

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

ROBERT G. CREAMER

Grievor

and

**TREASURY BOARD
(Health Canada)**

Employer

Before: [J. Barry Turner, Board Member](#)

For the Grievor: Derek Dagger, Counsel, Public Service Alliance of Canada

For the Employer: Roger Lafrenière, Counsel

Heard at Winnipeg, Manitoba,
May 27, 1997.

DECISION

Mr. Creamer's grievance before me dated March 5, 1996 reads:

*UNREASONABLE DENIAL OF DISCRETIONARY LEAVE AS PER
PSAC MASTER AGREEMENT ARTICLE M-21.13.*

Mr. Creamer is subject to the provisions of the Master Agreement between Treasury Board and the Public Service Alliance of Canada which the parties entered into on May 17, 1989.

Clause M-21.13 thereof, commonly referred to as discretionary leave, reads:

M-21.13 Leave With or Without Pay for Other Reasons

At its discretion, the Employer may grant:

- (a) leave with pay when circumstances not directly attributable to the employee prevent his or her reporting for duty. Such leave shall not be unreasonably withheld;*
- (b) leave with or without pay for purposes other than those specified in this Agreement.*

Mr. Creamer is requesting the following corrective action:

*GRANTING OF DISCRETIONARY LEAVE RETROACTIVE TO
November 10, 1995.*

At the outset, the parties agreed that the evidence in Deputy Chairperson Muriel Korngold Wexler's decision dated November 7, 1996 concerning the grievor Robert Creamer (Board file 165-2-94) should be considered to be evidence in this proceeding as follows at pages 6 to 17 of that decision:

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) [was alleged to have driven] (the parties agreed this replaces the word 'drove' in original decision) 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 "Counselling (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)

[. . .]

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 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. [...]

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.

Mr. Lafrenière argued that the grievance was not timely, since it was not submitted within twenty-five days of the situation arising as is required by clause M-38.10 of the Master Agreement. Clause M-38.10 reads:

M-38.10 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 grievance.

Mr. Lafrenière also argued that the employer never received a request for discretionary leave under clause M-21.13 of the Master Agreement other than on the grievance form.

Mr. Dagger responded that, since the grievor was harassed in the first place by one of his superiors, was told he could not work in Manitoba, had used up all of his sick leave and annual leave, the only option left for the grievor was to apply for discretionary leave. It was denied. Counsel argued the grievance is timely since it was filed when the grievor first found out he would no longer get a government pay cheque. Mr. Dagger argued that the grievor's non-attendance at work in Winnipeg was beyond his control.

In rebuttal argument, Mr. Lafrenière said the grievor was aware all along of the restrictions placed on the employer about employing him in Manitoba, but he used this to his benefit, did not challenge it, sat on his rights from November 1995 to March 1996 using all of his leave credits and then filed a grievance.

It was clarified and accepted by the parties that the period of time for which the grievor is requesting discretionary leave (and therefore the period to have his sick leave and annual leave restored) is from November 10, 1995 until June 19, 1996, the date before he signed the offer of employment in Sudbury (Exhibit E-21).

1. Robert Creamer agreed with the facts before me in Deputy Chairperson Korngold Wexler's decision (*supra*). He testified that a Dr. Lappi, Health Canada, told him that, as a result of the harassment the grievor received from Mr. Rogers, Mr. Creamer would work again but not in Manitoba. Mr. Creamer said he attempted to go back to work twice; once on January 12, 1996 in his memorandum to Mr. Rutherford (Exhibit G-4) and again on February 1, 1996 in another memorandum to Mr. Rutherford, Acting Zone Director (Exhibit G-1). He identified the employer's responses (Exhibits G-2 and G-3) that indicate his department was unable to assign him duties because he was restricted by Dr. Lappi from returning to a work site located in Manitoba.

Mr. Creamer said he did not want to go against Dr. Lappi's restriction but he wanted to return to work. He testified that he did not really believe the employer was trying to find work for him but he had no evidence to that effect. The grievor said he

initially paid for some psychiatric care but Health Canada eventually reimbursed him (Exhibits G-5 and G-6).

Mr. Creamer testified that his eventual move to Sudbury was a result of harassment by Mr. Rogers in the first place. He was only offered the Sudbury position but his plans all along were to stay in Winnipeg.

During cross-examination, Mr. Creamer indicated that the finding of harassment by the Public Service Commission against Mr. Rogers, who was his supervisor at the time, went back to February 1992. The grievor was on a period of sick leave during 1993 and 1994 and eventually had his leave credits reinstated by the employer (Exhibit E-1). Mr. Creamer went back to work in March of 1994 until June of 1995 during which time he no longer reported to Mr. Rogers, but initially to an immediate supervisor in Edmonton, and then after a restructuring in Manitoba he reported to Mr. Rutherford in Winnipeg (Exhibit E-2). Mr. Creamer said from June 14, 1995 onward no one ever told him he would report to Mr. Rogers. The grievor then requested sick leave on June 26, 1995 (Exhibit E-4). It was approved. In October 1995 the grievor requested the department to pay for his professional services for psychological counselling (Exhibit E-5). This request was granted. Mr. Creamer was on paid sick leave from June 26 to November 10, 1995. When asked by Mr. Lafrenière if he accepted Dr. Lappi's restrictions that he not work in Manitoba (Exhibit E-6), Mr. Creamer responded: "Yes I did." Mr. Creamer did not challenge Dr. Lappi's restriction. Mr. Creamer identified his application for disability insurance through Sun Life as Exhibit E-7 dated November 10, 1995. He acknowledged that he did not complete section 10 of his application that asked for his expected date to resume employment.

Mr. Creamer identified a letter from Dr. Epp recommending that the grievor be on sick leave until December 13, 1995 (Exhibit E-8). He testified that he was paid while he was on sick leave, that he used all of his annual leave until the time his leave credits ended. He applied for discretionary leave and filed his grievance at the end of his leave credit period when he learned he would be stricken off strength by the employer.

Mr. Creamer identified a request for interdepartmental transfer relating to him dated November 28, 1995 (Exhibit E-9) and completed by Nancy Masarsky, a Human Resources Advisor. Mr. Creamer agreed that the employer was in fact attempting to find him a position pursuant to Dr. Lappi's restriction. Mr. Lafrenière noted that the request for transfer indicated a date of availability as February 1, 1996. Even though Exhibit E-8, the letter from Dr. Epp, indicated the grievor was to be on sick leave until December 13, 1995, Mr. Creamer could not recall why he signed the request for transfer dated November 20, 1995 and put down as the date available for work of February 1, 1996. Mr. Creamer was on annual leave for all of January 1996.

The grievor identified two letters from Sun Life (Exhibit E-10 and Exhibit E-11) regarding his request for disability insurance claim. He recalled seeing a memorandum from Mr. Rutherford to Dr. Lappi indicating that Mr. Rutherford was going to ensure that the Public Service Commission was aware of the restriction that Mr. Creamer was not to be marketed to other departments in Manitoba (Exhibit E-12). Mr. Creamer agreed that with Dr. Lappi's restriction, his department was having difficulty finding a position for him and that his department also worked with Dr. Lappi. Mr. Creamer identified another letter from Sun Life dated January 12, 1996 (Exhibit E-13) that was requesting an independent medical examination. Mr. Creamer admitted he went to the office looking for work knowing full well the restriction that Dr. Lappi had placed upon him. Mr. Creamer also identified as Exhibit E-14 a letter dated January 18, 1996 from Dr. M. Stambrook, that discusses workplace restrictions for the grievor, but there is no mention of his not being able to work in Manitoba. Mr. Creamer said he did not go back to see Dr. Lappi to ask him to change the restriction to let him work in Manitoba. Mr. Creamer also identified and indicated he had received a copy of a letter from Mr. Rutherford dated January 29, 1996 to Dr. Lappi (Exhibit E-15) asking for some clarification regarding the restriction imposed by Dr. Lappi. When asked after receiving Exhibit E-15 if the grievor had gone to ask Dr. Lappi to remove the restriction, or to get one of his other doctors to modify the restriction, the grievor said he had not attempted to do this. Mr. Creamer then identified as Exhibit E-16 a letter from Sun Life dated February 6, 1996, indicating that his request for disability was not approved.

When asked by Mr. Lafrenière if he was content to stay on leave until all of his leave credits were used up, Mr. Creamer indicated he would have preferred to have

been back at work. He agreed however that all of his leave requests were granted and all leave credits were used by him. Mr. Creamer testified he made a request for discretionary leave when he found out that he would be taken off strength by his employer and that he made this request before his grievance. Mr. Creamer believed to the best of his recollection he asked Mr. Rutherford to grant him discretionary leave a day or two before he filed the grievance. He did not have any written documentation to prove this even though in the past he had made a number of written requests. He could not recall for what specific period he had asked for discretionary leave. Mr. Creamer added that his request for discretionary leave was denied. He was also not quite certain what exact period he was asking for discretionary leave, nor could he recall how it was denied. Mr. Creamer reiterated that it seemed unlikely he would not have put such a request in writing. He added: "You cannot file for a denial unless it is denied." He grieved on March 5, 1996.

The grievor identified another letter from Dr. Lappi dated March 6, 1996 (Exhibit E-17) indicating that he was delaying his explanation as to why the grievor was restricted to not working in Manitoba since he was waiting for a report from one of Mr. Creamer's care providers. Mr. Creamer identified Exhibit E-18, a letter dated April 4, 1996 from Dr. Lappi indicating that the grievor and Dr. Lappi were in the process of developing a new set of job restrictions for the grievor. He also identified an April 11, 1996 letter from Jerome Berthelette (Exhibit E-19) that expressed continued concern regarding clarification of Mr. Creamer's restrictions to work in Manitoba. The grievor identified a copy of his leave usage for fiscal year 1995-1996 that indicated he was on annual leave into March 1996.

Mr. Creamer identified an offer of employment to work in Sudbury, Ontario dated May 29, 1996 (Exhibit E-21) on which the grievor indicated he would only be available for work in August of 1996 and not June 3rd as the letter offered. Mr. Creamer explained that he did this because he was going to have a hernia operation during the summer of 1996. Mr. Creamer admitted he had an outstanding complaint before the Canadian Human Rights Commission against the department seeking the return of all his sick leave and vacation credits because of harassment by Mr. Rogers which is essentially the same remedy which he is seeking in the grievance before me today. He added he was harassed again in 1994 by an engineer in the department and felt that Mr. Rogers still had an indirect influence in his life. In

conclusion Mr. Creamer said he discussed with Dr. Lappi modifying the restrictions that he had placed on him, but the grievor did not know if this was ever put to his employer.

During re-examination, Mr. Creamer testified that Dr. Lappi, himself and Dr. Stambrook had a discussion regarding the modification of the restriction that he could not work in Manitoba. It was not modified. He reiterated that as late as June 1995, even though there had been a restructuring of his reporting relationship, he felt Mr. Rogers would still have a functional responsibility in his region and an influence in his life. Mr. Creamer believes that he had his hernia operation in July of 1996. When asked what would happen to a request for leave form if leave was denied, Mr. Creamer said: "The form would be scrapped."

Argument for the Grievor

Mr. Dagger argued that the grievor's absences were for reasons beyond his control. He reminded me that the Public Service Commission determined that Mr. Creamer had in fact been harassed by his supervisor (Exhibit E-1), and that the employer acknowledged the effects of the harassment were ongoing. He reminded me that this was in fact confirmed as late as February 14, 1996 in Mr. Cochrane's letter (Exhibit G-6) where he talked of Dr. Stambrook's confirmation of the treatment required for the grievor. He reminded me that Dr. Lappi, Dr. Stambrook and the grievor all met and determined that Mr. Creamer should in fact not go to work in Manitoba. He argued that the employer is now saying tough luck for Mr. Creamer but in 1996 it did not say that when it approved medical payments to Dr. Stambrook. He argued that the employer acknowledged the harassment was its responsibility on the one hand; on the other, the employer forced Mr. Creamer to use all of his sick and annual leave credits. Since the harassment was in effect the responsibility of the employer, Mr. Dagger argued that these leave credits should not have to have been used by Mr. Creamer. Mr. Dagger argued that Exhibit E-14, Dr. Stambrook's letter to Mr. Cochrane in January of 1996, sets out a proposed treatment plan for Mr. Creamer that would have been an ongoing program for him; yet the employer would have me believe that Mr. Creamer had to use all of his leave credits during this period.

Mr. Dagger also argued that the employer has a duty to accommodate and even though it allowed Mr. Creamer to take leave, this duty to accommodate in fact arose out of the employer's original conduct since Mr. Creamer became ill because of harassment by Mr. Rogers. He reminded me there is no evidence that Mr. Creamer did not cooperate with the employer's doctor; he referred me to Exhibit E-18 that indicates Mr. Creamer, his care provider and Dr. Lappi were working together to develop a new set of job restrictions. Mr. Dagger concluded that I do have the authority to grant the remedy of discretionary leave in place of the various leaves that the grievor took under protest as Mr. Creamer indicated in Exhibit G-1 dated February 1, 1996, the day he completed his annual leave. Mr. Dagger concluded the grievor was not properly accommodated because the employer's own doctor confirmed the problem for Mr. Creamer was caused by harassment in the first place. He should therefore not have been told to use his sick leave credits since this type of leave is primarily for random incidents of illness and not for an ongoing problem initially caused by the employer.

Mr. Dagger concluded that it was therefore proper for the grievor to submit his grievance as his leave was running out in March of 1996; counsel requested that I grant discretionary leave for the period November 10, 1995 to June 19, 1996. Counsel referred me to *Richmond et al. v. Attorney General of Canada* (1996), F.C.C. (Trial Division), T-1293-95.

Argument for the Employer

Mr. Lafrenière argued that it is important to read the provisions of Article M-21.13 from the Master Agreement. He reminded me that this article reads that the employer at its discretion may grant leave with or without pay for other reasons. He said the standard of review by me here is therefore very low. He asked if the employer had been patently unreasonable, arbitrary or discriminatory against Mr. Creamer, and concluded there was no evidence of this at all. Mr. Lafrenière asked that I look at the history of the Creamer situation and conclude that the employer has in fact been very patient with and sympathetic towards him. Mr. Lafrenière submitted that it has never been admitted by the employer that the harassment Mr. Creamer endured was in fact the cause of his illness. Although Mr. Cochrane's letter

(Exhibit E-1) is dated June 1995, Mr. Lafrenière asked to distinguish what happened before 1995 and what has happened after June 1995.

Mr. Lafrenière argued that the grievor is simply trying to “milk the system for all its worth”, since he was once given back his leave credits, used them all up again, and now has the gall to ask to get them back for a second time. He argued that the employer had complied perfectly with the collective agreement up to March 5, 1996 when the grievance was submitted, and now it is being ambushed by the grievor who wishes to revisit all that was done leading up to March 5, 1996. Mr. Lafrenière referred me to *Coram* (Board file 166-2-26681) as a case that has the same principle as what is before me, namely, Mr. Coram went on leave and then changed his request after he came back from leave. One simply can not do that. Mr. Lafrenière argued it would be just common sense for an employee to first deal with the issue of leave request or leave denial before filing a grievance since the employer must have at least some knowledge of what it is dealing with. He reminded me that Mr. Creamer went back five months in time to the surprise of everyone with his grievance, since it was dated March 5, 1996 and asked for special leave or discretionary leave going back to November 10, 1995. Mr. Lafrenière referred me to the decision in *The Queen (National Film Board) v. Coallier et al.* (F.C.A. File A-405-83) (unreported) that indicated a grievor can simply not go back that far in time without a valid explanation as to why his request was not filed in November of 1995. Mr. Lafrenière argued that I should therefore reject outright the grievor’s request for discretionary leave from November 10, 1995 to March 5, 1996.

Counsel argued that the confusion was compounded even further in Exhibit G-5, that is Mr. Creamer’s January 19, 1996 letter to Mr. Cochrane that asks on page 2, number 3 for all of his leave credits since June 26, 1995 and not November 10, 1995 be credited to him. Mr. Lafrenière reminded me the grievor testified he submitted a request for discretionary leave a day or two before he filed his grievance. The employer has no record of this request and there is no evidence of it before me. Counsel reminded me that what I have to determine here is the veracity of Mr. Creamer in this matter regarding his request for special leave that has disappeared.

Mr. Lafrenière also argued that the grievor's claim of alleged illness from November 1995 onwards that was still due to harassment by his department was false. He reminded me that, since the grievor was not at work during this period, how could it be possible for him to have been subject to further stressors. Mr. Lafrenière argued that Exhibit E-14, Dr. Stambrook's January 18, 1996 letter to Mr. Cochrane, indicates that he first saw the grievor on August 23, 1995 but at that point Mr. Creamer had been away from work since June of 1995. Mr. Lafrenière wondered how he could be under stress that late in August.

Mr. Lafrenière reminded me Dr. Lappi had said in the decision rendered by Deputy Chairperson Korngold Wexler (*supra*) that the grievor is subject to stress and has had stress in his life since 1987. Mr. Lafrenière also reminded me that the duty to accommodate is a two way street. The employee must help the employer in this matter. He argued Dr. Lappi is only a reference for the employer but does not speak for the employer; he reminded me that Mr. Creamer followed Dr. Lappi's advice and now wants a lot of money for it.

Regarding the attachment to Exhibit E-4, a medical note from Dr. Epp, Mr. Lafrenière noted that there is no reference to harassment in this note as the cause of stress to Mr. Creamer. He also argued that Exhibit E-6, Dr. Lappi's November 10, 1995 memorandum to Mr. Rutherford indicates, that Mr. Creamer is at the point where a return to suitable work is appropriate, albeit not in Manitoba, but there is no mention of harassment in this memorandum either. Mr. Lafrenière referred me as well to Exhibit E-8, a handwritten note by Dr. Epp dated November 9, 1995 that also makes no reference to harassment, only the need for the grievor to be on sick leave. Counsel also referred me to Exhibit E-9, the request for interdepartmental transfer signed by the grievor on November 20, 1995 that indicates his date for availability would only be February 1, 1996; Mr. Lafrenière wondered how in November the grievor would know he would not be available for work until February 1996. Similarly, with reference to Exhibit E-21, the offer of employment in Sudbury, Mr. Lafrenière was confused again since the letter was dated May 29, 1996 and only signed by the grievor on June 20, 1996; counsel wondered why he could not have taken up his duties earlier. Overall, Mr. Lafrenière concluded that enough was enough, and that Mr. Creamer has demonstrated a complete lack of responsibility in this matter.

He argued that the many attempts by the employer to solve his problem demonstrate that there has been no bad faith by the employer and that paragraph M-21.13(a) is not applicable in this case since he believes Mr. Creamer could have reported for duty earlier in June 1996 since he had control of his life at that point but chose not to exercise it. Mr. Lafrenière concluded by saying that paragraph M-21.13(b) was also not applicable since there are provisions in the collective agreement for sick leave that were not used by Mr. Creamer. He ended by saying that the grievor could have applied for leave without pay but that Mr. Creamer now only wants to make money.

In rebuttal argument, Mr. Dagger indicated that he never ceased to be shocked by the arguments of the employer. He referred to the offer of employment in Sudbury (Exhibit E-21). He pointed out that Mr. Lafrenière did not ask the grievor during cross-examination as to when he received this letter, and could now not draw adverse conclusions from the fact that it was only signed on June 20th. Mr. Dagger also argued that Exhibit G-6, Mr. Cochrane's letter of February 14, 1996 to the grievor, confirms that Dr. Stambrook said his treatment is attributable to workplace stressors due to the harassment he had suffered. Mr. Dagger concluded that the Assistant Deputy Minister has conceded in fact that his illness was due to harassment. Mr. Dagger reminded me to look at paragraph 1 of Exhibit E-14, Dr. Stambrook's letter of January 18, 1996 to Mr. Cochrane that reinforces the finding of harassment against the employer. Mr. Dagger asked me to send a clear message that harassment is not acceptable. Mr. Dagger also argued that for Mr. Lafrenière to go back so far in time to 1987 and to pluck one line from the grievor's past history and attempt to say that the employer can now wash its hands of this entire matter is very perplexing.

Lastly, Mr. Dagger argued that the employer cannot unreasonably deny a request for discretionary leave by an employee, especially one who has been harassed, and then tell that employee that he is abusing the system. He asked me therefore to grant the grievance.

Decision

There is a long history in this matter that has been summarized in the extract from Deputy Chairperson Korngold Wexler's decision (supra). I am also familiar with

some of the grievor's workplace history as a result of my decision rendered on May 17, 1993, Board file 166-2-23231. This being said, I am now being asked to decide if Mr. Creamer was unreasonably denied discretionary leave under clause M-21.13 of the PSAC Master Agreement.

I believe that he was not. Since the granting of leave in this case was discretionary, I agree with Mr. Lafrenière that the threshold for the standard of review is indeed very low. With respect to this standard of review, former Chairman Deans wrote in the *Kahn-Tinetta Horn* decision (Board file 166-2-21068):

Clause M-21.13 refers to discretionary leave. The employer may in its discretion grant or refuse to grant such leave providing that its decision is not arbitrary, discriminatory or taken in bad faith. In relation to para M-21.13(a), there is the added requirement that such leave shall not be unreasonably withheld.

I do believe that in the case before me, the employer was not arbitrary, was not discriminatory, did not act in bad faith, and was not unreasonable.

I also believe that Mr. Creamer's grievance is untimely pursuant to clause M-38.10 of the Master Agreement. The grievor's request for leave, as far as I can determine, was first made known to the employer in his grievance dated March 5, 1996, even though he knew he was going to require special or discretionary leave from November 10, 1995. Mr. Creamer therefore "sat on his rights" for months as Mr. Lafrenière said for some inexplicable reason. In any case there is no evidence that Mr. Creamer requested discretionary leave before he submitted his grievance; therefore there is no evidence of denial of such leave before he submitted his grievance.

On the ground of untimeliness alone, I would deny the grievance.

However, on the merits of the case I wish to add the following. I believe that Mr. Creamer simply did not want to return to work and tried as Mr. Lafrenière said "to milk the system for all its worth" as is clearly demonstrated on his application to Sun Life for disability insurance (Exhibit E-7), where he did not write an expected date to resume employment. His application was not approved. This unwillingness to

return to work was reinforced when he signed the request for transfer (Exhibit E-9) on November 20, 1995 but put as the date available for work February 1, 1996.

I agree with Mr. Dagger that a clear signal has to be sent that harassment in the workplace is not acceptable. The Public Service Commission investigation report followed by Mr. Cochrane's letter of June 5, 1995 (Exhibit E-1) acknowledges that the workplace environment should be free of harassment. I agree. However, I have no evidence of ongoing harassment before me, medical or otherwise, subsequent to the above finding and apology by Mr. Cochrane. Mr. Creamer's leave credits were restored. He then proceeded to use them all again before relocating to Sudbury. Dr. Stambrook's letter (Exhibit E-14) dated January 18, 1996 speaks of the finding of harassment not of ongoing harassment. I acknowledge what Mr. Cochrane wrote in his February 14, 1996 letter (Exhibit G-6) to Mr. Creamer that reads in part:

... Dr. Stambrook confirmed that your treatment is attributable to workplace stressors due to the harassment you have suffered, and as such, I am satisfied that your treatment falls within the intent of the Harassment Policy. ...

However, since reviewing all of the facts and testimony after the fullness of this hearing, I am still of the opinion that there was no ongoing harassment. It is also noted that the grievor was not at work during the period of November 10, 1995 until March 5, 1996 the date of his grievance.

The duty to accommodate is indeed a two way street. Mr. Creamer showed little or no initiative and responsibility to make himself available for work during the leave period in question. He wrote Exhibit G-4 knowing full well the restriction placed on his employment by Dr. Lappi. The employer did accommodate Mr. Creamer by granting him leave and eventually deployed him to Sudbury in May 1996 (Exhibit E-21).

I have determined that the employer has not breached the discretionary leave provisions of Article M-21.13.

For all these reasons, this grievance is denied.

**J. Barry Turner,
Board Member.**

OTTAWA, July 16, 1997.