

*Crown Employees*  
**Grievance Settlement  
Board**

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UNION# 02F006, 2002-0211-0041, 2002-0211-0042

**IN THE MATTER OF AN ARBITRATION**

**Under**

**THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT**

**Before**

**THE GRIEVANCE SETTLEMENT BOARD**

**BETWEEN**

Ontario Public Service Employees Union  
(Larman)

**Grievor**

**- and -**

The Crown in Right of Ontario  
(Ministry of Community, Family and Children's Services)

**Employer**

**BEFORE**

Randi H. Abramsky

**Vice-Chair**

**FOR THE UNION**

Ed Holmes  
Ryder Wright Blair & Doyle  
Barristers and Solicitors

**FOR THE EMPLOYER**

John Smith, Senior Counsel  
Mary Pat Moore, Counsel  
Management Board Secretariat

**HEARING**

April 7 & 8, May 6 & 7, 2003.

## AWARD

The Union has moved to have the Board grant its grievance on the basis that relevant evidence required for it to advance its case has been destroyed by an agent of the Ministry. This Award addresses that motion.

### **Facts**

This case has had a fairly long and painful past. The grievor, Don Larman, is a long-service Probation Officer 2 with the Ministry of Family and Children's Services. He first came to the Board on three grievances related to certain letters placed in his personnel file. Vice-Chair Ken Petryshen mediated the matter and Minutes of Settlement were executed on April 14, 1999.

Paragraph 2 of the settlement provides as follows:

2. The Ministry shall not refer to or rely on any of the report (sic), allegations and/or incidents giving rise to the Grievances in any way or in any subsequent proceedings.

The parties were back before the Board, this time before me, in July 2001, relating to three new grievances. The grievances were settled, and the settlement required a number of things from both the grievor and the Ministry. In part, the Ministry was to destroy all documentation related to the grievances prepared up to April 23, 2001. In addition, "[t]he parties agree[d] not to rely on the content of these documents."

In December 2001, the Ministry alleged a breach of the July 2001 settlement by the grievor, and disciplined the grievor based on findings in an investigation report dated November 15, 2001. It also transferred the grievor from his home position in the St. Catharines Probation Office to its Simcoe office. The grievor filed two grievances against the Ministry. The parties

resolved these matters on February 22, 2002. The Memorandum of Settlement, in part, states as follows:

7. The Employer will not take discipline or take substantive punitive action against the Grievor for the findings that directly relate to him in the Ministry of Community and Social Services investigation report dated November 15, 2001. The Employer will not take discipline or substantive punitive action on the four allegations upon which those findings were based.
8. The Employer will not give the Ministry of Community and Social Services investigation report dated November 15, 2001 to the workplace review consultant.

The “workplace review consultant” referred to in paragraph 8 had not yet been retained. At the mediation, the Ministry committed to hire an outside professional group to undertake a review of the St. Catherines Probation Office. While this review was pending and undertaken, Mr. Larman would remain out of the St. Catherines office on a leave of absence. He would then be advised, two weeks prior to his return to work, of his “workplace location” and he retained the right to grieve this workplace location under the collective agreement.

According to Rick Beauchamp, Program Manager, Community Programs for Hamilton/Niagara Region, the purpose of the review was to obtain an objective, professional assessment of the work environment at the office in relation to its commitment to provide a workplace free of harassment, discrimination and violence. It should be noted that Mr. Beauchamp testified only on examination-in-chief before the Union brought its current motion. The “terms of reference” of the review stated, in part, as follows:

The review will consist of, but not be limited to:

- interviews with all staff in the Probation Office to determine if the Ministry is meeting the above commitment
- review of complaints – both past and present and recommendations on resolution

- review of documents, reports, minutes and correspondence related to the working and interpersonal relationships between staff to determine whether the environment staff have created is consistent with the Ministry's commitment and fosters a positive atmosphere for growth and development.

A number of firms tendered for the project, and Mr. Beauchamp selected Mediated Solutions Incorporated. A formal consulting service contract was entered into between the Ministry and Mediated Solutions. This contract, it should be noted, was not produced until closing arguments on the Union's motion. The contract provided as follows in regard to information and material acquired by or prepared by or for Mediated Solutions, the "Consultant", pursuant to the contract:

#### **Ownership of Materials**

7. The Consultant agrees that copyright in and all information and material, excluding company logos and trade marks whatsoever acquired or prepared by or for the Consultant pursuant to this contract, shall, both during and following the term of the contract, be the sole property of Ontario.

#### **Delivery of Material and Information**

8. Upon receipt of a written request from Ontario, the Consultant agrees to deliver forthwith to Ontario all material and information specified in the request which is the property of Ontario and in the possession or under the control of the Consultant. ...The Consultant further agrees not to destroy any material or information which is the property of Ontario without Ontario's prior written approval. This clause survives the expiration or termination of the contract.

#### **Confidentiality**

9. The Consultant agrees to ensure that the Consultant, its partners, directors, officers, employees, agents and volunteers, shall both during and following the terms of this contract, maintain confidential and secure all material and information which is the property of Ontario and in the possession or under the control of the Consultant pursuant to this contract. ...

The workplace review was undertaken in June and early July 2002. Mr. Beauchamp testified that he did not provide any documents to the consultants. The manager of the St. Catharines office, Dave Hopkins, did that. Mr. Beauchamp met with the consultants to discuss

the terms of reference and his goal of obtaining a clear and objective assessment of the nature of the working relationships in the office and the problems, if any. He testified that he relayed his understanding, through the manager and staff, that concerns had been expressed regarding issues of harassment and claims of discrimination, and that there was tension among individuals in the office. Mr. Hopkins also attended this meeting.

Mr. Hopkins testified on examination-in-chief that, “to the best of my recollection”, he provided the consultants with his supervisor notes from September 19, 2001 to November 28, 2001, along with two e-mails dated June 26, 2002. When asked whether he could recall providing any other documents, he replied “to the best of my recollection, no.” On cross-examination, he acknowledged that he was “not 100%” sure but he was “fairly confident” that was all that he provided. He testified that pursuant to the earlier settlements, he had destroyed a number of documents. In addition, when he took a new job in August 2002, he did some “housecleaning” and destroyed documents about staff “which were not of any particular import.” On cross-examination, Mr. Hopkins was not certain exactly when the documents that were to be destroyed pursuant to the settlements were destroyed. He acknowledged that he did not send a covering letter to Mediated Solutions when he sent them his supervisor notes. Nor did he keep a written record of what had been sent. Instead, he sent them electronically to Mediated Solutions and unfortunately deleted the transmittal message. He could not recall exactly what it said, but recalled that it was along the lines of here is “what I promised you or what you were looking for.”

Mediated Solutions issued its Workplace Review Report on July 23, 2002. The Executive Summary of the report recommends that “the individual on leave”, Mr. Larman, “be

relocated laterally to another office maintaining his position as Probation Officer and given an opportunity to start fresh.” In concludes in part:

Returning the individual who has been at the centre of past and present conflict would unnecessarily disrupt the healing process. There is too much water under the bridge to repair the working relationship between the individual on leave and his former colleagues

In a footnote, the report states: “If this is not possible, then prior to this employee returning to the workplace, there should be a facilitated meeting of all staff in which all of the parties are told the expectations around the working environment.”

Mr. Beauchamp invited Mr. Larman to review the Executive Summary on August 1, 2002, but he was unable to attend. Accordingly, in order to comply with the 15-day notice of Mr. Larman’s workplace location as required by the February 2001 Minutes of Settlement, Mr. Beauchamp wrote to Mr. Larman on August 1, advising him that he would be temporarily assigned to the Simcoe Probation office, effective August 15, 2002. The letter states, in pertinent part, as follows:

As you know, the Ministry of Community, Family and Children’s Services retained Anne Grant and Judi Clarkson of Mediated Solutions Incorporated, a Toronto based Dispute Resolution firm to conduct a workplace review of the St. Catharines Probation Office during the months of June and July 2002. The consultant’s findings indicate that it would be beneficial for all parties in the St. Catharines Probation Office to have a fresh start. Management has carefully reviewed the consultant’s findings and recommendations to create a healthy working environment for all staff members of the St. Catharines Probation Office.

In order to provide you with a fresh start, you will be temporarily assigned to the Ministry of Community, Family and Children’s Services Simcoe Probation Office, effective August 15, 2002, until the Young Offender’s Program is transferred from this ministry to the Ministry of Public Safety and Security. At the time of consolidation, MPSS will confirm workplace locations for all staff. During your temporary assignment in Simcoe, your job responsibilities as a Probation Officer, classification and salary will remain the same. You will be reporting to your new supervisor, Jim Wilkinson. The Hamilton/Niagara Region will provide reimbursement for transportation costs from your home to the Simcoe Office. ...

On August 1, 2002, Mr. Larman grieved his relocation to the Simcoe office.

On August 15, 2002, counsel for the Union, Ed Holmes, advised the Registrar of the Grievance Settlement Board, that the Union and grievor claim that the Employer breached the February 22, 2001 Memorandum of Settlement, and requested that a hearing date be scheduled before me as I had remained seized. A copy of this letter was sent to counsel for the Ministry.

On August 19, 2002, the local union president, Judy DeVries, sent a letter to Human Resources Consultant Mike Symons, requesting disclosure in connection with Mr. Larman's grievance, "pursuant to Sections 22.14.4 and 22.14.5 of the Collective Agreement and all other appropriate sections of the Collective Agreement and the rules of natural justice." The request was quite extensive, and included the following, among other documents:

- all notes, reports, e-mails, briefing notes, letters, names of persons interviewed, and any and all other documentation in the possession of both the Hamilton/Niagara Regional Office and Mediated Solutions related to the Workplace Review of the St. Catharines Probation Office conducted by Mediated Solutions that the Hamilton/Niagara Regional Office of the Ministry engaged for this purpose.
- Copies of all correspondence between the Hamilton/Niagara Regional Office of the Ministry and Mediated Solutions with respect to the Workplace Review of the St. Catharines Probation Office.
- Copies of all documents relied upon for the Workplace Review by the Hamilton/Niagara Regional Office and Mediated Solutions.

On August 20, 2002, Human Resources Consultant Mike Symons responded to Ms. DeVries' request for disclosure. The letter states, in pertinent part: "Due to health and safety concerns that the employer has as a result of the circumstances that gave rise to Mr. Larman's

grievance, the employer will not be disclosing any further information to the grievor for the Stage 2 meeting.”

On August 30, 2002, counsel for the Union, Ed Holmes, wrote to counsel for the Employer, Mary Pat Moore, requesting “full and complete disclosure of any and all documentation, notes, tape recordings, memoranda, letters, reports etc. arising out of and establishing the internal review performed on the St. Catharines office.”

On September 30, 2002, Ms. Moore wrote to Mr. Holmes, as follows:

Please be advised that the Employer is not prepared to produce the report prepared by Mediation Solutions Incorporated dated July 23, 2002 at this time.

I have enclosed a copy of a letter dated September 18, 2000 (sic) from Anne E. Grant, Director, Mediated Solutions Incorporated. Ms. Grant identifies that there are no other documents in her possession related to the preparation of this report for the Hamilton Regional Office of the Ministry of Community, Family and Children’s Services.

Yours truly,

/s/

Mary Pat Moore  
Counsel

The attached letter from Mediated Solutions, addressed to Richard Beauchamp and dated September 18, 2002 states as follows:

Dear Mr. Beauchamp:

Re: Request for Documents  
St. Catharines Probation Office Workplace Review  
MSI File # OI 41525-1,166

Further to our telephone conversation regarding the above -mentioned request, I would like to confirm that the only documents retained in the Mediated Solutions Incorporated (“MSI”) file, other than our contract for services, is the final report dated July 23, 2002. I understand that this report is already in your possession. It

is MSI's practice (based on best practices in this field) to shred all documents, notes, memoranda, etc. used to generate the report and recommendations once the final report has been accepted by the retaining client. As per best practices, the notes were shredded in this case. I would also like to confirm that it is not my practice to tape record confidential interviews, and to my knowledge no recording were made in this case.

I hope this assists you. Please let me know if I can be of further assistance in this matter.

Yours Truly,

/s/

Anne E. Grant, RN, LL.M (ADR, C. Med  
Director, Mediated Solutions Incorporated...

On November 19, 2002, the first day of hearing in this matter, Mr. Holmes raised an issue about the need for further disclosure, and counsel for the Ministry agreed to respond by letter. Given that our next hearing date was not until April 7, 2003, Mr. Holmes advised that there was no rush, and it could wait until after the New Year.

On March 28, 2003, Mr. Holmes again wrote to Ms. Moore stating that "the materials disclosed do not satisfy our request", and listed a number of specific matters. One of the specific matters was that "[w]e have not been provided with a list of the documents or copies of same that were provided to the investigator in the course of the investigation. ..."

On April 4, 2003, Ms. Moore provided some further information in response to the Union's disclosure requests, then stated:

In response to your paragraph 5, the Employer has reviewed its files to determine which documents were provided to the workplace investigators. I have received instructions from the employer that the documents were shredded.

At the hearing on April 7, 2003, based on this representation that the Employer's record of the documents provided to the consultants had been destroyed, Mr. Holmes moved to have the

grievances granted. Counsel for the Employer requested an opportunity to speak again with Mr. Hopkins to clarify the situation of the documents that were provided to the consultants. The following day, Ms. Moore advised that the instructions she had received were in error and that the documents provided by Mr. Hopkins to the investigator had not been destroyed and that Mr. Hopkins would be available to testify about that. Mr. Holmes reserved his motion to consider these events.

When the hearing resumed on May 6, 2002, Mr. Holmes presented his motion.

### **Positions of the Parties**

#### **For the Union**

The Union asserts that the Employer's actions in regard to disclosure in this case – its initial refusals to provide disclosure, the shredding of relevant documents by its agent, Mediated Solutions Inc., its changing positions (the documents provided by Mr. Hopkin's were shredded and then "miraculously" found again) - all preclude the Union from advancing its claims and that to proceed with the hearing would constitute both a denial of natural justice and an abuse of process.

In support of its position, the Union relies on Article 22.14.4 and 22.14.5 of the collective agreement. Articles 22.14.4 and 22.14.5 provide:

- 22.14.4 The parties agree that principles of full disclosure of issues in dispute as alleged by a grievance advanced by the Union on behalf of a member or members, or the Union itself, and full disclosure of the facts relied upon by management in a decision that is subject to a grievance, are key elements in amicable and expeditious dispute resolution process.
- 22.14.5 The parties agree that at the earliest stage of the grievance procedure, either party upon request is entitled to receive from the other, full disclosure.

The Union notes that these provisions are fairly new to the collective agreement and demonstrate the parties' mutual commitment to "full disclosure." In its submission, under these provisions, if a document is "arguably relevant", the requesting party is entitled to get it. These provisions, it submits, create a substantive entitlement to full disclosure.

Along with the duty to disclose, the Union argues, there is corollary duty to preserve relevant documents. It submits that without the duty to preserve relevant evidence, the duty to disclose may be rendered meaningless. It contends that the greater the relevance of the evidence, the greater the degree of care required to preserve that evidence. In its view, given the history of this case, the relevancy of the documents exchanged between the Ministry and consultants, as well as the documents generated and gathered by the consultants would be at the highest level of relevancy.

Despite the contractual obligation to disclose and the corollary duty to preserve, the Union submits that disclosure was initially, and repeatedly, denied and documents were shredded by Mediated Solutions. On the eve of the hearing, the Union was advised that documents had been shredded by the Employer, and then, after counsel for the Union asserted that the grievor could not obtain a full and fair hearing under these circumstances, did the documents that were provided to the consultants "miraculously" reappear. It notes that although the Ministry initially asserted that a "mistake" had been made, there was no evidence of that presented during the testimony of Mr. Hopkins. Further, it submits that Mr. Hopkin's testimony about what he gave to Mediated Solutions is unreliable. It asserts that Mr. Hopkin's could not say with any certainty exactly what he provided to them. There was no list made and no accompanying letter or e-mail outlining what had been provided. On the contrary, the e-mail which transmitted the documents

to the consultants had been deleted, which the Union claims was a deliberate destruction of relevant evidence.

The Union further argues that the Ministry cannot hide behind the fact that it was Mediated Solutions, a third party, that destroyed the requested documents. It submits that Mediated Solutions was the hired agent of the Ministry and subject to its direction regarding the retention of documents. It notes that the contract between the Ministry and Mediated Solutions specifically addresses this point and makes the documents provided to Mediated Solutions as well as documents generated by Mediated Solutions the “property of Ontario.” It also prohibits their destruction. Yet the documents were intentionally destroyed based on the company’s “best practices” approach.

The Union also questions the completeness of the Ministry’s production of the documents it provided to Mediated Solutions. It notes that the contract between the Ministry and Mediated Solutions was not produced until the argument portion of this motion. It suggests that other documents that reasonably would be expected, such as a letter selecting Mediated Solutions, a letter accompanying payment for their services, a letter acknowledging receipt of their report, were not produced. This leads the Union to question the extent of the Ministry’s production, especially when considered in light of the Ministry’s initial refusal to disclose any documents. It submits that, under these facts, neither the Union nor the Board can be sure that all of the documents exchanged between the Ministry and Mediated Solutions have been disclosed, or that a full and fair hearing can take place.

This uncertainty, the Union asserts, is further seriously compounded by the deliberate destruction of relevant evidence by Mediated Solutions. It submits that with the destruction of

