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Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

RODNEY BEERS

Grievor

and

TREASURY BOARD
(Department of National Defence)

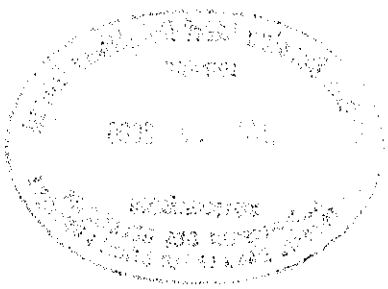
Employer

Before: Donald MacLean, Board Member

For the Grievor: Michael Tynes, Public Service Alliance of Canada

For the Employer: Harvey Newman, Counsel

Heard at Riverview, New Brunswick,
June 9, 1999.



[1] Rodney Beers claims that in January 1993 the employer refused to allow him to return to work after a two-year period on long-term disability.

[2] The employer says that at the time it was not sure of his capabilities to return to work. It required that he secure a medical report that would outline his work limitations and his future prognosis.

[3] Mr. Beers began working as a storesperson in the supply depot (warehouse) at the DND Canadian Forces Base Moncton in January 1981. He remained employed as a storesperson until the base closed in March 1996 as part of a reorganization of the department.

[4] Storespersons at the base had the use of various pieces of mechanical and power equipment to manipulate the inventory. However, there were times when they had to do heavy lifting as an integral part of the job. They routinely had to lift articles or boxes that weigh upwards of 100 pounds or even more.

[5] In October 1990, while he was on a day off, Mr. Beers suffered an injury when a horse stepped on his right foot. Consequently, he was not able to go to work. His family physician, Dr. Chesser, applied a below-the-knee walking cast to his leg. Mr. Beers had to use crutches for support. At the same time, the grievor also had pain in his left elbow. Dr. Chesser examined Mr. Beers again on November 22, 1990. He concluded that Mr. Beers had further problems with his left elbow, shoulder and wrist, and that he was unable to perform his regular duties as a storesperson. Mr. Beers remained off work due to his injuries. During the first week of December 1990, he had another misfortune when he twisted his knee. At this stage, Dr. Chesser referred him to Dr. Michael Forsythe, an orthopedic surgeon.

[6] Doctor Forsythe examined Mr. Beers in mid-December, 1990. He prescribed medication and psyiotherapy. In February, after a number of physiotherapy sessions, Mr. Beers was still experiencing pain. Dr. Forsythe reviewed his condition in late March 1991. At that time, the grievor still had pain in his left wrist and knee. Dr. Forsythe injected Depo-Medrol for elbow tendonitis during the visits. In April 1991, tests determined that Mr. Beers required surgery on his knee. Dr. Forsythe's report to Sun Life, dated November 20, 1991, indicated that Mr. Beers had been disabled from his work since October 1990. Initially, his absence was due

principally to the foot and knee injuries. In the later stages, it developed into decreased grip strength in his arm, coupled with the problems in his elbow.

[7] During the period since October 1990 Mr. Beers became eligible for benefits under the department's long-term disability (LTD) plan with the insurer Sun Life. He had to submit detailed narrative and medical reports from his physicians, as proof of his impairment and total disability. The insurer received information from both Dr. Chesser and Dr. Forsythe on Mr. Beers' disability. At first, there were delays in getting the claim established. In December 1991, the insurer backdated the claim to January 1991. Initially the LTD benefits were payable only up to January 31, 1992. Later, when Mr. Beers remained disabled, the insurer extended the benefits to January 11, 1993, in line with the two-year limit on the policy.

[8] A letter from the insurer to the base civilian personnel office on November 11, 1992, informed personnel that Mr. Beers' 24 months of LTD benefits were to end in January 1993. The personnel office mailed a copy of the insurer's letter to Mr. Beers. However, the letter came back to the office as "unclaimed" in December. In the meantime, Mr. Beers had learned by the end of November in a conversation with staff in the personnel office that his LTD benefits would stop in January 1993.

[9] Although his doctor recommended on January 4, 1993 that he could return to work at "light duties", the grievor did not see the insurer's letter until three weeks later, when he dropped into the personnel office to get his last LTD cheque.

[10] The personnel office received a copy of Dr. Forsythe's report to the insurer dated January 4, 1993. In it, his doctor recommended that Mr. Beers be put on light duty. At a meeting on February 2, 1993, Sheila Graham, the chief personnel officer at CFB Moncton, requested that he get a written medical report detailing the type of light duties that he could perform, and for how long.

[11] Mr. Beers tried to get the report from Dr. Forsythe's office, but the doctor's secretary told him to have his employer send a written request. The grievor says that he asked Ms. Graham to make the request to the doctor.

[12] Ms. Graham does not recall that he asked her. She testified that, if he had requested that she get the report, she would have replied that it was up to him to provide the information on his limitations to work. In late February 1993, the

personnel office noted that it had not received any medical report on Mr. Beers' condition. Ms. Graham's notes of a March 5, 1993 meeting with Mr. Beers and Mr. Bowser (a bargaining agent representative) indicate that she and Mr. Bowser advised him to get a report in writing from his doctor on his limitations to work and his prognosis. He mentioned to her that he had two doctor's appointments set up in the near future. She noted to him that the choice of doctor was up to him. Mr. Beers testified that Mr. Bowser was telling Ms. Graham that it was up to her to get the medical reports.

[13] Coincidental with the period of his problems with the employer, Mr. Beers suffered personal problems because of the death of six members of his family over a one-year period. This significantly added to the stress with which he had to cope. He did not give this information to the employer.

[14] The grievor became frustrated with the personnel office. He felt that he was unable to deal with Ms. Graham. He testified that she said at the meeting in March 1993, "We don't have jobs for people like you", (meaning employees on light duties). Ms. Graham categorically denies that she made any such statement to Mr. Beers. She just needed the doctor's assessment of his limitations before he could return to work. Her request was based on an employer policy regarding the reintegration back to work for employees on long-term absences. That policy had the agreement of the PSAC local at the base. She wanted to know what he could do in his job.

[15] Neither the grievor nor the employer obtained the medical report on his limitations. Yet, the employer did not encounter similar difficulties with getting medical information from the other 12 employees at CFB Moncton who were on LTD or workers' compensation at the time. They all secured medical reports on their respective conditions and any limitations from their respective doctors. Because it did not have Mr. Beers' medical report by August 1993, the personnel office arranged for an assessment of Mr. Beers by Health and Welfare Canada to evaluate his fitness for duty.

[16] In October 1993, he turned to his Member of Parliament, George Rideout, for assistance. Mr. Rideout wrote to Ms. Graham on two occasions on behalf of Mr. Beers in an effort to secure benefits or his return to work.

[17] The Health and Welfare assessment was complete in January 1994. A Health and Welfare doctor had examined him and, in turn, had received reports from Doctors Chesser and Forsythe.

[18] In mid-January 1994, Health and Welfare reported to the personnel office that Mr. Beers was class "B" (fit for duty, with limitations). The report indicated that he was unfit to return to his former employment as a storesperson. However, he was fit for alternative lighter work, as long as it did not involve heavy lifting over 30 pounds, prolonged sitting, standing or walking. The limitations were expected to be permanent. The employer began the process to have Mr. Beers return to work. A clerk position proved to be unsuitable to Mr. Beers, because it involved a decrease in pay.

[19] On the intervention of Mr. Beers, the Health and Welfare assessment was clarified on February 21, 1994. He could do the storesperson job as long as he did not have to lift objects over 30 pounds, or as long as the job did not involve any prolonged sitting, standing or walking.

[20] The personnel office reviewed the jobs that were available at the base. Mr. Beers returned to work on March 21, 1994. He was placed in a light duty "checker" position. It would have been a storesperson position, but the employer held it open as a light duty job for the grievor.

[21] In April 1994 on the receipt of a new medical report from Dr. Forsythe, the employer reassessed the grievor for all duties as a storesperson. As a result, Mr. Beers moved into a storesperson position without any limitations.

[22] Mr. Beers filed a grievance on May 13, 1994. He claimed that the employer refused to allow him to return to work on January 11, 1993. He sought reinstatement of his work status and his pay and benefits from that date until March 21, 1994, the date of his return to work.

[23] When the dispute was not resolved during the grievance process, the grievor referred the matter to adjudication in March 1996.

[24] In a letter on June 27, 1997, the employer informed the Board that the employer objected to the jurisdiction of the adjudicator to hear the reference due to the timeliness issue. The date on which the grievor filed his grievance was beyond the 25-day time limit within which he had to file his grievance.

Representations on Behalf of the Parties on the Timeliness Issue

For the Employer

[25] Counsel for the employer argues that an adjudicator appointed under *the Public Service Staff Relations Act* does not have jurisdiction to deal with this case. He reviewed the letter to the Board from the employer in which it raised the question of jurisdiction on the timeliness issue. Mr. Newman submits that there is no doubt that this grievance was untimely. The relevant collective agreement stipulates a 25-day time limit. It is not appropriate to extend the time limit to present the grievance.

[26] Counsel referred to clause M-38.10 of the Master Agreement between Treasury Board and the Public Service Alliance of Canada:

> *An employee may present a grievance to the First Level of the procedure in the manner prescribed in clause M-38.05, not later than the twenty-fifth (25th) day after the date on which he or she is notified orally or in writing or on which he or she first becomes aware of the action or circumstances giving rise to the grievance.*

[27] Under M-38.10, an employee has 25 days to present a grievance after becoming aware of the circumstances of his grievance. Mr. Beers was aware on January 11, 1993 that he was not allowed to return to work, even though he wanted to. He should have grieved this decision within 25 days. Yet, he did not. It took almost a year and three months for him to present his grievance.

[28] Even if we consider the matter as a continuing grievance, we have to count back from May 13, 1994, the date of the grievance. He wants to be paid to March 21, 1994. However, he is beyond the 25-day time limit even on that issue.

[29] Counsel also referred to clause M-38.17 of the Master Agreement:

> *The time limits stipulated in this procedure may be extended by mutual agreement between the Employer and the employee and, where appropriate, the Alliance representative.*

[30] There was no agreement by the employer to extend the time limits.

[31] Mr. Newman concedes that the employer did not raise the issue of timeliness in the grievance procedure. However, the employer is not required to raise the issue of timeliness at that stage. It is a matter of jurisdiction at any stage of the process. In

support of his point, counsel referred to the decision in *Boutilier* (Board file 166-2-26199). The Federal Court, Trial Division, set aside the adjudication decision, even though the issue of jurisdiction was not raised in the adjudication: *Canada (Attorney General) v. Boutilier* [1993] 1 F.C. 459. Furthermore, by applying the rationale in *Byers Transport Limited v Kosanovich* [1995] 3 F.C. 354, cited in *Boutilier*, an adjudicator has an obligation to raise and deal with matters of jurisdiction.

[32] The Federal Court judgement in *Coallier* (unreported FCC file A-405-83) confirms that the grievor is out of time. Everyone was put on notice in June 1997, that the employer was concerned about the timeliness of the grievance. There was no application for an extension of time limits by the grievor. Unless there is proof of an extension of the time limits by mutual agreement of the parties, a grievance that has been presented in an untimely fashion cannot be heard by an adjudicator, because he lacks jurisdiction to do so. There was no mutual agreement between the parties to extend the time limits in this instance. Furthermore, the employer objected to the timeliness of the grievance almost two years prior to the hearing, without any response to the contrary by the grievor. It is immaterial that the objection to timeliness was not made during the course of the grievance procedure. The parties have not made this a requirement in the collective agreement, nor is it a requirement of the rules of the Board.

[33] In the alternative, Mr. Newman submits that even if there is discretion to determine whether waiver applies to relieve the grievor from making an application for an extension of the time limits, this is not a proper case in which to exercise that discretion.

[34] Counsel referred to *Ouellette*, (Board file 166-2-21255, Korngold Wexler, Deputy Chairperson). In *Ouellette*, the grievance was untimely. The employer in that case raised the time limits question after the end of the grievance process. The grievor did not request an extension of time to present the grievance. A month prior to the adjudication hearing, the employer filed a notice of an objection to jurisdiction based on timeliness. The Deputy Chairperson allowed the objection. She dismissed the grievance on that basis. In so concluding, she noted that the objection to jurisdiction had been raised prior to the date of the hearing. The bargaining agent and the grievor had time prior to the hearing to reply to the objection and to make an application for

the extension. The grievance was untimely. Therefore, it was not within the jurisdiction of the adjudicator.

[35] Counsel for the employer asserts that the question to be answered is whether, on the face of it, the grievance can be heard. It is clear that the adjudicator does not have the jurisdiction to hear the grievance, because it was not presented in a timely fashion.

[36] According to counsel, the only issue for consideration is whether the grievance was timely. The grievor did nothing for over a year. The employer was not able to look at the situation in a timely fashion. An employee can not make a claim for compensation where he did not make a timely claim. He was outside the time limits and he did not make an application for an extension.

[37] The employer, therefore, submits that the adjudicator does not have jurisdiction to render a decision on the merits of this case. It should be dismissed.

For the Grievor on the Timeliness Issue

[38] The representative for Mr. Beers acknowledges that the grievance was filed outside of the time limits outlined in the collective agreement. He also acknowledges that there was no application for an extension of time in this matter. However, that does not mean that the grievance must be deemed untimely.

[39] While the issue is not a continuing grievance, it is a problem that the grievor was trying to resolve over a period of time. The grievor was not at work until March 21, 1994, because his employer would not permit him to return to work.

[40] There may be negligence by the local bargaining agent representatives because they failed to file a grievance at the earliest possible date. The grievor filed his grievance in May 1994, because he realized that he was not going to receive his compensation to March 21, 1994.

[41] The grievance went directly to the second level. In the reply to the grievance in June 1994, there was no objection to timeliness. There was no objection to timeliness at the final level either. It was only after the matter was referred to adjudication that the employer raised the issue of timeliness.

[42] Under clause M-38.10, an employee "may" present a grievance within 25 days. It does not say that an employee "shall" present. It is not mandatory. Accordingly, there is room for flexibility and discretion. Therefore, the grievance is not untimely, or it is a continuing grievance. The *Coallier* case (*supra*) is not applicable in this instance. The grievor was off work until March 21, 1994. Only after his return to work did he learn that he would not receive his compensation. There would then be a 25-day period back from the date between March 21 to May 23 when he was aware that he was not was not going to be paid for the period that he was off.

[43] Previous decisions of adjudicators have held that an application for an extension of time limits under the P.S.S.R.B. Regulations and Rules of Procedure is not mandatory for an adjudicator to assume jurisdiction to hear the grievance. The decisions in *Kettle*, (Board file 166-2-21941, Turner) and *Moyes* (Board file 166-2-24629, Deputy Chairperson Chodos) support this view.

[44] The grievor referred this case to adjudication in March 1996. The employer's first objection to the timeliness of the grievance is the employer's letter to the Board on June 27, 1997. That was over 15 months later.

[45] Mr. Tynes submitted that the doctrine of waiver applies in this case. Besides, there is no prejudice to the employer for the adjudicator to accept jurisdiction to hear this case.

[46] He requested that the employer's objection to the timeliness of the grievance be dismissed.

Employer's Rebuttal on the Timeliness Issue

[47] The employer replied to the suggestion by the grievor that "may" in article M-38.10 is permissive. The word "may" in that instance means that, if the employee is going to grieve, he must do so within 25 days. The employer did not hear from the grievor within 25 days. He is out of time. Counsel asks that I dismiss the grievance on the ground that it is untimely.

Decision on the Timeliness Issue

[48] The employer questions my jurisdiction to hear this reference to adjudication. It contends that the grievor was out of time in presenting the grievance in May 1994. It concedes that the employer did not raise the issue of timeliness until June of 1997. That was 15 months after the grievor referred his grievance to adjudication.

[49] Counsel for the employer refers to *Ouellette* (*supra*) in which the adjudicator held that the employer did not waive its right to raise an objection with respect to the timeliness of the grievance, even though it did not do so until after the grievance had been referred to adjudication. The adjudicator determined that the employee had ample time to respond to the objection.

[50] The first issue to answer is whether the employer "waived" its right to object to the untimely grievance of Mr. Beers.

[51] In *Canadian Labour Arbitration (3d)*, Brown and Beatty outline the doctrine of "waiver" (at paragraph 2:3130, page 2-94), as follows:

> *The concept of "waiver" connotes not insisting on some right, or giving up some advantage. It involves both knowledge and intention to forgo the exercise of such a right. In its application, it is a doctrine which parallels the one utilized by the civil courts known as "taking a fresh step", and holds that by failing to make a timely objection and "by treating the grievance on its merits in the presence of a clear procedural defect, the party "waives" the defect". That is, by not objecting to a failure to act within mandatory time-limits until the grievance comes on for hearing, the party then objecting will be held to have waived non-compliance and his objection to arbitrability will not be sustained.*

[52] At least two adjudication decisions delivered after *Ouellette* (*supra*) accept the concept of waiver as outlined in *Canadian Labour Arbitration (3d).* They do not subscribe to the premise in *Ouellette.*

[53] In *Kettle* (*supra*), the employer did not raise the timeliness issue in any of the three responses in the grievance process. The grievor did not apply for an extension of time under the Board's regulations. The adjudicator determined that the problem should be approached as a waiver of a procedural irregularity. He said (at page 12):

> *I consider that, the employer should have endeavored to focus on all issues during the grievance process and not suddenly (about eight days before the hearing) at the eleventh hour raise the issue of timeliness, and expect this Board to allow the employer's objection. This can be said to be analogous to not wanting to fully canvas all issues in a lower court, (that is the grievance process), but rather during an appeal at a higher court, (before the adjudicator). One of the purposes of the grievance process is to fully canvass all issues, including procedural irregularities.*

[54] He added that (at page 14):

> *I conclude therefore that the employer by not raising the matter in the grievance procedure waived its right regarding timeliness and that timeliness should not suddenly appear in the process at this stage. I do not have to decide whether or not the grievor is taken by surprise or prejudiced by the employer's objection at this late stage.*

[55] In the decision in *Sauvé* (Board file 166-2-26974, Simpson) the adjudicator came to a similar conclusion as *Kettle* (at page 4):

> *Although there may be some justification for the employer's concerns about establishing facts after so many years have elapsed, a concern that was expressed in the letter of Mr. Campbell (Exhibit E-1), the employer was certainly aware of the situation over the years. The investigation of the facts has been ongoing as shown by the exchange of letters over the years. Accordingly, I do not believe that the grievance is untimely but even, if it were, I am not prepared to entertain an objection to timeliness which is raised by the employer for the first time at adjudication. Not having raised the matter during the grievance procedure, the employer has waived its right to object to timeliness at adjudication.*

[56] I agree with the decisions in *Kettle* (*supra*) and *Sauvé* (*supra*). I believe that the occasion for an employer to raise a timeliness objection is during the grievance procedure. It is too late once the case is ready for adjudication. If an employer fails to object in the grievance procedure, it can be deemed to have waived its right to object to the timeliness of the grievance. It seems to me that an issue of timeliness on the presentation of a grievance ought to be raised at the earliest opportunity, and that is during the grievance process. That is where the parties are supposed to explore all issues that arise around the grievance. The purpose of the grievance process is to focus on and canvas all issues that are readily apparent. Otherwise, the party failing to do so may be taken to have condoned and overlooked the failings in the adherence to the time limits in the collective agreement. The matter that is referred to adjudication

includes both the grievance and the procedural issues that the parties raise in the grievance process.

[57] I further reject the characterization of the timeliness issue as one that goes to the jurisdiction of an adjudicator. In my opinion, the issue of timeliness is not a jurisdictional matter. Rather, it is a procedural issue that can be waived by either party expressly, or by implication, when a party fails to raise the objection during the grievance process.

[58] I would add that any issues of remedy that could be available to a grievor who presents his grievance late could be addressed in the merits of the case.

[59] For these reasons, I reject the employer's preliminary objection. I conclude that I have the jurisdiction to decide Mr. Beers' grievance on its merits.

Representations of the Parties on the Merits

Argument for the Grievor on the Merits

[60] Mr. Beers only learned that he was to return to work on January 23, 1993, when he was at the personnel office to pick up his disability cheque. Afterwards, he made an effort to return to work. He had seen his doctor on January 4, 1993. Dr. Forsythe suggested that the grievor perform light duties. Ms. Graham informed him that there were no jobs with light duties available at the base.

[61] Later, they met to discuss what light duties meant. She told Mr. Beers that he would need a letter indicating what his limitations were and how long he would be required to be on light duty.

[62] The grievor returned to Dr. Forsythe's office. The doctor's receptionist told him that personnel had to send a written request to the doctor. He relayed this information to Ms. Graham. He asked her to send a letter to Dr. Forsythe indicating what information she was looking for. Ms. Graham says that no such request was made.

[63] Ms. Graham met with Mr. Bowser and the grievor on March 5, 1993. She testified that Mr. Bowser told the grievor to get the information. The grievor's testimony is that the bargaining agent was telling the employer to request the information itself.

[64] The grievor and Ms. Graham disagree on who was to obtain the further medical information. The grievor was frustrated because he was unable to return to work. The personnel office wanted the medical information that it requested.

[65] However, Mr. Beers did not get anything from his doctor. He was waiting for Ms. Graham to draft a letter to Dr. Forsythe. Mr. Beers was unable to talk with Ms. Graham. He decided to go through his local bargaining agent representative. He also spoke with his Member of Parliament, George Rideout. Mr. Rideout requested that Ms. Graham obtain the information.

[66] In August 1993, the personnel office referred the grievor to Health and Welfare for assessment to determine his fitness for duty. Mr. Beers went for that exam in September 1993. The Health and Welfare review was complete in January 1994. Mr. Beers was declared fit with limitations. He agreed with the assessment. He contacted Health and Welfare himself to inform them of the jobs that he could do. Those jobs did not require heavy lifting.

[67] The actions taken in August 1993 could have and should have occurred from the beginning. Health and Welfare is the body to consult with doctors. Had this been done early on, the grievor would have likely been returned to work in January or February 1993.

[68] The grievor returned to work on March 21, 1994 on light duties.

[69] The period of no pay resulted in a loss of $30,000.00 over a 14-month period. The grievor found this very difficult to cope with. There may have been other things that he could have done. Yet, he is not familiar with procedures in personnel. He was not an expert in such matters. Much of the problem lies with the personnel office in its adoption of Health and Welfare referrals. This was not in the best interest of the employees. If an employee is unable to perform his duties and the employer needs clarification of his limitations, the employer should get the information itself. Furthermore, if the employer had made a request to Health and Welfare to assess Mr. Beers on a priority basis, it could have come back with the assessment within a reasonable time. If this had been done, the grievor would not have made a claim.

[70] Mr. Beers filed the instant grievance because he felt that he should be compensated for loss of time and benefits. The grievor had suffered financially. His lost pay was due to the employer's failure to obtain information that would allow him to return to work sooner. He could have performed duties in January 1993. This could have been established if the employer had acted then.

[71] Mr. Beers was very frustrated and angry at his situation at the CFB Moncton. He had been through a considerable ordeal. There was no malice on the part of the employer to cause hardship to the grievor. The problem came about because of his personal hardships and a breakdown in communications.

[72] The employer could have handled the matter in a more expedient fashion. The grievor lost money because of the employer's delay. The grievor asks that the adjudicator grant the grievor's request in whole or in part. Administrative errors by the employer caused his loss. They should be corrected by allowing him compensation for his lost pay.

Argument for the Employer on the Merits

[73] The facts in this case are straightforward. The letter indicating the cut off date of the grievor's LTD benefits went to personnel. It sent a copy to Mr. Beers. He did not receive it. Yet, he knew in December 1992 that his benefits were ending and that he was going to have to return to work soon.

[74] In January 1993, the grievor gave the personnel office a copy of Dr. Forsythe's letter to the insurer. The doctor reported that Mr. Beers was fit for work with limitations. In accordance with the employer's policy, Mr. Beers was advised that he had to obtain medical information from his doctor on his physical limitations and the duration of those limitations.

[75] In March 1993, the grievor met with Ms. Graham and Mr. Bowser. The grievor informed her that he had upcoming appointments with two doctors. Ms. Graham told him that a prognosis was required. Any doctor could do it. He was also told that, if he did not provide this information, he would be referred to Health and Welfare for assessment. Ms. Graham expected that he would get the information to her.

[76] The information did not come in. In August 1993, the personnel office made arrangements for an assessment of the grievor by Health and Welfare. They determined in February 1994 that he could do the storesperson job with modifications. Management carved out a special position for the grievor after receiving the assessment. He returned to work on a limited basis.

[77] Management has the right to expect that an employee will perform the regular duties of a position. There is no such thing as light duties, except accommodations for a limited time. There is, moreover, no legislation that requires an employer to offer light duties to an employee. If an employee is unable to perform his duties, the employer has the right to wait for confirmation of what he is capable of performing. The employer did not want to exacerbate his injuries.

[78] The employer acted reasonably in all the circumstances. It acted reasonably in assisting the grievor to return to work in a limited capacity. Any delays were not attributable to the employer. He may have misunderstood that he had to get the information. However, that was his responsibility to do so. The employer waited a reasonable time for him to get the information.

[79] As soon as the employer became aware of Mr. Beers' limitations, it made every step to accommodate him. It went beyond its legal obligation. It acted as expeditiously as possible.

[80] The only way that the grievor could have returned to work sooner is if he had gotten the assessment. The personnel office did not take steps to prevent Mr. Beers from getting back to work. The office took all of the steps it could to get Mr. Beers back to work.

[81] One can not but have sympathy with the grievor. He was injured and suffered personal misfortunes. The state of mind of the grievor was somewhat impaired. In retrospect, this would have caused him to take no steps to get information from his doctor. Regardless of the reasons for his impairment, he was the author of his own misfortune.

[82] The employer acted properly to have him regain meaningful employment. The personnel office was not aware of Mr. Beers' other personal problems. The employer can not be held liable for his personal situation.

Conclusion and Reasons for the Decision

[83] Many of the problems outlined above relate to a lack of communication between the personnel office and the grievor. It is necessary, therefore, to discern what in all likelihood occurred in this case.

[84] The grievor testified that he was not aware until January 23 that his benefits were going to be cut off . However, under cross-examination he acknowledged that he was aware of the insurer's intentions by the end of November 1992. Staff in the personnel office had relayed that information to him.

[85] The grievor did initiate steps to return to work in January 1993. On January 4, 1993, he saw his doctor. Later, he gave the note from his doctor to Ms. Graham. That note indicated that Mr. Beers was fit for light duty. Ms. Graham requested that the grievor obtain further detailed information from his doctor. The grievor did attempt to obtain the information, but he says that Dr. Forsythe's secretary told him that the doctor required a written request from his employer. The grievor says that he asked Ms. Graham to write the letter of request. Ms. Graham says that she cannot recall the grievor asking her to do so, but, if he did, she says that she would have denied such a request because it was personal medical information that only he could obtain.

[86] Accordingly, who had the obligation to obtain further medical information? The evidence demonstrates that the grievor was twice told that he was required to get the necessary medical information. He acknowledged that Ms. Graham advised him of the contents of the employer policy on limited duties. Yet, he did not get the information. Perhaps, there was a misunderstanding between the grievor and Ms. Graham. Nevertheless, the grievor should have been aware that he was required to get the information himself. He offered no evidence to support his assertion that personnel office said that it would get the information.

[87] Furthermore, had the grievor believed that Ms. Graham was going to obtain the information, he was apparently willfully blind. He may have wanted her to obtain the information. However, her testimony and her notes of the meetings with Mr. Beers indicate that she had no such intention. In the meeting of March 5, the grievor himself told Ms. Graham that he was scheduled to see two other doctors. Her response was that he could obtain the necessary information from any doctor. As time passed, it

should have been clear to the grievor that Ms. Graham was not going to obtain further medical information on his behalf.

[88] After March, all direct contacts between Ms. Graham and the grievor appear to have ceased. The grievor says that he felt that he could no longer deal with Ms. Graham. In his mind, the bargaining agent was dealing with his problem. However, there was no direct evidence that the bargaining agent asked Ms. Graham to write the letter to Dr. Forsythe. During this time, in fact, there is no evidence of any bargaining agent communication with Ms. Graham on behalf of Mr. Beers.

[89] It is readily apparent that Mr. Beers was frustrated with the personnel office. He went to see his Member of Parliament on two occasions. Perhaps, he did not know what to do in the situation. It is clear that he was under stress, and that he had personal problems. That may have clouded his judgement. I say this because at no time did he contact Ms. Graham. He had no income and was extremely frustrated with the situation, but he still did not contact her. According to the grievor, the personnel office was to write to Dr. Forsythe. When it became clear that it did not, and was not going to do so, the grievor, if he were thinking clearly, would have contacted her to determine what had happened. He did not attempt to clarify the situation. In fact, he did not contact the office directly at all.

[90] The grievor's representative argues that this is evidence of a breakdown in communication between the grievor and the employer. In my opinion, any breakdown in communication is mainly the fault of the grievor. That is not to say that the employer vigorously followed up on the grievor's situation. It did not. It may have been able to push the grievor to successfully obtain the information himself.

[91] Nevertheless, case law makes it clear that the onus is on an employee who is unable to perform his duties to present the employer with whatever evidence that he can. In *Halfaoui* (Board file 166-2-22201, May 1994), Deputy Chairperson Wexler said:

> *In his grievance, Mr. Halfaoui is seeking pay and benefits under the Master Agreement (Exhibit 1) with effect retroactive to December 6, 1988. Mr. Halfaoui sustained an injury in May 1985 and was absent from his job owing to illness until July 10, 1991. The case law dealing with reinstatement following an absence owing to an illness has established rather convincingly that the burden of proof is on the grievor to prove that he is fit and able to resume the normal duties of his position. The decisions in Stratton,*

> *supra, and Ricafort, supra, illustrate this principle. In the instant case, Mr. Halfaoui had the burden of proving that he was capable of performing the normal duties of his position as packaging supervisor.*

[92] There is, therefore, an onus on an employee to present the employer with evidence of his capabilities. In this case, the grievor only presented a note which informed his employer that he was fit for light duty. The position that he held as storesperson required heavy lifting. Since the employer was unaware of the grievor's limitations, it is understandable that the employer would want to be fully aware of the particular limitations of the grievor. The grievor did not fulfill his duty to provide that information.

[93] Although Mr. Beers was without pay for a 14-month period, it was due to his own unwillingness to deal with his situation. He initially attempted to return to work, but he became frustrated with the situation. He ceased all direct contact with his employer. He did not make further attempts to obtain the requested medical information. He was informed at least twice to obtain the information. Furthermore, Ms. Graham added that *any* doctor could make the assessment. This left Mr. Beers with the opportunity to ask any doctor to make the assessment. He had even stated during the meeting of March 5 that he had upcoming appointments with two doctors. He knew that it was not just Dr. Forsythe who could make the assessment. No one prevented Mr. Beers from obtaining the information. A person in Mr. Beers' situation should have made every effort to do so. It is possible that the personal stress that the grievor was under caused him to make poor judgement calls. Nonetheless, the onus was on him to prove to the employer that he was able to return to work. By failing to do so, he became the author of his own misfortune.

[94] That does not totally end the matter, however. The employer received the final assessment of Mr. Beers' limitations in the report from Health and Welfare of February 21, 1994. According to that report, he could do a storesperson's job, as long as he did not have to lift articles over 30 pounds, or as long as he would not be subject to prolonged sitting, standing or walking. The employer took time to find him such a job. That was reasonable. It should have been able to determine that within a week. However, to take a month to find the job for the grievor seems to me to be excessive. The employer did not explain why it delayed until March 21, 1994. While I agree with the employer that it was Mr. Beers' own failure that prevented his early return to work,

in the last month it became the employer's failure to act expeditiously that prevented his return for that extra period. His was ready to return, but the employer's deferral resulted in the loss of extra pay for Mr. Beers.

[95] Accordingly, I allow the grievance but only partially, as follows. The employer is responsible for the grievor's losses in the period from February 28, 1994 until March 21, 1994. Therefore, the employer must pay and compensate Mr. Beers for the period from February 28, 1994 until March 21, 1994.

[96] I remain seized of jurisdiction in the event that the parties encounter difficulties in implementing this decision.

Donald MacLean,
Board Member

MONCTON, January 7, 2000.