File: 165-2-94

Canada Labour Code,
Part II

Before the Public Service
Staff Relations Board

BETWEEN

ROBERT G. CREAMER

Applicant

and

TREASURY BOARD
(Health Canada)

Employer

RE: Reference under Subsection 129(5) of the Canada Labour Code

Before: Muriel Korngold Wexler, Deputy Chairperson

For the Applicant: Rick Taylor, Public Service Alliance of Canada

For the Employer: Roger Lafrenière, Counsel

Heard at Winnipeg, Manitoba,
February 3, 1994 and September 25 and 26, 1996.

This decision concerns a reference to the Board received on November 23, 1993, under subsection 129(5) of Part II of the Canada Labour Code of a safety officer's decision not to uphold a refusal to work. The refusal to work was invoked by Mr. Robert G. Creamer on October 25, 1993, pursuant to paragraph 128(1)(b) of Part II of the Canada Labour Code on the ground that his immediate supervisor's harassment of him constituted a "danger" as defined in subsection 122(1) of Part II of the Canada Labour Code.

This reference was first scheduled to be heard on December 6, 1993. However, it was postponed at the request of Mr. Creamer on medical grounds.

On December 3, 1993, Mr. Roger Lafrenière, counsel for the employer, objected to this Board's jurisdiction to hear this matter on the ground that "harassment" which was the danger perceived by Mr. Creamer did not fall under the Canada Labour Code. In his view, the "danger" defined by the Canada Labour Code did not include stress or conflict arising out of human relationships. On December 13, 1993, Mr. Ernie Lawson, the then representative of Mr. Creamer, argued that the Canada Labour Code did not prescribe limits upon the interpretation of the term "condition" as provided in the definition of "danger". The matter was re-scheduled to be heard on February 3, 1994.

On February 3, 1994, the matter was heard in part. The evidence of Mrs. Ceayon Johnston, the safety officer who investigated this refusal to work, and Mr. Creamer was presented to me. At the end of the day, the parties informed me that they were negotiating a possible settlement and, therefore, they requested an adjournment which I granted. The parties were unable to reach a settlement and the case was rescheduled for March 22, 1995. It was again postponed and rescheduled for June 20, 1995. On June 13, 1995, the Public Service Alliance of Canada requested, on behalf of Mr. Creamer, a further postponement on the grounds that Mr. Ernie Lawson, who had represented Mr. Creamer at the February 3 hearing, was in hospital and it would not be possible for another representative to become familiar with the case in time for the scheduled hearing. This further request for a postponement was granted. The case was again rescheduled for December 1, 1995 and postponed at the request of the safety officer who was unavailable on that date.

On February 27, 1996, Mr. Rick Taylor, of the Public Service Alliance of Canada, wrote this Board on behalf of Mr. Creamer requesting the rescheduling of this case. On March 28, 1996, Mr. Lafrenière wrote objecting to this request on the grounds that over four years had elapsed since the conflict between Mr. Creamer and his immediate supervisor first arose and there was no evidence that, at this stage, a decision by the Board would serve any useful purpose. Mr. Lafrenière invoked the doctrine of laches. On April 9, 1996, Mr. Taylor replied and insisted that the matter be set down for hearing. Thus, the matter was rescheduled for June 25 and 26, 1996. On May 15, 1996, Mr. Taylor wrote that he was unaware that the matter had already been heard in part on February 3, 1994 and he could not find any notes on Mr. Creamer's file at the Public Service Alliance of Canada in this respect. Thus, Mr. Taylor requested that the case be commenced de novo. On May 31, 1996, Mr. Lafrenière requested a postponement in light of Mr. Taylor's request and on the ground of unavailability of counsel. Finally, the matter was re-heard de novo on September 25 and 26, 1996.

At the hearing de novo, Mr. Lafrenière referred to his letter to the Board of March 28, 1996:

> *...*
>
> *BACKGROUND*
>
> *The complainant invoked his right to refuse to work on October 25, 1993. He believed that the past actions of his immediate supervisor constituted harassment. A review of the file discloses that the history of conflict goes back to February 1992. The complainant refused to continue to work because he felt that continuing to report to his immediate supervisor would have detrimental effect on his health. The refusal was investigated by a Safety Officer on October 26, 1993 who subsequently rendered a decision finding an absence of danger.*
>
> *On October 27, 1993, the complainant referred the Safety Officer's decision to the Board. The Reference under Part II was originally scheduled to be heard on December 6, 1993. It was adjourned to February 3, 1994 at the complainant's request.*
>
> *On February 3, 1994, the hearing commenced before Deputy Chairperson M. Korngold-Wexler. The complainant was represented by Ernie Lawson and I represented the employer.*

Before completion of the evidence, the proceedings were adjourned at the request of the parties in order to determine whether a settlement could be reached.

EVENTS SINCE START OF HEARING

From February 1994 to May 1995, I received no proposals of settlement from either the complainant or his representative. In light of the parties failure to settle the matter, the Board rescheduled the hearing for June 20, 1995. On June 13, 1995, Mr. Michael McTaggart requested a postponement of the hearing as a result of Mr. Lawson's illness. The Board granted the request and tentatively rescheduled the matter for September 7, 1995.

On October 31, 1995, the Board issued a Notice of Hearing setting out December 1, 1995 as the new hearing date. By letter dated November 15, 1995, the Board postponed the new hearing date, this time upon request of the Safety Officer. In this letter addressed to the Safety Officer, you indicated that:

> *"The Board was also advised by Mr. Taylor that this case should not be rescheduled until we are advised to do so by the PSAC."*

Over three months later, on February 27, 1996, I understand you have received a letter from Mr. Taylor requesting that the matter be re-scheduled.

EMPLOYER'S POSITION

Section 130(1) of the Canada Labour Code provides that where a decision of a Safety Officer is referred to the Board under subsection 129(5), the Board shall, without delay and in a summary way, inquire into the circumstances of the decision. Parliament has therefore imposed a requirement that these specific types of issues be determined quickly. The purpose of referrals to the Board is self-evident.

We are now nearing the end of March 1996, over four (4) years after the conflict between the complainant and his immediate supervisor first arose. There is no evidence that a decision by the Board, at this time, would serve any useful purpose. The employer recognizes that some delays in re-scheduling this matter are not attributable to the complainant. However, there remains extended periods of time since October 1993 to today where the complainant has failed to establish due diligence in bringing on the proceedings. In light of this failure and because no valid

> *explanation has been proffered, we invoke the doctrine of laches.*
>
> *The employer objects to this matter being re-scheduled and respectfully requests that it be dismissed summarily, without a hearing.*

In addition, Mr. Lafrenière cited the decision of the Ontario Labour Relations Board (O.L.R.B.) Pauline Au v. Lyndhurst Hospital (Au case) (1996) O.L.R.B. No. 2120, File No. 1517-94-OH where the O.L.R.B. found at page 17, para. 65 that:

> *We have seriously considered whether, even though there is an arguable case as set out above, in the exercise of our discretion, we should decline to hear this complaint because sexual harassment is much more central to the jurisdiction of the Human Rights Commission than to that of the limited reprisal jurisdiction of the Board under the OCCUPATIONAL HEALTH AND SAFETY ACT.*

The O.L.R.B. relied on the decision in Power Workers' Union - CUPE Local 1000 [1994] O.L.R.B. Rep. June 627,

> *... where a combination of circumstances, including delay, remedial difficulties, prior parallel litigation, and an overlapping human rights complaint, lead the Board to decline to inquire into a complaint. As the Board said, any of those factors alone or in combination might lead the Board to exercise its discretion to decline to entertain an application.*

In the Au case, the O.L.R.B. was very much concerned with duplication of proceedings.

Mr. Lafrenière submitted that I should dismiss Mr. Creamer's reference without a hearing on the basis of mootness. Mr. Lafrenière pointed out that Mr. Creamer has been assigned to a position in Sudbury and he no longer reports to Mr. Peter Rogers, his previous immediate supervisor. Furthermore, there are two outstanding grievances dealing with issues arising from Mr. Creamer's refusal to work on October 25, 1993, namely, leave issues. There is also a complaint to the Canadian Human Rights Commission and an investigation by the Public Service Commission. Thus, this Board has the right and obligation to decide if the public interest would be served by continuing with these proceedings. In this regard, Mr. Lafrenière cited

Borowski v. Canada [1989] 1 S.C.R. 342 concerning the doctrine of mootness. In that case, the Supreme Court of Canada found at page 353 that:

> *The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.*
>
> *The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.*

Mr. Lafrenière questioned in what way a hearing at this stage of Mr. Creamer's reference under Part II of the Canada Labour Code and a review of the safety officer's report would resolve the issue because there is nothing left to be decided. Moreover, four years have elapsed since the incident occurred giving rise to the allegation of harassment by Mr. Creamer. Thus, no useful purpose would be served in determining this matter at this time.

Mr. Lafrenière added that in view of his arguments of mootness and delay he was not addressing the jurisdiction of the Board concerning whether harassment was a condition envisaged by the Canada Labour Code. Mr. Lafrenière reiterated his

position that harassment did not fall under the definition of "danger" and this was not the proper forum to deal with a harassment issue.

Mr. Taylor replied that we should consider the circumstances giving rise to the refusal to work on October 25, 1993. Mr. Creamer's transfer to Sudbury did not resolve the issue. There is still an issue with respect to 14 months of leave which is the period between June 26, 1995 and August 6, 1996. Mr. Lafrenière pointed out that this leave issue was the subject of a grievance which had been duly referred to adjudication.

Having heard these arguments on jurisdiction, I decided to take the matter under advisement and hear the merits of the case. I was of the opinion that I could not decide the delay and mootness issues without hearing the evidence and considering the facts of the case. It seemed more expeditious at this time to hear the case and decide on the objections raised by Mr. Lafrenière later.

THE EVIDENCE

The oral evidence consisted of four witnesses: Mrs. Ceayon Johnston, and Messrs. Creamer and Raymond Strike, and Dr. Vernon Glen Lappi. In addition, the parties submitted 21 exhibits.

Mr. Robert Creamer has been an Environmental Health Officer, EG-06, Medical Services Branch, Health Canada, since March 1985. In April 1989, Mr. Peter Rogers, Senior Environmental Health Officer, became his immediate supervisor. Messrs. Rogers and Creamer both worked at the Winnipeg Office, Manitoba. On February 20, 1992, Mr. Rogers imposed on Mr. Creamer a three-day suspension which was later reduced to a one-day suspension during the grievance procedure. The suspension was imposed because of an incident which occurred on February 17, 1992. This incident of February 17, 1992 gave rise to a number of further events leading to the refusal to work of October 25, 1993. The evidence is to the effect that before February 18, 1992, Messrs. Creamer and Rogers did not have serious disagreements. On February 17, 1992, Messrs. Creamer and Rogers left Winnipeg by car for meetings on the Peguis and Fisher River Indian Reserves that are located about two hours north of Winnipeg. On their way home, Mr. Creamer (who was driving at the time with Mr. Rogers as his passenger) drove through the Peguis Reserve traveling at 100 km/h

in a 50 km/h school zone. Mr. Rogers told him to slow down and Mr. Creamer slowed to about 70 km/h. Mr. Rogers reported this incident to the Royal Canadian Mounted Police (RCMP) the next day but did not tell Mr. Creamer that he had done so. The RCMP issued a summons for speeding to Mr. Creamer but when the court case was called Mr. Rogers did not appear to testify and the proceeding was stayed. Mr. Creamer presented a grievance against the suspension which he referred to adjudication. The matter was heard by Mr. Barry Turner, adjudicator, who rendered a decision on May 14, 1993 (Board file 166-2-23231). Adjudicator Turner did find that Mr. Creamer was speeding as alleged by the employer. However, he reduced the penalty to a letter of reprimand on the grounds that "*corrective discipline in this case would have been more reasonable than punitive discipline*". As a consequence, on June 16, 1993, Mr. Rogers issued a letter of reprimand. On July 25, 1993, Mr. Creamer responded to this letter of reprimand.

Mr. Creamer explained that the three-day suspension and the report to the RCMP by Mr. Rogers came as a shock to him. He went on stress leave in March 1992 for a period of five to ten days. Arising out of this matter, Mr. Creamer presented three grievances, one against the suspension, another relating to the RCMP report and a third one alleging harassment by Mr. Rogers. The suspension was reduced by adjudicator Turner to a written reprimand. The other two grievances were denied by the employer. In addition, Mr. Creamer presented a complaint to the Public Service Commission alleging harassment which was also denied on the ground that it was a disciplinary matter. Mr. Creamer also wrote a letter to his Member of Parliament complaining about Mr. Rogers and the denial of his grievances by the employer.

Mr. Creamer described the chronology of events. On April 14, 1993, he returned to work from sick leave and, on April 27, 1993, he received a letter of "Councelling (sic) Relative to Performance" from Mr. Rogers. On May 3, 1993, Mr. Creamer presented a grievance alleging harassment by Mr. Rogers and, on May 4, 1993, Mr. Rogers filed a notice of intention to garnish Mr. Creamer's wages. On May 14, 1993, Mr. Rogers, as first step officer, heard the grievance against himself. This grievance was denied at the second step of the grievance procedure on October 7, 1993. On October 20, 1993, Mr. Creamer's union representative tried to transmit the grievance to the next level of the grievance procedure through Mr. Rogers who refused to sign the transmittal form. Consequently, Mr. Creamer asked to meet

with Ms. Susan Harley, the Regional Environmental Health Officer, and a meeting was held on October 25, 1993, at which time Mr. Creamer invoked his right under Part II of the Canada Labour Code to refuse to work on the ground that Mr. Rogers' harassment was a danger to his health.

Mr. Creamer explained further that he was concerned about the harassment which was affecting his health. Mr. Creamer had filed a claim against Mr. Rogers in Small Claims Court for damages for malicious prosecution and the Court had awarded him $675.00. However, Mr. Rogers appealed this decision to the Queen's Bench which ruled that the lower Court had erred as it had no jurisdiction to deal with malicious prosecution and the Court awarded Mr. Rogers $50.00 in costs. Mr. Creamer's lawyer issued a cheque for $50.00 to the Minister of Finance dated May 4, 1993. However, on that same day, Mr. Rogers filed a notice of intent to garnish Mr. Creamer's wages. Mr. Rogers never mentioned to Mr. Creamer that there was a problem with the $50.00. Mr. Creamer's wages were never garnished because he wrote a cheque to Mr. Rogers for the $50.00. Mr. Creamer added that the notice of intent to garnish came as a great shock and it was very embarrassing to him. It disturbed him greatly.

Mr. Creamer described further incidents leading up to the October 25, 1993 refusal to work. On March 18, 1993, Mr. Rogers wrote two memoranda to Mr. Creamer. The first one removed Mr. Creamer's office door and the second one concerned the monitoring of his work performance. In addition, on April 27, 1993, Mr. Rogers wrote a "Letter of Councelling (sic) Relating to Performance". Mr. Creamer presented a grievance against these three memoranda requesting the reimbursement of sick leave credits, the withdrawal of Mr. Rogers' memoranda and that appropriate disciplinary action be taken against Mr. Rogers. Mr. Rogers heard the grievance against himself at the first level of the grievance procedure and replied denying it on May 14, 1993. Mr. Creamer had requested that the grievance be transmitted directly to the second level of the grievance procedure in view of the fact that it alleged harassment by Mr. Rogers but Mr. Rogers refused this request. The grievance did go to the second level and an investigator was appointed to look into the matter. Ms. Sheila Carr-Stewart was the investigator in question and on September 27, 1993, she concluded that, while all the above incidents individually may not have been of major significance, collectively they constituted harassment (Exhibit 2). Notwithstanding these findings, the employer denied Mr. Creamer's grievance at the

second level on October 7, 1993. Thus, Mr. Creamer decided to transmit the grievance to the next level. Mr. Creamer's union representative was Mr. Raymond Strike. During his half hour lunch on October 20, 1993, Mr. Strike went to see Mr. Rogers with the transmittal form but the latter refused to sign the form. Mr. Strike explained that he went to Mr. Rogers because he was the manager involved in the process and he was available. Mr. Rogers told Mr. Strike that he first had to clear any type of Human Resources issue with Ms. Susan Harley, Regional Environmental Health Officer. Mr. Strike insisted that Mr. Rogers, who was past President of Local 50012, National Health and Welfare Union (NHWU), was familiar with the grievance procedure and it was his responsibility to sign the transmittal form but Mr. Rogers refused. This was the second time that Mr. Rogers had refused to transmit one of Mr. Creamer's grievances to the next level.

Mr. Strike left Mr. Rogers' office and, as he was going to the Human Resources offices, he met Mr. Creamer. He told Mr. Creamer that Mr. Rogers had refused to sign the transmittal form. Mr. Strike expressed to Mr. Creamer his frustration and annoyance with Mr. Rogers' refusal. As a result, Mr. Creamer presented a grievance against Mr. Rogers' refusal to sign the transmittal form. In addition, Mr. Creamer telephoned Ms. Harley to request that they discuss this matter since it was the second time that Mr. Rogers had refused to transmit one of his grievances. Ms. Harley met with Messrs. Creamer and Strike on October 25, 1993. Mr. Strike was present in his capacity as a member of the "Regional Safety Committee".

At this meeting, Mr. Creamer informed Ms. Harley and Mr. Strike that he was concerned for his health. He had taken a number of sick days because of stress caused by Mr. Rogers. In his view the incidents would continue and he asked to be removed from Mr. Rogers' supervision until matters were resolved. Mr. Creamer had taken the following three periods of sick leave: March 16 to April 24, 1992; September 9 to September 18, 1992; and March 19 to April 13, 1993.

The March 19 to April 13, 1993 sick leave period followed Mr. Rogers' two memoranda of March 18 when he had the door removed from Mr. Creamer’s office and placed Mr. Creamer on "monitoring of work performance". Ms. Harley made a telephone call to the Edmonton Office and replied that she could not agree to Mr. Creamer's request. At this meeting, Ms. Harley presented to Mr. Creamer a letter

of apology (Exhibit 14) in addition to apologizing orally with respect to the problem with the transmittal form. Furthermore, on September 27, 1993, Ms. Harley had also revoked the monitoring of his work performance (Exhibit 13).

Following Ms. Harley's denial of his request to be removed from Mr. Rogers' supervision at the meeting of October 25, 1993, Mr. Creamer told Ms. Harley that he had no choice but to refuse to work and he contacted Labour Canada to inform them of his refusal.

Mrs. Ceayon Johnston testified that her office received a telephone call from Mr. Creamer. She spoke to Mr. Creamer on the morning of October 26, 1993 and within ten minutes she met with him and his union representative at his work location. They prepared together Appendix A to her report, Exhibit 1. Appendix A is the "Refusal to Work Registration" form from Labour Canada. They went over the events leading to the refusal (Appendix B, Exhibit 1). Mr. Creamer provided details of his refusal. Ms. Johnston also met with a representative of the employer. In addition, Mr. Creamer submitted three medical certificates signed by Dr. Carl Epp, Eaton Place Medical Centre, 105 - 234 Donald Street, Winnipeg, Manitoba. The first certificate is dated September 8, 1992 and states that:

> *The above named was seen in the clinic today because of undue stress. It is advised that he rest at home until his symptoms clear.*

The second certificate is dated September 14, 1992 and reads:

> *The above named is under undue stress at work and was seen in the clinic today. It is advised he rest at home this week.*

The third one is dated March 24, 1993 and states that:

> *The above named was seen in the clinic March 17th, March 19th and today because of stress conditions at his place of work. He has several appointments with a counsellor. It is therefore advised he rest at home in between counselling sessions until ready to return to work.*

Mrs. Johnston found in her report that:

> *The basis of the Continued Refusal to Work lies in the interaction and behaviours of the two parties,*

> *Messrs. Creamer and Rogers, and not a machine or thing or physical condition of the work place. The medical certificates were considered and taken as proof that Mr. Creamer suffered from workplace stress. Further medical opinion and consent to release of medical information was not sought as the stress condition was taken as fact based on the medical certificates submitted.*
>
> *The issue is not whether Mr. Creamer suffers from stress related to the work place or not but whether danger as defined by the Code existed at the time of the Safety Officer's investigation.*
>
> (Exhibit 1, pages 5 and 6)

The decision of Mrs. Johnston was that:

> *Stress and conflict arising out of human relationships does not in my opinion meet the definition of danger within the meaning of the Code. I do not dispute that Mr. Creamer is under stress related to his work place. I am of the view that the existing situation is a labour relations matter and not an occupational safety and health issue. While I have the utmost empathy and compassion for Mr. Creamer, I believe that these matters are best dealt with in the grievance procedure.*
>
> (Exhibit 1, page 6)

Mrs. Johnston explained her Decision Path (Exhibit 1, Appendix P). She indicated that the role of the safety officer is to decide whether at the time the officer did his or her investigation, a condition existed in the work place which constituted a danger to the employee; she also pointed out that the employer's duties under section 125 of Part II of the Canada Labour Code relate to the physical conditions in the work place. In her view, the danger perceived by an employee must relate to a machine, thing or physical condition in the work place. She added that stress and conflict arising out of human relationships do not fall within the meaning of danger as defined by the Canada Labour Code. Mrs. Johnston came to those conclusions on the basis of the Operation Program Directives, Interpretation and Policy Guidelines and jurisprudence from Safety Officers.

To Mrs. Johnston's knowledge on October 26, 1993, Mr. Creamer had not approached a doctor and the latest medical certificate was dated six months before the refusal. Moreover, there was no identification of what was causing the stress.

Mr. Creamer was the one who volunteered the information that the stress was caused by Mr. Rogers. He indicated that the October 20, 1993 incident whereby Mr. Rogers refused to sign the transmittal form was the springboard for the refusal. Mrs. Johnston never saw the grievance in question and she assumed that Mr. Creamer had physically presented it to Mr. Rogers on October 20, 1993.

Mrs. Johnston testified that she did not inquire into the harassment allegation because in her view she did not have the jurisdiction to do so. As a safety officer, she did not detect any danger to Mr. Creamer within the meaning of Part II of the Canada Labour Code. She did not attempt to determine whether Mr. Creamer had any physical signs of illness. However, she did see distress on his part on October 27, 1993. Moreover, Mr. Creamer did not refer to or provide Mrs. Johnston with the name of a physician she could consult with respect to the alleged stress.

On October 27, 1993, Mrs. Johnston gave her decision orally at a meeting. At the end of this briefing, she saw that Mr. Creamer was crying. Mr. Creamer testified that he had a "breakdown" and he went to see his "family physician". Mr. Creamer went on sick leave until April 1, 1994 and he returned to work when he was declared fit to return to work by Dr. J. Kirkbride (Exhibit 3). When he returned to work, he reported directly to Ms. Harley and he did so until the spring or summer of 1995 when a reorganization of the Directorate occurred and he and Mr. Rogers became part of Medical Services. Ms. Harley remained with the Environmental Services.

Mr. Creamer had concerns in regard to this 1995 reorganization and he obtained on March 28, 1995, from Dr. Kirkbride a certificate indicating that he was fit to return to work with the limitation that he should not report to Mr. Rogers (Exhibit 4). Mr. Willy Rutherford, Zone Director, became Mr. Creamer's immediate supervisor. In addition, on June 5, 1995, Mr. Paul Cochrane, the Assistant Deputy Minister, wrote a letter of apology for the situation in light of the finding of harassment by the Public Service Commission (Exhibit 6). Mr. Cochrane went on to explain that "*the direct reporting relationship between (himself) and Mr. Rogers no longer exists ... Any functional direction, which Mr. Rogers would normally provide, will flow through the Zone Director ...*" (Exhibit 5). Mr. Creamer became very concerned about this response because in his view the harassment from Mr. Rogers had flowed

from someone else: the RCMP, the notice of intent to garnish and the monitoring which was approved by Ms. Harley.

Mr. Creamer declared that he expressed his concerns about his health to the Zone Director and the Public Service Commission.

On June 14, 1995, Mr. Cochrane wrote that Mr. Rogers had been counselled regarding his behaviour (Exhibit 8). Mr. Creamer felt that he was "very vulnerable" to further harassment from Mr. Rogers and he went on sick leave from late June 1995 to August 1996 when he accepted a deployment to Sudbury.

Mr. Creamer testified that "he had no trouble with Adjudicator Turner's decision" even though, he did not agree with it. Mr. Creamer took issue with the fact that Mr. Rogers had approached the RCMP to complain about his speeding and with the way he did this. Mr. Creamer did consider the fact that instituting an action in Small Claims Court against Mr. Rogers might have an effect on their relationship. In Mr. Creamer's view, their "relationship remained the same". They did not have a warm relationship; they were not friends. In his view, their relationship did not change because they did not have much of a relationship even before February 1992. Mr. Creamer recognized that he did not go out of his way to foster a better relationship with Mr. Rogers. Furthermore, Mr. Creamer acknowledged that filing a suit against Mr. Rogers in Small Claims Court for damages did not improve their relationship.

When the judgment was overturned in favour of Mr. Rogers, Mr. Creamer did not volunteer to pay the $50.00 because, in his view, it was being looked after by his lawyer. Mr. Creamer did not tell Mr. Rogers that his lawyer would take care of the $50.00. Mr. Creamer trusted his lawyer in this regard and he did not know that Mr. Rogers had not received the $50.00 until the notice of intent to garnish was filed on May 4, 1993.

Concerning the October 20, 1993 incident with the transmittal form, Mr. Creamer explained that according to Mr. Rogers' instructions, the grievances had to be transmitted through him. At that time, Mr. Creamer had the grievances of May 3, 1993 claiming the reinstatement of sick leave credits (no. 24) (Appendix K,

Exhibit 1) and May 12, 1993 (no. 26) (Exhibit 9) going through the grievance procedure.

Mr. Creamer did not discuss with Mr. Strike the possibility of transmitting the grievances through someone else. Mr. Creamer was aware that the grievances were being transmitted to the next level of the grievance procedure and the situation was ultimately resolved. Mr. Creamer added that he did not take any sick leave between October 20 and 25, 1993 and there were no incidents of harassment by Mr. Rogers during those five days.

Mr. Creamer testified that the employer did pay him for the periods of vacation and sick leave used. He was re-credited all vacation and sick leave used even those taken subsequent to October 25, 1993 (Exhibit 11). It was Mr. Creamer who, on September 10, 1995, specifically requested the employer that he not be re-credited with the 277.5 hours of sick leave because of Income Tax consequences (Exhibit 12).

Mr. Creamer declared that he believed that his stress came from only one source, namely Mr. Rogers. However, in July 1993, Mr. Creamer had been involved in a motor vehicle accident when he was riding in a bus which was struck by a car. He added that he had suffered the loss of his brother but he could not remember the date. Mr. Creamer is also diabetic. He explained that diabetes has an effect on the stress level of a person.

Mr. Creamer added that he started to see Dr. Epp at the Eaton Place Medical Centre after February 1992. The Eaton Place Medical Centre is a walk-in clinic. Mr. Creamer informed Dr. Epp about his problems with Mr. Rogers and the harassment. Mr. Creamer described to him specific events and provided him with a copy of the Carr-Stewart report (Exhibit 2). Mr. Creamer added that he had not been counselled by Dr. Epp or anyone else not to be confrontational and he gave no thought of the effect his actions had on Mr. Rogers. Dr. Epp was not called to testify.

Dr. Vernon Glen Lappi was the only doctor called to testify with respect to Mr. Creamer's health situation. Since June, 1993, Dr. Lappi has been an Occupational Health Medical Officer with the Occupational and Environmental Health Services, Health Canada, located in Winnipeg. On October 16, 1995, Mr. W.D. Rutherford, Acting Zone Director, South Zone, requested Dr. Lappi to carry out a fitness exam for

work assessment on Mr. Creamer (Exhibit 16). Dr. Lappi obtained Mr. Creamer's consent (Exhibit 17) to request a report from his "case provider" (Medical doctor or counsellor). Thus, on October 12, 1995, Dr. Lappi wrote to Dr. Michael Stambrook requesting a detailed medical history report including his opinion (Exhibit 18). In addition, Dr. Lappi arranged to obtain a chart from Dr. Kirkbride. Dr. Stambrook did write a report for Dr. Lappi but it arrived well after the latter had issued his opinion to Mr. Rutherford. Thus, Dr. Stambrook's report did not form part of Dr. Lappi's considerations.

When on November 6, 1995, Dr. Lappi met with Mr. Creamer, he first disclosed who he was and the purpose of the examination. He added that the Department was looking for an administrative decision as to whether Mr. Creamer was fit for duty. Dr. Lappi conducted a medical history. Mr. Creamer reported to him the events, how he felt and when the problems started. Dr. Lappi explained that the physician does not know whether the patient is telling the truth. However, the physician constantly evaluates what he is being told to see if what the patient is describing seems to hang together and is consistent with outside events. At the examination of November 6, 1995, Dr. Lappi noted that Mr. Creamer was not depressed but he speculated that he may have been depressed earlier.

On November 10, 1995, Dr. Lappi wrote to Mr. Rutherford that Mr. Creamer could return to the full duties of his position with the restriction that his worksite not be located in Manitoba (Exhibit 7).

Dr. Stambrook's report (Exhibit 20) arrived after Dr. Lappi has reached his conclusions but it served to support his own thoughts on what he was planning to suggest. When Dr. Lappi reached his conclusions he had reviewed Dr. Kirkbride's file and he had received the original occupational health file prepared by Dr. Terence Jolly. However, Dr. Lappi had not read Dr. Jolly's notes. Dr. Jolly had found that there was stress in Mr. Creamer's life as early as 1987. Dr. Lappi recognized that Mr. Creamer was susceptible to stress.

Dr. Lappi did not attempt to obtain the employer's version concerning Mr. Creamer's description of the events. Dr. Lappi had never seen Mr. Cochrane's letter of June 5, 1995 (Exhibit 5) or Mr. Rutherford's of March 31, 1995 (Exhibit 21)

where it is indicated that Mr. Creamer would receive direct line supervision from the Zone Director. Dr. Lappi had also never seen adjudicator Turner's decision of May 14, 1993 (supra). Dr. Lappi declared that, even though Mr. Creamer was informed that he was to report to the Zone Director, Mr. Creamer still felt that Mr. Rogers could influence decisions. Dr. Lappi recognized that he had only one consultation with Mr. Creamer and this was not sufficient to get a proper portrait of an employee. However, this is the way it is done in practice.

Mr. Raymond Strike testified that since August 1996 he has been the Regional Vice-President for the Manitoba Region, Public Service Alliance of Canada. Prior to that date he was, since November 1993, and for a period of three years, President of Local 50012, National Health and Welfare Union (NHWU). He was involved with the Health and Safety Committee and also dealt with grievances. Mr. Strike had also been a shop steward for two years prior to 1993. Mr. Strike was the primary union representative of Mr. Creamer throughout the events in question here. Mr. Strike assisted Mr. Creamer in the presentation of his grievances, starting with the February 17, 1992 incident. Mr. Strike testified that he presented options to Mr. Creamer but he never directed him to do something and he never advised him not to take action. Mr. Strike was also involved in the Public Service Commission's investigation (Exhibit 6) and the Carr-Stewart report (Exhibit 2). Mr. Strike did expect the upholding of Mr. Creamer's complaint. However, the reply at the second level of the grievance procedure did not uphold the allegations.

In Mr. Strike's view, the February 17, 1992 incident started the chain of events; it was the catalyst. Mr. Creamer was the recipient and not the catalyst for the problem with Mr. Rogers. Mr. Strike did advise Mr. Creamer to try to get along with Mr. Rogers. Mr. Strike was well aware of the animosity between Messrs. Rogers and Creamer. In his view, Mr. Rogers acted in a way to make Mr. Creamer feel uncomfortable. Mr. Strike's role was to try to resolve the situation. However, the relationship was deteriorating over a period of time and, in October 1993, the relationship had become impaired.

On October 20, 1993, Mr. Strike had in his possession a transmittal form signed by Mr. Creamer. Mr. Strike decided to use his one-half hour lunch period to present the transmittal form to Mr. Rogers. He chose Mr. Rogers because he knew that he

would be available and he had been involved in the process before. Mr. Strike was aware that one of the grievances to be transmitted to the next level of the grievance procedure related to the allegation of harassment against Mr. Rogers (Exhibit 9). This is the grievance Mr. Rogers had replied to by denying the harassment. Mr. Rogers had been the judge in his own case. Mr. Strike explained that it was not normal practice for him to go to Human Resources to present grievances and transmittal forms. Moreover, he wanted to keep Mr. Rogers in "the loop".

Mr. Strike described that, when he presented the transmittal form to Mr. Rogers, the latter said that he had to clear any type of "Human Resources issues" with Ms. Harley. Mr. Strike told him that he (Mr. Rogers) had gone through this process before and that it was Mr. Rogers' responsibility to sign it. He did not have "to agree with it". However, Mr. Rogers insisted that he had to call Ms. Harley. When Mr. Strike pressed him, Mr. Rogers finally did telephone Ms. Harley. Mr. Rogers did not suggest that someone else sign the form.

In light of Mr. Rogers' refusal to sign and accept the transmittal form, Mr. Strike left his office and walked towards the Human Resources office. This is when he met Mr. Creamer and described how Mr. Rogers had refused, for the second time, to sign the transmittal form. He voiced his frustration to Mr. Creamer and used an explicit term to describe Mr. Rogers. Mr. Rogers had been past president of the Local; thus, Mr. Strike expected him to be familiar with the grievance procedure. Mr. Strike felt frustrated and annoyed by Mr. Rogers' refusal; as a manager Mr. Rogers was aware of his responsibilities but refused to exercise them. Mr. Strike was concerned with getting the transmittal form signed and returning to work on time. Mr. Creamer expressed disbelief that Mr. Rogers had again refused to accept the transmittal form. Finally, the situation was resolved quickly when "Human Resources" processed the transmittal form.

Arguments

Mr. Rick Taylor, representative of the applicant, argued that the safety officer erred in her decision. Mrs. Johnston erred in her interpretation of the Canada Labour Code and created artificial limits to her jurisdiction which led her to make erroneous findings.

Mrs. Johnston interpreted "condition" as a physical condition. Mr. Taylor referred to paragraph 129(2)(b) of Part II of the Canada Labour Code which provides for the authority of the safety officer to conduct an investigation. He read the definition of "danger" and pointed out that the Canada Labour Code does not define the word "illness". Thus, Mr. Taylor referred to the definition found in Black's Law Dictionary, Fifth Edition (1979), where illness is defined as meaning: "*Sickness, disease or disorder of body or mind*". He added that the word "physical" is not contained in the definition of "danger" under subsection 122(1) or in paragraph 129(2)(b) of the Canada Labour Code.

Mr. Taylor submitted that the safety officer considered and took the three medical certificates signed by Dr. Epp as proof that Mr. Creamer suffered from workplace stress. Mr. Taylor referred to section 122.1 which provides that: "*The purpose of this Part* [Part II of the Canada Labour Code] *is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment...*".

Mr. Taylor added that the word "health" is not defined by the Canada Labour Code. Thus, he referred to section 12 of the Interpretation Act:

> *12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its object.*

Mr. Taylor argued that in light of section 12 of the Interpretation Act, we cannot read in the words "physical condition" since the Canada Labour Code does not provide for such a limitation.

Mr. Taylor referred also to section 15 of the Interpretation Act:

> *15(1) Definitions or rules of interpretation in an enactment apply to all the provisions of the enactment, including the provisions that contain those definitions or rules of interpretation.*
>
> *(2) Where an enactment contains an interpretation section or provision, it shall be read and construed*
>
> > *(a) as being applicable only if a contrary intention does not appear; and*

> *(b) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.*

In this respect, Mr. Taylor cited section 3 of the Canada Health Act:

> *3. It is hereby declared that the primary objective of Canadian health care policy is to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers.*

This brought him to the definition of "health" as defined in The Dictionary of Canadian Law, Second Edition:

> *HEALTH. n 1. "...[N]ot merely ...the absence of disease and infirmity, but ... a state of physical, mental and social well-being." R. v. Morgentaler (1988), 62 C.R. (3d) 1 at 29-30, 82 N.R. 1, [1988] 1 S.C.R. 30, 63 O.R. (2d) 281 n, 26 O.A.C. 1. 44 D.L.R. (4th) 385, 31 C.R.R. 1. 37 C.C.C. (3d) 449, Dickson C.J.C. (Lamer J. concurring). 2. The condition of being sound in body, mind and spirit, and shall be interpreted in accordance with the objects and purposes of this Act. Workplace Safety and Health Act, R.S.M. 1987, c. W210, s. 1.*

On this basis, Mr. Taylor concluded that there is both a statutory and a logical requirement to interpret the word "health" to include mental health.

Mr. Taylor pointed out that the safety officer made an erroneous assumption in Exhibit 1, page 6, where she wrote:

> *3) there is no alternate reporting relationship available to avert further problems...*

Mr. Taylor submitted that Mr. Creamer reported directly to Ms. Harley.

Concerning the safety officer's Decision Path, Exhibit 1, Appendix P, Mr. Taylor argued that Mrs. Johnston defined "stress" in paragraph 4 as defined by authors Barry S. Levy and David H. Wegman in their text "Occupational Health", Second Edition, at page 298.

Mr. Taylor added that occupational stress is an existing phenomena. Mr. Taylor referred also to the text in Occupational Stress: Issues and Developments in Research by authors Joseph J. Hurrell Jr., Lawrence R. Murphy, Steven L. Sauter and

Cary L. Cooper. He cited the following decisions: Decision No. 636/91, 21 W.C.A.T. Reporter, 277, dated January 28, 1992 rendered by Vice-Chairman Newman and panel members Jackson and Jago, where the worker was granted benefits under the Workers' Compensation Act on the grounds that the workplace stressors were serious and a reasonable and stable individual would have been seriously affected by the stressors; Pauline Au (supra); Bliss (Board file 165-2-18); and Scott (Board file 165-2-71).

Mr. Taylor concluded that in the case of Mr. Creamer the evidence demonstrated that Mr. Rogers harassed him, which caused work-related stress. Thus, I should uphold his refusal to work and order the reimbursement of all leave taken between June 1995 and August 1996.

Mr. Lafrenière argued that this case is not a grievance or a claim under the Workers' Compensation Act. It is a review by the Board of the safety officer's decision. I should dismiss the reference for mootness and in addition I should consider the delay in having this matter heard. Mr. Lafrenière pointed out that the issue I have to decide is whether there was a danger on October 25 or 26, 1993.

Mr. Lafrenière submitted there was no evidence presented to this Board Member of what danger existed on those two days. In this regard, Mr. Lafrenière referred to Bidulka et al. v. Canada (Treasury Board) [1987] 3 F.C. 630 (Federal Court of Appeal); and Antonio Almeida v. Via Rail Canada Inc. (1990) 82 di 10 (Canada Labour Relations Board).

Mr. Lafrenière argued that to determine the danger as envisaged by the Canada Labour Code we must look at the situation at the time the employee invoked the refusal. Mr. Lafrenière pointed out that on October 27, 1993, Mr. Creamer cried after hearing the safety officer's decision. This breakdown resulted from the safety officer's decision. However, on or about October 25, 1993, there is no evidence of stress or danger to Mr. Creamer as alleged by him arising out of harassment by Mr. Rogers.

Mr. Lafrenière submitted that Mr. Creamer has been suffering from stress since 1987 as evidenced by Dr. Lappi. This, however, does not mean that he was in danger throughout the period. Mr. Creamer referred to the October 20, 1993 incident as the

trigger. However, Mr. Creamer only invoked his right to refuse to work on October 25, 1993.

Mr. Lafrenière asked that I dismiss the reference on the facts as did the Canada Labour Relations Board in Almeida (supra). Mr. Creamer has not met the burden of proof.

In addition, Mr. Lafrenière argued that the wording of the Canada Labour Code is geared to equipment, machine or place. Harassment is not encompassed by the legislation. Moreover, situations of harassment cannot be dealt with summarily. Mr. Creamer had options and he exercised them by presenting grievances and complaints. Furthermore, Mr. Creamer failed to establish a nexus between the harassment and the stress and the effect the harassment had on him so as to render it a danger. Mr. Creamer should have submitted medical evidence. Dr. Epp was not called to testify and Dr. Lappi had a very limited one-sided version of the events. He did not see Mr. Creamer on or about October 25, 1993.

Concerning the three medical certificates signed by Dr. Epp, the safety officer took them at face value but Mr. Lafrenière challenged their probative value. He pointed out that in Decision No. 636/91 (supra), evidence of a psychiatric disability was adduced. When Dr. Lappi examined Mr. Creamer on November 6, 1995, he observed that he was healthy. Moreover, evidence of a danger on the day of the investigation should have been produced. Thus, Mr. Creamer's case is deficient. Furthermore, Mr. Strike contributed to the October 20, 1993 incident. He was aware of the animosity between Messrs. Rogers and Creamer and he inflamed it by making statements about Mr. Rogers to Mr. Creamer.

Mr. Lafrenière pointed out that I have two options: confirm the safety officer's report or give a direction, which in the circumstances is moot because the problem has been corrected; Mr. Rogers no longer supervises Mr. Creamer.

Reasons for Decision

The issue I have to decide is whether a condition existed in the work place which constituted a danger to Mr. Creamer when on October 25, 1993 he refused to

work and on October 26, 1993 when Mrs. Ceayon Johnston investigated the refusal. The relevant provisions of the Canada Labour Code are:

Subsection 122.(1):

> *122.(1) In this Part,*
>
> *...*
>
> *"danger" means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected;*

Section 124:

> *124. Every employer shall ensure that the safety and health at work of every person employed by the employer is protected.*

Subsection 128(1):

> *128. (1) Subject to this section, where an employee while at work has reasonable cause to believe that*
>
> > *(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or*
> >
> > *(b) a condition exists in any place that constitutes a danger to the employee,*
>
> *the employee may refuse to use or operate the machine or thing or to work in that place.*

Subsections 129(1), (2) and (5):

> *129.(1) Where an employee continues to refuse to use or operate a machine or thing or to work in a place pursuant to subsection 128(8), the employer and the employee shall each forthwith notify a safety officer, and the safety officer shall forthwith, on receipt of either notification, investigate or cause another safety officer to investigate the matter in the presence of the employer and the employee or the employee's representative.*
>
> *(2) A safety officer shall, on completion of an investigation made pursuant to subsection (1), decide whether or not*

> *(a) the use or operation of the machine or thing in respect of which the investigation was made constitutes a danger to any employee, or*
>
> *(b) a condition exists in the place in respect of which the investigation was made that constitutes a danger to the employee referred to in subsection (1),*
>
> *and he shall forthwith notify the employer and the employee of his decision.*
>
> *...*
>
> *(5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board.*

The duty of the Board is found in subsection 130(1):

> *130.(1) Where a decision of a safety officer is referred to the Board pursuant to subsection 129(5), the Board shall, without delay and in a summary way, inquire into the circumstances of the decision and the reasons therefor and may*
>
> *(a) confirm the decision; or*
>
> *(b) give any direction that it considers appropriate in respect of the machine, thing or place in respect of which the decision was made that a safety officer is required or entitled to give under subsection 145(2).*

Mrs. Ceayon Johnston found an absence of danger and I confirm her decision for the following reasons.

A review of the evidence established that Mr. Creamer alleged that he refused to work on the basis that a condition existed in the workplace that constituted a danger to him, namely, having Mr. Peter Rogers as his immediate supervisor. He alleged

Mr. Rogers to be a danger to him and in this regard he submitted in evidence the following incidents:

- the February 17, 1992 speeding incident which led to a complaint to the RCMP by Mr. Rogers against Mr. Creamer;

- the suspension imposed upon Mr. Creamer by Mr. Rogers which is the subject of adjudicator Turner's decision (supra);

- the two memoranda of March 18, 1993 ("Removal of Office Door" and "Monitoring of Work Performance") from Mr. Rogers to Mr. Creamer;

- the April 27, 1993 "Letter of Councelling (sic) Relative to Performance" from Mr. Rogers;

- the May 4, 1993 notice of intention to garnish his wages issued against Mr. Creamer by Mr. Rogers;

- Mr. Rogers' reply to the grievance alleging harassment by him;

- the October 20, 1993 refusal by Mr. Rogers to sign the grievance transmittal form.

Mr. Creamer testified that Mr. Rogers' actions caused him to take sick leave and three periods were identified, the last one ending April 13, 1993. Mr. Creamer attributed his "stress" to Mr. Rogers' actions. The evidence is to the effect that Mr. Creamer did not take sick leave because of stress between April 13, 1993 and October 27, 1993.

No medical evidence was adduced as to the alleged stress on October 25 and 26, 1993. Three short medical certificates were submitted to the safety officer and the latest one is dated March 24, 1993, some seven months prior to the refusal to work. Moreover, Dr. Epp was not called to testify. Thus, I find the three certificates lacking and of no probative value. Moreover, there is no medical evidence that Mr. Creamer suffered from stress caused by a condition in the workplace, namely Mr. Rogers, on October 25 and 26, 1993. The evidence submitted by Mr. Creamer did not establish that he was under stress on that day.

Dr. Lappi examined Mr. Creamer only once and this was done on November 6, 1995, two years after the refusal. He found Mr. Creamer to be in good health and he speculated that Mr. Creamer had suffered from stress previously in 1987. The cause of this stress was not revealed and there is no evidence that the cause was the workplace. Moreover, Mr. Rogers became Mr. Creamer's supervisor only in 1989.

Furthermore, Mr. Creamer, who is diabetic, recognized that he suffered a motor vehicle accident in July 1993 and the death of his brother. Surely, these serious events could have caused him stress.

The relationship between Messrs. Rogers and Creamer was antagonistic and full of conflict. They reacted to each other's actions. Each time one took action, the other reacted by taking another action. Moreover, Mr. Creamer failed to demonstrate that Mr. Rogers' actions and incidents of February 18, 1992 (the report to the RCMP of the speeding), March 18, 1993 (the two memoranda), April 27, 1993 (memorandum) and October 20, 1993 (refusal to transmit the grievance) were of such seriousness that they constituted a danger as defined by the Canada Labour Code. No medical or other expert evidence was adduced as to the symptoms and how a medical expert would establish that the stress was caused primarily by Mr. Rogers. In particular, no physician or other expert was called to describe the alleged stress and connect it to Mr. Rogers and the workplace.

In this regard, I cite the decision of the Federal Court, Trial Division, in Boothman v. Canada (1993), 63. F.T.R. 48, where in a suit against the Crown for damages for assault, intimidation and the intentional infliction of nervous shock arising in the course of the plaintiff's employment with the Canada Oil and Gas Lands Administration (COGLA), Noël, J., of the Trial Division of the Federal Court of Canada had the following evidence to consider at pages 63 to 66:

> *[81] During the trial, two experts were called by the plaintiff and their reports were filed as read. These reports relate to the impact of the COGLA events on the plaintiff's mental health. Dr. Frank Schnell, who is the plaintiff's family physician, stated that he had the plaintiff under his care from May 1986 to September 1989, and that during that time, plaintiff consulted him on seventeen occasions. With respect to the plaintiff's condition, he states:*

> *"The following point form list contributes symptoms taken directly from writings communicated to me by Ms. Boothman during my appointments and encounters with her:*
>
> *(a) Symptoms and conditions that are the result of a 'torture' via methods and behaviour applied to deliberately fragment or breakdown her personality or identity structure and destroy her selfworth resulting in dismissal from her said employment.*
>
> *(b) Intense emotional pain, crying and frequent episodes that are experienced as the result of her understanding that she has been scape-goated, lied to, slandered, unable to reach others for help, undervalued, and not believed. She feels that this has been intensified by her inability to find other employment.*
>
> *(c) Patient experiences intense worry, periodic anxiety attacks, periodic despair, acute reactive depression, occasional suicidal feelings, feels of persecution, general physical phenomena which she describes as being accompanied by intense chest pains, difficulty breathing, crying, and grieving.*
>
> *(d) Ms. Boothman feels that her symptoms are intensified by social isolation in crises, by feelings of aloneness with the problems, and by the affirmations of her counsellor that nobody cares.*
>
> *(e) Ms. Boothman relates to me that the symptoms reappear or recur with acute intensity in association with events or experiences similar to the original traumas when the patient feels she is not believed, or when she feels she is not heard when communicating pertinent information particularly to people in investigating or helping roles."*

[82] At paragraph 5, he observes:

"... that Ms. Boothman's predominant symptoms centre around the following:

> *(a) A preoccupation and obsession with thoughts pertaining to the work place events*

that culminated in her dismissal from the Department of Energy, Mines and Resources. She certainly very much would like to pursue this matter, and seek recognition that she was 'wronged', and try to seek some compensation to allow her to get on with her life.

(b) Emotional ability often including tearfulness, despair and anger in response to what she perceives as an unfair situation.

(c) Depressive symptomatology, including elements of hopelessness."

[83] At paragraph 7, he states:

"It was my impression during the time that she was under my care, that Ms. Boothman suffered from depression with obsessive features. Of course, I am unable to say if this diagnosis has undergone any change over the last three years since September 1989. In September 1989, it was also my opinion that these symptoms could have been caused by traumatic events alleged to have occurred during Ms. Boothman's employment with the Department of Energy, Mines and Resources Canada."

[84] Finally, at paragraph 9, Dr. Schnell concludes:

"At the time of my last appointment involving Ms. Boothman, I was unable to give a definitive prognosis as to whether or not her symptomatology would improve or disappear over time. At the time I certainly felt that Ms. Boothman strongly perceives, and has been hurt deeply, by the events that she related to me as occurring at the place of employment with the Federal Department of Energy, Mines and Resources. However, at the time I was uncertain as to whether or not there is any form of treatment that could help her with the exception of time."

[85] Dr. Schnell is not a psychiatrist although he did take general courses in psychiatric medicine. He stated that he had suggested to the plaintiff that she consult with a psychiatrist but that the plaintiff refused.

[86] The second expert was Hilde Houlding, a professional social worker and counsellor who is presently Director of Counselling at the Calgary Family Service Bureau. Ms. Houlding has a Bachelor's and a Master's degree in Social Work and has been employed with the Bureau since 1962. Her counselling activities focus primarily on adult couples and individuals, and she has a particular interest in the

treatment of trauma induced by prolonged exposure to repeated episodes of violent physical, verbal or sexual assault within the context of the family.

[87] From July 1986 to March 21, 1989, the plaintiff attended fifty-two counselling sessions. In paragraph 10 of her report, Ms. Houlding states:

> *"The onset of Ms. Boothman's phobic apprehension of harassment, and loss of emotional control and employment in the work environment was precipitated by the traumatic events which took place during her employment with the Department of Energy, Mines and Resources Canada."*

[88] In the subsequent paragraphs, Ms. Houlding provides a detailed account of the events which took place at COGLA as related to her by the plaintiff and opines as to the psychological impact of these events on the plaintiff. She concludes her review of the events by stating:

> *"As a result of the events at the Department of Energy, Mines and Resources Canada, Ms. Boothman has been under prolonged distress and has subsequently suffered acute emotional and psychological pain, social isolation, stigmatization, abaissement of her identity, and suicidal despair."*

[89] As to her prognosis for future recovery, she states:

> *"The prognosis for future recovery is doubtful. The acute post traumatic stress symptoms have persisted with minimal modification for over five years. The frequency and intensity of recurring crisis preclude consideration of employment. Further the time involved in bringing this matter before the court requires the victim to maintain a vigilant state and conduct repeated mental rehearsal of events to strengthen recall rather than facilitating the natural post-traumatic healing process and gradual suppression of painful recall."*

Mr. Justice Noël concluded at page 65 that:

[94] There can be no doubt that the plaintiff suffered from psychological and emotional difficulties prior to her experience with COGLA and during her tenure, she exhibited behaviour consistent with this state.

However, he rejected the argument that there was no liability because Ms. Boothman had a pre-existing vulnerability on the basis that the supervisor exploited that vulnerability thereby making her condition extensively worse.

I wish to point out that Mr. Creamer failed to describe the alleged stress and no evidence was adduced as to his symptoms on October 25 and 26, 1993. Furthermore, and more particularly, no incident involving Mr. Rogers occurred between October 21 and 25, 1993. Mr. Creamer invoked his refusal to work at the conclusion of a meeting with Ms. Harley where Mr. Rogers was not in attendance. It is also worthy of note that Mr. Creamer broke down crying on October 27, 1993 after the safety officer advised him of her decision and, again, Mr. Rogers was not in attendance and there had been no further incidents between Messrs. Rogers and Creamer since the former's refusal to sign the transmittal form.

It is simply impossible for me to make a determination with respect to Mr. Creamer's stress and its cause on October 25 and 26, 1993 without medical or other expert evidence as to his health at the time of his refusal and the safety officer's investigation.

The task of the safety officer was to determine whether at the time of the investigation a condition existed that constituted a danger to Mr. Creamer (Bidulka et al. (supra)) and there is simply no evidence apart from his testimony to support Mr. Creamer's allegation of such a danger. The danger has to be real and not a mere perception or an anticipation that the future would be a mere repetition of the past.

The evidence is also to the effect that Ms. Harley apologized orally and in writing to Mr. Creamer at the October 25, 1993 meeting (Exhibit 14). Moreover, on September 27, 1993, Ms. Harley rescinded the "Work Performance Monitoring" letter (Exhibit 13). In this letter, Ms. Harley wrote:

> ...
>
> *I understand from discussions with Mr. Peter Rogers, SEHO, that the working relationship between you is cordial and productive. I encourage you to build on your success over the recent work performance period. I would like to meet with you and Mr. Rogers in Winnipeg in the near future to outline future goals and expectations as part of a regular performance discussion process.*

As in Bliss (supra) and Scott (supra), Mr. Creamer failed to establish his claim that he was suffering from stress (injury or illness) and the cause was Mr. Rogers. No evidence was adduced to describe the injury or illness, the symptoms and possible consequences that could be a danger to him. In Decision No. 636/91 (supra), the Workers' Compensation Board had evidence of a psychiatric emotional disorder to support its finding of disability arising out of and in the course of the claimant's employment. This is not the case here.

In view of my decision that Mr. Creamer, who had the onus of proof, failed to produce the required evidence to establish his claim, I do not need to determine whether the definition of "danger" applies to a situation such as the one raised by this case. For the same reason, I do not need to deal with the issues of mootness and laches raised by counsel for the employer.

For all the above reasons, this reference is hereby dismissed and I confirm the decision of Mrs. Ceayon Johnston that there was no danger to Mr. Creamer on October 26, 1993, although I do not necessarily endorse her rationale for that decision.

Muriel Korngold Wexler,
Deputy Chairperson

OTTAWA, November 7, 1996.