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Citation: 2000 PSSRB 29

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

KEITH W. ARMSTRONG

Grievor

and

TREASURY BOARD
(Public Works and Government Services Canada)

Employer

Before: Rosemary Vondette Simpson, Board Member

For the Grievor: James Bart, The Professional Institute of the Public Service of Canada

For the Employer: Ursula Tauscher, Counsel

Heard at Edmonton, Alberta,
December 16 to 18, 1997; April 7 and 8; September 15 to 18; November 30; and December 1, 1998; May 18 to 21; June 8 to 10; and July 27 to 29, 1999.
(Written submissions filed August 26, September 24 and October 8, 1999.)

[1] The grievor, Keith Armstrong, a professional engineer, was employed by Public Works and Government Services Canada (PWGSC) as a Divisional Manager for two years and four months before being assigned to special projects. His employment was terminated effective October 30, 1996. The letter from RA. Quail, Deputy Minister, which terminated his employment sets out the following grounds:

> *On the basis of the conclusions of the investigations, I am satisfied that there is sufficient substantiation of the allegations against you. Specifically, I am convinced that you violated the Treasury Board of Canada's Harassment Policy by your misuse of the power and authority delegated to you as a manager. Additionally, you have engaged in irregular and inappropriate contracting practices, thereby violating the Conflict of Interest Code and the Contract Administration policies. There is also evidence to the effect that you have violated your obligation and responsibilities in respect of the use of the departmental credit card assigned to you.*
>
> *I view your actions gravely since they jeopardized the relationship of mutual trust with Public Works and Government Services Canada in a very fundamental manner. Consequently, I am convinced that management can no longer rely upon you in the workplace.*
>
> *Effective immediately, and in accordance with the authority vested in me under paragraph 11(2)(f) of the Financial Administration Act, I hereby terminate your employment for cause by reason of your misconduct.*

[2] Keith Armstrong's grievance which was referred to adjudication on August 12, 1997, requested the following corrective action:

> *That the termination be rescinded and that I be made whole in all respects including reimbursement of all pay and benefits denied me as a result of the employer's action.*

[3] The hearing into this grievance commenced in December 1997 and ended in July 1999. Eleven witnesses were called on behalf of the employer. Their names and the dates on which they testified are as follows:

<u>December 16 and 17, 1997; July 29, 1999</u>

Henry Westermann
A/Divisional Manager
Alta/NWT Environmental Services
PWGSC Edmonton

(formerly: Manager
Environmental Audit and Assessment
Environmental Services
PWGSC Edmonton)

December 17 and 18, 1997

Roger Young
Investigator
Grievance Mediation and Arbitration Services

April 7 and 8, 1998; July 29, 1999

Michael Nahir
PC-03, Environmental Engineer
Environmental Services, Alta/NWT
PWGSC Edmonton

April 8, 1998

Edward Domijan
Environmental Project Officer
Environmental Services, Alta/NWT
PWGSC Edmonton

April 8, 1998

Debbie Jones
Administrative Assistant
Environmental Services, Alta/NWT
PWGSC Edmonton

April 8, November 30 and December 1, 1998

Ralph Gienow (retired)
Acting Regional Director
Architectural and Engineering Services
Western Region
PWGSC

September 15 and 16, 1998

Bernard Gagnon
Investigator
Internal Affairs Directorate
Audit and Review Branch
PWGSC Ottawa

September 16 and 17, 1998

Douglas Longley
Manager
Real Properly Contracting Unit
PWGSC Edmonton

September 17 and 18, 1998; July 29, 1999

Lawrence Borowski
ENG-05, Design Manager
Highways Group
PWGSC Edmonton

November 30, 1998

Bill Nosworthy
Director
Real Property Services
Canadian Heritage
PWGSC Western Region

July 29, 1999

Sandra Dickie (no longer with the Public Service)
Regional Manager
Staff Relations, Compensation and Systems
PWGSC Western Region

[4] On behalf of the grievor, the following witnesses were called, who testified on the dates indicated:

May 18, 1999

Brian Gray
Manager, Environmental Services
PWGSC Ottawa

May 19, 1999

Nick Tywoniuk (retired)
Former Regional Manager
Environmental Services
PWGSC

May 19, 1999

Linda Melnyk
Former CR-03 Clerk
Environmental Services Unit

May 20, 1999

Frank Smith
(father-in-law of Keith Armstrong; formerly of Track Industries)

May 20 and 21; June 8-10; July 27-29, 1999

Keith Armstrong

Summary of Evidence

[5] It would be impossible to summarize in detail all of the evidence of the numerous days of hearing during which 16 witnesses testified, some at great length. I will endeavour to summarize the major points of evidence relating to the four areas of misconduct as alleged in the letter of discharge.

[6] The grounds for the termination of Keith Armstrong's employment fall into four areas:

I Harassment of Henry Westermann
II Conflict of Interest
III Contracting Irregularities
IV Departmental Credit Card Misuse

I Harassment of Henry Westermann

[7] When Keith Armstrong was given the position of Manager of the Environmental Services Unit, Henry Westermann was its most senior employee. Henry Westermann acted as the Divisional Manager before Keith Armstrong was appointed to the position. Shortly after Keith Armstrong's arrival, Henry Westermann was promoted from Project Officer (PC-02) to Manager, Environmental Audit and Assessment (PC-03) (Exhibit G-76).

[8] Michael Nahir was hired by the Department as an ENG-03 (Project Engineer) in March 1995 on a term basis whereas Henry Westermann was a PC-03, a position senior to Michael Nahir's (Exhibit E-54). Henry Westermann was an indeterminate employee with nine and one-half years of experience at the time. Keith Armstrong and Henry Westermann were on the hiring panel for Michael Nahir. The organization chart showed Michael Nahir's position as reporting to Henry Westermann and Henry Westermann testified that he was aware that the occupant of the position reported to him (Exhibit E-13 - organization chart dated February 1, 1995.)

[9] Keith Armstrong testified that he intended that Michael Nahir's position report to him and he thought it did. He stated that he did not became aware that Michael Nahir reported to him through Henry Westermann until the fall of 1995 when he made a request for that information from the Department.

[10] Documents presented by the employer indicated that Keith Armstrong had knowledge of Michael Nahir's reporting relationship to Henry Westermann. When Keith Armstrong requested Human Resources to change Henry Westermann's position title in early July 1995, he used Henry Westermann's position number on his request. That number is the one appearing on the organization chart as belonging to the person to whom Michael Nahir reported. There is thus objective evidence to indicate that Keith Armstrong was aware of Michael Nahir's reporting relationship.

[11] Henry Westermann testified that there had been a number of acrimonious exchanges between himself and Keith Armstrong since they started working together. In his evidence, Henry Westermann described a meeting, which took place on September 25, 1995. Keith Armstrong insisted on including Michael Nahir, who was Henry Westermann's subordinate, in this meeting. Since the purpose of the meeting was to review Henry Westermann's performance appraisal, Henry Westermann vehemently protested the presence of Michael Nahir.

[12] In the performance appraisal itself, Henry Westermann's position was incorrectly stated to be "project officer". According to Henry Westermann's evidence, Keith Armstrong originally told him that this was a mistake but later in the meeting Keith Armstrong told Henry Westermann that he was unaware of his actual title.

[13] At his performance appraisal review on September 25, 1995, Keith Armstrong gave Henry Westermann three "administrative" letters. Henry Westermann testified that Keith Armstrong told him that non-compliance could lead to his dismissal. Keith Armstrong, in his evidence, did not dispute this.

[14] One letter related to contaminated sites and stated as follows:

> *This letter is to advise you that you are not to provide expertise or advice to clients with respect to contaminated sites or issues. Requests for advice on contaminated sites are to be discussed with either Michael Nahir or myself.*

> *I would like to see you manage such a project under the supervision of either Michael Nahir or myself and we will discuss this on a project specified basis.*

[15] Keith Armstrong testified as to his reasons for presenting Henry Westermann with this letter. He felt that Henry Westermann did not have the requisite expertise in the area of contaminated sites. He testified that his concerns for Henry Westermann's knowledge of and expertise with contaminated sites arose out of Henry Westermann's work related to the Bishop Piché project and also the Sprague Building in Edmonton. He also testified that the most high profile and prestigious work of Environmental Services was in the area of dealing with contaminated sites. According to Keith Armstrong's evidence, Henry Westermann did not even know what a feasibility study was and he considered Henry Westermann to be out of his depth when he worked on the very contaminated Bishop Piché site.

[16] Henry Westermann, in his evidence, presented his résumé, which showed that he did have knowledge and experience in the area of contaminated sites. He testified that Keith Armstrong knew that he was working on the Bishop Piché project and did not change his assignment nor supervise it more closely. The witness not only knew what a feasibility study was, but he had taken soil samples at the field trip in June 1995, which were used as the basis for the consultant's analysis and report of remediation options. Also, Henry Westermann had previously been involved in the Coppermine project where a feasibility study was done.

[17] With regard to the Sprague Building, Keith Armstrong indicated his dissatisfaction with Henry Westermann's work in an environmental audit he did of the building in 1994. Keith Armstrong was concerned that the client considered the building ready for sale but it was not ready for sale because there were fuel tanks in the ground. He testified that Henry Westermann was of the opinion that the tanks did not have to be removed before the land could be sold. He found it unprofessional that Henry Westermann did not agree that the tanks were in a position of non-compliance.

[18] Henry Westermann's testimony explained that, when he conducted the environment audit, he discovered that the tanks had been decommissioned and filled with sand in 1985. He made inquiries of the local fire Marshall and was told that, while the legislation had now changed, it was not mandatory that the tanks be removed at the audit stage. Henry Westermann noted this in his audit report (Exhibit E-92):

> *No immediate action is recommended to assess the contamination but this information must be provided at the time of sale of the property and the issues investigated at the time.*

[19] Henry Westermann was dealing with the audit stage only and quite specifically recognized that more might have to be done when a sale was contemplated.

[20] Henry Westermann stated that Keith Armstrong took away a substantial part of his duties when he was forbidden to deal with contaminated sites.

[21] At the performance appraisal meeting, Keith Armstrong presented Henry Westermann with what has been called a "Specific Service Agreement" (SSA) administrative letter, which reads:

> *This letter is to inform you that you are not to enter into any specific service agreement (SSA) without the prior approval of either the Deputy Divisional Manager or myself.*
>
> *Prior approval will involve a signature of either the Deputy Divisional Manger or myself on the SSA.*

[22] By Deputy Divisional Manager, Keith Armstrong meant Michael Nahir. This was a title that Keith Armstrong had given Michael Nahir without a formal process when Michael Nahir was a newly hired term employee who reported to Henry Westermann on the organization chart.

[23] Keith Armstrong testified that he was concerned about a SSA that Henry Westermann had drafted for the Coppermine operation. He felt that it did not look professional and the description of services was totally inadequate. He testified that he had told his staff at staff meetings how he wished SSAs to be completed, although this may not necessarily have been reflected in the minutes. He stated that he expected SSAs to be prepared in the same manner as those for Discovery and Rayrock mines - in typewritten format with terms of reference attached. When it was pointed out to him in cross-examination that the Copper Mine SSA, which Henry Westermann drafted, indicated that there is an attachment, he stated that he had not seen the attachment and was not aware that there was one. It was Henry Westermann's evidence that the attachment set everything out with the detail required by Keith Armstrong. One of the employer's exhibits (Exhibit E-67) shows a bundle of SSAs, which were prepared by Keith Armstrong in a number of different

styles. Some of these had very brief descriptions of the services to be performed and others were hand-written.

[24] Henry Westermann testified that he was given no idea by Keith Armstrong what the concerns were with his Copper Mine SSA and Keith Armstrong admitted that he had not tried to clarify the matter with Henry Westermann. In fact, the uncontradicted evidence of Henry Westermann was that he received an E-mail from Keith Armstrong on July 5, 1995 requesting that he not enter into any SSAs without the prior approval of Keith Armstrong. Although Henry Westermann's position description provided that he prepare SSAs, he refrained from doing so after Keith Armstrong's request of July 5. There was, therefore, no need for the administrative letter of September 25 regarding this subject.

[25] Keith Armstrong claimed that Henry Westermann failed to keep him informed of the work he was doing and he testified that directing Henry Westermann to do SSAs only under the restrictions he imposed would ensure that he was aware of the projects that Henry Westermann was working on.

[26] With regard to the communication problems that Keith Armstrong cited in his evidence, Henry Westermann testified that he kept Keith Armstrong informed about his projects at staff meetings and this is recorded in the minutes (Exhibits E-59, E-63 and E-64). He also stated that he sent E-mails to Keith Armstrong, which cover the time frame from July 21 to November 9, 1995 (Exhibit E-68).

[27] In cross-examination, Keith Armstrong stated that, as he recalled, his dissatisfaction with the way Henry Westermann was keeping him informed of his work and projects commenced about the time that staff meetings were no longer being held. He sent an E-mail on June 19, 1995 to Henry Westermann to warn him about keeping him informed. However, the staff meeting minutes for that same day, which were submitted by the employer, show that at a staff meeting on June 19, Henry Westermann did report on his work that day.

[28] On September 25, 1995, Keith Armstrong also gave Henry Westermann an administrative letter, which informed him of the relocation of his office space. An excerpt from that letter reads as follows:

> *This letter is to advise you that you will be relocating your workspace to the office space formally* [sic] *occupied by myself on the Highways side of the 9th floor.*
>
> *In keeping with your current situation in the workplace, this move will provide a closer working place to your supervisor and an opportunity to develop a more harmonious professional relationship throughout the division.*

[29] Both Henry Westermann and Roger Young, the departmental investigator on the harassment allegation, testified that it was the smallest work area in Environmental Services. They also described it as being comparable to the normal space occupied by a support staff employee who sits outside his or her boss' office.

[30] Henry Westermann testified that he made a number of attempts to meet with Keith Armstrong after September 25 to discuss the appraisal with him. A meeting was arranged but it did not take place. In his evidence, Keith Armstrong stated that he did not get a chance to meet with Henry Westermann because of his own busy schedule.

[31] Keith Armstrong attempted to alter Henry Westermann's position title to have it reduced from "Manager, Environmental Audit and Assessment", to "Project Officer, Environmental Audit and Assessment". Henry Westermann had previously occupied the project officer (PC-02) position but had been promoted to PC-03, Manager, Environmental Audit and Assessment. On July 5, 1995, Keith Armstrong communicated with Human Resources and requested that Henry Westermann's position title be changed back to "Project Officer" from "Manager". The Department made the decision not to change the position title (Exhibits E-26 and E-27). Keith Armstrong testified that he intended only to change the title and not the classification; Henry Westermann would remain a PC-03, but as a project officer not a manager.

[32] Keith Armstrong nevertheless directed that Henry Westermann's business cards carry the title of "Project Officer" rather than "Manager". Henry Westermann questioned this. He testified that Keith Armstrong told him that there was only one manager in the group and that it was he. Michael Nahir was given the title of Deputy Divisional Manager and Head of Contaminated Sites (Exhibits E-2, E-25 and G-5).

[33] A telephone list was also created which showed Michael Nahir as more senior than Henry Westermann. Michael Nahir's name carries the title "Manager and Head of Contaminated Sites" and his name appears before that of Henry Westermann.

[34] In his evidence, Michael Nahir stated that he put together a brochure (which he admitted contained a misstatement and exaggeration of his own qualifications) for Environmental Services which was to be used to market the services of that unit. He was provided with an organization chart by Keith Armstrong. The organization chart was unauthorized; it confuses the actual reporting relationship of Michael Nahir to Henry Westermann and downgrades Henry Westermann's position.

[35] According to Keith Armstrong's evidence, the chart represents a concept only. He went on to say that he would include whatever he believes the client wants and expects. This brochure was in fact sent to Parks Canada (Exhibits G-1 and E-14).

II Conflict of Interest

[36] The witnesses who testified in relation to this issue are Bernard Gagnon, Michael Nahir, Ralph Gienow, Frank Smith, Edward Domijan, Lawrence Borowski and Keith Armstrong.

[37] All employees, upon appointment, must read the Conflict of Interest and Post-Employment Code for the Public Service (the "Code") and signify in writing that they understand and will comply with the Code. Keith Armstrong testified that he received a copy of the Code and the Employee Certification document with his letter of offer of employment from PWGSC dated August 26, 1993 and that he read the Code and understood it. He signed the Employee Certification document on September 2, 1993 and returned it to PWGSC together with his acceptance of the offer of employment as Divisional Manager, Environmental Services.

[38] The allegations of conflict of interest were concentrated in four main areas:

I work done on Keith Armstrong's home by Lyle McKendry, owner of L&G Bobcat;

II the relationship between Keith Armstrong and L&G Bobcat during the work on the Sprague Building in Edmonton;

III the use of Environmental Resources Group Ltd for soil sampling; and

IV the relationship between Keith Armstrong and Track Industries.

[39] It was admitted by Keith Armstrong that he developed a close personal relationship with Lyle McKendry, owner of L&G Bobcat. They bought each other meals and socialized. It was also admitted that L&G Bobcat performed free labour on his home in St. Albert, Alberta, while that same contractor was performing official work for the Department. When interviewed by Bernard Gagnon, the departmental investigator, Keith Armstrong stated the work consisted of running some PVC piping from his home to a tree and then to the street. Bernard Gagnon testified that Keith Armstrong admitted to him that Lyle McKendry and one of his employees performed this work and it took approximately one and one-half hours. Keith Armstrong also admitted to Bernard Gagnon that what he did was not acceptable and that he regretted it.

[40] Michael Nahir stated in his evidence that Keith Armstrong told him the work L&G Bobcat had done on his house was the installation of weeping tiles. He also testified that Keith Armstrong told him another time that the work consisted of stump removal.

[41] Keith Armstrong testified that the work was of a minor nature and consisted of digging a small trench and running PVC piping from his home to a nearby tree.

[42] Edward Domijan testified he saw Lyle McKendry use Keith Armstrong's truck during the week of October 3, 1995. Keith Armstrong admitted at the hearing that Lyle McKendry used his truck all that week while performing work at the Sprague Building. Lyle McKendry then invoiced the Department at the superintendent rate, a rate which included an amount for the use of a vehicle. Therefore, L&G Bobcat invoiced the Department for the use of Keith Armstrong's truck on the Sprague Building project.

[43] Keith Armstrong testified that, because they had just returned from Rayrock Mine and L&G Bobcat had no equipment with it, it was preferable to have Lyle McKendry use his truck rather than incur the additional expense of a rental vehicle.

[44] Keith Armstrong arranged for the hiring of two former business associates (Don Beamish and Graham Smith) by L&G Bobcat, under the name Environmental Resources Group (ERG) Ltd, for a significant portion of the soil sampling work to be done for the removal of underground storage tanks in British Columbia.

Keith Armstrong did not consider consulting the Real Property Contracting Unit in Edmonton to assist him in the contracting process. ERG was simply awarded the contract.

[45] Bernard Gagnon testified that he questioned Keith Armstrong about his association with Don Beamish and Graham Smith. Initially, Keith Armstrong indicated to him that he did not know Don Beamish and Graham Smith very well. When Bernard Gagnon reminded him that they were former business partners of his in another company called Marpac, Keith Armstrong admitted that he knew them and that he had signing authority on the Marpac account when he was in Chiliwack.

[46] In direct testimony, Keith Armstrong stated that Don Beamish and Graham Smith were part of Marpac and that in his former association with them, he did have access to the Marpac bank account and that he performed services on behalf of Marpac on two occasions.

[47] A company by the name of Track Industries in Calgary was hired to provide parts (for the Isachsen project) through the L&G Bobcat contract. A Track Industries invoice was paid through the L&G Bobcat contract. Keith Armstrong also made an official government trip to Calgary to meet with Track Industries. Track Industries was partly owned by Keith Armstrong's father-in-law, Frank Smith.

[48] Bernard Gagnon testified that Keith Armstrong admitted to him that he arranged for L&G Bobcat to contact Track Industries.

[49] At the hearing, Keith Armstrong stated that L&G Bobcat was having difficulty locating parts for the equipment at Isachsen and he suggested that Track Industries be consulted. He also stated he discussed the type of equipment at Isachsen with his father-in-law and showed him pictures of this equipment. He stated that Environment Canada, which was the client, had asked him to make inquiries to determine whether it was feasible to sell this equipment. Because Track Industries manufactured this type of equipment, Keith Armstrong spoke to his father-in-law to get some ideas. Regarding the trip to Calgary in October 1995, where the purpose of travel is given as meeting with Track Industries, Keith Armstrong stated it was merely an introduction to another company (Diversified) that may have been interested in the Isachsen equipment. He stated at the hearing that he did not understand why Track Industries was an issue.

[50] Frank Smith, Keith Armstrong's father-in-law, testified that Keith Armstrong told him Lyle McKendry would call. He spoke to L&G Bobcat on two occasions and also gave Keith Armstrong an introduction to another company called Diversified. Other than that, Frank Smith stated he had no further involvement.

[51] A document called "Status Report" was introduced to shed further light on arrangements with Track Industries.

[52] In cross-examination, Keith Armstrong denied he had ever seen a copy of the document called "Status Report". Lawrence Borowski, however, stated in his evidence that he found this document in Keith Armstrong's working file on Isachsen. Michael Nahir also stated in his evidence that he had been asked by Keith Armstrong to review this document and to make comments on it. He did so (he identified his handwriting on the document) and returned it to Keith Armstrong.

[53] The Status Report is addressed to Dave Law of Environment Canada (the client at Isachsen). It contains information indicating that there was a side arrangement that L&G Bobcat keep a drill (a large tracked vehicle) in return for the work done during the summer at Isachsen and that there were discussions with Track Industries whereby Track Industries would acquire the vehicles at Isachsen in return for performing some of the clean-up work.

III Contracting Irregularities

[54] The two main problem areas concern the contracts with Soilcon Laboratories Ltd, whose principal was Michael Goldstein, and L&G Bobcat Ltd, whose principal was Lyle McKendry.

[55] The Soilcon contract is for consultant services. It is dated September 2, 1994 and the completion date is September 16, 1994. The contract cost is $6,900 and the services read:

> *To provide environmental expertise for the design on closure of Rayrock and Discovery Mines in the Northwest Territories.*

[56] Rayrock and Discovery are large mine sites located in the Northwest Territories. Rayrock is an abandoned uranium mine located approximately 150 km north-west of Yellowknife. This project involved a clean-up of the abandoned tailings materials.

Discovery is an abandoned gold mine located approximately 84 km north-east of Yellowknife. It was also a tailings clean-up project.

[57] Keith Armstrong testified that he knew of Soilcon while he was employed by the Department of National Defence at Chilliwack. Soilcon had conducted laboratory analysis work for him in relation to removal of underground storage tanks. Following discussions with his supervisor, Nick Tywoniuk, it was agreed to retain Soilcon on a sole source basis without solicitation of competitive bids. He requested a sole source contract with Soilcon because of the necessity of being on site September 13 to 16, 1994 and because Soilcon had a highly specialized background.

[58] Although Keith Armstrong stated that he arranged the sole source contract for Soilcon on the basis of Soilcon's highly specialized background and expertise in mining, he was unable to describe in any detail what Soilcon's expertise was, nor how the company might have acquired that expertise. He was unable to explain that on its website Soilcon, apart from its work on the Sullivan mine, only claims mining expertise acquired during the projects it completed for PWGSC (Discovery, Rayrock and Venus) mines.

[59] Soilcon submitted an invoice dated November 29, 1994, in the amount of $6,890.80 for the field trip and subsequent report. Keith Armstrong stated that notwithstanding what the invoice states, Soilcon did not prepare a report following the field trip.

[60] There were two amendments authorized by the grievor to the Soilcon contract, which brought the total cost of the contract up to $98,895.06:

(1) Amendment No. 1, dated January 24, 1995, in the amount of $30,000;
(2) Amendment No. 2, dated July 27, 1995 and approved August 17, 1995, in the amount of $61,995.06. In this Amendment, Soilcon is also asked to undertake a "Pathway Analysis" for Venus Mine.

[61] Invoices were approved for payment prior to the work being performed and the work was performed before an amendment to the contract was authorized. According to the departmental experts in contracting, this constitutes serious breaches of the departmental contracting rules.

[62] On May 18, 1995, Soilcon provided two estimates: one for anticipated work at Rayrock Mine and the other for anticipated work at Discovery Mine. The total of the two estimates was $59,762.

[63] On July 11, 1995, almost two months later, Soilcon submitted three invoices in the total amount of $64,842. No receipts were ever included with these invoices.

[64] On July 13, 1995, these invoices were approved for payment by Keith Armstrong. His stamp signature and date appear on these invoices.

[65] The actual expeditions to Rayrock and Discovery mines took place between July 17 and 24, 1995, and this is when the field work was actually done.

[66] Lawrence Borowski testified as to his findings in the Soilcon Review File. There is nothing on the file to indicate that Soilcon ever visited the Venus Mine site.

[67] On August 17, 1995, the amendment to the contract to authorize this work was approved.

[68] Keith Armstrong testified that the estimates provided by Soilcon on May 18, 1995 constituted a fixed price contract. This was confirmed by Brian Gray. Keith Armstrong stated that he and Brian Gray decided to hold Michael Goldstein to this price.

[69] Lawrence Borowski testified that the express terminology of the May 18 letters demonstrates that they are not part of a fixed price contract. The contract language used speaks of a proposed budget and estimates. The attached tables expressly indicate that these are estimates.

[70] The original Soilcon contract states that the method of payment is to be calculated on an hourly rate and the box for "fixed sum" is marked as "N/A". All of the invoices, including the two at issue (Invoice 1757 and Invoice 1758) list the number of hours spent for the consulting services. There is no suggestion in Amendment No. 1 or Amendment No. 2 that the method of payment has changed from the original contract.

[71] In a fixed price contract, the money is paid once the deliverable is received (unless the contract allows for interim payments). Here, Keith Armstrong approved the invoices of July 11, 1995 for payment on July 13, 1995. This is before the field trips were undertaken and before the final reports were received from Soilcon. There was no amendment in place to authorize and pay for the work done by Soilcon. According to the Department's senior management witnesses, the Department had no choice but to pay these invoices in relation to the field work because the contractor did this work in good faith and had to be paid. Since there was no provision for interim payments, Soilcon should not have been paid for the reports until satisfactory final reports were received by PWGSC. As of January 1996, final reports for Rayrock, Discovery and Venus mines had not been received by PWGSC.

[72] Soilcon also performed services for PWGSC in analyzing soil samples from the removal of underground storage tanks in British Columbia. There was no contract in place for this work.

[73] According to Douglas Longley, a problem arises especially with the invoices dated July 11, 1995, which brought the total billing to $98,000. At that time, only one amendment had been issued to the original agreement, which brought the authorized expenditure to $36,900. The second amendment was not issued until July 27, 1995, over two weeks after the date of the invoices. This amendment required the authorization of the Regional Director. The files give no indication that the Regional Director was ever made aware of the large increase in cost.

[74] Soilcon was, it seems, allowed to or directed to proceed with work by Keith Armstrong who had no authority to request such work. In addition to the question of the proper authorization of work, there is a question of why Soilcon was selected in the first place since the firm is located in Richmond, B.C., and the work was in the Yellowknife area.

[75] The SPEC index (which is a list of qualified firms) should have been used to select the firm to do this work. It was not used because Soilcon is not registered with SPEC. Urgency is no excuse for bypassing the SPEC's process because the identification of a firm from the SPEC index for a $5,000 contract can be accomplished in less than an hour.

[76] Keith Armstrong testified that the invoices were approved for payment by his superior.

[77] Keith Armstrong started by awarding a contract to Lyle McKendry (L&G Bobcat) to "...remove underground storage tanks in British Columbia (B.C.)...various locations predominantly throughout the lower Fraser Valley, B.C." The notice soliciting the bids described the project as outlined above. Douglas Longley testified that during the tendering period, the requirements were changed instructing bidders to include a rate for mobilization of each piece of equipment to and from work sites other than the Abbotsford airport. Firms in the Abbotsford area were therefore given preference because other firms would need to cover their costs for mobilization to Abbotsford within their hourly rates for equipment.

[78] The notice implied that Abbotsford was identified as the most likely main location of the work. One might reasonably expect a significant portion of the work to take place at Abbotsford with the majority of the work in the lower Fraser Valley. The invoices, however, reveal that all that work was completed within the first three months of the contract expending $106,000 of the $112,327 contract. Of that $106,000, less than $5,000 was spent for work at Abbotsford and no other work was carried out in the lower Fraser Valley.

[79] By a series of change orders and amendments to this original contract, Keith Armstrong arranged for Lyle McKendry to be the contractor for almost all of the successive work that Keith Armstrong had to arrange for the Department. The majority of work carried out under the original contract took place in five locations quite remote from the lower Fraser Valley: Victoria and Port Hardy on Vancouver Island, the Queen Charlotte Islands, Prince Rupert and Terrace. While some of the work in these locations was done by subcontract to L&G Bobcat (without any evidence of a competitive process), men and equipment were transported from Abbotsford to these locations incurring significant ferry and other transportation costs

[80] Later, changes made to the contract allowed Lyle McKendry to perform work at different locations in the Northwest Territories and in the high Arctic.

[81] The Treasury Board Manual on contracting guidelines says that:

> *Contracts should not be amended unless such amendments are in the best interest of the government, because they save time or dollars, or because they facilitate the attainment of the primary object of the contract.*

[82] According to Douglas Longley, a new contract should have been issued for the work in the Sprague Building in Edmonton. Making the work available to Edmonton contractors, many of whom are qualified, would have taken no more than two weeks and the competitive process might have resulted in savings. It makes no sense to bring Lyle McKendry in from the Arctic without any of his equipment to do the job when an Edmonton contractor could do the job. Since Lyle McKendry did not have any of his equipment with him, he had to subcontract anyway.

[83] The original contract with L&G Bobcat is a very simple form of contract and is merely for the supply of equipment and workmen. It allows for the provision, as and when required, of certain pieces of equipment at pre-determined rental rates and the provision of certain classes of workers at pre-determined hourly rates. There is no provision in the contract for amendments and therefore no contractual authority for issuing amendments.

[84] Douglas Longley explained that amendments and change orders could arise in construction contracts, unlike the L&G Bobcat contract (which is really an equipment rental contract). However, even in the case of construction contracts, Treasury Board guidelines impose the restriction that all change orders must be "consistent with the general intent of the original contract". The changes to the L&G Bobcat contract, which allowed Lyle McKendry to participate in the clean-up of mine tailings and other waste, including radioactive waste in the Arctic, are certainly well outside the general intent of the original contract.

[85] The original contract was awarded to L&G Bobcat for the "removal of underground storage tank systems and other environmental utilities - various locations" predominately throughout the lower Fraser Valley and other B.C. locations. It is an Agreement for the Supply of Equipment and Workmen. The contract was dated October 18, 1994 and the value was $112,370. As a result of the Change Orders, the total value of the contract amounted to $254,308.26.

[86] Keith Armstrong testified that a central site had to be chosen. He chose Abbotsford because he felt most of the work would be at Abbotsford.

[87] Various departmental witnesses, including Douglas Longley, familiar with contracting procedures testified that by specifying Abbotsford as the central location, the implication is that this is most likely the location of the main area of work. By specifying the location of the work as predominately the lower Fraser Valley, it would be expected that a majority of the work would be carried out in this area.

[88] According to the evidence of Keith Armstrong, L&G Bobcat was located close to Abbotsford, Lyle McKendry previously did work for Keith Armstrong, and Lyle McKendry had access to Keith Armstrong's telephone at home during the period before the awarding of the contract.

[89] When a review of the contract documentation was conducted, it was shown that less than $4,000 was spent at Abbotsford and no other work was carried out in the lower Fraser Valley. There is no substantiation in the documentation or by other evidence that most of the work was expected to be performed at Abbotsford. L&G Bobcat is from Sardis, which is not far from Abbotsford.

[90] Keith Armstrong was the design manager of the Rayrock Mine project and he involved L&G Bobcat in that project. When questioned as to what expertise L&G Bobcat could bring to bear on an abandoned uranium mine, he stated Lyle McKendry had been a former shift boss in a mine.

[91] The Atomic Energy Control Board (AECB) was involved in the Rayrock Mine project because it was the regulator and was required to give the ultimate approval for the project. The AECB strongly advised that no human being be allowed into the mine. Nevertheless, Keith Armstrong admitted that he allowed Lyle McKendry to do an exploration of the mine.

[92] The project meeting minutes indicate that as early as January 20, 1995, Lyle McKendry was considered for involvement on the project by Keith Armstrong. The minutes of January 20 indicate that "L&G Bobcat Ltd is to determine condition of mine shafts and investigate options within the mine". Keith Armstrong took no steps to set up a contract with L&G Bobcat for their services at Rayrock Mine. He did not

obtain a written estimate for the work from L&G Bobcat, nor did he obtain any estimates from other contractors or consultants.

[93] The project meeting minutes show that L&G Bobcat continued to be involved in the project in February 1995. L&G Bobcat was given the opportunity for radiation safety training along with the members of Environmental Services. Ultimately, in the field trip of September 29 and 30, 1995, L&G Bobcat was part of the team that undertook an exploratory trip into the mine (the raises) to look for a suitable location to store some highly radioactive material that was found on site.

[94] L&G Bobcat submitted an invoice in the amount of $765 for consulting services in relation to Rayrock Mine on February 27, 1995. The only contract in place with L&G Bobcat was an agreement for the supply of equipment and workmen in relation to removal of underground storage tanks, predominately in the lower mainland. There is no provision in the contract for L&G Bobcat to provide consulting services.

[95] L&G Bobcat's involvement in Rayrock Mine continued through to early October 1995. Bill Nosworthy then told Keith Armstrong that there would be no more work with L&G Bobcat.

[96] On July 31, 1995, L&G Bobcat invoiced PWGSC for $30,120.72 representing the expediting services of Braden Burry Expediting plus contractor's mark-up of $2,675.87 for the field trip that took place between July 17 and 27, 1995. Keith Armstrong approved this invoice for payment on August 1, 1995.

[97] L&G Bobcat did not go on this field trip. Keith Armstrong stated he requested one of his employees, Patrick Vallerand, to make the arrangements for expediting services. Patrick Vallerand arranged for Braden Burry to perform these services but neglected to have a contract set up. Keith Armstrong stated that when he became aware of this, there was insufficient time to go through the proper channels to have a contract with Braden Burry in place so he decided to funnel the cost through L&G Bobcat as a subcontract. All L&G Bobcat did was pay Braden Burry and invoice PWGSC. For this, L&G Bobcat charged and was paid a contractor's mark-up of $2,675.87.

[98] Braden Burry was also used to provide expediting services in relation to the field trip to Rayrock Mine on September 29 and 30, 1995. Here too the Braden Burry costs were paid through L&G Bobcat and a mark-up of 9.75% was applied. This time L&G Bobcat went along on the field trip.

[99] During cross-examination, Keith Armstrong stated L&G Bobcat made all the arrangements for the expediting services for this field trip. He had no recollection of why Braden Burry sent a fax dated August 10, 1995 to Michael Nahir. That fax contained a quote for expediting services for the Rayrock Mine field trip. In response to a question on re-direct examination, Keith Armstrong introduced a document showing the billing rate for his employees. He testified that he had L&G Bobcat make the arrangements for the expediting services because Lyle McKendry's hourly rate of $24.50 was less than any of his employees; it was more economical to have Lyle McKendry perform these services.

[100] Michael Nahir gave rebuttal evidence. He testified that Keith Armstrong gave him the task of organizing the Rayrock Mine field trip, including arranging for expediting services. He stated he solicited the quote from Braden Burry, undertook the requisite negotiations and attended at the site work to ensure Braden Burry had provided the necessary services. This evidence was not challenged by Keith Armstrong.

[101] Part of the services provided by L&G Bobcat was a report on Rayrock Mine. That report is undated and consists of a letter a little more than one page in length; yet the preparation time is recorded as 33.5 hours. Keith Armstrong testified that Lawrence Borowski used the information provided on the last paragraph in his design.

[102] In rebuttal, Lawrence Borowski stated the information he used for the design came from a report prepared by Keith Armstrong, a report that was substantially longer and contained much more detail. Contrary to Keith Armstrong's testimony, Lawrence Borowski stated he had never seen L&G Bobcat's report.

[103] L&G Bobcat was hired as the contractor for the clean-up work at the Isachsen Mine site.

[104] Lawrence Borowski, an engineer very experienced in contracting, testified that there was growing concern in the Department over Keith Armstrong's continued use of L&G Bobcat. For political reasons alone, it was undesirable to bring in a contractor from Abbotsford to work in the high Arctic, especially when he lacked any special skills to do so. The hiring of a local firm was to be preferred.

[105] In relation to the contractor's work, a price quote was obtained from a northern firm, Kenn Borek, in June-July 1995 for the summer work. That bid was higher than L&G Bobcat's and because of the opposition from others on the project team, Keith Armstrong stated that he consulted his supervisor, Nick Tywoniuk, who advised him to go with the lowest price. On this basis, L&G Bobcat was hired to do the work.

[106] Keith Armstrong confirmed that the two prices sought for the Isachsen work were not a competitive process handled through the Real Property Contracting Section (Douglas Longley' section). He was not sure what data was given to these two firms to allow them to submit a price even though he was the one who provided the information. He had no evidence to show that these firms were quoting on the same information and for the same work.

[107] There were no Terms of Reference, nor was there anything else in writing to show what L&G Bobcat was expected to do. Keith Armstrong confirmed that he told L&G Bobcat what work was to be done and that L&G Bobcat had no prior Arctic experience.

[108] L&G Bobcat went to Isachsen on two occasions: May and August 1995. The first trip was a site visit by L&G Bobcat. The engineering team was on site during the summer visit and it was at this time that L&G Bobcat started up some of the equipment. L&G Bobcat paid the expediting costs on this trip as well.

[109] In relation to the May site visit, L&G Bobcat did not submit any receipts for the expenses charged to and paid by PWGSC. The invoice dated September 5, 1995, in relation to the summer trip, contains a charge of $13,917.28 for unspecified material with no backup to support this charge.

[110] Keith Armstrong was given the task of removing the storage tanks at the Sprague Building owned by PWGSC in downtown Edmonton. He needed a contractor, he testified, who was qualified, licensed and gave good prices. He decided to use

L&G Bobcat without any competition, he said, because of time constraints and the fact that he was not very familiar with the tendering process.

[111] Keith Armstrong's evidence was that he used the tendering process for the initial contract with L&G Bobcat and was familiar with the services provided by Douglas Longley's group, the Real Property Contracting Unit.

[112] Douglas Longley stated that a search of the government computerized database of contractors (ACCORD) could be done in approximately one hour. Unlike B.C. (which is where L&G Bobcat is from), there is a licensing requirement for contractors in Alberta who remove underground storage tanks. Any contractor selected for the work would have to meet the licencing requirement. This would ensure a quality control measure on any contractor selected through the ACCORD system.

[113] Furthermore, Edward Domijan testified that removal of underground storage tanks is a common undertaking in Alberta and there are many contractors in Alberta who can do this type of work.

[114] The first phase of the Sprague Building project took place September 6 to 11, 1995. Mobilization costs of $973.50 were paid for L&G Bobcat to bring its equipment to Edmonton. During this time, the underground storage tanks and hoists were removed, soil samples were taken and the area was then re-paved.

[115] The second phase of the Sprague Building project took place in early October 1995. In examination in chief, Keith Armstrong stated he first became aware that the laboratory results showed contamination in the soil, which needed to be removed, while he was on a field trip with L&G Bobcat. It was his view that, because L&G Bobcat was travelling through Edmonton on his return trip, it was reasonable to use Lyle McKendry to conduct the second phase, the removal of the contaminated soil.

[116] Keith Armstrong was out of town with Lyle McKendry on the Rayrock Mine field trip of September 29 and 30, 1995, returning on October 1. Also on this trip were two employees of Environmental Services who also worked on the Sprague Building project: Michael Nahir and Edward Domijan. The laboratory results were sent to Keith Armstrong by fax on September 13 and 18, 1995. Edward Domijan testified that Keith Armstrong asked him to arrange for a contractor to complete the Sprague Building excavation and transport the contaminated soil to a disposal site.

Edward Domijan used the ACCORD system, obtained the names of five contractors and began the process of obtaining a price quote from one of the contractors. However, he was unable to complete this task because he was required to work on the Rayrock Mine. While on this field trip, Keith Armstrong told him that L&G Bobcat would be completing the Sprague Building work.

[117] During cross-examination, Keith Armstrong denied there was any discussion with Edward Domijan about the Sprague Building project. He did not recall delegating the duty of completing the project to Edward Domijan. He did not recall receiving the results of the laboratory testing that were faxed to his attention. He offered, by way of explanation, that he made Michael Nahir the project manager of the Sprague Building project and perhaps the laboratory results went directly to him. Yet when questioned further, he stated he first made Michael Nahir project manager on October 1, on the return trip from Rayrock Mine.

[118] While on the Rayrock Mine field trip, Keith Armstrong stated he discussed the Sprague Building project with L&G Bobcat. Keith Armstrong's time sheets show he recorded two hours on Saturday, September 1, and four hours on Sunday, September 2 (the day the team travelled back to Edmonton) on the Sprague Building project. Even though Michael Nahir and Edward Domijan were involved in the Sprague Building project and were with Keith Armstrong on the Rayrock Mine trip, he denied discussing the Sprague Building project with them. Later, he amended his testimony to agree that he was aware of the laboratory test results prior to the Rayrock Mine field trip and that he discussed the further work on the Sprague Building with the team (L&G Bobcat, Michael Nahir and Edward Domijan) on Saturday, September 30, 1995 while on the Rayrock Mine field trip.

[119] Keith Armstrong allowed L&G Bobcat to use his personal vehicle while working on the Sprague Building project. Edward Domijan testified that he observed L&G Bobcat using Keith Armstrong's truck one day during that week. Because the superintendent rate charged by L&G Bobcat includes the use of a vehicle, L&G Bobcat had invoiced and been paid for the use of Keith Armstrong's personal vehicle.

[120] The entire work carried out at the Sprague Building site during the first week of October 1995 was subcontracted; yet there is no evidence of any type of competitive process for any of the subcontracts. In addition, Edward Domijan stated he made the arrangements for disposal of the contaminated soil and supervised the sweeping of the site. L&G Bobcat invoiced three superintendent hours for this.

IV Departmental Credit Card Misuse

[121] Ralph Gienow testified on behalf of the Department. Linda Melnyk, Nick Tywoniuk and Keith Armstrong testified for the grievor.

[122] Ralph Gienow testified that, when an employee receives a MasterCard from the Department, that employee must sign an "Acknowledgement of Responsibilities and Obligations". At the same time, the employee receives copies of a PWRP-1, Acquisition Card Purchasing, and a PWRP-2, Inventory Control.

[123] Keith Armstrong signed this document on January 7, 1994.

[124] Keith Armstrong led evidence that he tried to set up an inventory list and Linda Melnyk testified that Keith Armstrong had asked her to complete an inventory list. She did so and gave it to him. Keith Armstrong testified that he does not remember receiving this inventory list.

[125] There are a number of rules governing the use of a card. The card can only be used personally by the holder and is not to be lent to others. There is also a per purchase dollar limit of $1000 and a total limit of $10,000 on the card. Attractive items, such as cameras, must be controlled by inventory and the card is not to be used for travel or relocation benefits.

[126] The MasterCard receipts (Exhibit E-24) show that Keith Armstrong allowed other individuals to use his MasterCard to make purchases. There was also evidence to show that Nick Tywoniuk, Keith Armstrong's supervisor, had allowed his administrative assistants to make purchases on his card, but only for office supplies.

[127] Keith Armstrong also allowed some purchases to be made, which exceeded the $1000 limit. Some purchases were only in violation of the rule when the GST was added. It was his evidence that he interpreted that the GST was excluded from the $1000 limit.

[128] Keith Armstrong also allowed his card to be used for travel on 16 occasions. Over a period of approximately 18 months, purchases for clothing and footwear were charged to his card for a total of $8,700.

[129] There are Treasury Board policies governing the purchase of clothing. Keith Armstrong testified that he was aware that Treasury Board policies existed but he never saw any of them. His explanation for the clothing purchases was that the clothing was needed for the remote and northern work and that no one told him what he was doing was wrong. He admitted that he made no attempts whatsoever to ascertain whether any procedures existed for such acquisitions.

[130] In his evidence, Ralph Gienow noted that he had checked and found no managers other than Keith Armstrong who purchased clothing with their departmental credit card.

[131] The receipts indicate the following purchases on Keith Armstrong's credit card:

(a) personal items (toothbrush and soap holder)
(b) underwear
(c) Ducks Unlimited sweatshirt
(d) numerous T-shirts
(e) belt
(f) denim shirt
(g) there are numerous examples of purchases of footwear
(h) there is also the purchase of eyeglasses without any heed to the special procedures for such purchases.

[132] There were a number of cameras and camera equipment purchased on the MasterCard. A total of eight cameras were purchased and none was placed in inventory and, therefore, there was no control of these items. Some of the cameras were valued at more than $200. Not all cameras were recovered.

[133] There was a purchase of $168.39 for a cellular phone and microphone. These items were not put in inventory and thus there was no control over these items.

[134] Debbie Jones, Keith Armstrong's administrative assistant, testified that she brought the improper use of the departmental credit card to Keith Armstrong's attention but he did not take her seriously.

Arguments

For the Employer

[135] The employer argued that Keith Armstrong had engaged in a campaign of harassment against Henry Westermann. He had abused his authority by using the powers of his position as Manager of Environmental Services to carry out this campaign. All of the acts by Keith Armstrong against Henry Westermann, as set out in the evidence, demonstrate a campaign to humiliate and demean Henry Westermann.

[136] The argument of counsel for the employer concludes with the following submissions:

> [...]
>
> *Conclusion*
>
> *237. In this case where Keith Armstrong was dismissed for cause, the burden of proof is on the employer to establish the following:*
>
> *a) that Keith Armstrong engaged in the activities and conduct upon which the employer relied;*
>
> *b) those activities are of such a character to warrant discipline; and*
>
> *c) discipline is warranted.*
>
> *Brown and Beatty, Canadian Labour Arbitration, 3rd ed., pages 7-22 to 7-28.*
>
> *238. It is submitted that the activities and conduct of Keith Armstrong that are relied upon by employer are of such a character that discipline is warranted. Mr. Armstrong violated the Treasury Board Harassment Policy by misuse of the power and authority delegated to him. The evidence demonstrates that Mr. Armstrong misused his power and authority as Divisional Manager of Environmental Services in regard to Henry Westermann. His conduct toward Mr. Westermann tended to demean and belittle Mr. Westermann in front of the other members of Environmental Services, all of whom were junior to him and some of whom (Michael Nahir and Ed Domijan) were his subordinates. In addition, Keith Armstrong used his position as Divisional Manager to attempt to take away position duties and to downgrade Mr. Westermann's position title thus endangering, undermining and threatening the economic livelihood of Mr. Westermann. The evidence in this regard has already been extensively reviewed.*

239. It is submitted that it has been demonstrated that Keith Armstrong engaged in irregular and inappropriate contracting practices on innumerable occasions thereby violating the Conflict of Interest Code and the contract administration policies. These relate to the Soilcon and Bobcat contracts which Mr. Armstrong negotiated, signed on behalf of PWGSC and administered. The many times he did so have already been outlined. PWGSC is the contracting arm of the Federal Public Service and contracting is one of the core responsibilities of employees like Mr. Armstrong. The integrity of the department's employees is critical; it is important that the department's employees are perceived to be acting openly, fairly and honestly. As a manager, Mr. Armstrong should have an even greater knowledge of departmental policies and procedures and should be aware of the impact of his actions on his employees. It is no answer to say that he was on a learning curve and that no training was given to him. Any employee should have the initiative and the wherewithal to find out the proper procedures. This applies even more so to Keith Armstrong who was an educated man with his engineering designation and who occupied a managerial position. There were resources available to him in every area and the evidence showed that Mr. Armstrong elected not to utilize them.

Cudmore (1996) 166-2-26517 [Tab 10]

240. Mr. Armstrong also placed himself in a real, potential or apparent conflict of interest on a number of occasions over an extended period of time. He does not appreciate the gravity of his actions, rather he sought to explain his behaviour away.

Walcott (1997) Board File 166-2-25590 [Tab 11]

241. It is further submitted that the evidence demonstrates that Keith Armstrong violated his obligation and responsibilities in relation to the use of the departmental MasterCard entrusted to him. This was not an isolated incident. It occurred over an extended period of time and involved numerous areas – purchases over the credit card limit, restrictive purchases, clothing, eyewear and footwear, books and a number of miscellaneous matters. Debbie Jones, the administrative assistant in Environmental Services, stated that she brought the improper use of the MasterCard to Mr. Armstrong's attention and he just laughed at her and did not take her seriously. Again, this demonstrates that Keith Armstrong had no regard for departmental policies and procedures.

242. The misconduct covers all aspects of Mr. Armstrong's employment, as a manager, in carrying out project work and in his dealings with contractors. These are not spontaneous acts that could be explained away as a momentary aberration.

Renouf (1998) Board File 166-2-27765 and 27766 [Tab 12]

243. It is submitted that the bond of trust between the department and Keith Armstrong has been irretrievably broken. Mr. Armstrong himself even admitted this was so when he stated that he was not sure he could work for this employer (PWGSC) again. Mr. Armstrong stated his primary concern was to clear his name. In many instances, Keith Armstrong did not accept responsibility for his actions but instead sought to explain the situation away or to blame others. Mr. Armstrong admitted at the hearing that the administrative letters issued to Henry Westermann were a mistake yet his testimony attempted to demonstrate the opposite (explain why they were justified). Indeed, in many instances, he did not recognize that what he did was wrong.

Thomson (1998) 166-2-27846 [Tab 13]

244. Further, Mr. Armstrong's demeanor demonstrated a hostility to the department and to those employees who testified on behalf of the department. Mr. Armstrong was uncooperative throughout the department's investigation of the allegations raised. He failed to provide an explanation to the substantive allegations against him despite being given the opportunities to do so. Those responses he did provide consisted, in the main, of attacks upon the character of the various investigators of the department. The department cannot accept Mr. Armstrong back in any capacity.

McLeod (1999) Board File 166-2-27845 [Tab 14]
Chong (1986) Board File 166-2-16249 [Tab 15]

245. Not only has Keith Armstrong refused to provide a meaningful explanation to the employer when given the opportunity to do so, he has not established the existence of any mitigating factors in his favour.

Brown and Beattie, Canadian Labour Arbitration *3rd, p. 7-224 to 7-228 [Tab 9]*

246. Keith Armstrong was a short term employee who has demonstrated no remorse nor acknowledged that what he did was wrong. He has formed his own successful contracting company which has even been successful in securing contracts with Federal and Alberta governments.

Green v Canada (Treasury Board) [1997] F.C.J. No. 964 (T.D.) [Tab 16]

247. In the event that it is determined that the misconduct of Mr. Armstrong does not warrant dismissal, it is submitted that the parties ought to be given an opportunity to make submissions and give evidence on whether damages can be awarded considering the corrective action requested and if so, the method of calculation and the amount of the damages.

Matthews v Canada (Attorney Genera) [1997] F.C.J. No. 1691 (T.D.) [Tab 17]

For the Grievor

[137] Keith Armstrong wanted someone present when he presented Henry Westermann's performance appraisal to him. He made an error in judgement when he selected Michael Nahir to be the witness, but at the time he did not know that Michael Nahir was Henry Westermann's subordinate. The appraisal itself is, by its nature, subjective and Keith Armstrong was not an experienced manager who might have done things differently. It was not made in bad faith.

[138] Keith Armstrong had definite concerns about Henry Westermann's abilities to deal with contaminated sites, to enter into specific services agreements. His instructions regarding specific services agreements would require Henry Westermann to report to him more frequently.

[139] There was no harassment involved in moving Henry Westermann's office to the space outside Keith Armstrong's door. Keith Armstrong himself had occupied this space at one point. Keith Armstrong was an extremely busy manager who devoted an inordinate amount of time to project work and not enough to administrative work.

[140] The fact that there was a delay in imposing discipline for the harassment allegations should be considered in mitigation. Progressive discipline should have been employed. A case for discharge has not been made out.

[141] The argument of the grievor's representative concludes with the following submissions:

> [...]
>
> ***10. CONCLUSIONS***
>
> *10.(1) The Employer has assembled a formidable arsenal of misconduct to support a case for discharge. Some of it has been proven; a considerable amount of it has not. No dishonest behaviour has been demonstrated within the generally accepted standard of proof required to prove such an allegation. The bond of trust cannot be said to have been irrevocably broken, nor has it been proven that Armstrong could not bring himself up to acceptable standards of performance through the application of progressive discipline.*

10.(2) What has been presented in evidence is a picture of a green and naive employee who was ill-equipped to handle some of the critical aspects of his job. He was given a mandate by his boss and was told to go out and acquire new business and make money. He did exactly that. In the process, he made a number of mistakes, some of them serious, and he now obviously realizes that.

10.(3) The Employer gave him no help. They did not train him nor did they monitor those aspects of his performance that are now being held up as culpable conduct worthy of termination. That does not exonerate him or excuse his mistakes. In circumstances such as this, however, it is reasonable to expect that he should have been given the opportunity to correct his performance through the application of progressive discipline. That, obviously, did not happen.

10.(4) The chronology of events is instructive:

- *In May of 1995, Nosworthy investigated the circumstances behind the L&G Bobcat contract [Exhibit G-22]. If any shortcomings were noted, the Employer did nothing.*

- *In October, 1995, Nosworthy became aware of the circumstances connected with the change orders. The Employer did nothing.*

- *On February 8, 1996, Roger Young completed the report of his investigation into Westermann's complaint of harassment. The Employer did nothing.*

- *On April 2, 1996, Bernard Gagnon completed his investigation into Armstrong's contracting practices.*

- *On June 24, 1996, the R.C.M.P. submitted the findings of its investigations into certain aspects of Armstrong's contracting practices [Exhibit G-13].*

- *On June 24, 1996 the Department presented Armstrong with its findings of misconduct.*

- *Sometime after August 1, 1996, Gienow commissioned an audit of Armstrong's acquisition card usage.*

- *On October 30, 1996, Armstrong was discharged.*

10.(5) It is evident that the Employer was determined to fire Armstrong and expended its efforts in building a case for discharge through an examination of every aspect of his employment. In effect, the Employer saved up the incidents of culpable behaviour or alleged culpable behaviour until it thought it had enough.

10.(6) The course decided upon by the Employer runs counter to the principle of progressive discipline. As was stated by the Arbitrator in Re Simon Fraser University and Association of University & College Employees (1990) 17 L.A.C. (4th) 129 (Munroe) [Case Book, TAB 20]:

> *I have commented more than once on the seriousness of the grievor's misconduct. Of course, that must be an important consideration in my assessment of whether the university's disciplinary response to the situation was excessive. But at the same time, it must be said that the decision to dismiss the grievor stands out as an apparent deviation from the accepted norm of a disciplinary progression, i.e., from the commonly accepted view that wherever reasonably practicable, industrial discipline should be designed to correct and rehabilitate; not simply to punish and discard.*

10.(7) While the evidence establishes some culpable behaviour on Armstrong's part, it does not support a case for discharge especially in the absence of any course of progressive discipline. We submit that the rationale set out in Re Simon Fraser [supra] is applicable in the instant case:

> *No doubt, the presumption favouring a disciplinary progression is not absolute. Indeed, for some offences in some circumstances, the employer's legitimate interests will demand arbitral acceptance of the penalty of dismissal for even a single occurrence. However, implicit in the modern just cause standard is the notion that for most offences in most circumstances, an employer will take the path of corrective discipline prior to resorting to the ultimate sanction of a severance of the employment relationship. It follows that in the usual run of cases, "...if an employer is going to deviate from the accepted approach of progressive discipline he must at the very least come forward with clear and compelling justification for discharge as the only response reasonably available to him": see Palmer, Collective Agreement Arbitration in Canada, 2nd ed. (1983), p. 298...*
>
> *Within that general frame, and for the reasons already expressed, I am of the opinion that the dismissal of the grievor was excessive in the circumstances. While I accept that the grievor's misconduct struck at the roots of the employment relationship, I am not satisfied that it justified a wholesale abandonment of the theory of progressive discipline. On the contrary, I am of the view that an appropriate intermediate response can have the result*

> *of restoring the employment relationship to its proper equilibrium.*
>
> *10.(8) On the basis of the foregoing and in consideration of all the circumstances, we submit that a period of suspension would be equitable.*
>
> *10.(9) At the same time, we are mindful of Armstrong's equivocal answer to one of the Adjudicator's questions. We are also mindful of the Employer's demonstrated but unwarranted view of Armstrong. Finally, we are mindful of the Adjudicator's authority to fashion a remedy which she might deem appropriate in the circumstances. If the Adjudicator determines to exercise her authority to not reinstate Armstrong, we submit that her decision should incorporate the following elements:*
>
> *(a) A finding that there was no dishonest motivation or conduct on Armstrong's part;*
>
> *(b) A finding that discharge was not warranted; and*
>
> *(c) An award of 24 months wages in lieu of reinstatement as an equitable remedy. In this latter respect, the Adjudicator is referred to the recent decision in Ling [PSSRB File 166-2-27472] wherein the Adjudicator awarded 48 months pay in lieu of reinstatement. The grievor in that case* had eight years service.

Reasons for Decision

I Harassment of Henry Westermann

[142] The Harassment Policy of PWGSC (Exhibit E-5) sets out as its policy objective its aim "to provide a work environment that supports productivity and the personal goals, dignity and self-esteem of every employee". The policy sets out:

> *3. Every employee will be treated fairly in a work environment that is free of harassment and supportive of their dignity and self-esteem. HARASSMENT IS UNACCEPTABLE; IT WILL NOT BE TOLERTED IN ANY FORM ...*

[143] Harassment is defined as follows:

> *7.a) Harassment means any improper behaviour that is directed at and offensive to a person and which a person knew or ought reasonably to have known would be unwelcome. It comprises objectionable conduct, comment or display made on either a one-time or continuous basis that*

> *demean, belittle, cause personal humiliation or embarrassment to an employee...*

[144] Abuse of authority is defined as follows:

> *7.c) Abuse of authority means an individual's improper use of power and authority inherent in the position held, to endanger an employee's job, undermine the performance of that job, threaten the economic livelihood of the employee, or in any way interfere with or influence the career of such an employee. It includes such acts or misuses of power as intimidation, threats, blackmail or coercion.*

[145] The Policy also sets out the responsibilities of managers:

> *12. Managers and supervisors are responsible for providing leadership. They must set both the example and the standard of conduct in treating people with mutual respect and dignity while fostering a climate free of all forms of harassment.*

[146] Keith Armstrong's treatment of Henry Westermann, which demeaned and belittled him and actually placed him in danger of losing his job, was a serious abuse of Keith Armstrong's authority as a manager. This conduct was made all the more serious because Keith Armstrong, as a manager, had a special responsibility to provide leadership in enforcing the Department's harassment policy.

[147] In order to justify his treatment of Henry Westermann in placing restrictions on him, Keith Armstrong alleged a lack of knowledge and experience on the part of Henry Westermann. When Keith Armstrong was given the opportunity to provide support for his allegations against Henry Westermann and Henry Westermann was given an opportunity at the hearing to defend his work, it was clear that there was no basis for the conclusions Keith Armstrong had reached about Henry Westermann's lack of competence. Henry Westermann had not been able, until the hearing, to explain his work, having been denied by Keith Armstrong an opportunity to discuss his appraisal with him.

[148] Similarly, Keith Armstrong's complaints about Henry Westermann's failings in communication were shown to be unfounded. Keith Armstrong engaged in a course of conduct directed at Henry Westermann which was blatantly demeaning. This includes taking a newly hired term employee, Michael Nahir, an employee who reported to Henry Westermann, and giving him the title of "Deputy Divisional Manager" so that it

appeared that Michael Nahir's position was superior to Henry Westermann's position, although in fact Henry Westermann was Michael Nahir's supervisor.

[149] In light of all the circumstances, I find that Keith Armstrong's contention that he was unaware of Michael Nahir's reporting relationship to Henry Westermann is not credible.

[150] Placing Henry Westermann in a small office situated outside Keith Armstrong's office was demeaning and designed to undermine Henry Westermann's image in the office. Also, making it necessary for Henry Westermann to have to come to Michael Nahir for advice and direction was obviously designed to humiliate and embarrass Henry Westermann.

[151] Similarly, Keith Armstrong attempted to have Henry Westermann's title of "Manager, Environmental Audit and Assessment" officially taken away after his promotion to this position. Keith Armstrong's request to have Henry Westermann revert to his old position title of project officer was denied by the Department, but Keith Armstrong's attempts to bring this about constituted a further effort to demean Henry Westermann. Keith Armstrong went to the lengths of having a telephone list created which showed Michael Nahir as being senior to Henry Westermann and an unauthorized organization chart created which appeared to downgrade Henry Westermann's position.

II Conflict of Interest

[152] The principles of conflict of interest in the Public Service are set out in section 6 of the Conflict of Interest and Post-Employment Code for the Public Service ("the Code") as follows:

> ***Principles***
>
> *6. Every employee shall conform to the following principles:*
>
> *(a) employees shall perform their official duties and arrange their private affairs in such a manner that public confidence and trust in the integrity, objectivity and impartiality of government are conserved and enhanced;*

> *(b) employees have an obligation to act in a manner that will bear the closest public scrutiny, an obligation that is not fully discharged by simply acting within the law;*
>
> [...]
>
> *(e) employees shall not solicit or accept transfers of economic benefit, other than incidental gifts, customary hospitality, or other benefits of nominal value, unless the transfer is pursuant to an enforceable contract or property right of the employee.*

[153] Section 16 of the Code sets out ways of complying with these principles, such as avoidance or withdrawal from the activity or situation and providing a confidential report to allow someone else to decide if there is a real, potential or apparent conflict of interest.

[154] Section 30 sets out the necessity of avoiding preferential treatment:

> ***Avoidance of Preferential Treatment***
>
> *30. Employees must not accord preferential treatment in relation to any official matter to family members or friends, or to organizations in which the employee, family members or friends have an interest. Care must be taken to avoid being placed, or appearing to be placed, under obligation to any person or organization that might profit from special consideration by the employee.*

[155] There have been a number of cases dealing with conflict of interest and apparent conflict of interest.

[156] In *Threader v. Her Majesty the Queen* [1987] 1 F.C. 41, the Federal Court of Appeal accepted the view that the Public Service will not be seen as impartial and effective if apparent conflicts between private interests and public duties are tolerated. Whether an appearance of conflict of interest exists must be determined on an objective, rational and informed basis.

[157] The *Threader* case recognizes that the notion that the appearance of a conflict of interest gives rise to legal consequences is an entirely modern concept, since legal consequences only normally flow from reality.

[158] When Keith Armstrong discussed acquiring vehicles from Isachsen with his father-in-law, he was putting himself in an apparent conflict of interest situation. His father-in-law had an interest in Track Industries. Track Industries received no vehicles from the Isachsen site.

[159] In *McIntyre* (Board file 166-2-25417), the grievor was an audit unit manager with Excise\GST, Revenue Canada, who was discharged for breaching the Conflict of Interest Code and the Departmental Code of Conduct by waiving a compliance audit, by setting higher return limits and waiving return limits for his brother-in-law's companies. His dismissal was upheld. The adjudicator held that the very fact the grievor worked on files that related to his brother-in-law's business dealings was an act of preferential treatment.

[160] Adjudicator Jolliffe, in the *McKendry* decision (Board file 166-2-674), expressed what is expected of a public servant when he wrote:

> *The essential requirements are that the public servant should serve only one master and should never place himself in a position where he could be even be tempted to prefer his own interests or the interests of another over the interests of the public he is employed to serve. Those requirements constitute the rationale of the doctrine that he should avoid a position of apparent bias as well as actual bias, and that he should never place himself in a position where...as Dean Manning put it..."two interests, clash, or appear to clash".*
>
> *These words are as relevant and applicable in the case before me as they were twenty-one years ago.*

[161] One of the main purposes of the Conflict of Interest Code is to ensure and increase public confidence in the Public Service. The Code refers to real and potential or apparent conflicts of interest. The question of monetary gain is not the sole governing factor.

[162] There are a number of facts which lead me to conclude that Keith Armstrong's relationship with Lyle McKendry involved situations where real and apparent conflicts of interest took place.

[163] Keith Armstrong knew Lyle McKendry prior to his being hired as a manager with PWGSC. Lyle McKendry had access to Keith Armstrong's home telephone number during the tendering stage and there were a number of calls between them before the

contract was awarded. It was not appropriate and, indeed, constituted an apparent conflict of interest for Keith Armstrong to allow these calls to him at home at this stage of the contracting process.

[164] After the awarding of the contract, Keith Armstrong and Lyle McKendry had a close and intense working relationship, according to Keith Armstrong, buying each other meals and socializing. He allowed Lyle McKendry to perform work at his house for which Lyle McKendry did not charge him.

[165] Various witnesses and an investigator, Bernard Gagnon, testified as to varying versions given by Keith Armstrong as to what the work at Keith Armstrong's home consisted of. Even if the work performed was of the fairly minor nature, which Keith Armstrong described at the hearing, he was prohibited under the Conflict of Interest and Post-Employment Code from receiving such a benefit.

[166] Similarly, Keith Armstrong lent Lyle McKendry his personal truck to use for a week on a project. This also could raise questions in the minds of the public as to the kind of relationship that existed between Keith Armstrong and Lyle McKendry. What favours might be expected in return for the granting of such favours?

[167] Keith Armstrong's rationale was that he lent his truck to Lyle McKendry to prevent Lyle McKendry from having to rent a truck to do the job and thus save money. This makes no sense. There is no saving to the Department because the price of a truck was included in the rate paid to Lyle McKendry in the contract.

[168] The fact that Keith Armstrong's father-in-law, Frank Smith, was a part owner of Track Industries and that Keith Armstrong put L&G Bobcat in touch with him and this resulted in the sale of equipment from Track Industries to L&G Bobcat, is another breach of the Conflict of Interest and Post-Employment Code. I cannot rely on the document called "Status Report" in order to reach any conclusions about Keith Armstrong's relationship with Track Industries because of the lack of evidence in the background of the document, how it was created and how the document was actually used.

[169] My conclusion is that Keith Armstrong engaged in a course of conduct which breached sections 6 and 30 of the Conflict of Interest and Post-Employment Code.

III Contracting Irregularities

[170] The wording of the notice soliciting bids for removal of underground storage tanks improperly gave preferential treatment to firms from Abbotsford because it implied that the bulk of the work to be done under the contract would take place near Abbotsford and it also made bidders from places other than Abbotsford responsible for mobilization of equipment costs to and from Abbotsford. Only a very small portion of the work was performed at Abbotsford. Eventually the original contract was amended and changed to allow Lyle McKendry, of L&G Bobcat, to perform clean-up work at several contaminated sites in the high Arctic and Northwest Territories.

[171] Keith Armstrong relied exclusively upon Lyle McKendry to do all of his contract work for the Department, throughout B.C., the Arctic and even in Edmonton, without reference to the regular bidding process in the Department.

[172] Soilcon was not chosen for its contract through the regular bidding process. In addition, invoices were approved for payment by Keith Armstrong before the work was completed. The original small contract was amended successively until the amount of the contract reached almost $100,000.

[173] Although Keith Armstrong's supervisor eventually signed all the invoices, there was no condonation by the Department. The Department was entitled to rely on the decisions of a manager of Keith Armstrong's seniority. He did not consult with the contracting authorities within the Department before. The Department was presented instead with bills that needed to be paid because the work was done.

[174] There was no provision in the L&G Bobcat contract to allow for subcontracting. Nevertheless, subcontracting did take place without any open bidding process or advice from the Real Property Contracting Unit. It was pointed out in evidence that the subcontracting services provided by ERG Ltd (former business associates of Keith Armstrong) totalled $14, 717.

[175] Although the L&G Bobcat contract only provides that there be a contractor's mark-up on unspecified material of 9.75%, there were numerous contractor's mark-ups on other charges and invoices. There were many mark-ups where L&G Bobcat rendered no service other than to have the invoice flow through the company.

[176] The L&G Bobcat invoices reveal that a surcharge for administration costs was made. The evidence of Douglas Longley was that administration costs are normally part of a contractor's overhead and there should not be an extra charge for them. Nevertheless, the L&G Bobcat invoices show that Keith Armstrong approved the payment of administration costs to L&G Bobcat. He also approved payment for telephone charges made to him by L&G Bobcat during the tendering stage of the contract.

[177] I do not accept the excuse that Keith Armstrong was inexperienced, a neophyte who did not know the rules of contracting. He knew that a basic element of his job was dealing with contracting. He should, therefore, have thoroughly prepared himself by learning the government rules for contracting. As a professional engineer, this was his responsibility. A professional cannot evade his responsibilities to conduct himself in a professional manner by blaming others and his own lack of knowledge. Neither can an engineer at his level of responsibility excuse himself by saying: "Well, I got my superior to approve this."

[178] Even if I was to accept that Keith Armstrong was just inexperienced and unknowledgeable and could do nothing about this himself, he still has no excuse because the Department had a unit under Douglas Longley who could have provided him with all the technical assistance he might require.

IV Departmental Credit Card Misuse

[179] Keith Armstrong is also guilty of misusing his departmental credit card by lending it to others, by allowing certain individual purchases to exceed $1000, by using it extensively to pay for travel, when this is expressly forbidden, by using it to avoid departmental procedures for clothing purchases (some of which would appear to be for personal use unrelated to the high Arctic trips) and by allowing "attractive" items purchased, like cameras, to be uncontrolled by inventory as required.

Credibility

[180] I give no credence whatsoever to Keith Armstrong's statement that he did not know Henry Westermann's position title and that he did not know that Michael Nahir reported to Henry Westermann. He was the manager. Raising a subordinate up, so that Henry Westermann had to check matters out with him, giving him a position title

superior to Henry Westermann's was all part of the harassment plan that Keith Armstrong devised. What could be more humiliating to Henry Westermann than to have his subordinate, Michael Nahir, present at the devastating personal assessment meeting?

[181] There were so many discrepancies and selective lapses of memory in Keith Armstrong's testimony that wherever his evidence is in conflict with that of other witnesses I prefer their testimony to his.

Conclusion

[182] Having considered all the evidence, as well as the submissions of the parties, I believe that discharge is the appropriate penalty under the circumstances. The bond of trust is indeed broken between Keith Armstrong and his employer. He showed little recognition of the seriousness of his actions. I have little hope that he could undergo such a rehabilitative change that he could be rendered an acceptable manager in his old position.

[183] It is true that dishonesty was not proven against Keith Armstrong. He was not charged with, nor shown to be "on the take" or that he received any kickbacks or substantial benefits from his close ties to Lyle McKendry of L&G Bobcat.

[184] The wrongdoing in which Keith Armstrong engaged in all four areas of the employer's grounds for dismissal was so serious and extensive as to make the principle of progressive discipline inappropriate. The employer was justified in waiting until the whole investigation was complete before imposing discipline.

[185] Although I have found Keith Armstrong's misconduct in the four relevant areas of his discharge notice to be serious enough to uphold the discharge, I must note that there was no evidence of theft or dishonesty. Apart from a relatively minor benefit received for work done on his house, there is no evidence that Keith Armstrong arranged matters so that he could personally receive monetary benefits.

[186] Based on the evidence and the hostility apparent between Keith Armstrong and his co-workers, and his own comment made to me at the end of the hearing to the effect that he did not want to be reinstated to his old position, I am convinced that the bond of trust inherent in the employment relationship has been irretrievably broken.

[187] For all these reasons, Keith Armstrong's grievance is denied.

Rosemary Vondette Simpson,
Board Member

OTTAWA, April 6, 2000.