IN THE MATTER OF AN ARBITRATION

BETWEEN:	ST. MICHAEL'S HOSPITAL
AND	SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1

AND IN THE MATTER OF THE GRIEVANCE OF M. CREDO

ARBITRATOR: J.F.W. Weatherill

Hearings in this matter were held at Toronto on April 9, August 28, October 8 and 10 and November 21, 2014.

A. Stevens, for the union.

K.R. Bock, for the employer.

AWARD

In this grievance, dated June 17, 2013, the grievor alleges that the employer is in violation of the collective agreement and the Ontario Human Rights Code in that she has "been denied accommodation in accordance with my physician's advice".

The grievor, who was hired by the hospital in September, 1999, has worked since 2004 in the Patient Transport Department, where she is now employed as a Patient Transport Assistant (PTA, or Porter). The grievor suffers from rheumatoid arthritis, which primarily affects her hands, fingers, wrists and elbows. This condition made it difficult for the grievor to perform the tasks of her job, which include the transportation (where necessary assisting, or with the assistance of, another employee) of patients (on stretchers or on wheelchairs or hospital beds), specimens, blood samples, charts, x-rays and hospital equipment. The grievor was off work because of her arthritis from January 28 until February 19, 2013. There is no issue with respect to her disability and inability to work during that period, and during her absence she was in receipt of short term disability benefits. The grievor is a full-time employee, and it appears that her return to work on February 19 was on a full-time basis.

The grievor's return to work in February was not successful: her arthritis flared up, and she was absent from February 26, 2013, and again received sick leave benefits. There is no issue as to that. The grievor, who had been under the care of her family doctor, was then seen by a rheumatologist, Dr. Perlin, starting in March, 2013. Dr. Perlin advised the hospital that the grievor was not fit to work, that a course of treatment had begun, and that she would be reassessed on May 23, 2013. In fact, the grievor was able to be reassessed earlier than that, and was examined by Dr. Perlin on May 13. At the hospital's request, Dr. Perlin submitted a standard form, dated May 14, containing her report and comments on the grievor's condition. That report indicated the treatment the grievor had been following; her response to treatment ("partial"); and the impact of her symptoms on her occupational functions ("pushing, pulling, lifting, gripping limited"). To the question whether the grievor was currently fit for modified work, the doctor's response was "yes", and to the question regarding any restrictions or limitations which should be taken into consideration in planning the grievor's return to work, the doctor's response was:

Full time hours OK
Lighter duties which would minimize hand and left elbow strain/pain recommended re: above occupational related limitations.

On May 13, 2013, Dr. Perlin had sent a detailed report to the grievor's family doctor. That report included the statement that the grievor "is keen to get back to work as a St. Michael's Hospital porter as she is systemically well".

The hospital received Dr. Perlin's report on May 16, and on the same day the Disability Case Coordinator called the grievor with respect to her return to work, and suggested a "Transitional Return to Work Plan" which would be in effect over a period of eight weeks. That period was suggested by Dr. Perlin's answer, on the standard form, to the question "what is the duration of any restrictions noted above?". The response was "next eight weeks until follow-up assessment".

At the time of the first conversation between the grievor and the Disability Case Coordinator, the grievor was hesitant about returning to work, and wanted at least to book her follow-up appointment with Dr. Perlin. The grievor's short term disability payments were coming to an end, and the grievor did not wish to apply for Employment Insurance benefits, as the hospital suggested. The hospital also suggested she take certain vacation benefits to which she was entitled, and it seems certain such benefits were paid to the grievor.

As her disability payments were about to expire, the grievor was anxious to return to work on a full-time basis, and it appears this anxiety was largely fuelled by financial concerns. After the initial conversation between the grievor and the Disability Case Coordinator there were further conversations, and on June 3 a return to work meeting was held, at which the grievor was provided with a Transitional Return to Work Plan which the hospital had prepared. This plan called for the grievor to work on certain limited tasks, increasing in their physical requirements over a period of eight weeks, and to perform these tasks for limited hours (the number of hours increasing over the period) and for a limited number of days per week (the number of days increasing toward the end of the period).

Considerable evidence was heard as to the nature and desirability of such a plan, created on an individual basis and applied, it seems, in cases of employees returning to work after a significant absence due to illness or injury. Its purpose is to

promote a smooth return, without provoking any unwanted stresses or return of symptoms and allowing the employee to become work-hardened. Such plans were said to be common, at least in the hospital environment, and to constitute "best practice".

The hospital appears to have imposed a plan of this nature in all or most cases of employees returning from significant absence due to illness or injury, and I do not consider there can be said to have been discrimination against the grievor in this respect. The plan was, however, imposed (while the grievor signed it, she understood that if she did not, she would not return to work at that time), and the substantial issue is whether or not the hospital was entitled to impose this plan on the grievor as a condition of her return to work.

It is not necessary to determine this case on the basis of any alleged violation of the *Human Rights Code*. The grievor was, clearly, entitled to be accommodated on account of her illness. She was accommodated in respect of the tasks she would be called on to perform, and there is no dispute as to that. There was, it could be said, a "forced accommodation" in that the grievor was not allowed to work her regular hours, and it is that which is the substantial subject of this grievance. The issue in this respect is whether or not the hospital was in violation of the collective agreement in refusing to allow the grievor to return to her full-time job (subject always to accommodation as necessary) once the doctor's certification of "full time OK" had been given.

Of course "full time OK" was not meant as a *prescription* for full-time work! The obvious meaning of that notation is that there was no medical impediment to the grievor's return to full-time duties; the grievor was found to be fit for full-time work, and thus cleared for such a return. In the case of an employee, such as the grievor, returning from a significant absence and requiring accommodation, a certain flexibility in planning such a return and arranging the appropriate accommodation is natural, and the grievor herself was somewhat hesitant when called by the Disability Case Coordinator when Dr. Perlin's report of May 14 was received. Subject to such flexibility, however, when an employee who has been absent due to illness or injury is cleared by his or her caregiver to return to work, then the employee has the right to his or her job, unless the employer can show why that should not be the case. See, in this respect, *Firestone Tire & Rubber Co.,* 3 L.A.C. (2d) 12, at p. 13:

> *There is no doubt that an employer has both the entitlement and the obligation to satisfy itself as to the fitness of its employees to carry out the tasks to which they will be assigned. What is proper will depend, in each case, on the nature of the work and the circumstances [in] which it is to be performed. In* Re U.A.W., Local 525, and Studebaker-Packard of Canada Ltd. (1960), 11 L.A.C. 139 (Cross), *it was held that it was a paramount right of management to require that employees be physically fit to perform the work that they are required to do and to satisfy itself by medical opinion if necessary, that this is so. In* Re U.A.W., Local 89, and Reflex Corp. of Canada Ltd. (Weatherill*), referred to in* Re U.A.W., Local 27 and Eaton Automotive Canada Ltd. (1969), 20 L.A.C. 218 at p. 220 (Palmer*), the* Studebaker *case was approved, and it was added that there must be reasonable and probable grounds for the imposition of such a requirement. In the Reflex case, it was said:*
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> > *Clearly, when an employee returns from an absence due to illness, the occasion is proper for the company to require some certification of fitness. Where the certificate is not satisfactory, the company could properly require a further certificate, or could direct its own medical examination. - - - .*

In the instant case, the hospital did accept the doctor's report. As to the restrictions on the tasks the grievor could perform, it complied with those restrictions in the accommodation which was made. As to the notation "Full time OK", apart from considering, correctly of course, as I have noted, that full-time work was not *required* for the grievor's health – physical health, at least - it simply went ahead with what it considered to be the best practice in such cases, and imposed a schedule of limited days and hours. The doctor's notation to the effect that the grievor was cleared for full-time work was not rejected or put in question; it was simply not given effect, and a "work-hardening" transitional schedule was imposed, to the grievor's financial detriment.

It was argued for the hospital that it is not the doctor's role to tell the hospital how to accommodate, and I quite agree. The doctor sets out the employee's limitations, which might involve restrictions with respect to tasks, environment, time worked or other matters. The parties must then work out, if possible, and subject to the limitations set out in the *Code*, an accommodation within those restrictions. Here, the doctor set out task limitations and no others. The time limitation was imposed by the hospital. I have no doubt that the hospital acted in good faith, and in what it considered to be the best interests of the grievor and all concerned. It has, as the *Firestone* and other cases have noted, the entitlement and obligation to ensure its

employees' fitness for work, but that does not mean that an employer stands *in loco parentis* with respect to its employees. In any event, it is bound by the provisions of the collective agreement.

Article 16 of the collective agreement in effect between the parties at the material times sets out the regular work week (although it does not constitute a guarantee) for full-time employees. The grievor is a full-time employee. The hours of her transitional schedule were not those provided for in article 16. The grievor was not laid off, or suspended or otherwise unavailable to work her regular hours. She was willing, indeed anxious to work on a full-time basis and had been medically cleared to so, but was prevented from doing so by the employer-imposed return-to-work plan. The medical advice, which is not questioned, imposed task restrictions and suitable accommodation in that respect was arranged. No restriction on hours of work was given. No argument was advanced as to availability of work, or as to undue hardship. In these circumstances given the medical clearance, it cannot properly be said that there were "reasonable and probable grounds" for the imposition of a limitation on days and hours of work.

It follows from the foregoing, and I find, that the grievor, being medically cleared to do so, was entitled to return, subject to the accommodation of her restrictions, to full-time work. It has not been shown that the grievor was medically or otherwise unable or unfit to perform her duties, as accommodated, on a full-time basis. The imposition of limitations on the grievor's hours of work, even if it be thought to be "best practice", has resulted in a violation of the collective agreement, and a compensable loss to the grievor.

For all of the foregoing reasons, the grievance is allowed. The parties agreed that the matter of remedy could be dealt with once the question of violation of the collective agreement had been determined, and that I retain jurisdiction to deal with that matter and to complete the award.

DATED AT OTTAWA, this 22d day of December, 2014,

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Arbitrator