

## **Arbitration Award Summary**

### **DCL Grievances**

- 01-08-144 – Denial of Accommodation**
- 01-08-149 – Discrimination / Accommodation**
- 01-08-155 – Discrimination / Accommodation**
- 01-08-157 – Medical Documentation**
- 01-08-161 – Access to Workplace**
- 01-08-163 - Termination**

#### **Case Outline:**

These grievances fall under the collective agreement that expired March 31, 2009.

The grievor first identified to the Employer in April 2007 that he was seeing a Specialist in regards to a medical condition. He advised at that time that he may require a modification of his duties.

Between April 2007 and July 2008 there were many attempts at accommodation, requests for medical documentation as well as ongoing medical care for the grievor. The three Accommodation grievances were filed as a result of the difficulty encountered during this process. On July 15, 2008 the Employer formally requested that the grievor undergo an Independent Medical Examination (IME) and Functional Capacities Evaluation (FCE). A grievance was filed in response to the Employer's direction to attend these tests under threat of discipline. The tests were completed and the results provided to the Employer.

During this time the grievor provided medical notes to be absent from work for medical reasons from June 30<sup>th</sup> to July 24<sup>th</sup>, 2008. He provided an additional note on July 31<sup>st</sup> where his physician advised that he would be off work for an additional six weeks. The Employer advised the grievor that during his absence on sick leave, that he would be required to contact Mr. Charles Taylor prior to going in to the worksite. As a representative of the Local, the grievor filed a grievance on the basis of the Employer "*barring him from the workplace*".

August 13, 2008 the grievor filed a Harassment Complaint against the CEO as per the Employer's Anti-Harassment / Conflict Resolution Policy.

On August 14, 2008, the Employer sent the grievor a letter in regards to the results of the IME and FCA reports. In the letter, they made a request for further documentation supporting the grievor's continuing absence from work. The grievor supplied a medical certificate on August

25<sup>th</sup> (dated August 19<sup>th</sup>) which indicated that he would be off for another 6 weeks pending consultation with a specialist.

September 3, 2008, the Employer delivered a letter of termination to the grievor during a disciplinary meeting. The termination was grieved on September 5, 2008.

**Employer's Argument:**

The Employer maintained throughout that they felt they did not have sufficient information. At no point were they seeking a diagnosis; they made their requests for documentation as they felt they needed a clearer description of any limitations or restrictions and an indication of the possible duration of the condition in order to justify the all night shifts accommodation.

The Employer did not contact the grievor's physician directly due to privacy concerns. An accommodation was made for the grievor on night shifts and they only indicated a deadline to the accommodation when they had still not received the requested information.

Under Article 40.06, the Employer arranged a Functional Capacity Evaluation. They hoped this would finally answer their questions and give them a clear direction for the accommodation. They felt they were facing undue hardship in keeping the schedules of other employees in line with the Collective Agreement with all of the changes required to keep the grievor on night shifts.

In respect to "barring" the grievor from the worksite, the Employer was reacting to the concerns of other employees and had not in fact barred the grievor from the worksite, instead, they had requested that he contact Mr. Taylor first.

Finally, the termination was in reaction to the grievor's failure to return to work despite the Employer's willingness to accommodate him in line with the evaluation findings. It was deemed at that time that there wasn't a reasonable prospect that he would return to work in the foreseeable future.

**Union's Argument:**

The Employer failed to accommodate the grievor by not placing him on a schedule of permanent night shifts despite documentation from the grievor's physician. Further, the Employer was discriminating against the grievor based on disability and harassing him to obtain additional medical information. The Union and the grievances objected to the Employer's seeking diagnostic and treatment information.

The Union objected to the Employer's requirement that the grievor undergo the Independent Medical Evaluation and Functional Capacity Evaluation under threat of discipline especially when the grievor had given permission to the Employer to speak directly with his physician so that any remaining questions could be answered directly.

The Union further argued that the grievor was wrongfully and unjustly dismissed from his position. In addition, the dismissal was non-disciplinary and without warning.

**Arbitrator's Decision:**

The Arbitrator found that the first five grievances could not succeed; however, the termination grievance #01-08-163 was upheld.

In regards to the accommodation grievances (01-08-144 / 01-08-149 / 01-08-155), the Arbitrator found that there was a misconception on the part of the grievor as to the extent of the duty to accommodate and clarified that it is subject to the limit of undue hardship. He also made note that although the Employer justified its actions in not contacting the grievor's physician directly due to privacy concerns, that in this instance the grievor had given consent, compromising his rate to privacy in favor of an accommodation. By refusing the opportunity to speak directly with the physician, the Employer became a barrier to the information.

Based on testimony and presented evidence, the Arbitrator decided that although night shifts may have been the best; that an assessment was not done of the suitability of accommodation on day shifts and that the Employer's insistence of accommodation on day shifts was not unreasonable. Therefore these three grievances were denied.

For grievance 01-08-157, the Arbitrator considered the cited articles of the collective agreement as well as the case law cited by the Union. He found that under the provisions of Article 40.06 that the Functional Capacities Examination was a reasonable requirement. The refusing of a medical examination does not justify discipline; however, the Employer may refuse to return the employee to active duties. As the grievor did attend the examination, the issue was deemed "academic" and the grievance was dismissed.

For grievance 01-08-161, "barring from the workplace", the Arbitrator decided that based on testimony and evidence, that he had not in fact been barred, merely required to contact Mr. Taylor first. As even the grievor testified to concerns over the reaction of other staff to his accommodation, the requirement was deemed reasonable and the grievance was dismissed.

Grievance 01-08-163 was filed in response to the grievor's dismissal and was allowed by the Arbitrator. There is a requirement for a warning prior to the decision for a non-disciplinary dismissal. No such warning was given to the grievor. In addition, the grievor had provided the Employer with a medical slip indicating follow up within 6 weeks which would have occurred one week after the termination. The Employer was found to have not met either of the two conditions for non-culpable termination (Edith Cavell Test). The termination was set aside for lack of just cause.