

IN THE MATTER OF AN ARBITRATION

BETWEEN:

MIDDLESEX LONDON EMERGENCY MEDICAL SERVICES
(“the Employer”)

and

ONTARIO PUBLIC SERVICE EMPLOYEES UNION, LOCAL 147
(“the Union”)

Grievance of Andrea Flaherty
(“the Grievor”)

Before: Larry Steinberg, Sole Arbitrator

Appearances

For the Employer:

John Saunders, Counsel
Colin Heise, EMS Coordinator—Human Resources
John Prno, Deputy Chief
Tawana Giscombe, Articling Student (except November 16, 2017)
Evan Taylor, Articling Student (November 16, 2017 only)

For the Union:

Tim Hannigan, Counsel
Meagan Slack, Steward
Andrea Flaherty, Grievor

Written submissions received on July 4, November 2 and December 21, 2018.

[1] In my award dated January 23, 2018 (2018 CanLII 1735 (ON LA)), I found as follows:

[98] I have found that the employer did not fulfill its duty to accommodate with respect to RAD and the volunteer positions in Public Education and Community Paramedical and so declare. Due to the complexities of the employer's accommodation process, the parties agreed that I should restrict my award at this stage to a declaration and remit the matter to them to determine remedy.

[2] The parties were unable to resolve the question of the compensation to which the grievor is entitled.

[3] As noted in the award, the work in the RAD program involved an agreement between the union and the employer that the most senior applicant would be selected to perform the work as a means of giving them some respite from being on the road. The union asserts that it would not have prevented the grievor from performing the work and therefore she would have received 40 hours of work.

[4] It is pure speculation, at best, whether the union would have agreed to waive the agreement about the filling of the RAD position. There is no evidence that would permit me to draw the conclusion that the union would have acquiesced as it now asserts and it is therefore highly uncertain what the outcome would have been if this work opportunity had been raised.

[5] This work opportunity is akin to the "loss of a chance" cases. The only thing the grievor lost was the opportunity to ask the union and the employer to waive their agreement to permit her to perform the work. But the evidence is that she did not do so notwithstanding that she was aware of this work opportunity.

[6] Taking into account all of the circumstances of this case, I do not believe that the grievor is entitled to anything more than nominal damages for the failure of the employer to comply with its procedural duty to accommodate by failing to consider the RAD work opportunity and that the award of \$500.00 in general damages which was awarded is sufficient to compensate for this loss.

[7] There is also a dispute between the parties about whether, pursuant to the employer's policy, the grievor was eligible to be assigned this work or whether other employees would have been assigned the work prior to her. In view of my findings above, it is not necessary for me to make a determination of this issue except for the following. The employer's assertion that it would have moved employees from Logistics to RAD is as speculative as the union's position that it would have agreed to waive its agreement with the employer.

[8] The other work opportunity concerned volunteer work in Community Paramedicine. There was very little evidence of the nature, type or quantity of such work. The union claims, without any particulars, that the grievor should be compensated for six weeks of such work.

[9] The union's claim for this work amounts to a claim that the employer breached its procedural duty to accommodate by failing to consider whether this work was suitable for modified work. Based on the evidence and all the circumstances of this case, the award of \$500.00 in general damages is sufficient to compensate the grievor for this breach. The union has not proved that a wage loss claim in addition to the general damage award is warranted.

[10] In the result, I decline to order the employer to pay any further compensation to the grievor.

Dated at Toronto Ontario this 11th day of January 2019.



Larry Steinberg