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Employee duties in the event of dismissal on grounds of incompetence

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In a recent decision¹, a grievance arbitrator confirmed the dismissal of a production operator on the grounds of repeated errors and incompetence in the performance of her job duties.

The complainant was hired in 2002. In 2016, she went on sick leave for more than a year. After her return to the workplace in February 2017, her work performance still failed to meet employer expectations, due to the fact that she committed a significant number of errors. She received several written warnings and suspensions prior to her dismissal in January 2018.

Principally relying on the principles laid down in *Edith Cavell Private Hospital*² and *Commission scolaire Kativik*³, the Union argued that the employer had not taken reasonable measures to arrange for the complainant to be transferred to another suitable position. In that regard, the Union cited the example of a position where parts could be collected with the assistance of a scanner, a tool that in its view would significantly reduce errors and that could have been offered.

The arbitrator dismissed the arguments of the union upon the following grounds.

Firstly, he was of the view that the evidence of the employer demonstrated that the complainant committed twice as many and up to four times as many errors as her work colleagues.

The arbitrator also observed that the employee had been performing the same job duties for a considerable number of years. The nature of the work and corresponding job duties had not been modified. Tasks were routine and made no physical demands that the employee was unable to meet. The complainant herself admitted that her physical limitations did not prevent her from carrying out her job duties.

Furthermore, the arbitrator ruled that the employer had displayed considerable patience with the complainant, offering support and assistance, and inquiring as to what might have been the cause of her errors in the performance of her duties. The complainant responded that she had concentration problems. He noted that the complainant did not accept the offer of support by the employer. Nor did she take advantage of the assistance offered to attempt to find an

¹ *Syndicat des métallos, section locale 1138L v. Syncreon Canada inc.* 2019 QCTA 51

² *Edith Cavell Private Hospital v. Hospital Employees' Union, Local 180*, (1982), 6 L.A.C. (3d) 229

³ *Commission scolaire Kativik v. Ménard, S.C.*, 2017-10-04, 2017 QCSC 4686. The judgment of the Quebec Court of Appeal is currently pending.

explanation for her lack of concentration in order to establish a diagnosis of the underlying cause preventing her from adequately performing her job duties.

The arbitrator dismissed the grievance and confirmed the dismissal. He added that it had not been demonstrated to his satisfaction that the employer had failed to propose alternative suitable employment to the employee within the company. In reaching this finding, the arbitrator distinguished the *Edith Cavell* and *Kativik* cases in the following terms:

“The test imposed upon the Employer in Edith Cavell and applied in Kativik was carried out under circumstances where the Employer had either eliminated the job position formerly held by the employee or modified his or her duties significantly or imposed new tasks without providing the training and the time necessary to allow the employee to perform them in a satisfactory manner, or without making a reasonable effort to find a position within the enterprise that the employee would be capable of holding if provided the opportunity and a normal adaptation period in order to facilitate safeguarding of his or her employment.”⁴

What can be learned from this decision?

This case informs us that an employer doesn't have to demonstrate that it has undertaken reasonable efforts to offer another job position to an employee prior to dismissal upon grounds of incompetence where the employee has been carrying out the same job duties for several years and the job duties have in no way been modified.

⁴ *Supra* note 1, par 51