

Public Service Staff  
Relations Act



Before the Public Service  
Staff Relations Board

---

BETWEEN

**ANTHONY FOSCOLOS**

Grievor

and

**TREASURY BOARD  
(Revenue Canada - Taxation)**

Employer

***Before:*** [P. Chodos, Vice-Chairperson](#)

***For the Grievor:*** David Landry, Public Service Alliance of Canada

***For the Employer:*** André Garneau, Counsel

---

Heard at Calgary, Alberta,  
May 6 to 8, 1998.

## DECISION

---

Since September 1996 the grievor has been employed as an Income and Excise Tax Auditor (PM-2). Prior to that, and during the period in dispute, Mr. Foscolos was a PM-1, Enquiries Officer - Source Deductions, at the Calgary District Office of Revenue Canada. In that capacity Mr. Foscolos had three broad responsibilities: he would answer enquiries over the phone regarding source deduction problems; he would work at the counter dealing face to face with persons seeking information; and, he would respond in writing to correspondence from the general public. It is the grievor's contention that he was not permitted to perform his duties, and consequently he was not paid, from December 7, 1995 until April 29, 1996. More specifically, the grievor maintains that he was directed by management either to guarantee that he would work specific hours of work, or to take extended sick leave without pay (the grievor's sick leave credits had been depleted at that time). The grievor further maintains that because of his illness, a condition known as hypersomnia, he was unable to give his assurance that he could report to work for specific periods of time, and consequently he was forced to take sick leave throughout the approximately four and one-half month period in question. The grievor is claiming compensation in respect of this period.

Mr. Foscolos testified that he had been suffering from this condition for several years; in March 1995 he submitted two Sick Leave Certificates (Exhibit G-1) which referred to his "*recurrent bouts of extreme fatigue and vertigo*". His supervisor at the time, Mr. Jack Robertson, had permitted him to be absent from time to time, when necessary without loss of pay; Mr. Robertson would allow him to come in late and make up the time on other occasions.

Beginning in May 1995, Mr. Foscolos had made arrangements for a six week period to take some time off each week as educational leave, in order to pursue some accounting courses. In September 1995 he again sought educational leave in the amount of 3.5 hours per week. In a memo dated October 11, 1995 Ms. Carole Kellough, Chief, Interpretation & Service advised the grievor that "*...unfortunately current operational requirements in your unit preclude the approval of the requested leave. Additionally, the division's policy is that educational leave may not be approved on a part-time basis as requested.*" (Exhibit G-3) Mr. Foscolos was perplexed by this reply; he observed that the volume of work had not changed since the Spring when he had earlier been granted educational leave; furthermore, he was not

---

requesting to work part-time and was prepared to show the utmost flexibility as to when he would take off the three and one half hours per week. In October he sought two and one half weeks of educational leave without pay in order to prepare for an exam to be held in early December. This request was also rejected. On November 7, 1995 he met with Ms. Kellough's superior, Mr. Gerry Burke who is the Assistant Director, Client Assistance. He raised with him the question of his education leave as well as the stressful circumstances in the office. The previous day, that is November 6th, his physician, Dr. Perry Glimpel, advised him that he was placing him on medical leave for one month to evaluate his condition. On November 8th he provided his immediate supervisor, Mr. Tim Bradnam, with a medical certificate from Dr. Glimpel advising that Mr. Foscolos was "... to take leave of absence from Nov 6, 1995 to approximately Dec 6, 1995 ...." When he provided the certificate to Mr. Bradnam he indicated that he wished to stay at work for a couple of days to complete certain files.

According to Mr. Foscolos, on Monday, December 4, 1995, he returned to work. The following day he worked a half day, as he overslept; he had contacted his supervisor indicating that he would be there as soon as he could. He testified that on December 6th, he worked the full day. On December 7th, he woke up around noon, called Mr. Bradnam and indicated he would do his best to come in that day; he never got to work. Approximately half an hour later, Mr. Bradnam called him at home. According to the grievor, Mr. Bradnam advised him that he had spoken with Ms. Kellough, and it was decided that if he could not guarantee specific hours of work, he would have to go on full-time Sick Leave; Mr. Bradnam also advised him that he needed to provide a doctor's note supporting his contention that he could not go to work. Mr. Foscolos testified that he told Mr. Bradnam he wanted to work, would try to do so and would have his doctor outline why he could not guarantee specific hours of work. Mr. Bradnam responded that his choices were to guarantee specific hours, or go on sick leave with supporting medical documentation.

On December 15, 1995, Mr. Foscolos provided Mr. Bradnam with a medical certificate, dated December 12, 1995 from Dr. Glimpel. Accompanying the certificate was a memorandum addressed to Mr. Bradnam which stated the following:

*To Tim Bradnam, Manager Employer Enquiries*

*I am writing this letter to confirm our conversation of December 7, 1995.*

*During this conversation I mentioned that the effects of my illness make it impossible to work specified hours but that I was able to work. This offer was denied even under the conditions that my physician would provide the documentation supporting that I could not work fixed hours. Furthermore, I realize that this is a decision that was made in consultation with your superiors (Carole Kellough and Gerry Burke).*

*As I was informed in this conversation that I would have to remain on medical leave, without pay, I have included a note from my Doctor extending my medical leave.*

*If you require any further information, please contact me. Also if the information outlined above is incorrect please notify me as soon as possible.*

(Exhibit G-8)

Mr. Foscolos stated that he received no reply to Exhibit G-8 until January 4, 1996 when he received a letter from Ms. Kellough, which stated among other things that:

...

*... We are not prepared to grant your request for "ad hoc" hours of work for a number of reasons. ... we must be able to count on our employees to be available if not on a full-time basis, at the very least, on a predictable basis.*

...

*... If you are here for specified hours perhaps we could make arrangements for job sharing or hire a part-time employee to make up the difference. In the absence of a commitment from you we are unable to pursue either of these options.*

...

*Just to confirm, if you are willing and able to commit to a specific part-time schedule we will, as you were previously advised, accommodate your request.*

Mr. Foscolos stated he was unhappy with Ms. Kellough's reply; while he did not think he could work regular hours, he was expecting that he might be absent only a couple of hours a week; he was not seeking part-time employment; he was also skeptical that management could hire someone and train them in order to replace him on a part-time basis; as well, there was no one available to job-share with him at the time. Mr. Foscolos also observed that he was capable of performing the full range of his duties; furthermore, there was a massive amount of correspondence which the Department was six months behind in responding to; he could have done that work completely independent of his co-workers and regardless of when he came in to work. In his view, he could also have done the counter and phone enquiry work whenever he was in the office.

A co-worker of Mr. Foscolos, Susanna Heinonen testified that the period from January to March was the busiest time in the office; because of a lack of staff, they were only able to answer 40% of calls, and all the staff were under considerable stress because of the workload. She corroborated Mr. Foscolos' testimony that the correspondence was several months behind; it was her view that a person working even a few hours a day would have been helpful because of the overwhelming workload. She maintained that there was nothing to prevent someone from coming in at variable times and still contribute to the work that needed to be done. She also noted that Mr. Foscolos was "*a top performer who is very conscientious and productive*".

Upon receipt of Ms. Kellough's letter of January 4, 1996, Mr. Foscolos concluded that he had no choice but to file a grievance. He met with Mr. Burke as well as a union official, on February 2nd concerning his grievance, however, nothing came of it. On February 6, 1996 Mr. Foscolos received a letter from a Mr. N. H. McKenzie, Team Leader, Officer Audit, in respect of his request for a secondment to that section. Mr. McKenzie stated in his letter that:

...

*It has also come to my attention that you are currently on medical leave and are unable to work specified hours. Your medical condition is regrettable, however, Office Audit is not prepared to permit an employee to work "unspecified hours of work".*

(Exhibit G-12)

Mr. Foscolos submitted another medical certificate dated February 22, 1996 from Dr. Glimpel in which his physician noted that:

...

*... his problem is currently ongoing. At the present time, however, he appears to be physically unable to meet the demands of a job that requires adherence to a strict schedule.*

On February 8th he received a Second Level Reply to his grievance in which Mr. Burke stated that:

...

*As was discussed previously, if you are willing and able to commit to a specific part-time work schedule, management is willing to accommodate this type of request.*

On March 26, 1996 he received a Third Level Reply from Mr. Rod Monette, Assistant Deputy Minister, Prairie Region; Mr. Foscolos took heart from Mr. Monette's observation that:

...

*I am aware that the option of part time work or job sharing has been offered to you. Management is still willing to accommodate this type of request should you be willing to reconsider. I would ask management to be extremely flexible in both scheduling your hours and receiving notification of your inability to attend work on any given day.*

...

The grievor had hopes that this reply would lead to a resolution; he wrote a detailed letter to Mr. Monette outlining what had happened to him; in this letter he noted the following:

...

*... As I have told management, I believe that I could follow a routine (i.e. noon to 5:00 PM) fairly consistently (but not with absolute certainty - I could not guarantee). It is likely that I would generally be able to follow this type of routine but flexibility would be a key factor. The other related concern is that I would have to peruse (sic) this as a part time employee. If my status changes from full time to part time, this jeopardizes my benefits and puts me at the mercy of my*

---

*supervisors in trying to re-attain full time status. For this reason I cannot consider any option that jeopardizes my contract of full time employment. This, again is why I have requested a flexible arrangement temporarily until the ramifications of my illness are fully realized.*

(Exhibit G-17)

On April 23rd he met with Mr. Brian Morris of Human Resources and his union representative. Management proposed that he work from noon to 5:00 p.m. for a two-month period with 90% guaranteed performance. He asked if the agreement could be cancelled if he found he could work full time; management responded that they would assess the situation as it arises. Mr. Foscolos indicated that he would have accepted such an arrangement in December. However, he did not accept it at the time as he felt he could work longer hours; in fact, Mr. Foscolos did return to work on a full-time basis on April 29th. He provided a medical certificate from his Neurologist dated April 26, 1996 indicating that he had medical clearance to return to full-time employment.

In cross-examination Mr. Foscolos reiterated that he was at work on December 4th, 5th and 6th notwithstanding that the computerized leave records show him as being on medical leave on those dates (Exhibit E-1). He also maintained that he was not at work after December 7th, and in particular he denied that he was at work on December 8th, or that he had seen Ms. Kellough that day.

Mr. Foscolos was shown his Activity Record for the week ending December 8, 1995, which he had signed on December 15, 1995 (Exhibit E-2). This record indicates that he was on medical leave on December 5th, 6th and 7th and was in the office a full day on December 8th. He did not dispute the accuracy of this document.

The grievor stated that when he met with Mr. Burke on November 7th he had not spoken to him about his health problems, although he had in his possession at the time a medical certificate; he did not recall if he had provided that certificate to Mr. Bradnam on November 7th. He does not recall also if he had discussed with Mr. Bradnam his medical problems in November or whether he had spoken to anyone else about his condition.

He reiterated that he did not come to work on December 7th, that he had called in sick that day. While it may have been possible he left a voice message, he does not believe he did so. He does not recall calling in sick on December 6th, nor does he recall indicating that he would try to return the next day. Mr. Foscolos adamantly denied the suggestion that he had told Mr. Bradnam on December 7th that he once had mononucleosis; he denied having told Mr. Bradnam that he would not be able to tell him on any particular day whether he would be in to work. He also denied that he had told Mr. Bradnam that if Mr. Bradnam could work with that, its O.K., otherwise he would have to go on extended sick leave. He did agree that Mr. Bradnam had called him up at 2:30 p.m. to discuss his circumstances.

Mr. Foscolos does not recall leaving a voice mail on December 11th or going in to work that day; nor does he recall telephoning Mr. Bradnam on December 12th and leaving a message that he would not be at work that day, but would bring in a medical certificate. He gave Mr. Bradnam Exhibit G-8 on December 15th; he does not recall having any discussion with Mr. Bradnam about Exhibit G-8.

Dr. Perry Glimpel testified on behalf of the grievor. He stated that he has been treating Mr. Foscolos for Hypersomnia since December 1994. Mr. Foscolos had complained to him about requiring between 10 to 14 hours of sleep per day, and that after being awake for three or four hours he would again feel the need for sleep; in addition, he had blurring vision and dizziness. Dr. Glimpel referred him to a Sleep Disorder Clinic, and to a Neurologist, Dr. Murphy. Between December 5, 1995 and February 22, 1996, his condition remained essentially unchanged. During this period Mr. Foscolos had come to see Dr. Glimpel to obtain a medical leave of absence; Dr. Glimpel observed that while he believed Mr. Foscolos should be kept at work, he felt it was reasonable to give him a medical certificate and to continue investigating his condition. In Dr. Glimpel's view, Mr. Foscolos' condition would not have prevented him from performing specific duties, although it would be difficult for him to work fixed hours. Dr. Glimpel stated that he would have preferred that Mr. Foscolos' hours of work be modified, and that he return to work during the period in question.

In cross-examination, Dr. Glimpel agreed that Mr. Foscolos likely was unable to meet his work requirements at the time. He agreed that it made sense that he would



have to be at the office regularly, and therefore he should take off work; he provided him with a medical certificate on February 22nd (Ex. Exhibit G-14) for this purpose.

Ms. Carole Kellough testified on behalf of the employer. Ms. Kellough observed that as a result of an extensive reorganization and the consolidation with the Excise Branch, all the enquiries functions came together in one shop in the Spring of 1995. Accordingly, there was no historical basis for determining the volume of work at that time. Ms. Kellough recalled that in May 1995 Mr. Foscolos had requested educational leave; Mr. Robertson and Ms. Kellough approved the request based on the then current circumstances. When Mr. Foscolos made another request for educational leave in September 1995, it became apparent that the workload was becoming very high and that the staff was not able to keep up with it. Accordingly, she rejected his request because of operational requirements. At the time it was her understanding that Mr. Foscolos was requesting part-time work; she was not aware of his health problems, until she saw his medical certificate in November 1995. On November 7th Mr. Bradnam informed her of Mr. Foscolos' medical certificate respecting medical leave for one month; however, there was no indication of the nature of his medical condition.

On December 7th Mr. Bradnam had told her that he received a voice mail that Mr. Foscolos would not be at work that day. Ms. Kellough advised Mr. Bradnam to contact Mr. Foscolos at home to determine when he might return to work. Mr. Bradnam then advised her that he had spoken with Mr. Foscolos, who indicated he wanted to return to work but could not say on what days he would be in or what hours he would work, nor could he confirm that he would be able to phone in on those days that he would be absent, because he was suffering from a sleep disorder. Mr. Bradnam and Ms. Kellough met with Mr. Burke to discuss Mr. Foscolos' attendance pattern, as well as the demands that this would make on staff; it was agreed that they would try to accommodate his condition, but would want some guarantee of a given number of hours of work in order to arrange coverage in respect of the telephone and counter enquiries. She noted that employees are scheduled for up to one half hour intervals in respect of these enquiries, which are considered their first priority. It was her understanding that Mr. Foscolos wanted to have a totally open-ended work schedule but with no guarantee that he would even advise them that he was not coming in to work on any given day. They decided that they could not accommodate

a totally open-ended schedule. In addition, they required a medical certificate from Mr. Foscolos. Mr. Bradnam was instructed to convey this information to Mr. Foscolos.

On Friday, December 8th, Mr. Foscolos came into her office between 8:00 and 9:00 a.m. He told her that he had just retrieved his security and I.D. passes, and that it was his intention to return to work on a normal basis. Mr. Bradnam was on his day off on December 8th; on Monday, December 11th, Ms. Kellough conveyed this information to Mr. Bradnam; she was surprised to learn that Mr. Foscolos was not in the office that day.

When Ms. Kellough saw Dr. Glimpel's medical certificate dated December 12, this was the first information she had about the nature of Mr. Foscolos' medical condition; however, there was no indication about his ability to come to work; it seemed to her that Mr. Foscolos apparently had tried to come back to work, could not do so, and therefore his doctor had recommended that he take extended leave. Ms. Kellough observed that contrary to Mr. Foscolos' memo of December 15th, they were not insisting that he remain on sick leave; in their view that was his doctor's decision and not management's prerogative. According to Ms. Kellough, they were always prepared to make arrangements with him but they required some assurance as to when he was likely to be there; in her letter to him on January 4th, she was inviting him to put forward an alternative working arrangement. Ms. Kellough stated that they were always open to an accommodation, but it was up to Mr. Foscolos to approach them with a more specific arrangement.

In cross-examination Ms. Kellough stated that they did not have the impression that Mr. Foscolos was requesting to be a part-time employee. In her discussions with Mr. Bradnam on December 7th, he referred to his notes; Mr. Bradnam normally takes notes of conversations with his staff. They had expected that Mr. Foscolos would discuss his circumstances with his doctor and advise them as to what he was capable of doing. Management was in agreement that Mr. Foscolos would be advised that he was expected to work fixed times. Ms. Kellough observed that when Mr. Foscolos did not return to work on December 11th and 12th, and then produced a medical certificate without any further details, it appeared to her that his doctor was again putting him on full-time medical leave, and that he was unable to resume work. According to Ms. Kellough, the alternatives were clear cut: either Mr. Foscolos was well

enough to return to work on a regular basis, or he would return to work on a less than full-time basis, or remain on full-time medical leave. Ms. Kellough stated that she felt the grievor was less than forthcoming; she expected him to come in and initiate a dialogue about his situation. When she replied to Mr. Foscolos' memorandum of December 15th, she did not respond to the specifics contained in his letter. While she agrees that Mr. Foscolos had not requested to be a part-time employee, he never indicated what exactly he was looking for. For budgeting purposes, they needed some sort of assurance as to what his hours would be. Ms. Kellough identified Exhibit G-21, a work schedule for the week of June 17 to 21, 1996; she observed that while this is the basic plan, there are day-to-day urgencies which would interrupt this schedule.

Mr. Timothy Bradnam became Team Leader, Client Services on October 15, 1995. He had not met Mr. Foscolos prior to this time. He testified that early in November he was informed that Mr. Foscolos had not shown up for a training course, nor had he called in concerning the reasons for his absence. On November 7 at 8:12 a.m. he received a voice message from the grievor that he would be in at 11:00 a.m. to tidy things up, that his doctor was giving him leave. While Mr. Bradnam was not aware of Mr. Foscolos' medical condition, he did know that Mr. Foscolos had very few sick leave credits available. In the afternoon of November 7th, Mr. Foscolos provided him with a medical certificate indicating that he would be off from November 6 until approximately December 6. Mr. Bradnam then asked him to hand in his I.D. and security passes, as he would be away beyond the standard security period of three weeks.

On November 10, 1995, Mr. Foscolos dropped off his security tags; Mr. Bradnam did not see him again until December 15th. He received a voice mail from Mr. Foscolos on December 6th at 7:42 a.m. to the effect that he would not be in until noon that day. At 12:50 p.m., Mr. Foscolos left another message saying that he would not be in to work, but would try again tomorrow.

On December 7th, the grievor called in sick at 1:13 p.m. He again left a message that he would try again tomorrow; he also stated that once Mr. Bradnam talked to him, he would understand the situation. Mr. Bradnam called him at 2:30 p.m.; Mr. Foscolos explained that he once had mononucleosis and he believed "*it was kind of coming back*"; he was getting very tired and was sleeping sixteen hours a

day, that he had gone to his doctor for tests to see if he was suffering from mononucleosis and was referred to the Foothills Sleep Clinic; he had an appointment with the clinic sometime next month. Mr. Foscolos also told him that he had no problem trying to return to work but could not guarantee he would be there, or even if he could let him know that he would not be there on a particular day. Mr. Foscolos also stated to him that since they were so back-logged, anytime he showed up to work was of benefit to the Department. According to Mr. Bradnam, he also said: *"If you can work with that, great, but if it was a problem, maybe I'll have to go on extended sick leave."*

Mr. Bradnam conveyed his conversation with Mr. Foscolos to Ms. Kellough and Mr. Burke. He also expressed his concern that, based on Mr. Foscolos' past record, they could not depend on him even to make it in to work by noon, and that some days he did not call in sick until after 1:00 p.m., while on other occasions he did not call in at all. Mr. Bradnam stated that he expressed the view that Client Services would suffer because the grievor could not indicate when he would be at work. It was decided at the meeting that if Mr. Foscolos could provide a doctor's certificate and would guarantee so many hours, that would be fine; otherwise, he would have to remain on sick leave. Later that afternoon, Mr. Bradnam again called Mr. Foscolos and told him that he would have to guarantee certain hours that he would be able to work; otherwise, Mr. Foscolos would have to remain on leave. According to Mr. Bradnam, Mr. Foscolos reiterated that he could not guarantee specified hours; however, he would certainly come to work if he was not sick. When Mr. Bradnam returned to work on Monday, December 11, he was advised that Mr. Foscolos had been at work on December 8th, which surprised Mr. Bradnam in view of their conversation on December 7th.

On December 11th, Mr. Foscolos called in sick at 8:05 a.m.; the next day he called at 4:00 p.m. to say that he would not return to work, and would be producing a medical certificate. On December 14th, Mr. Foscolos advised that he would try to come in the next day to clean things up. It was Mr. Bradnam's understanding that Mr. Foscolos meant that he would not be at work for awhile.

On December 15th, Mr. Foscolos gave him Exhibit G-8 and requested a written response to this letter. Mr. Bradnam told Mr. Foscolos at the time that he took

exception to the tone of the letter and disagreed with Mr. Foscolos' observation in Exhibit G-8 that "*this offer was denied*". Mr. Foscolos then stated again that he wanted an answer to his letter right away.

Mr. Branam observed that it was left up to Mr. Foscolos to discuss with his doctor the number of hours he could work; he maintained that Mr. Foscolos did not tell him that his doctor said he could not work fixed hours. In Mr. Bradnam's view, management had not received a proposal from him yet, and therefore, they were not in a position to deny any offer from Mr. Foscolos. Mr. Bradnam maintained that he had not given Mr. Foscolos an ultimatum that he had to go on fixed hours or take leave.

On December 21st Mr. Foscolos came into the office at 2:00 p.m., and again wanted to know if the response to his letter was completed. Mr. Bradnam recalled asking Mr. Foscolos: "*Are you under the impression that you have to work scheduled hours, that is, starting at noon or 1:00 p.m.?*" Mr. Foscolos replied: "*Yes, I thought it was for scheduling; if that's not the case I'd like to know.*"

Mr. Bradnam gave Exhibit G-8 to Ms. Kellough noting that Mr. Foscolos was waiting for a written response. Mr. Kellough advised that she would respond to the letter. In January, he called Mr. Foscolos to advise him that a response was ready; he had no further discussion with him.

In cross-examination, Mr. Bradnam stated that he was "*pretty sure*" that Mr. Foscolos had said on December 6 that: "*It probably won't happen until noon.*" in referring to his appearance at work. He reiterated that according to his notes, Mr. Foscolos had said that if his inability to give a guarantee of when he would be in was a problem for Mr. Bradnam, hopefully he can extend his medical leave. Mr. Bradnam maintained that at the meeting on December 7th, Mr. Burke and Ms. Kellough shared his concern about the impact of Mr. Foscolos' absence on Client Services; he again stated that it was their decision that Mr. Foscolos had to agree to a certain number of hours, but not specified hours. He was told by Mr. Burke that Mr. Foscolos had to guarantee so many hours, along with the medical certificate, and this is what he passed on to Mr. Foscolos. It was left up to the grievor to come up with a schedule; if he had done so he would have taken his proposal back to Ms. Kellough.

He agreed that Ms. Kellough's letter of January 4th made reference to "specified hours"; he made no effort to correct this statement. Mr. Bradnam observed that he wanted to be sure that the response to Mr. Foscolos' letter was sound, as he was under the impression that the grievor was trying to "*set him up, to put words in his mouth*".

In argument, the grievor's representative submitted that on December 7, 1995 the grievor was given the choice of either working specified hours or taking medical leave, if he produced a medical certificate. The grievor made an effort to work on December 8th and discovered that he was not able to work specified hours; Dr. Glimpel confirmed that he could not work fixed hours, but he was capable of performing his duties.

The grievor's representative disputed Mr. Bradnam's evidence that he was instructed to advise Mr. Foscolos that he need only work an agreed upon number of hours of work; Mr. Landry maintained that this is contradicted by Exhibit G-8, Mr. Foscolos' testimony, and the evidence of Ms. Kellough. He referred to Exhibit G-9 where Ms. Kellough had used the phrase "*specified hours*". In Exhibit G-8 Mr. Foscolos had set out what he thought had transpired on December 7th, and had asked that it be corrected if it was wrong; however, he never received any clarification.

It is the grievor's position that in December he was willing to work fixed hours, but his illness may prevent him from doing so; accordingly, he could not say when he would be able to actually work a normal 7.5 hours per day. Mr. Landry acknowledged that the grievor did not put forward a third option; rather, he accepted the paradigm that was put to him by management. Mr. Landry maintained that it was not his illness that prevented the grievor from working, but rather the employer's decision to insist on specified hours of work. He noted that the grievor was never declared unfit to perform his duties, nor did the employer seek any additional evidence concerning limitations in respect of his ability to work. This employee posed no hazard to himself or others and there was clearly work that he could have done.

The grievor's representative referred to the adjudication decision in *Stene* (Board files 166-2-20058 & 20773) where it was concluded that an employee cannot be prevented from working on the mere possibility of medical problems; Mr. Landry also referred to *Dennison* (Board files 166-2-14159 & 14160) which cites the *Kelly* decision

---

(Board file 168-2-96) in support of the principle that the employer cannot place an employee on sick leave against their will. The grievor's representative also noted that in accordance with the Supreme Court decision in *Renaud v. Board of School Trustees, School District No. 23 et al.*, (1992) 2 S.C.R. 970 the employer is required to take reasonable measures short of undue hardship to accommodate an employee's disability. In this instance, the grievor was willing to work but was not capable of working fixed hours; however, the employer sat on its hands and was not prepared to accommodate the grievor in respect of the limitations imposed by his medical condition.

On the question of compensation, Mr. Landry submitted that, while there is no way of knowing exactly what hours the grievor would have worked had he been permitted to do so, the grievor should not be penalized because the employer had acted precipitously. Mr. Landry suggested that the grievor be compensated for 50% of his wages from December 7th to January 24th, and for 80% from January 24th to the end of April.

Counsel for the employer replied that it was the grievor's illness which resulted in him being off work, not the actions of the employer. Mr. Garneau referred to the circumstances leading up to the December 7th conversation between Mr. Bradnam and Mr. Foscolos; he noted that it was the grievor who took medical leave from November 6 to December 6. On December 6th, Mr. Foscolos called in to say that he would be late; later in the day he called again to say he would not be in at all. When Mr. Bradnam contacted him the next day, he was advised by Mr. Foscolos that he was still sick and that he could not guarantee when he would be at work on any particular day. Mr. Garneau agreed that it was Ms. Kellough's intention to seek from Mr. Foscolos specified hours of work. The employer was prepared to show some reasonable accommodation but was seeking information from Mr. Foscolos as to what he is able to do.

Counsel for the employer maintained that at no point did Mr. Foscolos come forward to indicate when he would be prepared to be at work, notwithstanding management's communication to him that they would consider any reasonable specified hours of work. Counsel noted that the *Renaud* decision (supra) states that "*To facilitate the search for an accommodation, the complainant must do his or her part*

as well.”; this reference was cited in two adjudication decisions: *Begley* (Board file 166-2-26311) and *Guibord* (Board file 166-2-25249). In this instance, the employer had advised Mr. Foscolos that they were prepared to accommodate him within limits; they wanted him to provide medical information and to advise them as to what kind of accommodation he required. Notwithstanding these communications, Mr. Foscolos did not fulfill his part in the seeking of an accommodation.

Counsel also submitted that Mr. Foscolos had not discharged the onus of demonstrating that compensation is due him. The evidence shows that on most days he could not work; accordingly, there is no basis for assuming that he would work at all during the period in dispute.

In rebuttal Mr. Landry submitted that the duty still rests on the employer to initiate an accommodation. He maintained that the employer did not request the grievor to provide a certificate which would indicate what duties he could or could not do.

#### Reasons for Decision

It is not disputed that the grievor was suffering from a medical condition which had impaired his ability to attend at his place of work and perform his duties on a regular basis. It is also clear that the grievor was on medical leave, at the direction of his physician, from November 6 until approximately December 6, 1995. The evidence demonstrates that while he apparently intended to return to work at least by December 6, he did not do so until December 8th; he was at work for that one day. He did not return the following week, although he advised his superior, Ms. Kellough on December 8 that he was hoping to attend at the office on a regular basis. December 8th was in fact the last day the grievor was at work until the end of April.

When the grievor did not show up to work on December 7th he was called by his supervisor. There is some dispute as to the precise nature of these conversations; in essence, it is Mr. Foscolos' contention that Mr. Bradnam had conveyed to him that either the grievor "guarantee" specified hours of work, or that he go on extended sick leave. Mr. Bradnam, on the other hand, maintains that Mr. Foscolos had advised him that he could give no assurance as to when he would come in to work, and because of his medical condition, he may not even be in a position to indicate it on any given day



whether he would be coming to work and, that if Mr. Bradnam “*can live with that, that would be great*”. According to Mr. Bradnam, Mr. Foscolos said to him, in effect, that if those conditions were not satisfactory, he (i.e. Foscolos) would have to go on extended sick leave.

In weighing this evidence, it is my conclusion that Mr. Bradnam’s version of this conversation is the more accurate. Firstly, Mr. Bradnam took detailed notes at the time of these conversations, and with the aid of his notes he was able to recall the events in considerable detail. Furthermore, the grievor’s memory of the events was clearly faulty; he did not recall, for example, that he had not been at work on December 4th and 5th, and that he was in fact at work on December 8th. However, as the grievor acknowledged in cross-examination, the attendance forms signed by him demonstrate that this was the case. Moreover, throughout his testimony, the grievor showed several lapses of memory. Accordingly, there is ample reason to conclude that Mr. Bradnam’s recollection of the events is more reliable than that of the grievor.

In light of these events, it is understandable that management was confused as to whether Mr. Foscolos was capable of coming to work at all, or at least on some regular basis. The employer, in the person of Ms. Kellough and Mr. Bradnam, was attempting to seek some indication from the grievor as to when he would be likely to present himself at work. I appreciate that the grievor’s medical condition left him, from time to time, unable to show up at work, notwithstanding his best intentions. However, I do not believe that it was unreasonable for the employer to seek from the grievor some indication as to when he would likely be able to attend work, and when no firm direction in this regard was forthcoming from him, to assume, particularly in light of the medical certificates he provided, that he would not be attending work. If this assumption was unfounded, it was incumbent on the grievor to either show up at work, or state with some specificity when he would do so. He did neither.

This is not to say that an employee should be penalized if they cannot fulfill their normal responsibilities to attend work on a regularly scheduled basis; the employer does have an obligation, up to the point of undue hardship, to accommodate an employee suffering from a disability. However, the obligation to accommodate is a two-way street; as noted in the *Renaud* decision (supra):

*The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation ...*

*To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.*

I would also note that, at the outset of this hearing, the grievor was advised that he has the onus to demonstrate the proper amount of compensation which he would be entitled to. This poses a particular problem in this case, given that the grievor was not at work for a month preceding the period in question; furthermore, it was his position that as a consequence of his medical condition he could give no assurance as to when he would be at work, and in fact he did not attend at work at all during this period. In light of these circumstances, it is indeed problematic as to what, if any, compensation the grievor would be entitled to, assuming that I would find that the employer had acted improperly. No evidence was presented from which I could make any reasonable inference as to when the grievor would have come to work during the period in question.

In any event, for reasons noted above, it is my conclusion the employer did not act improperly, and therefore the grievor is not entitled to any compensation in respect of his absence from December 7, 1995 until the end of April 1996.

Accordingly this grievance is denied.

**P. Chodos,  
Vice-Chairperson.**

OTTAWA, June 8, 1998.