IN THE MATTER OF AN ARBITRATION

BETWEEN:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 636

-AND-

TYCO INTEGRATED FIRE AND SECURITY CANADA INC.

GRIEVANCE OF G. BUSBRIDGE

AWARD

Arbitrator:	Laura Trachuk
For International Brotherhood of Electrical Workers, Local 636:	Katherine Ferreira Eric Lucci Geoffrey Busbridge
Tyco Integrated Fire and Security Canada Inc.:	Paul Boshyk Guneev Bhinder Jimmy Canizares

This arbitration took place in Toronto on April 30, 2018 and written submissions were completed by June 22, 2018.

AWARD

The International Brotherhood of Electrical Workers, Local 636 (the "Union") has filed a grievance alleging that Tyco Integrated Fire and Security Canada Inc. (the "Employer") has violated the collective agreement and the *Human Rights Code* (the "Code") by requiring Geoffrey Busbridge (the "Grievor") to leave his workstation and go to an empty office to test his blood glucose and inject the insulin he requires for his diabetes.

FACTS

The Employer runs a call centre for home and commercial alarms. The Grievor has been employed at the Central Monitoring Centre as a Communications Coordinator 2 since July 2015. He receives signals from alarm monitoring equipment at commercial establishments and then contacts authorities or the client as required. He currently works a 4:00 p.m. to 12:00 a.m. shift five days per week. There are between 45 and 50 employees working at the Centre. They are divided into three shifts. The employees work at workstations/cubicles in an open space. They do not have assigned cubicles and work in one that is available on their shift. It is a seven day per week 24 hours per day operation and people on three shifts, therefore, share the cubicles. The Employer does not have the cubicles cleaned but leaves disinfectant wipes for the employees to clean them themselves.

In or around September or October 2016, the Grievor learned that he has Type 1 Diabetes Mellitus which requires that he monitor his blood glucose levels and inject insulin during his shift. He informed his Team Managers, Jimmy Canizares and Sherley Teves, and they were generally supportive. At that time he would test his blood glucose level at his workstation about 15 minutes before his break and inject the insulin required. On December 5, 2016 the Grievor asked Mr. Canizares and Ms. Teves to distribute an information sheet he had written to his shift supervisors (CC#3s) advising that he has diabetes, what it is and what he needs to do to manage it including eating regularly, testing his blood and injecting himself with insulin. The information sheet included a description of symptoms he might show if he were hypoglycemic or hyperglycemic.

In or around that time, a union steward working in the area told the Employer that the Grievor was testing his blood and injecting insulin at his cubicle and that it might be a health and safety issue. After receiving the Grievor's request to distribute the information sheet and the comment from the steward, the Employer told the Grievor not to monitor his blood glucose and inject insulin at his workstation and instead to go and use one of the offices that were infrequently occupied. The Grievor became upset and said the direction was discriminatory. He testified that he understood that if he did not use one of the offices it could result in action up to and including suspension. Mr. Canizares confirmed his instructions to the Grievor in an email dated December 12, 2016:

> Management requests that you use a private room to administer your medical care, this includes the drawing of blood during glucose testing. We will also provide in each room disinfectant wipes which you can use post care.
>
> Please feel free to use anyone of the free offices which are located directly across from the bank of desks dedicated for monitoring. Armando's office is always free so may be an ideal choice as it is also the closest in proximity to your colleagues should you require any assistance. Please note that anyone of the

> other offices can be used including Shirley and my office if needed. With respect to breaks we are happy to facilitate your break schedule so as to coincide with your testing schedule.
>
> I have also attached some important Health & Safety information including relevant policy.
>
> Please let me know if you have any questions or concerns.

Mr. Canizares attached the Employer's "BloodBorne Pathogens (Exposure Control Plan)" to the above email.

The Grievor responded:

> Thank you for the reply,
>
> In light of the overwhelmingly negative response I have had from all parties involved, I will handle all aspects of my care in private. I will use the west office in the CMC.
>
> I officially request extra time to test my blood sugar and administer my injections. If I am to be doing the testing in private, I will need to test and inject 15 minutes before each break. I would be going to the designated care spot, testing my blood, injecting the appropriate amount of insulin, and then returning to work until the actual break time.
>
> Because of the responses I have had to my condition, I am not comfortable discussing my diabetes with my co-workers at this time. If anyone approaches me about any part of my care I will differ (sic) them to their team lead. To this effect, I will permit management to mention that I have diabetes when they are approached by employees so that my use of the office etc. can be explained. Beyond that I consider the rest of the details of my care private and confidential. I feel this should prevent further issues.

Mr. Canizares testified that at the time he directed the Grievor to use a private office for his care he had not done any research on whether testing blood glucose and administering insulin was a health and safety issue but that it made sense to him that there was a risk of "spilling blood". He asserts that he subsequently reviewed the "BloodBorne Pathogens (Exposure Control Plan)" and that as well as the information he received from the Canadian Diabetes Society confirmed that the approach the company was taking was the correct one. No sharps containers had been installed at the time the Grievor was directed to use the offices. The Employer did install one later in one of the offices and another one in the hallway near the washrooms.

The Grievor complied with the Employer's direction to use an empty office but the dispute continued. On April 27, 2017 he advised the Employer that the BloodBorne Pathogen Policy did not apply to him because he had no bloodborne pathogens and was no more likely to spread illness than any of his co-workers. The Employer responded that it had a health and safety concern with him administering medications at his desk except in emergency situations and that if he did he would not be permitted to work until meeting with Human Resources. The Employer requested a medical note and the

Grievor provided the following on May 8, 2017 from a doctor in the Surgery Department at Sunnybrook Hospital:

> As you know, Mr. Geoffrey Busbridge has been diagnosed with Type 1(Insulin Dependent) Diabetes Mellitus. This condition requires Mr. Busbridge to measure his blood glucose several times per day by way of finger stick sampling. He responds to his result by administering the appropriate dose of medication that may require insulin injection. If the blood glucose is at a critical level, he may need to take further action. Ideally, Mr. Busbridge should be allowed to perform the sampling and medication administration at this desk for both routine and emergency situations for safety, effectiveness, and confidentiality. Please do not hesitate to contact me for further clarification.

The Employer reviewed the note and continued to refuse to allow the Grievor to administer his care at his workstation. Among other things, he was told that if he administered his care at his workstation he would be sent home "suspended" until further investigation. The grievance was filed on May 23, 2017 and provided:

> Local Union 636 of the I.B.E.W. on its own behalf and that of its member Mr. Geoffrey Busbridge hereby grieves that the Employer has violated the Collective Agreement, including but not limited to Articles 1.04 and 18.03 thereof, as well as any and all provisions of any relevant statutes, including but not limited to the Ontario *Human Rights Code*.
>
> Without limiting the generality of the foregoing, the Union grieves that the Employer has discriminated against the grievor contrary to the Ontario Human Rights Code by denying the grievor the right to monitor his blood glucose levels and administer (if needed) insulin while at his work station and instead offering the grievor the use of a private office or washroom to administer insulin and check his blood glucose.

The Grievor testified that he typically monitors his blood glucose twice during a shift but it could be more often if he is ill or in a stressful situation. He brings a kit to work which includes a blood glucose monitor called a One Touch Verio Flex. To test his blood he uses a lancet which is a spring-loaded microsharp and applies it to his finger. By applying pressure the lancet pricks his finger and provides a small amount of blood. The lancet retreats back into the housing. He then takes a test strip and places it inside the glucose monitor and applies the strip to the drop of blood on his finger. The monitor registers his blood glucose and he cleans the tip of his finger with an alcohol wipe. The sharp remains inside the lancet and he takes it home and disposes of it there. The test strips stay inside the kit and are also disposed of at home. The Grievor testified that he wipes the surfaces of the desk he is using with alcohol wipes both before and after he tests his blood glucose and administers insulin.

The Grievor testified that typically the hand he tests does not touch anything until it stops bleeding. He explained that if he has any concern that blood might have touched any surface he wipes it down with an alcohol wipe. The Grievor said that may have happened once in two years.

The Grievor explained that he has to inject insulin before he eats and sometimes at other times if his blood glucose level is too high. If his blood glucose level is too low he

eats some tablets that cause it to rise. The Grievor said that he typically needs to administer insulin twice during a work shift. He uses a pair of insulin pens. Each has a different kind of insulin. There is a dial on each pen to measure dosage. Once he measures and removes the cap from the pen there is a special cap for the needle itself. He removes that cap and then applies the pen, typically to his abdomen. It can be done through multiple layers of clothing. He holds the button on the pen down for up to 10 seconds. He then removes the pen and replaces both caps. There is no cleanup required. He replaces the pen inside his kit and takes it home where he disposes of the sharps. He said by leaving the tips on the pens the chance of leaving one behind is only a remote possibility.

The Grievor keeps his kit in a bag in his backpack underneath or on the side of his cubicle.

The offices that the Grievor was told to use have doors and window blinds but the Employer does not require him to close them. One of the offices has been used to store food for workplace events. A sharps container was installed in the other office some time after the Grievor had been told to use it. Another sharps container was installed in the hallway outside the washrooms. The Grievor only used the sharps container once because he does not remove the sharps at work and takes everything home in his kit to dispose of there.

Mr. Canizares testified that a cleaning service cleans the offices once per day but does not clean the cubicles. He said that if they had the cubicles cleaned it would interrupt the employees' work. The cleaning service cleans the office the Grievor is supposed to use around 7:00 or 8:00 p.m. Mr. Canizares acknowledged that the Grievor might use it after that so it would not be cleaned before someone else used the office the next day. Mr. Canizares testified that the Grievor is required to use the office because of the company's Bloodborne Pathogen policy. He said the company was concerned that other employees would be sitting at the same desk where the Grievor was testing his blood glucose and administering his medication. He said, however, that if there was an emergency the Grievor could test and administer anywhere and anytime. Mr. Canizares also testified that the Grievar could do his testing and administration whenever he needs to but he has to use the office. He confirmed that if the Grievor did his regular testing and administering at his desk he would not be permitted to work until they determined what the issue was. Mr. Canizares denied that the Grievor would be suspended without pay.

Mr. Canizares testified that the company's Bloodborne Pathogens (Exposure Control Plan) applies to the Grievor's situation because it is directed at protecting employees from bloodborne pathogens and if the Grievor administered his medications at his desk they would be exposed. In cross-examination Mr. Canizares agreed that the Bloodborne Pathogens policy is not about dealing with diabetes but is actually focused on infectious diseases and communicating diseases through blood.

The only reference to diabetes in the Bloodborne Pathogens (Exposure Control Plan) is the following:

> Note: Some employees may have medical conditions (e.g. diabetes) which require them to use syringes in the workplace. Provisions for their proper disposal must be considered (i.e. sharps containers).

The Grievor testified that being told to use the offices for his care made him feel alienated and that a large part of his life was unwelcome and inconvenient for his co-workers and the company. He said that when he has to test his glucose levels and administer insulin outside the workplace he does not have to find a private place to do it.

The Grievor testified that it was disruptive to his work to log out, take himself off the phone and close his station to alarm calls by leaving his desk. He said that if he was doing routine blood glucose checks at his desk he would not have to take himself off the phones or alarms but if it was an emergency check he would. The Grievor acknowledged that the company told him that he can take that time away but it still means that his co-workers have to carry the extra work. He also explained that his performance is assessed by his reliability which is measured by his time on the phone. He believed that unexpected breaks have an impact on his reliability. The Grievor is also concerned that processing fewer alarms impacts on his productivity which is also measured. He said that his reliability and productivity scores determine the raise he receives at the end of the year. In cross-examination, the Grievor acknowledged that he was told that leaving his desk to do his care would not impact his scores but he said that he was not given written confirmation or an explanation about how the Employer was going to do that. Mr. Canizares testified that the employees were not graded on productivity and reliability in 2017 because there was a problem with the data. The company, therefore, gave everyone an average rating. Mr. Canizares explained that the Grievor is only rated on his productivity for the time he is logged on so when he logs out to go do his testing and medication the time is not counted. He said that the time should also have no impact on reliability providing that it is logged appropriately in the system.

The Employer has not produced any medical documentation. However, Mr. Canizares testified that the company contacted Diabetes Canada and found information on what an employer is required to do with respect to accommodation. He provided an email with an excerpt from a document that says that an employee need not tell the employer about their diabetes unless they are seeking accommodation. It says that accommodation may only require their work schedule be adjusted so that they can have regular breaks. It does not say anything about where an employee is required to monitor or administer medications.

Mr. Canizares explained that the offices the Grievor has been told to use are the four managers' offices, two of which were usually empty until recently. One is now permanently occupied but most of them are only occupied during the day and the Grievor works evenings. Mr. Canizares agreed that any of the offices might be used for meetings. The Grievor was eventually told to try to use the one with the sharps container but could use any of the others if that one was occupied. The offices are located close to the worksations.

The manufacturer's instructions for the One Touch Verio Flex says "After use and exposure to blood, all parts of this kit are considered biohazardous." The Grievor did not agree that the kit was biohazardous. The manufacturer's instructions for a lancet called the One Touch Delica says "Discard the used lancet carefully after each use to avoid unintended lancet stick injuries. Used lancets may be considered biohazardous waste in your area. Be sure to follow your healthcare professional's recommendations or local regulations for disposal." The Grievor agreed that the used lancet was biohazardous. However, he explained that in order for someone to be stuck with the lancet they would have to load it by clicking the spring down and then discharge it by pressing it against

their skin. The only other way to be stuck by the lancet would be to dismantle the applicator and remove it. It is a few millimetres long.

The manufacturer's instructions for the Lantus SoloStar insulin pen says "Do not share disposable or reusable insulin devices or needles between patients, because doing so carries a risk for transmission of blood-borne pathogens". The Grievor said that the pens are not biohazards but the needle tips would be if they were shared. He also said that the devices are designed so that they do not draw blood but only inject insulin.

COLLECTIVE AGREEMENT

> 1.04 No discrimination Clause: The parties agree to abide by the Ontario *Human Rights Code* and shall not discriminate against any person or class of persons based on a prohibited ground under the Ontario *Human Rights Code*.
>
> 18.01 The Company and the Union agree to cooperate to put and maintain in force all measures required by law to protect the health and safety of all the Employees.
>
> 18.04 The Company shall have the responsibility to adopt and apply, according to circumstances, reasonable procedures and techniques to ensure the safety and health of the employees during their working hours. The Union may make suggestions to the Company concerning the safety of the Employees.

HUMAN RIGHTS CODE

> 5(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, ethnic origin, citizenship, creed, sex, sexual orientation, marital status, family status or disability.
>
> 10(1) In Part I and in this Part,
>
> "disability" means,
>
> (a) any degree of physical disability, infirmity, malformations or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus…
>
> 11(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
>
> (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
>
> (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

(2) The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

(3) The Tribunal or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship.

17. (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.

(2) No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

(3) In determining for the purposes of subsection (2) whether there would be undue hardship, a tribunal or court shall consider any standards prescribed by the regulations.

OCCUPATIONAL HEALTH AND SAFETY ACT

25(2) Without limiting the strict duty imposed by subsection (1), an employer shall,

(h) take every precaution reasonable in the circumstances for the protection of a worker;

SUBMISSIONS

The Union submits that the Employer has violated Article 1.04 of the collective agreement and Section 5(1) of the Code by requiring the Grievor to use a private office to test his blood glucose level and administer insulin.

The Union argues that the Grievor has diabetes which is a disability under the Code. It says that the Grievor has experienced an adverse impact by being required to do his care in a private office and that his disability is a factor in that adverse impact. It says that it has, therefore, made out a *prima facie* case of discrimination and the evidentiary burden shifts to the Employer. The Union contends that the Employer has not demonstrated that its conduct is not discriminatory and/or that there is any statutory justification for it. It insists that there is “no evidence of any health and safety hazard(s) that would necessitate a private office”.

The Union submits, further, that the requirement that the Grievor monitor his blood glucose level and administer his insulin in a private office stigmatizes him and “singles him out on the basis of his disability”. It notes that he testified that he felt alienated and that something that had become a big part of his life “was not welcome and inconvenient for my co-workers and the company around me”. The Union also recounts that he said he “was being asked to do something that was unnecessary and disruptive to my work”.

It asserts that the Grievor faced potential negative consequences if he did not comply with the private office requirement. The Union contends that those consequences and the stigmatizing and alienating effects of the Employer's requirement that he use a private office establish that the Grievor suffered adverse treatment.

The Union also argues that the Employer's requirement that the Grievor use a private room for his care is discriminatory because it is an arbitrary distinction related to his disability. It says that the Grievor never told his Employer that he needed a private space and there is no medical evidence to support such a requirement.

The Union submits that neither the Employer's BloodBorne Pathogen policy nor the materials related to the Grievor's medical equipment establish the need for a private space. It contends that the requirement was devised and imposed by the Employer "in the absence of objective evidence" and is thus arbitrary. The Union argues that the arbitrary nature of the requirement supports a finding that it is discriminatory.

The Union argues that the Employer has not satisfied the burden of providing "evidence that its conduct was not discriminatory and/or to provide a statutory justification for the impugned conduct". It says that there is "no direct, objective evidence of consultation with health and safety experts and/or the Ministry of Labour to establish a health and safety concern or hazard that would require the use of a private office". The Union contends that "there is no evidence which established a health and safety hazard present in the cubicles in which the Grievor typically works that would be controlled and/or mitigated by having him check his blood glucose levels and administer insulin in a private office".

The Union submits, further, that to the extent that the disposal of medical items raises a concern, it is not addressed by the requirement to use a private office. It says that there were no sharps containers when the Grievor was initially told to use the office and there is currently only a sharps container in one of the rooms he uses. It contends that if the Grievor were permitted to do his care at his workstation, the Employer could provide other sharps containers or move the ones it has.

The Union asserts that Mr. Canizares' view that blood could be "spilled" during insulin injection was impressionistic and does not establish a health and safety concern. It contends that impressionistic evidence is not sufficient either to establish a health and safety concern or to establish how such a concern could be mitigated by using a private office. The Union notes that the offices are also shared workspaces like the cubicles. It submits that while the offices are cleaned and the cubicles are not, the Grievor may use one of the offices after it is cleaned in the evening so someone could use it in the morning without it having been subsequently cleaned. The Union also notes that the offices have been used to store food and other items which also indicates that they do not have the level of medical cleanliness necessary to control or mitigate bloodborne pathogens even if there were such a risk, which it denies.

The Union argues that the chance of anyone pricking themselves on the Grievor's medical equipment is remote because he keeps it in a bag that remains in his backpack. It says that, in any case, there is no evidence that medical equipment is more likely to be left behind in a cubicle than in an office.

The Union submits that Diabetes Canada is not a legal authority on discrimination and notes that, in any case, the material provided does not state that a private space to check blood glucose levels and administer insulin is necessary to accommodate an employee with diabetes.

The Union also denies that the Employer is accommodating the Grievor by insisting that he do his care in an office and says that he is not, therefore, insisting on perfect accommodation. It contends that the requirement to use the office was arbitrarily imposed by the Employer and does not meet any restriction or medical need related to the Grievor's diabetes.

The Union asks that the grievance be allowed and that $5,000.00 be awarded as damages for injury to the Grievor's dignity.

The Union refers to the following authorities: *Moore v. British Columbia (Education)*, [2012] 3 S.C.R.; *Peel Law Association v. Pieters,* 2013 ONCA 396 (CanLII); *Misitech v. Value Village Stores Inc*., 2016 HRTO 1229 (CanLII) (Scott); *Law Society of British Columbia v. Andrews*, [1989] S.C.J. No 6; MUHC v. *Syndicat Des Employés De L'HGM*, [2007] 1 S.C.R.; *McDonald v. Mid-Huron Roofing*, 2009 HRTO 1306 (CanLII) (Keene); *Leong v. Knight and Day Restaurants*, 2004 BCHRT 84.

The Employer responds that it has not violated the collective agreement or the Code because its policy that the Grievor test his blood glucose levels and administer insulin injections in a private office is a *bona fide* occupational requirement (BFOR) based on health and safety. It contends that it has provided the Grievor with reasonable and appropriate accommodation.

The Employer submits that the booklets and instruction guides related to the Grievor's medical equipment state that all parts of his kit are considered biohazardous and that a used kit may transmit infectious diseases. The Employer contends that using the kit in the cubicle area increases the risk that employees will come in contact with a used testing kit, lancet or blood and that sharps injuries could occur.

The Employer argues that its requirement that the Grievor use a private office is consistent with its policy on BloodBorne Pathogens because employees are not permitted to work in rooms "where known blood, biological agents or other potentially infectious material hazards are present". It also relies on language that managers must ensure "work practices and procedures are in place to minimize the risk of exposure to any communicable diseases". The Employer says as well that it is required to treat all bodily fluids as contaminated.

The Employer argues that the office it has designated for the Grievor's use is close to his work area, has a sharps container, is usually vacant, is kept in a tidy state and is cleaned halfway through his shift. It says that, in contrast, the cubicles are not cleaned at all and each employee is responsible for wiping it down at the end of their shift.

The Employer argues that its policy is reasonable because it does not require the Grievor to use his break time to test his blood glucose level or administer insulin. It also relies upon the fact that the Grievor can test and administer in a cubicle in an emergency.

The Employer submits that it meets the three part test to establish a BFOR set out by the Supreme Court in *British Columbia (Public Service Employee Relations Commission v. B.C.G.E.U. (Meiorin*) (*infra*). It says that it adopted its policy for health and safety reasons and that is rationally connected to the function being performed. It says that health and safety is an objective justification for a discriminatory standard. The Employer contends, as well, that it adopted its policy in the honest and good faith belief that it was necessary for the fulfillment of its goal of securing the health and safety of its employees. It maintains that the policy is reasonably necessary to accomplish that goal and that it could not accommodate the Grievor without incurring undue hardship.

The Employer submits that it is required under the *Occupational Health and Safety Act* to "take every precaution reasonable in the circumstances" to protect the health and safety of its workers. It says that its "Exposure Control Plan" has been adopted:

- "To protect the health of Tyco employees in relation to the spread of bloodborne pathogens and biological hazards."

- "To prevent the transmission of infectious and communicable diseases within the workplace."

- "To ensure that ill or disabled employees are dealt with in a manner that does not endanger others, yet is considerate and empathetic.

The Employer says that its requirement that the Grievor use a private office mitigates the risk of exposure to bloodborne pathogens, biohazards and sharps related injuries because it is accessed by fewer employees. It insists that the policy is, therefore, rationally connected to the purpose of maintaining health and safety.

The Employer submits that there is no evidence or insinuation that it did not adopt its policy in the honest and good faith belief that it was necessary to its purpose of maintaining health and safety.

The Employer argues that the requirement that the Grievor use an office to test his blood glucose and to administer insulin is reasonably necessary to meet the goal of ensuring the health and safety of employees in the office. It says that the impact on the Grievor cannot be accommodated without undue hardship.

The Employer contends that the Grievor is only entitled to reasonable accommodation, not perfect accommodation. It says that its accommodation is reasonable because it has provided a private vacant office with a sharps container that is cleaned in the middle of the Grievor's shift. It says that reduces the chances that employees will come into contact with used testing kits, lancets or blood or that they will sustain sharps related injuries.

The Employer asserts that the impact on the Grievor is minimal because the office is close to the workstations and he is not required to close the door or blinds. It argues that he does not have to use his breaks to test or administer insulin. The Employer denies that logging out to go and test and administer has an impact on his reliability or productivity metrics. It says that the office is maintained in a tidy state and was only used to store food once. The Employer notes that the Grievor is permitted to test and administer at his cubicle in an emergency. It submits that it also accommodated the

Grievor by permitting him to change to the evening shift when he requested that after the grievance was filed.

The Employer submits that its policy "balances the Grievor's interests, the concerns of his colleagues (including the Union Steward) and the Employer's obligation to maintain health and safety in the workplace". It says that it meets or exceeds the accommodation guidelines published by Diabetes Canada.

The Employer argues that the Grievor's preferred accommodation to do routine testing and administering in the cubicle area does not address the risk that other employees may be exposed to bloodborne biohazards and sharps-related injuries. According to the Employer, the Grievor's preference to administer his care at his cubicle creates an undue hardship.

The Employer contends that the Grievor's practice of disposing of used lancets at home contravenes the directions in the manufacturer's reference guide. It says that even if the Grievor were safely testing and administering in the cubicle area its policy would still be reasonable and necessary.

The Employer submits that the medical note provided by the Grievor does not say that testing and administering at his cubicle is medically necessary. It asserts that the doctor said that would be ideal but the Grievor is not entitled to his ideal accommodation solution. The Employer contends that the Grievor has a duty to facilitate the implementation of its reasonable accommodation solution.

The Employer denies that it has adopted its policy because it finds the Grievor's testing and administering to be indecent or offensive. It says that its policy was adopted "for purposes rationally connected to the health and safety of the workplace and for no other purpose".

The Employer asks that the grievance be dismissed. It argues that even if a violation of the collective agreement were to be found, no damages should be awarded because there was no injury to the Grievor's dignity, feelings or self-respect.

The Employer refers to the following authorities: *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.*, 1999 CarswellBC 1907 (SCC); *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights),* 1999 CarswellBC 2730 (SCC); *Aitchison v. L & L Painting and Decorating Ltd.*, 2018 HRTO 238 (CanLII) (Johnston); *French v. Selkin Logging*, 2015 BCHRT 101 (Blasina); *Gaetz v. Canada (Armed Forces)*, 1988 CarswellNat 1341 (Facey); *Gaetz v. Canada (Armed Forces*) 1989 CarswellNat 878 (Petrie); *Mahon v. Canadian Pacific Ltd*., 1987 CarswellNat 199 (FCC); *Zaromitidis v. Toronto Police Services Board*, 2014 HRTO 1296 (CanLII) (Whist); *Renaud v. Central Okanagan School District No. 23*, 1992 CarswellBC 257 (SCC); *Stewart v. Elk Valley Coal Corp*., 2017 SCC 30; *O.P.S.E.U. v. Ontario (Ministry of Community Safety & Correctional Services*), 2011 CarswellOnt 7338 (Dissanyake); *Ottawa Carleton District School Board and OSSTF, District 25 (Sauvé), Re*, 2007 CarswellOnt 10659 (Trachuk); *Hutchison v. Canada (Minister of Environment),* 2003 CAF 133 (FCC); *Bowman v. Toronto Police Services Board*, 2013 HRTO 737 (CanLII) (Liang); *Leong v. Knight & Day Restaurants Corp*., 2004 BCHRT 84 (Junker).

The Union replies that the issue in this case is not whether the Employer's requirement

that the Grievor use a private office for his care is a BFOR, nor is the issue whether the Employer has satisfied the third component of the test in *Meiorin*. The Union contends that "the private office rule does not arise from any restriction, limitation or requirement arising from the Grievor's diabetes". It says the Grievor never asked for a private space or provided medical documentation saying that it was required. The Union maintains that it was, therefore, arbitrarily imposed and discriminatory.

In the alternative, the Union argues that the private office rule is not a BFOR. It submits that the Employer has cited a health and safety concern but has not provided sufficient objective evidence to support it or to explain how the private office rule mitigates it. For example, it has not provided any evidence that sharps are less likely to be left behind and harm someone if the Grievor uses a private office rather than a workstation. The Union notes that the Grievor keeps his kit in his backpack at his workstation. It contends, further, that the Employer could provide more sharps containers. The Union submits that while the workstations are used more often, other employees do use the private offices. Furthermore, while the offices are cleaned, the Grievor uses them after that is done and before people come in and use it in the morning.

The Union also argues that the Employer has not provided objective evidence of undue hardship. It contends that its evidence of a health and safety risk is impressionistic and it has not demonstrated, for example, that it would be an undue hardship to clean the cubicles.

The Union submits that the Grievor is not seeking a preferred form of accommodation, he is objecting to a rule that adversely affects him and was arbitrarily imposed on him because of his disability.

DECISION

The Grievor has a disability recognized under the Code. In order to manage that disability he needs to monitor his blood glucose level and administer insulin. He can do that at his desk with minimal disruption to his work. However, the Employer insists that he do it in a private office which is a greater disruption to his work and which sends the message that what he is doing is a health and safety risk to his colleagues i.e. that he could pass on some kind of infectious disease to them through ordinary diabetic care. That is not the case and, therefore, forcing the Grievor to use the office is a violation of the collective agreement and the Code.

The Employer contends that it is a *bona fide* occupational requirement for the Grievor to test his blood glucose and inject insulin in on office as opposed to his workstation. The Union says that BFOR is not the appropriate characterization and that the Employer is imposing an arbitrary requirement which amounts to discrimination. Whichever way it is characterized, the Employer's requirement that the Grievor test and administer in the office is discriminatory because it is based on the assumption that his diabetic care poses a risk to his co-workers and that is not supported by objective evidence. To the extent that there is any risk, it is no more severe than any other health and safety risk associated with sharing workstations.

The Grievor is required to test his blood glucose level and administer insulin because of his disability. The Employer insists that he leave his cubicle and go to an office to administer his care. The Grievor testified that being required to use the office makes him

feel alienated and unwelcome in the workplace. Therefore, the requirement the Employer has imposed has an adverse impact on the Grievor with a connection or nexus to his disability. (*Moore supra* para.33) The Union has, therefore, made out a *prima facie* case. As a result, the burden shifts to the Employer to justify its requirement on the basis of the three part test set out in paragraph 54 of *Meiorin (supra)*:

> 54 Having considered the various alternatives. I propose the following three-step test for determining whether a *prima facie* discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on the balance of probabilities:
>
> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

The Employer asserts that it meets the first two parts of the test in *Meiorin* because its requirement that the Grievor use the office is rationally connected to its obligation to provide a safe and healthy workplace and that it has acted in good faith. It says that its requirement that the Grievor use the office meets the third part of the test because it is reasonably necessary to meet the objective of providing a safe and healthy workplace and that the accommodation the Grievor seeks would be an undue hardship.

Aside from a shift change he sought after the grievance was filed, the only accommodation the Grievor has actually sought is the few minutes required to administer his care a few times per shift at his cubicle. The Employer has decided that he should take more time and go to a separate office because that would be safer for his co-workers. The Employer believes that the Grievor's care is a health and safety risk to employees and that fewer of them will be exposed to it if he uses an office. However, it has failed to demonstrate that the Grievor's care is a health and safety risk to other employees.

The Grievor's use of his One Touch Verio Flex and insulin pens at his desk presents no risk to his co-workers. He returns the equipment to his kit and his kit to his backpack after use and disposes of the sharps at home. The Employer is concerned that he might be careless and leave sharps lying around. There is no basis for such conjecture. There is no evidence that the Grievor has ever left any of his equipment where a co-worker could find it. As the used testing equipment and needles are not accessible to co-workers there is no biohazard to be concerned about. There is almost no risk of any drops of blood getting on the cubicle surfaces and to the extent that it is possible, there is no evidence that it is more of a risk than the germs regularly spread over commonly used areas by coughing and sneezing or not thoroughly washing hands. Employees with colds are not sent to work in the offices. Blood is more likely to come in contact with cubicle surfaces from everyday hazards like paper cuts, nose bleeds and hang nails. Applying the BloodBorne Pathogens (Exposure Control Plan) to an employee testing

blood glucose levels and administering insulin using modern medical equipment is unreasonable.

If an Employer is going to allege that “known blood, biological agents or other potentially infectious material hazards are present” because an employee must care for their diabetes in the workplace, it should have medical documentation to back that up. However, the Employer has produced no evidence from any medical expert to support its claim that allowing the Grievor to do his care at his cubicle poses a hazard to his co-workers. The only medical documentation presented recommended that the Grievor use his cubicle, so obviously that doctor did not see it as hazard. It is not sufficient to rely on a few lines in the medical equipment booklets that say that used equipment is biohazardous. The Employer needs to explain that hazard. How likely is it that any blood will come in contact with the cubicle? How much blood is that likely to be? How likely is it that wiping it away will neutralize it? How would someone become infected, i.e. would they also have to have an open cut that touched the same tiny spot? What diseases could be caught that way?

The Employer relies upon documents from the manufacturers of the testing and injection equipment that say that the devices are bio-hazardous after they are used. However, the Grievor takes the lancet and pens home so there is no risk of anyone coming into contact with them. Furthermore, they are not even a risk to someone who picks one up unless that person actually presses them against their skin. At that point someone could come into contact with any blood remaining on the sharp that is sheathed in the lancet or pen. However, as noted above, there is no basis for the Employer’s fear that the Grievor will be irresponsible with his equipment nor is there a basis to believe that one of the Grievor’s co-workers who saw such equipment would pick it up and experiment with it.

The Employer also claims that Diabetes Canada says that an employer’s duty to accommodate might include “a private area to test blood sugar levels or to take insulin”. That was not included in any material provided in the arbitration. However, it would not be surprising that some people with diabetes may prefer to administer their care in private because they prefer to keep their condition and/or the details of their care private. If a worker requests such accommodation it should be granted. However, privacy is not granted to people with diabetes for their care because there is anything dangerous about it. Thus, if someone does not want to test their blood glucose and inject insulin in private they should not be forced to do it that way. In any case, the Employer is not relying on privacy to justify its requirement that the Grievor do his care in an office.

The Employer has also failed to demonstrate that, even if there were a minimal health and safety risk, testing blood glucose and administering insulin in an office would reduce the number of people exposed in any significant way. Two other people would use the same cubicle as the Grievor in a 24 hour period. However, people have to clean the offices and other people sometimes use them for work and meetings.

The Employer has noted that it was a Union Steward who suggested that there might be a health and safety issue with the Grievor using his cubicle for his care. It was not explained whether the concern was for the Grievor, his co-workers or both. In any case, the Union did not persist in that view and filed a grievance several months later when the situation was not resolved.

Forcing the Grievor to get up and go to a private office is not a reasonable response to the minute risk that a drop of blood would get on a cubicle surface and not be wiped off. The Employer could presumably improve the health and safety of everyone by having the cubicles cleaned. The Grievor's practice of replacing his equipment in his kit without removing the sharps is arguably safer for his co-workers than removing them to put them in the sharps container. In any case, I note that he was required to use the offices before a sharps container was even provided so that was not the justification for imposing the rule on him at the time. Furthermore, requiring the Grievor to go to the office means that he is taking more time away from his work. Finally, forcing the Grievor to get up and go into the office for his care sends a message to his co-workers that there is something dangerous about his condition. That is an injury to his dignity.

It is obvious that much engineering design has gone into making the blood glucose testing and insulin injection procedures safe for the user and others. People with insulin dependent diabetes use the equipment in public places like restaurants without endangering anyone and usually without anyone even noticing. There is no need for the Grievor to go to a separate space to do it and it makes the workplace no more safe for anyone. The Employer has produced no medical evidence to support its claim that he must do it in a private office and the Grievor has produced a note that says the opposite. It is not, therefore, a *bona fide* occupational requirement nor is it reasonable accommodation. The only accommodation the Grievor requires are a few minutes a few times each shift to test his blood glucose and administer insulin if needed. He can do it quickly and safely in his cubicle.

For all of the above reasons I find that the Employer has violated the collective agreement and the *Human Rights Code* by requiring the Grievor to test his blood glucose and administer insulin in an office rather than his cubicle. I order that it cease and desist from requiring the Grievor to leave his cubicle to monitor his blood glucose and administer insulin. The Union is seeking damages for the injury to the Grievor's dignity. The Grievor did experience injury to his dignity. However, the Employer has accommodated the Grievor's need for a shift change and has never expressed any concern about the time needed for his care. In the circumstances I find that $1,000.00 is an appropriate amount to be paid as damages. The Employer is, therefore, ordered to pay $1,000 as damages for the injury to the Grievor's dignity.

The Grievance is allowed.

August 17, 2018

Laura Trachuk
Arbitrator