

CITATION: Kardaras v. Sun Life Assurance Company of Canada, 2020 ONSC 3925
COURT FILE NO.: CV-16-560974
DATE: 20200624

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)
)
Voula Kardaras) A. Assuras, for the Plaintiff
)
Plaintiff)
)
– and –)
)
Sun Life Assurance Company of Canada) E. Bennett-Martin and H. Gastle, for the
) Defendant
Defendant)
)
)
)
)
)
) **HEARD:** December 2, 4-6, 10-13, 16-19,
2019 and May 7, 2020

O'BRIEN, J

REASONS FOR JUDGMENT

Overview

[1] In September 2014, Voula Kardaras was diagnosed with major depressive disorder with anxious features. She took a medical leave from work at that time. Her short and long-term disability insurer, the Defendant, Sun Life Assurance Company of Canada (“Sun Life”), provided her with benefits coverage until she attempted a gradual return to work starting December 2015. However, by the time Ms. Kardaras was up to four days of work per week, her treating psychiatrist advised that there had been a worsening of her depressive disorder and she should be maintained at three-days per week. In spite of this, Sun Life terminated Ms. Kardaras’ benefits as of the date originally scheduled for her return to full-time work. The central question in this action is whether Ms. Kardaras was entitled to long-term disability benefits beyond the date Sun Life terminated them.

[2] In order to answer this question, I must interpret the terms of the group benefits policy between Sun Life and Ms. Kardaras' employer, Apotex Inc. (the "Policy"). In particular, the issues for me to determine are:

1. Was Ms. Kardaras entitled to ongoing benefits coverage beyond the date scheduled for her full-time return to work? Specifically, was she entitled to benefits during the "own occupation" period under the Policy and during the "any occupation" period?
2. If she was entitled to additional coverage, what is she owed for unpaid benefits?
3. Is Ms. Kardaras entitled to damages for mental distress or aggravated damages?

[3] Sun Life submits that Ms. Kardaras was not entitled to benefits beyond January 25, 2016 for either the remainder of the "own occupation" period or for the subsequent "any occupation" period. Ms. Kardaras, on the other hand, submits that she was entitled to benefits both for the remainder of the "own occupation" period and for the "any occupation" period continuing to the date of trial.

[4] I find that Ms. Kardaras was entitled to benefits beyond January 25, 2016, when she was attempting a gradual return to work and when Sun Life discontinued her benefits. Sun Life was not entitled to discontinue her benefits at that time. On January 25, 2016, Ms. Kardaras was not capable of performing the essential duties of her own occupation. Her inability to perform the essential duties of her own occupation persisted to the end of the "own occupation" period under the Policy. During the subsequent "any occupation" period, I find that Ms. Kardaras did not meet the Policy definition of being unable to do "any occupation." Continuing at her own occupation at reduced hours and pay was sufficient to meet the requirement of an occupation comparable in status and reward to her occupation prior to her disability. Accordingly, Sun Life owes Ms. Kardaras for unpaid benefits from January 25, 2016 to the end of the "own occupation" period, which was January 13, 2017.

[5] I also conclude that benefits owed during this period should be calculated according to the rehabilitation provisions of the Policy. Ms. Kardaras was participating in this program at the time of the discontinuation of her benefits. Sun Life would have continued to provide Ms. Kardaras with the reduced benefits under this program, which took into account the part-time income she was earning, rather than paying full disability benefits. I note that Sun Life's own documentation calculated its liability in this case under the terms of the rehabilitation program.

[6] Finally, Ms. Kardaras is entitled to mental distress damages for Sun Life's breach of the duty of good faith. I find that Sun Life assessed Ms. Kardaras' claim in a manner that was not reasonable and balanced and that was contrary to the duty of good faith. Its conduct caused Ms. Kardaras mental distress, for which she is entitled to damages.

Timeline

[7] In order to assist with understanding the sequence of events, the following provides a timeline of relevant dates:

September 2014 – Ms. Kardaras began receiving benefits under the Policy due to her depression and anxiety. She first received short-term disability (STD) benefits before subsequently receiving long-term disability (LTD) benefits.

December 7, 2015 – Ms. Kardaras began a gradual return to work at Apotex.

January 15, 2016 – Ms. Kardaras was by this time working four days per week under the gradual return to work plan. Her treating physician, Dr. Sethna, wrote a note to indicate she should be maintained at three days per week.

January 25, 2016 – Sun Life discontinued benefits on the basis of its position that Ms. Kardaras was capable of working full-time and capable of performing the essential duties of her own occupation. Ms. Kardaras continued working three days per week without receiving benefits.

January 13, 2017 – This would have been the last date of the “own occupation” period if Ms. Kardaras had continued to receive benefits after January 25, 2016.

By the date of trial, Ms. Kardaras was continuing to work three days per week at Apotex and had not received any benefits from Sun Life since they were discontinued on January 25, 2016.

Was Ms. Kardaras entitled to benefits during the “own occupation” period?

[8] As further detailed below, I conclude that Sun Life terminated Ms. Kardaras’ benefits prematurely. At the time of her anticipated full-time return to work, January 25, 2016, Ms. Kardaras was not capable of returning to her duties on a full-time basis. She was not able to work more than three days per week. I find that she was not able to perform the essential duties of her own occupation, both because of her reduced hours and because of her limited ability to perform her duties while at work.

A. Meaning of essential duties of insured’s own occupation

1. Policy Provisions

[9] The Policy specifies two periods of coverage under its “General description of the coverage” for long-term disability. The first is known as the employee’s “own occupation period” and refers to the insured’s ability to perform the duties of his or her own occupation. The provision reads as follows:

During the elimination period and the following 24 months (this period is known as the own occupation period), you will be considered totally disabled while you are continually unable due to an illness to do the essential duties of your own occupation.

[10] The second period of benefits specified in the Policy provides for benefits only if the insured is totally disabled from any occupation. It reads:

Afterwards, you will be totally disabled if you are continuously unable due to an illness to do any occupation which you are or may become reasonably qualified by education, training or experience.

[11] It is also relevant that at the time of the discontinuation of Ms. Kardaras' benefits, she was participating in a gradual return to work program. The Policy included specific provisions related to gradual returns to work, which fell broadly within the category of rehabilitation programs. It provided that an insured may be required to participate in a rehabilitation program, which could include part-time work. It also specifically stated that the intention of the program was to assist the insured in becoming "capable of full-time employment." It read in relevant part:

You may be required to participate in a rehabilitation program approved by Sun Life in writing.

It may include the involvement of our rehabilitation specialist, part-time work, working in another occupation or vocational training to help you become capable of full-time employment.

2. *Legal Test*

[12] An insured is considered to be totally disabled from performing her own occupation where she is unable to perform "substantially all of the duties of that position." Total disability does not mean absolute physical disability, but rather that the insured's injuries are such that common care and prudence require her to desist from her occupation in order to effectuate a cure: *Paul Revere Life Insurance v. Sucharov*, [1983] 2 S.C.R. 541, at p. 546.

[13] Ms. Kardaras submits that the test for coverage under the rehabilitation program is not whether the insured person is "totally disabled," and therefore she submits the insured does not need to meet the "own occupation" and "any occupation" tests. In her submission, the test under the rehabilitation program is whether the insured is capable of full-time employment.

[14] I agree with Sun Life, however, that starting a rehabilitation program does not change the test for disability under the Policy. Indeed, the Policy expressly provides that LTD payments under the Policy end on "the date you are no longer totally disabled." In addition, although the goal of the rehabilitation program is to help the insured become capable of full-time employment, Sun Life retains discretion to discontinue a rehabilitation program, though I accept that this must be done in good faith: *Industrial Alliance Insurance and Financial Services Inc. v. Brine*, 2015 NSCA

104, at para. 105. The Policy provides that “Sun Life is under no obligation to approve or continue a rehabilitation program for an employee. We will consider such factors as financial considerations and our opinions on the merits of rehabilitation.” That said, in the circumstances of this case, the fact that Ms. Kardaras’ benefits were discontinued while she was in good faith attempting a return to work, is a factor relevant to Sun Life’s breach of the duty of good faith, as further discussed below.

B. Ms. Kardaras was not capable of performing the essential duties of her own occupation

[15] In my view, Ms. Kardaras has been continuously unable to work for more than three days per week and has been continuously unable to perform the essential duties of her own occupation from the date of the discontinuation of benefits to the date of trial. Although ultimately, I conclude that Sun Life was required to continue Ms. Kardaras’ benefits only during the “own occupation” period, in case I am wrong in my analysis of the “any occupation” period, I address below her capacity to work in her own position to the date of trial. However, my conclusion is that Sun Life’s obligation under the Policy was only to continue Ms. Kardaras’ benefits during the “own occupation” period and not thereafter.

1. Ms. Kardaras was not capable of working more than three days per week

[16] I find that from January 25, 2016 to the date of trial, Ms. Kardaras was not capable of working more than three days per week. Although she was physically capable of working more than three days per week, it was expected that if she worked beyond three days per week, she would decompensate to a major depressive disorder.

[17] There is no dispute that Ms. Kardaras suffered an acute episode of depression in September 2014 and was unable to work. Sun Life agrees that Ms. Kardaras was entitled to receive STD and then LTD benefits at that time. It made regular payments to her over the period from September 2014 to January 24, 2016.

[18] By way of background, Ms. Kardaras first suffered from major depressive disorder in 2005 and received treatment from her psychiatrist, Dr. Sethna, at that time. She continued to receive treatment to varying degrees over several years. In June 2014, she presented to Dr. Sethna in distress. Her father, whom she had been caring for, had just passed away and her mother had just been diagnosed with cancer. Dr. Sethna diagnosed Ms. Kardaras with a relapse of her major depressive disorder, with anxious features and complicated grief.

[19] In early September 2014, Dr. Sethna was concerned about Ms. Kardaras’ condition. Ms. Kardaras was very anxious and frightened about her son Tommy’s malignant brain tumour, which had become symptomatic. She was living with her mother, whose condition had declined rapidly. Dr. Sethna initially suggested Ms. Kardaras persevere at work, but ultimately encouraged her to go off work. In a form filed in support of Ms. Kardaras’ short-term disability claim, Dr. Sethna

described her diagnosis as major depressive disorder with anxious features, escalated stress loading, and grief.

[20] Sun Life accepts that Ms. Kardaras was disabled at this time, but points to the fact that her depression was precipitated by severe life stressors, including the death of her father, the death of her mother, and her son's health condition. Sun Life submits that these stressors dissipated over time and that by the expected end of Ms. Kardaras' gradual return to work, January 25, 2016, she was capable of working full-time.

[21] I agree that Ms. Kardaras' condition improved through 2015. However, I find that by the time Sun Life expected her to return full-time, she was not capable of attending at work more than three days per week. First, it is important to recognize that although Ms. Kardaras was prepared to attempt a gradual return to work, there were indicators that her return to full-time duties might not be successful.

[22] By June 2015, after she had been off work for approximately nine months, Ms. Kardaras' condition had improved somewhat. When she saw Dr. Sethna on June 25, 2015, he found her to be very stressed, anxious and easily overwhelmed. However, he also found that she was sleeping better with the help of a sleeping aid, and that her helplessness was "episodic" rather than "pervasive." At that time, Dr. Sethna found that she presented less compellingly with depression and more with variant dysphoria, which is a variant of depression or a minor depression.

[23] At the subsequent appointment of September 21, 2015, Dr. Sethna found that Ms. Kardaras' depression persisted, but that it was at a lower degree. Therefore, he recommended that she attempt a gradual return to work.

[24] Ms. Kardaras testified that she struggled somewhat with Dr. Sethna's recommendation, although she was willing to attempt a return to work. Starting in September 2015, she had been attending sessions with a psychologist funded by Sun Life, Dr. Morrell-Bellai, for cognitive behavioural therapy. In a report to Sun Life dated October 26, 2015, Dr. Morrell-Bellai reported Ms. Kardaras' diagnosis as major depressive disorder, recurrent, in partial remission, with anxious distress. She specifically stated that Ms. Kardaras was "quite nervous about returning to work given her on-going symptoms," but that she had reassured Ms. Kardaras that if she was unable to return to work she would be placed back on medical leave.

[25] Ms. Kardaras' gradual return to work was scheduled to start on December 7, 2015. She was required to attend four days of re-orientation during the first week. Subsequently, she was scheduled to return to her own duties on a graduated basis, starting with three days per week at four hours each day.

[26] Shortly after starting her gradual return to work, on December 15, 2015, Ms. Kardaras saw Dr. Sethna, who found that her dysphoria persisted. Ms. Kardaras was persistently depressive and presented as sad, ruminative, tearful, and helpless. Dr. Sethna recommended that she resume seeing Dr. Morrell-Bellai. When Dr. Morrell-Bellai saw Ms. Kardaras three days later, on

December 18, 2015, she noted that Ms. Kardaras was “very emotionally distraught.” This was as a result of an incident in which Ms. Kardaras had requested a change to her scheduled work days but had been denied. Dr. Morrell-Bellai reported that as a result of this turn of events, Ms. Kardaras was “once again in an emotionally fragile state.”

[27] By January 15, 2016, Ms. Kardaras was working four days per week but with difficulty. Ms. Kardaras saw Dr. Sethna on January 15, 2016, after which he wrote a note stating that Ms. Kardaras should maintain her work schedule at three days per week, 8am to 2pm each day. Dr. Sethna then provided further details in a letter to Sun Life dated January 18, 2016. In the letter, he stated that Ms. Kardaras’ mental state was “not as good as [he] would have liked” and that there had been “a worsening of her depressive disorder with significant decreases in functionality and coping.” Dr. Sethna indicated that Ms. Kardaras was experiencing escalating distress and increasing self-criticism. In his testimony before me, Dr. Sethna explained that it was important to decrease Ms. Kardaras’ rate of return to work in order for her to be able to remain in the workplace. He was trying to avoid having to pull her out of work altogether, as he could see that her condition was deteriorating.

[28] Around this time, Sun Life also received information directly from Ms. Kardaras about the difficulty she was having in coping. On January 15, 2016, Ms. Kardaras spoke with her Sun Life contact to advise that her doctor had recommended that she maintain three days per week. Ms. Kardaras advised that she was exhausted and only sleeping four hours per night. She further explained that she was having emotional meltdowns with no clear trigger and that normal conversations were making her well up with tears.

[29] In spite of this information, and particularly the information and recommendation provided by Dr. Sethna, and *without having any other medical information or having completed any other medical review*, Sun Life maintained its position that Ms. Kardaras was capable of returning to work on January 25, 2016. When Ms. Kardaras appealed this decision, Sun Life refused the appeal and discontinued her benefits effective January 25.

[30] I do not accept that Ms. Kardaras was capable of working more than three days per week at that time. Dr. Sethna’s evidence was compelling. Dr. Sethna is the Chief of Psychiatry at the Markham Stouffville General Hospital, a position he has held since 2007. He is in charge of the entire mental health program at that hospital and has worked there for almost thirty years. He has extensive experience providing both inpatient and outpatient care. Dr. Sethna also is involved in educational programming and has been an adjunct assistant professor at several universities in Ontario. He has published multiple research papers including on the issues of depression and anxiety. He also has extensive experience in treating patients suffering from depression and anxiety.

[31] Dr. Sethna was firm and unshaken in his testimony before me that Ms. Kardaras was not medically well enough to work more than three days per week. He explained that she suffered from and continues to suffer from dysthymia, which is a persistent but lower grade depression. Although this persistent depression is not as debilitating as when major depression hits, it is a

“significant cause” of morbidity and mortality. With dysthymia, Ms. Kardaras continues to experience functional limitations and periods of decompensation. Dr. Sethna was of the view that if required to work more than three days per week, Ms. Kardaras would very likely decompensate to the major depressive disorder she had experienced in the past.

[32] I do not accept Sun Life’s submission that Ms. Kardaras was not sufficiently unwell to justify not returning to work full-time on January 25, 2016 because her significant life stressors had dissipated by then. The impact on Ms. Kardaras of her parents’ deaths had not completely dissipated with the passage of time. Dr. Sethna described Ms. Kardaras’ grief over the deaths of her parents as a “complicated grief,” which is to say that she was not able to grieve the losses and move on. Complicated grief lingers and maintains an intensity. Moreover, Ms. Kardaras testified before me that her son continues to have a brain tumour. Indeed, she was understandably extremely emotional in her testimony before me, to the point of crying and physically shaking, as she described her son’s brain tumour as inoperable and spoke of her fear about the results of an upcoming MRI.

[33] I also do not accept Sun Life’s submission that Ms. Kardaras’ failure to return to work full-time in January 2016 was due to a desire to maintain work/life balance, rather than because of concerns for her health. When Ms. Kardaras first discussed a gradual return to work with Sun Life, she indicated a desire to explore the possibility of returning to work on a full-time basis, but over four days per week (with extended hours on each of the four days). Sun Life interpreted this proposal as a “life choice” that Ms. Kardaras wished to make. Sun Life relies on the evidence of Bradley Murray, who was a health management consultant at Sun Life, but who is not a medical professional. Mr. Murray took carriage of Ms. Kardaras’ file at the point when Ms. Kardaras started the “rehabilitation” phase and his role was to assist her in returning to work.

[34] Mr. Murray testified that Ms. Kardaras sought the four day per week arrangement as a “life choice” rather than as an accommodation, in order to maintain work/life balance. Indeed, Mr. Murray documented the language of “life choice” and “work/life balance” at various points in Ms. Kardaras’ file in describing the proposed arrangement.

[35] I accept that Ms. Kardaras, or Mr. Murray, or both, used the words “work/life balance” in their discussions of the proposed arrangement. However, I do not accept that, in using those words, Ms. Kardaras meant that she wanted a more relaxing or enjoyable life, as opposed to a life in which she was well and medically stable. Rather, I accept that, as Ms. Kardaras testified before me, she made this suggestion because she was concerned, she would not be well enough to work five days straight. The proposal would allow her to work for four days and have a day at home to recover. Both Ms. Kardaras and Dr. Sethna testified and I accept that their joint goal for Ms. Kardaras was that she ultimately would return to work on a full-time basis.

[36] An insured person who is in recovery and has been medically advised to return to work at a reduced level should not be considered to be making a “lifestyle choice.” See, for example, *Clarfield v. Crown Life Insurance Co.*, [2000] O.J. No. 4074 (S.C.), at para. 53. In this case, I am fortified in my view that the reference to work/life balance did not indicate a lifestyle choice by the fact that Dr. Sethna also used the term work/life balance, both in his testimony before me and in some of his correspondence relating to Ms. Kardaras. For example, in his letter to Sun Life dated January 18, 2016, Dr. Sethna stated that he hoped that returning Ms. Kardaras to a three day per week schedule would “allow her to manage her work/life balance a bit more effectively.” Dr. Sethna explained that he meant by this that he wished for Ms. Kardaras to be able to maintain some quality of life, to remain “somewhat content inside,” despite her symptoms and functional limitations, and not to decompensate to a more serious episode of major depression. Dr. Sethna explained that what he describes as “work/life balance” is a factor in every patient he sees. He tries to ensure his patients are able to maintain a basic quality of life in spite of a certain level of suffering.

[37] In view of Dr. Sethna’s and Ms. Kardaras’ evidence about what was meant by “work/life balance,” I conclude that to the extent Ms. Kardaras used this terminology, she meant it in the sense of being able to cope with her life and avoid a medical crisis. Ms. Kardaras may not have known to describe this as a medical accommodation but in any event, as of January 15, 2016, as set out above, I find that the medical accommodation of working three days per week was necessary. Dr. Sethna’s use of the term work/life balance in his correspondence at that time meant allowing Ms. Kardaras to maintain a basic quality of life without decompensating to a major depressive episode with the accompanying more intense degree of suffering.

[38] After initially reaching the decision to deny Ms. Kardaras the continuation of her benefits, Sun Life maintained that position through several levels of appeal. At the second level of appeal, Sun Life dismissed Ms. Kardaras’ appeal in spite of a second, more detailed report from Dr. Sethna. In this report dated February 5, 2016, Dr. Sethna more forcefully emphasized the deterioration in Ms. Kardaras’ condition, outlining the symptoms with which she was contending. He described Ms. Kardaras as suffering from a “major depressive disorder complicated by significant life stressors that have been persistent.” He explained that the “stress loading” caused by Ms. Kardaras’ gradual return to work had overwhelmed her. Dr. Sethna also specifically emphasized in this letter that the reason he had restricted Ms. Kardaras to working three days per week was to prevent a complete relapse:

The reason for the decline in the return to work schedule from full time to Tuesday, Thursday, and Friday was to prevent a complete relapse, to allow her to see success in terms of her vocation rather than experiencing an aversive phenomenon that disallows engagement at all.

[39] It is also telling that Dr. Morrell-Bellai, the psychologist retained by Sun Life to provide treatment to Ms. Kardaras, agreed with Dr. Sethna. On February 17, 2016, in a phone call with Sun Life, she advised that Ms. Kardaras was “not doing great, not as bad as she has seen her in the past, but still has symptoms” and would benefit from ongoing therapy. Dr. Morrell-Bellai further asked if anything was required from her to support Ms. Kardaras’ appeal. She also advised that she concurred with the opinion in Dr. Sethna’s most recent letter.

[40] At the third and final level of appeal, Dr. Sethna provided another report, dated June 27, 2016, describing Ms. Kardaras’ symptoms. He indicated that she was “more symptomatic” than prior to her return to work. He also explained his justification for recommending that she maintain work at three days per week, stating as follows: “Her quality of life has declined significantly since her return to work, and she is in a persistently overwhelmed and defeated state.” He emphasized that working more than three days per week had been “medically contraindicated” since December 2015.

[41] In the spring of 2016, in response to the second appeal, Sun Life arranged for one of its medical consultants to review Ms. Kardaras’ file. With respect, I do not find the opinion of the medical consultant, Dr. Esche, to be persuasive in the face of the compelling evidence from Dr. Sethna.

[42] Dr. Esche is a psychiatrist based in Alberta. She primarily works as a consultant for Sun Life on a contract basis. She is considered to be a “health partner,” meaning she is part of Sun Life’s health team in managing claims. In her work for Sun Life, she does not see patients, but instead reviews their documentary files. She also does not work at a hospital and has not worked for a teaching hospital in the last twenty years. Unlike Dr. Sethna, she has not published any research on depression or anxiety. Dr. Esche has never met nor spoken to Ms. Kardaras. She also has never spoken with any of Ms. Kardaras’ treating practitioners. In my view, Dr. Esche is not as well-qualified as Dr. Sethna. More importantly, by doing a paper review, she was not in as good a position to assess Ms. Kardaras as was Dr. Sethna, who had seen Ms. Kardaras in person over a number of years.

[43] After first reviewing Ms. Kardaras’ file in April 2016, Dr. Esche provided the opinion that she could not find medical evidence to support the conclusion that Ms. Kardaras’ had a “major mental illness” that would prevent a return to full-time work. Leaving aside that the question of whether an individual suffers from a “major mental illness” is not the test for entitlement to benefits, I cannot accept Dr. Esche’s opinion over the information and view provided by Dr. Sethna. Dr. Esche opined that Dr. Sethna was prescribing low or subtherapeutic doses of Ms. Kardaras’ anti-depressants. She also stated that Dr. Sethna had not changed Ms. Kardaras’ medication since February 2015, which she took to be an indication that Ms. Kardaras was stable. In addition, according to Dr. Esche, Ms. Kardaras’ life stressors were mostly resolved.

[44] I have already addressed the issue of Ms. Kardaras’ life stressors above. With respect to her medication, Dr. Sethna explained that, in treating persistent lower grade depression, although the historic thinking had been that it was important to continue to increase dosages of prescribed

anti-depressants, a recent study has provided compelling evidence that there is no advantage to augmenting dosages, and that physicians should be judicious in doing so. Instead of “pushing doses,” physicians should engage in strategies such as switching medication or “boosting” the initial medication with a second anti-depressant.

[45] In this case, Dr. Sethna has adjusted Ms. Kardaras’ medication on a few occasions. He added a second anti-depressant, Wellbutrin in May of 2016. In July 2016, he decreased Ms. Kardaras’ Cymbalta and added Cipralex. He explained that Cipralex had been effective in treating Ms. Kardaras’ depression in 2005, but that since then the medical community has become aware of potential cardiac effects from the dosage she was receiving. He therefore increased her dosage to the top end of what is now considered safe. When Ms. Kardaras’ symptoms continued to linger on Cipralex, he more recently switched her to Pristiq.

[46] In short, I accept that Dr. Sethna, a highly competent psychiatrist, was engaged in the delicate work of trying various strategies to improve the symptoms of a patient he had treated for many years. Although her symptoms had improved since the time when she first went off work in September 2014, she continued to struggle with symptoms of a reduced level of intensity, but which nonetheless had a serious impact on her quality of life. With respect for Dr. Esche, who was limited by the nature of the review she conducted, her conclusions based on her paper review of the file does not convince me that Ms. Kardaras was medically capable of returning to work full-time on January 25, 2016, without the risk of a major relapse and serious suffering.

[47] Following the reports and reviews I have detailed above, both Dr. Sethna and Dr. Esche provided further reports and evidence regarding Ms. Kardaras’ condition to the date of trial. Dr. Sethna emphasized that Ms. Kardaras continued to experience the symptoms described above. He maintained that requiring her to work more than three days per week was medically contraindicated. Dr. Esche continued to reject this position, again highlighting what she considered to be a lack of symptoms and a lack of treatment.

[48] I am persuaded that to the date of trial, it has been medically contraindicated for Ms. Kardaras to work more than three days per week. I am convinced that what Dr. Esche has viewed as a lack of treatment has instead been Dr. Sethna’s struggle to assist Ms. Kardaras with persistent symptoms. Dr. Sethna emphasized that Ms. Kardaras “is where she is because of what she suffers, not because of what she chooses.” In addition to the pharmacological changes described above, she has attempted individual therapy, group cognitive behavioral therapy, and exercise (which can be an important component of recovery). Dr. Sethna recently suggested to Ms. Kardaras that they consider a hospital admission for her to try a completely different type of treatment. This treatment, called repetitive transcranial magnetic stimulation (rTMS), is an intensive treatment by magnetic brain stimulation provided to a patient on a daily basis. Dr. Sethna is not overly optimistic that it will be successful for Ms. Kardaras, but thinks it is worth trying. He concluded it would be worth trying during what he described as one of his “moments of therapeutic desperation” -- in other words a moment in which he feels desperate in his treatment of a patient because he does not like to see people suffer forever. He would like to give Ms. Kardaras another chance to find a treatment that will make her well.

[49] I also do not consider the evidence of Ms. Kardaras' activities as documented in the surveillance reports obtained by Sun Life from January and November 2019 to prove that Ms. Kardaras is more functional than she claims. The surveillance reports show Ms. Kardaras going to work and engaging in various errands, such as shopping and going to the hair salon. There is no suggestion that Ms. Kardaras is not able to carry out basic tasks of life in her current state. However, as Dr. Sethna explained, the fact of carrying out the activity does not identify the patient's mental state. A patient can be in acute distress but may use shopping as a self-soothing activity. In other words, a shopping expedition or other errand does not correlate to a good day or bad day. In Ms. Kardaras' case, grocery shopping, for example, is a comforting activity for her. On the other hand, Ms. Kardaras gave the example of shopping at a nursery in the fall of 2019 when she unexpectedly broke down. She called her son to come pick her up and, while waiting, sat in a corner of the nursery and cried for 20 minutes.

[50] I also note, in reviewing the surveillance reports, that the reports do not show Ms. Kardaras engaging in extensive out-of-work activities other than errands, shopping, and on a couple of occasions attending at the Markham Stouffville Hospital (presumably for appointments with Dr. Sethna). This is consistent with her evidence that she works three days per week in order to be able to recover during the other days. On at least three of the dates that were monitored (January 10, January 12, and November 3, 2019), Ms. Kardaras' residence was observed for an entire day and she was not seen at all. In other words, the implication was that she stayed home the entire day. In short, I do not view the surveillance reports as undermining the fundamental point that Ms. Kardaras is just barely able to cope and maintain a basic level of contentment when working three days per week.

2. Ms. Kardaras was not performing the essential duties of her occupation while at work

[51] I also rely on the evidence of Ms. Kardaras and her colleagues to conclude that she was not medically capable of working more than three days per week and that, while at work, she was not performing the essential duties of her occupation.

[52] Felix Francis, one of Ms. Kardaras' supervisors, worked with her before and immediately after her medical leave. Ms. Kardaras' title at Apotex was Project Leader in technical operations process validation. This means validating processes according to regulatory requirements and ensuring they meet those requirements. Prior to going on leave, her job included reviewing protocols for compliance purposes, but also monitoring manufacturing processes by physically watching the processes in action "on the floor" and taking account of data points and data results. Mr. Francis testified that prior to going on leave, Ms. Kardaras was one of the most senior members of the group. She carried out her work very efficiently and often represented the group at meetings.

[53] After her return from her medical leave, when Ms. Kardaras was working three days per week, she was much slower in completing her work. Her job became limited to a "desk job," involving duties such as reviewing written protocols, and her work was limited to tasks that were not intensive or detail-oriented. She no longer went "down on the floor." In addition, when Mr.

Francis invited Ms. Kardaras into his office to ask her how she was doing, on several occasions she “broke down” emotionally.

[54] I also accept evidence from Ms. Kardaras and her colleagues about her continuing day-to-day struggles. Ms. Kardaras describes herself as having some good days and some bad days. She struggles with fatigue and on bad days finds herself staring blankly at her computer and moving piles of paper on her desk without accomplishing anything. Ms. Kardaras’ current supervisor, Renato Rodrigues, testified that at times he can see that Ms. Kardaras is struggling and unwell at work. He periodically takes work away from her that she is struggling to complete. He receives complaints from other employees that she is slow to complete her work.

[55] Ms. Kardaras sometimes is noticeably unwell at work. On one occasion in October 2019, Mr. Rodrigues could see Ms. Kardaras was unwell and asked her to go home because he knew she would not be able to accomplish anything that day. On another occasion, he could see that Ms. Kardaras was “shaken.” He suggested that they go outside for a walk to assist in calming her down. More regularly, he takes her for coffee when she does not seem well and offers to take work from her.

[56] Another colleague, Jo-Anne Lenarduzzi, has known Ms. Kardaras from Apotex for many years. She says that before her illness, Ms. Kardaras was “bubbly” and “happy.” Now, she is generally “sad.” She has good days and bad days, but periodically comes into Ms. Lenarduzzi’s office visibly upset, venting and with her eyes welling up.

[57] The fact that Ms. Kardaras has consistently achieved a level of “meets expectations” in her performance appraisals at Apotex, both before and after her medical leave, does not undermine my conclusion that she is not completing the essential duties of her position. Ms. Kardaras’ supervisor, Mr. Rodrigues, explained that Ms. Kardaras meets expectations in the duties she is assigned. However, there are many tasks which otherwise fall within the role of Project Leader that he does not assign to her because he knows they are too much for her to handle.

C. Legal Analysis re Own Occupation Period

[58] I conclude that Ms. Kardaras was not capable of performing the essential duties of her own occupation as she was not performing substantially all of the duties of her position. She was working three days per week and not five. During those three days, she was not performing substantially all of her duties. Her manager took certain types of tasks away from her and reduced her workload. She was less effective, suffered emotional breakdowns, and on some days pushed paper around on her desk.

[59] The ability to work part-time does not preclude a finding that an insured is entitled to benefits: *Jones v. Prudential Group Assurance Co. of England (Canada)*, 1999 CarswellOnt 2360 (S.C.), at para. 69. See also *Cubello v. Guidolin*, 2000 CarswellOnt 1524 (S.C.), at para. 29, which reaches the same conclusion, although decided with respect to income benefits under the Statutory Accident Benefits Schedule. I do not consider that Ms. Kardaras’ work at a reduced and less

effective level three days per week constituted being capable of performing “substantially all” of the duties of her job.

[60] Sun Life submits that during the “own occupation” period, according to the calculations of its actuarial expert, Patricia Harris, Ms. Kardaras was working 71% of her pre-disability hours. In other words, although working three days per week, Ms. Kardaras worked somewhat more than two-thirds of her previous hours. Sun Life relies on this calculation to submit that Ms. Kardaras was performing substantially the duties of her own occupation. However, this analysis does not take into account that Ms. Kardaras was substantially less effective during her working hours. Taking the days and hours worked, together with Ms. Kardaras’ reduced role, reduced tasks, and struggle while at work, I conclude that she was not performing the essential duties of her own occupation.

Was Ms. Kardaras entitled to benefits during the “any occupation” period?

[61] On the other hand, I conclude that Ms. Kardaras was not entitled to benefits during the “any occupation” period. Although Ms. Kardaras was not able to perform substantially the duties of her own occupation, the test for entitlement during the “any occupation” period is different. Being disabled from “any occupation” means that the insured person cannot perform work reasonably commensurate in status and reward with their background, job experience, training and general education level: *Thevenot v. Manufacturers Life Insurance Co.*, [2006] M.J. No. 91 (Q.B.), at para. 24. The test for coverage under an “any occupation” provision is set out in Eric J. Schjerning, *Disability Insurance Law in Canada*, 2nd ed., (Toronto: Thomson Reuters Canada, 2017) at p. 57 as follows:

A policy with the “any occupation” definition of disability usually requires that total disability is such that the insured person is prevented from engaging in any occupation or from performing any work for compensation or profit. An insured will be deemed totally disabled if he can take on only trivial or inconsequential work, or work for which he is highly over-qualified, or work for which he is completely unsuited by background.

A person is considered not to be totally disabled from engaging in “any” occupation if his condition would enable him to enter into an occupation reasonably comparable to his old occupation in status and reward, and reasonably suitable in work activity in light of his education, training and experience.

[62] In this case, I find that Ms. Kardaras’ current role, working three days per week, is sufficient to qualify as reasonably comparable to her old occupation in status and reward, as well as reasonably suitable in light of her education, training and experience.

[63] As set out above, Ms. Kardaras’ current role is not the same as her pre-disability role. She has less of a leadership role and her tasks are less complex and time-sensitive. Nonetheless, she has the same title and performs some of the same tasks she used to perform.

[64] Further, according to the analysis provided by Sun Life's actuarial expert, the regular pay Ms. Kardaras has received while working part-time since the discontinuation of her benefits is approximately 73% of her pre-disability basic monthly income. Although in this case, the Policy does not identify a salary range that would be considered commensurate income for the purposes of identifying a reasonably comparable occupation, Schjerner writes in Disability Insurance Law in Canada that many insurance policies will list a specific salary threshold, usually from 60 to 75% of the prior salary (at p. 57). Provisions in other policies of course cannot be applied to this Policy, but without any other wording in the Policy to assist, this seems like a reasonable range to consider among other factors in determining commensurate income.

[65] In this case, taking all of the circumstances into account, including that Ms. Kardaras has the same title, performs some of the same tasks, and earns approximately 73% of her prior income, I conclude that her current employment is reasonably commensurate to her pre-disability employment in status and reward, and taking into account her education, training and experience. Accordingly, Ms. Kardaras was not entitled to benefits under the Policy from the completion of the "own occupation" period under the Policy and to the date of trial.

How should Ms. Kardaras' benefits for the "own occupation" period be calculated?

[66] Given my conclusion that Ms. Kardaras was entitled to ongoing benefits during the remainder of the "own occupation" period, I need to determine how to measure those benefits. First, the "own occupation" period ran for 24 months following the expiry of Ms. Kardaras' receipt of short-term disability benefits. This period expired on January 14, 2017. Therefore, Ms. Kardaras was entitled to benefits from the date they were discontinued (January 25, 2016) until January 13, 2017.

[67] Given that Ms. Kardaras was working part-time during this period, the appropriate method of calculating her benefit is in the manner provided in the rehabilitation provisions under the Policy. Ms. Kardaras was participating in a rehabilitation program at the time of the discontinuation of her benefits. To put her in the position she would have been in if the contract had been performed, she is entitled to payment under that program. Although the rehabilitation program under the Policy is within Sun Life's discretion and does not necessarily continue indefinitely, as set out above, Sun Life is required to administer the program in good faith. I was not pointed to an evidentiary basis on which to conclude that Ms. Kardaras' participation in the rehabilitation program would have ended in favour of another calculation of benefits. In its own internal documentation related to this claim, Sun Life calculated its potential exposure in this case under the rehabilitation provisions of the Policy and has not suggested that any other provisions would apply. Further, it is reasonable to conclude Sun Life would have applied these provisions, as a calculation under the rehabilitation program takes into account the income earned by Ms. Kardaras from her employment and results in a lower amount of benefits owed by Sun Life. Therefore, I conclude that Ms. Kardaras is entitled to the amounts she was due under the rehabilitation provisions of the Policy from January 25, 2016 to January 13, 2017.

[68] My calculation of the amount owed for that period is \$12,037. To come to that number, I have used the calculation provided by Ms. Kardaras' actuarial expert, Arlene Posel for the monthly benefit and premium owing for 2016 (\$11,977). I have added the amount up until January 13, 2017 by prorating the monthly benefit and premium owing for January 2017 (\$144) for 13 out of 31 days, which comes to \$60. I added \$11,977 and \$60 to arrive at \$12,037.

Is Ms. Kardaras Entitled to Aggravated Damages or Damages for Mental Distress?

[69] Ms. Kardaras claims damages for mental distress due to Sun Life's failure to pay her benefits. She also claims aggravated damages for what she alleges was Sun Life's breach of the duty of good faith. Ms. Kardaras did not suffer the same type of mental distress as is usually associated with insurance contracts as "peace of mind" contracts. However, I find that she did suffer mental distress from Sun Life's breach of the duty of good faith. I characterize these damages as damages for mental distress, as opposed to aggravated damages.

A. Breach of Duty of Good Faith.

[70] The contract between an insurer and an insured is one of utmost good faith. In addition to the express provisions in the policy, there is an implied obligation in every insurance contract that the insurer will deal with claims from the insured in good faith: *702535 Ontario Inc. v. Non-Marine Underwriters of Lloyd's London, England* (2000), 184 D.L.R. (4th) 687 (Ont. C.A.), at para 27.

[71] The duty of good faith does not require that an insurer necessarily be correct in making a decision to dispute its obligation to pay a claim. Mere denial of a meritorious claim is not an act of bad faith. But it does require that the insurer assess the merits of a claim in a balanced and reasonable manner. For example, the insurer cannot simply discard compelling evidence that is not favourable to its position. Rather, an insurer must instead make an "even-handed evaluation of all evidence": *Asselstine v. Manufacturers Life Insurance Co.*, 2003 BCSC 1119, at para. 198. See also *Warrington v. Great-West Life Assurance Co.*, [1995] B.C.J. No. 1214 (S.C.), at paras. 85-91.

[72] I conclude that Sun Life did not approach the issue of Ms. Kardaras' health condition in an even-handed manner. It took the view that Ms. Kardaras was seeking work/life balance and clung to that idea through the trial, even when in my view it was clear from the medical evidence, the evidence of her colleagues, and her own evidence that she continues to suffer from her medical condition to a degree that has a significant impact on her life. In spite of what I consider to have been the compelling medical evidence in Ms. Kardaras' favour, Sun Life continued through trial to characterize Ms. Kardaras as having a "sense of entitlement" in seeking payment of her benefits.

[73] In finding that Sun Life breached its duty of good faith, I rely on the following:

- Sun Life discontinued Ms. Kardaras' benefits when the only medical evidence it had was to the effect that Ms. Kardaras was not able to work more than three days per week. A month earlier, Dr. Morrell-Bellai had advised Sun Life that Ms. Kardaras was in an "emotionally fragile" state. On January 15, 2016, Ms. Kardaras told Sun Life she was exhausted, sleeping only four hours per night, and having emotional meltdowns. On January 15, 2016, Dr. Sethna wrote a note stating that she should maintain her schedule at three days per week, and on January 18, 2016 he wrote a letter saying she was not doing well, her condition was worsening, and she was experiencing escalating distress. Sun Life did not have any medical evidence to contradict Dr. Sethna's expert opinion but nonetheless disregarded his opinion, saying that Ms. Kardaras' symptoms did not appear to be of a severity which would preclude her from performing the essential duties of her own occupation.
- Sun Life maintained its position despite never receiving any differing opinion from any doctor who had assessed Ms. Kardaras. Dr. Sethna repeatedly informed Sun Life that Ms. Kardaras' condition was declining and that he was recommending she work no more than three days per week to avoid a complete relapse of her major depressive disorder. Dr. Morrell-Bellai, the psychologist retained by Sun Life, concurred with Dr. Sethna's opinion. In spite of this, Sun Life accepted the opinion of Dr. Esche, who had never assessed nor even met Ms. Kardaras.
- Sun Life did not have an open mind to reviewing additional medical information provided by Ms. Kardaras. Although Sun Life initially stated in response to the first appeal that it would be willing to review any new records and reports, it did not then show an open mind to the further, more detailed information and reports provided by Dr. Sethna. For example, when a representative of Sun Life wrote to Dr. Esche in April 2016 seeking her review of the file, she stated the following under "reason for referral": "This file refers to a 57 year old project leader who has been off work since September 2014 due to 'caregiver burnout.'" The reference to "caregiver burnout" strikes me as a vast oversimplification of Ms. Kardaras' serious medical condition, major depressive disorder. The Sun Life representative went on to write that "[w]hile it is noted that the [plan member] experienced a number of issues related to caregiver responsibilities, it is unclear, given her mother passed away in April 2015 and her son's condition is stable, why the member has not returned to full-time work." Again, I find this to be a

simplistic approach to Ms. Kardaras' medical condition, particularly given the medical report from Dr. Sethna on file.

- Similarly, in the September 7, 2016 letter responding to Ms. Kardaras' third and final appeal, Sun Life's representative wrote that "[i]t is not at all clear as to why Ms. Kardaras did not return to full-time work other than it appears it was her personal preference to do so." This is despite the fact that in Dr. Sethna's most recent report dated June 27, 2016, he had written that Ms. Kardaras was in a constant state of overwhelmingness, heightened distress and marked self-criticism; that her quality of life had declined significantly since her return to work; that she was in a persistently overwhelmed and self-defeated state; and that working more than three days per week was "medically contraindicated."
- Given that Dr. Esche did not agree with Dr. Sethna and Dr. Morrell-Bellai, she could have sought clarification from Dr. Sethna or Sun Life could have obtained an independent medical examination of Ms. Kardaras. Instead of doing so, it accepted and preferred the opinion of Dr. Esche, the only professional out of the three who had never examined nor even seen Ms. Kardaras.

[74] Another relevant factor is that Sun Life discontinued Ms. Kardaras' benefits when she, in good faith, was participating in a gradual return to work program. Ms. Kardaras repeatedly indicated that she was concerned about whether she was capable of returning to work. Nonetheless, she agreed to participate in a gradual return to work and was in good faith attempting to mitigate her damages, as required by Sun Life. Sun Life's rehabilitation program expressly contemplated and encouraged part-time work, with the goal of the employee returning to full-time work. Indeed, the Policy's provisions for calculating benefits provides a top-up of part-time earnings to full-time pay. That is, the insured is entitled to receive their full LTD payments, plus payments from other sources, such as their employer, up to no more than 100% of their pre-disability basic earnings indexed for inflation. While Sun Life now claims that Ms. Kardaras' ability to work part-time constituted performing the "essential duties of her own occupation," the Policy's rehabilitation program anticipates that the insured will be entitled to ongoing benefits until a full-time return. In other words, Sun Life required Ms. Kardaras to participate in the rehabilitation program and, when she was not able to return to full-time, it held the part-time work against her by saying that the part-time work constituted performing the essential duties of her own occupation. This is not to say that Sun Life is never entitled to discontinue an insured's benefits during a gradual return to work. In all of the circumstances of this case, however, I consider this to be an additional aggravating factor in light of Ms. Kardaras having been very anxious about attempting to return to work, her doctor's clear and repeated statements that she was being pushed too hard, and where Sun Life nonetheless discounted her doctor's opinion and used her gradual return to work against her.

B. Damages for Mental Distress

[75] I conclude that Ms. Kardaras is entitled to damages for mental distress caused by Sun Life's breach of the duty of good faith. These damages are awarded for Sun Life's breach of contract and therefore are not properly characterized as aggravated damages.

[76] Ms. Kardaras claims both damages for mental distress caused by Sun Life's breach of a "peace of mind" contract, as well as aggravated damages on the basis that Sun Life breached the duty of good faith. She relies on cases like *Clarfield* at para. 75 and, more recently, *Gascoigne v. Desjardins Financial Security Life Assurance Company*, 2019 BCSC 1241, to submit that a breach of the duty of good faith constitutes a separate cause of action that may ground such an award.

[77] Sun Life, on the other hand, submits that Ms. Kardaras has not suffered the type of mental distress damages awarded for breach of "peace of mind" contracts, and that aggravated damages do not arise from a breach of the duty of good faith. It relies on the Nova Scotia Court of Appeal's decision in *Industrial Alliance* in its submission that a breach of the duty of good faith cannot lead to aggravated damages, as such a breach does not constitute an independent cause of action. Instead, breaches of the duty of good faith are impliedly contractual: *Industrial Alliance*, at para. 154.

[78] I agree with Sun Life that Ms. Kardaras has not proven the type of mental distress that is usually associated with disability contracts. Disability insurance contracts are typically considered to be "peace of mind" contracts. They provide peace of mind by providing the insured with the knowledge of income security in the event of a disability. The Supreme Court of Canada has said that the "intangible benefit provided by such a contract is the prospect of continued financial security when a person's disability makes working, and therefore receiving an income, no longer possible": *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, at para. 57.

[79] In the specific circumstances of this case, Ms. Kardaras did not prove that she suffered mental distress caused by financial strain from Sun Life's refusal to pay her benefits. Indeed, the income she earned from her work at Apotex three days per week amounted to more than Ms. Kardaras would have earned if she had received only disability benefits without working during the same period. This is because disability benefits under the Policy are a proportion of the insured's pre-disability earnings.

[80] I also agree with Sun Life that in the context of a disability insurance contract, in which the duty of good faith is an implied term, a breach of the duty of good faith does not ground an award of aggravated damages. However, contrary to Sun Life's position, it can ground a claim for mental distress damages. According to *Fidler*, at para. 52, "true aggravated damages" are not awarded under the general principle of *Hadley v. Baxendale*, but rest on a separate cause of action, usually in tort. However, mental distress damages arise out of the contractual breach itself. They are awarded under the principles of *Hadley v. Baxendale* and are based on the parties' expectations at the time of contract formation. As set out in *Industrial Alliance*, in the context of a contract for insurance, the insurer's duty of good faith is an implied term of the contract. It is within the

reasonable contemplation of the parties at the time of contract formation that a breach of this implied term may cause mental distress. Further, mental distress arising from a breach of the duty of good faith may be considered reasonably foreseeable. Although not in the insurance context, the Ontario Court of Appeal applied this approach in *Tim Ludwig Professional Corporation v. BDO Canada LLP*, 2017 ONCA 292, at paras. 60-61, 69.

[81] In this case, Sun Life's breach of the duty of good faith caused Ms. Kardaras mental distress that I conclude was in the reasonable contemplation of the parties. I have found that Sun Life's approach to Ms. Kardaras' claim was neither balanced nor reasonable. Sun Life's unbalanced approach caused Ms. Kardaras significant distress, leaving her feeling unacknowledged and unheard. Dr. Sethna described the impact of Sun Life's approach on Ms. Kardaras as a "sense of betrayal." She felt it as a lack of acknowledgment of her as a human, and of her efforts to "pull back from the brink." Ms. Kardaras felt she was being accused of lying and malingering, when, as stated by Dr. Sethna, "her situation is real and really not debatable." Dr. Sethna also emphasized that the experience of not being believed by Sun Life, or of Sun Life not acknowledging the seriousness of her condition, was particularly difficult for Ms. Kardaras. What he described as her "code of ethics" was strong. She had certain expectations of herself which meant that it was particularly disturbing for her to be viewed in the way she felt Sun Life was viewing her. Ms. Kardaras described herself as being very stressed because, regardless of what her doctor said, Sun Life was "shutting [her] out." She felt she had worked very hard, was abiding by the rules, and could not understand why Sun Life was responding in the way it did. Ms. Kardaras felt that Sun Life's position was pre-determined, regardless of what her doctors said, and like she was a "little person trying to fight for her life."

[82] At the time LTD payments are due under the Policy, the insured person is disabled. It is a period of vulnerability, particularly for an insured person experiencing anxiety and depression who may feel especially vulnerable to and stressed by unfair treatment. I conclude that it was reasonably foreseeable that Sun Life's unbalanced conduct would cause Ms. Kardaras heightened distress.

[83] Finally, according to *Fidler* at para. 47, in awarding damages for mental distress, the court also must be satisfied that the degree of mental suffering caused by the breach was sufficient to warrant compensation. I find Ms. Kardaras' mental distress to be sufficient to support an award of damages. During a period in which Ms. Kardaras was highly vulnerable, she experienced an increase in stress, a loss of dignity, and a feeling of not being heard and acknowledged. I am satisfied from the evidence of both Dr. Sethna and Ms. Kardaras that Sun Life's conduct toward Ms. Kardaras was deeply troubling and distressing to her, such that damages for mental distress are appropriate.

C. Quantum of Mental Distress Damages

[84] In terms of quantum, Ms. Kardaras claims \$25,000 in damages for mental distress, \$10,000 in aggravated damages and a further \$76,000 in aggravated damages representing the value of the “care hours” she used from her work entitlements to supplement her income while working part-time and not receiving LTD benefits. She has provided me with cases in which awards for aggravated damages range from \$18,000 (*Cross v. Canada Life Assurance Co.*, [2002] O.T.C. 56 (S.C.)) to \$75,000 (*Clarfield*). In some of these cases, the distinction between aggravated damages and mental distress damages is not clear, such that the term “aggravated damages” is used to capture damages for mental distress arising from the breach of the duty of good faith.

[85] I consider the appropriate damages in the case at bar to be lower than in the cases referred to me by Ms. Kardaras. The circumstances of this case are not as egregious as other cases, given that Sun Life did pay Ms. Kardaras’ benefits for an extended period at the outset of her claim and discontinued her benefits at a time when she was earning an income that was more than she would have earned on full benefits. Further, I have found that Ms. Kardaras was entitled to benefits for the “own occupation” period but not for the “any occupation” period. In the case with the lowest award provided by Ms. Kardaras, *Cross v. Canada Life Assurance*, the insured received damages for mental distress of \$18,000 after she was left without any disability payments or employment income for over a year and was forced to collapse a portion of her RRSP to obtain money to live on. Ms. Kardaras’ situation was much less dire, given that she was earning an income during the period at issue.

[86] I do not award Ms. Kardaras any additional damages with respect to the care hours. Ms. Kardaras does not claim the value of the care hours as damages for unpaid benefits and I do not consider her use of the care hours to be connected to the mental distress she suffered. As set out above, her mental distress was tied to the manner in which Sun Life dismissed her claim for benefits, but not from her financial loss. I also note that the claim for \$76,000 in care hours did not arise in any clear way before oral submissions on closing. I now have reviewed the document counsel referred me to in support of this claim, which was Ms. Kardaras’ rough calculation of what she considered to be her loss for not being paid for full-time work. This calculation does not appear to have been completed according to what Ms. Kardaras would have been entitled to receive under the terms of the Policy, nor is it specific to any care hours actually used. I find that the care hours Ms. Kardaras used are much less than the value suggested. After reviewing the payroll slips, as well as the summaries found in the report of Ms. Kardaras’ expert, I conclude that the value of the care hours used by Ms. Kardaras during the own occupation period is less than \$4,000. In any event, as set out above, Ms. Kardaras did not show that the use of these hours was a factor in her mental distress. I do not use the value of the care hours as a benchmark or contribution to the total amount due for mental distress damages.

[87] Taking all of the circumstances into account, I consider \$10,000 to be appropriate compensation for the mental distress Ms. Kardaras suffered.

Disposition

[88] The action is allowed to the extent that I order Sun Life to make payment for benefits to the end of the “own occupation” period and for mental distress damages. The claim for benefits during the “any occupation” period is dismissed. Sun Life shall pay damages to Ms. Kardaras for the “own occupation” period in the amount of \$12,037, as well as mental distress damages in the amount of \$10,000.

[89] The parties should attempt to reach a resolution with respect to costs. If the parties are unable to reach agreement, Ms. Kardaras may provide a costs outline and submissions of no more than five pages to my judicial assistant within 20 days from the date of this decision. Sun Life will then have 10 days to provide responding submissions with the same limits. The submissions may be e-mailed to Anna Maria at annamaria.tiberio@ontario.ca.



O'Brien, J.

Released: June 24, 2020

CITATION: Kardaras v. Sun Life Assurance Company of Canada, 2020 ONSC 3925
COURT FILE NO.: CV-16-560974
DATE: 20200624

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

Voula Kardaras

Plaintiff

– and –

Sun Life Assurance Company of Canada

Defendant

REASONS FOR JUDGMENT

O'Brien, J.

Released: June 24, 2020