulting greater risk to firefighters.

Chief Grant's conduct appears to have implicitly acknowledged the capacity of a three-person crew was reduced by the inclusion of a pregnant firefighter unable to enter the hot zone. When the grievor's platoon chief, Bill Forbes, objected on the grounds of safety to her being part of a three-person crew on a first-response truck during her accommodation, Chief Grant reacted by directing that Ladder 232 not be used to backfill at other stations as a first responding vehicle when the grievor was one of three on board. By taking this step, the then chief appeared to not only acknowledge the existence of some increased risk but also to treat this increase as sufficient to warrant not using Ladder 232 to backfill. In the absence of testimony from Chief Grant indicating his decision was motivated by something other than safety, I conclude safety was his motive, based on the circumstantial evidence of his decision being made in response to the concern raised by P.C. Forbes.

I note Chief Grant suspended the use of Ladder 232 to backfill, even though this truck might rarely actually serve as first responder to a fire while backfilling with the grievor as part of the crew during her accommodation. In doing so, he appears to have acknowledged a basic principle of risk assessment. The gravity of

any risk is a function of both the probability of harm and the severity of that harm if it occurs. There is good reason to take steps to eliminate even a small chance of very serious injury or death at a fire scene.

The suspension of Ladder 232 providing backfill in other districts did not preclude the possibility of this truck being first responder in District 3 where it is based along with Pump 231. When 231 was backfilling elsewhere, or when it was out of its home station for any other reason, Ladder 232 would become the first responding vehicle at fires in District 3. Even if it was not officially dispatched as first responder, it would be part of the response to a structure fire in its district, as the only aerial south of the QEW, and would be first to arrive on scene because trucks from other districts would have to travel further. The chance of Ladder 232 arriving first at a fire could be minimized by not using Pump 231 to backfill, but this would result in some other district lacking a truck able to pump water and, therefore, needing to be covered by two adjacent stations with correspondingly longer response times.

If the increased risk resulting from Ladder 232, with a crew of only two unrestricted firefighters, providing first response when backfilling is sufficient to warrant suspending this arrangement, as Chief Grant apparently judged it to be, then Ladder 232 should not provide first response in its home district with this sort of crew, as Chief Durdin conceded when testifying. This could only be accomplished by keeping Pump 231 at home and not using it to backfill outside District 3. Not using 231 as backfill would mean the first responding truck to a fire in another district would be delayed by 3 or 4 minutes, because it would have to be dispatched from a station outside that district. Logic indicates a first response so long delayed would create a greater risk than a timely but limited response by Ladder 232. In short, Chief Grant's decision to suspend backfilling by Ladder 232

suggests there will always be an increase in risk, whenever the minimum complement includes a pregnant firefighter, performing alternative non-hazardous duties, as part of a three-person crew on this truck.

Weighing all of the evidence based on the balance of probabilities, I conclude in the crucial early stage of attacking a fire there would be a significant negative impact on the safety of other firefighters, and a corresponding potential for a loss of morale, resulting from the employer's decision to count the grievor as part of the minimum complement after she elected to perform alternative non-hazardous duties. I base this conclusion on the testimony of witnesses and, at least in relation to the first responding crew, the conduct of Chief Grant in suspending the use of Pump 231 to backfill when the grievor was on board during her accommodation.

Modified work in the suppression division is not the only type of accommodation offered by the employer. A pregnant firefighter may elect to work steady days elsewhere in the fire department. When this election is made, the accommodation poses no risk to other firefighters because the person being accommodated is not counted as part of the complement. Does the provision of this form of accommodation bring the employer into compliance with the Code?

The association contends this question should be answered in the negative, based on the line of authority saying an employer must fashion an accommodation based on modifications to an employee's current position, if this can be accomplished without undue hardship, rather than offering other forms of accommodation that are more disruptive for the employee. The following cases were cited in support of this proposition: *Mount Sinai Hospital and Ontario Nurses' Assoc.* (1996), 54 L.A.C. (4th) 261 (Brown); *Hamilton Police Association v. Hamilton Police Services Board* [2005] CanLII 20788 (Ont. D.C.); *Carter v.*

Chrysler Canada Inc. [2014] HRT0 845; and *City of Windsor and Windsor Professional Firefighters Assoc.* (2010), 201 L.A.C. (4th) 197 (Williamson).

The facts in *City of Windsor* are analogous to those at hand. The employer offered two forms of accommodation to a pregnant firefighter: remaining in the suppression division on modified duties and being included in the complement; or transferring to another division where presumably she would not be part of the complement in suppression. Having determined accommodation in suppression would compromise the safety of other firefighters, if the grievor was counted as part of the complement, Arbitrator Williams concluded the employer was obliged to offer an accommodated position in suppression that was not so counted. In support to this conclusion, he wrote:

The duty to accommodate requires an assessment to be made by the employer of the duties of the incumbent and examining how they may be modified so as not to constructively discriminate against her because of her pregnancy, and requires consideration of modifying the existing set of duties of the position such [that] they can be performed by the pregnant employee. In short, it means looking to modify the work duties of the existing position. It does not mean searching the organization to find a new position the duties of which she can perform ... (para. 56)

In *Mount Sinai Hospital*, involving the accommodation of a disabled nurse, I took a slightly different tack in addressing an analogous issue in the broader context of assessing undue hardship:

37. While the cost of accommodative measures is important, it is not the only consideration to be weighed in applying the test of undue hardship. In *Central Alberta Dairy Pool* [[1990] 2 S.C.R. 489] Wilson J. recognized this cost must be compared with the resulting benefit in deciding whether the hardship caused by accommodation is undue. Having listed a number of types of costs to be taken into account, she went on to say:

[T]he results which will obtain from a balancing of these factors against the right of employees to be free from discrimination will

necessarily vary from case to case. (page 520)

38. In a disability case, this balancing exercise should be conducted by comparing the cost of accommodation with the benefit resulting from it in the particular circumstances. Consider a disabled employee who is at a very large disadvantage caused by his or her handicap, and assume all of the employment-related burdens of this person's disability could be eliminated at very little cost to the employer. In this scenario, the hardship imposed by accommodation would not be undue because the benefit greatly exceeds the cost. Compare the foregoing example with another where the disadvantage removed by accommodating an employee would be very small in relation to the cost of eliminating it. In this context, the hardship of accommodation would be undue because the cost far exceeds the benefit. We believe the latter example is the type of case addressed by the following remarks about the duty to accommodate made by Sopinka J. in *Renaud*, supra:

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. If a proposal that would be reasonable in all of the circumstances is turned down, the employer's duty is discharged. (page 593)

39. *The general principle of proportionality which emerges from the foregoing analysis is that the burden which an employer should be required to bear varies inversely with the consequential relief flowing to a disabled employee. One corollary of this principle is that more should be done to provide work to someone who otherwise would remain outside the active workforce, without any of the rewards of employment, than to place a person in one job rather than another. By the same token, if a handicapped employee wishes to perform the type of work done before being disabled, more should be done to achieve this result in cases where the alternative job is very inferior than in cases where this alternate assignment is only slightly less advantageous to the individual. (emphasis added)*

How does the principle of proportionality apply to the facts at hand? The employer has offered a pregnant firefighter in the suppression division two types of accommodation: one in suppression continuing to work twenty-four hour shifts and doing most, but not all, of the tasks previously performed; and the other outside

suppression working the day shift and doing a different set of duties about which little evidence was led. The second type of accommodation entails significantly more disruption to the working life of a firefighter. The cost of replacing a pregnant firefighter is the same in both scenarios and the employer does not contend this cost amounts to undue hardship. Nor does the employer claim there is any offsetting benefit to it when a pregnant firefighter opts to be accommodated outside suppression. In these circumstances, based on the principle of proportionality, I conclude allowing a pregnant firefighter to elect an accommodation outside of the suppression department, without being counted as part of the complement, does not bring the employer into compliance with the Code. The application of the principle of proportionality has led me to the same result as Arbitrator Williamson reached in *City of Windsor* by a slightly different route.

I have concluded the employer is obliged to offer to a pregnant firefighter, working in the suppression division, alternative non-hazardous duties in that division, outside the hot zone, on the basis she will not be counted as part of the complement.

The association also seeks a ruling about any pregnant firefighter who elects to remain in the hot zone but with a limitation on her duties to accommodate a physical restriction arising from pregnancy. In particular, the association contends such a firefighter should not be counted as part of the complement. In the absence of specifics about exactly what duties such a person is unable to perform, I can say no more than the propriety of treating her as part of the complement will depend on whether the nature of the restriction is such as to significantly endanger other firefighters if she is not replaced.

IIX

The grievances are allowed in part. I remain seized to deal with issues arising in the implementation of this award including individual remedies for the grievor. I also remain seized of the second issue raised by the grievances: whether the duties of an accountability officer or a safety officer are unsafe for a pregnant firefighter.



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December 5, 2016