

IN THE MATTER OF AN ARBITRATION

BETWEEN:

SODEXO (the Employer)

AND

CUPE, LOCAL 145 (the Union)

RE: Grievance of Lucy Praticante (18-E-01108)

Appearing for the Union: Wassim Garzouzi

Appearing for the Employer: Reg Smart

Sole Arbitrator: Norm Jesin

AWARD

1. The parties agreed to appoint me pursuant to section 50 of the *Ontario Labour Relations Act*. The Union presented an individual grievance on behalf of Lucy Praticante.

BACKGROUND

2. The Grievor has worked for the Employer (and its predecessors) since 2002. She has a full-time position in environmental services.

3. In October 2016, the Grievor required medical leave from work. Pursuant to section 13 of the collective agreement, the Grievor exhausted her HOODIP bank, then employment insurance, and ultimately applied and was accepted for long-term disability benefits by Great-West Life.

4. In April 2018, the Grievor undertook a graduated return to work. This was ultimately unsuccessful. On or around April 30, 2018, the Grievor presented the Employer with medical documentation supporting additional accommodation and a gradual return to work. She provided additional documentation on May 30, 2018.

5. The medical documentation was presented to the occupational health department, which ultimately deferred the decision to Great-West Life. The Grievor had appealed to Great-West Life (as she was asked to do) and the Employer took the position that it would simply follow the decision of the insurer.

6. A grievance was presented alleging a violation of the collective agreement and the *Ontario Human Rights Code*.

ISSUES

7. The issue is whether the Employer had a duty to accommodate the Grievor after she returned to work and was ultimately unsuccessful. Specifically, did the Employer have an independent duty to assess accommodation for the Grievor while she was appealing the decision by Great-West Life, denying her long-term disability benefits.

ARGUMENT

8. The Union argues that the Employer has an ongoing duty to accommodate, and once presented with new medical documentation, it must re-assess its accommodation plan in light of the available information. In the present case, the Employer simply relied on a third-party, without independently assessing the situation. The Grievor presented medical documentation on April 30, 2018 and May 30, 2018, supporting a gradual and accommodated return to work. The Employer never sought to challenge the medical information, nor did it seek to clarify what it perceived to be conflicting medical assessments.

9. The Union seeks compensation for the period between the time the medical information was presented to the date of the award. The Union also seeks damages, pursuant to the *Ontario Human Rights Code*.

10. The Employer's position is simple – the Grievor was engaged in a process outlined in the collective agreement under article 13. She was appealing a decision made by the insurance company. The Employer simply sought to wait for that process to be exhausted before pursuing its own accommodation. By way of example, the Employer cites the contradiction of returning the Grievor to work while she is applying for benefits claiming "total disability".

11. Both sides relied on jurisprudence.

DECISION

12. In view of the time that has lapsed since the grievance was presented, the parties agreed to proceed under a section 50 process. I have spoken with the witnesses, reviewed the documents and analyzed the caselaw.

13. Per the parties' request, I am issuing an expedited decision.

14. For the following reasons, the grievance is allowed.

15. First, there is no real dispute that the duty to accommodate is ongoing. It does not stop, until the point of undue hardship, which is not alleged in this case.

16. Second, when the Grievor presented medical documentation to return to work, the Employer had various options. It could have met with the Grievor to discuss the new information, it could have sent follow-up questions to her doctor, it could have had her medical documentation assessed by a third-party, or it could have sent the Grievor to an independent medical examiner. None of this was done.

17. Rather, the Employer assumed that since the Grievor had appealed the decision by Great-West Life, she could not be accommodated. The outcome of this position has been relatively severe. A long-term and valued employee was prevented from working for a period of almost fifteen months, despite presenting medical documentation outlining clear restrictions and possible accommodations.

18. The Employer argued that there was never an intent to discriminate, and to the contrary, the Employer was simply deferring to a specialized third-party. I have no doubt accepting that there was no intent to discriminate in this case. Nonetheless, the Employer failed in its duty to accommodate the Grievor.

19. In view of the foregoing, I declare that the Employer violated the collective agreement and the *Ontario Human Rights Code*. The grievance is allowed. I order that the Grievor be made whole, with no loss of wages, service or seniority.

20. At the request of the parties, I remain seized to deal with the implementation of the remedy.

Dated this 29th day of July, 2019.



Norm Jesin