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File: 160-34-64

Citation: 2002 PSSRB 17

Canada Labour Code,
Part II

Before the Public Service
Staff Relations Board

BETWEEN

JOHN PRUYN

Complainant

and

CANADA CUSTOMS AND REVENUE AGENCY

Employer

RE: Complaint under Section 133 of the Canada Labour Code

Before: Léo-Paul Guindon, Board Member

For the Complainant: Dave Landry, Public Service Alliance of Canada

For the Employer: Asha Kurian, Counsel

Heard at Hamilton, Ontario,
February 5 and 6 and July 16 to 19, 2001.

[1] On December 1, 1999, John Pruyn filed a complaint pursuant to Part II of the *Canada Labour Code* (section 133) with Human Resources Development Canada Labour Program, (Ontario Region) Southwestern District Office against his employer, the Canada Customs and Revenue Agency (CCRA). The Public Service Staff Relations Board (Board) received the complaint on March 23, 2000.

[2] Mr. Pruyn stated that he had been threatened, intimidated and mistreated because of his refusal to work on October 13, 1999.

[3] The basis of his refusal to work under section 128 of the *Code* was that the carpeting tiles located on the second floor of the CCRA building at 32 Church Street, St. Catharines, Ontario, were lifting up and were a tripping hazard. Mr. Pruyn's office was located on the second floor in the carpeted area.

[4] At the outset of the hearing, the employer's counsel submitted a preliminary objection to the jurisdiction of the Board to hear the complaint on the basis that the employer did not dismiss, suspend, lay off or demote the employee or impose any financial penalty on him following his refusal to work. In his complaint, Mr. Pruyn stated that he was threatened and intimidated by the employer, but these two matters are not found in the prohibitions contained in section 147. Counsel argued that the wording of the complaint does not reveal any punishment or threat of punishment, or disciplinary action or threat of disciplinary action and the Board refused to take jurisdiction in similar circumstances in *Desjardins and Turbide* (Board file 160-2-30).

[5] The representative of the complainant argued that "other penalty" is included in the prohibitions found in section 147 of the *Canada Labour Code*. In his complaint, Mr. Pruyn stated that he was isolated in his work area and suffered important restrictions to his movements inside the building. If he did not respect these restrictions, he would be disciplined. Mr. Pruyn suffered from the situation and as a result, was out of work on sick leave for a long period of time, thereby sustaining a financial penalty. Section 147 of the *Canada Labour Code* covers that situation and the Board has jurisdiction to hear the complaint.

[6] I took the preliminary objection under advisement, because I needed to make an evaluation of the evidence to be submitted by the parties in relation to the complaint to be able to determine whether or not I had jurisdiction.

[7] The employer's counsel requested more information regarding the complaint to be able to present her evidence and the representative of the complainant agreed to start with his evidence.

The Facts

[8] John Pruyn has worked at the CCRA for 22 years. He worked as an E-File Coordinator for five years at St. Catharines at the PM-03 group and level. Following an accident in 1993, his leg was amputated above the left knee. He uses a prosthetic leg. In 1998, after falling on ice, he suffered back pain. This increased his difficulty in walking and running. Since 1998, he walks with a cane. The prosthetic leg creates phantom pain and inflammation. Mr. Pruyn needs access to a washroom with special equipment for the disabled to care for it. On December 6, 1997 (Exhibit G-1), followed by a reminder on June 12, 1998 (Exhibit G-2), the employer was notified of Mr. Pruyn's special needs.

[9] The minutes of the meetings of the Occupational Safety and Health Committee (OSHC) show that lifting carpet tiles have been an outstanding problem since September 1995 at the St. Catharines location where the complainant worked. The temporary solution did not solve the problem (Exhibits G-3 to G-17). New carpet tiles should replace the loose ones (August 7, 1996 meeting minutes, Exhibit G-5). Since the building will undergo major renovations, including the replacement of the carpeting, a temporary solution was applied. The lifting carpet tiles were taped or nailed down.

[10] On July 12, 1999, in a letter to the Property Manager, Mr. John Rao (ATS officer) recognized that the loose carpet tiles created a tripping hazard for all employees (Exhibit G-20), and that the temporary solution did not solve the problem.

[11] The mixture of the carpet and the tape posed a higher tripping hazard for Mr. Pruyn who has a prosthetic leg; the leg works better on an even floor of the same texture. The temporary solutions applied made him fear for his safety. He so advised management on four different occasions between March 3 and October 6, 1999 (Exhibits G-18, G-19, G-21, G-22).

[12] Receiving no answers from management, Mr. Pruyn discussed the carpet problem with a safety officer at Labour Canada (Mr. Paul Danton) shortly before

October 13, 1999. Mr. Pruyn indicated to Mr. Danton, during a telephone conversation, that he would have to refuse to go to work if no improvement was made.

[13] On October 13, 1999, Mr. Pruyn arrived at work at approximately 7:30 a.m. and the carpet tiles around his work station were lifted. Mr. Dave Woodford (Management Representative on the OSHC) came to Mr. Pruyn's work station and Mr. Pruyn advised him that the area was unsafe. Mr. Pruyn also advised Mr. Woodford of his intention to refuse to work pursuant to section 128 of the *Canada Labour Code*. In the absence of any response from management, Mr. Pruyn sent an e-mail at 9:15 a.m. to notify the employer of his work refusal due to "the unsafe conditions with the carpets" and he went home (Exhibit G-23). Mr. Woodford telephoned Mr. Pruyn at home and told him that he had to stay at the office on a work refusal and would have to return. Notwithstanding the advice he received from Penney Kreamer (union representative), Mr. Pruyn refused to return to the office. After a telephone conversation with Mr. Danton, Mr. Pruyn returned to work at 11:30 a.m. after being reassured that he would not have to go in the carpeted area. He would be relocated to another office outside this area.

[14] On the same day, a meeting was held with management (John Rao, David Woodford and representatives of employees on the OSHC) and a potential resolution to the carpet issue was signed by Mr. Pruyn, among others. This resolution specified:

(1) daily inspection of the carpet to be conducted by the OSHC;

(2) alert staff to refusal to work due to condition of carpet and ask for co-operation in identifying any problem areas;

(3) repairs will be made within 24 hours of notification to the ATS helpdesk whenever a problem is identified;

(4) a complete inspection will be completed on October 13, 1999 and any problem areas identified will be taped or retaped;

(5) discussions regarding possible alternative work locations to be opened (Exhibit G-24).

[15] On October 13, 1999, the OSHC held discussions by telephone with Paul Danton (Safety Officer, HRDC). Mr. Pruyn was present for a second call (Exhibit E-5). On October 15, 1999, Mr. Woodford initiated a meeting with the OSHC. Penney Kreamer and Mary-Ann Pearson-Jolley (local union representative) took part in the meeting with Mr. Pruyn. The participants agreed that Mr. Pruyn's time at home on October 13, 1999 would be treated as authorized time off. At the meeting, Mr. Pruyn refused to declare that the temporary solution made the carpet tiles safe (Exhibit E-7). Mr. Pruyn agreed to an alternate work location but specified that he did not want to be isolated from his fellow employees. It is very important for him to have access to people and to visit co-workers. Mr. Pruyn feels that management wanted to put restrictions on his access to the building, as was done in 1992 when he needed Mr. Woodford's permission to leave his office. According to Mr. Pruyn, management's attitude to exclude someone because of his disability goes against the new orientation of the Government of Canada as outlined in the document entitled "Future Directions – To Address Disability Issues for the Government of Canada" (Exhibit G-27).

[16] On November 8, 1999, Mr. Danton formulated conclusions and resolutions reached following a November 1st meeting on the carpet issue with Mr. Woodford and Mr. Pruyn. The current flooring was no longer considered "a tripping hazard" and an inspection of the second floor would be done to locate and secure the lifting tiles by taping them. A test area would be created to monitor the newly installed carpet tiles after removal of the lifting tiles to determine if the tiles are adhering properly to the floor (Exhibit G-25).

[17] On November 9, 1999, Ron Woelk, Director of the St. Catharines Office, met with Mr. Pruyn in the presence of Mr. Woodford. The carpet issue was discussed at the outset of the meeting. Mr. Woelk specified that the CCRA will have to spend between $200,000 and $250,000 to replace the carpets due to Mr. Pruyn's refusal to work and that Mr. Pruyn was the only one to complain. According to Mr. Pruyn, the carpet was still a hazard to his health and safety and he would not agree that it was 100% safe. Mr. Woelk pointed out that Mr. Pruyn's fear of walking on the taped carpet appeared to apply to work only but not to the distribution of anti-Agency literature by Mr. Pruyn around the building. Mr. Pruyn requested that the limitations on his access to the carpeted area be put in writing. Mr. Woelk indicated that Mr. Pruyn's work refusal was motivated by his anti-Agency position and concluded that Mr. Pruyn had a problem

with authority. Mr. Pruyn requested the presence of a union representative at the meeting because it had become disciplinary in nature.

[18] Mary-Ann Pearson-Jolley, the union representative, was called into the meeting and Mr. Woelk addressed Mr. Pruyn's failure to respect authority again. According to Mr. Woelk, Mr. Pruyn had not shown a professional attitude in past information sessions which he conducted as part of his duties because he wore a worn shirt and pants with holes. Mr. Woelk stated that Mr. Pruyn would be prevented from conducting future information sessions because of his unprofessional attitude. Mr. Woelk changed his mind with respect to the union representative's involvement and agreed to let Mr. Pruyn perform the session if he stuck to the agenda and avoided getting into an anti-Agency declaration. At that stage of the meeting, Mr. Pruyn became upset and walked out. Mr. Woelk filed notes of the November 9 meeting (Exhibit E-20). Mr. Woodford's notes (Exhibit E-7) and Mr. Woelk's notes (Exhibit E-20) corroborate that these issues were discussed at the November 9 meeting.

[19] In the afternoon of November 9 Jacqui Sherman (Mr. Pruyn's supervisor) met with Mr. Pruyn and offered him solutions to enable him to avoid walking on the carpeted area so that he could perform his work. An employee would bring in and remove material from Mr. Pruyn's office. Employees would go to his office to talk to him. Mr. Pruyn would phone his supervisor if a situation or need arose which would require him to enter the carpeted area. Mr. Pruyn interpreted these directions as being told he must ask permission to enter the carpeted area. The supervisor submitted that she was trying to act in the best interests of his safety because he stated that the rug was still a safety problem for him (Exhibit G-29).

[20] Ms. Sherman and Mr. Woodford wanted to meet with Mr. Pruyn at 10:00 a.m. on November 10, 1999. Mr. Pruyn was too emotional about events which had transpired during the last two days to speak or meet with them. Ms. Pearson-Jolley acted as a go-between. The following issues and concerns of the employer were reported to Mr. Pruyn:

(1) his movements must be restricted to areas without carpet problems;

(2) management must provide a solution for his special needs that will allow him to avoid going in the carpeted area;

(3) Mr. Pruyn will have to telephone his team leader if he needs to enter the carpeted area (Exhibit G-29).

[21] On November 10, 1999, at 11:10 a.m., Mr. Pruyn advised his supervisor that he was going home as he was sick. Mr. Pruyn testified that management's attitude at the meeting and the restrictions imposed on his movements created a high level of frustration for him and he was unable to work because of stress.

[22] During his sick leave, Mr. Pruyn discussed the situation with Mr. Danton who suggested that he file a complaint. Mr. Pruyn thought that he was being punished for invoking his right to refuse to work under Part II of the *Canada Labour Code*.

[23] On November 10, 1999, Mr. Pruyn saw his lawyer, Mr. Toppari, about another issue and talked to him about the November 9 meeting. Mr. Toppari sent out a letter of information to Mr. Woelk on November 18, 1999 stating that, as a result of a severe spinal injury in 1998, Mr. Pruyn encountered more difficulties walking on the deteriorated carpet in the work place (Exhibit G-30).

[24] On November 22, 1999, Mr. Pruyn requested that the period he was absent should be treated as leave with pay because it was caused by work-related incidents (Exhibit G-32). Management denied this request in a letter given to him following his return to work on November 29, 1999 (Exhibit G-33). This answer written by Ms. Sherman stated the following in the concluding paragraph.

...

> *I would also at this time like to remind you that on your return to work you will be expected to use the special office prepared for you, and you are not to enter the common work areas without the express permission of your Team Leader. This step is being taken to ensure your personal safety and deal with the tripping hazard identified with the carpets. Arrangements have been made for you to use the uncarpeted Public Washroom at the top of the stairs on a temporary basis until Public Works Government Services Canada has completed refitting one of the lower level washrooms to meet your needs.*

[25] After his return to work on November 29, 1999, Mr. Pruyn was still very embarrassed and humiliated by the November 9 meeting (see paragraph 17) and wanted to meet with Mr. Woelk to clear up the situation. This request was received by

Mr. Woelk who stated that Mr. Pruyn had chosen to escalate the situation into a legal matter with a letter from his lawyer (Exhibit G-40). The following day, Mr. Pruyn sent an e-mail (Exhibit G-35) to Mr. Woelk, among others, to specify his concerns. The e-mail reads as follows:

> *November 30 1998*
>
> *On Nov 9, 1999, we had a meeting from which I left very upset. After the meeting you and Mary Ann discussed what happened and you expressed surprise that the prosthetic leg caused the holes in my pants and that you would come to me to talk about it. On Wednesday morning I was also in the office and Mary Ann asked you to come to talk to me. During the two weeks off I did not hear from you.*
>
> *When we were discussing my access to work areas of the building (during our meeting of Nov 9, 1999) we agreed that I would use the walker on the carpeted area and that Dave Woodford and myself would continue discussions and work out a mutually acceptable plan. Dave and Jacqui Sherman came to see me after the meeting of Nov 9, 1999, to try and discuss the carpet issue. However I advised them that I was too upset to discuss it. Dave and Jacqui also wanted to discuss the carpet issue on Wednesday morning, but I was still too upset and Mary Ann acted as a go between.*
>
> *When I came back to work on November 29, 1999, I expected that Dave, Jacqui and myself would get together to discuss the carpet issue. Instead Jacqui gave me a letter around 1 AM stating I could not go anyplace that was carpeted in the common area without her express permission. I called Dave Woodford regarding this letter. He said he had nothing to do with it, and was not aware of its contents.*
>
> *The carpet issue arose because carpets were allowed to lift even though it was promised that it would be looked after and the carpets would be nailed and taped down. After my refusal to work the Health and Safety Committee and Labour Canada worked out an agreement to keep the carpets taped down. The carpets were declared safe.*
>
> *I have met with Dave Woodford and Jacqui Sherman to discuss the carpets. I have been asked if I consider the carpets safe. It is not my area of expertise to declare the carpets safe. I have raised my concerns and expressed reservations that the taping may not be kept on top of and carpets may lift. However, I did agree to use the walker when I was on the carpeted area. I expressed one reservation about this in that if for some reason I forgot to use the walker I would not be jumped on (ie I did not want to*

> *be disciplined for this). It was my full intention to use the walker at all times.*
>
> *After my refusal to work, I went back to the carpeted area and functioned very well, as my mind was at ease, while I waited for the office by the elevator to be completed. I agreed to this with the understanding that I would not be isolated from the rest of my co-workers and that I would not need permission to work with and visit my co-workers during my lunches and breaks.*
>
> *The restrictions in the last paragraph of Jacqui's letter of November 29, 1999, undermine my feeling of well being, affect my ability to work, are demeaning and makes me feel I am being treated as a child. Rather than ensuring my personal safety it undermines it. Personal safety also includes mental well being and these restrictions are destroying my mental well being.*
>
> *I am asking you to immediately remove the restrictions on my movements contained in Jacqui's letter of November 29, 1999.*

The union representative, Nick Stein, agreed with Mr. Pruyn's request to allow him full access (Exhibit G-35).

[26] On November 30, 1999, Mr. Pruyn tried to get permission from Ms. Sherman (his team leader) to go to the specially equipped washroom located in the carpeted area to look after his personal hygiene needs because his prosthetic leg had to be removed and washed with soap and alcohol to treat the phantom pain and inflammation. He was unable to get in touch with his team leader or with his director to obtain permission to go in the carpeted area. Therefore, Mr. Pruyn had to travel home to take care of his hygiene needs. He notified management by e-mail messages sent at 10:46 a.m. and 4:30 p.m. on November 30, 1999 (Exhibits G-37 and G-38). In both of those e-mail messages sent to management, Mr. Pruyn stated that the entire incident was humiliating and demeaning to him and the restrictions imposed on him were having a detrimental effect on his health.

[27] On December 1, 1999, Mr. Pruyn went to see his doctor. He was put on sick leave because of stress at work. He filed a complaint under Part II of the *Canada Labour Code* on December 1, 1999 (Exhibits G-41 and G-42). After the November 9 meeting (paragraph 17) and the November 29 incidents, Mr. Pruyn felt that the employer was preparing to discipline him. The notes, from Janice Morgan to Jacqui Sherman obtained through the *Access to Information Act*, convinced Mr. Pruyn

that the employer wanted to discipline him (Exhibit G-39). Those notes stated that if Mr. Pruyn did not adhere to the directions stated in the November 29 letter from Ms. Sherman, he would be disciplined accordingly.

[28] An objection was submitted by the employer's counsel regarding the relevance of any incident that occurred after the filing of the complaint on December 1, 1999. In her opinion, if the complainant wanted to submit facts that happened after that day, a new complaint should be filed. According to the complainant's representative, the same pattern of behaviour by management occurred for the period prior to December and after. The evidence relating to the incidents that happened after December 1, 1999 has to be considered in this complaint. The complainant should be able to submit evidence of facts that occurred after December 1, 1999. I took the objection under reserve and I will deal with it in the reasons for my decision.

[29] The employer's counsel objected to the filing of notes taken in a December 10, 1999 meeting of management on the basis that the witness was not able to identify the author (Exhibit G-44). The complainant obtained this exhibit by a request under the *Access to Information Act*. It is related to a meeting held with Ron Woelk and Jacqui Sherman on December 10, 1999. I reserved my decision on the objection and I will make a determination on its admissibility in my reasons for decision. These notes showed that management was considering taking disciplinary measures against Mr. Pruyn for his absence after his work refusal (October 13, 1999) and for his absence for taking care of his personal hygiene (November 30, 1999) and for the desk drops taken into consideration at the November 9, 1999 meeting. Mr. Woelk testified that he did not clearly recall that meeting and had never seen the notes before they were filed at the hearing.

[30] According to the employer's counsel, the notes sent by Janice Morgan to Jacqui Sherman on November 26, 1999 have to be identified by the author and the adjudicator should not accept this evidence. I took this objection under advisement as well. The complainant's representative observed that the objection was not made at the time the exhibit was filed. Later, in the hearing, the author of those notes, Janice Morgan, testified and identified her notes filed under Exhibit G-39.

[31] Around December 12, 1999, Mr. Pruyn filed harassment complaints against Ron Woelk and Jacqui Sherman. These complaints were still ongoing at the time of the present hearing. An investigator (Ms. Josie Ciebien) was appointed on March 10, 2000

(Exhibit E-16). She performed her investigation between March and May 2000. She testified, at the hearing of this complaint, that upon interviewing Mr. Pruyn, he told her that he did not feel isolated. On June 29, 2001, Mr. Pruyn was advised that the investigation concluded that his allegations of harassment against Mr. Woelk and Ms. Sherman were unfounded (Exhibits E-3 and E-4).

[32] On December 22, 1999, Mr. Woelk sent a letter to Mr. Pruyn (Exhibit G-43). At that time, Mr. Pruyn was still denied access to the carpeted areas in the work place, although Labour Canada and the OSHC had indicated that the repairs performed were adequate since November 8, 1999. The letter reads as follows:

> *Further to our meeting of November 9, 1999 and your subsequent request to meet again, I am writing to clarify some of the items that were discussed.*
>
> *First, in regards to you having access to the main work area. The actions taken to remove you from the work area were made for Safety and Health reasons and only after consultation with you. Even though you had originally indicated to the Safety & Health Committee that you were satisfied with the arrangements that had been made to tape down the edges of the carpet tile and you signed an agreement to that effect you indicated the next day that you still considered conditions unsafe. Although Labour Canada had indicated that the arrangements made to deal with the tiles was adequate, in order to ensure your safety in the work place until such time as the carpet tiles are replaced under our renovations project our only option was to make alternate arrangements that would still allow you to perform your duties. We have arranged for Public Works to replace the carpet in the main walking isles. When this is completed we will again evaluate if this temporary solution will meet your safety requirements.*
>
> *You have indicated that you need to deal with personal hygiene issues related to your prosthesis several times a day. We have taken your word for this without anything from your doctor or Health Canada to verify this need and have arranged to have a washroom on the lower level equipped for your needs. Until that was ready you were authorized to use the washroom at the head of the stairs. The changes to that washroom have amounted to a cost of several thousand dollars. At this point in time I am requesting that you provide your Assistant Director with a letter from your doctor verifying that you need the washroom for the purpose mentioned and indicate how often you have this requirement. Furthermore you indicated that you have sustained a serious injury to your spine. In order*

to ensure that we are dealing with all of your Health & Safety issues and any restrictions that may apply to your being able to perform the full range of your duties, we want you to be assessed by Health Canada assessment. It is very important for us to have accurate information to assess your health needs. If you deny us access to proper information from your doctor we will ask Health Canada to provide us the best information we can get from expert medical personnel and will attempt to accommodate your needs based on this expert advise. This approach is obviously less desirable than the more accurate information from your Doctor. Depending on the advise we get, in the worst case scenario, we may have to refuse you access to the workplace until such time as we are satisfied that there is no further risk to your health and we can adequately provide a comfortable work environment for you. Your health and working conditions are important to us.

On November 30, 1999 you called me and left a message on my voice mail at 9:15 in the morning and indicated that you needed to use the washroom inside the work area for reasons of personal hygiene and that you couldn't reach your Assistant Director, Jacqui Sherman. You knew at that time that she was in a Union Management meeting which you were also supposed to attend. You then left the workplace and went home to deal with your problem which you stated was of an urgent nature. This took you approximately one hour. I must inform you that this time is considered as unauthorized absence and will be charged to that time code.

In regards to the matter of your making "desk drops" of information you personally consider to be of value to other employees you are not to engage in this type of action any further without the express permission of your Assistant Director or myself. Should you persist with this you may face disciplinary action.

Any questions related to the contents of this letter can be addressed to your Assistant Director or myself.

[33] On December 23, 1999, Mr. Pruyn was still on sick leave with an anticipated date of return to work of January 4, 2000. In fact, Mr. Pruyn returned to work on January 31, 2000 after the union representative proceeded to finalize an agreement for the conditions of return to work (Exhibit G-46). These conditions were set out in a letter dated January 31, 2000 to Mr. Pruyn from Janice Morgan (Exhibit G-47) which reads as follows:

This letter will confirm the conditions under which you will return to work effective this date.

First, in order to deal with the Safety and Health issue related to the carpet tiles in the work area, a walk through the area will be undertaken including yourself, members of the Safety and Health Committee, the Labour Canada Representative and your Union Representative. If the condition of the tiles is acceptable, you will be required to sign the attached acknowledgement. Any further concerns related to the tiles will be dealt with in the normal manner.

Furthermore, if the condition of the carpet tiles is acceptable, you will be returned to your normal work area and the restrictions in Jacqui Sherman's memo dated November 29, 1999 will be lifted.

In order to accommodate your stated hygiene need, the washroom on the lower level has been renovated to meet your need. You are to use this washroom until the main floor renovations have been completed.

Effective immediately you will report to Janice Morgan until the return of Jim Harrison for work and leave purposes. This reporting relationship will continue until such time as your harassment complaint has been dealt with.

At this point you have been advanced the maximum 25 days for sick leave under the collective agreement. No further advances will be entertained until such time as these credits are repaid. Any sick leave taken must be accompanied by a medical certificate, and will be charged to sick leave without pay. Failure to provide a medical certificate will result in the leave being charged to unauthorized absence, which may be subject to disciplinary action.

Furthermore in order for Management to properly deal with your medical and safety concerns, we feel that it is imperative that we obtain a medical assessment of your condition and needs. Consequently, specific questions will be provided that you will obtain answers to from your doctor within ten working days from the date you receive the questions. Should the information not be sufficient to satisfy Management's concerns that they can address your needs, then an assessment by Health Canada will be requested.

The restriction regarding desk drops will continue to apply. You will not make desk drops of any information that criticizes Agency policies or programs without obtaining the prior approval of your Team Leader or Assistant Director.

Any questions regarding the content of this letter may be addressed to your Team Leader or myself.

On January 31, 2000 Mr. Pruyn agreed to sign a declaration stating the new carpet tiles presented no further hazard for his safety (Exhibit E-15).

[34] The OSHC closed the carpet issue in their January 19, 2000 meeting, after new carpet tiles were laid down (Exhibit E-14).

[35] On Wednesday, February 9, 2000, Mr. Pruyn stayed home and rested due to some acute back and stump pain. Upon his return to work, he requested to take that day as vacation leave because he did not have a medical certificate and did not want to have a day without pay. One week later, he had not received an answer from Janice Morgan. Mr. Pruyn had requested an answer in writing with a copy to his union representative. Nick Stein, the union representative, reacted by asking that "this continued harassment of this individual cease immediately" (Exhibit G-51). On March 8, 2000, Ms. Morgan agreed finally that Mr. Pruyn would be allowed to use vacation leave credits to cover absences due to sick leave (Exhibit G-50).

[36] On March 23, 2000, Mr. Danton forwarded the complaint to the Board on behalf of Mr. Pruyn (Exhibit G-52). Mr. Pruyn stated in his testimony that he was still isolated and banished from making public appearances for the CCRA. Mr. Pruyn was back to his original work area on March 23, 2000 (Exhibit G-66), following an understanding with Ms. Morgan that he would be comfortable returning to client services with Ms. Sherman performing her duties in the same work area (Exhibit E-1).

[37] The E-File Coordinator position that Mr. Pruyn held was eliminated throughout Canada in 1999 and he started to help out in client services around April 2000. Some debates between Mr. Pruyn and management relate to workload during that period (Exhibits G-64 and E-1).

[38] On March 30, 2000, Mr. Pruyn requested that the decision to exclude him from team meetings be overturned. As a member of the client assistance team, Mr. Pruyn thought he should be able to attend the team meetings notwithstanding the presence of Ms. Sherman at those meetings. Mr. Pruyn considered that the employer did not allow him back in the team (Exhibit G-53).

[39] Mr. Pruyn's harassment complaint against his team leader put a lot of stress on client services at the St. Catharines office. The employer tried, unsuccessfully, to find a temporary assignment for Mr. Pruyn (Exhibit G-56).

[40] Mr. Pruyn wants the Board to allow his complaint and to grant him financial damages, for being penalized by the employer for exercising his rights under Part II of the *Canada Labour Code*. He submitted that he suffered a financial penalty because he had to use up all his sick leave credits due to the stress at work, as a result of his employer's actions. Mr. Pruyn submitted two medical certificates into evidence, dated June 7, 2000 and November 2, 2000, which state that his absences were due to depression brought on by work-related stress (Exhibits G-59 and G-60). Mr. Pruyn wants the Board to order the employer to reinstate the sick leave credits taken from November 10, 1999 to January 31, 2000. The employer should also reinstate his vacation leave credits taken during the same period of time, in lieu of sick leave without pay.

[41] The relevant sections of the *Code* provide as follows:

> *128.(1)* ***Refusal to work if danger*** *– Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that*
>
> (a) *the use or operation of the machine or thing constitutes a danger to the employee or to another employee;*
>
> (b) *condition exists in the place that constitutes a danger to the employee; or*
>
> (c) *the performance of the activity constitutes a danger in the employee or to another employee.*
>
> *128.(6)* ***Report to employer*** *– An employee who refuses to use or operate a machine or thing, work in a place or perform an activity under subsection (1), or who is prevented from acting in accordance with that subsection by subsection (4), shall report the circumstances of the matter to the employer without delay.*
>
> *...*
>
> *133.(1)* ***Complaint to Board*** *– Where an employee alleges that an employer has taken action against the employee in contravention of paragraph 147(a) because the employee has acted in accordance with section 128 or 129, the employee may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.*
>
> *133.(2)* ***Time for making complaint*** *– A complaint made pursuant to subsection (1) shall be made to the Board not*

later than ninety days from the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint.

133.(3) ***Restriction*** *– An employee may not make a complaint under this section if the employer has failed to comply with subsection 128(6) or 129(I) in relation to the matter that is the subject matter of the complaint.*

133.(4) ***Exclusion of arbitration*** *– Notwithstanding any law or agreement to the contrary, a complaint referred to in subsection (1) may not be referred by an employee to arbitration..*

133.(5) ***Duty and power of Board*** *– On receipt of a complaint made under subsection (1), the Board may assist the parties to the complaint to settle the complaint and shall, where it decides not to so assist the parties or the complaint is not settled within a period considered by the Board to be reasonable in the circumstances, hear and determine the complaint.*

133.(6) ***Burden of proof*** *– A complaint made pursuant to subsection (1) in respect of an alleged contravention of paragraph 147(a) by an employer is itself evidence that the contravention actually occurred and, if any party to the complaint proceedings alleges that the contravention did not occur, the burden of proof thereof is on that party.*

134. ***Board orders*** *- If, under subsection 133(5), the Board determines that an employee has contravened section 147, the Board may, by order, require the employer to cease contravening that section and may, if applicable, by order, require the employer to cease contravening that section and may, if applicable, by order, require the employer to*

(a) *permit an employee who has been affected by the contravention to return to the duties of their employment;*

(b) *reinstate any former employee affected by the contravention;*

(c) *pay to an employee or former employee affected by the contravention compensation not exceeding the sum that, in the Board's opinion, is equivalent to the remuneration that would, but for the contravention, have been paid by the employer to the employee or former employee; and*

(d) *rescind any disciplinary action taken in respect of, and pay compensation to any employee affected by,*

the contravention, not exceeding the sum that, in the Board's opinion, is equivalent to any financial or other penalty imposed on the employee by the employer.

...

Disciplinary Action

147. General prohibition re employer *– No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee*

(a) *has testified or is about to testify in a proceeding taken or an inquiry held under this Part;*

(b) *has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health and safety of the employee or of any other employee of the employer; or*

(c) *has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.*

Arguments

[42] The employer's counsel argued that no penalty was imposed on Mr. Pruyn between October 13 and December 2, 1999. The evidence produced by the complainant for the period after December 2, 1999 cannot be considered by the Board.

[43] The employer never challenged Mr. Pruyn's work refusal decision on October 13, 1999. The November 9 meeting was called in regard to Mr. Pruyn's distribution of anti-Agency material and his lack of professionalism in past E-file presentations. These issues were not related to his work refusal. During the investigation of his harassment complaint, Mr. Pruyn explained that he did not feel isolated and the credibility of his testimony, in this matter, can be questioned because he declared to the contrary. The employer cannot ignore the letter dated November 18, 1999 from Mr. Pruyn's lawyer. It must take into serious consideration the spinal injury Mr. Pruyn suffered in 1998. The employer had to limit Mr. Pruyn's access to the carpeted area for health and safety reasons as he had specifically stated.

[44] The restrictions imposed on his movements were for a limited period of time. Mr. Pruyn has a fear of falling on the taped carpet tiles and this temporary solution was decided upon after consulting with both the OSHC and his union representative, Mary-Ann Pearson-Jolley. On November 30, 1999, Mr. Pruyn went on sick leave. The employer's counsel submitted that no penalty was imposed by the employer upon Mr. Pruyn between the work refusal on October 13, 1999 and the complaint filed on December 2, 1999.

[45] If Mr. Pruyn felt isolated after the November 9 meeting it was not meant to be harassment or punitive, but management's willingness to accommodate him. The employer's good faith is clearly shown from the absence of discipline against Mr. Pruyn for his refusal to return to work and his distribution of anti-Agency material. The unauthorized absence for the November 30 incident when Mr. Pruyn returned home to attend to his personal hygiene is not related to his work refusal. The employer's good faith is demonstrated by its decision to improve the washroom for Mr. Pruyn's specifics needs. This shows the employer's good faith and is inconsistent with harassing behaviour. The complaint should be dismissed accordingly.

[46] The complainant's representative submitted that the restrictions to access to the carpeted area of his work place were imposed on Mr. Pruyn after the November 9 meeting. No restrictions had been imposed before that date. According to Mr. Woelk, management was not unreasonable to locate Mr. Pruyn in an office outside the carpeted area, which had earlier been indicated by Mr. Pruyn to Mr. Woodford to be a safety hazard (Exhibit E-20). This decision is contrary to the November 8, 1999 (Exhibit G-25) evaluation of the OSHC, by mutual agreement with the Safety Officer (Paul Danton), who concluded that the carpet did not present a tripping hazard.

[47] On November 10, the employer made the decision to isolate Mr. Pruyn after an intimidating and humiliating meeting. Management's behaviour came out clearly when Mr. Woelk talked about the costs of the carpet replacement, estimated as being between $200,000 and $250,000; Mr. Woelk pointed out that Mr. Pruyn was the only person who refused to work. These statements clearly blame Mr. Pruyn for the expenditure. The employer showed its bad faith in challenging Mr. Pruyn's return to work on January 4, 2000, although it did not challenge the reason for his absence as being "stress at work".

[48] For those reasons, the complaint should be allowed.

Reasons for Decision

[49] Since 1995, the lifting carpet tiles appear to be an outstanding problem at the St. Catharines building. Since July 1999, management recognized that it is a tripping hazard for all employees (Exhibit G-20). Mr. Pruyn was worried about this situation in March 1999, particularly in light of his physical disabilities, and refused to work on October 13, 1999 when the situation worsened. The employer did not challenge Mr. Pruyn's right to refuse to work. The potential resolution agreement signed on October 13, 1999 clearly states that staff should be on the alert to identify any problem areas due to the condition of the carpet.

[50] I consider that the evidence clearly indicates that when the complainant refused to work on October 13, 1999, he had reasonable grounds to believe that a condition existed in the work place which constituted a danger to him. The complainant had the burden to prove that his refusal to work was based on genuine safety concerns; I am satisfied that the complainant has discharged it (see *Canada Post Corp v. Jolly,* [1992] 87 di 218 (Canada Labour Relations Board)).

[51] Mr. Pruyn's complaint is, in itself, evidence that section 147 of the *Code* was violated. By virtue of subsection 133(6), the employer has the onus to prove that the alleged violation did not occur.

[52] At the outset of the hearing, the employer's counsel requested that the complainant provide details. I consider that the complainant's evidence submitted at the hearing was part of his original complaint. I dismiss the objection raised by the employer with respect to the admissibility of the documentation filed under Exhibit G -39, this document having been identified by the author Janice Morgan (see paragraph 30).

[53] The objection raised by the employer with respect to the admissibility of Exhibit G-44 is dismissed, because this document was obtained from the employer's documentation under the *Access to Information Act* process. However, this document adds nothing to the evidence received at the hearing and was unconvincing.

[54] The complainant alleged that the employer imposed a penalty or took disciplinary action against him because of his refusal to work while the existing condition constituted a danger for him. More specifically, Mr. Pruyn alleged that the

employer took disciplinary action or threatened to take action against him by putting restrictions on his access to the building's carpeted area and, consequently, to his co-workers. The complainant alleged that these restrictions and discipline threats originated from the November 9, 1999 meeting. This situation lasted until March 2000 when Mr. Pruyn returned to the work station he occupied at the time of his work refusal.

[55] The onus is on the employer to prove that the imposition of a penalty is truly unrelated to the work refusal, primarily because the employer's actions are proximate to the work refusal: *David Baker and Polymer Distribution Inc.,* [2000] CIRB no. 75. The November 9, 1999 meeting was initiated by the employer to discuss the work refusal and other issues related to it, and became disciplinary when other issues were raised (anti-Agency desk drops, the unprofessional attitude, problem with authority). At the November 9 meeting, approximately one month after the work refusal, the employer strongly blamed Mr. Pruyn. Management submitted that Mr. Pruyn was the only one to complain about the carpet situation. Management further submitted that the cost to replace the defective carpet tiles would be incurred due to Mr. Pruyn's work refusal. The employer should, consequently, clearly demonstrate that imposing the penalty is not related to the work refusal, following the principle stated in the *Baker* case.

[56] The employer admitted that the issue of the November 9 meeting was disciplinary when Mr. Woelk agreed to call Mary-Ann Pearson-Jolley to attend the meeting as the complainant's union representative. Clause 17.02 of the collective agreement, between the Treasury Board and the Public Service Alliance of Canada covering all employees in the Program and Administration Services Group, Code 300/98, states the right of the employee to have a representative of the bargaining agent attend the meeting when the employer intends to render a disciplinary decision concerning him (Exhibit G-67). The disciplinary nature of the November 9 debate added to the employer's burden of proof to convince the Board on the balance of probabilities that it never intended to discipline the complainant as alleged: *DiPalma v. Air Canada,* [1996] 100 di 89 (C.L.R.B.).

[57] The employer admitted that the "non-professional attitude" issue was submitted at the November 9 meeting, along with "problem with authority" demonstrated by Mr. Pruyn's actions with the "anti-agency desk-drops". Those issues clearly showed

management's intimidating behaviour. Management threatened to remove Mr. Pruyn from his responsibility involving an E-file presentation for a joint meeting with local tax practitioners. I conclude that the November 9 meeting was of a disciplinary nature.

[58] The employer submitted that the "anti-agency desk-drops", the "non-professional attitude" and "lack of respect for management" are issues not related to the work refusal. My evaluation on the content of the November 9 meeting and its proximity to the work refusal which was also dealt with on that occasion leads me to the conclusion that the meeting was disciplinary in nature. The employer's evidence and submissions do not convince me that the employer did not intend to threaten or discipline the complainant for his refusal to work.

[59] After Mr. Pruyn's October 13 work refusal, management decided to find Mr. Pruyn another work location. Following the November 9 meeting, the complainant alleged that this was a penalty imposed on him by isolating him. Management submitted that the decision to maintain the alternate work location until March 2000 was motivated by the fact that Mr. Pruyn was afraid to fall on a floor of various textures (carpet tiles and tape) as he stated at the November 9 meeting and by his refusal until January 31, 2000 to sign a statement that no hazard to his safety existed.

[60] On this issue of "isolation", the complainant alleged that this constituted a penalty, included in the prohibitions contained in section 147 of the *Code*, because "management was aware of the detrimental effect that the isolation was having on him". Concerning this matter, I must point out that Mr. Pruyn submitted the "isolation" concern following his work refusal and on several occasions after, at the November 9 meeting and in the subsequent e-mail messages. Management cannot ignore the concerns clearly stated by Mr. Pruyn in relation to isolation. Management admitted knowing about Mr. Pruyn's concerns but stated that it wanted to fulfil its obligation to protect Mr. Pruyn. On that issue, I conclude that management was well aware of Mr. Pruyn's concerns regarding isolation and that its willingness to protect him looks more like a pretext than a real concern. Management's request on December 22, 1999 to the complainant and to his doctor to specify his needs or restrictions in relation to his prosthesis and his spinal injury showed that those issues were not clear enough to warrant the isolation before that date. In other words, if management was convinced that Mr. Pruyn needed special protection or accommodation related to his prosthetic leg and spinal injury, this information would

have been requested as soon as Mr. Pruyn submitted his October 6, 1997 e-mail message for the special hygienic needs or at the November 9 meeting for his spinal injury and not at the later date of December 22, 1999. The fact that the employer asked Mr. Pruyn to prove his special needs on December 22, 1999 after the renovations to the washroom were completed constitutes in my view bad faith on the employer's part.

[61] At the November 9 meeting, Mr. Pruyn agreed to use his "walker" when he would have to go on the carpeted area. The employer did not convince me that this commitment was not serious or adequate to secure Mr. Pruyn's safety if he had to go on the carpeted area. The explanation given by the employer is that Mr. Pruyn's commitment was not serious because Mr. Pruyn added: "if I do not forget to bring the walker to work". To agree with this argument, I have to conclude that Mr. Pruyn wanted to put his health or safety in jeopardy just to put his employer in a bad situation. On the contrary, I am convinced that Mr. Pruyn's fears to slip on the carpet were strong enough for him to be cautious. I am convinced that those words "if I don't forget to bring it" stated by Mr. Pruyn at the very strained November 9 meeting are stated to prevent disciplinary action, if he ever steps on the carpeted area without his walker.

[62] For the reasons stated above, I conclude that the employer imposed a penalty on Mr. Pruyn when it maintained his isolation after the November 8, 1999 declaration by the Safety Officer Paul Danton that the current flooring was no longer considered a tripping hazard. After November 8, 1999, the temporary solutions applied with respect to carpet tiles and the inspection procedure are sufficient to avoid the carpet tiles to be hazardous as stated by the OSHC and the Labour Canada Officer. Mr. Pruyn's fears to go on carpet tiles, before his work refusal, seemed to be minimized after the application of the temporary solutions. As per the many statements he made to the employer, verbally and in writing, this isolation affected his ability to work. The bargaining agent agreed to another work location for Mr. Pruyn with his consent. This was valid for a short period of time following the work refusal, as stated in Mary-Ann Pearson-Jolley's November 10 e-mail message as follows:

> *I recognize that you may feel isolated from your co-workers but it is for a short period time only and your co-operation would be appreciated.*

[63] This understanding was shaded by the hostile tone imposed by management's attitude at the November 9 meeting towards Mr. Pruyn. The tone of the December 22, 1999 letter from Mr. Woelk to Mr. Pruyn clearly demonstrated that management's hostile attitude was still maintained. Mr. Pruyn's declaration to the harassment investigator stating that he did not feel isolated is not substantiated enough by the witness to minimize or give less credibility to the other statements to the contrary by Mr. Pruyn. For all these reasons, the preliminary objection submitted by the employer's counsel to the jurisdiction of the Board to hear the complaint on the basis that the employer did not act in a way prohibited by section 147 of the *Code* is dismissed.

[64] Management's behaviour did not improve after December 1, 1999 when Mr. Pruyn filed his complaint. The same drastic attitude persisted and was worse towards Mr. Pruyn who had to fight to obtain 25 sick days in advance and to get the permission to use vacation leave instead of losing a day's pay. This situation persisted until March 2000 when he finally got back to his original work station. The employer's objection to the evidence formulated for incidents that occurred after December 1, 1999 is dismissed. Management's action against the employee was using the same pattern of discipline after December 1, 1999.

[65] In this case, I am satisfied that Mr. Pruyn's exercise of his right to refuse to work pursuant to the *Code* is a proximate cause of the subsequent penalty imposed on him by the employer. Furthermore, I am satisfied on the basis of the evidence adduced and having considered the submissions of the parties that the employer has violated paragraph 147(*c*) of the *Code*.

[66] The penalty imposed on Mr. Pruyn by the decision to maintain him in isolation created a high level of stress at work and this is directly responsible for the incapacity of the complainant to perform his duties between November 10, 1999 and January 31, 2000. This is corroborated by the medical certificates submitted into evidence by the complainant. The penalty imposed by the employer on Mr. Pruyn created a financial loss. Mr. Pruyn used all his sick leave credits and some vacation days that he had to use in lieu of sick leave without pay. I order the employer to give back to Mr. Pruyn the sick leave credits for each sick day taken by Mr. Pruyn between November 10, 1999 and January 31, 2000 as well as any annual leave credits which he

used to cover any absence due to illness during the same period. This order is rendered under the authority of paragraph 134(*d*) of the Code.

[67] In the December 22, 1999 letter (Exhibit G-43), the employer disciplined Mr. Pruyn when it penalized him for unauthorized absence for his November 30, 1999 trip home to take care of his hygiene needs. The employee had no alternative but to go home to care for his hygiene needs because he could not use the specially equipped washroom located in the carpeted area without his team leader's special permission. He had no other choice than to go home to avoid a disciplinary measure; the lower level washroom was not already equipped for his special needs. I order the employer to reimburse Mr. Pruyn for the time taken for his hygiene needs on November 30, 1999.

[68] Accordingly, to the extent indicated, the complaint is allowed. I remain seized of this matter in case the parties encounter any difficulties in implementing my decision.

Léo-Paul Guindon,
Board Member

OTTAWA, February 7, 2002