

Another Union Arbitration Win

This is a sad story. Did it have a happy ending? I don't know. I guess it depends upon your perspective or perhaps who you ask. The hero of the story died before she could know that she won her case. She never lived to see that her courage helped to reshape the law and to benefit the lives of other workers with disabilities. We believe she would have been pleased. So, did the story have a happy ending? You decide.

Trudeen Kemp worked as a cashier for Canada Safeway for about 20 years. She was good at her job and worked hard for her employer. Unfortunately, she developed a "repetitive strain injury" to her shoulder. These types of injuries are an epidemic with cashiers. They are difficult to treat and even more difficult to live with.

The employer made a half hearted effort to find work that Trudeen could do with her disability but before very long they just gave up and demoted her to part-time. This unilateral employer decision had a catastrophic impact on Trudeen. It meant she was no longer able to get 40 hours per week. It meant that she was no longer eligible for Long Term Disability benefits. It meant that her life insurance policy would only pay \$5000.00 instead of \$55,000.00. It meant she spent the last few months of her life living in poverty without disability payments. You see, 6 months after she was reduced to part-time she was diagnosed with lung cancer. Sadly she passed away about 9 months later.

Even before the fatal diagnosis the union filed a grievance alleging that Trudeen's demotion was improper and even illegal pursuant to Human Rights legislation. The case came before Arbitrator W.D. McFetridge who was charged with adjudicating this difficult matter.

The Supreme Court of Canada has said that an employer has the obligation to accommodate an employee's disability "to the point of undue hardship". Cases that have followed have made it clear that this is a very strict onus on employers which cannot be defeated unless the employer can prove that to accommodate would cause very, very serious hardship to the employer. Our arbitrator eventually found that the employer in this case didn't come close to satisfying the onus.

The employer's position was that they simply didn't have enough light duty work within Trudeen's restrictions to enable her to remain full-time. The arbitrator determined that they made this assessment without adequate medical information to even tell them accurately what she was capable of doing or what jobs fit her restrictions.

The union suggested many alternatives that could have been tried. One was returning her to the "Customer Service Desk". Previously she had been successfully accommodated working almost full-time hours on the desk. For reasons only they knew Safeway pulled her out of there, reducing this work to almost nil. They tried after the fact to argue she wasn't good at it and was not good with customers. They called witnesses to bash the character of this poor dead woman and to suggest she missed

90% of her shifts on the desk. Arbitrator McFetridge refused to accept these allegations because there was no documentary evidence to support them and in fact much of the documentary evidence showed the opposite.

We queried why Trudeen couldn't have been accommodated by receiving shifts in 2 or more stores to make up 40 hours per week within her restrictions. The employer's evidence in reply to this was "we don't do that". Not surprisingly the arbitrator didn't think this was sufficient reason not to try. Similarly, we asked why she couldn't have been given shifts at corporate head office where there was lots of light duty work. The company's excuse in this regard was also found wanting.

There were many other proposals and excuses, all of which Arbitrator McFetridge rejected. At the end of the day he determined that "the Company reduced the Grievor to part time employment before it considered all viable forms of accommodation".

Trudeen Kemp's heirs received more than \$60,000.00 in compensation. Future disabled workers will also benefit because this case very clearly sets out the onus on employers and what disabled employees have a right to expect from their employer.