IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT, 1995*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

HAMILTON HEALTH SCIENCES CORPORATION
- The Employer

-and-

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4800
- The Union

AND IN THE MATTER OF the grievance of Hanna Quraishi

Arbitrator:
Howard Snow

Appearances:
On behalf of the Employer:
Robert E. Salisbury - Counsel
Christina Vallonio - Labour Relations Analyst
Michael Lysecki - Facilitator, Special Needs Services
and others

On behalf of the Union:
Bridget Pridham - National Representative
Tom Baker - National Representative
Alex Magis - Grievance Officer Local 4800
Hanna Quraishi - Grievor

Intervener:
Katrina di Adamo

Hearing held February 18, March 10, April 22, June 3 and June 22, 2004, in Hamilton, Ontario.

AWARD

I. INTRODUCTION

The grievor changed jobs with the Employer, starting a new position as an accounting clerk. The collective agreement provides for a trial period for an employee who switches to a new position. The Employer terminated the trial and returned the grievor to her old position. This grievance concerns the Employer's duty to provide training and feedback to the grievor in her new position and, alternatively, the Employer's duty to accommodate the grievor's disability.

II. THE EVIDENCE

The Employer operates a large hospital with four main sites and a number of satellite programs. One of the satellite programs - Special Needs Services - provides services to children with special needs, both developmental and physical. Among its functions, Special Needs Services coordinates respite care for families and facilitates the provision of specialized treatment for children not covered by local agencies. In addition, Special Needs administers the early autism program. The Special Needs programs are funded separately from the hospital.

Special Needs has six full time employees and some 200 part time employees providing respite care and other assistance to children. A major aspect of the work of Special Needs is accounting for the $2,000,000+ which flows through the office, paying the part time staff, paying for outside services, etc.

In 2003 the accounting work in the Special Needs office required a full time accounting

clerk. The Employer approved a regular full time clerk position and the job was posted. Several persons applied and Hanna Quraishi, the grievor, then a regular part time employee working as a business clerk, was selected. She began work October 20, 2003.

I note that Katrina di Adamo, the person who was then doing the accounting work in Special Needs, wished to remain in the position and the staff in Special Needs, including Mike Lysecki, the manager, preferred to have Ms di Adamo stay. However the collective agreement required that other employees be considered first.

The grievor and Mr. Lysecki were the two primary witnesses. Each reviewed the period from the hiring decision through to the decision to terminate the grievor's trial period. On many facts the two agreed; on many other facts the grievor was uncertain or had no recollection. In addition, Ms di Adamo testified briefly about some of the computing issues and about errors made by the grievor. Two other witnesses testified briefly - Inge Vasovich, the grievor's physician, and Chris Serran, an Employer Health Abilities Case Manager.

The grievor's starting date in the new position was selected principally to allow her to have a two week period to work with the person then doing the job, Ms di Adamo, and to have exposure to the full range of duties. Mr. Lysecki, the manager of the Special Needs office, prepared a schedule of topics to be addressed during the first two weeks.

During the first week the grievor was provided with an overview of the various programs and with invoices and cheque requisition. The second week was a pay week and considerable time was spent on the payroll system. Most aspects of the job were covered during the two weeks, but Mr. Lysecki testified that the grievor was slow in learning the job and it was impossible to cover all items.

Early in the third week Mr. Lysecki reviewed the grievor's performance with the grievor. The grievor received largely positive feedback indicating that, while her work needed improvement, she was nevertheless doing as expected since she was new and still getting to know the job. In addition, during the entire period the grievor worked at this job Mr. Lysecki inquired periodically as to how she was finding the work. A common response by the grievor was that there was a lot of work in the job. Mr. Lysecki gave her generally supportive responses that it was new, that it would become easier, and that she would soon be able to perform the various tasks, and he offered the grievor assistance in learning and doing the job.

During the third and fourth weeks the grievor worked alone. Much of the job involved work with computers. In the third week of the trial Mr. Lysecki, the manager, became concerned that the grievor was not performing at an adequate level and, in particular, he was concerned as to the grievor's lack of ability in two computer programs which were essential to the position, Excel used in tracking expenditures and Peoplesoft used for payroll. The job posting had specified excellent Excel skills and Mr. Lysecki concluded that the grievor did not have the skills needed. The job posting also specified experience with Peoplesoft which the grievor did have. In addition, specific training was provided in Peoplesoft by Ms di Adamo and by the Employer's staff Peoplesoft trainer but both the trainer and Mr. Lysecki felt the grievor was not doing well with Peoplesoft. During the training in the first two weeks with Ms di Adamo, and with the staff trainer, the grievor was invited to and did take notes. Mr. Lysecki was also concerned that the grievor could neither recall the material covered in the training nor find the appropriate references in her notes.

By the end of week three, when the grievor was working alone and responsible for performing tasks she had been exposed to in week one, Mr. Lysecki concluded ". . . she was behind in most tasks, had further problems with Excel, was still having trouble following her notes and was now starting to have to fix problems she had created." Mr. Lysecki and other

staff were concerned that the grievor was “in over her head”. Those opinions were not communicated directly to the grievor. Instead Mr. Lysecki and the other staff remained supportive of the grievor and tried to assist her.

The fourth week was another pay week and the grievor was required to do the payroll work she had been taught in week two. Monday of that week was a holiday and thus payroll had to be completed in one day less than normal. The grievor did not begin the payroll, instead did other tasks for which she was not responsible, such as answering the telephone. The grievor was told to concentrate on the payroll. When she did get to work on the payroll it took longer than normal and many problems were encountered.

Considerable evidence was provided at the hearing as to problems the grievor had in performing her duties. The evidence included printouts of computer screens and a computer “slide show” during which several errors were outlined. Suffice it to note that the grievor made numerous mistakes in entering data in Excel spread sheets. In addition, the Employer had various links between spread sheets designed to automatically copy data from one sheet to another. Instead of using those links the grievor deleted some of them and manually entered incorrect data. Finally, there was evidence of a large number of payroll errors by the grievor in the fourth week of her trial.

Mr. Lysecki concluded that the grievor was not doing well in this position and that she did not have the potential to improve sufficiently. He felt that she would be better suited to a job in which she could focus on a single task and that she was not, and would not be, suited to this position which he felt required “rapid thinking and fast, accurate and appropriate action.” He concluded that the grievor was not working out and that the trial period should be terminated.

Mr. Lysecki arranged for a meeting with the grievor and a member of the Employer's human resources staff on the morning of November 13. At that meeting the grievor's performance was reviewed and she was advised that she was being returned to her former position. In the meeting the grievor acknowledged that her work had not been as she had hoped and for the first time suggested that her poor performance might have been due to back pain caused by a mid September auto accident. The grievor visited her physician that same day and, later on November 13, the grievor met Mr. Lysecki and suggested that her work problems may have been due to a head injury from the auto accident.

The grievor testified about many of the concerns raised by Mr. Lysecki. She acknowledged that her performance had been poorer than she would have liked and attributed her poor performance primarily to the poor training she received. In addition, she suggested that her medical condition interfered with her work.

I note that neither before nor during the trial period did the grievor suggest that she had any medical limitations that would affect her job performance. When she was asked by Mr. Lysecki or the staff in Special Needs about her health, the grievor replied that she was fine. The medical concerns were raised only after the Employer terminated the trial period.

The Employer knew of the grievor's September auto accident well before the grievor began this job. The Employer raised with the grievor a concern about her health and arranged for the grievor's personal physician to complete a Functional Abilities Form. The Employer noted on the form sent to the physician that modified duties had been offered. The physician signed the form September 24, did not answer the various questions regarding the grievor's health or limitations, but instead wrote a brief note indicating the grievor was unable to return to work at present but could return to work full time October 20.

Chris Serran, an Employer Health Abilities Case Manager followed up with the grievor by telephone October 13, before the grievor started this job, and was advised by the grievor she would return full time as planned. Mr. Serran later contacted Mr. Lysecki to inquire of the grievor's situation and Mr. Lysecki replied October 27 that "So far, and I have asked, Hanna is feeling that she can do just fine. No complaints re sitting, back or headaches etc."

The grievor agreed that prior to starting this job she had been offered modified duties and had rejected them. She agreed that before and during her trial period she had advised the Employer that she had no medical limitations which would affect her work performance. However, she did testify that she had telephoned the Employer's employee health service on Friday of the third week of her new job and left a message but that she did not speak to anyone then, or later. Although she did not explain why she made this telephone call, it appeared that the call was prompted by her own perception that she was having difficulty with the work.

Inge Vasovich, the grievor's physician, testified at the hearing about the grievor's injuries and about changes to her medical condition during the relevant period. Dr. Vasovich relied primarily on the notes she had made in the grievor's chart. Her notes for November 13, the day the grievor was advised that she was being returned to her former position, read "no change in signs & symptoms, has started new job, continue with meds & home exercise". Dr. Vasovich testified that the grievor's condition had changed very little from September 24 through November 13. Her notes for November 13 make no mention of the grievor losing her position. That issue appeared for the first time in the notes made during a visit November 19. As for difficulty concentrating, that problem appeared for the first time in the notes made during a visit November 24.

After the termination of her trial period, the grievor grieved that "The Hospital has acted in

an unjust and improper manner, violating Article(s); 9.05, 26 and all relevant clauses in the collective agreement."

In reply to a request for particulars, the Union wrote the Employer February 11, 2004, as follows:

> . . .
> Ms. Quraishi began her "trial period" on October 20th, 2003. The trial period was terminated on November 13th, 2003. During this timeframe, Ms Quraishi, did not receive any type of assessment, test, feedback or review regarding her work performance from Management. Management failed to provide adequate oral instruction, and demonstrate or articulate the standards of the job she was required to meet.
>
> Management was not reasonable in their conclusion that Ms. Quraishi was incompetent after 19 working days in the position.
>
> If it is determined that medical evidence is required, you will be forwarded such information in a timely fashion.
> . . .

III. COLLECTIVE AGREEMENT

The following are the key provisions of the parties' collective agreement:

ARTICLE 9 - SENIORITY

> . . .

9.05 - Job Posting

> . . .
>
> The successful applicant shall be allowed a trial period of up to thirty (30) days, during which the Hospital will determine if the employee can satisfactorily perform the job. Within this period the employee may voluntarily return, or be returned by the Hospital to the position formerly occupied, without loss of seniority. The vacancy resulting from the posting may be filled on a temporary basis until the trial period is completed.
> . . .

9.14 - Technological Change

. . .

Where new or greater skills are required than are already possessed by affected employees under the present methods of operation, such employees shall be given a period of training, with due consideration being given to the employee's age and previous educational background, during which they may perfect or acquire the skills necessitated by the new method of operation. The employer will assume the cost of tuition and travel. There shall be no reduction in wage or salary rates during the training period of any such employee. Training shall be given during the hours of work whenever possible and may extend for up to six months.

. . .

ARTICLE 26 - MANAGEMENTS' RIGHTS

(a) Except as specifically abridged, delegated, granted or modified by this Agreement, all the rights, powers and authority of Management are retained by Management and remain exclusively and without limitation within the rights of Management.

. . .

(c) . . .

(iii) The exercise of any of these rights will not be inconsistent with the provisions of this Agreement.

(iv) The Hospital agrees to treat their employees with justice and consideration.

IV. POSITION OF THE UNION

The Union made two submissions.

First, the Union submitted that the grievor did not receive a proper trial period in this new job. The primary trainer was Ms di Adamo who was understandably distressed that she was not allowed to keep the position and this caused the first two weeks to be difficult. The grievor did not receive adequate oral instruction and the required standards were not

adequately communicated. The feedback provided was positive such that the grievor had no idea she was not meeting the standards and was about to be returned to her former position. The Employer should have reviewed any perceived failings in the grievor's job performance with her and given her an opportunity to improve. The grievor was not treated with "justice and consideration" as was required.

Secondly the Union submitted that the Employer failed to accommodate the grievor's medical needs. The Employer knew that the grievor had been in an auto accident. The Employer had a duty to inquire further as to the grievor's health and to accommodate the grievor's medical restrictions. This was particularly the case here where the grievor was not performing well - the Employer should have explored further whether there were medical reasons for the poor performance.

The Union asked that I find a violation of the collective agreement and remain seised.

The Union referred to the following authorities: *Canadian Labour Arbitration,* 3rd edition (Brown, Donald J. M. and David M. Beatty) Section 6:3230 (Trial, training and familiarization periods) (July 2000); *Dexter-Lawson Manufacturing Inc. and United Steelworkers of America, Local 2890* (1997), 68 L.A.C. (4th) 379 (Marcotte); *Consumers Glass and Aluminum, Brick and Glassworkers International Union, Local 269G* (1997), 61 L.A.C. (4th) 303 (Shime); *Corporation of City of Brantford and Canadian Union of Public Employees, Local 181* (1990), 17 L.A.C. (4th) 149 (Burkett); *Maple Leaf Mills Ltd., Grocery Products Division and United Food & Commercial Workers, Local 530P* (1993), 31 L.A.C. (4th) 384 (Springate); *Greater Niagara General Hospital and Ontario Nurses' Association* (1995), 50 L.A.C. (4th) 34 (H.D. Brown); *Human Rights and Charter Law Reporter* (July/August 2002) summarising *Sylvester v. B.C. Society of Male Survivors of Sexual Abuse* (B.C. Human Rights Tribunal).

V. POSITION OF THE EMPLOYER

The Employer submitted that it had fully met its obligations.

Originally the grievance was one dealing with a failure to provide a proper trial period for this new position. Since the collective agreement elsewhere speaks of "training" periods (see, for example, the Technological Change provision, above), there can be no doubt that the parties agreed on a trial period, as distinct from a training period, for the grievor. In a trial period such as this an employee is expected to be able to do all the tasks already and simply requires a period of familiarization and a chance to prove he or she can, in fact, do the required tasks.

The grievor held this position for 19 days and it seemed clear that she performed the job unsatisfactorily. She was given an extensive two week familiarization during which the job was "double teamed". She was provided with specialized training from the Peoplesoft trainer and with assistance from other staff. However, over the two weeks the grievor worked alone, she demonstrated that she did not have the basic competencies, especially in data input, attention to detail and accuracy.

In essence, the grievor testified that she needed more training. However, under this agreement the grievor was not entitled to training, merely to a trial period during which she had an opportunity to show that she could do the job. She had not shown she could do the required work.

As for the accommodation issue, the key time is during the trial period in this new position. The grievor raised no concern about any medical limitations until after the Employer determined that she would be returned to her former position. Moreover, the medical

evidence did not support any medical restrictions on her ability to perform the duties of this position. Prior to the trial the grievor's physician felt the grievor was able to work without restrictions. There was no evidence as to any change in the grievor's medical situation during the trial period. Nothing was said to Dr. Vasovich by the grievor which changed the physician's opinion during the trial period. Nor did Dr. Vasovich herself diagnose any condition which caused her to change her opinion. The first mention in Dr. Vasovich's notes of the grievor raising a problem with concentration was well after the Employer decision. Even at that late date, there was no mention in those notes of Dr. Vasovich finding any medical condition affecting concentration. There was no basis for concluding the grievor was disabled during the trial period.

Moreover, the Employer submitted that if the Union were allowed to advance a claim for accommodation, the Union had not suggested any accommodation which the Employer might have made which would have allowed the grievor to successfully perform her duties in this job.

Finally, the Employer submitted that, even if the grievor was disabled, the issue of accommodation was not raised in the grievance nor in the particulars provided just prior to the hearing, and could not be raised at the hearing.

The Employer asked that the grievance be dismissed.

The Employer referred to the following authorities: *Canadian Labour Arbitration*, 3rd edition (Brown, Donald J. M. and David M. Beatty) Section 6:3230 (Trial, training and familiarization periods) (November 2003) and Section 6:3300, (Ability and Qualifications: Criteria) (November 2003); *West Lincoln Memorial Hospital and Niagara Health Care & Service Workers Union (Christian Labour Association of Canada), Local 302* (1999), 83

L.A.C. (4th) 105 (Burkett); *Hart Chemicals Ltd. and Canadian Automobile Workers, Local 1917* (1992), 30 L.A.C. (4th) 159 (H.D. Brown); *Timberjack, Inc., and Glass, Molders, Pottery, Plastics and Allied Workers International Union* [1999] O.L.A.A. No. 910 (Brandt); and *Bonner v. Ontario (Ministry of Health)* (1992), 16 C.H.R.R. D/485 (Ont. Bd. Inq.).

VI. CONCLUSIONS

The first issue to determine is whether the Employer provided a proper trial period for this employee who changed jobs with the Employer.

The collective agreement explicitly provides for a trial period. For a maximum of 30 days the Employer and the employee each have an opportunity to evaluate the new job situation. The Employer has the express right to return the employee to the former position. The test to be used by the Employer is whether "the employee can satisfactorily perform the job" (Article 9.05, above).

A decision to return an employee who has successfully secured a job posting is a decision which must be made in a fair and objective manner and must reflect the employee's ability to perform the job (see, for example, Brown and Beatty, Section 6:3230). The assumption behind this trial period is that the employee has the necessary skills to do the job and the trial period is to allow the employee an opportunity to demonstrate that.

The Employer in this instance concluded near the end of week four that the grievor was not satisfactorily performing the job and was unlikely to do so in the future. Was that a fair decision reflecting the grievor's abilities in this job?

There can be no doubt that the grievor had difficulty in the new job. She acknowledged that

fact at the meeting during which she was advised she would be returned to her former position and she acknowledged it again at the hearing. I heard persuasive evidence of errors in data entry, of errors using Excel, and of many errors in the payroll the grievor prepared. I find that the Employer's decision was a reasonable decision and was based on the grievor's performance.

The Union did not argue that the grievor performed the job well, but rather that her failures in the job were the Employer's fault as it had not provided an adequate familiarization period and had not provided adequate feedback.

On the contrary, I find that the Employer met its obligations for this trial period - as opposed to a training period. It allowed the grievor to work with Ms di Adamo - the person who had been doing the work - for two weeks and to be exposed to and trained in nearly all aspects of the job. While I acknowledge that Ms di Adamo wished to stay in the position and was upset that she could not do so, there was no evidence that Ms di Adamo did anything to interfere with the grievor's work in this new position. While the grievor made some criticisms of Ms di Adamo's abilities as a teacher, I can think of no better way for the Employer to have exposed the grievor to the requirements of her new job than the approach taken. In addition Mr. Lysecki, the Peoplesoft trainer and other staff provided assistance to the grievor.

Nor can I fault the Employer for the type of feedback provided. The feedback in my view was fair. The grievor was working hard but she was having difficulty and the response was to acknowledge the problems, encourage her to keep at it, and tell her that she would be able to do it. Moreover, the Employer made repeated attempts to help ensure that success would come. There is nothing to suggest that with different feedback the grievor would have performed at an acceptable level.

That leaves the issue of accommodation. The parties agreed that the Employer was required to accommodate an employee with a disability to the point of undue hardship. The first question is whether the grievor was disabled.

I note that the Employer was aware of the grievor's auto accident and raised a concern about the grievor's ability to return to work. At the Employer's request, the grievor's physician, Dr. Vasovich, provided a Functional Abilities Form indicating that the grievor could return to full time work without restrictions as of October 20, the day the grievor did in fact start this job. The Employer followed up with the grievor the week before she returned and was advised by the grievor that she would be returning to full time work and duties. Prior to the trial period the grievor and her physician assured the Employer that the grievor was able to do the job without restrictions. Moreover, nothing in the physician's notes would support the need for any accommodation during the trial period.

During the period of the trial nothing was said by the grievor or by her physician which would have suggested there was any need for accommodation. When Mr. Lysecki asked, the grievor denied having any medical complaints. Nothing in the physician's notes during the time the grievor worked at the new job indicated any need for accommodation.

It was at the meeting November 13 during which the grievor was advised she was being returned to her previous position that there was the first suggestion that the grievor's difficulties at work may have been related to her auto accident. There is nothing in the physician's notes, nor in the physician's testimony at the hearing, which supported this claim. In fact, both the physician and the grievor had made representations to the contrary. The grievor's first mention of any difficulty in concentrating found in the physician's notes occurred November 24, well after the Employer's decision, and during the grievor's third visit to her physician after the Employer advised her that she was being returned to her

former position. I find no evidence that the problems the grievor had in the job were in fact related to the accident, nor to any medical difficulties she may have had, whether as a result of the accident or otherwise.

As I find no factual basis for a need for accommodation, it is unnecessary to address the Employer's submission that this job which required concentration and accuracy could not be modified so that an employee who had trouble concentrating could be accommodated, nor the Employer's submission that the Union was unable to raise this issue of accommodation, having included it in neither the grievance nor in the particulars provided.

The grievance is dismissed.

Dated in London, Ontario, this 21st day of July, 2004.

Howard Snow, Arbitrator