

In the Matter of the *Labour Relations Code*, R.S.A. 2000, c. L-1

In the Matter of a Collective Agreement between the Alberta Union of Provincial
Employees and Alberta Health Services

And in the Matter of the Termination Grievance of Edmond Hajrallahu

Between:

ALBERTA UNION OF PROVINCIAL EMPLOYEES

Bargaining Agent

-and-

ALBERTA HEALTH SERVICES

Employer

AWARD

Before: J. Leslie Wallace, Chair
Ralf Kuntzemann, Union Nominee
Roy Wotherspoon, Employer Nominee

For AUPE: Greg Maruca (Counsel), Edmond Hajrallahu

For AHS: Daniel Glasner (Counsel), Larry Walter

Hearing: April 26-28, 2011, Calgary, Alberta

Award: January 4, 2012

AWARD

I. Introduction and Facts

[1] Edmond Hajrallahu was a 0.5 FTE regular part-time clerical employee of Alberta Health Services classified as Administrative Support III. He worked in the Department of Patient Information at the Tom Baker Cancer Centre in Calgary, where he performed general clerical and record keeping duties. On October 6, 2009 his employment was terminated for alleged harassment of a co-worker and abusive behaviour towards his supervisor and co-workers. This followed an earlier five-day suspension, in February 2009, for an incident of what the Employer deemed to be sexual harassment. The suspension was not grieved. Mr. Hajrallahu did grieve his termination, and this board was constituted to hear the grievance after the parties were unable to resolve it through their grievance procedure.

[2] The parties entered into an Agreed Statement of Facts that we set out here in edited form. We have omitted the name of the female employee who was the object of the alleged harassment for reasons of privacy.

(...)

3. The Grievor commenced employment with the Employer on or around January 8, 2008. (...)

4. At all relevant times, the Grievor held a regular part-time position as Administrative Support III in the Patient Information Department at the Tom Baker Cancer Centre, reporting to Dilshad Jina (the “Manager”). (...)

5. On February 12, 2009, the Grievor was suspended for five (5) days following an investigation into complaints of sexual harassment (the “Suspension”). The Suspension was not grieved; however, on a without prejudice basis, it was agreed that the Suspension may be removed from the Grievor’s Personnel File after twelve (12) months of continuous service as opposed to eighteen (18) months as specified in the Collective Agreement. (...)

6. At all relevant times prior to June 24, 2009, as an employee of the Alberta Cancer Board (“ACB”), the Grievor was subject to ACB Policy – Sexual Harassment 4.B.2 (the “Old Policy”). A copy of the Old Policy would have been provided or made available to the Grievor and Union. (...)

7. At all relevant times on and following June 24, 2009, as an employee of the Employer, the Grievor was subject to the Workplace Abuse and Harassment Policy (the “New Policy”). A copy of the New Policy would have been provided or made available to the Grievor and Union. (...)

Incidents

Sexual Harassment

8. On June 18, 2009, the Grievor allegedly sexually touched a female co-worker, [F.] (the “Harassee”) during their shift (the “Physical Harassment”). The Physical Harassment was not immediately reported to the Employer.

9. Between August 19, 2009 and August 20, 2009, the Grievor posted both private and public harassing messages on the Harassee’s facebook account (the “Unwelcome Comments”). The Unwelcome Comments were not immediately reported to the Employer. (...)

10. On September 28, 2009, the Harassee complained to the Employer’s Human Resources Department (“Human Resources”) about the Grievor’s Physical Harassment and Unwelcome Comments (the “Complaint”). (...)

11. In support of the Complaint, by written statement of September 30, 2009 to Human Resources, the Harassee recounted the Physical Harassment and Unwelcome Comments. (...)

Abusive and Aggressive Behaviour

12. On numerous occasions in September 2009, the Grievor allegedly acted aggressive and abusive towards co-workers and the Manager (the “Abusive Behaviour”). The Abusive Behaviour was witnessed by the Harassee as noted in Exhibit 10 and a co-worker, Rajmonda Stavileci. A copy of Ms. Stavileci’s statement of September 24, 2009 is attached (...)

Investigation and Termination

13. By email of September 24, 2009 to Human Resources, the Grievor provided his interpretation of the Aggressive Behaviour and his general work problems. A subsequent email within Human Resources suggested that this be investigated. (...)

14. On September 28, 2009, Omar Illodo of Human Resources met with the Manager to discuss the Aggressive Behaviour. (...)

15. On October 6, 2009, an investigative meeting was held between the Grievor, a Membership Services Officer from the Union, Omar Illodo and Larry Walter of Human Resources (the “Investigative Meeting”). (...)

16. Following the conclusion of the Investigative Meeting, Human Resources deliberated and reached a determination to terminate the Grievor’s employment. A copy of the letter of termination of October 6, 2009, is attached (...).

Certain of these facts were agreed to by the Union conditional upon named persons appearing at the hearing as witness. All the named persons did so attend and gave testimony.

[3] The panel heard evidence from the Grievor; the Complainant; co-worker Rajmonda Stavileci; the Grievor’s manager Dilshad Jina; and Human Resources Officer Omar Illodo. From this evidence, along with the agreed facts, this composite picture of the facts emerged.

[4] The Grievor is a young man in his mid- to late twenties. He immigrated to Canada as a refugee from his native Kosovo in 1999, during the Serbian-Kosovar turmoil of the time. He possessed four years of post-secondary pharmacy training taken in Kosovo. After coming to Canada he took a further two years of training in a B. Comm. program at Mount Royal University, as it now is. He has lived with his family in their home throughout. On January 16, 2008 he was hired to work on a casual basis in the Department of Patient Information, Tom Baker Cancer Centre, at the level of Administrative Support II. He passed probation and on December 20, 2008 was upgraded to regular part time (0.5 FTE) status at the level of Administrative Support III. Thus when he was dismissed he had approximately 21 months service.

[5] The principal activities of the Patient Information Centre are the receipt, storage, authentication, and conversion to electronic form of many thousands of patient records.

It is, we surmise, repetitive and often unexciting work where discipline and attention to detail are more important than educational attainments or innovativeness. The employee group doing this work is clerical and predominantly female.

[6] The Employer maintains a Policy SWE-02 titled “Workplace Abuse and Harassment”, effective June 24, 2009. In part it reads as follows:

POLICY STATEMENT

Workplace Abuse and Harassment is not tolerated. Alberta Health Services (“AHS”) is committed to providing respectful, secure and supportive work environments to ensure the physical safety and well-being of all individuals. AHS promotes an atmosphere of trust and respect. (...)

(...)

POLICY ELEMENTS

1. Reporting an Incident of Abuse or Harassment

1.1 When an incident of Workplace Abuse or Harassment occurs, Staff shall immediately inform the department Manager.

(...)

1.4 Reports of Workplace Abuse or Harassment shall be made in good faith. False reports may lead to disciplinary action up to and including termination of employment or contract. (...)

DEFINITIONS

Abuse means a single or series of incidents occurring in the Workplace against a staff member that is known or reasonably ought to be known to be unwelcome including but not limited to an act of physical contact without consent; physical contact with intent to harm; subjection to non-consensual sexual contact, activity or behaviour including attention based on sex or gender, or sexual advances; aggressive or violent physical or verbal behaviour; or verbal or written threats causing fear, intimidation or emotional harm.

Harassment means a form of discrimination against a staff member prohibited under the *Human Rights, Citizenship and Multiculturalism Act* based on the following grounds: race, religious belief, colour, gender,

physical or mental disability, body size and weight, age, ancestry, place of origin, marital status, source of income, family status, or sexual orientation. Harassment is inappropriate, unwelcome or coercive behaviour in the Workplace based on one or more of the above grounds which occurs by one individual towards another, where the behaviour is known or reasonably ought to be known to be unwanted or unwelcome. Harassment may be a single or series of incidents and may take verbal, written, graphic or physical forms. (...)

[7] On February 12, 2009, the Grievor was suspended for five days for an incident or incidents that the Employer found to constitute sexual harassment of a co-worker. This board learned nothing about the misconduct other than what can be gleaned from the suspension letter. From the letter it appears to have been an instance of off-duty harassment of a co-worker through messages on Facebook, the ubiquitous social-networking Internet website:

We have concluded the investigation into the complaints the Alberta Cancer Board (ACB) received recently relative to your alleged sexual harassment. Our findings came through the written complaints, the interview with the complainants, other witnesses/department employees, an independent translation of emails/Facebook messages sent by you to one of the complainants and the interview with yourself regarding the allegations.

The information gathered overall supports the allegations made and we find that sexual harassment has occurred as defined and in violation of ACB Policy (...)

As a result of these findings, you are hereby suspended from work, without pay, for five (5) working days, effective immediately. (...)

(...)

Edmond, it is important to understand that the Alberta Cancer Board will not tolerate harassment (including sexual) in any form. It is also very important, in this case, for you to understand that sexual harassment extends to situations which occur at, or away from, the workplace, during or outside working hours and that it may be deliberate or unintentional.

Any further incidents of this nature, will result in further disciplinary action up to and including termination of employment.

[8] One of the Grievor's co-workers was F., the young woman whose complaint in part led to his termination and to this grievance. She too worked in the Health Records section at the Tom Baker Centre, as an Administrative Support III at the time. Her duties were principally filing, electronic and paper chart maintenance, and telephone service. She first worked with the Grievor in July 2008. They worked in the same room, usually for about four hours in the afternoon when her day shift overlapped with the Grievor's afternoon/evening shift. For short periods their shifts overlapped completely when the Grievor provided vacation coverage for another day shift worker.

[9] The Complainant and the Grievor developed a social relationship that she described as eating lunches together and occasional phone conversations after work. Both were users of Facebook, and at some point in their acquaintance they became Facebook "friends". A brief outline of aspects of the Facebook social networking site is required. While we were neither told about nor necessarily understand all the nuances of Facebook, this much seems clear. Being Facebook friends is a status that is conferred by mutual agreement. It allows users to send private messages to each other. Facebook also has public or semi-public functions, in the sense that one does not have to be a friend of another person involved in the interaction. One of the "semi-public" functions (our description, not Facebook's) is that a user with a Facebook profile can post photos on his or her page and grant access to others, not just friends, to post comments about them.

[10] There was dispute in the evidence about how long the Grievor and F. were Facebook friends. There seems to be agreement that they designated themselves friends with each other after an e-mail exchange in which F. stated something to the effect that she would be friends with him if she were "hypnotized". The meaning of this was neither explored nor explained in the evidence. According to the Grievor, he removed F. from his list of friends – "unfriended" her, in Facebook-speak – after only about a week because she was "pestering" him to date her. The Complainant denies doing any such thing, in just the first of several exasperating examples of complete contradiction of evidence in this case. The Complainant says that her recollection is that they ceased

being Facebook friends in June 2009, after the incident that gave rise to the charge of harassment that resulted in the Grievor's termination.

[11] The evidence of this incident is that of the Grievor and the Complainant. There is no independent corroboration of either's testimony. According to the Complainant, it occurred on the afternoon of June 18, 2009, the Complainant's birthday. She was covering an absent co-worker and working in the Review Room with the Grievor. Although three other employees did work in the same room that afternoon, none were present at the time. She stated that she was standing, bent over slightly, writing out phone messages as the Grievor was packing his things to go downstairs to another unit. As he was leaving the room, she says, he struck her on the buttocks with his flat hand. She describes it in her statement to the Employer's Human Resources department this way: "As Eddie was leaving the room, I was slightly bent over taking down some phone messages and Eddie, smacked my butt very comfortably and walked away quickly, laughing to himself". She states that her reaction was one of disgust, and she immediately called out to him to come back and explain how he would dare to behave so inappropriately. This entire description comes from her written statement; in testimony she added nothing to it, nor did she describe whether the Grievor returned to face her at that point.

[12] The Grievor flatly denies everything of this incident, except that he was working in the Review Room with F. most of that day, that he wished her a happy birthday, and they "might have exchanged a few laughs". He claimed that there was nothing different in their relationship after this date, and that he was only aware of the allegation when he was called in to be terminated.

[13] The termination, however, did not come about for another three months, because the Complainant did nothing about the incident at the time. Challenged as to why that was so, the Complainant said that she had confronted the Grievor at the time and she felt safe enough to "let it go for now", to "just keep my distance and give it some time".

[14] What led to the resurrection of the June 18 incident was a lengthy exchange of Facebook communications involving the Grievor and the Complainant in mid-August 2009, some two months later. Most of these communications were retrieved by the Complainant, printed and placed in evidence. They are difficult to place in terms of local time or even of chronological sequence because of incongruities in the time-stamps that Facebook assigns to individual communications. But arranged to achieve internal consistency, and with the assistance of the participants' testimony, the exchange can be described thus.

[15] The initiating incident was a weekend social event, a baby shower for F.'s friend Ema. Ema was visibly pregnant, and a picture was taken with F. and another co-worker alongside Ema, their arms holding Ema's stomach. The picture was posted on Ema's public Facebook page. The Grievor had access to this page and had the ability to post a comment. He did so, over his name, to the effect of "Look at those Arnold arms". Though no one said as much in evidence, one can only surmise that this was a reference to former California Governor Arnold Schwarzenegger, who would be associated with large, muscular arms from his earlier careers as a body-builder and movie actor. It was certainly taken that way by F., who explained that she has long been self-conscious about the size of her arms in proportion to the rest of her body. She said that she had told the Grievor of this, so she took the Facebook posting to be a derogatory comment directed at her personally.

[16] The Grievor denies that this was the intent of the posting. He says that it was a reference to the image of the other women supporting Ema's stomach and the impression of strength it conveyed.

[17] The Complainant responded to this by approaching another co-worker to use her Facebook profile to answer the Grievor. We pause to note that to this point, the exchange was described to us only by testimony, unsupported by documents; but the subsequent communications are documented. They started on the afternoon of Wednesday, August 19, 2009 and finished the next morning. They take the form first of comments posted to

the Grievor's Facebook page, and later of private messages exchanged through the "Messages" function on Facebook. Such private messages can be sent directly between "friends", or by using a lookup function built into the Facebook site.

[18] The exchange must be reproduced to appreciate its full flavour. The exchange was as follows, spelling errors and Web contractions included, corrections italicized as necessary, and personal information of third parties obscured:

From: **Facebook** ...
To: Edmond Hajrullahu

(...)

"Eddie, it's [F.]!!

You look 40 yrs old in this picture 27 and bolding [*balding*]???"

Have you heard of hair transplants????"

[There appears to be a missing communication at this point]

From: **Facebook** ...
To: Edmond Hajrullahu

(...)

"Well at least im not stuck in my basement for the last two years like mamas boy!! By the way I would rather look like a mature lady then a fake to call nothing in his own"

From: **Facebook** ...
To: Edmond Hajrullahu

(...)

"Try carrying a laptop bag with a PC rather then your sandwhich!!

Freak....and dressing like you are a professional guy...when all you do is file....file....file...."

Edmond Hajrullahu

That is a prity stupid thing to say about not owning anything because I chose to live with my family. U make fun of me because I file. U are a clear [*clerk?*] just like me and you do the same job. Prity stupid coments coming

from somebody who thinks alot of them selfs. DONT BE JEALOUS CAUSE I CHASED /S./ INSTEAD OF YOU. I TOLD YOU I DONT WANA GO OUT WITH YOU SO DONT BE ANGRY. I am not surprised to hear these things from you, did not expect anything better. Just wait until Dilshad comes back and I am going to show here those comments you left there. Thanks alot for those lovely comments.

F.

Eddie,

Let's make some clarification here.

I think im upset for the fact that you had smacked my ass on June 18, Thursday. The reason why I remember this so vividly is because that day I was celebrating my B-day at TBCC.

I should have immediately filed a complaint on you on that day when the initial incident took place. Perhaps, I was afraid that you would get furious with me for confronting your inappropriate behaviour.

These comments on facebook I made to you comes from this history and a recent comment you made on my facebook picture "arnold arms".

Lets not be so naïve when you know that this was a cheap comment directed to me because you know I would always tell you how conscience I am about my arms.

So, I suppose you pushed me to the limit and I had to vent my frustration somehow.

If you need to take this to Dilshad, please feel free to do so. I will be more then glad to provide awareness of your consistent behaviour.

I am not angry because you like /S./, I think you are using her issue as a scapegoat for your behaviour and that is wrong.

I have no interest for someone who has no self respect.

Thank you and have a great day!!

Edmond Hajrullahu

You should be ashamed of your self. Being married and asking guys out. Sorry hun but you are to hairy for me.

F.

First of all, I am not married. I don't know why you are thinking that I am. I never asked you out, so please dont flatter yourself.

I was never married, so get that out of your head, its just a conspiracy that I told you, so that you would leave me alone.

Thank you for insulting me. I am sure your case with Dilshad will go very well.

By the way, since you already have an existing red flag charged with harassment once, I suggest you be careful because I will make sure you get charged again.

Have a great day and try to limit your messages to me, as I do not want to associate with you.

Edmond Hajrullahu

Do you think I am crazy to smack you on the ass in fron of people at work. U are out of your mind saying that I did that. I simply meant that you are strong not to make fun of you when I made a comment about your arms. Still that should not have pushed you to the limits. Your arms are big in your head. I never said and nobody said that your arms are big. We will just let Dilshad handle this when she comes back. Thanks again for the false acusations. U need to let go of the past. I told you that I dont date married women when you asked me out. REMEMBER THAT.

F.

I think you are really trying hard to push this one on me.

I dont regret anything I have said to you because you deserve it.

You are a very aggressive guy with women when they dont give you what you want.

We have had no past and I have never asked you out on a date.

Nice try and like you said....talk to Dilshad.

Please stop sending messages to me and handle this situation like you said you will.

Edmond Hajrullahu

So you are saying you were never married. U are a miserable excuse for a woman. U are a pathetic liar. Or should I just tell ema you told me she said that I am a too face. U talk trash about people then you go and pretend like you never said nothing. U are a too face. Or should I just tell Dilshad what you said about her, that she is a pice of shit this and that. U are the one laughing like a cow at work at anything. Are you on drugs because that's what people are saying. You are the one looking like a hooker on your profile picture.

F.

I suggest you stop here otherwise I will go and take this up as a case.

Thank you for this wonderful email, its lots of proof. I dont think you belong to any place of work because you are a threat to all employees.

I feel violated with my rights and abused with your words.

I will fight your position out of this Institution to the end.

Have a great day!!

Edmond Hajrullahu

First of all as far as your coments go about me being a freak with a lap top bag full of nothing but sandwiches and about not owning anything, I have to say that is prity pathetic. I own everything I have even my car wich is more that I can say for you. I have style wich is more than I can say for you. I am in shape wich is more than I can say for you. I shared my lunch with you and u mock me about that. I have style that's why I dress the way I dress not to prove a point. U dress like an old woman. U make fun of my looks because I'm losing hair, thanks dear. I still look good. At least I'm not a woman with a mustach, lol. SO AGAIN SORRY I SAID NO TO YOU BUT I DONT DATE MARRIED WOMEN WHO DISRESPECT THEIR HUSBANDS. U

wana make a case go ahead. U will fal in the same category as the girls who tried to get me fired. U will only make your self look bad. Think about what you said to me in your past letters about being a freak with a lap top bag. U did not only disrespect me but my sister as well, someone who was very generous to you in the recent past. U say I pushed you to the limits by saying u have big arms. I only ment you were strong. However is that's your limit than you dont stand for anything and have no character, because if you did you would have never said those things. THANK YOU VERY MUCH I LOVED YOUR COMENTS AND GOOD LUCK IN THE PAST HONEY I HOPPE YOU FIND SOMEONE TO DEAL WITH YOUR IMATURITY AND PUT A RING ON A FINGER THAT DOES NOT DESERVE ONE.

[19] The Facebook time signatures on these messages are confusing, but when one considers the evidence that the most likely time signatures are Eastern Daylight Time and Pacific Daylight (California) Time, several of the messages appear to fall within the participants' working time. It was in fact admitted by the Grievor that some of these communications were made from work while others were made from his home. We think, from the back-and-forth flow of the conversation, that it is an unavoidable inference that the Complainant too engaged in some parts of this running communication during work time.

[20] Despite the charged and combative tone of these messages, the Complainant did not report the exchange and complain about them until September 30, 2009, almost a month and a half later. In cross-examination, when asked to explain the long delay, the Complainant was at first evasive; then offered that, as for the June buttock-slapping incident, she "wanted to let things settle down"; then that she considered the Facebook conversation not to be work-related and was slow to make it a work issue; and finally she claimed that in fact she did talk to supervisor Dilshad Jina about the Grievor, at least in general terms. The best that she could say to account for the timing of her complaint was that she began to consider the Grievor's conduct toward her "more important" and worth reporting "after the incident in September", of which we say more immediately following.

[21] This appears to have been the end of the Facebook communications between the Grievor and the Complainant. All of this happened, however, against the backdrop of friction between the Grievor and some of the female co-workers in his office, including his supervisor. We have already mentioned the Grievor's earlier discipline for harassment in February 2009, which was not grieved. In March 2009, he had been rebuked by e-mail by his supervisor Dilshad Jina. The text of this message shows that she as his immediate manager, at least, believed that he was unjustifiably complaining about what he perceived as her favouritism toward his female co-workers; and that he was unwilling to do tasks he did not like to do. In testimony, Ms. Jina spoke in general terms – no dates, precise or approximate, were supplied – of incidents in which the Grievor got angry and tossed a pile of his uncompleted work onto a co-worker's desk. Again in general terms, she testified that his female co-workers complained about him “yelling” at them and “throwing things”. She told us that she believed that F. and Rajmonda, another female co-worker, were scared of him. And she testified that she had taken to communicating with him by e-mail “because that's how I found I had to communicate with him”.

[22] In September 2009, the friction between the Grievor, his co-workers and Ms. Jina intensified. The Employer's evidence of this comes from Ms. Jina's and Rajmonda Stavileci's testimony, supported by Ms. Stavileci's statement of September 24, 2009 given to Human Resources. This evidence recounts several incidents. On September 14, the Grievor complained to his co-workers about being assigned an unfamiliar task; and the next day abandoned that task in favour of another that he was familiar with. On September 21, Ms. Jina confronted the Grievor – mildly, according to the statement – about an uncompleted pile of documents that appeared to have been hidden, whereupon he spoke back to her in a harsh tone that “You are talking to me like I am incompetent”.

[23] On September 22 he took exception to Ms. Stavileci leaving on his desk a pile of his reports that were not properly completed and, in front of several others, tossed the reports onto her desk and told her loudly to do them herself. Ms. Stavileci reported the

incident to Ms. Jina, who called the Grievor into her office to advise him to complete his tasks.

[24] On September 23, the Grievor engaged in a prolonged discussion with Ms. Stavileci at high volume, from across the room, that she took offence to. We received no more details, however, of this incident.

[25] Matters came to a head on Thursday, September 24. That day, Ms. Jina called the Grievor into her office to discuss the complaints about his manner and his failure to perform his work. As this conversation was related to Human Resources representative Omar Illodo and in testimony to us, Ms. Jina told the Grievor that if he could not complete his tasks, he would go back to working 0.5 FTE (That was the Grievor's regular position, but he had been given extra hours on a casual basis to help clear a backlog of work). According to Ms. Jina, the Grievor became angry; called her a fool; told her that "the girls are making a fool of you" and that she listened to everyone but him; told her that if she cut his hours he would sue her; and that he would speak to Human Resources and to the Union.

[26] Ms. Jina testified that she was in shock at this response and reported the conversation first to her team lead, then to Human Resources when she called for advice. She was advised to send the Grievor home with pay for the remainder of the day. She did this, because "the girls were upset".

[27] On the same day, probably almost immediately after the meeting with Ms. Jina, the Grievor sent a letter by e-mail to Senior Human Resources Representative Larry Walter. It states itself to be a follow up to a phone call the previous day, and its purpose to be to seek Mr. Walter's advice about "some difficulties that I am experiencing in my working environment". The Grievor complained about rumours in the workplace that he was a threat to female co-workers; about unattributed remarks among them that "we should get rid of Eddie"; about being assigned excessive additional work to the detriment

of his own tasks; about being “set up to fail”; and about resentment from his line manager, Ms. Jina.

[28] Also on September 24, Rajmonda Stavileci prepared a written statement (Ex. #11) and submitted it to Ms. Jina. The statement catalogued the several incidents of alleged aggressive or abusive behaviour involving the Grievor between September 14 and September 23, complained that she felt harassed and afraid to have contact with the Grievor at work, and concluded, “I have great respect and admiration from [*sic: for?*] my superior and disappointed to know that she also feels threatened”.

[29] Mr. Walter and Mr. Omar Illodo, the Human Resources Advisor with primary responsibility for the Tom Baker Cancer Centre, resolved to investigate the complaints against the Grievor. Mr. Illodo arranged a meeting with Ms. Jina for Monday, September 28. There he canvassed the Thursday incident in Ms. Jina’s office, the Grievor’s work performance generally, his relationship with his co-workers, and the complaints that the Grievor had made to Mr. Walter the week previous. Ms. Jina was critical of the Grievor’s performance and workplace demeanour. Mr. Illodo either did not learn or did not record anything of consequence about the Grievor’s issues related in his complaint, for Mr. Illodo was unable to tell us any details of what he learned about these charges in his investigation. It was most probably at this meeting that Ms. Jina supplied him with Ms. Stavileci’s written statement of September 24.

[30] Just after his meeting with Ms. Jina, Mr. Illodo was approached by F. She related her complaints against the Grievor, about both the buttocks-slapping incident and the Facebook exchange. Mr. Illodo requested her to make a written statement setting out these matters in detail. Mr. Illodo advised Mr. Walter of this complaint by e-mail that afternoon. In it he says “She described an episode where Eddie touched her private parts and also has some e-mails from him that she will send to me.” After indicating his plan for proceeding, his message concludes with the statement, “I don’t think the organization can afford having a third sexual harassment complaint against him, Larry, if you know what I mean...”. Mr. Illodo in cross-examination explained this by saying that in his

mind, the Grievor had not got the message that this kind of misconduct was not acceptable and “a stronger message was called for”. Asked whether he had concluded the Grievor was guilty before starting his investigation, Mr. Illodo responded no, he was only “concerned that [he] was getting another complaint”.

[31] F. provided her written statement two days later, on September 30. In it she related the June and August incidents and concluded with a general complaint about his “aggressive” and “harsh” manner and the errors in his work. The very final point in her statement asserts that it had come to her attention that the Grievor had falsely accused her of following him and asking for dates.

[32] Mr. Illodo and Mr. Walter reviewed the documentation and Mr. Illodo’s notes and impressions of what he had learned about the conflict in this workplace. They provisionally concluded that there had been an act of harassment by the Grievor against F. in June. They analyzed the Facebook exchange and interpreted the messages as abusive. Mr. Illodo acknowledged that the remarks were inappropriate going both directions, but said that it was their judgment that the Grievor had started the dispute with his comment about “Arnold arms”. He said that overall the tone and content of the Grievor’s messages was the worse, that it was “very disrespectful”.

[33] Mr. Illodo and Mr. Walter decided to interview the Grievor. The interview occurred October 6, 2009 with both Illodo and Walter present and a Union membership services officer present to assist the Grievor. It was plainly contemplated that immediate dismissal was an option, and even the most likely course, for Mr. Walter had prepared the letter of dismissal that Mr. Hajrullahu received at the end of the interview.

[34] In the interview, which Mr. Walter led, management canvassed his general behaviour towards his supervisor and co-workers as well as the specific incidents in the last week of September. They asked questions about the June buttocks-slapping incident with F. And they put to the Grievor the August Facebook exchange, although from the meeting “script” placed in evidence as Ex. #14, it appears that they were not inclined to

delve into the nature of the relationship between F. and the Grievor. Instead they appear to have either simply put his Facebook statements to him, or asked very open-ended questions, to solicit whatever he wanted to say about the exchange.

[35] It is only one of the many things about this case to cause us concern that the Employer could not supply any notes of its interview with the Grievor. Mr. Illodo testified that he had been unable to find them. As a consequence, he was only able to supply this board with generalities about the Grievor's answers (Mr. Walter did not testify). The thrust of his testimony was that the Grievor essentially denied everything, and did not give them any reason to doubt or reassess the conclusions they had earlier reached provisionally on assessing the information of Ms. Jina and the Grievor's co-workers. They did not consider his denials credible.

[36] The meeting lasted somewhere between 20 minutes and 45 minutes, based on the differing assessments of Mr. Illodo and the Grievor. After the interview, Illodo and Walter caucused to consider what they had been told and came to the conclusion that, particularly in view of the past suspension, there was cause to terminate the Grievor's employment. They returned and gave the Grievor his termination letter, Ex. #15, which reads in necessary part:

(...)

Since February 12 [2009, the date of his earlier suspension], as identified in the investigative meeting, you have been in violation of this [*Workplace Abuse and Harassment*] Policy through the disrespectful and abusive manner in which you communicated and behaved towards your Manager and certain co-workers. Specifically, one of your co-workers requested twice that you cease your abusive and aggressive communication with her through the Facebook emails, yet you continued.

In addition, you touched this same co-worker in an inappropriate manner, which constitutes sexual harassment.

You had been advised previously that harassment (including sexual) will not be tolerated. Your continued conduct has also been deemed as workplace abuse, which will also not be tolerated.

As a result, we must advise you that effective immediately your employment with AHS-Cancer Care is terminated, with cause, for continued violations of the Workplace Abuse and Harassment Policy. (...)

[37] The Grievor gave testimony before this board. It amounted to something very close to a categorical denial of all the facts and incidents upon which the Employer relied. He characterized his general relationship with his co-workers as “very pleasant, I looked forward to going to work every day”. Of his particular relationship with F., he stated that it was good, pleasant, and that he would not say there was any discomfort between them. He told us that he was “fond” of his supervisor Ms. Jina and that he had the “utmost respect” for her. He flatly denied that he had ever slapped F. on the buttocks and, as previously noted, said that he was only made aware of the allegation at his termination interview. Asked why F. would have invented the allegation, he offered that he believed she was “ticked off” that he had told her that he would not become involved with her – by which we understand, to go on dates with her.

[38] Turning to the Facebook messages, the Grievor admitted sending some of them from work. He acknowledged that the exchange was irresponsible and childish on his part, but that he had felt belittled, disrespected and “smeared”. He noted that F.’s early communications in the exchange had been on public parts of the Facebook site, while he responded privately. He maintained that the “Arnold arms” comment that commenced the exchange was not directed to F. in particular.

[39] The Grievor denied the allegations that he conducted himself in the workplace in an aggressive or abrasive manner. He told us that he treats women with respect. He said that he did not throw documents or yell; at most he would gently drop documents on another worker’s desk. Asked about testimony to the effect that others considered him to have anger management issues, he responded “I think I’m a pretty contained guy... I don’t get upset to the degree that I get angry”. And asked about his dealings with Ms. Jina, he flatly denied calling her a fool or threatening to sue her if his hours were cut.

The Grievor's view is that some kind of disagreement was created between them. He did not explain or articulate this theory, though one surmises from his evidence and his letter to Larry Walter of September 24, 2009 that he may assign blame to his co-workers for this.

[40] Respect was a recurring theme in the Grievor's testimony. He considered himself a victim of disrespectful behaviour by his co-workers; that his own respectful attitudes were not reciprocated. He agreed with cross-examining counsel that he considered himself a victim of his own sensitivity, and that "to some extent", they – his supervisor and co-workers – were out to get him, that he was set up to fail.

[41] Union Counsel asked the Grievor to reflect on the events and comment about his role. Though he did not apologize for anything at his termination meeting, and really did not do so before this board, he was willing to say that he felt apologetic about being rude to F. and responding to her selfishly. He acknowledged that it was a mistake that he would always keep in mind if returned to work.

II. Findings and Decision

[42] We who regularly sit on boards of arbitration often hear evidence of things done and decisions made without due thought or attention to the facts known or discoverable. We routinely hear stories of human failings in the workplace. We often hear the accounts of witnesses whose ability or commitment to tell the unvarnished truth about what they saw or experienced comes into doubt. Through all of this, the experienced arbitrator or member thinks twice about being needlessly critical or preachy in manner or in writing, for there but perhaps for Grace do we all go.

[43] Sometimes, though, an arbitration case involves so many errors, failings and evidentiary weaknesses on both sides of the dispute that one cannot remain silent and still decide and explain the result with any coherence. This is such a case, and regrettably we

must make some rather far-ranging comments about credibility and about the capability with which these matters were handled. We are sorry to say that almost no one closely involved in these events can come away completely unscathed by the judgments that must be made.

[44] The Employer's case is built upon the idea that there is one central kind of misconduct exhibited by the Grievor, the abusive harassment of other people in his workplace. Into this one characterization it tries to fit several elements: the Grievor's previous discipline; the buttocks-slapping incident in June 2009, which it characterizes as sexual or physical harassment; the Facebook exchange; the general complaints of the Grievor's co-workers and manager about his performance and manner in the workplace; and his direct dealings with his manager in the period leading up to his dismissal. There are problems, however, with approaching the facts of the case as one more or less uniform course of misconduct. One is that of discerning the truth of the buttocks-slapping incident against a backdrop of two employees who possessed some measure of social relationship between them. Another is that the Facebook exchange, however discreditable to both participants, happened in part while both employees were off-duty and that both of them, however improbably, seem to have treated it as not being conduct that related to work. They considered themselves free to indulge in a cycle of nasty, personal remarks in which there was provocation on both sides. A problem related to both the Facebook exchange and the buttocks-slapping incident is the passage of time: what should it be taken to mean that the Complainant did not make the buttocks-slapping incident an issue for management until three months after it occurred; nor the Facebook exchange for a full month afterward? And there is the conceptual problem is that in the dealings between the Grievor and his supervisor, Ms. Jina was not powerless. She was management, and what the Employer characterizes as this element of "abuse" in fact has more the character of insubordination or insolence. Considerations of whether and how management asserted its authority to control insolent or insubordinate behaviour are relevant to such misconduct.

[45] In light of these different strands to the alleged misconduct, and the different problems associated with the various elements, there was called for an investigation and response of some sophistication and care on the part of the Employer. Our first general observation is that the investigation did not display those qualities. Management seems to have very early come to the predisposition that the complaints about the Grievor were generally true and that it was “more of the same” as the misconduct for which he was disciplined in February. The e-mail reference to the organization not being able to afford another sexual harassment complaint against the Grievor suggests the possibility of closed minds at the earliest stage of the investigation. Regrettably, the subsequent course of the investigation did little to dispel this possibility. The Complainant’s account of the buttocks-slapping incident was accepted uncritically, without delving into the nature of their relationship or, perhaps, even the precise nature of the harassment alleged: of this, Mr. Illodo’s description of F.’s complaint to Mr. Walter as one of “touch[ing] her private parts” makes the behaviour sound more sinister than it may have been. There is no indication that management addressed the late-breaking nature of this complaint as an issue; nor that they appreciated from the very personal and familiar content of the Facebook exchange that there was a history between the Grievor and the Complainant that had to be assessed to determine the truth and character of the buttocks-slapping incident. Nor was there any indication that management took seriously the possibility that there might be elements of truth in the Grievor’s September 24 e-mail to Mr. Walter outlining his views of what was going on in the workplace.

[46] Management’s assessment of the Facebook exchange was reasonable in some respects, but oddly lacking in some others. They correctly came to the conclusion that the Grievor had started the exchange with his “Arnold arms” comment, and it was a reasonable judgment call that on balance, his part in the conversation was more offensive than F.’s. But there seems to have been little willingness to examine the exchange as an out-of-control spiral in which each nasty comment begot another in return; or to consider generally the degree to which F.’s communications might have mitigated, though not excused, the Grievor’s blame for his part in the exchange. We are struck by the thought that the Complainant’s messages, posted early in the conversation on a public part of the

Facebook site, may have been nicely calculated to cut the Grievor where he would bleed, so to speak. Instead of considering these things, it appears that the Employer limited itself to finding that the Grievor started the exchange and said the more offensive things; therefore he was the harasser in the exchange, his conduct warranted discipline, and the Complainant's did not. With due respect, we find its approach simplistic.

[47] With this, we may turn to our assessment of the Complainant's evidence. She was, we are sorry to say, a talkative and combative witness, in ways that hurt her credibility. She tended to ramble in her testimony, adding to answers seemingly as better ones came to mind. She did not readily accept direction from cross-examining counsel, and seems to have viewed her appearance as a witness as much as an opportunity for debate as an obligation to inform the board of the facts. What her appearance did clearly demonstrate is that she is a young woman of strong opinions and not easily intimidated. But this does not concord with some of her testimony to the effect that she felt intimidated or unsafe in the presence of the Grievor. Overall, the combination of her assertive, even argumentative manner; the lack of restraint shown in her part of the Facebook exchange and in her testimony; and her odd inability or reticence to satisfactorily explain why she brought forward her complaints at the time she did, leads the trier of fact to be cautious about treating her evidence as the complete and unembellished truth.

[48] In fact, it would be difficult to rely on the Complainant's testimony in preference to that of the Grievor, if only there was strong, credible evidence to the contrary from the Grievor himself. Unfortunately, the Grievor's demeanour as a witness, and particularly the substance of his testimony, also troubled us. His manner was very self-controlled. It bordered on the taciturn, leading the trier of fact to wonder whether and how much of events was being left unsaid. This concern was minor, however, compared to that created by the substance of what he told us. He denied virtually every damaging fact except the incontrovertible Facebook exchange. He did so in terms that would have us conclude that he was a good employee and that this dispute is entirely explained as a workplace

conspiracy among his manager and his co-workers; first to treat him unfairly in the distribution of work, and ultimately to oust him from his job.

[49] As a panel of experienced labour relations practitioners, we would be the last to deny that office politics exist, or that gender imbalances in the workplace (in either direction) can lend themselves to more, and worse, workplace disputes than normal. In our experience, however, real workplace conspiracies aimed at a wholly innocent employee are much rarer than employees often believe them to be. The trier of fact is put in mind of a turn of phrase used by an eminent historian when speaking of a particular historical issue of reputation: that such billowing, black smoke must presumably issue from some sort of a fire¹. Rumour and reputation are not true just because they exist, of course. But where so many complaints exist, from many sources, one is not easily convinced that they are all false and the creation of a malign conspiracy. A witness who makes this the thrust of his testimony asks much of the arbitration board. It is generally a much more believable story when a witness admits a measure of the criticisms against him- or herself and draws attention to the facts and circumstances that mitigate or excuse the fault that exists.

[50] From this discussion, the reader may readily conclude that we are unwilling to rely entirely on the testimony of either the Complainant or the Grievor. Our task is to try to piece together a version of the facts that is most likely from the evidence we have; to determine whether we are convinced of their truth on the civil standard of a balance of probabilities; and to decide whether those facts establish the Employer's case that just cause for discharge existed. We carry out the latter task within the accepted framework of analyzing a disciplinary discharge set out in the B.C. Labour Relations Board's case of *Re William Scott & Co. Ltd.* [1977] 1 Can. L.R.B.R. 1, which advises arbitrators to ask, first, do the facts disclose just cause for discipline; second, is the discipline imposed appropriate or excessive in all the circumstances; and last, if the discipline is excessive, what is the appropriate penalty?

¹ John Julius Norwich, *Byzantium: The Early Centuries* (Penguin: 1990), p. 192

[51] Turning first to the June incident, we find it more likely than not that the Grievor slapped the Complainant on the buttocks while she was bent over writing notes in the Review Room. The Complainant's evidence that the incident took place was not shaken, or even seriously challenged, in cross-examination. The story acquires some support from the fact that she referred to it in the Facebook exchange and that she was able to place the incident precisely in time. There is enough circumstantial detail of the incident in her September statement that it is not likely to have been completely made up. The Grievor's denials are unconvincing by contrast. His initial denial in the Facebook exchange was aggressive and accusatory. One would expect him instead to have been mystified by a charge like this that was a complete fabrication and to have responded, in essence, what are you talking about? His denial in testimony was also not very convincing, comprising a bland assertion that the incident never happened together with another accusatory explanation that the Complainant may have been angry at his rejecting her. This leads us to prefer the Complainant's evidence, at least on the point that the incident occurred.

[52] We also accept the Complainant's evidence about the character of the contact. It was a single slap on the buttocks, administered "comfortably" in her word – by which we take to mean familiarly, for shock and surprise value rather than to inflict pain, and certainly not a fondling or other overtly sexual advance as Mr. Illodo's e-mail to Mr. Walter inaccurately suggested. We accept that the Grievor walked away immediately after the contact, again demonstrating the intent to cause surprise and shock rather than to open, however crudely, a sexual advance.

[53] What we do not accept is the Complainant's evidence that the incident caused her lasting distress and insecurity. Her immediate reaction was anger and the resolve to confront the Grievor, which she did in no uncertain terms. The evidence of this reaction was consistent with her apparent character on the witness stand, of a spirited and strong-willed person who is not easy to intimidate. There followed two months of silence, until the incident was resurrected in the Facebook e-mail exchange following the "Arnold arms" comment that she found personal and insulting. Then there followed another

month of silence until she sought out and spoke to Mr. Illodo during the workplace upheavals of the week of September 24, 2009. Her explanation of the delay was that she intended to give the Grievor time to alter his behaviour and only decided to come forward because later events convinced her that his behaviour was worse, and a more important issue, than she had previously believed. This rings false. It sounds contrived. We are concerned by the fact that the statement followed so closely on the workplace incidents of late September and the apparently completely unsolicited letter of September 24 from Ms. Stavileci to Ms. Jina. The possibility we see is that the Grievor's behaviour of September led his co-workers to bring forward saved-up complaints against him, including F.'s encounter with him in June. This, together with the other incongruities of the Complainant's evidence on this point, causes us to discount and reject the claim that the June incident was debilitating and affected the Complainant's performance at work.

[54] The evidence about the Facebook exchange is clearer. The Grievor started it with his publicly posted comment about "Arnold arms". We consider the comment to have been a personal reference to the Complainant's arms, and that she correctly appreciated its meaning. The Grievor's alternate interpretation is not plausible. The rest of the escalating exchange took place the afternoon and evening of August 19 and the morning of August 20, 2009, with both participants sending some of the messages from work. We address presently our views of these communications when we turn to the question whether and what degree of discipline is warranted.

[55] The Employer terminated the Grievor partly because of the "disrespectful and abusive manner in which you communicated and behaved towards your Manager and certain co-workers". This requires us to consider the evidence of the Grievor's relationship with them, both generally and in particular during the week of September 24, 2009. Of his relationship with co-workers, we prefer the evidence of the Complainant, Ms. Stavileci, and Ms. Jina. The thrust of their evidence was that, far from being a "pretty contained guy" (the Grievor's words), he has during his employment in this workplace been unco-operative and inappropriately aggressive in his communications, often enough to damage his reputation among those he works with. This conduct

included rejecting work, ostentatiously passing it to other employees, and being critical of co-workers publicly and at loud volume. All of this happened in the latter part of September, 2009. We are driven to the conclusion that, for an employee concerned about the respect with which he is treated, the Grievor has sometimes failed to exhibit the same respect of his co-workers.

[56] Of the Grievor's dealings with Ms. Jina, we have no difficulty accepting Ms. Jina's evidence that the Grievor, when confronted with inappropriate behaviour and told that it might cost him his casual shifts, responded abusively and with threats. We find that he called Ms. Jina a fool to her face, told her that "the girls" were making a fool of her, and that if his hours were reduced he would variously sue her, complain to Human Resources about her, or involve the Union. The last point is innocent in substance (though maybe not in tone) because he has a right to seek Union assistance; but the former statements were threats; and calling one's supervisor a fool to her face is insolent. This event occurred, we find, and needs to be taken into account in the assessment of just cause.

[57] All of these areas of misconduct – the buttocks-slapping incident, the Facebook exchange, the Grievor's conduct towards co-workers, and his insolence toward his supervisor – furnish cause for discipline. The next question is whether discharge is appropriate or excessive in the circumstances.

[58] The Employer characterizes the buttocks-slapping incident both generally as harassment and specifically as sexual harassment. It points to the definition of "sexual harassment" under its 1992 Policy of the same title (Ex. #6):

1.3 Sexual harassment is defined as unwanted sexual solicitations or advances, either verbal or physical, that are threatening or coercive. Sexual harassment includes but is not limited to:

- unwanted remarks, jokes, innuendos, or taunting of a sexual nature about a person's body, attire, age, marital status or sexual orientation;

- unwanted or intimidating invitations or requests with sexual overtones;
- unwanted and unnecessary physical contact such as touching, patting, pinching;
- sexual assault.

It also relies on the definitions of “abuse” and “harassment” contained in its current Policy SWE-02, which was adopted about a week after the June incident:

Abuse means a single or series of incidents ... that is known or reasonably ought to be known to be unwelcome including but not limited to an act of physical contact without consent; physical contact with intent to harm; subjection to non-consensual sexual contact, activity or behaviour including attention based on sex or gender, or sexual advances; aggressive or violent physical or verbal behaviour; or verbal or written threats causing fear, intimidation, or emotional harm.

Harassment means a form of discrimination ... based on the following grounds: (...) gender (...). Harassment is inappropriate, unwelcome or coercive behaviour in the Workplace based on one or more of the above grounds which occurs by one individual towards another, where the behaviour is known or reasonably ought to be known to be unwanted or unwelcome. Harassment may be a single or series of incidents and may take verbal, written, graphic or physical forms. (...)

[59] These are reasonably accurate definitions of the concepts of harassment and sexual harassment in so far as the breadth of the objectionable conduct is concerned. Like many attempts at definition, however, they obscure or understate the importance of context. Two actions that are equally “harassment” by the letter of the definition may be radically different in severity depending upon the nature of the act and the context within which it occurs. And we are struck by the wisdom of the words Arbitrator Laing uses in *British Columbia v. B.C.G.E.U.* (1995) 49 L.A.C.(4th) 193 at 242:

In these times there are few words more emotive than harasser. It jars our sensibilities, colours our minds, rings alarms and floods adrenaline through the psyche. It can be used casually, in righteous accusation, or in a vindictive fashion. Whatever the motivation or reason for such a charge, it must be treated gravely, with careful, indeed scrupulous, fairness given both to the

person raising the allegation of harassment and those against whom it is made.

The reason for this is surely self-evident. Harassment, like beauty, is a subjective notion. However, harassment must also be viewed objectively. Saying this does not diminish its significance. It does, however, accentuate the difficulty of capturing its essence in any particular circumstance with precision and certainty.

For example, every act by which a person causes some form of anxiety to another could be labeled as harassment. But if this is so, there can be no safe interaction between human beings. Sadly, we are not perfect. All of us, on occasion, are stupid, heedless, thoughtless and insensitive. The question then is, when are we guilty of harassment?

I do not think that every act of workplace foolishness was intended to be captured by the word “harassment”. This is a serious word, to be used seriously and applied vigorously when the occasion warrants its use. It should not be trivialized, cheapened or devalued by using it as a loose label to cover petty acts or foolish words, where the harm, by any objective standard, is fleeting. Nor should it be used where there is no intent to be harmful in any way, unless there has been a heedless disregard for the rights of the other person and it can be fairly said “you should have known better”.

[60] The Grievor’s swatting the buttocks of the Complainant was without doubt an “act of workplace foolishness”. It was crass and presumptuous. It was offensive as between a man and woman who had not reached a level of close friendship and familiarity that goes beyond that of casual workplace acquaintance. It had, or was capable of having, sexual overtones. But though it may have been technically within the Employer’s meaning of “harassment” or “sexual harassment” as an act of unwelcome physical contact between man and woman, in character it falls toward the very low end of the scale of severity. We have already observed that it did not appear to be aimed at inflicting pain, but only shock or surprise. It was a single, sharp but fleeting physical contact, after which the Grievor went away. It was not a fondling or lingering physical contact that would accentuate the sexual character of the act. And, highly important to our analysis, the action was never repeated after the Complainant confronted the Grievor and told him he was out of line. Taken together, these facts make the incident one that to us justifies discipline, even significant discipline, but not discharge.

[61] The Facebook exchange was partly off-duty conduct and partly workplace conduct, but nothing turns on this. To the extent it was off-duty conduct, it was of a kind that can justify employer discipline. The framework of analysis is that set out in *Millhaven Fibres Ltd.* (1967) 1(A) U.M.A.C. 328 (Ont., Anderson). Arbitrator Anderson there concluded that off-duty conduct may be the subject of discipline only where the employer can demonstrate that the conduct engages a real and tangible interest of the employer. He set out five broad categories of harm to the employer's interests that it may show to justify the discipline. One of them is that "the grievor's behaviour leads to refusal, reluctance or inability of the other employees to work with him or her". An employee who uses off-duty time to engage in an exchange of personal insults with a co-worker may reasonably be considered to create such a problem for their common employer and to expose himself to discipline as a result.

[62] The exchange was discreditable to both participants. The language was unrestrained, insulting and fully capable of generating animosity between Complainant and Grievor that could make it difficult for them to work together. The incident warranted discipline. Again, however, in severity it falls short of a level warranting discharge. The exchange was a first and only occurrence of its type between these employees. There appears – most clearly in the testimony of the Complainant – to have operated between them a curious inability to understand that insulting and alienating a co-worker through a social media application is in fact work-related conduct. And again very importantly, the Grievor cut off the conversation and did not repeat his conduct after he was forcefully told by the Complainant to stop.

[63] Turning finally to the conduct that the Employer characterizes as abuse of co-workers and supervisor, we intend to concentrate upon the incident between the Grievor and Ms. Jina. We accept the evidence about the Grievor's manner with his co-workers and find that it is capable of supporting discipline. The concept of progressive discipline, however, includes the idea that at the early stages of an employee's misbehaviour, management will do what is reasonable to take corrective action directly with the

employee. There is no indication in the evidence that management confronted the Grievor about his behaviour in any effective way before the meeting of September 24 in Ms. Jina's office. In the absence of any such evidence, the appropriate discipline warranted by this element of the Grievor's conduct would be very mild indeed, if discipline could be supported at all.

[64] As earlier suggested, the Grievor's encounter with Ms. Jina in her office on September 24 is more properly characterized as insolence or insubordination than "abuse", because the former words recognize the position of power and authority occupied by the recipient of the abusive conduct. The case law summarized by Brown & Beatty, *Canadian Labour Arbitration*, 4th ed. (Looseleaf: 2006: Canada Law Book) at §7:3660, establishes that insolent or defiant behaviour may be characterized as insubordination warranting discipline even in the absence of a refusal to comply with a particular lawful direction. The conduct is to be analyzed for whether it amounts to a challenge of the employer's authority and how severe a challenge it is:

(...) In determining whether the quality of the grievor's remarks can be characterized as insolent and defiant, regard may be had to the nature of the business, and the common language and mode of expression utilized and tolerated in the plant. Assuming that the behaviour or language at issue is not particularly disruptive, insulting or contemptuous of management, only minor disciplinary sanctions would be warranted. On the other hand, if the language is accompanied by a refusal to obey instructions, threats or an assault on a supervisor, more severe disciplinary sanctions, including discharge, may be justified. As a general principle, it has been suggested that discharge may be appropriate where it can be said that the employee's conduct, viewed in its totality, is "sufficiently contemptuous of authority as to justify the conclusion that the ongoing employment relationship...should be terminated".

(footnotes omitted)

[65] The insolence in this case strikes us as moderate in severity. This is a white collar workplace, an office environment. It is not a workplace where some level of profane or other language critical of management is allowed to pass unanswered. Calling Ms. Jina a "fool" to her face was insulting and contemptuous. It is an insult that is

relatively serious because it mocks the manager's powers of intellect and judgment generally. Threatening to sue Ms. Jina or complain to Human Resources was also a rejection of management's authority to make workplace decisions like the one in question. The remark is not excused or mitigated by the fact that the Grievor would have great difficulty finding a cause of action upon which he could sue in the ordinary courts. Non-lawyers are not likely to be familiar with such subtleties, and even to many educated people a vague threat of being entangled in legal proceedings is intimidating. Offsetting the severity of the insolence somewhat are the considerations that the Grievor was not profane, he did not threaten any kind of physical response, and (very importantly) the insolence took place privately, in Ms. Jina's office, rather than in front of other staff. When all these things are considered, we again conclude that the Grievor's insolence warranted discipline of some significance; but it was not by itself so serious as to justify discharge.

[66] We have so far analyzed each element of the Grievor's proven misconduct separately. They must, of course, now be considered cumulatively as to whether discharge is a proper response. As part of this analysis we must also consider other global factors. The important ones are length of service and past disciplinary record. The Grievor was a short-service employee. Though this does not reduce the standard for dismissal below the threshold of "just cause", it does disentitle the Grievor to any special consideration and credit for having long service with this employer. He also had a past disciplinary record of a significant recent suspension, levied for some of the same misconduct generally of which he is accused in this case. This too disentitles the Grievor from the credit he would receive for a history of trouble-free performance; and it tends to move an arbitration board to regard as reasonable an employer's judgment that the employment relationship cannot be salvaged.

[67] We are therefore left with a short-service employee with a recent five-day suspension for conduct broadly similar to some of the conduct in this case. We have an incident of harassment or physical abuse of a co-worker, F., that is mild in severity as cases of harassment go, but that we assess as moderately serious misconduct considering

the toxic effect of harassment like this that has even a distantly sexual character. There is proved the misconduct of the Grievor's part in the Facebook exchange. This we characterize as mild to moderately serious misconduct, the Grievor's fault being mitigated somewhat by the shared fault of the Complainant in causing the insults to spiral out of control. We have the Grievor's conduct to his co-workers, which is of too little weight to make a difference in our assessment, mostly because he was not previously called to account by management. And we have the Grievor's insolent and threatening behaviour to Ms. Jina. This we have characterized as moderately serious misconduct, because although it was contemptuous of and resistant to management authority, it was not profane and it was not done in public.

[68] Taken together, this plainly justifies a very significant disciplinary response from the Employer. We are unable, however, to bring ourselves to conclude that discharge was an appropriate response. While taken as a whole the Grievor's course of misconduct was highly blameworthy, it was not so serious that we may conclude with assurance that the employment relationship is irreparable, or that the Grievor is not salvageable as an employee with the benefit of effective management. There turned out to be some mitigating facts and considerations in the case as it was presented to us. These might have been ascertained with a discharge investigation that was less of a rush to judgment than this one was. Overall, then, the case warrants a judgment that discharge was excessive in all the circumstances.

[69] The final issue to consider is, what is the appropriate disciplinary response? For misconduct additional to and partly repetitive of the conduct that earned the Grievor a five-day suspension, a longer suspension must follow. Into the judgment of how long the suspension should be we factor the Grievor's conduct at the arbitration hearing itself. We have earlier remarked upon the Grievor's inability to concede certain facts or to admit anything but the most incontrovertible blame. We note his insistence on maintaining a categorical denial that we have found unworthy of credit. This perpetuated the categorical denial that he made to the Employer in its investigation, a course that contributed to the Employer's inability to discern the full facts of the case. We are not

inclined to consider the Grievor's lack of candour before us as a factor that can establish just cause for discharge where it does not otherwise exist. It is, however, a factor that can and should affect the exercise of discretion in the decisions about length of suspension and the resulting compensation that flows from a reinstatement. The result that best reflects our views of this factor, and our views of the entire case, is that the Grievor should be reinstated to employment as of the date of this Award, without compensation. We so order.

[70] We say he should be reinstated "to employment", not to his previous job. Although the employment relationship is not irreparably breached, the relationships in this particular one of the Employer's offices are so badly damaged by events, including the conduct of this hearing, that it would be inadvisable to force the Grievor back into that setting. The Grievor too, is likely to have better prospects for success in another setting. Therefore we direct that the Employer reinstate the Grievor to employment in the same classification at the same FTE level as previous. In doing so, we take the view that this is not a case to direct damages in lieu of reinstatement. This is a large employer, with many jobs of this type that may be examined as possible solutions and the normal remedy of reinstatement should apply. We reserve jurisdiction to resolve any dispute that persists about implementation of our remedial direction.

[71] We remain concerned at the evidence we heard about the Grievor's workplace manner, his beliefs concerning conspiracies against him, and his seeming inability to admit fault. We wish to express the view that education in an area such as anger management, engaging with "difficult" people, or dealing with workplace diversity, might profit the Grievor and play a role in allowing him to succeed. We make no binding direction in this regard, but suggest that the Employer consider making one or more such educational opportunities available to the Grievor, on either an in-service or community basis, at its expense, of course.

[72] The grievance is allowed. This Award is unanimous. The nominees authorize its release over the signature of the Chair.

ISSUED and DATED this 4th day of January, 2012 at Edmonton, Alberta.

A handwritten signature in black ink, appearing to read "J. Leslie Wallace". The signature is fluid and cursive, with a long horizontal stroke extending to the right from the end of the name.

J. Leslie Wallace
Arbitration board chair

Case Name:

Canada Post Corp. v. Canadian Union of Postal Workers (Discharge for Facebook postings Grievance, CUPW 730-07-01912, Arb. Ponak)

**IN THE MATTER OF a Grievance Arbitration
Between
Canada Post Corporation (Referred to as
the "Employer" or "Corporation"), and
Canadian Union of Postal Workers (Referred to as the "Union")
Formal Arbitration
Discharge for Facebook Postings
Grievance # 730-07-01912**

[2012] C.L.A.D. No. 85

216 L.A.C. (4th) 207

110 C.L.A.S. 53

Canada
Labour Arbitration
Edmonton

Panel: Allen Ponak (Arbitrator)

Heard: May 17, August 30 & 31, October 6, and November 2 & 3, 2010; February 24 & 25, April 11 & 12, August 29, 30 & 31, September 7 & 8, and October 17, 2011.

Award: March 21, 2012.

(134 paras.)

Labour arbitration -- Discipline and discharge -- Available sanctions -- Dismissal.

Labour arbitration -- Discipline and discharge -- Grounds -- Insubordination.

The grievor, a postal clerk with 31 years of service, was discharged after management became aware of her postings on her Facebook account. The postings were made over a one-month period

and contained a number of derogatory, mocking statements about her supervisors and the employer. The employer argued that the postings were grossly insubordinate, had the potential to damage the reputation of the employer, and had greatly harmed the supervisors. The employer pointed out that the grievor was unapologetic, blaming her supervisors for creating an intolerable work environment that justified her postings. The union accepted that the postings were regrettable but argued that they were the result of a toxic work environment. The grievor also thought her postings were private. The union submitted that dismissal was too harsh a penalty.

HELD: Grievance dismissed. The postings on Facebook were abusive, intimidating and mocking. They were disseminated to the grievor's friends, who included other employees of the employer. Discovery of the postings harmed the targeted managers. Both managers substantial time off work for emotional distress and one required medical care. While the grievor might have believed that her postings were private, that did not relieve her of the responsibility for what she wrote. The arbitrator rejected the union's contention that the grievor was a heavy drinker or suffered from mental illness as reasons for diminished responsibility. The grievor's provocation defence failed because her response on Facebook was grossly disproportionate to the events complained of. The employer had just cause to dismiss the grievor.

Appearances:

For the Union: Rhonda Hilton and Gordon Fischer.

For the Employer: Kevin Feth.

AWARD OF THE ARBITRATOR

ISSUE

1 The Grievor, a postal clerk with 31 years of service, was discharged after management became aware of her postings on her Facebook account. The postings were made over a one-month period and contained a number of derogatory, mocking statements about her supervisors and the Corporation. The postings were sent to more than 50 of the Grievor's Facebook friends including a number of co-workers. The two supervisors disparaged in the postings became extremely distraught after being apprised of and reading the postings, and required significant time off work for emotional distress. The Employer argued that the postings were grossly insubordinate, had the potential to damage the reputation of the Corporation, and had greatly harmed the supervisors. The Employer pointed out that the Grievor was unapologetic, blaming her supervisors for creating an intolerable work environment that justified her postings. Under the circumstances, and despite the Grievor's long service, it was the Employer's position that termination was warranted.

2 The Union grieved the discharge. It accepted that the postings were regrettable and ought not to have been made. The Union argued, however, that a toxic work environment explained why the Grievor had chosen to vent her frustration in this manner and noted that the Grievor had believed that her Facebook postings were private. Considering the Grievor's long service and how close she was to retirement, the Union submitted that discharge was too harsh a penalty.

EXHIBITS

3 The following Exhibits were presented at the outset and during the course of the hearing:

1. Urban collective agreement, expiring January 31, 2011.
2. Grievance 730-07-0912, December 3, 2009.
3. Grievance reply, February 2, 2010.
4. Letter of discharge, November 26, 2009, plus attachments.
5. Canada Post Code of Conduct, December 2005.
6. Canada Post brochure "Respect and Fairness".
7. Notes of Supervisor M, October 8, 2009.
8. Addressed admail, depot productivity report for December 2008 - September 2009.
9. Notes of Supervisor M, October 9, 2009.
10. 24 hour Notice of Interview for Grievor, October 9, 2009.
11. Three photos taken by Supervisor M.
12. Notes of Supervisor M, October 14, 2009.
13. 24 hour Notice of interview for Grievor, October 14, 2009.
14. Emergency suspension of Grievor, October 14, 2009.
15. Notes of Supervisor M.
16. Power point slides from Sensitivity and Respect in the Workplace presentation, November 3, 2009.
17. Power point slides from Bullying prevention presentation, November 3, 2009.
18. Grievor's Facebook posting discovered by Supervisor M on November 19, 2009.
19. Additional Facebook postings collected by Supervisor M.
20. Notes of Superintendent D, October 9, 2009.

21. Notes of Superintendent D, October 9, 2009.
22. Notes of Superintendent D, October 9, 2009.
23. Calendar for October and November 2009.
24. Newsletter of CUPW Edmonton Local, June 2009.
25. Grievor's emergency letter of suspension written by Ms. Darlene Swabb, Manager, November 19, 2009 with Facebook postings attached.
26. 24 Notice of Interview to Grievor, November 23, 2009.
27. Police report filed by Superintendent D, November 20, 2009.
28. No exhibit.
29. Letter of suspension for Grievor, October 19, 2009.
30. Notes of Ms. Swabb, November 24, 2009.
31. Letter from Grievor to Ms. Swabb, November 23, 2009.
32. Grievor's handwritten letter to Manulife Insurance case manager.
33. Notes taken by Mr. Ron Andrichuk, Labour Relations Officer, at November 24, 2009 interview of Grievor.
34. Statement of Employee P, October 9, 2009.
35. Statement of Employee B, October 9, 2009.
36. Email from Employee K to Ms. Bev Ray, local union president, forwarding Exhibit 35.
37. Email from Employee K to Ms. Ray, October 14, 2009.
38. Expert report of Dr. George Pugh, Clinical Psychologist, August 25, 2011.
39. Curriculum Vitae of Dr. Pugh.
40. Letter from Ms. Ray to Dr. Pugh, July 29, 2011.
41. Agreed Statement of Facts regarding Facebook, September 1, 2011.

AGREED FACTS REGARDING FACEBOOK

4 For purposes of this arbitration, Canada Post Corporation ("Canada Post") and the Canadian Union of Postal Workers, Local 730 ("C.U.P.W.") admit the following facts:

1. Facebook is a social media website that had more than 250 million users worldwide and more than 12 million users in Canada during October and November 2009.
2. To become a Facebook user, one must sign up for an account and provide the information requested by Facebook. Signing up for Facebook is free.
3. During 2009, the account sign-up page on Facebook indicated that the objective of Facebook is to create an online space in which people can connect with one another and share information.
4. In 2009, any individual with a Facebook account could access any other Facebook user's site through the internet, unless a user had enabled Facebook's Privacy Settings. The Privacy Settings available to users in 2009 are discussed in more detail at paragraphs 17-29.
5. In 2009, Facebook users connected with other Facebook users by becoming Facebook "Friends." Potential Friends could be located by searching an individual's name on Facebook. The user conducting the search could then click on the potential Friend's name in order to send a Friend request. Two Facebook users would become Friends when the Friend request sent by the first user was accepted by the other user.
6. In 2009, once two users had become Friends, they appeared on one another's Friend List, and had access to the contents of each other's Facebook site. Further, they could gain access to a whole new network of Friends by extending Friend Requests to the Friends of their Friends.
7. The average Facebook user in 2009 had 130 Friends.
8. An integral part of every Facebook user's Facebook page is that user's Wall. The Wall is a virtual white board on which the user and the user's Friends may post messages. In 2009, the messages posted to the Wall identified the author of the post by designating the author next to the message, and each post indicated the date and time that author posted the message to the Wall. The date and time were controlled by Facebook and reflected the local date and time of the Facebook user on whose Wall the message was posted.
9. In 2009, Facebook users could post messages and images on their own Walls, and on the Walls of their Friends.

10. In 2009, a Facebook user posted on his or her Wall by selecting the Wall tab from the profile page, typing text into the text box that prompted him or her to "write something," and then clicking the "share" button. The message or image was then posted to the Wall.
11. In 2009, Facebook users could post material on a Friend's Wall by selecting the Friend's Wall tab from the profile page, typing text into the text box that prompted the user to "write something", and then clicking on the "share" button.
12. In 2009, whenever Friends replied to one another's Wall posts, a Wall-to-Wall discussion resulted, and this discussion was posted on the Walls of both users. The Wall discussion depicted the author of the posted messages next to each message, along with the date and time of the post.
13. In 2009, Facebook had a standard feature by which Friends were automatically updated about one another's Facebook postings through Facebook's News Feed function. The Facebook News Feed function automatically directed new postings on the user's Wall to all of the user's Friends, unless the user expressly reduced the selection of Friends who received the News Feed.
14. In 2009, the News Feed feature of Facebook could not be disabled entirely, but it could be customized to show only the News Feed of certain users, and to hide the News Feeds of other users.
15. In 2009, whenever a user posted material to his or her Wall, the contents would appear on both the user's Wall and the user's News Feed, almost immediately.
16. In 2009, a Facebook user could access his or her Facebook site through a handheld mobile device like a cellular telephone or Blackberry utilizing the Internet. The News Feed function could also be enabled to forward each News Feed to a user's handheld mobile device.
17. In 2009, Facebook enabled users to select and customize privacy settings for their Facebook account, thereby controlling who could access and view the contents of their Facebook account.
18. In 2009, Facebook provided information to users about Privacy Settings in two main ways: by clicking on the "help" link or by clicking on the "privacy" link, both of which appeared at the bottom of the Facebook homepage on the user's account. By clicking on the "privacy" link, a user was taken to a page entitled "Controlling How You Share," which provided a detailed overview of Facebook's privacy controls.

19. In 2009, the portion of the "Controlling How You Share" page entitled "Additional Controls" informed users that each time they post, they are able to choose which privacy setting will apply to that individual post.
20. In 2009, Facebook provided its users with three different methods through which they could select and adjust their privacy settings.
21. First, users could click on the "Account" button located on the upper right hand corner of their screen, and select the "Privacy Settings" option from the drop-down menu.
22. Second, users could enter the term "Privacy" into the search bar located on the top of the screen.
23. Both of these options would direct the user to a page entitled "Privacy," at which point a users could select the Privacy Settings described below at paragraphs 25-29.
24. The third way through which Facebook users could change their Privacy Settings was by clicking the "Privacy" link located on the bottom left-hand corner of their screen, which would direct them to the "Privacy" page referenced above.
25. In 2009, the five Privacy Settings Facebook made available to users were:
 - a. Everyone
 - b. Friends and Networks
 - c. Friends of Friends
 - d. Friends
 - e. Custom
26. In 2009, the "Everyone" setting meant that a user's information was available to anyone on the Internet who had a Facebook account.
27. In 2009, the "Friends and Networks" setting meant that a user's information was available to that user's Friends, and anyone in that user's Networks. Networks refers to a Facebook option in 2009 that permitted users to join Networks consisting of other Facebook users with whom they went to high school, college, as well as Networks consisting of co-workers and users living in the same geographical region.

28. In 2009, the "Friends of Friends" setting meant that a user's information was available to that user's Friends, in addition to all of their Friends.
29. In 2009, the "Friends Only" setting meant that information was only available to that user's Friends.
30. In 2009, the "Custom" enabled the user to mix and match the settings described in paragraphs 26-29 so that different Privacy Settings could be applied to different types of information shared on Facebook.
31. In 2009, Facebook's "recommended" Privacy Settings were configured so that a user's posts, including Wall posts, were viewable to "Everyone," which is the broadest possible setting and allowed access to all Facebook users.
32. Therefore, in 2009, in order to limit access to Wall posts, a user was required to alter the recommended Facebook Privacy settings.
33. In 2009, on the bottom of the "Controlling How You Share Page," a user was able to access links to Privacy Frequently Asked Questions ("FAQs") as well as Facebook's Privacy Policy. The Privacy FAQs provided a user with detailed information about Privacy Settings, whereas the Privacy Policy explained how personal information was collected, used, and disclosed by Facebook.
34. In 2009, Section 8 of Facebook's Privacy Policy stated that there is no guarantee that information posted on Facebook is private, and read as follows:

Risks inherent in sharing information. Although we allow you to set privacy options that limit access to your information, please be aware that no security measure are perfect or impenetrable. We cannot control the actions of other users with whom you share your information. We cannot guarantee that only authorized persons will view your information. We cannot ensure that information you share on Facebook will not become publicly available.
35. In 2009, the Privacy Policy also contained a link to Facebook's "Statements of Rights and Responsibilities," which set out the terms of use for Facebook that all users were required to agree to and abide by. Under the "Safety" sub-heading of the Statement of Rights and Responsibilities, Rule 6 and Rule 7 expressly prohibited users from posting content that was "harassing, threatening, harmful, intimidating, or that may incite violence".
36. In 2009, if users clicked on the "help" link, they were directed to a screen that offered a series of help icons, one of which addressed privacy. By

clicking on the privacy icon, users were directed to a page that offered a list of links that offered additional information on Facebook-related privacy issues.

37. In 2009, the "Privacy Settings and Fundamentals" link provided a user with detailed instructions about how to control privacy settings.
38. In 2009, users could also select from a menu on certain Facebook features, such as Walls and News Feed, in order to access privacy information that relates specifically to these features.
39. In 2009, the feature on Wall Privacy provided a user with detailed information about how to edit Wall privacy settings, hide wall content, and who was capable of viewing their Wall.
40. On July 16th, 2009, the Office of the Privacy Commissioner of Canada issued a News Release entitled "Facebook Needs to Improve Privacy Practices, Investigation Finds." This News Release provided an overview of serious "privacy gaps" identified by an investigation undertaken by the Privacy Commissioner relating to Facebook and its use of personal information.
41. The News Release stated that the Privacy Commissioner recommended improved transparency about Facebook's privacy practices in order to "ensure that the social networking site's nearly 12 million Canadian users have the information they need to make meaningful decisions about how widely they share personal information." A copy of this News Release is attached as TAB 1.
42. The Privacy Commissioner's investigation received immediate attention from major Canadian news media, including the following:
 - a. The Edmonton Journal ran a story on July 16th, 2009 on page A3 entitled "Facebook Runs Afoul of Privacy Laws", a copy of which is attached as TAB 2.
 - b. The Globe and Mail ran a story on July 16th, 2009 entitled "Ottawa takes on social media giant for violating Canada's law", a copy of which is attached as TAB 3.
 - c. CBC.ca ran a story on July 16th, 2009 entitled "Facebook Breaches Canadian Privacy Law: Commissioner", a copy of which is attached as TAB 4.

43. The Parties agree to be bound by the admissions in this Statement of Agreed Facts. However, each Party reserves the right to present further evidence.

EVIDENCE

5 The Employer called four witnesses: Supervisor M, Superintendent D, Ms. Darlene Swabb, Zone Manager, and Mr. Ron Andrichuk, a Canada Post Labour Relations Officer. Six witnesses testified on behalf of the Union: the Grievor, three co-workers -- Employee P, Employee B, and Employee K, Ms. Bev Ray, local union president, and Dr. George Pugh, a clinical psychologist who testified as an expert witness on psychological assessments. Following the Union's witnesses, Superintendent D was re-called in rebuttal.

6 The material events unfolded at a postal depot in Edmonton which will be referred to as "Midtown Depot". At the time of her dismissal, the Grievor had been an employee of Canada Post since 1977 and was in her early 50's. She was a full time PO4 and had worked at Midtown in City Finals since May 2007. Prior to accepting this inside position, the Grievor had worked many years driving a mail truck. Physical restrictions had triggered the move from outside to inside work. There were eight other bargaining unit employees on her City Finals shift and her regular hours of work were 11 PM - 7 AM. City Finals employees unload and prepare mail for final sortation and delivery by letter carriers. Midtown Depot had a total complement of over 150 employees across its various shifts, the majority of whom are letter carriers who begin reporting to work at 5 AM.

7 Supervisor M was the principle direct supervisor for City Finals employees at Midtown during the night shift. His hours of work were 11 PM to 7 AM. His responsibilities were divided among three depots and he was physically present at Midtown for only part of his shift. At the time of the events, he was 24 years old and had worked at Canada Post for two years. Supervisor M reported to Superintendent D, a supervisor with more 20 years of service who had overall responsibility for Midtown. Her normal hours of work were 6 AM to 2 PM, but she would report earlier on some occasions in order to personally observe work on the night shift.

Midtown Depot Background Prior to October 2009

8 Most of the critical events, including the impugned Facebook postings, took place in October and November 2009. Prior to Fall 2009, the Grievor described her relationship with Supervisor M as satisfactory, a description with which Supervisor M concurred. Indeed, other Midtown staff who testified had a relatively benign view of Supervisor M, recognizing that he was young and was normally following directives from Superintendent D. Employees were more likely to blame the superintendent rather than the supervisor for the problems that subsequently arose.

9 The Grievor had a negative view of her relationship with Superintendent D that pre-dated the events of October 2009. She said she deliberately avoided contact with Superintendent D following a tense verbal exchange in 2007 about the treatment of another employee in which the superintendent had purportedly threatened to remove the Grievor from the depot. In addition to this one specific exchange, the Grievor was very critical of Superintendent D's managerial style in general, accusing her of shouting at employees, swearing at them, and waving her finger in employees' faces. She also said that the superintendent had a pair of boxing gloves in her office, which, in the Grievor's opinion, sent an aggressive message. For her part, Superintendent D characterised her relationship with the Grievor before October 2009 as "okay" and "no problems" and categorically denied acting in an abusive or improper manner towards the Grievor or any Midtown employees. She

denied yelling, waving fingers, or swearing at employees, testimony backed by the evidence of Supervisor M.

10 Superintendent D's self perception was not universally shared and several employees testified about how they were treated. Employee B is a 17 year employee who worked in City Finals for three years. Prior to transferring to Midtown, she had worked with Superintendent D in another depot, describing her as "the nicest person", "kind-hearted and reasonable". According to Employee B, Superintendent D's approach at Midtown was different, with much closer monitoring and "impossible" expectations for moving mail. She believed Midtown staff worked hard and were very conscientious but their dedication had not been recognized by their supervisors. She testified that Superintendent D usually spoke in a loud voice, "enough to make me uncomfortable" but could provide few specific examples of shouting or yelling.

11 Employee P, a PO4 with more than 20 years seniority, transferred to Midtown in January 2009. He described the working atmosphere in Midtown as very poor and accused Superintendent D of micro-managing and criticizing staff whenever she was in the depot. Employee P testified that the superintendent was "always barking out orders", was "in your face", and "never greeted staff as people". He stated that she spoke loudly in a raised voice even though the depot itself was not noisy. He had observed her yelling at letter carriers, but agreed that Superintendent D had never yelled at him nor had he seen her yell at the Grievor.

12 Employee K has been a Canada Post employee since 1998, working in City Finals in Midtown from 2007 to 2010, and has experience as a union steward. She accused Superintendent D of bullying employees by yelling at them and wagging her fingers in their faces, recalling a specific shouting incident in the superintendent's office soon after Employee K moved to Midtown. She said that whenever Superintendent D came into the depot "you knew you were going to get it", describing her expectations for processing mail as unreasonable. In cross-examination, Employee K agreed that she did not have notes of incidents prior to October 2009 and could provide few specific examples of Superintendent D's improper behaviour. She reiterated her opinion, however, that the superintendent was "always belittling staff", was unpredictable, and "should not be a supervisor".

13 Superintendent D testified in rebuttal to allegations about her behaviour prior to October 2009. She agreed that she had raised her voice at times with Employee K, but denied yelling, explaining that Employee K was very confrontational and that she "had to raise her voice to maintain control on the work floor". She could not recall a specific incident of yelling at the Grievor in her office in 2007 and stated that her daily notes, in which she recorded significant events, contained no record of such an altercation. Superintendent D said she had never been criticized or coached by senior management about her management or communication style.

Incidents in October and November 2009

14 The relationship between Midtown management and some employees, the Grievor included, deteriorated significantly in October 2009. Several material events contributed to the deterioration and these events are referenced in the Grievor's Facebook postings and were offered as explanations by the Grievor for what she had posted.

I. October 8/9 Shift

15 On instructions from Superintendent D, Supervisor M called a staff meeting in the lunch room at the start of the City Finals shift to address productivity concerns. Supervisor M conducted

the meeting by himself; the superintendent did not attend. Supervisor M testified that the purpose of the meeting was to share concerns about volume and performance trends at Midtown Depot (Exhibit 8) and encourage staff to raise productivity. As part of the presentation, he directed staff not to use their cell phones while on the work floor, not to gossip with the letter carriers, and, in response to a question about work pace, indicated an expectation of four letter containers per hour.

16 The message was not well received by employees. The Grievor and Employee K testified that the Midtown staff had received commendations for strong performance and that any productivity shortcomings were attributable to under staffing and the presence of several workers on modified duties, not employee inefficiency. Employees were upset at the criticism of their efforts and voiced their dissatisfaction during the meeting. The Grievor said employees expected praise for their hard work over the summer, not criticism. While there were some differences in specific recollections, there is no dispute that staff were very angry. They interrupted a number of times to express their disagreement (e.g. "this place is a joke") sometimes using foul language (e.g. "this is fucking ridiculous") and the Grievor became upset and walked out before the end of the meeting (Exhibit 7). Employees were upset that Supervisor M was unwilling to modify his message in the face of their vocal disagreement with management's analysis of the situation. For example, the Grievor testified that cell phones were used to text volume counts to Supervisor M when he was not at Midtown, making the ban on cell phones counterproductive. In Employee K's view, "it was not a meeting -- it was a dictatorship".

17 Shortly after the end of the meeting, the Grievor went to Supervisor M's office to give him two doctor's notes that had been previously requested. According to Supervisor M, the Grievor said "fuck you" in response to a question before leaving his office (Exhibit 7), something that the Grievor did not dispute. Superintendent D arrived at Midtown at 3 AM and also met with the Grievor over the doctor's notes and the need to complete certain forms. The Grievor agreed that she and Superintendent D did not discuss productivity issues or the earlier meeting. She was unhappy, however, at the way her medical needs were being handled (Exhibit 32).

18 Later the same shift, the Grievor overheard an altercation between Employee B and Superintendent D. Employee B testified that she and the superintendent had a verbal confrontation over productivity expectations and Employee B left work early due to stress. In an email describing the incident, Employee B wrote that Superintendent D "made me feel inferior, inadequate and like I was garbage" (Exhibit 35). The Grievor had no direct involvement in this particular incident, but recalled hearing Superintendent D yelling at Employee B. The Grievor was upset because she believed Employee B was being harassed by the superintendent. The next shift, Employee B and Superintendent D met about the incident, and, in the words of Employee B, "apologized to each other and resolved the matter", and hugged at the end of the meeting. The Grievor was not aware of this reconciliation.

19 Just prior to the end of the shift (morning of October 9), the Grievor received a 24 hour notice of interview from Supervisor M for "abusive language and behaviour towards your team leader" (Exhibit 10). Supervisor M described October 8/9 as "the worst shift" he had ever experienced.

II. October 13/14 Shift

20 The Grievor was off work for the next three shifts because of the Thanksgiving long weekend. The October 12/13 shift, her first shift back, was uneventful. On October 13/14, Superintendent D was present at the start of the shift which, according to the Grievor, made her and other staff

"pretty tense". Sometime later in the shift, a large Halloween-type skeleton appeared in the Midtown lunch room. The skeleton was hung from the ceiling with a wire around its neck and was holding a hand lettered sign which said "How is Your Pace" (Exhibit 12). The Grievor testified that she and Employee P had purchased the skeleton the previous morning for Halloween and it was a harmless lunchroom decoration. Neither managers were amused by the skeleton, both believing that it showed the staff was treating productivity as a joke. Supervisor M saw the skeleton as neither playful or joking. Superintendent D said the skeleton was frightening and threatening. She made an announcement that it should be removed, but no one came forward to remove it. The skeleton remained hanging until the Grievor and Employee K left the depot.

21 At 4:45 AM a major altercation arose involving Employee K and the superintendent. Notes of this event were made by Superintendent D (Exhibit 22), Employee K (Exhibit 37), and Supervisor M, who witnessed part of the incident (Exhibit 12), all of whom testified about it. The incident started when, for operational reasons, Superintendent D asked Employee K to move from the rotation position at which she was working to the bypass position. Employee K was reluctant to move as she wanted to finish sorting the mail she had started. The superintendent gave her a direct order to leave her work station and move to bypass, and by her own admission, Employee K declined to move, asking to finish the last of the mail she had been sorting. At this point, the superintendent ordered Employee K to her office with the intent of issuing an emergency suspension. Employee K refused to go to the superintendent's office, testifying that Superintendent D was yelling and aggressive (an accusation denied by the superintendent) and she was fearful of being in the office alone. Employee K then telephoned the police (who did not attend the depot) and Ms. Ray, the local union president. Ms. Ray testified that Employee K sounded very stressed, "almost hysterical" and she could hear the superintendent yelling at Employee K and telling her to hang up the phone. Superintendent D called Supervisor M and another superintendent to come to Midtown and assist her with the situation. They arrived at 5:15 AM.

22 Parts of the altercation were overheard or witnessed by other employees, the Grievor included. The Grievor testified that the atmosphere that shift was tense and that she heard, but was not able to see, the argument between Employee K and the superintendent. She said the superintendent was yelling. At this point the Grievor received a call on her cell phone from Ms. Ray (who had not been able to get through to Employee K). The Grievor left her work station to give the cell phone to Employee K. As this was going on, Superintendent D attempted to serve a 24 hour interview notice and emergency suspension on Employee K who was demanding a witness. The Grievor volunteered to be a witness, but was told that Employee P could be the witness and was ordered to return to work. When the Grievor hesitated, she was also issued an emergency suspension by Superintendent D (Exhibit 14). In the Grievor's view, she had simply been "picked out of the group", but both Supervisor M and Superintendent D stated that the Grievor had at least twice refused a direct order to return to work (Exhibits 12 & 37).

23 The Grievor and Employee K then waited in the lunch room for the arrival of a union steward from another depot, were formally served with their suspensions, and left the depot. As she left the Depot, the Grievor took down the skeleton that was still hanging in the lunch room. After leaving Midtown, the Grievor and Employee K went to a nearby restaurant where Ms. Ray joined them. According to Ms. Ray, both employees were extremely upset and she stayed with them for two hours. Superintendent D was also very upset by the incident. She testified that prior to the arrival of the other managers "I had an employee (K) who was refusing to obey orders", "she had called the police" and "I didn't know what to do". She said she was reduced to tears.

III. October 15th Interview

24 The Grievor was interviewed on October 15th stemming from the events of the October 8/9 and October 13/14 shifts. She had received two 24 hour notices of interview: the first for "use of abusive language and behaviour towards your team leader on October 8, 2009" (Exhibit 10); and the second for "failure to follow a direct order to return to your work stations at approximately 5:20 AM on October 14, 2009" (Exhibit 13). Zone Manager Darlene Swabb conducted the interview along with Superintendent D. She said that Canada Post's code of conduct (Exhibit 5) and policies on workplace respect (Exhibit 6) were reviewed. The Grievor was told that she could not use her cell phone during work, was to refrain from excessive breaks and idle chatter, and that she could not refuse direct orders from supervisors. According to Ms. Swabb, the Grievor responded that she was being harassed by Superintendent D, accusing the superintendent of shouting and waving her fingers at employees. The Grievor contended that staff were working hard and there was no need for supervisors to demand a faster work pace. The skeleton hung in the lunch room was also raised in the interview, the Grievor responding that all City Finals employees were responsible for the skeleton.

25 Following the interview, the Grievor received a three day disciplinary suspension without pay to be served from October 20 - 22 (Exhibit 29). It should be noted that the Grievor's Facebook postings had not been discovered at this time and that the three day suspension, which was grieved, was not among the grounds specified in the dismissal letter following discovery of the Grievor's Facebook postings. The combination of the disciplinary suspension, an intervening weekend, and a paid suspension meant that the Grievor did not work from October 15 - 22. She was scheduled to return to work on the October 22/23 shift. Employee K received a five day suspension, returning to work on October 27th.

IV. November 3rd Presentation by Human Resources

26 Following the events of the October 13/14 shift, Ms. Ray discussed the situation in Midtown with Ms. Swabb, Mr. Andrichuk, and another senior manager. They agreed that an intervention at Midtown, jointly supported by the union and corporation, would be useful. Human Resources subsequently arranged a meeting of City Finals employees and supervisors for the stated purpose of resolving conflicts in the depot. The session took place on November 3rd in the Midtown Depot lunchroom. Chairs were set up in a semi-circle and the meeting was conducted by two human resources facilitators. According to Ms. Ray, Superintendent D and Supervisor M initially stayed in the back of the room, but at her request joined the semi-circle (Superintendent D said there were insufficient chairs at the outset). The facilitator reviewed the harassment provisions of the collective agreement and presented power points on workplace values and mutual expectations, harassment, and various forms of bullying (Exhibits 16 & 17). Ms. Ray testified that Superintendent D explained that monitoring productivity is not harassment and bargaining unit employees began expressing their views. Employee K and Superintendent D began arguing and the discussion escalated until the facilitators intervened. Superintendent D, for her part, did not recall the exchange described by Ms. Ray.

27 In Ms. Ray's opinion, there was a great deal of tension during the meeting and, based on her interpretation of body language, she suggested that Superintendent D had been a reluctant participant. Employee K felt that the meeting "did nothing to help us", stating that Superintendent D was a bully and the source of problems in Midtown Depot. The Grievor expressed similar views about the value of the meeting, testifying that "it changed nothing". She said that workers in Midtown were

watched at all times, told repeatedly they were doing a poor job, and constantly threatened with having the depot moved to main plant. At the November 3rd meeting, the Grievor asked if the plant wide bid could be moved up so that she could transfer out of Midtown. She denied suggestions that she had acted improperly during the meeting or failed to pay attention. In a Facebook posting, the Grievor described the meeting as the superintendent's "pity party".

28 Managers had different recollections of the November 3rd meeting. Ms. Swabb said she organized the meeting to reinforce expectations of conduct following the disruptive events at the depot in October. Ms. Swabb, Supervisor M, and Superintendent D all testified that they had observed the Grievor during the meeting, describing her as "not engaged" and rolling her eyes at comments made by the facilitator. They did not believe that the Grievor or Employee K took the meeting seriously.

29 There were no other incidents after November 3rd provided in evidence relevant to the current grievance.

Facebook Postings

30 The Grievor's Facebook postings were discovered by management on November 19th. Superintendent D was told by a Midtown letter carrier to check Facebook about "rumours being spread by City Finals employees" about her. Not knowing much about how Facebook worked, she called Supervisor M and asked him to investigate. Supervisor M had been a Facebook user for several years. To disguise his identity, he logged into Facebook using the account of a friend and searched for Facebook sites of Midtown employees who he considered to be disruptive. He started with Employee K, but her Facebook account had privacy settings that did not permit him access. He then searched the Grievor's name and was able to access her Facebook page, her privacy settings allowing complete public access.

31 On the Grievor's Facebook wall he found postings about himself, his superintendent, and Canada Post. He testified that the Grievor had 52 friends, some of whom he recognized as Canada Post employees. From his initial review he could see that employees were interacting with the Grievor on her Facebook account, that there were many derogatory comments about managers, and that the postings revealed that she worked for Canada Post. Supervisor M offered the opinion that despite the lack of any restrictive privacy settings the Grievor's Facebook site showed some sophistication. There was some customization of the site, with additions to her wall such as "Boxes", "Hug Me", and "Music" that were not part of the automatic default settings. She had also learned to post messages through texting from her cell phone, something he had not learned how to do.

32 Supervisor M testified that he made screen shots of all postings that referenced Canada Post, pasted the screen shots onto a MS Word document (Exhibit 18), sent the document by email to Superintendent D, and contacted Ms. Swabb. The postings copied by Supervisor M start on October 10th at 1:03 AM and end November 5th at 1:05 AM. Some of the postings were made by cell phone while the Grievor was at work. Using Exhibit 18, I have set out the material postings in a table form:

Date & Time of Posting	Who Posted	On/Off Work	Posting
Oct 10; 1:03 AM	Grievor	Off Work	Up and drinking again. 3 nights of freedom from Postal Hell. DIE BITCH DIE. I'm playing with the Voo Doo doll. If I wasn't drunk I would take it to the driveway and run the bitch over.
Oct 10; 1:21 AM	Grievor	Off Work	Up and drinking again. I'm playing with my [first name of superintendent D] Voo Doo Doll. DIE BITCH DIE. If I wasn't drunk I would take her outside and run her over.
Oct 10; 4:06 AM	Grievor	Off Work	I just am making my G man voo doo doll now. So far I have Catch STD Lose office keys. Computer virus. Dog (his status symbal) runs away. Catches Swine Flu. Girl friend dumps him. Feel free to give me ideas.
Oct 13; 9:02 AM	Grievor	Off Work	We surprised the Evil [D] by showing up for work!! She brought in 4 casuals and a injured Letter Carrier and had the two DA's come in 2 hrs early. [Employee S] told us she told them on Friday we weren't going to show up!! WRONG AGAIN BITCH you gon b the one missing PERMANENTLY
Oct 14; 11:48 AM	Grievor	Off Work	[Midtown] Depot Harassment update: [K] - 4 24 hr notices. Me 2 24 hr notices. [P] 1 24 hr notice. [B] 1 24 hr notice. [K] and me Emergency suspended @ 5:30 this morning. Kangaroo Court commences @ 5:30 tomorrow am in [D] land where she rules. Think Stalinist Russia and you get the picture.
Oct 16; 4:58 AM	Grievor	Off Work	Is lovin my indefinite suspension
Oct 19; 5:26 PM	Grievor	Off Work	If [K] and I drop our grievances the C_nt won't fire us. I'm think it over. I really don't want to go back. I'm really enjoying my suspension.

Oct 20; 3:17 PM	Grievor	Off Work	We got suspensions and did not give up the right to grieve. My first grievance will be to put the vacancies up for bid so I can get away from the crazy bitch.
Oct 20; 10:31 PM	Grievor	Off Work	Hell called. They want the Devil back. Sorry, she's busy enforcing productivity @ [Midtown]
Oct 20; 10:43 PM	Grievor	Off Work	I want to put in a grievance so I can bid out
Oct 21; 7:09 PM	Grievor	Off Work	Skeleton photo from Midtown lunchroom with sign "How's Your pace"
Oct 21; 7:22 PM	Grievor	Off Work	Sorry Hell, she's still busy enforcing pace and productivity. You can imagine what all this is doing for productivity. I heard they have brought in 4 casuals and they still aren't getting the parcels sorted. Good Job [D]. It's YOU that should be fired.
Oct 21; 10:54 PM	Grievor	Off Work	she's lost some weight [reference to skeleton photo]
Oct 22; 9:18 AM	Emp K	Off Work	she looks familiar, I'm sure I know her lol [laugh out loud]
Oct 22; 9:25 AM	Emp K	Off Work	She's stressed she has mean employees
Oct 22; 4:25 PM	Grievor	Off Work	Poor thing, Go back to Hell, they miss you.
Oct 22; 8:15 PM	Grievor	Off Work	Tonight is my first night back, since my suspension, but I'm just not feeling well enough to meet expectations, hell I'm on my fourth cooler, so I'm staying home to rest/pass out, lolol I've gone Postal.
Oct 22; 8:27 PM	Grievor	Off Work	I'm Texting in Sick, my idiot supervisor is 24.
Oct 22; 8:39 PM	Grievor	Off Work	All of us are getting out in December, if we don't get rid of her. The Letter Carriers have a petition I heard, but they're scared to get caught, she has her snitches.
Oct 22; 8:44 PM	Non Emp'ee		Sounds like the Wicked Witch of the postie station
Oct 22; 8:47 PM	Midtown Emp'ee	Off Work	Ya, I know every night us drama night. But we will see what tonight brings....

Oct 25; 5:40 PM	Grievor	Off Work	My Ipod is charging, gonna risk going to work tonight. Hoping the evil hag won't be in until HER OWN shift. Hopefully the HAG has realized how BAD for Productivity she is.
Oct 28; 9:37 AM	Non Emp'ee		Oh dear still dealing with the hag I see.... lol...
Nov 2; 12:21 AM	Grievor	At Work	40 minutes till coffee break
Nov 2; 4:18 AM	Grievor	At Work	Hello from stall # 2 my favorite stall # 1 is out of order. 43 minutes till coffee time. They really should get padded seats now that I'm spending a LOT more time in here!!
Nov 2; 6:44 PM	Midtown Emp'ee	Off Work	LOL #1 is my favorite to LOL....
Nov 3; 11:59 am	Grievor	Off Work	We had a 2 hr meeting that accomplished nothing but the best part was when [D] played the victim and threatened to leave skeleton was brought up again lol It's Halloween!! If she thinks it looks like her I'm not gonna disagree lol
Nov 3; 12:54 PM	Grievor	Off Work	Gotta get some sleep 2 hr early start to do the mail left from [D's] two hr pity party
Nov 4; 3:43 AM	Grievor	At Work	Hello from stall 2. No sign of the evil [D] so everything going smooth so far. It's only 3 40 am so u never know. Her yes man [M] is here probably to make sure we don't take extra an extra minute on the lunch break gotta go sort
Nov 4; 8:53 AM	Grievor	Off Work	It was a long night, 10 hrs in the mail mines. The Hag showed at 6 and the swoop through, I've never seen her without the UGLY coat. C'mon voo doo doll work your magic
Nov 5; 2:00 AM	Grievor	At Work	Hello from stall 1. It's been fixed for now lol. No supervisor so we are enjoying the break in the bullying. But the witching hour is 3. Maybe she won't show up again till the swoop through @ 6 like yesterday. Maybe she's afraid since [K] phoned the police on her lolol.
Nov 9; 1:05 AM	Grievor	At Work	Hello from stall one I'm on what we slaves call a break!!

33 Following the discovery and reporting of these initial postings on November 19th, Supervisor M returned to the Grievor's Facebook site "about a week later", although he was not certain of the exact date. He was still able to gain public access, as there were no privacy restrictions. He sent

the new postings to management (Exhibit 19). Three postings by the Grievor are relevant to the current proceedings (in order of posting):

- * I wonder who the RAT is? Yes Friends, someone has printed out my entire wall and profile since Oct 9 and handed it to Canada Post Management. Thanks Friend.
- * Just a warning -check your privacy settings to friends only and b careful who your friends are friends with they can also view your wall if you don't check friends only. It's too late for me but not for u
- * I'm taking it to the press this afternoon. keep an eye on the news.

As well, there is a posting from a Midtown co-worker asking "We want to no what's going on????"

Suspension and Interview

34 Ms. Swabb received a copy of the Facebook postings on November 19th. After reading the postings, she discussed the situation with Superintendent D and Supervisor M, the Corporation's Critical Response Team, and Labour Relations. She described both the superintendent and supervisor as traumatized and she had concerns about their personal safety. At Ms. Swabb's suggestion they filed police reports (Exhibit 27). Ms. Swabb imposed an immediate emergency suspension on the Grievor. The suspension letter stated in part (Exhibit 25):

This letter will serve to advise you that you are indefinitely suspended pending the outcome of the investigation into allegations of your threatening and intimidating conduct whereby you posted threatening, slanderous, intimidating and demeaning comments directed at Canada Post Corporation Management personnel between October 10, 2009 and November 9, 2009 (www.facebook.com). Copies are attached.

The Grievor was advised to refrain from contacting management (Ms. Swabb excepted) and was barred from Corporation facilities. The Grievor testified that she experienced "shock and horror" upon receiving the emergency suspension: "I couldn't believe [my Facebook] was out in public -- I thought I had my privacy on ... and only friends could see".

35 Superintendent D testified that "I was virtually hysterical from the moment I saw the entries" and "was stunned at their venom". She read the postings repeatedly and admitted being "obsessed by them". She stated that "I realized I didn't know the Grievor at all -- she disdained me, hated me, hated the clothes I was wearing". Describing herself as an emotional wreck, Superintendent D, who had a record of 22 years of perfect attendance, remained off work for six weeks under doctor's care, in counselling, and on medication. When she eventually returned to work, she transferred to special projects rather than direct supervision.

36 Supervisor M testified that he was upset and disturbed by the Facebook postings, especially since his private vehicle had recently been vandalized twice while parked near Midtown Depot (Exhibit 15). He did not want to return to work, feeling that employees wished him ill. He remained off work for two weeks, stating he could not face the Grievor and her friends and wondered if he wanted to continue to work for Canada Post. Upon his return to work, he was re-assigned, at Ms.

Swabb's behest, to a different depot. Supervisor M lamented that he felt that he was being punished for the Grievor's conduct.

37 The Grievor was sent a 24 hour interview notice "to discuss allegations regarding your threatening and intimidating conduct" on Facebook (Exhibit 26). The interview took place on November 24th and was conducted by Ms. Swabb. In attendance were Mr. Andrichuk, Mr. Greg McMaster, a union representative, and the Grievor. The notes of Ms. Swabb (Exhibit 30) and Mr. Andrichuk (Exhibit 33) were entered into evidence. Mr. McMaster did not testify.

38 At the start of the interview, the Grievor provided a note addressed to Ms. Swabb as follows (Exhibit 31):

Needless to say I am shocked at the methods used to formulate your position. I tend to believe it was an invasion of my privacy. The fact that Supervisor M knows that I am not very computer savy, and used this as an opportunity to see what he could find on face book, is appalling.

There is no denying the postings but I take exception to your interpretation of their intent. At no time did I intend my remarks to be threatening slanderous, intimidating or demeaning. They were simply my opinions expressed at a time that I was emotionally vulnerable. Had I realized that my individual facebook page was of public domain I would have refrained from posting them.

It will be interesting to see if your investigation will be in depth enough to reveal the underlying cause of my actions.

While I respect your position that I have no contact with Canada Post Corporation employee during their work hours and that I have no communication with Canada Post management, I find it rather restrictive that I'm not allowed access to any Canada Post facility or premises. That forces me to rely on other avenues to relay correspondence in defence of my position. What you have done is taken away my ability to act in my own defence.

I respectfully wait for your response.

When cross-examined about the letter during her testimony, the Grievor agreed that the letter did not contain an apology. By way of explanation, the Grievor stated that she was in shock at the time.

39 In the interview, the Grievor admitted that the Facebook postings were hers and offered an apology. The notes of Ms. Swabb and Mr. Andrichuk are slightly different but they both show the Grievor apologizing for "the pain and embarrassment this has caused [Superintendent D]" and expressing horror that the postings "were made public", blaming her poor grasp of Facebook's privacy settings for the public availability of her site. Ms. Swabb testified that the Grievor claimed that she would have written a letter of apology but that the emergency suspension had contained "no contact" instructions and she did not know how to have an apology relayed to employees (notwithstanding having Ms. Swabb's contact information). Neither Ms. Swabb nor Mr. Andrichuk interpreted the Grievor's apology as genuine. Ms. Swabb described it as "more like a prepared statement" and noted that the Grievor never said the postings were inappropriate. Mr. Andrichuk said

that the Grievor expressed regret at making the postings public, but did not appear remorseful about the contents of the postings or for sharing them with co-workers.

40 According to Ms. Swabb and Mr. Andrichuk, the Grievor offered a number of explanations for her postings during the interview, including: problems with the Corporation's disability insurer over requested medical information (Exhibit 32 details the Grievor's concerns), management's October 8/9 "attack" on employees for poor productivity in spite of short staffing, the fact that she was drunk when some of the off-work postings were made, Supervisor M not standing up for employees, Superintendent D "running the place like a prison" and screaming at staff, and a "summer of hell" during which depot staff were mistreated. In Ms. Swabb's opinion, the Grievor simply offered excuses and took no responsibility for her own actions.

41 Following the meeting, Ms. Swabb made the decision to terminate the Grievor's employment. She testified that the discharge was based solely on the Facebook postings and did not rely on previous discipline. She said the postings "crossed the line", the Grievor was unrepentant, there was little to indicate the Grievor would not repeat the behaviour, and the postings had been very harmful to the Supervisor M and Superintendent D. Ms. Swabb agreed that in making the dismissal decision, she was aware of the Grievor's lengthy seniority and she had no evidence that the Grievor had ever been previously disciplined for threatening, harassing, or bullying supervisors or co-workers.

42 The four-page letter of termination reviewed the November 24th interview, cited specific postings (including the ones found after November 19th), and reached several conclusions that are set out below (Exhibit 4):

You chose to make a conscientious decision to demonstrate inappropriate, threatening, harassing, and bullying behaviour. I find the rationale for your actions to be inexcusable. I strongly believe that the intent of your postings were not only to serve as a threat to your team leaders but also, to promote hatred and defiance towards them. I am extremely disturbed by the fact that this behaviour exists within our work environment.

Canada Post's primary concern is the safety and well-being of all employees and cannot tolerate any behaviour that compromises it. Given the public nature and inappropriate content of the comments that you posted on Facebook, it can be deciphered that you are making reference to the Canada Post Corporation by anyone reading the comments.

I cannot find any reason to excuse or condone your behaviour. The employment relationship must be one of trust, respect and integrity for all. The employment relationship between you and Canada Post Corporation has been broken. Due to the seriousness of your misconduct and the impact on others, it is therefore my decision that upon receipt of this letter to release you from Canada Post Corporation.

Grievor's Evidence

43 The Grievor testified at length about the content of the Facebook postings and her reasons for the postings. The Grievor started a Facebook account in 2009 (she believed during the summer but was not certain) and said she had become addicted to it by October. She had 52 Facebook

friends, four of whom were current or former co-workers (including Employee K and Employee B). At the time of the arbitration hearing, the Grievor continued to use Facebook, estimating that she had 80 friends, but stated that she did not post while drinking and refrained from making offensive comments about others. She could not say how many of her current friends were employees of Canada Post.

44 Until her postings were discovered, the Grievor believed that her Facebook account could only be seen by her Facebook friends. She stated that she thought privacy "was automatic unless I changed it to be otherwise", an assumption that she learned was erroneous after her Facebook site was discovered by management. Following receipt of an emergency suspension on November 19th for the postings, the Grievor unsuccessfully attempted re-set her privacy settings to restrict access. Eventually, the Grievor spoke to Ms. Ray who showed her how to properly enable privacy settings. Ms. Ray confirmed that she had assisted the Grievor in enabling the privacy settings to restrict access to friends only.

45 In direct examination, the Grievor reiterated the difficult working conditions in Midtown Depot, which she attributed to under staffing, unrealistic expectations of managers, and the belligerent management style of Superintendent D. The Grievor described in detail a number of events that have been reviewed earlier in this award: her interaction with Superintendent D in the superintendent's office in 2007; the October 8/9 productivity meeting; the shouting incident on October 8/9 between Employee B and the superintendent which she overheard and left Employee B in tears; the skeleton in the lunch room on October 13/14; the October 13/14 heated altercation between Employee K and the superintendent, during which Employee K called the police, and which culminated in discipline for Employee K and the Grievor; and the November 3rd presentation by Human Resources, at the end of which the Grievor asked if she could transfer out of Midtown. Suffice to say, the Grievor described an environment in Midtown Depot that she considered intolerable, with employees being monitored closely, told continuously that their performance was inadequate, and harangued by an abusive superintendent. In the Grievor's words, "work had become hell".

46 The Grievor testified that by October 2009 the work environment had resulted in a great deal of personal stress. Others felt the tension too, in the Grievor's opinion, citing discouraged comments from several co-workers and a letter carrier petition complaining about Superintendent D. The Grievor said she began drinking when off work¹, felt she was on the verge of a nervous breakdown, and, after seeing a doctor, began taking pain killers and muscle relaxants.

47 The Grievor was asked about a number of specific Facebook entries that she had made.

- * October 10 @ 1:08 AM: posting includes DIE BITCH DIE and "run her over". The Grievor explained that she was referring to a voodoo doll she had made of Superintendent D, "it was the start of my nervous breakdown", that she had been trying in vain to get a doctor's appointment for three weeks, and she was drinking at the time.
- * October 13 @ 9:02 AM: "Surprised Evil D" "WRONG AGAIN BITCH" "You gon b missing PERMANENTLY". The Grievor explained that the superintendent did not expect her and several other employees to report to work and had brought in additional staff. They surprised the superintendent by showing up for work.

- * October 14 @ 11:45 AM: "Harassment Update". This was a reference to 24 hour notices of interview and emergency suspensions given to the Grievor and other employees following the events of the October 8/9 and October 13/14 shifts.
- * October 16 @ 4:58 AM: "Lovin ... suspension". The Grievor was off work due to a suspension and stated "I was drinking" and "at home, free from harassment".
- * October 19 @ 5:20 PM: "If K and I drop grievances the C_nt won't fire us". The Grievor explained that she had been told by the Union and management that if she and Employee K did file grievances they could retain their jobs. She did not say anything about writing "c_nt".
- * October 20 @ 3:17 PM: "suspended and ... did not give up the right to grieve" "bid ... to get away from the crazy bitch". The Grievor said that she had grieved her suspension and she wanted to transfer out of Midtown.
- * October 20 @ 10:31 PM: "Hell called. They want the Devil back". The Grievor testified that "I thought I was being funny".
- * October 21 @ 7:09 PM: Photo of skeleton with comments, including "Go back to Hell". The Grievor did not recall the comments or to what they referred. She said that she had been drinking while on suspension.
- * October 21 @ 7:22 PM: "Good job D. It's YOU who should be fired". The Grievor could not recall why she had posted this particular entry.
- * October 22 @ 8:47 PM: "First night back... on fourth cooler, staying home to rest/pass out lol. I've gone Postal". The Grievor explained that she had been drinking and was terrified to return to work at Midtown at the end of her suspension.
- * October 22 @ 8:15 PM: "getting out in December if they don't get rid of her". The Grievor reiterated that she and other Midtown employees were waiting for the general shift bid so that they could transfer out of Midtown.
- * October 22 @ 8:47 PM: "idiot supervisor is 24". The Grievor acknowledged that she was referring to Supervisor M.
- * October 25 @ 5:45 PM: "evil hag won't be in until HER OWN shift... the HAG... BAD for productivity". The Grievor was asked "can you explain". She responded that "whenever Superintendent D was around, there was more fighting than work".

- * November 2 @ 4:18 PM: "Hello from stall # 2...". The Grievor was in the bathroom at work, had posted using her cell phone, and was joking about the amount of time she was spending in the bathroom.
- * November 3 @ 11:59 AM: "2 hr meeting that accomplished nothing" "skeleton was brought up again lol... if she thinks it looks like her I'm not gonna disagree lol". The Grievor was referring to the November 3rd intervention by HR, a meeting that, in her view, accomplished nothing.
- * November 3 @ 12:54 PM: "[Superintendent D's] 2 hr pity party". This was a reference to the November 3rd meeting. The Grievor stated that the meeting was supposedly about respect and fairness, "but it ignored the real issues" in Midtown.
- * November 4 @ 8:53 AM: "The Hag showed up ... never seen her without that UGLY coat". The Grievor said that it was very warm in the depot but that the superintendent always wore a heavy coat and told staff that it was legal to keep the temperature at 26 degrees Celsius.
- * November 5 @ 2 AM: "Hello from stall 1. ... no supervisor ... break from bullying... maybe she's afraid of us since [Employee K] called the police on her lololol". The Grievor posted while in the washroom. She explained that work went more smoothly while Superintendent D was not at the depot. Her reference to bullying was directed at Supervisor M who would come to the depot to enforce break times. She did not comment on why she believed calling the police was so funny (i.e. "lololol").

48 At the conclusion of her direct examination, the Grievor emphasized that she had apologized at the November 24th interview and had learned her lesson -- "I won't drink and use the computer". She said she was in shock when fired and felt suicidal. The Grievor stated that she had worked hard for Canada Post for 30 years and at the time of her dismissal was trying to transfer from Midtown and get away from Superintendent D. Ms. Ray confirmed that the Grievor was "absolutely devastated and terrified of the future" after her discharge. On the Union's advice, after her dismissal the Grievor had deleted the Facebook postings referring to Canada Post that are contained in Exhibits 18 & 19.

49 In cross-examination, the Grievor agreed that there had been no direct conversations between her and Superintendent D between April 2007 and October 2009, but stated that she "never forgot the incident" in the superintendent's office and that the superintendent had "done bad things" to other staff during this time period. She reiterated that the October 8/9 productivity meeting, conducted entirely by Supervisor M, had been very unfair, characterizing the discussion as "a slap in the face" and "bullying" by management which failed to recognize the staff's very hard work. She said she had never been treated so poorly in 30 years at Canada Post and that "everything was fine" until that meeting. The Grievor denied that she had coached Employee P and Employee B on writing sympathetic email accounts of the events during the October 8/9 shift (Exhibits 35 & 36).

50 With respect to Supervisor M, the Grievor testified that she wished he "stood up for us once in a while" since "we had trained him and then he turned on us". She acknowledged that the super-

visor had a job to do and agreed that she and Employee K had interrupted him a number of times during the meeting. She was referred to the notes Supervisor M made after the meeting (Exhibit 7) but could remember little of the specifics contained in them. She said "I just remember how bad it was ... and being really really really upset and angry". She was not certain whether or not she had said "fuck you" to Supervisor M later in the shift and acknowledged that she might have sworn during the meeting. She characterized his notes to that effect (Exhibit 7) "as a complete fabrication".

51 Superintendent D was not present at the productivity meeting, arriving at the depot later that shift. The Grievor met briefly with the superintendent over some medical forms that the Grievor needed to complete, their sole interaction that shift. They did not discuss the meeting or productivity matters. The Grievor admitted that in a letter to her insurer she had incorrectly described the superintendent's actions that night when she wrote that "Superintendent D came in at 3 AM on October 9 to scream and yell at us over productivity" (Exhibit 32). Late in the shift, the Grievor (and others) overheard parts of an exchange between Superintendent D and Employee B which left Employee B in tears. She blamed the superintendent for the confrontation. At the end of the shift, the Grievor was given a 24 hour interview notice for swearing at Supervisor M.

52 The Grievor blamed her subsequent Facebook postings on the October 8th meeting, reiterating that it was an attack on staff. In response to the question "is Supervisor M responsible for Facebook", the Grievor replied that "Supervisor M and Superintendent D were to blame for what I wrote ... and alcohol too". Shortly after that response, the Grievor stated "I'm to blame for Facebook", adding that fear of coming to work led to her postings. She said that "I guess you had to be there" to understand her fear. She added that the Midtown staff received no respect from their supervisors.

53 The Grievor posted nasty comments about her supervisor (e.g. "catch STD") and her superintendent (e.g. "Die Bitch Die") on October 10th during the Thanksgiving long weekend. She returned to work on the October 12/13 shift and could not recall any specific interactions with the superintendent on that shift. Two hours after the shift ended, the Grievor agreed she posted a new Facebook message in which she referred to Superintendent D as "Evil D" and wrote "wrong again bitch" and you will be "the one missing permanently".

54 The Grievor was asked about the skeleton costume that she and Employee P had hung in the lunch room during the October 13/14 shift. She insisted that it was a harmless Halloween decoration, even though Halloween was more than two weeks away, and that the skeleton had nothing to do with Superintendent D. She explained that they had intended to put out additional decorations but the superintendent's negative reaction had stopped them. The Grievor admitted that she had made the "How is Your Pace" sign, stating that it was based on an old standing joke from a comment about pace made two years previously by Ms. Swabb. The Grievor denied that the skeleton and sign were an attempt to defy management.

55 Later on the October 13/14 shift the Grievor and Employee K were given emergency suspensions after a confrontation between Employee K and the superintendent. The Grievor agreed that she had left her work station after she had heard shouting and volunteered to act as a witness in order to assist a colleague, not to provoke management. The Grievor was referred to the notes of Supervisor M (Exhibit 12) which state that she was directly ordered to return to her work station before being suspended. The Grievor suggested that the notes were incorrect and that she was arbitrarily picked out of a group of employees, all of whom were observing the altercation.

56 Following the emergency suspension, the Grievor was interviewed on October 15th. A three day disciplinary suspension was imposed, which was grieved. She remained off work until the October 25/26 shift (some of the time off was for sick leave) and agreed that her postings from October 14 - 25 were her reactions to the suspensions. The Grievor acknowledged that she had referred to the interview as a kangaroo court in one posting and said she was "lovin her suspension" in another posting. The Grievor was asked about her posting of October 19th in which she described Superintendent D as a "C_nt". She initially responded that she did not know what "C_nt" stood for, saying that it "did not necessarily" mean "cunt". After a sceptical query from the arbitrator, she stated "I can agree" that it meant cunt, but said "I don't remember writing this". In another posting the next day, the Grievor referred to the superintendent as "a crazy bitch". She agreed that her postings about "the devil", "Go Back to Hell" and comments about the skeleton having appeared to have lost weight were references to Superintendent D. The Grievor explained that "I spent my whole suspension drinking".

57 The Grievor was referred to her postings (Exhibit 19) after her emergency suspension on November 19th and after her Facebook site had been disclosed to management. She said she "probably" was aware that her warning about a "rat" sending her postings to management would go out to all her Facebook friends. She agreed that in another posting she threatened to talk to the media about Canada Post, but when asked to explain her thinking she answered that "I don't remember writing that". She denied knowing that negative publicity could embarrass or harm Canada Post.

58 The Grievor could not initially recall if she was drinking after her Facebook site was disclosed to management, stating she was in shock from the suspension and horrified and ashamed that her Facebook site was publicly available. When pressed further about how the post-suspension Facebook postings reflected her shame, the Grievor responded that she was angry as well as ashamed and "I guess that is what I wrote". She added that "I must have been drinking". The Grievor acknowledged that she did not write anything on Facebook expressing remorse for what she had written about her managers or issuing a general apology. She testified that she felt terrible that her Facebook postings had wrecked her career when she was so close to retirement.

59 The Grievor was asked about the November 24th interview that preceded her dismissal. She emphasized that she had begun the interview with an apology and disagreed that she had attempted to shift the blame to management. She confirmed that she had mentioned that she found the boxing gloves hanging in Superintendent D's office as intimidating, but agreed that she had never expressed her concern to the superintendent or actually seen her wearing the boxing gloves.

60 The Grievor was questioned about her knowledge of Facebook. She said that her sister had taught her initially "for about 5 minutes" how to set up a Facebook account and that she had taught herself the rest. She learned how to post messages from her cell phone on her own and was not aware that some of the boxes on her site, such as "Hug Me" were customized applications. The Grievor was aware that Facebook users could set their own privacy settings, but had not realized, until Ms. Ray showed her, that she needed to "save changes" for a specific privacy setting to be enabled. She had tried to re-set the privacy settings after her site was discovered by management, but had not been successful. She testified that had she known how to set the privacy settings properly, she "wouldn't be here today", but acknowledged that she was aware that her Facebook friends at least were reading her postings because some had responded to her Facebook comments. The Grievor testified that it had never occurred to her that Facebook friends could forward her postings to their own friends.

61 With respect to the November 3rd meeting on "Respect and Fairness", the Grievor conceded that she characterized it as a "pity party" on Facebook. She explained that the meeting did not address the real problems in Midtown Depot, which were the harassment and bullying of staff by management and the false assertion that there was a productivity problem in the depot. There was neither respect nor fairness at Midtown in her opinion. In the Grievor's view, the purpose of the meeting was "to cover their ass -- it had nothing to do with us". She described the Canada Post pamphlet on respect and fairness (Exhibit 6) that was reviewed at the meeting as "propaganda" and claimed that she had not had the chance to read it or if she had read the pamphlet, she had read it very quickly. The Grievor was referred to page 2 of the pamphlet in which "allocating work" and "requiring performance standards", were specifically mentioned under the heading of "what does not usually constitute harassment" (Exhibit 6). She stated that she hadn't understood that allocating work and setting performance standards were not considered harassment. When asked about the authority of supervisors to assign work, she responded "ask them". The Grievor reiterated that staff was being overworked and that "we were winning awards yet she was still bullying us". In reply to questions about the acceptability of falsely accusing supervisors of attacking workers or spreading false rumours, she repeated that she was exhausted from doing the work of two people and that it was "hard to respect somebody who beats you down all day".

62 The Grievor was asked about certain postings made while she off work from October 15 - 25. She had trouble recalling the context or why she had made specific comments, explaining that she was drinking a lot during her time off. She could not say, however, if she had been drunk when she had made specific postings. The Grievor denied that she posted the skeleton photo as a form of retaliation against her suspension. She agreed that she would have been pleased to see Superintendent D fired, expressing the view that the staff would be more productive if the superintendent was gone. The Grievor was unable to suggest why the superintendent would want to destroy a productive team and was adamant that management's concerns about productivity were ill founded. She believed that the ban on cell phones had been unfair because Midtown letter carriers were allowed to use cell phones. She disputed that staff on her shift were defiant on this issue, but acknowledged that they continued to use their phones at work, herself included. The Grievor said that her postings from the bathroom were a form of venting, not defiance on her part.

63 When asked about her use of capital letters for certain words or phrases, "DIE BITCH DIE" was cited as an example, the Grievor denied that she capitalized for emphasis. When questioned on this point by the arbitrator, the Grievor retreated from that answer and conceded that capitalization may have been used for emphasis. She added that she was likely drunk, making it difficult for her to recall exactly why capital letters were chosen. She agreed that she had used good grammar, punctuation, and spelling in many of her postings (postings on October 21 and October 22 were cited as examples), but denied that such facility was incompatible with being drunk. She said that she was a good speller and was not a "falling down drunk".

64 The Grievor was questioned about whether she thought referring to Superintendent D as a "hag" and commenting that her coat was "ugly" were demeaning and hurtful. She responded that she did not expect the superintendent to see these postings and "well I wasn't trying to make her look worse". After some further probing, the Grievor reluctantly admitted that various postings might have demeaning -- "I guess". She explained that she was "drinking and venting". When the Grievor was queried about whether she thought it funny that Employee K had called the police she denied that the incident was humorous even though, in describing it, she wrote "lololol" on her Facebook posting about the incident. She explained "I was just venting" and disagreed that it was an

example of "mean girls having fun" (a reference to the Grievor's October 22nd posting). According to the Grievor, "We were victimized on a daily basis". She denied that comments like "DIE BITCH DIE" and "missing PERMANENTLY" were intended to intimidate Superintendent D or might have been interpreted that way by the superintendent.

65 In a follow-up question by the arbitrator, the Grievor contended that she was angry and frustrated and meant what she wrote, but did not intend for Supervisor M or Superintendent D to actually see the postings. She compared the situation to swearing at another driver while driving -- "you don't expect the other driver to hear you". When the Employer pointed out that she had invited others to give her ideas about how to torment Supervisor M in a posting on October 10th, the Grievor answered "clearly I was drinking, I wouldn't have wrote that if I wasn't".

Psychologist Report

66 The final area of evidence was an assessment of the Grievor prepared by a clinical psychologist at the request of the Union. Dr. George Pugh's curriculum vitae were entered into evidence (Exhibit 39) and he was accepted as an expert in the area of psychological assessment. He testified that he was approached by the Union in July 2011, that he interviewed the Grievor for two and a half hours in August, and conducted tests to evaluate intelligence, personality, and hostility. He prepared a written report that was provided to the Union and made available to the Employer prior to his testimony (Exhibit 38).

67 The letter to Dr. Pugh from the Union indicated that the Grievor had been discharged from Canada Post for comments she had posted about her supervisors on Facebook, that "she alleges she was a victim of the employer, especially two management representatives", "she may have authority issues" and she "may also have an alcohol abuse problem" (Exhibit 40). Included with the letter were the letter of discharge, the impugned Facebook entries, and two letters written by the Grievor to management after her Facebook site was discovered, but prior to her discharge.

68 In his report, Dr. Pugh concluded that the Grievor fell in the normal range in terms of thought, drive, and perception/orientation (page 8). With respect to cognition, the Grievor reported difficulty in concentrating and Dr. Pugh assessed her as "anxious and fragile" on an emotional level (page 8). He noted that the Grievor had a drinking problem (page 6) and had been sexually abused once when she was sixteen years old. The latter experience, Dr. Pugh wrote, resulted in "trust issues with others" (page 5). On the specific psychological tests, her IQ was assessed as average and her vocabulary and logical thinking skills as above average (page 10). On personality inventories, Dr. Pugh suggested caution in interpreting the results because of validity outcome scores. He noted that the Grievor's scores on "negative impression", "potential for self harm" and "traumatic stressors" were elevated, which he interpreted as a "cry for help" (page 11). Overall, with respect to personality he concluded (page 11):

In general, it is my opinion that [the Grievor] has a very fragile personality. For years she suffered in guarded silence and undeserved shame as a consequence of her sexual abuse. She compensated for this abuse in the work place by being an obedient and compliant hard worker who seldom complained but when she did, her comments were most likely only a step beyond silence with a passive-aggressive quality. This strategy, the generally compliant but sometimes irritated persona, worked relatively well until she was placed in an extremely

stressful work place. This triggered addiction behaviours (drinking alcohol) and then foolish and impulsive highschool-like revenge tactics.

Dr. Pugh also rated the Grievor in the "non-problematic range" on an aggression scale, but noted moderately problematic scores on "verbal aggression" and "hostility. He wrote that "these scores indicate that she carries feelings of hostility that, when stressed, will possibly be released".

69 In his summary and recommendations, Dr. Pugh reviewed some of the Grievor's "worst" Facebook comments, noted her allegations "that her supervisors created an atmosphere of bullying and harassment", and re-stated his findings with respect to the Grievor's mental health, intellectual abilities, and "fragile personality". While he indicated that "it is difficult to separate the trauma of her dismissal from other factors in her life", Dr. Pugh expressed the opinion that the dismissal "had a very significant, negative and traumatic impact ... on her mental health" (page 12). He suggested that "it is possible that her hurtful comments on Facebook were actions on her part that were, in her mind, responses in kind; of the same nature and spirit of those of her colleagues" (page 13).

70 Dr. Pugh wrote that verbal comments of the kind made by the Grievor in Facebook "exchanged between employees (behind the supervisor's back) are the norm in many places of work, especially those characterized by high levels of stress" such as the Grievor's night shift. He suggested that the Grievor's misfortune was that "they became accessible to the victims". Dr. Pugh concluded his report by submitting that the Grievor's dismissal was disproportionate to her misconduct and recommended that she be reinstated with a short suspension (page 14).

71 Dr. Pugh elaborated on his report in his testimony. In direct examination, he acknowledged that he first saw the Grievor some two years after her dismissal and was aware that the dismissal itself and some intervening events, particularly her boyfriend's serious illness, had contributed to instability. In Dr. Pugh's opinion, he had not identified any specific psychological illness that existed prior to the termination. He was asked about the likelihood of the Grievor re-offending if she was returned to the workplace. Dr. Pugh answered that the Grievor had apologized, understood the impact of her remarks on others, and was aware now of how easily privacy can be compromised on Facebook. In his opinion, the Grievor had learned her lesson, but would benefit from counselling.

72 In cross-examination, Dr. Pugh agreed that the validity scores of some of the psychological tests made interpretation difficult. He conceded that he had seen the Grievor after she had observed many days of the arbitration hearing and her responses could have been influenced by what she believed would most help her be reinstated. Nevertheless, based on his interview and all the test score data he had gathered, he rejected the hypothesis that the Grievor had deliberately manipulated her answers during his assessment to make herself more sympathetic. He believed the results were best interpreted as a "cry for help" by the Grievor. In reaching his conclusions, Dr. Pugh assumed that the Grievor's apology for the harm she had caused her supervisors was genuine, but agreed that the Grievor still harboured feelings of anger and resentment towards management. He accepted that had the Grievor not expressed her hostility through her Facebook postings, her anger may have been manifest in other ways. According to Dr. Pugh, the Grievor was able to distinguish right from wrong.

73 Dr. Pugh was asked about his recommendation that the Grievor be reinstated with a short suspension. He acknowledged that he had not been asked to make a recommendation in that regard, but stated that he frequently gave sentencing recommendations in court cases. In Dr. Pugh's opinion,

the Grievor's discharge was disproportionate to the misconduct and he believed it appropriate that he say so in his report.

COLLECTIVE AGREEMENT

ARTICLE 10 DISCIPLINE, SUSPENSION AND DISCHARGE

10.01 Just Cause and Burden of Proof

(a) No disciplinary measure in the form of a notice of discipline, suspension or discharge or in any other form shall be imposed on any employee without just, reasonable and sufficient cause and without his or her receiving beforehand or at the same time a written notice showing the grounds on which a disciplinary measure is imposed.

(b) In any arbitration relating to a disciplinary measure, the burden of proof shall rest with the Corporation and such proof shall be confined to the grounds mentioned in the notice referred to in paragraph (a) above.

EMPLOYER ARGUMENT

74 The Employer described the Facebook postings as reprehensible, targeting the Grievor's two supervisors and Canada Post in general. In the Employer's view, the postings were threatening and intimidating, they promoted hatred and defiance towards Superintendent D and Supervisor M, and it was clear that they referred to a Canada Post work setting. The postings were available to the public at large in addition to the Grievor's Facebook friends, a number of whom were current or former co-workers. It was noted that the postings were made on 14 separate dates from October 9, 2010 to November 9, 2010 and again after their discovery on November 19th. They could not be construed as momentary lapses or as short-lived emotional outbursts. It was argued that the Grievor was unapologetic. The Employer submitted that the contents of the Facebook postings, the harm they had caused, and the Grievor's lack of remorse, particularly as demonstrated by the defence of provocation, more than justified dismissal.

75 With respect to content, the Employer characterized the postings as insubordinate, contemptuous of management, and a form of psychological violence. The Grievor's Facebook friends included co-workers. The postings were defiant about expectations regarding work pace, staffing decisions, use of cell phones, and the attempt of Human Resources to assist. The Grievor had described the November 3, 2010 intervention, jointly supported by the Union and Employer, as a "pity party". The Grievor's postings had mocked her supervisors' age, intelligence, and way of dressing, often ending her insults with "lol", shorthand for "laugh out loud". She referred to them in demeaning and insulting terms such as "devil", "hag", "bitch", "G man", and "c_nt". She had invited retribution and had used capital letters to emphasize, threaten, and intimidate ("BITCH", "PERMANENTLY"). In the Employer's submission, the supervisors had become targets of hate for nothing more than doing their jobs. The postings were the mean-spirited entertainment of a bully.

76 The Employer argued that the evidence established that the postings had significantly harmed the supervisors at whom they were directed. After the postings were discovered, Supervisor M took two weeks of stress leave during which he questioned his career at Canada Post. His anxiety was heightened because his car had recently been vandalized at work. He feared for the safety of his dog, which had been expressly mentioned in one posting, and he filed a police report in case any-

thing happened to him or his property. Upon his return to work, he was re-assigned to a different depot, which he viewed as a form of punishment.

77 The impact on Superintendent D was graver, according to the Employer. She was traumatized by the postings and was off work for six weeks, unable to sleep and under care of a physician and a psychologist. She felt threatened and filed a police report. The Employer pointed out that the superintendent had maintained a perfect attendance record for the preceding 22 years, demonstrating the degree to which she had been affected. She was unable to work at Midtown following her return to work and was re-assigned to special projects.

78 In the Employer's submission, the victimization of the two supervisors continued at the arbitration hearing when the Grievor attributed her Facebook postings to their behaviour. It characterized the Grievor's testimony as "blame the victims", pointing to the repeated reference to the October 8/9 productivity meeting as an attack on her and other staff and the constant references to Superintendent D's alleged aggressiveness.

79 The Employer argued that the Grievor was neither contrite nor apologetic, attacking her supervisors during the hearing in an attempt to exonerate herself. When her Facebook postings were discovered, the Employer noted that the Grievor accused those who may have tipped off management as "rats". She continually tried to explain away offensive postings by claiming to be drunk. Her letter to Ms. Swabb lashed out at management for the supposed violation of her privacy (Exhibit 31), but gave no recognition to the harm the Grievor had caused her supervisors. The Employer acknowledged that the Grievor had offered some kind of apology when interviewed on November 24th, but took the position that, based on the evidence of Ms. Swabb and Mr. Andrichuk, and the Grievor's subsequent "blame the victim" approach at the arbitration hearing, the apology was insincere.

80 The Employer contended that the Grievor's postings on Facebook harmed Canada Post. Management had been forced to arrange coverage for the absences of Supervisor M and Superintendent D and eventually had to find replacements for them in Midtown. The Facebook postings were publicly available for at least six weeks and would have been easily accessible if anyone had searched "postal", "mail" or "depot". In the Employer's view, the postings created a risk to the Corporation's reputation by calling into question management's treatment of employees (e.g. "gone postal") and by demeaning supervisory staff. The Employer drew attention to the Grievor's postings after her Facebook site was discovered, but before her privacy setting had been enabled. She had threatened to go to the media and had expressly mentioned Canada Post by name, increasing the Corporation's risk. The Employer took the position that the potential for harm to reputation, rather than evidence of actual harm, is sufficient to attract disciplinary sanctions (*EV Logistics v. Retail Wholesale Union, Local 580* (2008) BCCAAA No. 22 (Laing)).

81 The Employer challenged the Grievor's contention that her Facebook postings were intended to be private and really no different than a conversation among friends. The Employer asserted that Facebook postings, by their very nature, are in the public domain and widely recognized as such. The local union leadership had alerted members to the fact that Facebook and other social media were "a very public space" in a June 2009 newsletter (Exhibit 24). In the Employer's view, given the Grievor's large number of Facebook friends, including current and former employees, she could hardly pretend that her site was akin to a private conversation. Indeed, one of her postings had invited others to provide ideas for insulting Supervisor M (October 10: 4:06 AM).

82 The Employer suggested that there is a fundamental difference between "bar talk" and social media: social media is accessible for months or years; it has a huge potential audience; the contents are discoverable through key word searches; and the contents are easily copied and forwarded to others. For those reasons, the Employer argued, arbitration awards dealing with Facebook, blogs, email, and other social media cases had universally concluded that employees cannot shield themselves from the consequences of inappropriate postings by claiming an expectation of privacy. The Employer cited *Naylor Publications Co. and Media Union of Manitoba* (2003) CLB 13386 (Peltz); *Chatham-Kent and CAW, Local 127* (2007) 159 LAC (4th) 321 (Williamson); *Government of Alberta and Alberta Union of Provincial Employees* (2008) 174 LAC (4th) 371 (Ponak); *Wasaya Airways and Air Line Pilots Association, International* (2010) 195 LAC (4th) 1 (Marcotte); and *Lougheed Imports v. UFCW Local 1518* (2010) CLB 26395 (BCLRB).

83 The Employer submitted that the Grievor's explanation that she was drunk when she posted offensive material should be rejected as a defence. The Employer pointed out that the Grievor was not claiming that she was an alcoholic and had provided no medical support for that proposition. More importantly, in the Employer's view, the Grievor's testimony as to when she was drinking and posting was not credible, pointing to inconsistencies in direct and cross-examination for this claim. For example, the Employer noted that at the November 24th interview, the Grievor had claimed she had been drunk when she made all the offensive posts, but had changed her story when she was reminded that a number of her posts had been made while she was at work. Many postings occurred shortly before or after work, reducing the likelihood of any significant drinking.

84 The Employer acknowledged that some of the postings referenced drinking, but argued that even if the Grievor had been drinking while she was posting there was no evidence of diminished capacity or that she was so drunk that she did not know what she was doing. On the contrary, the Employer suggested that the level of punctuation, good spelling, correct grammar, use of capital and small letters, and underscoring in the word "c_nt" all connoted a certain degree of coherence and sobriety. The Employer submitted that the appropriate inference was not that the Facebook postings revealed the personality of a drunk Grievor, but the postings were consistent with the defiant personality the Grievor displayed at work and consistent with her dislike of her supervisors. The evidence fell far short of establishing on balance that the Grievor's misconduct could be attributed to alcohol in the Employer's submission. It provided several authorities regarding the use of alcohol as a defence for misconduct: *Brown & Beatty, Canadian Labour Arbitration (4th) 7:6150*; *Public General Hospital Society of Chatham and Service Employees' Union, Local 210* (1991) 23 LAC (4th) 35 (Hinnegan); *Grober Inc. and United Food and Commercial Workers, Local 175* (2002) 109 LAC (4th) 53 (Williamson); and *Livingston Distribution Centres Inc. and Teamsters Union, Local 419* (1996) 58 LAC (4th) 129 (MacDowell).

85 Provocation also could not be used to shield the Grievor from the consequences of her misconduct according to the Employer. The Employer argued that there was neither an objective nor a subjective basis for concluding that the Grievor had faced circumstances that justified her Facebook response: *Brown & Beatty, 7:4412*; *Halifax Regional Municipality and Nova Scotia Union of Public and Private Employees, Local 13* (2004) 131 LAC (4th) 1 (Veniot). In its view, the evidence did not support a conclusion that the Grievor had been provoked nor did the evidence demonstrate a link between the Grievor's actions and the alleged provocation. By the Grievor's own admission, the Employer argued, there had almost no direct interactions between herself and Superintendent D from 2007 to October 2009 when the impugned Facebook postings began. The superintendent had not attended the October 8/9 productivity meeting that loomed so large in the Grievor's mind. Many

of the incidents purported to have provoked the Grievor had involved other employees and the Grievor had not even been present in some cases. It characterized much of this evidence as collateral and unreliable (Gorsky et al. *Evidence and Procedure in Canadian Labour Arbitration* (Thomson - Carswell); *Fraser Health Authority and Hospital Employees' Union* (2004) 129 LAC (4th) 302 (Dorsey)). Moreover, the Employer asserted, specifics of various alleged provocations were vague, such as Superintendent D "yelled" or "attacked us", exaggerated, or misrepresented facts. As an example, the Employer noted that the Grievor had conceded that Supervisor M had not raised his voice during the October 8/9 productivity meeting and that Superintendent D had never shouted at employees about productivity on October 8/9, contrary to what she had written her insurer (Exhibit 32).

86 The Employer submitted that none of the authorities accepted provocation as a defence unless the alleged provocative act had been directed against the responding employee herself. Indirect provocation, in the Employer's submission, was really just a form of vigilante justice. As well, successful provocation defences usually required that the reaction be proximate to the provocation, an indication that the individual did not have a chance to remove herself from the emotional impact of the provocation. In the current case, the Employer noted, the Grievor had posted most of her offensive material hours or days after the event that had supposedly provoked her. Finally, even if the arbitrator concluded that there was some basis for a provocation defence, the proportionality of the response was relevant. The Employer argued that the Grievor's response through Facebook was greatly disproportionate to any provocation.

87 To illustrate, the Employer drew attention to what the Grievor had posted about Supervisor M on October 10th after the productivity meeting: wishing him to catch sexually transmitted diseases and swine flu, getting dumped by his girlfriend, and having his dog run away. All the supervisor had done was to deliver unwelcome productivity statistics during the previous shift without raising his voice or singling out the Grievor or any other employee. In the Employer's view, there was simply no provocation, and even if there was, the Grievor's vituperative response was totally out of proportion to the alleged wrong. Similarly, Superintendent D's only interaction with the Grievor on that shift had been over routine medical forms, something that could not have provoked October 10th postings exhorting the superintendent's demise ("Die Bitch Die"). The Employer cited the following authorities in support of its submission that the Grievor's responses were greatly disproportionate to any possible provocation: *Capilano Highway Services Co. and British Columbia Government Employees' Union* (1990) CLB 10196 (Munroe); *National Steel Car Limited and United Steel Workers of America, Local 7135* (2005) 144 LAC (4th) 175 (Craven); *Northwest Waste System Inc. and Transport, Construction, and General Employees' Association, Local 66* (2007) 164 LAC (4th) 312 (Blasina); *Avis Budget Group and United Food and Commercial Workers, Local 175* (2009) 181 LAC (4th) 396 (Craven); and *City of Woodstock and Canadian Union of Public Employees, Local 1146* (2007) 281 (Barrett).

88 Lastly, the Employer turned to the evidence of Dr. Pugh. It was argued that Dr. Pugh's written report and oral testimony failed to establish any link between the Grievor's offensive Facebook postings and a psychological condition or illness. Thus, in the Employer's submission, there was no medical or psychological evidence that could provide a defence for the Grievor's misconduct. With respect to Dr. Pugh recommendation that the Grievor should be reinstated, the Employer took the position that this recommendation was not based on factors within his area of expertise but built on self-serving information provided by the Grievor. The Employer urged the rejection of any of Dr. Pugh's opinion evidence that strayed outside psychology. In support of this position, the Employer

cited: *Bullmoose Operating Corporation and Communications, Energy, and Paperworkers Union, Local 443* (2000) 88 LAC (4th) 317 (Larson) and *Detra Berberi and Canadian Human Rights Commission and Attorney General of Canada* (2009) CHRT 21.

89 In short, the Grievor had engaged in gross misconduct for over a month that had harmed two managers and the Corporation and for which she was unapologetic. In the Employer's submission, the employment relationship had been irreparably damaged, justifying discharge.

UNION ARGUMENT

90 The Union acknowledged that the Grievor's inappropriate Facebook postings justified discipline but argued that discharge was excessive in the circumstances. The Employer's social media policy had not been communicated to employees and the Employer had relied on grounds, such as the Grievor's use of her cell phone at work, that were not part of the letter of discharge and therefore could not be used to justify discipline (*Canada Post Corporation and Canadian Union of Postal Workers [Jeworski]* (1984) Unreported (Norman)). It was submitted that the Grievor had no intention of making her Facebook postings public and was simply venting to her friends and co-workers. She had assumed her privacy settings had been enabled, a mistake easily made, according to the Union, due to the multiple steps involved in enabling the settings. The Grievor had been genuinely shocked and upset when she had learned that her Facebook postings were publicly available and had been seen by management. In the Union's submission, that was never the Grievor's intention.

91 The Union argued that while in theory the Grievor's postings were available to any of the millions of people with Facebook accounts, there was no evidence of actual widespread access or any harm to the Corporation. Canada Post was not expressly named in any of the postings until after the Grievor's Facebook site had been discovered by management. It would have been difficult, in the Union's submission, to identify where and for whom the Grievor worked. The last names of the supervisor and the superintendent were not mentioned in any of the postings.

92 The Union disagreed that the Grievor had been unremorseful. It was argued that the evidence was uncontradicted that the Grievor had apologized at the beginning of the November 24th interview. Further, the notes of Mr. Andrichuk showed that she had apologized at the end of the interview as well. The fact that Ms. Swabb questioned the Grievor's sincerity simply reflected her cynicism; Mr. Andrichuk, a seasoned labour relations professional had been far less certain that the Grievor lacked sincerity. The key fact, in the Union's submission, was that an apology had been tendered by the Grievor at her first opportunity at the November 24th interview. The Union pointed out that between the discovery of the postings and the interview the Grievor had been instructed not to contact any members of management, preventing an earlier apology. Moreover, it was argued that the Union, not the Grievor, determined strategy. It was the Union, not the Grievor, that had advanced the argument that her behaviour had been provoked, in part, by a toxic work environment. This could not be construed as evidence that the Grievor was unrepentant.

93 The Union emphasized that a poisoned work environment was a critical factor in assessing the Grievor's conduct. According to the Union, the evidence established that Supervisor M and Superintendent D imposed new rules on City Final employees, such as banning cell phones, based on productivity statistics derived from the entire depot and over which City Final employees had little control. Naturally, employees became angry and lost confidence in their managers when unrealistic expectations were imposed. It was the Union's position that Superintendent D was hardly as innocent as she claimed and responsibility for what occurred must be shared (*Canada Post Corporation*

and *Canadian Union of Postal Workers* (1999) CLB 12464 (M. Picher)). Contrary to her own evidence, the Union argued that employees had consistently testified that the superintendent yelled and swore at them and wagged her fingers in their faces. She kept boxing gloves in her office -- a sign of her belligerence. Even Ms. Swabb, the Union suggested, had not disavowed Superintendent D's tendency to demean and frighten employees, although she had used euphemisms such as "strong communicator" and "tone may increase". It was no wonder that the Grievor and other employees had stated a strong desire to transfer out of Midtown as soon as possible, a sentiment publicly expressed at the November 3rd intervention meeting. In the Union's view, the superintendent's conduct met the definition of bullying and the Grievor's conduct ought to be considered in that context.

94 The Union submitted that there were significant mitigating factors in the Grievor's favour. She had 32 years of service with Canada Post, starting her employment when she was 18 years old. She was just a few years away from pension eligibility which begins at age 55. None of the Employer's case law, according to the Union, dealt with an employee of that age and that length of service.

95 The psychological assessment of Dr. Pugh ought to be accepted (*Canada Safeway Limited and United Food and Commercial Workers Union, Local 1518* (2011) 203 LAC (4th) 228 (McPhillips)). It showed that the Grievor had suffered previous trauma in her youth and that her discharge re-traumatized her. The trauma of the discharge, combined with the long time lapse since the events, explained why some of the Grievor's testimony was inconsistent. There was no question, in the Union's view, that some of the offensive postings had been made while the Grievor had been drinking and that she drank heavily during her suspension. Given all that had occurred, the Union submitted that the Grievor would not re-offend.

96 In support of its position, the Union provided the following additional authorities: *Senior Flexonics (Canada) Ltd. and SMWIA, Local 540* (2010) CLB 3323 (Gray); *Hydro One Networks and Society of Energy Professionals* (2010) CLB 2026 (Herman); *Inventronics Ltd. and United Steelworkers Union, Local 9175* (2010) CLB 7698 (Wood); and, *Health Employers Association of British Columbia and Hospital Employees' Union* (1999) BCCAAA No. 387 (Laing).

EMPLOYER REPLY

97 The Employer argued that the Union cases were distinguishable because many involved a single incident and genuine remorse, elements absent in the current case. With respect to the grounds specified in the letter of discharge, the Employer submitted that defiance was listed as one of the grounds and therefore conduct such as use of cell phones during work, which employees had been ordered to cease, could be relied upon as a factor in support of discharge. The Employer cited two additional cases on the question of grounds specified in the letter of discharge: *Canada Post Corporation and Canadian Union of Postal Workers [Garnier]* (2009) Unreported (MacLellan) and *Canada Post Corporation and Canadian Union of Postal Workers [Kozak]* (1999) 81 LAC (4th) 185 (M. Picher)².

98 The Employer recognized the long service and age of the Grievor and accepted these factors were appropriately considered in mitigation. However, the Employer submitted that these factors did not bestow immunity on employees. Long term employees can be dismissed if the misconduct is sufficiently serious: *Canada Post Corporation and Canadian Union of Postal Workers [Melmoth]* (2006) Unreported (Norman).

99 With respect to whether the Grievor is likely to repeat her misconduct if reinstated, the Employer did not view the Grievor as a strong candidate for rehabilitation given that she had referred to the November 3rd intervention as a "pity party", had posted offensive materials immediately after receiving a three day suspension for insubordinate behaviour, had referred to the unknown person who had reported her Facebook postings to management as a "rat", had blamed her supervisors and drinking for her postings, and had not recognized her own responsibility. Moreover, the Employer argued that the issue was not what the Grievor might do in future, but what she had already done.

DECISION

100 There is ample case law that supports the principle that what employees write in their Facebook postings, blogs, and emails, if publicly disseminated and destructive of workplace relationships, can result in discipline (*Naylor Publications; Chatham-Kent; Government of Alberta; Wasaya Airways; Loughheed Imports, and EV Logistics*). The main question in this arbitration is whether the amount of discipline imposed on the Grievor, discharge, is an appropriate penalty in all the circumstances of this case. That the Employer had just cause for discipline was not disputed by the Union. It recognized that the contents of the Grievor's Facebook postings exposed her to discipline, but argued that dismissal was too harsh, especially for an employee in her early 50's with more than thirty years of service.

101 To determine whether the Grievor's misconduct was sufficiently serious to warrant discharge, I begin by examining her Facebook postings, the contents of which have been set out earlier in the award. The material postings began on October 10, 2010 and continued until shortly after their discovery by management on November 19, 2010. In this period, the Grievor made 26 postings on 14 separate dates about her workplace and supervisors. Five of the postings were made via cell phone while the Grievor was at work. The postings are universally nasty in tone and content, with the majority aimed at Superintendent D. She is frequently referred to in vulgar and contemptuous terms, including, "bitch", "c_nt", "wicked witch", "evil hag" and "devil", sometimes capitalized for emphasis. The postings contain threats, most notably "die bitch die", "run you over" and "missing permanently". While the Grievor explained that in some postings she was only referring to a voodoo doll of the superintendent, not the real superintendent, it is a distinction without a difference. The Grievor's sentiments were clear -- her words, whether aimed at a voodoo doll or directly at Superintendent D, are offensive and frightening. Is the superintendent supposed to feel better because the Grievor only expressed an interest on running over and killing a voodoo doll of the superintendent? The answer is obvious.

102 In addition to the abusive and intimidating language, the postings are mocking to the point of bullying with many of the more offensive comments accompanied by "lol" which stands for "laugh out loud". The postings invite others to join in and indeed others do offer their own mocking comments from time to time. A set of postings on October 21 & 22 contained a photo of the Halloween skeleton hung in the Midtown lunchroom with comments like "she's lost some weight" and "go back to hell, they miss you", that unquestionably referred to the superintendent. In a later posting about the skeleton, the Grievor wrote, with what can only be described as glee ("lol"), that "if she thinks it looks like her, I am not going to disagree". A non-employee chipped into the general ganging up on the superintendent by calling her "the hag" and "wicked witch". After human resources and the union arranged a meeting to address employee - management friction in Midtown, the Grievor referred to these efforts as Superintendent D's "pity party". Another posting belittled the fact that Superintendent D wore a coat at work and then mocked the coat itself. Other postings boast

how the Grievor and co-workers had tricked Superintendent D into calling in extra staff after they had misled her about whether they would be reporting to work (October 13). A second posting jokes (with multiple "lolol") that the superintendent must be afraid of staff since Employee K "phoned the police on her".

103 A co-worker posted that the superintendent had "mean employees", which pretty much sums up the attacks. The postings are mean, nasty, and highly personal. They go well beyond general criticism of management and essentially target one person with a degree of venom that is unmatched in other social media cases. In *Government of Alberta* the criticisms of management only infrequently take on a personal tone, with most of the offensive comments directed at co-workers in a misguided attempt at humour. Management as a whole is targeted in *Naylor Publications* and *Lougheed Imports*, rather than a specific individual. *Chatham-Kent* involves general criticism of management and the denigration of a client. The current case is unprecedented in the repeated mockery, the threatening language, the vile insults, and the debasement of an identifiable manager. Nor are the postings a momentary lapse, perhaps carried out in a short-lived fit of rage. They take place over more than a month on multiple days.

104 Given the vitriolic nature of the postings, it is unsurprising that their discovery harmed the targeted managers. Both Superintendent D and Supervisor M were extremely shaken by what they read and they had every right to be upset -- the postings making chilling reading. Both needed substantial time off work for emotional distress and Superintendent D required medical care. Neither manager returned to Midtown and Supervisor D has not returned to an operational position with direct supervisory functions. The evidence of actual damage caused by the postings is uncontradicted.

105 I recognize that the job of manager oftentimes requires a thick skin and it would be unrealistic for those who manage people to expect unbridled affection from the employees they supervise. Managers must understand that some, even perhaps all, employees may not like them. I also recognize that Midtown Depot was an unhappy place for a number of workers. However, no manager should have to endure the kind of cruel personal attacks directed at Superintendent D and, to a lesser extent, at Supervisor M. The Grievor's Facebook postings went far beyond the boundaries of acceptable workplace criticism. The postings were shared with other Midtown workers who were the Grievor's Facebook friends, undermining managerial authority and further poisoning an already challenging work environment. In addition, the Grievor was largely unapologetic. I will address the issue of the Grievor's acknowledgement of wrongdoing in more detail when I discuss the Union's provocation defence. For now it is sufficient to say that while I accept that the Grievor issued a verbal apology at her formal interview on November 24, 2009, the evidence as a whole suggests that the Grievor was remarkably unrepentant for the damage she had caused her managers.

106 The contents of the Facebook postings and the damage inflicted on two managers, combined with the absence of any sincere apology or recognition of wrongdoing, provide strong support for the decision of the Employer to dismiss the Grievor. I will now turn to the defence offered by the Union to determine if, notwithstanding the nature of the Facebook postings, there is a case that can be made for reinstating the Grievor.

107 The first defence offered by the Union was that the Grievor had not intended that her postings would be seen by management, Superintendent D, or Supervisor M. I accept the Grievor's evidence, corroborated by Ms. Ray, that she believed that only her Facebook friends would be able to view her postings. I accept that the Grievor's had not understood that her postings were available to the general public, not just her Facebook friends, and could be easily accessed by simply typing her

name into an internet search engine or logging into Facebook. Having reviewed the Agreed Statement of Facts, and listened to the testimony of the Grievor, Supervisor M, and other witnesses familiar with Facebook, I am satisfied that such mistakes are easy to make. Facebook's recommended default privacy settings allowed universal access in 2009. Unless a user specifically restricted privacy, there would be open access. Not bothering to carefully review the privacy steps is akin to not reading carefully, if at all, the policy pages that accompany most common on-line programs nowadays (such as itunes, Skype, or "Dropbox"). Many computer users just skip this step or tick the appropriate box without reading the rules of use. The Grievor was not much different in that regard.

108 The fact that the Grievor was under a misapprehension about who could access her Facebook site, however, does not relieve her from the responsibility for what she wrote. The Grievor demonstrated a degree of recklessness in not even considering how easily her postings could be spread, even if restricted to just her Facebook friends (see, *EV Logistics*, para. 60 and *Wasaya Airlines*, page 63). There is nothing, for example, to prevent friends from forwarding a posting to other friends. It is difficult to believe that the Grievor would have been completely oblivious to the growing controversy over Facebook privacy, widely reported in the media (Statement of Agreed Facts, paragraph 42) and the subject of a commentary in the local union newsletter that warned that "you never know who sees your comments" (Exhibit 24). The Grievor greatly increased the likelihood that her postings would be eventually discovered by management by having current and former postal workers among her friends. This brought her Facebook postings directly into the workplace, undermining any claim her site was intended as a private, non-work, forum.

109 The Grievor's defence is similar to that of someone in an extra-marital affair who tells a few friends about it and, when the affair is invariably discovered, protests that they never wanted their husband or wife to find out and certainly never intended to hurt anyone. The very act of the affair and the disclosure to a few friends, or in this case, the contents of the postings and the inclusion of co-workers, create a certain inevitability of discovery and harm. It is a weak excuse to claim, as the Union and Grievor have done in the current case, that there was no intention to harm the supervisors because they would never see the postings.

110 A second position advanced by the Union is that the Grievor was drinking when she made a number of postings -- in essence, a diminished responsibility argument. No claim was made that the Grievor was an alcoholic, only that she may have lacked judgement because of the effects of alcohol. Frequently during her testimony, when asked about a particular offensive posting, the Grievor responded that she must have been drinking.

111 The evidence suggests that limited reliability should be attached to the Grievor's assertions about the impact of alcohol. On two dates, October 10 and 22, the postings expressly mention drinking. At first the Grievor said that she had been drinking when all her postings were made, but then when confronted with postings made while she was at work, the Grievor backed away from this assertion and conceded that she had been drinking for some, but not all, the postings. Second, a number of the postings were made shortly after the end of the work day or while she was preparing to report to work making it less likely that she would have been drinking heavily (for example at 9:02 AM on October 13; 5:40 PM on October 25; and 8:53 AM on November 4). Third, the postings, while offensive, are generally articulate and grammatically well constructed, and demonstrate control of capitalization and underscoring, suggesting that if the Grievor had been drinking when the postings were made, her impairment was not severe. Fourth, there is little change in tone and theme between the emails she wrote while drinking (October 10; 1:21 AM) and those postings at

work (November 5; 2:00 AM), and those made at times where heavy drinking was unlikely (October 13 at 9:02 AM). Virtually all emails attack her supervisors, whether the Grievor is sober or not. I conclude there is weak evidence to support the claim that the Grievor's heavy drinking should diminish her accountability for many of the offensive postings.

112 In reaching this conclusion, I note that there is substantial case law that suggests a defence of diminished responsibility needs to be established through medical evidence (*Livingston Distribution; Grober*). In the current case, a psychologist, Dr. Pugh, assessed the Grievor almost two years after her dismissal. He reported that the Grievor had told him that she had a drinking problem, but there was nothing in his evidence to suggest that her alcohol intake had reached the level of an illness or that she required treatment for alcoholism. Dr. Pugh testified that the Grievor knew right from wrong and he did not propose that because of drinking the Grievor's responsibility for what she had written should be reduced. Thus, in addition to weak evidence of a link between drinking and posting, the medical evidence required for a diminished capacity defence is also lacking.

113 A third element of the Union's defence rested on Dr. Pugh's psychological assessment of the Grievor and his recommendation that her dismissal was disproportionate to her misconduct. Dr. Pugh carried out a number of psychological tests on the Grievor and concluded that she had a fragile personality, possibly due to teenage sexual abuse, and that her dismissal had "a very significant and traumatic impact on her". In his report, Dr. Pugh did not identify any mental illness prior to the Grievor's dismissal. In his testimony, he confirmed that the evidence did not suggest that the Grievor had been suffering a mental illness at the time of her impugned Facebook postings that could be linked in any causal fashion to her conduct. Thus, I find no basis in the psychological evidence to conclude that the Grievor's misconduct could be attributable to a psychological illness or disorder. I am cognizant of Dr. Pugh's opinion about the impact of the dismissal, which is properly considered under mitigating factors.

114 With respect to Dr. Pugh's opinion that dismissal was too harsh under the circumstances, he is entitled to express his view. However, his area of expertise is psychology and he was accepted as an expert witness in that domain, not labour relations or arbitration. He was not in a position to assess the credibility of the Grievor under cross-examination or her version of events relative to that of other witnesses. For these reasons, I attach very little weight to Dr. Pugh's opinion on the appropriate amount of discipline that should be imposed in this case.

115 I now turn to the fourth and most important tranche of the Union's defence, its argument that the Grievor was provoked into her misconduct because of management's bullying and belligerent behaviour, particularly on the part of Superintendent D. The length of the arbitration hearing was largely due to the time needed to review a number of workplace events that, in the Union's submission, provided an important context for the Grievor's Facebook postings. The provocation defence is inter-related with the question of the sincerity of the Grievor's apology for what she wrote in Facebook. The Employer argued that the Union's position on provocation amounted to a campaign of "blame the victims". If the Union pursued the provocation argument, according to the Employer, it would undermine any claim by the Grievor that she was apologetic and accepted responsibility for her offensive postings.

116 I begin with the case law on provocation. In *Canadian Labour Arbitration (4th)*, a provocation defence is summarized as follows (Section 7:4412):

Where an employee is able to prove that his or her behaviour was, at least in part, induced by acts of provocation or entrapment on the part of a member of management (or indeed others), that fact may be relied upon to mitigate the penalty imposed. Whether provocation should count as a mitigating factor typically arises in cases involving confrontation, such as insubordination, fighting, and strikes. Although provocation is a factor arbitrators have considered in many cases, it can almost never completely exonerate an employee. Moreover, its force as a mitigating factor will be attenuated if the grievor had the opportunity to extricate himself or herself from the situation or where he or she responded in a disproportionate way.

117 In *Halifax Regional Authority*, Arbitrator Veniot reviewed the principles of provocation as they developed in the context of criminal behaviour and applied these principles, with modification, to the labour relations context. His analysis is as follows (paragraphs 51 - 57):

51 While it is clear from the above that provocation can occur from acts or words or a combination of both, it is obvious that there must be some boundary conditions established for the use of the defence. Simply saying "I was provoked" will only seed further questions, one of which is whether the actions complained of will support the defence. In other words, in order to have the defence available for any purpose, some test of bare sufficiency is needed to assess the evidence constituting the alleged provocation.

52 In this respect, the criminal law is a readily available and relevant source of analysis. There, the concept has received full and thorough consideration over a long period of time. The ideas developed in that area of the law can usefully be examined to see whether they can or should be adopted, or adapted, with utility, to the arbitral jurisprudence. Two of them seem of immediate assistance:

* first, an objective analysis must determine that the alleged provocation is sufficient to deprive an ordinary person of self-control;* secondly, there is a decision to be made on a subjective issue -- whether the person provoked actually acted on the provocation.

See: Tremear's, *supra*, in commentary, at p. 431.

53 I believe both of these concepts belong in the arbitral jurisprudence whenever provocation is being argued, because they focus on and elucidate key principles which underpin the concept in use, and set parameters for it that are suitable for the workplace.

54 The objective analysis ensures that a person relying on provocation is held to a threshold standard of reasonableness on the sufficiency of the alleged provocation itself. This is tied in significant ways to the employer's right to run its operation without disruption. The employer cannot be held to purely subjective, self-justifying reactions of any employee who wishes to act out and then allege provocation. The need for an arm's-length analysis of the allegedly provocative

activity, focused on the objective, often-used "ordinary person" paradigm, seems self-evident to me. A provocation defence of any sort which cannot pass this test would fail at this point.

55 The second, subjective, element also seems necessary, and flows materially from the nature of the defence itself. An employee raising a provocation necessarily is alleging actual provocation to which his or her misconduct is linked, as cause to effect. Even with a favourable "ordinary man" test result, a provocation defence must fail if the provocative conduct did not actually provoke the objectionable retaliation or activity. A person not actually provoked could never rely on the defence.

56 In its typical criminal use, there is a superadded and related timing requirement: the accused must have acted upon the found provocation "on the sudden and before there was time for his passion to cool". See, for example, Criminal Code, R.S.C. 1985, c. C-46, s. 232(2). In this case I need not concern myself further with whether this particular is to be imported into the arbitral jurisprudence. On the facts as I have found them to be, it is not an issue. It is plain on the accounts given above that Ms. Ryan's reaction to Mr. McCully's alleged actions and words in her office -- I will come to them below -- was virtually instantaneous.

57 Once use of the defence as a complete excuse is argued, there is, I think, a matter of proportionality to be considered. Words and/or conduct may be such that they would deprive the ordinary person of self-control; the person provoked may actually lose control. However, where the "complete defence" result is claimed, it seems to me that there must be some proportionality between provocation and response. To say that a person is justifiably provoked is not to cloak that person with the right to react to any length with impunity. The acts or words of a person reacting to provocation, and seeking to use the provocation as a complete defence, in my view, must show some reasonable relationship between the provocation and the employee's reaction to it.

Proportionality was also emphasized in *Capilano Highway* (see especially paragraph 20).

118 For the purposes of the current case, these principles can be framed as follows: 1) was there some act or series of acts that reasonably could be seen as provocative; and, 2) was there a response against the perpetrator of the act(s) that was proportional and proximate to the provocative action.

119 I now turn to the evidence. There is little doubt that Midtown Depot was an unhappy place for a number of employees, the Grievor included. Employees who testified believed that productivity expectations imposed by management were unfair and unrealistic, placing staff under unwellcome pressure. There was conflicting evidence about how the management style of Supervisor M and Superintendent D contributed to the pressure. Supervisor M was young and relatively inexperienced and divided his time among three depots. He essentially carried out instructions from his superiors and was viewed that way by Midtown staff. He was consistently described as soft spoken and relatively mild mannered. No one accused him of shouting, swearing, or acting aggressively

towards employees. There is no basis in any of the evidence about Supervisor M that supports a conclusion that his personal management style could be seen in any way as provocative.

120 With respect to Superintendent D, I accept the evidence of Midtown staff that her management style could be abrasive. She raised her voice at times to a point where it could be considered shouting, waved her fingers at people when attempting to make a point, at times too close for comfort, and occasionally said words like "shit" when upset at something. There is no question that Superintendent D believed that productivity could be improved at Midtown and, with the assistance of Superintendent M, implemented steps that she believed would increase efficiency, such as banning cell phones, enforcing certain work standards (four letter containers per hour), monitoring work break times more closely, and discouraging non-work related chatting. Both Superintendent D's style and productivity efforts upset Midtown staff, including the Grievor. The staff were experienced and did not feel they needed to be told what to do or monitored closely. They felt that the depot had been understaffed and that their level of productivity had been more than acceptable under the circumstances.

121 In this context, the productivity meeting of October 8/9 obviously struck a raw nerve. Even though delivered by Supervisor M, it is clear that the Grievor and other staff blamed the superintendent for the message that their work pace had to be improved. Indeed, in a letter sent to the disability insurer around this time (Exhibit 32), the Grievor accused Superintendent D of screaming and yelling at staff about productivity when, in fact, the superintendent did not attend the meeting at all (a fact conceded by the Grievor in cross-examination). The impugned Facebook postings began the next night, the Grievor citing the October 8/9 productivity meeting as the trigger.

122 In addition to the productivity meeting, several other events took place in October and November 2009 that were highlighted by various witnesses. During the October 8/9 shift, the Grievor had separate meetings, which she found unsettling, with Supervisor M and Superintendent D over a disability claim and her need to provide certain medical information. Later that same shift, Employee B and the superintendent had a verbal exchange overheard, but not witnessed, by the Grievor in which she claimed to have heard the superintendent shouting. Employee B was obviously upset after the exchange and left work early, which troubled the Grievor. (The Grievor was unaware that Employee B and the superintendent met and reconciled the next shift.) Finally, at the end of the shift the Grievor was given a 24 hour notice of interview for alleging swearing at Supervisor M during the productivity meeting and their discussion about the Grievor's disability claim. The Grievor's Facebook postings on October 10th included the "die bitch die" and "missing permanently" comments aimed at Superintendent D and the wish list of evils that could befall Supervisor M (e.g. catches swine flu).

123 The next incident took place on the October 13/14 shift. The Grievor hung a skeleton in the lunch room with a "How's Your Pace" sign. Later, Employee K and the superintendent got into a nasty confrontation over the superintendent's order that Employee K perform a different task, escalating to the point where Employee K phoned the police. The Grievor overheard and then witnessed part of the confrontation and received an emergency suspension along with Employee K for allegedly refusing to return to her work station. She was very upset at the time.

124 On October 15th, the Grievor was interviewed about the incident and accused the superintendent of harassing employees by shouting and enforcing unrealistic productivity requirements. She received a three day suspension which was grieved (it had not been heard as of the date of the current arbitration). The Grievor did not work from October 15 to October 22, posting twelve mes-

sages in that time period including ones where she referred to the superintendent as the "devil", "crazy bitch" and "c_nt".

125 After the Grievor's return to work, she continued to post mocking comments such as "wicked witch" and "evil hag" though no particular incidents were identified as triggering events. The last incident of note was the November 3rd intervention the human resources department, which the Grievor referred to as a "'pity party". Following the meeting, the nasty posts continued (e.g. "the hag" and "ugly coat") until the Grievor's Facebook site was discovered by management on November 19th.

126 Is this the kind of provocation that can stand as a defence against the Grievor's offensive postings? The answer is no. First, it is difficult to see how these various incidents and Superintendent D's management style as the kind of provocative events that are "sufficient to deprive an ordinary person of self-control" (*Halifax Regional*; paragraph 52). Many of the events cited by the Grievor happened to others, not her directly. The sole exception was the emergency suspension on October 14th and the subsequent three day suspension. The most notable confrontations mentioned by the Grievor involved Employee B and Employee K. The productivity meeting and the November 3rd intervention involved Midtown as a group and the Grievor was in no way singled out for special criticism. While Superintendent D may have shouted at employees from time to time or waved her fingers at them or sometimes used mild expletives, not a single example was provided in which this kind of behaviour had been directed at the Grievor other than a meeting two years previously. Moreover, the Grievor's Facebook responses were hardly immediate, which is consistent with a loss of control, but took place many hours and sometimes many days after the purported triggering incident had occurred. Thus, the great majority of the Grievor's Facebook postings were neither proximate to the event nor in response to something that had happened to her, greatly undermining her provocation defence.

127 Even if one were to conclude that the Grievor had been legitimately provoked by the events taking place in Midtown, the disproportionate response further undermines the provocation defence. Even if I accept that Superintendent D had an aggressive management style that angered some employees, the degree of character assassination visited on her by the Grievor is all out proportion to the purported level of offence. The superintendent was not physically aggressive, she did not scream (there is a difference between talking loudly and even shouting versus screaming) and habitually use foul language, she did not use racial epithets, she did not act target specific individuals for vilification in front of others, and she was not even present during most of the City Finals' shift. Many of the actions she took, such as emphasizing productivity, setting work standards, and issuing operational directives were a normal part of her role as a manager. The allegations of bullying, let alone the picture painted of a tyrannical reign of terror, do not stand up to scrutiny. Rather, the picture that emerges is that of the Grievor and a small group of colleagues taking an active dislike to the superintendent for doing her job in a way in which they disapproved. The Grievor then operationalized this dislike through her Facebook postings. This was not a legitimate response to a provocation -- this was mean and nasty bullying of a manager who was attempting to carry out her job.

128 The failed provocation defence combined with other factors makes it difficult to accept the sincerity of any apologies offered by the Grievor. It is true that the Grievor formally apologized at the disciplinary interview conducted after her Facebook postings were discovered, but the genuineness of that apology is belied by a great deal of evidence that suggests that the Grievor shows little

remorse for the harm she caused Supervisor M and Superintendent D. Though not stated in so many words, an important part of the Grievor's explanation for what she posted was that Superintendent D got what she deserved because of her mistreatment of Midtown staff; indeed, at one point in cross-examination that Grievor stated that the superintendent and supervisor were to blame (along with alcohol) for the contents of her Facebook site. On numerous occasions during questioning, the Grievor would refer to an incident or event at Midtown to justify what she wrote, distancing herself from responsibility or add that she must have been drunk.

129 This sentiment of blaming the victims is the very antithesis of remorse. Also contrary to an acceptance of responsibility was the Grievor's letter to Ms. Swabb read at the outset of the November 24th interview disciplinary. She accused management of an invasion of privacy, denied the postings were intended to be intimidating or demeaning, and stated that she had not realized her postings were in the public domain. The letter however contains no apology (Exhibit 31). The Grievor's response when she learned that her postings had been discovered by management is also revealing. There was no apology or even any expression of concern for those she might have harmed -- rather the Grievor responded by posting "I wonder who the RAT is", hardly a sign of any regret except perhaps at being discovered.

130 In short, I am left with an unapologetic Grievor whose Facebook postings viciously targeted a manager whose conduct, while not popular, could not possibly justify what the Grievor had done. The postings took place for one month and likely would have continued had they not been discovered by management. The postings caused significant harm to the targeted supervisors. They were publicly available through the Grievor's failure to enable any privacy settings, but even had privacy settings restricted access, the fact that current and former employees were among her Facebook friends brought the postings into the workplace.

131 I am aware of the Grievor's age and length of service, factors that might in some cases provide sufficient grounds to relieve against discharge. In this case, however, the Grievor's attitude makes her a poor candidate for re-establishing the employment relationship. Throughout her testimony the Grievor remained self-serving and evasive (for example her initial denial of the meaning of "c_nt") and simply refused to accept accountability for her actions. She recanted a number of times during her testimony after being caught in obvious contradictions or upon belatedly realizing the damage her testimony was causing her own case. When asked what lessons she had learned, the Grievor responded she "wouldn't drink and use the computer in future". Her biggest expression of regret was how the current events had "wrecked my career". Despite her long service and the undoubted hardship that her termination has caused, a point reinforced by Dr. Pugh, I find no basis for reinstatement.

132 In reaching this conclusion I have reviewed the Union's authorities, which, with great respect to Union counsel, are distinguishable. Only one case involved the use of social media (*Hydro One*) and in that case the offending email was an isolated incident for which the grievor was truly remorseful. Other cases involved single events and apologies (*Senior Flexonics*, *Inventronics*) or the arbitrator found provocation (*Canada Post [Leavere]*). These cases are not comparable and do not provide case law that would suggest a different outcome.

133 Accordingly, I conclude that the Grievor had just cause to dismiss the Grievor.

AWARD

134 For all the above reasons, the grievance is dismissed.

Dated March 21, 2012 in Calgary Alberta.

Allen Ponak

qp/e/qlspi/qlhbb/qlhcs

1 The Union agreed that it would not be claiming the Grievor was an alcoholic and entitled to accommodation.

2 The Union was given, and took, the opportunity to comment on the new cases introduced by the Employer.

Case Name:
**Credit Valley Hospital v. Canadian Union
of Public Employees, Local 3252
(Brathwaite Grievance)**

**IN THE MATTER OF an Arbitration
Between
Credit Valley Hospital ("the Hospital"), and
Canadian Union of Public Employees
and its Local 3252 ("the Union")
AND IN THE MATTER OF the Grievance of
N. Brathwaite Grievance #2010-19**

[2012] O.L.A.A. No. 29

214 L.A.C. (4th) 227

109 C.L.A.S. 95

No. MPA/Z101635

Ontario
Labour Arbitration

Panel: Randy L. Levinson (Arbitrator)

Award: January 9, 2012.

(23 paras.)

Labour arbitration -- Discipline and discharge -- Grounds -- Breach of trust.

The grievor was a part-time Environmental Service Representative assigned by the employer hospital. After an outpatient jumped to his death from a parking garage, the grievor was assigned to assist in the cleanup of the scene. The grievor was subsequently terminated for taking pictures of the scene and posting them on his Facebook page. The employer took the position that the grievor violated its Code of Conduct and breached the confidentiality of patient, employee and corporate information. The union submitted that the grievor did not engage in culpable misconduct, as the em-

ployer's policies about confidentiality did not apply to the specific facts in the case. Therefore, discharge was an excessive disciplinary response.

HELD: Grievance dismissed. The grievor engaged in culpable misconduct. The Code of Conduct applied to his actions. He posted two pictures on his Facebook page of the scene with comments about the patient's suicide on Hospital property that others viewed. By so doing, the grievor publicized and disseminated confidential patient information on the internet about this tragic event. It was not just and reasonable in all the circumstances to substitute another penalty for the discharge. The grievor had a checkered disciplinary record, was not remorseful, and did not fully accept responsibility for his misconduct.

Appearances:

For the Hospital: **Robert W. Little (Counsel), Robert Church (Student-at-Law), Diane Zdybal (General Manager, Service Department), Carolyn Nancekivell (Human Resources Manager), Roslyn Bacchus (Supervisor).**

For the Union: **Tracey Pinder (National Representative), Joe Ricci (Local Union President), Cathy DiMauro (Chief Steward), Laird McLeod (Secretary-Treasurer), Denise Murdock (Steward).**

AWARD

Introduction

1 In September 2010, a tragedy occurred at the Hospital. An adolescent outpatient who attended at the Hospital for an appointment with a physician for mental health treatment jumped to his death from one of the multilevel parking garages. Mr. Brathwaite, a part-time Environmental Service Representative (ESR) was assigned to assist with the cleanup of the scene. During his time there, Mr. Brathwaite took two pictures of the scene with his cell phone. He then posted them on his Facebook page, with a caption under each picture. One day later, he deleted the posted pictures. The posted pictures were brought to the Hospital's attention. An investigation followed. Mr. Brathwaite "admitted" that he took one picture of the scene. However, he denied posting it on Facebook. After completing its investigation, the Hospital concluded that Mr. Brathwaite posted two pictures and comments regarding the incident, that he violated its Code of Conduct ("*Code*") and that he breached the confidentiality of patient, employee and corporate information. On September 27, 2010, the Hospital terminated Mr. Brathwaite's employment.

2 The parties disagree about whether Mr. Brathwaite engaged in culpable misconduct. If he did, they further disagree about whether it is just and reasonable in all the circumstances to substitute another penalty for the discharge. I will briefly set out the basic thrust of the parties' arguments. The Hospital submitted that Mr. Brathwaite engaged in a clear and very serious breach of its policies about confidentiality, warranting his termination. The Hospital argued that I should not substitute another penalty for the discharge, given the seriousness of the misconduct, Mr. Brathwaite's poor disciplinary record and his lack of candour throughout. The Hospital further argued that general deterrence should be given a priority, in this case. The Union submitted that Mr. Brathwaite did not

engage in culpable misconduct, as the Hospital's policies about confidentiality do not apply to the specific facts here. In that regard, the Union submitted that the incident occurred in a public area, the individual was not identified at the time as a patient at the Hospital, and Mr. Brathwaite was unaware of that fact. The Union submitted that he was at most guilty of poor judgment that was not culpable. The Union argued that Mr. Brathwaite's actions were a momentary aberration, and were not malicious or calculated, as he did not make any slanderous or disrespectful comments about the incident. Alternatively, if Mr. Brathwaite is found to have engaged in culpable misconduct, the Union argued that I ought to substitute another penalty for the discharge. While Mr. Brathwaite was not a perfect employee, the Union submitted that he is committed to improving his work performance. The Union argued that although Mr. Brathwaite lied during the investigation, he was scared, he is remorseful, and he now accepts responsibility. After carefully considering the evidence adduced and the parties' submissions, I conclude that Mr. Brathwaite engaged in culpable misconduct, and that it is not just and reasonable in all the circumstances to substitute another penalty for the discharge.

The facts

3 In June 2005, the Hospital hired Mr. Brathwaite as an ESR. On June 29, 2005, he signed an Employee/Volunteer Confidentiality Form acknowledging the Confidentiality Policy ("*Policy*") of the Hospital. It reads, in part, as follows:

The relationship The Credit Valley Hospital has with patients, staff members and the community it serves is based on trust and respect. It is a reasonable expectation for every patient and staff member that personal information will be treated in complete confidence.

Every employee/volunteer in the performance of his/her duties, at some time, has the opportunity to gain knowledge of personal patient/staff & corporate information. Every employee is expected to respect the confidentiality of all patient/staff & corporate information learned at the Hospital. It should be understood that confidential information includes verbal, written and electronic data concerning patients, staff and hospital business.

The Hospital views the disclosure of confidential patient/staff & corporate information by any employee/ volunteer, without proper authorization, as a violation of the individuals [sic] employment/volunteer obligation and will result in disciplinary action up to and including dismissal.

I acknowledge that I have reviewed the excerpts from the Hospital's Confidentiality Policy set out above.

I understand that I will be bound by this policy and that I will be obliged to respect the confidentiality of any information pertaining to any patient/staff member or the corporation which I learn as a result of my service with The Credit Valley Hospital.

4 On February 6, 2009, Mr. Brathwaite signed an acknowledgment of the *Code*. The acknowledgment and attached *Code* relating to confidentiality read, in part, as follows:

I acknowledge that I received, read, and understood the terms of the Code of Conduct Policy and the Code of Conduct/Workplace Issues Procedure of The Credit Valley Hospital. As an employee or volunteer of The Credit Valley Hospital, I agree to be bound by the terms and conditions contained in the Code of Conduct Policy and any amendments thereto.

...

Confidentiality

- * Maintaining confidentiality of all personal health information and other confidential Hospital information both on and off duty.
- * Taking all reasonable measures to ensure that personal, patient and corporate information is collected, used and disclosed only in circumstances necessary and authorized for patient care, research, or education, or is necessary in the conduct of the business of the Hospital.
- * Divulging, obtaining and using confidential information only as needed by employees to perform their duties.

Inappropriate conduct and behaviour includes, but is not limited to, that which interferes in the Hospital's ability to achieve its goals, reduces productivity, or is negligent or insubordinate and includes without limitation:

Breach of Confidentiality

- * Unauthorized disclosure or access of confidential patient or personal health information or confidential Hospital information.
- * Discussion of confidential information in a public area.
- * Misuse or failure to safeguard confidential information including user codes or passwords.

5 On the date of the incident, Mr. Brathwaite was working the afternoon shift. He was called to the scene of the incident in the parking lot to assist with the cleanup. When he arrived there with his cart and cleaning supplies, there were many people present, including the police, who were investigating at the time. Mr. Brathwaite was advised to wait, until being called. According to Mr. Brathwaite, he sat and waited on a bench between 20 and 30 minutes. He then called Damian Baird, Environmental Team Leader, about continuing with his other duties. He was told to stay for another 20 to 30 minutes. Mr. Brathwaite went back to the bench and texted someone. After that, he used his cell phone to take a picture of the crowd at the scene. Mr. Brathwaite said that everyone had their back turned to him, except for a police officer. After Mr. Brathwaite waited for that second period of time, he called Mr. Baird again. He was told to return to his scheduled work, and that he would be called, when needed. Around 7:00 or 7:30 p.m., Mr. Brathwaite was called to assist with the cleanup. He had never been involved with a similar situation. By that point, the body had been re-

moved. Mr. Brathwaite assisted with the cleanup. He took another picture of the scene. He said it included a glove, gauze, what he described as "absorption" on the ground, and rubbish.

6 After completing the cleanup, Mr. Brathwaite went on his break. He uploaded and posted the pictures on his Facebook page. Mr. Brathwaite said that he was all emotional, and that he got caught up in the moment. He testified that under the first picture, he wrote a comment: "Mother pleads with kid not to jump off PRCC side of the parking lot but did anyways poor thing." When asked how he knew this, Mr. Brathwaite said he heard everyone talking about it, when he first went out to the scene. Mr. Brathwaite testified that under the second picture, he wrote a comment: "This is what I have to clean up". Mr. Brathwaite then returned to work and completed his shift. He said he did not know whether the suicide victim was a patient, or what he looked like, and that he just heard that a kid jumped off the garage. Mr. Brathwaite testified that if he knew the suicide victim was a patient, he would not have taken pictures of the scene. In cross-examination, Mr. Brathwaite admitted that he did not take any steps to find out whether the suicide victim was a patient. But, he said that he [the suicide victim] was in a public area on Hospital property, and that he was not told he [the suicide victim] was not a patient.

7 Annalecia Cox is a security guard at the Hospital. She was on shift the date of the incident, and she spoke with Mr. Brathwaite that day. She also saw pictures that Mr. Brathwaite posted on his Facebook page. She then spoke with Mr. Brathwaite about them. The details of the foregoing are contained in a signed statement of her interview with management on September 21, 2010. It reads, in part, as follows:

On the [date omitted] of September, I was one of the Security guards attending to the incident where the boy jumped off the [details omitted] parking deck.

I seen [sic] Nicholas Brathwaite there as well and he had his phone out and I told him "you don't want your phone out right now"

On Thursday night [the day following the incident] on my shift I accessed facebook on my phone and then later from a computer in the Security Office. I had an invitation to be a friend from Nicholas Brathwaite and so I accepted. When I joined these pictures popped up:

1. A caption said that "a 14 year old kid jumped off the CVH parking lot". The picture showed me, talking to Mark [last name omitted]. It also showed Pat [last name omitted], Ingrid and John walking with Police Officers. The direction of the picture was from the PRCC entrance doors looking towards the initial scene.
2. The second picture showed the paper and the gauze on the ground after the body was removed. The caption at this picture was "I had to clean this up".

I was very upset by this. I called Nicholas's boss Damian, so I could get his phone number, but they would not release it to me. Instead Damian told Nicholas to call Annalecia in Security. He called me and I said to him "what the fuck are

you posting pictures of the suicide on facebook for" I told him he was being an idiot and to take them off right away.

8 Mr. Brathwaite acknowledged receiving a telephone call from Ms. Cox, the day following the incident. However, Mr. Brathwaite took issue with some of the information contained in Ms. Cox's signed statement. He said that Ms. Cox did not tell him, "you don't want your phone out right now" on the date of the incident. He said Ms. Cox's description of the first picture was inaccurate because everybody's back was turned to him, except for the police officer. Mr. Brathwaite said Ms. Cox's description of the second picture was accurate, but that there was absorption on the ground, as well. Mr. Brathwaite said that when Ms. Cox spoke with him, she did not say "what the fuck are you posting pictures of the suicide on facebook for" or call him an idiot. Rather, he said she was more concerned with how she looked because she was in her uniform. That day, Mr. Brathwaite said he removed the pictures and comments he posted on Facebook. In cross-examination, he was asked why he took them down. Mr. Brathwaite said he did so because it was causing too much commotion, and before there would be more problems. Mr. Brathwaite said there were six posted comments about the pictures on his Facebook page. The following day, while at work, Mr. Brathwaite said a co-worker wanted to become a friend on Facebook and asked him about the pictures. The co-worker told him that she heard that he had pictures on Facebook about the incident. Mr. Brathwaite also said that he received three or four requests from people he knew at the Hospital to become friends on Facebook. He did not accept these friend requests.

9 On September 20, 2010 ("September 20"), the Hospital interviewed Mr. Brathwaite about the incident. He "admitted" taking one picture of "paper and stuff" that was on the ground. When questioned about whether he posted pictures on his Facebook page, Mr. Brathwaite denied doing so. Mr. Brathwaite explained that he was scared about losing his job. He said that he did not want to admit to something he did not do. In cross-examination, he said he thought the Hospital may have had some different kind of picture, or believed that he took a picture of a body. Mr. Brathwaite also admitted that he knew at that time that Ms. Cox and others had seen the pictures he posted on Facebook. However, Mr. Brathwaite said he did not know what the Hospital had, as they were not being specific, during the interview.

10 On September 23, 2010 ("September 23"), the Hospital spoke again with Mr. Brathwaite. Mr. Brathwaite apologized for taking a picture. However, he again told the Hospital that he did not put it on Facebook and told the Hospital "I promise you that I never put any pictures of anyone on Facebook." In cross-examination, Mr. Brathwaite was asked why he did not tell the truth, given that he had time to think about it. Mr. Brathwaite admitted that he had an opportunity a number of times, but that he did not take it. At the conclusion of his testimony, Mr. Brathwaite was asked why he lied. Mr. Brathwaite said that he would have told the truth, but by the time he went to Human Resources on September 20, there were so many rumours, that he did not know what the Hospital had, and the Hospital did not tell him what they had. He was scared, and he was not going to admit to taking a picture of something that he did not take. Mr. Brathwaite was further asked at the hearing why he has decided to tell the truth. He testified because he got fired, and he knew that he did not breach anything, and he knew that in his heart.

The decision

11 The first issue is whether Mr. Brathwaite engaged in culpable misconduct. The parties disagree about whether the Hospital's confidentiality policies apply here, and justify the imposition of some discipline. One basis of the Union's argument that Mr. Brathwaite's conduct fell outside the

ambit of the Hospital's confidentiality policies was that they do not meet one of the long-recognized requirements for unilaterally introduced rules established in *Re Lumber & Sawmill Workers' Union, hoc. 2537 and KVP Co. Ltd.* (1965), 16 L.A.C. 73 (Robinson). In that regard, the Union contends that the Hospital's *Policy* and *Code* do not meet the third requisite of being clear and unequivocal. More particularly, the Union maintains that the *Policy* and the *Code* relating to confidentiality are unclear, as they do not specifically provide that an employee who takes a photograph of the parking lot at the Hospital and posts it on Facebook will be terminated. The often quoted portion from page 85 of *Re Lumber & Sawmill Workers' Union, hoc. 2537 and KVP Co. Ltd.* (supra) reads, in part, as follows:

A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:

1. It must not be inconsistent with the collective agreement.
2. It must not be unreasonable.
3. *It must be clear and unequivocal*
4. It must be brought to the attention of the employee affected before the company can act on it.
5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
6. Such rule should have been consistently enforced by the company from the time it was introduced, [emphasis added]

12 For ease of reference, the relevant provisions of the signed *Policy* read, in part, as follows:

The relationship The Credit Valley Hospital has with patients, staff members and the community it serves is based on trust and respect. It is a reasonable expectation for every patient and staff member that personal information will be treated in complete confidence.

Every employee/volunteer in the performance of his/her duties, at some time, has the opportunity to gain knowledge of personal patient/staff & corporate information. *Every employee is expected to respect the confidentiality of all patient/staff & corporate information learned at the Hospital. It should be understood that confidential information includes verbal, written and electronic data concerning patients, staff and hospital business.*

The Hospital views the disclosure of confidential patient/staff & corporate information by any employee/ volunteer, without proper authorization, as a violation of the individuals [sic] employment/volunteer obligation and will result in disciplinary action up to and including dismissal.

I acknowledge that I have reviewed the excerpts from the Hospital's Confidentiality Policy set out above.

I understand that I will be bound by this policy and that I will be obliged to respect the confidentiality of any information pertaining to any patient/ staff member or the corporation which I learn as a result of my service with The Credit Valley Hospital, [emphasis added]

13 For ease of reference, the relevant provisions of the signed *Code* read, in part, as follows:

Confidentiality

- * Maintaining confidentiality of all personal health information and other confidential Hospital information both on and off duty.
- * ***Taking all reasonable measures to ensure that personal, patient and corporate information is collected, used and disclosed only in circumstances necessary and authorized for patient care, research, or education, or is necessary in the conduct of the business of the Hospital.***
- * Divulging, obtaining and using confidential information only as needed by employees to perform their duties.

Inappropriate conduct and behaviour includes, but is not limited to, that which interferes in the Hospital's ability to achieve its goals, reduces productivity, or is negligent or insubordinate and includes without limitation:

Breach of Confidentiality

- * ***Unauthorized disclosure or access of confidential patient or personal health information or confidential Hospital information.***
- * Discussion of confidential information in a public area.
- * Misuse or failure to safeguard confidential information including user codes or passwords, [emphasis added]

14 In my view, the foregoing highlighted provisions in the Hospital's *Policy* and *Code* clearly set out and underscore the critical significance of the well-known, the well-understood and the all-encompassing notion of the confidentiality of patient information, a cornerstone in the present health care context. The Hospital's *Policy* also specifies the potential disciplinary consequences for the unauthorized disclosure of confidential patient information. The *Policy* provides, in part, that: "The Hospital views the disclosure of confidential patient . . . information by any employee . . . without proper authorization, as a violation of the individuals [sic] employment . . . obligation and will result in disciplinary action up to and including dismissal." Having regard to the well-known, the well-understood and the all-encompassing fundamental employee obligation not to disclose confidential patient information, it is unnecessary for the Hospital to particularize in writing every

single possible violation of this obligation to satisfy the third requisite in *Re Lumber & Sawmill Workers' Union, Loc. 2537 and KVP Co. Ltd.* (supra) that a rule must be clear and unequivocal. In the present health care context, that requisite has been satisfied by the foregoing highlighted provisions in the Hospital's *Policy* and *Code* which set out in sufficiently clear detail the broad ambit of the scope of an employee's obligation regarding the nondisclosure of confidential patient information.

15 The Union maintained that the Hospital's *Policy* and *Code* do not apply here in any event, as the incident occurred in a public area, the affected individual was not identified at the time as a patient at the Hospital, and Mr. Brathwaite was unaware of that fact. Mr. Brathwaite acknowledged the self-evident impropriety of his actions, albeit with the proviso, if he had known the suicide victim was a patient. In that regard, Mr. Brathwaite testified that if he knew the suicide victim was a patient, he would not have taken pictures of the scene. On balance, I find that Mr. Brathwaite was aware that the suicide victim was a patient on the date of the incident. Mr. Brathwaite was not forthright with the Hospital during its investigation at the September 20 interview, or when they spoke on September 23. He stated several reasons for this. They included the following. He was scared about losing his job. He did not want to admit to something he did not do or admit to taking a picture of something that he did not take. He thought that the Hospital may have had some different kind of picture or believed that he took a picture of a body, when he went to Human Resources on September 20. There were so many rumours. He did not know what the Hospital had, and the Hospital did not tell him what they had. In my view, there is no credible reason to account satisfactorily for Mr. Brathwaite's lack of candour with the Hospital on September 20 or 23. A number of these stated notions do not make much sense. For example, Mr. Brathwaite could not be genuinely concerned about something he did not do, or about a picture he did not take. I accept that he was scared about losing his job, but find this was because he was aware of the gravity of the situation, given he was aware on the date of the incident that the suicide victim was a patient. If Mr. Brathwaite genuinely did not know that, one would reasonably expect him without hesitation to raise this fact with the Hospital at the September 20 interview, or when they spoke on September 23. However, that was not the case, and Mr. Brathwaite did not credibly account for his failure to do so. Mr. Brathwaite's deliberate attempts to mislead the Hospital during its investigation inescapably lead to the conclusion that he was aware that the suicide victim was a patient on the date of the incident.

16 Even if Mr. Brathwaite had not been expressly told or did not hear on the date of the incident that the suicide victim was a patient, I would not find this to exonerate Mr. Brathwaite from culpability, in these circumstances. In that regard, Mr. Brathwaite must be deemed to have constructive knowledge on the date of the incident that the suicide victim was a patient. To maintain the integrity of the confidentiality of patient information, Mr. Brathwaite ought to have acted with reasonable diligence, which he did not do. He ought to have conducted himself by acting on the presumption that the suicide victim was a patient, given the context of what occurred, and the clarity of the surrounding circumstances. This includes the tragedy occurring on Hospital property, and Ms. Cox's statement to him at the scene "you don't want your phone out right now" before he took the pictures, against the backdrop of the well-known, the well-understood and the all-encompassing fundamental obligation on employees to maintain the confidentiality of patient information. Consequently, Mr. Brathwaite cannot take any solace from the fact that he did not take any steps to find out whether the suicide victim was a patient, or the fact the suicide victim was in a public area on Hospital property outside the Hospital building, or that he was not told the suicide victim was not a patient.

17 In my view, the Hospital's *Policy* and *Code* clearly apply to Mr. Brathwaite's actions, which must be viewed in their totality. He posted two pictures on his Facebook page of the scene with comments about the patient's suicide on Hospital property that others viewed. By so doing, Mr. Brathwaite has publicized and disseminated confidential patient information on the Internet about this most tragic event. This includes his comment that Ms. Cox observed under the first picture, namely "a 14 year old kid jumped off the CVH parking lot". Overall, I found Ms. Cox to be a credible witness. On this point, I find her evidence to be clear, given forthrightly and to be unshaken in cross-examination. Mr. Brathwaite's posted comment disclosed information about the circumstances surrounding the patient's death, including the age, and the location. The fact Mr. Brathwaite did not specifically name the patient does not fundamentally change the nature or character of his culpable misconduct by disclosing confidential patient information, as he did. Even had I accepted Mr. Brathwaite's testimony about the comment he posted under the first picture, it would not exculpate him. In that regard, he testified it was: "Mother pleads with kid not to jump off PRCC side of the parking lot but did anyways poor thing." That comment would have disclosed information about the circumstances surrounding the patient's death, namely the location, and details about the mother's involvement in the tragedy.

18 Having found the Hospital proved that Mr. Brathwaite engaged in culpable misconduct, the remaining issue is whether it is just and reasonable in all the circumstances to substitute another penalty for the discharge. In my view, it is not just and reasonable to do so. By his actions, Mr. Brathwaite has engaged in very serious misconduct. I consider this characterization to be consistent with the following cited cases. In *Re Municipality of Chatham-Kent and Canadian Auto Workers, Local 127 (Clarke)* (2007), 159 L.A.C. (4th) 321 (Williamson), the arbitrator upheld the discharge of an employee in part because the grievor breached a confidentiality agreement by disclosing residents' personal information on a blog accessible to the public. In *Re Vancouver Hospital and Health Sciences Centre and H.E.U. (Khan)* (1995), 39 C.L.A.S. 432 (Munro) (Aurora Ont; Canada Law Book), the arbitrator upheld the discharge of an employee who he found had a telephone conversation with someone to whom she imparted confidential medical information about a resident.

19 In seeking to mitigate the seriousness of Mr. Brathwaite's misconduct for the purpose of substituting a lesser penalty, the Union submitted that his actions should be characterized as a momentary aberration, and referred to *Re Wm. Scott & Company Ltd. and Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 C.L.R.B.R., 1 (P. Weiler). In that case, the British Columbia Labour Relations Board ("B.C.L.R.B.") in reviewing an arbitration decision referred to the frequently cited decision in *Re United Steelworkers of America, Local 3257 and The Steel Equipment Co. Ltd.* (1964), 14 L.A.C. 356 (Reville), that catalogued a number of factors to consider when determining whether to mitigate a disciplinary action. One factor was whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses, or whether the offence was premeditated. At paragraph 14 of its decision, the B.C.L.R.B. listed what it considered to be the most important factors when determining whether to mitigate a disciplinary action. This included "Was the grievor's conduct premeditated or repetitive, as opposed to a momentary aberration, or was it provoked by someone else (for example, in a fight between two employees)?".

20 Mr. Brathwaite said that he was all emotional, and that he got caught up in the moment, when he uploaded and posted the pictures on his Facebook page. Viewed objectively in their entirety, Mr. Braithwaite's actions cannot be properly characterized as being a momentary aberration, or being spur of the moment. While his actions had some element of being spur of the moment, they

were mainly premeditated. In that regard, the first picture ostensibly appeared to be spur of the moment. However, the second picture was premeditated, given the passage of time between when the two pictures were taken. Further, Mr. Braithwaite's posting of the pictures with captions on his Facebook page had the hallmarks of premeditation, given the passage of time between when the pictures were taken and when they were posted, and the fact that Mr. Brathwaite posted them while he was on break. Given the foregoing time-line and chronology, Mr. Brathwaite had sufficient time for reflection before taking his second picture, and before posting both pictures on his Facebook page with comments. By his actions of taking the pictures and posting them on his Facebook page with comments that others viewed, Mr. Brathwaite without any justification has put his own self-interest and feelings ahead of the well-known, the well-understood and the all-encompassing fundamental obligation on employees to maintain the confidentiality of patient information. Consequently, I do not find Mr. Brathwaite's ostensible spur of the moment decision to take the first picture to be a sufficiently compelling factor to form part of a principled basis to mitigate the penalty.

21 On the whole, the evidence compels the significant finding that Mr. Brathwaite was not truly remorseful or contrite, and that he did not truly and fully accept responsibility for his misconduct. The Union argued that although Mr. Brathwaite lied during the investigation, he was scared, he is remorseful, and he now accepts responsibility. Mr. Brathwaite repeatedly lied to the Hospital on September 20 and 23, during its investigation. At the conclusion of his testimony at the hearing, Mr. Brathwaite was asked why he has decided to tell the truth. He testified because he got fired, and he knew that he did not breach anything, and he knew that in his heart. This rather remarkable testimony militates against a finding that he is truly remorseful or contrite. It militates against a finding that he truly and fully accepts responsibility for his misconduct. This testimony further undermines the notion that Mr. Brathwaite has positive rehabilitative prospects.

22 Another factor tipping the scales against reinstatement is Mr. Brathwaite's somewhat checkered disciplinary record for work performance issues, to which I have not previously referred. On June 20, 2006, Mr. Brathwaite was given a written warning for work performance issues. On December 5, 2006, he was suspended for one day for a work performance issue. On November 7, 2007, Mr. Brathwaite was given a written warning for a work-related issue. In August 27, 2008, Mr. Brathwaite he was given a written warning for not meeting expectations of his job. On May 19, 2009, he was given a written warning for a work-related performance issue. Lastly, from a deterrence perspective, a clear message must be sent to employees that disclosing confidential patient information without authorization is totally unacceptable and will not be tolerated. In the present circumstances, Mr. Braithwaite's reinstatement would send the wrong message or a mixed message about the gravity of employee misconduct for disclosing confidential patient information without authorization.

23 To summarize, I conclude that Mr. Brathwaite engaged in culpable misconduct, and that it is not just and reasonable in all the circumstances to substitute another penalty for the discharge. Before concluding, I would like to thank Ms. Pinder and Mr. Little for ably, thoughtfully and expeditiously presenting this matter.

DATED at Ancaster, this 9th day of January, 2012.

RANDY L. LEVINSON, ARBITRATOR

qp/s/qlspi/qlhcs

Case Name:

Groves v. Cargojet Holdings Ltd.

**IN THE MATTER OF an Adjudication
Between
Elyse Groves, and
Cargojet Holdings Ltd., Edmonton, Alberta
Adjudication under Division XIV -- Part III of the Canada Labour Code
Complaint of Unjust Dismissal**

[2011] C.L.A.D. No. 257

No. YM2707-8641

Canada
Labour Arbitration
Calgary, Alberta

Panel: Michelle M. Somers (Adjudicator)

Heard: February 3-4, 2011.

Award: July 29, 2011.

Amended award: September 15, 2011.

(127 paras.)

AWARD

INTRODUCTION

1 The complainant, Elyse Groves ("Groves") complains that she was unjustly dismissed from her employment as Ramp Agent/Ground Handler by her employer, Cargojet Holdings Inc. ("Cargojet").

2 Cargojet's termination letter of April 20, 2010, reads in part:

"I am writing to advise you that it has come to our attention that you have been publishing threats of violence against a Cargojet employee on an Internet Forum

that the public has access to. This threat includes kicking the co-worker in the genitals with steel-toed boots and spitting in his face. In addition, various insults were made against your co-workers and the workplace as a whole.

As you're aware, Cargojet has a workplace violence policy. There is a zero tolerance policy for workplace violence and harassment. You have acknowledged, in writing, that you have read and understood the policy and are aware that termination is a consequence.

As a result of the serious violation of Cargojet policies, we are terminating your employment for cause, effective immediately."

3 Prior to the hearing, I directed that Cargojet produce Groves' complete personnel file. I also issued three Notices to Attend on Groves' behalf.

4 The witnesses for the employer provided sworn testimony at the hearing, as did the three witnesses for the complainant. Both parties were allowed to make opening and closing statements.

5 At the conclusion of the hearing, Cargojet expressed concern about the contents of the personnel file which they had provided at my direction to the complainant, and asked that these materials be kept confidential. I cautioned Groves about the necessity of refraining from improper use of human resources materials. Groves solemnly agreed with all those present that the contents of her personnel file in her possession were to be used solely for the purposes of this adjudication, and that they would be kept completely confidential to herself thereafter.

6 In this Award, the names of certain individuals will be referred to using alphabetical aliases (not initials) in square brackets.

BACKGROUND FACTS

7 Cargojet's western operations are based in Edmonton. They provide domestic and transborder air cargo services. The company also operates at the Calgary airport, where Groves worked. Groves was employed by Cargojet from September 17, 2007 until her termination on April 20, 2010.

8 She began on day shift during her first year, under lead hand, Graham McKendry, and was put on night shift in January 2009, under lead hand Jason Byron. The personnel file which was produced at my direction shows the following: --

A) Positive Work History and Promotion

9 Groves' initial work history was very good. Although her Probationary Review Form showed some need for improvement, a May 19, 2008, Annual Performance Review Form completed by the Operations Supervisor, Jonathan Wintschel, point to a highly-rated employee. His (undated) comments about her written up on a separate sheet were as follows:

"Elyse is an excellent worker. Over the past year she has proven herself again and again. Elyse is currently being trained on load planning and infojet. If and when a load planner position opens Elyse would be one of my first candidates for the position. Over the next few months she will be fully qualified to load plan.

Elyse is also an Asset in the warehouse her attention to detail when it comes to weighing and dimming freight is excellent."

10 Groves was promoted to Load Handler on an undetermined date. A Load Handler position is considered to be an office position, unlike Ground Handler which involves lifting weights ranging from 10 lbs. to 100 lbs. with assistance. Unfortunately, her performance began to deteriorate.

11 On October 6, 2008, Wintschel sent her a memo to the effect that she had taken 8 sick days since January 2008 and he would therefore be putting a letter on her file. The memo cautioned that if her absences continued, they would take further disciplinary action. "Elyse you are a strong member of our team and [we] hope that you can correct this."

B) Decline in Performance

12 On June 13, 2009, Groves was working as the auditor weighting a flight with a co-worker. The captain's Air Safety Report indicated that a new flight plan containing information on a weight increase had not been entered. The Report indicated that the airplane had enough fuel to accommodate the extra weight, but that had the flight been a longer one, a fuel stop might have been required.

13 This incident gave rise to a memo dated June 23, 2009, from Alex Lowe, the Manager of Alberta Operations. The memo stated the wrong maximum payload was entered as a result of Groves' co-worker selecting the wrong flight leg in the computer system. Compounding the error was the failure by Groves to fulfill her audit duties. Lowe's memo says that Groves' defense was that her auditing software was not functioning. His comment was that regardless of the technical challenge, she should have found another way of verifying the information.

14 Notes in Groves' personnel file indicate that Groves made mistakes on her load plan on June 16, 2009, and again on July 10 and 14, 2009.

15 On July 17, 2009, Graham McKendry, Groves' former lead hand, emailed her that she was not filing her flight files correctly, and that she had been reminded of this repeatedly. McKendry occasionally took over as Operations Supervisor at night when Wintschel was away.

16 On July 21, 2009, an email was sent from McKendry to Alex Lowe and Jon Wintschel asking that a list containing eight infractions be added to her personnel file. They included failure to organize flight files, being out of uniform, adding freight by pen to the load sheet, preparing ULD tags at the wrong time, printing off "awb's" at the wrong time, and a poor attitude. The email ends with the comment: "If this is 1% of what you deal with every night Jon, I agree...cut her loose."

17 Further load planning errors by Groves were listed in an August 10, 2009 memo from McKendry to Lowe.

C) Demotion

18 On August 13, 2009, a letter was sent to Groves informing her she was being demoted back to Ground Handler because of her continuing load planning errors. The letter also stated she showed a lack of respect for her superiors, and disregarded the personal appearance policy by coming to work out of uniform on two occasions, which violated the company safety policy. The letter concluded by saying that insubordination would not be tolerated, and that continuance of her behavior would result in further disciplinary action up to and including termination of employment.

19 On October 9, 2009, she filed an Accident/Incident Investigation Report which stated that while performing her normal duties, she began to experience back pain and spasms. The injury did not occur from one task incident. It had been occurring for 3 months and had become no longer tolerable. Her doctor recommended she take time off. When she returned to work, her duties were modified to accommodate her back injury. Groves filed a claim with the Workers' Compensation Board. Wintschel prepared an Employer's Report indicating that the employer would like to flag this injury because they believed it wasn't work related and because no injury date could be specified. Emails from the personnel office requested that the employer put its comments on the validity of the WCB claim on the form. In an email dated October 24, Wintschel opined that "I think Elyse is trying to pull one over on us." The claim was denied.

20 Included in her personnel file is a long list of infractions kept by Wintschel. The list is mainly notations of her sick days and late days from January 14, 2008, to April 16, 2010. There are approximately 58 notations.

21 The list includes an incident that occurred on February 17, 2010. In an email dated February 18, 2010, Wintschel reports to Lowe: "Myself, Rob and Elyse were in the office when Elyse called me a Jew and I explained to Elyse that I take offence to being called a Jew." Wintschel sent an email to Lowe on February 18, 2010, outlining the incident and said: "I want to see here [*sic*] suspended or FIRED ... as much as I don't like her I still treat her with respect and she has once again gone over the line ..."

SUMMARY OF THE EVIDENCE AND TESTIMONY

22 The employer states that Groves was terminated because she violated the *Workplace Violence Prevention Policy*. The violation occurred when she posted comments on her Facebook page concerning the lead hand to whom she reported. The impugned comments, posted on February 23, 2010, are as follows:

"Elyse Groves hates losers. This guy at work is a fag. I hate him. I have ever felt lower at work. Whatever, I dont need friends.

[AB] replies: punch him in the twig and berries and say "you know what you did" Imfao but seriously

Elyse Groves I have steel toes...Kicking would work better.

[AB] replies: well there you go just don't forget to say the line lol

Elyse Groves I will yell it so loud that I will spit in his face when I say it.

[CD] replies: WHO?!?!?!?!?; OP

Elyse Groves My lead hand. Not Graham. Even though I would have liked to haha.

[CD] replies: LOL Awwww Graham's cool shit

Elyse Groves Ya he is cool if you like ... ill just say he is cranky lol"

On a subsequent day, Groves posted:

"**Elyse Groves** my work is already enough like a high school. All people do is talk and everyone is so shady. I wish I could do that Haha but then there would be a lot more people missing work from black eyes and broken bones lol"

23 Two other excerpts from her Facebook pages were submitted by the Employer. They consist of two comments by Groves: 1) "Other than that loser at my work. Im trying to brush it off but pricks are hard to make go away [smileyface];" 2) "Everyone is so childish and sneaky", and "everyone knows everyone somehow and everyone talks".

24 Groves signed the employer's *Workplace Violence Prevention Policy* on February 24, 2009. It reads in part:

"Cargojet maintains a zero tolerance policy towards violence in the workplace. Here at Cargojet we are committed to providing a safe and healthy work environment free from violence, threats of violence, harassment, intimidation and disruptive behavior for all our employees.

Definitions

... Violence shall include, but not be limited to the following:

...

- * Threats of any nature, verbal, or electronic
- * Aggressive behavior that constitutes a reasonable fear of bodily harm to another person
- * Verbal assault, causing emotional duress

...

Violence Reporting Procedures

- * In the event that an employee is either directly affected by or witness to any violence in the workplace, it is imperative for the safety of all Cargojet employees that the incident be reported promptly.
- * Report any violence or potentially violent situations immediately to management, SMS, the Human Resources department or a neutral third party 24/7 at Concern Check Confidential Tip Line at 1-866- *** _****.!

...

- * All reports shall be kept confidential
- * All reports shall be investigated, and dealt with appropriately.

Enforcement

- * Any Cargojet employee who threatens, harasses or abuses another employee, or any other individual at or from the workplace shall be subject to disciplinary action, up to and including termination of employment, and the pursuit of legal action.
- * Violent action, threats and harassment are serious criminal offences, and shall be dealt with appropriately."

25 Groves also signed the Cargojet *Code of Ethics* on October 17, 2007, shortly after she began her employment there. In that document, "Workplace" is defined as follows:

"An employee is deemed to be at the workplace when the employee is on the premises of any of Cargojet's (defined below) facilities or aircraft; is at a work-related site; or the employee is in transit to a work-related site. The term "premises" includes, but is not limited to, any place of *[sic]* location from which Cargojet conducts its business. The term "work-related site" includes, but is not limited to, a place or location where the employee is attending at the direction of Cargojet and for the purposes of Cargojet."

26 The Code of Ethics also sets out restrictions on the use of Cargojet's assets, including electronic equipment.

"Employees may not use Cargojet's information technology systems to: ... Send harassing, threatening or obscene messages;"

27 On January 28, 2010, a letter from the President & C.E.O., Ajay Virmani, was distributed to the Cargojet "Team":

"Every employee has the right to work without being harassed... Harassment can take on many forms, including verbal assaults through the use of abusive language, and/or any aggressive behavior that poses a threat or emotional distress to employees, customers or suppliers...In addition, our Workplace Violence Policy makes it clear that we have a zero tolerance policy towards violence in the workplace, which includes abusive language, verbal assault and harassment of any form."

a) Testimony by Employer's Witnesses

28 The Facebook postings came to the company's attention when a print copy was handed to Alex Lowe, the Alberta Operations Manager, by Wintschel, who had received it from Jason Byron, who in turn had received it from one of Groves' co-workers, Robert Pepper. Lowe says his reaction to the postings was shock and disappointment that Groves had made these comments publicly. He debated how best to handle it, and sent a copy to Cargojet's human resources personnel.

29 Lowe testified that when Groves became his employee, she was a Ground Handler, loading and unloading aircraft and distributing cargo; He said she was promoted to Load Handler for six months. Her performance often met the employer's expectations, but suffered from excessive absenteeism and poor timekeeping. One instance of insubordination was when she and a co-worker

took turns taking paid Saturday mornings off without permission. Both were disciplined for this infraction.

30 The second serious insubordination occurred while Wintschel was away on vacation. Groves came to work in a tank top, shorts and sandals, violating dress policy and safety policy concerning steel-toed footwear. Jason Byron was in charge as lead hand during Wintschel's absence. He advised her that her attire was inappropriate. She wore the same outfit again for a second shift and was sent home to change. Lowe testified that Groves was not focused on her duties, and distracted by the socializing in the office.

31 On March 11, 2009, Lowe received a call from Groves. She sounded very upset, and advised that her aunt was ill after routine surgery and wasn't expected to live through the night. Lowe told her to take the night off. He testified that he was very upset to see her Facebook posting of March 11 at 5:09 a.m., in which she wrote that she was "so excited about getting my hair cut and dyed today! Oh. And eyebrows waxed! That's my pampering :D Now I just need a massage from my big man and ill be set".

32 Among Groves' Facebook friends was a management specialist for their largest client, United Parcel Services. One of their DHL drivers was also a Facebook friend. Lowe testified that knowing their customers had read this was extremely disconcerting to the company. He said their customers rely on Cargojet and have to be confident it can deliver the service.

33 Elizabeth Dayot, Cargojet's Human Resources Manager, testified that Groves had complained to her in early September 2009 about unfair hiring practices. Groves reported that she recommended that Wintschel hire one of her friends, who was 18 years old. Wintschel replied "I'm not hiring anyone under age 25". Wintschel received a letter signed by Alex Lowe, dated December 2, 2009, outlining Cargojet's equal opportunity policy. The letter stated that discriminatory remarks towards potential candidates based on age were not acceptable, and that any further actions of this nature might result in disciplinary action.

34 The next witness was Robert Pepper, a Ramp Agent at the same time as Groves. He also knew her outside of work as a result of having attended her birthday party, and he was also one of her Facebook friends. He testified that her posts would be visible to all her Facebook friends. Among them were Davis Straub, a supplier to Cargojet and Groves' boyfriend. Pepper saw her posted threats, and debated for two weeks about what to do. Eventually he decided her co-workers would want to know what Groves was saying about them. He printed the postings and gave them to Groves' lead hand, Jason Byron. When asked whether Wintschel had asked him to monitor Groves' Facebook page, he replied that he had offered to because he thought it was wrong to say those things.

35 On cross-examination by Groves, Pepper testified that other employees also wore non-Cargojet attire on casual Fridays and clothing to keep warm in the winter. He also said that because Byron was a big guy, he was probably not fearful as a result of the threats, but he surmised that based on conversations he had with the, other employees probably were. Pepper testified that there was horseplay at the worksite, guys wrestled around, and Groves also wrestled with Byron. This was human behaviour, he said, because everywhere he had worked, people engaged in horseplay, but no one beat anyone up, and there was nothing malicious about it.

36 Pepper also testified that he was once reprimanded for Facebook comments and removed them afterwards on his own initiative. He thought the company reaction was "blown up". The

comments were made about a ServiceAir jet taxiing into the wrong place and hitting a pole. No one was on the spot to stop them from doing so. He says he would have made the same comments had it happened at Air Canada where he previously worked. He named no names in his post. According to Pepper, Geoff King, who worked at ServiceAir, confronted him at the workplace not because of concern about Cargojet's reputation, but for personal reasons. They went outside and yelled at each other, it became heated, Geoff walked forward and bumped into Pepper, Pepper bumped back, and Geoff said "you know I won't fight you and I'd lose and I'd have to come back and shoot you". He said he was friends with Geoff and neither of them felt threatened by this exchange.

37 He told Lowe about the incident the next day, talked with Geoff's supervisor and apologized to him about his posting the ServiceAir name.

38 Pepper also testified Cargojet are quite lenient when it comes to taking sick days, and also about horseplay when it's in fun. He added that if the behaviour consisted of harassment or harm, something other than two friends at work having fun, Cargojet would impose discipline. In the past, he has been taken aside and told to watch what he says.

39 During Pepper's cross-examination by Groves, she tendered photos of two occasions when Pepper and Byron opened crates and handled the contents. The photos show Pepper wearing a brightly-patterned hoodie, and Byron brandishing a military type gun. This was in breach of regulations. In one of them, Groves said that Wintschel was present in the room while the photo was taken.

40 In response to questioning on Pepper's testimony by Lowe, which I allowed, Pepper said that, with respect to any breaches of policy by supervisors such as Wintschel or Byron, he would not have been told whether they had been disciplined or not. He also said that the incident regarding the ServiceAir jet did not involve Cargojet.

41 The next witness for the employer, Jonathan Wintschel, testified that Groves started out as a good worker with potential, but that over time her work dragged, her attitude became poor, and she was insubordinate. She would not comply with orders to do tasks, and came into work out of uniform.

42 On being cross-examined by Groves with respect to the photos of employees wearing various costumes and other non-uniform attire at work, Wintschel replied that the photos had been shot on Halloween, that tuques are permitted in the winter, and that cowboy attire is allowed during Stampede week. He also added that one of the Ramp Agents had been terminated, although he did not testify as to the reason for the termination.

43 Jason Byron, the lead hand who was the subject of the Facebook threat, testified that he became friends with Groves, and that their relationship was like that of a big brother to a younger sister. They had a lot of fun, enjoyed their time together, and exchanged presents on birthdays and at Christmas.

44 In the beginning, she was one of his best workers in the warehouse. She learned quickly and he counted on her. He said her performance began to decline once "she realized I had to become more of an authority figure". For example, she would take one and a half hour lunches "to see what she could get away with". She would go missing from her workstation and he would have to look for her. On one occasion, she and a co-worker decided they would take half-Fridays off without permis-

sion. She repeated this conduct again after having been told not to, and he had to ask Wintschel to reprimand her.

45 With respect to being out of uniform, she came in wearing shorts and flip flops on one shift, and completed the shift. The next day she came to work in full uniform but with flip flops on her feet. Byron sent her home to get her safety boots.

46 He testified that when Groves was demoted back to Ground Handler, she adapted well and seemed almost happy to be relieved of the stress of load planning. However, he added that she showed a lack of respect towards him and Wintschel, questioning why she had to do the jobs assigned on the duty roster. Her attendance became very unreliable. Co-workers had to work twice as hard to pick up the slack. "Lates and sick" became a real problem, he said.

47 His reaction to her posted threat against him was that he felt extremely insulted, very threatened and disappointed. He saw it as character defamation and very damaging to his reputation, and added that he has a good reputation at Cargojet. He was unsure what Groves and her friends might be capable of, as she had told him about a fight that took place in her backyard in which she didn't call the police, but locked herself in the house.

48 On cross-examination by Groves, Byron admitted there was horseplay, including a body check against him that missed and broke the lunch room wall. With respect to the photo of him holding a gun, Byron said that it was taken in 2006, and was part of a DHL shipment which the DHL representative had opened so Wintschel could determine whether they were dangerous goods. The DHL representative suggested they hold up the gun for a picture. Photos of odd cargo, such as a tiger, were regular practice. He admitted that doing so might have been bad judgment on his part.

b) Testimony by Complainant's Witnesses

49 Groves testified about an incident involving her hoodie. She and a co-worker, with whom she had been friends from childhood, one day wore bright orange hoodies to work. Byron teased her extensively about them, calling them them the "pylon sisters". They stopped wearing the hoodies after one day because of the relentless teasing. She testified the teasing went on for days. Groves went to Wintschel and asked that he "get Jason off my back". Wintschel's response was that it was just a joke.

50 A week later, on February 23, 2010, Byron handed Groves a "Hurt Feeling Report". She read a few lines and was so upset she threw it down and went outside. She then went to Wintschel with the Report and said "this is way too much". Groves said Wintschel was aware of the Report. He told her to relax, it was a just a joke. He said one of the drivers had brought it in that morning and that it was humorous.

51 She testified she had begun taking anti-depressants the day before. The day she was handed the Hurt Feeling Report is the day she posted the threat against her lead hand on Facebook, February 23, 2010. I reproduce a portion of the Report here:

Hurt Feeling Report

Date: _____

Time of Hurtfulness _____ AM _____ PM

A. Which ear were the words of hurtfulness spoken into? ___ left ___ right ___ both

B. Is there permanent feeling damage?

C. Did you need a tissue for the tears?

Reasons for filing this report:

1. I am think-skinned
2. I am a pussy
3. I have women-like hormones
4. I am a queer
5. I am a little bitch
6. I am a cry baby
7. I want my Mommy

Name of "Real Man" who hurt your sensitive little feelings: _____

If you feel that you need someone to hug, go home to Mommy and let her hug you and change your diaper. If you feel as though you need to speak to someone to soothe you, please call this number: 1-800-cry-baby or 1-888-sis-girl

Girly man who filed this report: _____

Signature of girly man: _____

Real man (person who is being charged): _____

Signature of Real Man: _____

Superintendent's Signature: _____

52 In her evidence, Groves submitted copies of the emails in her personnel file criticizing her work. She testified that when she called Wintschel "JEW", it was because they were his initials, Jonathan Edward Wintschel. She says she asked him "why are you JEW", which he took as "why are you Jewish", and got very upset. Groves explained she had heard about his nickname elsewhere, apologized and said she did not mean it in that way. She said he accepted the apology, and laughed about it, but then sent the memo of February 18, 2010, to Lowe.

53 On the witness stand on the day of the hearing, Wintschel said he didn't know she had taken offense about the teasing over the hoodie. Byron was cross-examined about the hoodie incident as well. He said he was joking but then realized he had "caught you on a bad night and you took offence". He said he was willing to apologize but she was too upset. He admitted he had teased her for

two nights about it. With respect to the Hurt Feeling Report, he said the truck driver had brought in a stack and he handed it to a few people to read. He also said he did not feel the teasing was enough to break their friendship, but admitted there had been a change between them. Although Groves had invited him to have a coffee, he said the Facebook comment changed things.

54 On June 3, 2009, Wintschel emailed Groves and her co-worker about errors on the job. McKendry also emailed Groves and her co-worker the next day, June 4, with a copy to Wintschel, expressing disappointment that they had not printed out their AWB's. "You both are having difficulties in fulfilling your job duties. Do you need to be retrained? Do you need help? Do you even care? I'm recommending to Jon that you both stay for your entire shift, until you have shown us that you are able to properly complete your job duties. I would like to hear your replies to my email as well." He emailed them again on June 8, writing: "Still no reply...That's a really good indication, to myslef [sic] at least, that you two don't really care to [sic] much for your jobs. Good to know."

55 Groves testified this last email upset her a great deal. She spoke to Wintschel about it, who said she should relax, everything would be fine.

56 With respect to the handwritten list of infractions, Groves alleged that this was part of the campaign against her, and some of the notes were written by a previous daytime supervisor, while some of them were by Wintschel. She said Wintschel never told her to stop kissing her boyfriend at work, as was listed in his notes. She said Wintschel's attitude toward her changed after she reported his discriminatory remark regarding hiring young people, and that he was no longer friendly with her.

57 When cross-examined by Lowe, Groves admitted she had been spoken to a few times about the infractions leading up to the June 8 memo by McKendry, but added there was no paperwork in the files about these reprimands. Regarding the Hurt Feeling Report, she said that the only other persons who had seen it were those she showed it to, that no one mentioned it, that it was not passed around.

58 In his testimony, Davis Straub, who worked casually as a Ground Handler, said he was there when Groves was given the Hurt Feeling Report, and did not see anyone else receive it. He also testified that the February 23, 2010, Facebook posting was blocked so that it could only be seen by Groves' friends, and by his friends. He added that the comment made to Groves and her co-worker about the orange hoodies was: "you'd be useless in other ways, you guys can be pylons and stand at the wing tips."

59 Carla Schetterer, Ground Handler, testified that she often witnessed employees wearing non-traditional attire, such as black pants, tuques and Halloween costumes, all of which they were permitted to wear. Horseplay took place every day. She never saw the Hurt Feeling Report, or anyone else with it. She said that when they came in with the orange safety hoodies, Wintschel said they could be safety cones, but only once.

60 On cross-examination, Schetterer said she also wore shorts once and Wintschel asked her to go home and change. She also admitted that 9 months prior to the hearing, Groves had said there would be repercussions towards Byron and Wintschel, and that hopefully they would be fired. Her relationship with Groves had tapered off. Schetterer's reply evidence was that in August 2009, she was also reprimanded for wearing sandals. Her experience of breaches of policy at Cargojet was that one woman was called a bitch at work, the one who got preferential treatment because she was allowed longer lunches at the beginning of her employment.

61 The last witness for the complainant was Geoff King, an employee at ServiceAir, one of Cargojet's customers. He affirmed he had seen Cargojet employees wearing non-uniform attire, such as costumes, a black wig, a sweatband and a fighter pilot suit. He confirmed there was horse-play and wrestling. With respect to the argument between Pepper and him about the ServiceAir jet hitting a pole, he saw the Facebook post by Pepper saying "trust ServiceAir to do something like this" and took that as saying he could have avoided the mistake. He says he has known Pepper for about 12 years, and wanted to talk to him about it privately. Pepper said he was "sick and tired of this BS", and got very angry. His fists were clenched so hard they were white, and he said "these are what I settle things with". King said he was "scared as hell".

62 On cross-examination, he admitted this incident had nothing to do with Cargojet. He said he was aware of the relaxed dress code on Halloween and during Stampede, but the examples he mentioned did not take place on those occasions. He saw people dressed inappropriately on the ramp numerous times.

SUBMISSIONS

63 The employer submitted that the complainant posted comments on Facebook threatening to kick the supervisor in the genitals and spit in his face, insulted the company and her workplace, on a forum which could be viewed by customers and employees. Her job performance had deteriorated to the point where it jeopardized the safety of aircraft. She disregarded procedures when she took the morning off, which eliminated the audit process of the load planning function. He said she was not demoted for inappropriate attire, but rather for a series of errors, errors that compromised flight safety, errors that would not have occurred had she followed proper procedures. Nor was she terminated for inappropriate work wear. She was disciplined for this infraction and the blatant insubordination. The suggestion that Wintschel and Byron influenced Cargojet's decision to terminate her was false, as he had treated her fairly. She violated the violence prevention policy, was insubordinate, insulting to customers and fellow employees, and lied to supervisors. He asked that the complaint be dismissed and that the dismissal for cause be upheld.

64 The complainant submitted that she had performed diligently, and as a result was promoted to Load Planner. She was abruptly terminated on April 20, 2010, with no evidence made available to her, and no opportunity to defend herself or to explain the provocation. She alleged she was targeted by her immediate supervisors, and singled out for infractions no different from those committed by others. The evidence, she said, demonstrates that Wintschel and McKendry wanted to see her fired even before the entry on Facebook appeared. She was harassed, provoked and given a Hurt Feelings Report that was demeaning. When she attempted to confide in her supervisor, no action was taken. She had no reliable support system at work, and posted her comments on Facebook in order to blow off steam. She had not meant to harm anyone. She thought the severity of her co-workers' perceptions of her to be slanderous, and she had considered these accusers to be amazing colleagues and great friends. She submitted that she did not directly say she would, or wanted to, kick her lead hand in the genitals or spit in his face. She alleges that there was no regular disciplinary practice for improper behaviour because that type of behaviour was constant. She posed the question: "how could I have assumed that a release on a Facebook page would be grounds for dismissal"? She also asked why she was so severely punished when she had no history of violence or harassment. She asked to be awarded suitable compensation for overwhelming mental and physical duress, and for the impact on her self-esteem and on her financial situation.

ANALYSIS

65 In the field of employment law, it is well established that the employer bears the onus of showing that it has just cause to dismiss an employee.

66 The analysis to be followed in deciding whether a discharge was just or unjust is set out decisively in *William Scott & Co. v. C.F.A.W., Local P-162*, [1977] 1 C.L.R.B.R. 1, [1976] 2 W.L.A.C. 585, [1976] BCLRB No. 98 (available on Westlaw)(Weiler). In that case, Arbitrator P.C. Weiler discussed the evolution of employment principles from the common law principles of master and servant to the modern contractual relationship between the employer and employee. The seminal approach taken by Canadian labour arbitrators involved a different analysis of discharge grievances, as expressed in *Steel Equipment Co. Ltd.* (1964), 14 L.A.C. 356, and cited with approval by Laskin J.A. of the Ontario Court of Appeal when he upheld the arbitrator in *R. v. Arthurs ex p. Port Arthur Shipbuilding Co.* (1967), 62 D.L.R. (2d) 342 (Ont. C.A.).

67 Weiler then laments the subsequent reversal of that case by the Supreme Court of Canada in *Port Arthur Shipbuilding Co. v. Arthurs et al.*, (1968), 70 D.L.R. (2d) 693 (S.C.C.). In that case, the court appeared to suggest that the employer had an absolute discretion to dismiss any employee for any conduct, no matter how trivial. In response, Weiler says, "Canadian legislatures uniformly considered it necessary to overturn *Port Arthur Shipbuilding* by statutory reform" (at para. 9). Today, to approach a discharge grievance in accordance with the Labour Code, Weiler says, at para. 11 :

... [A]rbitrators should pose three distinct questions in the typical discharge grievance. First, has the employee given just and reasonable cause for some form of discipline by the employer? If so, was the employer's decision to dismiss the employee an excessive response in all of the circumstances of the case? Finally, if the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?

68 Weiler, then lists the factors which an arbitrator properly considers at the second stage of the analysis. They are a condensed version of the factors listed in *Steel Equipment Co. Ltd.* At para. 12, he states:

... However, usually it is in connection with the second question - is the misconduct of the employee serious enough to justify the heavy penalty, of discharge? -- that the arbitrator's evaluation of management's decision must be especially searching:

- i) How serious is the immediate offence of the employee which precipitated the discharge (for example, the contrast between theft and absenteeism)?
- ii) Was the employee's conduct premeditated, or repetitive; or instead, was it a momentary and emotional aberration, perhaps provoked by someone else (for example, in a fight between two employees)?
- iii) Does the employee have a record of long service with the employer in which he proved an able worker and enjoyed a relatively free disciplinary history?

- iv) Has the employer attempted earlier and more moderate forms of corrective discipline of this employee which did not prove successful in solving the problem (for example, of persistent lateness or absenteeism)?
- v) Is the discharge of this individual employee in accord with the consistent policies of the employer or does it appear to single out this person for arbitrary and harsh treatment (an issue which seems to arise particularly in cases of discipline for wildcat strikes)?

69 Turning to the first stage of the *William Scott* analysis, the evidence was that through the use of improper language, the complainant seriously maligned her employer. She posted insulting, threatening comments about her supervisor, her fellow employees and her workplace on Facebook. Any reasonable person reading those remarks would interpret them as offensive, disloyal and insubordinate. I find that the complainant did engage in conduct that gave the employer just cause to impose discipline.

70 The next question I must ask is whether the misconduct was serious enough to warrant dismissal.

- i) How serious is the immediate offence of the employee which precipitated the discharge (for example, the contrast between theft and absenteeism)?

(a) Seriousness of Offence --

71 In *Alberta and A.U.P.E. ("R")* (2008), 174 LAC. (4th) 371, [2008] A.G.A.A. No. 20, 2008 CarswellAlta 796 (Ponak), a government employee had blogged extremely unflattering and hurtful comments about her co-workers. They ridiculed her co-workers and expressed contempt for management. Her postings were numerous and lengthy, and the testimony showed they had a very hurtful impact on employees she worked for and with. She had evidently spent a fair amount of effort in composing what she thought were clever parodies of her working environment. She was initially unremorseful, maintaining that her postings were meant to be humorous, although she did bring in greeting cards for co-workers on her last day that attempted to justify her conduct and re-establish her relationships.

72 Arbitrator Ponak denied the grievance of her dismissal. At para. 98 he said:

"While the Grievor has a right to create personal blogs and is entitled to her opinions about the people with whom she works, publicly displaying those opinions may have consequences within an employment relationship...the Grievor, in expressing contempt for her managers, ridiculing her co-workers, and denigrating administrative processes, engaged in serious misconduct that irreparably severed the employment relationship, justifying discharge."

73 There is a small but growing body of jurisprudence attempting to define social networking activity and its relation to traditional employment law principles, such as insubordination and harm to business reputation.

Nature of Facebook

74 In his testimony, Groves' boyfriend, Davis Straub, who was also a casual employee at Cargojet, testified that Groves' Facebook postings were blocked against everyone but her friends and his friends. In my view, a Facebook posting is different from a website blog.

75 Facebook first appeared in 2004. It now has 750 million active users across the world. Seven years later, its novelty, although not its popularity, has faded, along with other types of internet communication such as MySpace and website blogs. To those born after 1985 or so, there is nothing new about it. Ms. Groves was born in 1988. She was 19 years old when she was hired by Cargojet in 2007.

76 The vast majority of subscribers to Facebook now understand its public aspect. Its settings can be modified to limit access, and most subscribers do. At least part of its appeal is due to the fact that it mimics traditional social interactions. The ability to include or exclude those who can share in the conversation is important. Many subscribers, in particular younger persons, regard Facebook as conduct engaged in on personal time, unconnected to the workplace, analogous to sharing a beer with colleagues and friends, or getting together with friends to confide details about their jobs. As the complainant stated in her closing statement, "How could I have assumed that a release on a Facebook page would be grounds for dismissal"?

77 Unlike a website blog, Facebook subscribers can limit their audience. At the first step, only invited "Friends" can view their page. The next level of exclusion is determined by the privacy settings that the subscriber chooses. For example, Groves' Facebook postings could be seen by Everyone, Friends of Friends, or Friends Only, depending on the privacy settings she has set up. The comments added in response to her original post would be viewed only by her Friends, if she has chosen "Friends Only" on the "Can see Wall Posts by Friends" menu.

78 The Facebook FAQ site explains:

What can I do on the Wall? The Wall is a place to post and share content with your friends.

Sharing with a broad audience: Use the share menu that's located at the top of your home page and profile to let others know what's on your mind. You can update your status and share photos, videos, links and other application content. Things you share will appear as posts on your profile, and can appear in News Feed. (To control whether or not specific people have the option to view your stories, you can change the privacy settings for each piece of content you post.)

Sharing with an individual: You can use the share menu at the top of a friend's profile to write or share something on his or her Wall. Friends of your friend will also be able to view your post. If you'd like to share something privately, you can always send someone a private message.

Who can see my Wall? You can control the visibility of all content you and your friends post on your wall by following these instructions:

... Your friends' posts: A drop-down menu allows you to choose who can view the content that friends post to your Wall. If you don't want people to

post on your Wall, uncheck the box next to the "Friends can post to my wall" option. [In another field, subscribers can also choose who Can See Wall Posts by Friends: Everyone, Friends of Friends, and Friends only.]

Your posts: Look for the "Things I share" section. A drop-down menu allows you to choose who can view the content that you post to your wall.

When my friend posts on my Wall, who can see it in their News Feed? When a friend posts on your Wall, only your mutual friends will see a story in their News Feeds. For example, if Dave is friends with both John and Julia, he will see a story in his News Feed when they write on each other's wall. If he is only friends with John, none of their wall-to-wall conversations will appear on his homepage.

I commented on something, and it's showing the full text of my comment on my Wall. Who can see this story? The only people that can see the story about your comment are those who can see the content you commented on. For example, if you commented on a photo that only you and your friend can see, only you and your friend would be able to see the story on your Wall.

79 In *Chatham-Kent (Municipality)*, (2007)159 L.A.C. (4th) 321, [2007] O.L.A.A. No. 135, the employee posted commentary and photos about co-workers and residents in a Home for the Aged that was insubordinate to management, and breached her employer's confidentiality provisions. Her 2006 blog was on a social network site called MSN Spaces:

"Some of the contents of Ms. Clarke's blog are critical of management of the Home in general, identifies two managers by a first name or initials, and criticizes a particular decision made by one of these managers that adversely affected her. In one blog Ms. Clarke claims having been blackmailed or threatened by management, describes the new residence facility as a hole, states that she is friggin pissed off, and that she hates her job. She also made reference to management in general as stupid fucking assholes."

80 Arbitrator Williamson held at para. 27 that:

"To submit that Ms. Clarke's conduct has not provided the employer with a basis for just cause because the contents of her blog are nothing other than what employees would talk about on their break and therefore should be condoned is to ignore that the standards in the health care sector for confidentiality of personal information are high and significantly different from those that would apply in the industrial or manufacturing sector, as well as to over look that the information was set out in a blog on the internet that was available to the public."

81 In the present case, there was, first, no allegation of a breach of an employer confidentiality provision. Second, the grievor in *Chatham-Kent* was posting her blogs on MSN Spaces, a website accessible to anyone with an internet connection. Third, Groves' postings were a less sustained attack and somewhat less egregious than they were in *Chatham-Kent*, in which the grievor had blogged pejorative comments about various persons in her workplace over the course of about four

months. In the present case, the largely undated comments on which the employer relied to terminate Groves were posted on three separate occasions sometime in February and March, 2010.

82 I make the same distinctions between the present case and *Alberta v. A.U.P.E., supra*. In the latter, the grievor's blogs were lengthy and frequent. They were posted on the internet, a site to which anyone had access. A great deal of evidence was led in that case on the hurtful impact on many individuals that her comments maligned. In the present case, only Byron, her lead hand, testified to being affected by the posts. However, the effect of her comments about him had a strong negative impact, and seriously damaged their previously friendly relations.

83 These distinctions do not excuse the poor judgment exhibited by venting one's feelings on a social networking site. Nevertheless, these postings cannot be viewed in the same way as an ongoing blog on a website open to the public at large.

(b) Off-duty Conduct -

84 The employer claimed that its reputation was, or was capable of being, negatively affected by the complainant's Facebook postings.

85 Although a threat made to a co-worker at the workplace would have been a serious workplace offence, these Facebook communications, while offensive and disrespectful, cannot have the same impact as those made in a face-to-face altercation at the workplace.

86 There is no doubt that threatening to physically harm another person, even indirectly, is a serious offence. However, this case raises an interesting question: can Facebook comments posted at one's home, that is, off-duty, constitute a breach of an employer's workplace policy?

87 In my view, the answer will be different in each case. Here, Cargojet's *Workplace Violence Prevention Policy* together with its *Code of Ethics* does not contemplate conduct engaged in off the worksite itself. The two documents when read together delineate the boundaries of the policy.

88 The former document states:

"Cargojet maintains a zero tolerance policy towards violence in the workplace.

... In the event that an employee is either directly affected by or witness to any violence in the workplace, it is imperative for the safety of all Cargojet employees that the incident be reported promptly.

... Any Cargojet employee who threatens, harasses or abuses another employee, or any other individual at or from the workplace shall be subject to disciplinary action, up to and including termination of employment, and the pursuit of legal action.

89 The *Code Of Ethics* defines "workplace", and the prohibition against electronic harassment. It does not extend the prohibition against electronic threats or harassment beyond improper use of company equipment.

"An employee is deemed to be at the workplace when the employee is on the premises of any of Cargojet's (defined below) facilities or aircraft: is at a

work-related site: or the employee is in transit to a work-related site. The term "premises" includes, but is not limited to, any place of [*sic*] location from which Cargojet conducts its business.

... Employees may not use Cargojet's information technology systems to: ... Send harassing, threatening or obscene messages;..." [emphases mine]

90 I note that under questioning by the employer, the testimony of both Robert Pepper and Geoff King attempted to distance the company from responsibility for an altercation that took place on Cargojet property.

91 In my view, you cannot argue on the one hand that raised fists and voices and threatening statements at the workplace involving one Cargojet employee against another individual, is not violence at the workplace, and at the same time argue that a threat, in point of fact an indirect threat, posted on a social networking site constitutes violence at the workplace.

92 In evaluating the principles relating to a determination of whether off-duty conduct can be grounds for discipline, I refer to *Ottawa-Carleton district School Board v. Ontario Secondary School Teachers' Federation, District 25 (Plant Support Staff) (Cobb Grievance)*, [2006] O.L.A.A. No. 597, 154 L.A.C. (4th) 387, in which arbitrator Goodfellow said, at para. 17:

"In order for an employee's off-duty conduct to provide grounds for discipline and discharge, it must have a real and material connection to the workplace, in the manner described above [*Re Millhaven Fibres, supra*]. And where the interest asserted by the employer, as it is here, is in its public reputation and its ability to be able to successfully carry out its works, the concern must be both substantial and warranted. The test, so far as possible, is an objective one: what would a reasonable and fair-minded member of the public.. .think if apprised of all of the relevant facts."

93 The five-fold test in *Re Millhaven Works, and Oil, Chemical & Atomic Workers Int'l Union, Local 9-670* (1967), [1967] O.L.A.A. No. 4, was relied on in *Wasaya Airways LLP v Air Line Pilots Assn., International (Wyndels Grievance)* (2010) 195 L.A.C. (4th) 1, [2010] C.L.A.D. No. 297 (Marcotte), and reads as follows:

- (1) "The conduct of the grievor harms the Company's reputation or product
- (2) The grievous behaviour renders the employee unable to perform his duties satisfactorily
- (3) The grievor's behaviour leads to refusal, reluctance or inability of other employees to work with him
- (4) The grievor has been guilty of a serious breach of the Criminal Code and, thus rendering his conduct injurious to the general reputation of the Company and its employees

- (5) Places difficulty in the way of the Company properly carrying out its function of efficiently managing its works and efficiently directing its work forces."

94 The result of the complainant's postings, taken in their entirety, requires me to answer (1), (2) and (3) in the affirmative. However, I find that her postings have only minimally harmed the company's reputation for service. These comments cannot be said to give rise to a substantial concern about the company's ability to successfully carry out its business, which depends much more on other factors such as timeliness and accuracy of service. The complainant's postings are rather in the nature of derogatory commentary on the relationships among staff at the workplace, and a personal threat against her supervisor. The postings make no commentary on the professional aspects of Cargojet's services.

95 With respect to criterion (2), I find it difficult to imagine that an employee who feels that way about her supervisors and her workplace would be able to carry out her duties with any interest in the quality of her performance. As a result of her pejorative posts about several aspects of her workplace and her tendency to saddle the company with the entire responsibility for the breakdown in the employment relationship, I must infer that the complainant's behaviour would render her unable to perform her duties satisfactorily. In making this inference, I am not basing my conclusion on the record of the complainant's actual performance, which did not form the employer's basis for dismissal.

96 I also infer from the evidence of Jason Byron, the lead hand who testified that he felt threatened after reading Groves' posting, would be at least reluctant to work with her. Certainly, the comments depicting her workplace as a "high school", where she must work with a "loser" and a "fag" whom she hates, where everyone is "so childish and sneaky", could lead to an inference that others in her workplace would be reluctant to work with her as a result of her behaviour.

97 As discussed above, and with respect to tests (4) and (5) above, I do not view an electronic threat arising out of mounting frustration with her employment to be a serious breach of the Criminal Code rendering her conduct injurious to the general reputation of the Company and its employees. Her behaviour is simply an indication of the breakdown of the relationship between an employee and her supervisor, with its attendant array of threat, childish name-calling, expletives and false bravado. I also cannot conclude that these Facebook postings prevented the Company from properly carrying out its function.

98 I find that the posted comments are not materially connected to the workplace according to the *Millhaven Fibres* test. Moreover, a reasonable and fair-minded member of the public would come to the conclusion that overall, these postings would have only a negligible effect on the ability of the company to maintain its reputation for service and to function efficiently. Three offensive postings on Facebook do not, in my mind, create a substantial and warranted concern about the future of Cargojet's operations. I find that the complainant's off-duty conduct does not provide grounds for discharge.

99 Overall, my finding on the first factor in the second stage of the *William Scott* analysis is that the offence that precipitated the discharge, the Facebook postings, is not a highly serious offence, compared to, for example, a direct threat made at the workplace.

- ii) Was the employee's conduct premeditated, or repetitive; or instead, was it a momentary and emotional aberration, perhaps provoked by someone else (for example, in a fight between two employees)?

100 It is true that Groves' work performance deteriorated steadily after she was promoted. I also note that a concerted effort was made by her supervisors, Wintschel and McKendry, to ensure that every small infraction was reported. I find it unusual that there was a record of her demotion, but no record of her promotion in her personnel file. The file contained only one Annual Performance Review despite the fact she had worked there for more than two and a half years.

101 Also missing from the complainant's file were reports about the complaints she made regarding what she felt was excessive teasing, and which I accept as true. The wording of the Workplace Harassment memorandum personally signed by the President of Cargojet suggests that the determination of an incident of harassment is a subjective one. "Harassment can take on many forms, including verbal assaults through the use of abusive language, and/or aggressive behavior that poses a threat or emotional distress to employees..." [emphasis mine]

102 Her complaints of harassment were not investigated. Instead, they were brushed off as "humourous". There is no indication, either in the file or in the evidence, that her supervisors took steps to find out why she took sick days, or that they provided her with remedial training for errors committed in her load planning duties. The question "Do you need to be retrained?" made by lead hand Graham McKendry in the context of the rest of his June 4, 2009, email does not appear to be sincere.

103 Groves posted the threat against Byron on the day he handed her the Hurt Feeling Report, February 23, 2010. Her complaint about that Report was summarily dismissed by Wintschel.

104 In outlining the failure of her employer to investigate her complaints, I wish to emphasize that their neglect does not justify the steps that the complainant took to vent her frustration. I agree with the employer that any wrongdoing or breaches of company policy by other employees does not excuse Groves' conduct. However, the complainant's evidence points to circumstances that led to a "momentary and emotional aberration as a result of provocation by a fellow employee".

105 In *Greater Toronto Airports Authority v. Public Service Alliance Canada, Local 0004 (C.B. Grievance)*, (2010) 191 L.A.C. (4th) 277, [2010] C.L.A.D. No. 127, arbitrator O.B. Shime discussed the implied term of trust placed on the employer as well as on the employee. He relied on *Malik v. Bank of Credit and Commerce International S.A.* [1997], 3 All E.R. 1 for the proposition that in an employment relationship, there are reciprocal duties on both the employer and the employee. In *Malik*, the House of Lords stated that there is an obligation on the employer not to conduct itself, without reasonable and proper cause, in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. At p. 15, Lord Steyn said:

"The reason for this development is part of the history of the development of employment law in this century. The notion of a "master and servant" relationship became obsolete. Lord Slynn of Hadley recently noted in *Spring v. Guardian Assurance pic* [1994] 3 All E.R. 129 at 161 [1995] 2 AC 296 at 335

'... the changes which have taken place in the employer/employee relationship, with far greater duties imposed on the employer than in the past, whether by statute or by judicial decision, to care for the physical, financial and even psychological welfare of the employee

... it was the change in legal culture which made possible the evolution of the implied term of trust and confidence."

106 Shime noted that *Malik* was approved by the Ontario Court of Appeal in *Haldane v, Shelbar Industries Ltd.* (2000) 46 O.R. (3rd) 206 (Ont. C.A.).

107 In the case in front of me, the offensive Facebook comments appeared at the nadir of Groves' employment relationship. In view of the events at her workplace leading up to the postings, the absence of an adequate response to her complaints by the employer, and the evidence as a whole, I conclude that the postings were not repetitive or premeditated conduct. I find that the complainant's conduct was an emotional aberration, aggravated by the increasingly deteriorating relationship between her and her employer and provoked by particular events.

iii) Does the employee have a record of long service with the employer in which he proved an able worker and enjoyed a relatively free disciplinary history?

108 There is no question that Groves' performance over her short-to-medium-term employment of two years and seven months at Cargojet was not satisfactory. Groves was capable of better, as indicated by her early history at Cargojet. Aside from one laudatory performance review, the file shows a lamentable history of absenteeism, tardiness and errors in performing her duties, at least one of which was serious. The Facebook threat against the lead hand appears to be the straw that broke the camel's back.

109 I find that the complainant enjoyed a history that was neither long nor free from a disciplinary history. In fact, the number of absences and lateness was high.

iv) Has the employer attempted earlier and more moderate forms of corrective discipline of this employee which did not prove successful in solving the problem (for example, of persistent lateness or absenteeism)?

110 Groves' supervisor(s) issued several reprimands, as well as two letters cautioning that more severe disciplinary action might be taken, including termination, if her poor performance continued. The letters did not succeed in ameliorating her performance.

v) Is the discharge of this individual employee in accord with the consistent policies of the employer or does it appear to single out this person for arbitrary and harsh treatment (an issue which seems to arise particularly in cases of discipline for wildcat strikes)?

The complainant gave testimony that she was treated differently from other employees for the same misconduct. She went further and stated that she was specially targeted, and that a statement by Wintschel proved that he was looking for ways to fire her. I accept her testimony on this issue. Besides the Wintschel memo of February 18, 2010, saying he want to see her suspended or fired, her

former lead hand McKendry had made a much earlier statement in his memo of July 21, 2009: "If this is 1% of what you deal with every night Jon, I agree ... cut her loose."

111 There was conflicting evidence on the issue of whether other employees went undisciplined for wearing non-regulation clothing on occasions other than permissible ones, notably by the only non-Cargojet employee who testified, Geoff King. He said that he had seen different attire numerous times on occasions other than Halloween or Stampede.

112 I have already discussed the employer's inconsistent discipline as between Pepper's threatening behaviour on Cargojet property and the complainant's threatening remarks on a social networking site.

113 Robert Pepper also testified that he was simply reprimanded for inappropriate Facebook comments about a customer, and later took them down on his own initiative.

114 In *Wasaya Airways LLP, supra*, the grievor was a pilot on a commercial northern airline who was terminated after his employer found out he had posted comments on Facebook about the airline's First Nations customers. The comments were negative and could be characterized as racist. Substantial evidence was led to the effect that customers who read the comments would be sufficiently offended that they were likely to cease flying on that airline.

115 Arbitrator Marcotte found that the grievor's off-duty conduct did create potential harm to the company, that there was no evidence of provocation causing an emotional response, that his remarks were a serious breach of the company's policies, and that his short-term service was coupled with prior discipline. These factors did not lessen the level of discipline imposed.

116 However, he also found the grievor had not intended to breach human rights legislation and had written a letter of apology to that effect. In addition, the employer had discriminated against the grievor by applying different levels of discipline for the same misconduct, and was inconsistent in enforcing breaches of company values. Arbitrator Marcotte held that overall, the level of discipline was excessive in consideration of mitigating factors.

117 In *Alberta and A.U.P.E., supra*, arbitrator Ponak strongly condemned the employee's failure to tender a sincere apology to those she had hurt. I note that in the present case, the complainant has shown the same disregard for the effect of her statements on her co-workers. She has not shouldered responsibility for her offensive posts. She has been unwilling to recognize the serious impact of her behaviour. Unfortunately, like the employee in the *Albeta v. A.U.P.E.* case, Groves has shown a signal lack of remorse for what she has done. She has not tendered an apology, not taken responsibility for the disrespect and abusiveness of her comments.

118 The employer in this case submitted *Lougheed Imports Ltd. (c.o.b. West Coast Mazda) (Re)* [2010] B.C.L.R.B.D. No 190 as authority for a finding that it had just cause to dismiss Groves.

119 In *Lougheed Imports*, an employee posted derogatory and threatening commentary on his Facebook page against his workplace and against management personnel, and alleged dishonest dealings by his employer. There were 11 such postings over a period of about one month.

120 Some examples are:

- If somebody mentally attacks you, and you stab him in the face 14 or 16 times...that constitutes self defence doesn't it????

- stress relief anyone (posted the top five kills from Dexter, a television show concerning a vigilante killer)
- Completely Exploded & SNAPPED on the Fixed Ops/Head Prick at work today...He sent me Home (With Pay) and wrote me up (Strike 1) ... although the FUKN gloves are off now... I gotta control my temper.
- ... All I Gotta say is they pissed off the WRONG GUY ... big time.
- Is wondering if his 2 supervisors at work, go to the bathroom together?? And who holds who's penis while pissing?
- ... HE'S A COMPLETE JACK-ASS... not just Half-a-Tard
- West coast detail and accessory is a fuckin joke ... don't spend your money there as they are fuckin crooks and are out to hose you ... there a bunch of greedy cocksucin low life scumbags
- [J.T.'s] feeling tactical, and vengeful, and retaliatory.

Arbitrator Matacheskie held, at para. 112:

"I find that the nature of the comments made towards the supervisors were offensive and egregious. J.T. expressed contempt for and ridiculed the manager and supervisors in such a manner that there was proper cause."

121 In my view, *Lougheed Imports* is distinguishable in both the number and nature of the comments of the posts compared to the ones posted by Groves. They also show a sustained and mounting level of hostility towards his employer.

CONCLUSION

122 Overall, I find that the complainant in this case engaged in conduct that gave the employer just cause to impose discipline.

123 Was the misconduct was serious enough to warrant dismissal?

124 Considering the evidence overall and the mitigating factors set out above, I conclude that termination was an excessive disciplinary response.

125 In particular, I note: the provocation caused by events at the workplace, the absence of appropriate measures taken by her employer when faced with her complaints of harassment, the differential treatment for similar infractions committed by other employees, the transitory nature of her conduct compared to similar cases, the fact the offence was not committed at the workplace and therefore did not breach the workplace violence prevention policy, the nature of Facebook postings compared to website blogs which gave rise to more severe discipline in other cases, and the minimal harm to the employer's reputation. For these reasons, the circumstances of her misconduct merit a different penalty from the one given by the employer.

126 What alternative measure should be substituted as just and equitable discipline?

127 Re-instatement was not asked for, nor would it be suitable in this case. However, the appropriate award must take into account the complainant's lack of remorse or apology, and her poor performance history.

1. The complainant is entitled to one month's salary with the usual statutory deductions, but no further deductions for any mitigated earnings.
2. The termination letter of April 20, 2010, is to be expunged from her record of employment.
3. If she has not already done so, the complainant will take down the Facebook postings which gave rise to the discipline.

Dated at Calgary, Alberta, this 29th day of July, 2011.

Michelle M. Somers
Adjudicator

qp/s/qlspi/qlhbb/qlaim/qlhbb

1 The telephone number has been omitted for confidentiality reasons

Case Name:

**Teck Coal (Cardinal River Operations)
v. United Mine Workers of America,
Local 1656 (Norman Grievance)**

**IN THE MATTER OF an Arbitration
Between
Teck Coal (Cardinal River Operations) ("Employer"), and
United Mine Workers of America, Local 1656 ("Union")
Re: Kyle Norman ("Grievor")**

[2010] A.G.A.A. No. 37

Alta. G.A.A. No. 2010-043

Alberta
Grievance Arbitration
Edmonton, Alberta

Panel: Colin Taylor, Q.C. (Arbitrator)

Heard: March 9, 10, 30, 2010.

Award: April 26, 2010.

(40 paras.)

Labour Arbitration -- Discipline and discharge -- Grounds -- Failure to attend work.

Labour Arbitration -- Discipline and discharge -- Grounds -- Dishonesty.

Labour Arbitration -- Discipline and discharge -- Grounds -- Breach of trust.

Labour Arbitration -- Human rights and privacy issues -- Discrimination -- Duty to accommodate.

Grievance by employee, which alleged unjust dismissal. The employer accused the employee of improper absences and dishonesty about the absences. The Union's position was that the grievor's alleged misconduct was caused by a mental disability, and that the employer had failed its duty to accommodate.

HELD: Grievance denied. The evidence did not establish the grievor suffered from a mental disorder. The grievor simply preferred the company of his friends, drinking and parties to working. He falsely claimed to be an alcoholic. He made constant and frantic pleas to be labelled an alcoholic. The medical evidence conclusively proved he was not addicted to alcohol. The grievor was an irresponsible and immature adult who chose a lifestyle which did not include regular attendance at work. The employer could not trust him. He manipulated his doctors to write notes based on subjective complaints and he took sick leave benefits when he should have been working.

Statutes, Regulations and Rules Cited:

Alberta Human Rights Act, R.S.A. 2000, c. A-25.5, s. 7, s. 44(1)(h)

Appearances:

For the Employer: J. Najeeb Hassan.

For the Union: Patrick Nugent.

AWARD

I

1 By letter dated October 28, 2009, Kyle Norman, the Grievor, was dismissed from his employment at the Employer's Cardinal River Operations near Hinton, Alberta. The letter reads, in part, as follows:

We have reviewed all of the circumstances regarding your absences from work and have come to the conclusion that your employment with us must be terminated.

In coming to this conclusion, we have taken into account that you have told us what your issues are. However, that does not excuse your untruthfulness to us about your absences. Nor does it explain why you were absent from work. Even though you say you had been seeing a counselor, you did not take any concrete steps to resolve your issues. Instead, you skipped work to pursue a variety of other activities, and then lied to us about the reason for your absence, claiming that you had a legitimate medical reason for missing work.

Trust and honesty are the cornerstone of the employment relationship. By your untruthfulness, you have irreparably breached your relationship with us. Therefore, your employment is terminated effective immediately.

We will arrange for you to receive all monies owed to you up to your termination date.

2 By letter dated November 2, 2009, the Union grieved "the wrongful dismissal" and the issue came on for arbitration.

3 The Employer's position is that termination of the Grievor's employment of 27 months was the appropriate response to his alleged employment misconduct and the employment relationship is irretrievably broken.

4 The Union's position is that the Grievor's alleged misconduct was caused by a mental disability and the Employer has failed its duty to accommodate. The Employer contends that the Grievor did not suffer from a disability and the Union has failed to establish a *prima facie* case of discrimination.

II

5 Following consideration of all of the evidence, I make the following findings of fact:

- (a) The Grievor is 26 years old. He is unmarried with no dependents.
- (b) The Grievor commenced employment at Cardinal River Operations on June 13, 2007 in the position of Equipment Operator in the pit. In February 2009, he transferred to the coal processing plant in the position of Process Operator. His work schedule was "4 on and 4 off". Each shift was 12 hours. Day shift was 7:00 am to 7:00 pm. Night shift was 7:00 pm to 7:00 am. The Grievor's last day worked was September 18, 2009.
- (c) On November 4, 2008, the Employer issued a "Counselling Interview Report". It is signed by the Grievor as acknowledged, understood and received. The Report states that the Grievor had missed 186 hours of work "year to date 2008". It requires him to provide medical notes for absences; to contact his foreman prior to missing work and warns that if attendance is not improved, he may be subject to discipline up to and including termination. The average annual absenteeism rate for the plant and pit were 9 and 11 hours respectively.
- (d) On February 18, 2009, a meeting occurred with the Grievor to discuss certain incidents related to his attendance at work. The Employer accepted the Grievor's explanation but stressed the importance of attendance:

RW: Attendance is important to us. This is your last day at the pit. Attendance everywhere, the plant is a good place to be, do your job and learn.

...

GF: If you need help, seek it. We want and need you to be at work.

KN: You mean EFAP. I have already done that and am doing it.

RW: The plant is different. One person misses everyone is affected. More work for everyone at work.

KN: This is a new start for me. A new man, I want to do well.

- (e) On May 10, 2009, the Grievor was issued a written "Discipline Report" for being absent without leave on May 2, 2009. No grievance was filed.
- (f) On May 27, 2009, an attendance review meeting revealed that between January 1, 2009 and May 27, 2009 the Grievor had missed 198 hours. Process Plant Supervisor Ralph Conant testified that it was made clear to the Grievor at the meeting "his job was on the line". Mr. Conant issued the following letter on May 27, 2009:

I met with you on May 27, 2009 to discuss your absenteeism.

In the past 6 months you have been absent due to illness a total of 196 hours. Attendance is a condition of employment with Teck Coal; the number of sick days that you have taken over this period does not meet this standard. In order to manage your excessive absenteeism, we will monitor your attendance and will meet to review all incidents of absence when they occur.

A review meeting will be held in 90 days, on or about August 25, 2009, at which time we will review your attendance record and any occurrences of absenteeism.

I am encouraged that you are taking steps to prevent further absenteeism, and expect that there will be notable improvement in attendance upon review. A copy of this letter will be placed on your file, but please note it is not a discipline letter.

If you have any questions or concerns in regards to this matter please do not hesitate to discuss them with me.

- (g) On July 15, 2009, the Grievor called in sick. Mr. Conant later learned through the Union that the Grievor was not sick but wanted time off because of the death of a friend. Notwithstanding the Grievor's dishonest claim of illness, the Employer granted time off for compassionate reasons. Mr. Conant said the Grievor "guaranteed" he would report for his next shift. He did not do so.
- (h) On August 31, 2009, the Grievor was issued a written Discipline Report for sleeping on the job. No grievance was filed.

- (i) The Grievor was on statutory holiday leave on September 7, 2009. He missed work September 8, 9 and 10, had four days off and attended work September 15, 16, 17 and 18, 2009.
- (j) For the period January 1, 2009 to September 18, 2009, the Grievor missed 282 hours. The relevant average absenteeism rate (including the Grievor) was 11 hours for the pit and 20 hours for the plant. An "Attendance Review Meeting" was held September 18, 2009 at which the Grievor was again warned, "[y] our absenteeism could result in discharge. We can help." The negative impact of the Grievor's absenteeism on the plant was made clear.
- (k) On September 19, 2009, the day following the "Attendance Review Meeting", the Grievor's Facebook page announced that he was "in the City and ready to party". I reject as implausible the Grievor's possible explanations for this which include that he was trying to make a former girlfriend jealous and others might have posted the message without his knowledge or consent. On September 4, 2009, the Grievor told his counselor he "is quite happy in his life. He had expressed that he has moved beyond the relationship that ended". On September 22, 2009, the Grievor told his counselor that he had a new girlfriend.
- (l) The Grievor's next scheduled shift was September 23, 2009, the first of a four-day night shift rotation. About one and one-half hours prior to the start of the shift, he was seen by Mr. Conant driving towards Hinton away from the Mine. Shortly after, the Grievor called in sick. The Supervisor attempted telephone contact but was unsuccessful. The Grievor testified that he had visited friends earlier that day who were camping at a site between Hinton and the Mine. His friends left the campsite for a hike at which point the Grievor said he went to the Mine intending to report for duty. For no particular reason, the Grievor said he "broke down", decided he could not go to work and enroute home passed Mr. Conant. Notwithstanding claims to be an unremitting alcoholic, the Grievor said he had nothing to drink that day. He called in sick and did not work any of the four days. His succeeding rotation was October 1 to 4, 2009. He missed all four days.
- (m) Notwithstanding the Grievor's claim of an emotional breakdown on September 23, 2009, he did not mention this to his doctor in visits on September 24 and 25, 2009. Nor did he make any arrangements to see his counselor before or after this alleged breakdown. In fact, on September 4, 2009, the Grievor told the counselor he was "quite happy with his life" and his concerns were related to his spending, cleanliness of his house and conflicts with his parents. They did not discuss any issues related to alcohol addiction or emotional instability that would lead to a "breakdown". On September 22, 2009, the Grievor told his counselor he had a new girlfriend and wished to discuss financial issues. Moreover, the counselor visits on

September 4 and 22, 2009 were not because of emotional problems. They were a condition of his bail. I reject the Grievor's evidence that he did not attend work on September 23, 2009 because of a "breakdown". It does not ring true.

- (n) The Grievor's emotional state on September 23, 2009 is informed by his Facebook postings of September 19 and 21, 2009. He was "ready to party".
- (o) Notwithstanding being too sick to attend work on September 23, 24, 25 and 26, 2009, the uncontradicted evidence of John Klassen is that the Grievor was at a local bar, the "Zoo", around midnight on the 26th . He should have been at work at this time. Mr. Klassen left the Zoo around 1:30 a.m. and the Grievor was still there. Mr. Klassen described him as drinking and inebriated. Mr. Klassen is not an employee at the Mine and has no reason to be untruthful. In fact, his evidence was unchallenged.
- (p) The Grievor denied he was at the Zoo on September 26, 2009. I do not believe him.
- (q) On October 1, 2009, the Grievor again called in sick. He claimed to have a doctor's appointment on that day. In fact, he did not see his doctor on that day. He next saw the doctor on October 8, 2009. At this point, the Grievor knew he was in trouble with his Employer and was scheduled to attend a disciplinary meeting.
- (r) On October 2, 2009, when the Grievor had reported too ill to attend work, he was seen by Ms. Nikiea Hope, employee relations assistant for the Employer, at another local bar known as "Masters". He asked Ms. Hope not to reveal his presence at the bar. She said she would not lie for him. The Grievor claimed to be there as a designated driver. Ms. Hope testified that he smelled of alcohol and appeared drunk.
- (s) The Grievor testified he was not drinking on October 2, 2009 but at other times claimed to be an alcoholic and drinking every day. The Grievor's explanations for his actions on October 2, 2009 are implausible and no evidence from his friends to corroborate the designated driver story were proffered. The Grievor's explanation for his presence at the bar when he was supposed to be too ill to go to work is not credible.
- (t) On October 3, 2009, when the Grievor was supposedly too sick to attend work, he hosted a party at his home. It strains credibility to the breaking point to suggest the Grievor was too ill to attend work on October 3 and 4, 2009 but well enough to host a party at his home. When confronted by the Employer about this, he responded with words to this effect: "a real party is when police shut it down at midnight."

- (u) Despite his pleas of illness, the Grievor did not attend a doctor between September 25 and October 8, 2009. I find as a fact that his attendance at the doctor's office on the latter day was prompted by the fact that he was required to attend a disciplinary hearing that day and required a medical note to substantiate a claim to illness.
- (v) The Grievor admitted to his family physician, Dr. Peter Caffaro, on November 2, 2009 that he was claiming to be too sick to attend work when in fact some of his absences were because of his drinking.
- (w) By October 8, 2009, the Employer had exhausted its patience. It required the Grievor to attend a meeting accompanied by a Union representative. The Grievor knew the jig was up and quickly made arrangements to see his doctor and get a note to excuse his absences. He was able to do this even though he testified that it can take weeks to get a doctor's appointment. Evidence from Dr. Caffaro established that was not true. Even though the Grievor had not seen his doctor since September 25, 2009, he was remarkably able to persuade Dr. Caffaro's Resident to write a note on October 8, 2009 that said he was too sick to go to work since October 1, 2009 and into the future.
- (x) Neither the Resident or other doctor at the clinic had seen the Grievor from October 1 to October 7, 2009 yet he was provided a note which said he was "unable to work from October 1st indefinitely for medical reasons". How did the Resident know this? Because the Grievor said so. The doctor's clinical note for October 8, 2009 reads:

Needs note to say off for Oct. 1 --now+

Discussed suicidal feelings. nil acute.

generally just feels angry about living working life when having to leave 'party friends'.

- (y) Dr. Caffaro agreed that medical notes were often based on what the Grievor told him. His clinical note for June 24, 2008 records a visit for "sick/ note for work." The diagnosis was "ill-defined intestinal infections". The clinical note goes on to say, "[h]e is feeling fine but would like a note for work ... appears well." Dr. Caffaro was asked if the clinical notes reflect what the Grievor told him were then resolved complaints and based upon what he was told by the Grievor. He answered:

Essentially yes

- (z) The medical note provided to the Grievor for that visit reads:

Kyle E Norman was unable to work on Monday 23 June 2008 for medical reasons.

Dr. Caffaro agreed that was "based wholly and completely on what he told you". Dr. Caffaro further testified that "notes were given because requested."

Dr. Caffaro was referred to a medical note issued by an associate which the Grievor took to the October 8, 2009 disciplinary meeting with the Employer. It is dated September 24, 2009 and reads:

Kyle E Norman was unable to work September 23rd -- 26th, 2009 for medical reasons.

Asked if that was based upon what the Grievor told the doctor, he replied:

Would appear to be so.

(aa) Dr. Caffaro agreed there was a "pattern of self-reporting" and the Grievor got medical notes "after feeling better".

(bb) Dr. Caffaro's attention was drawn to the conflict between what the Grievor told his addictions counselor about his consumption of alcohol and what he told Dr. Caffaro on October 9, 2009. The Grievor told the counselor he only drank on days off work but told Dr. Caffaro he was drinking two cases of beer a day. It was suggested the Grievor was exaggerating to Dr. Caffaro. He replied:

There is a dissonance between the two reports.

(cc) Dr. Caffaro agreed that the Grievor's evidence of drinking daily and going three or four days without food was "not reflected in the [clinical] notes."

(dd) Dr. Caffaro's clinical notes dated November 2, 2009 with a diagnosis of "[n]ondependent abuse of drugs" includes this:

Concerned that he has been terminated from mine -- there (sic) issue is all the times he called in with flu he actually had EtOH issues -- does admit that [some] of this might have had to do with the absences ...

Based upon that clinical note it was suggested to Dr. Caffaro that the Grievor "was telling the Employer he had the flu when in fact he had alcohol issues -- therefore asking for notes was untruthful." He answered:

There is a suggestion of that.

(ee) Dr. Caffaro agreed that for the period January 28, 2009 to September 2009, there is nothing in the clinical notes related to mental health issues.

- (ff) The Grievor testified that both before and after September 18, 2009 (the last day he attended work), he "drank every day -- a lot at my home -- I had a few friends over -- also went out and drank -- I would drink to pass out. I was depressed -- who will take care of my dogs -- then I would start drinking again, all day." He testified that he told Ms. West:

I needed to drink every single day -- I was deathly ill from a week of drinking. It was unsafe for me to be there [work] I had suicidal thoughts.

This is not consistent with what he told his counselor or Dr. Beckson, the medical expert in this case.

- (gg) It is instructive to note that the Grievor stopped drinking "eight or nine days before going to Grande Prairie to avoid de-tox."
- (hh) In cross-examination, the Grievor agreed that he told Dr. Caffaro his gastrointestinal problems were caused by drinking.
- (ii) The Grievor said "on some occasions" he told Dr. Caffaro some of his work absences were the result of drinking -- not because of illness.
- (jj) The Grievor agreed that he did not seek any psychiatric help for his claims of depression and major anxiety. He further agreed there was no diagnosis for those claimed maladies.
- (kk) The Grievor did not attend work for his four day rotation September 23-26, 2009. Despite his claim to be drinking constantly, the doctor's clinical notes for the September 24, 2009 visit bear the notation "appears well".
- (ll) The Grievor insisted he was not drinking on October 2, 2009 when he was seen at the "Masters" bar but later said "[m]aybe I had a couple at home."
- (mm) It was put to the Grievor that he told the addictions counselor that he was to blame for the loss of his job. He replied, "[c]ould have said that."
- (nn) The Employer organized a meeting with the Grievor and his Union representative on October 8, 2009 to discuss its dissatisfaction with the Grievor's continuing absenteeism. The meeting began with the Grievor providing three medical notes which he had obtained that day. The Employer asked for an explanation for the Grievor's absenteeism. The notes of that meeting include the following Employer comment:

We have reason to believe that Kyle has no medical condition to prevent him from work unless he can provide a good medical justification for why he's not at work. What medical reason can he be off work but can party?

Employer has right to know, he has obligation to tell us or we have no choice but to terminate.

- (oo) At the close of the meeting, the Grievor asked to speak privately with Ms. Robyn West, Superintendent of Employee Relations. He told Ms. West he was an alcoholic. In her words, "He admitted that there was no medical treatment he was undergoing that was preventing him from going to work he was simply partying ... He repeated himself over and over, about being a bad alcoholic and how ashamed and sorry he was ... I listened and told him what we needed was to understand what was preventing him from working, he said partying." These admissions by the Grievor to Ms. West were not challenged.
- (pp) The Employer did not believe the Grievor and no longer trusted him. He was dismissed on October 28, 2009.

III

6 The Union submits that at all relevant times the Grievor suffered from a mental disability which accounts for the conduct for which he was dismissed and it was therefore discriminatory for the Employer to terminate his employment. The Union relied upon *United Steelworkers of America, Local 5885 v. Sealy Canada Ltd. (Bender Grievance)*, 147 L.A.C. (4th) 68 in which Arbitrator Smith at para.57 said:

The issue is whether on all of the evidence the Grievor's judgement was sufficiently impaired by reason of his mental disorder that he is relieved of culpability ... In the words of Arbitrator Thorne, in the Nestle Canada case, 'if the grievor's behaviour on that occasion was a manifestation of his mental illness, discipline was clearly not appropriate.'

It should be noted that the employee in *Sealy* was diagnosed with bi-polar disorder and involuntarily committed in a manic episode.

7 The Union submits that in this case the Grievor's conduct for which he was dismissed was a manifestation of his mental disability and the Employer has failed its duty of accommodation.

8 The Union relies upon section 7 of the *Alberta Human Rights Act, R.S.A. 2000, c.A-25.5* (the "Act") which reads as follows:

Discrimination re employment practices

7(1) No employer shall

(a) refuse to employ or refuse to continue to employ any person, or

(b) discriminate against any person with regard to employment or any term or condition of employment,

because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person.

(2) Subsection (1) as it relates to age and marital status does not affect the operation of any bona fide retirement or pension plan or the terms or conditions of any bona fide group or employee insurance plan.

(3) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

9 Section 44(1)(h) of the Act defines "mental disability":

(h) "mental disability" means any mental disorder, developmental disorder or learning disorder, regardless of the cause or duration of the disorder;

10 Commenting on the purpose of Canadian human rights legislation, the Supreme Court of Canada in *Quebec. v. Montreal (City)*; *Quebec v. Boisbriand (City)* 2000 SCC 27, said

With respect to employment, its more specific objective is to eliminate exclusion that is arbitrary and based on preconceived ideas concerning personal characteristics which, when the duty to accommodate is taken into account, do not affect a person's ability to do a job.

11 In the *Report of the Commission on Equality in Employment* (1984), cited in *Boisbriand*, the Commission at p.2 said:

Equality in employment means that no one is denied opportunities for reasons that have nothing to do with inherent ability. It means equal access free from arbitrary obstructions. Discrimination means that an arbitrary barrier stands between a person's ability and his or her opportunity to demonstrate it. If the success is genuinely available in a way that permits everyone who so wishes the opportunity to fully develop his or her potential, we have achieved a kind of equality. It is equality defined as equal freedom from discrimination.

Discrimination in this context means practices or attitudes that have, whether by design or impact, the effect of limiting an individuals' or group's right to the opportunities generally available because of attributed rather than actual characteristics. What is impeding the full development of the potential is not the individual's capacity but an external barrier that artificially inhibits growth.

12 The duty to accommodate is not a freestanding issue; *prima facie* discrimination must first be established: see *British Columbia (Public Service Agency) v. British Columbia Government and Service Employees' Union*, 2008 BCCA 357; *Health Employers Assn. of British Columbia (Kootenay Boundary Regional Hospital) v. British Columbia Nurses Union*, 2006 BCCA 57 (para.34); and *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employes de l'Hopital General de Montreal*, 2007 SCC 4: "[t]he duty to accommodate in the workplace arises when an

employer seeks to apply a standard that is prejudicial to an employee on the basis of specific characteristics that are protected by human rights legislation." (para.11)

13 The legal burden is on the Union to establish, on a balance of probabilities, that the Employer discriminated against the Grievor on the basis of a mental disability. In order to do so, it must first establish a *prima facie* case of discrimination. This requires the Union to establish that the Grievor had a disability, that he received adverse treatment and his disability was a factor in the adverse treatment.

14 If a *prima facie* case of discrimination is made out, the burden shifts to the Employer to justify its conduct as a bona fide occupational requirement which includes consideration of whether the Employer discharged any duty to accommodate the Grievor.

15 The expert opinion medical evidence in this case was provided by Dr. Mace Beckson, University Sciences Professor of Psychiatry and Biobehavioural Sciences, University of California, Los Angeles.

16 Doctor Beckson conducted a 5.75 hour psychiatric examination of the Grievor, in addition to which he considered the Grievor's medical and psychotherapy records.

17 Among Dr. Beckson's conclusions is that the Grievor does not suffer from an addiction to alcohol:

He made specific choices to consume the quantities [of alcohol] he did; during his work days he would come home and have only one beer and no more, by his own choice ... regardless of his alcohol consumption, continued to socialize, have girlfriends, pursue recreational activities and continue working at the mine. There were no medical or psychological problems caused by his drinking of which he was aware.

Mr. Norman consumed alcohol in social contexts and as [a] crutch to feel less distressed by his fears and frustrations. He did drink and drive, leading to several arrests. Mr. Norman's drinking was a source of conflict in his interpersonal relationships and his hangovers contributed to his absenteeism ... [his] continuing use of alcohol was reflective of his poor choices in general and not an addiction, reflecting any impairment in his control of his drinking. At no time was Mr. Norman incapacitated or unable to appreciate the risks of his behaviour, or find himself unable to make his own decisions.

18 The Grievor's family physician, Dr. Caffaro, agreed that the Grievor abuses alcohol but is not an alcoholic. Notwithstanding these opinions, the Grievor persisted in maintaining a contrary view.

19 Dr. Beckson said the Grievor does not have a major mental illness. Specifically, he does not meet criteria for:

- a. Major Depressive Disorder
- b. Anxiety Disorder

- c. Attention Deficit Disorder
- d. Psychotic Disorder.

20 Dr. Beckson said the Grievor "has been impulsive and self-damaging, including abusing alcohol and drugs, driving recklessly and binge eating. Mr. Norman reported feeling uncomfortable and helpless when alone, and he has had difficulty expressing disagreement with others because of fear of loss of support or approval. He tends to be overly dramatic and has exaggerated emotions." Dr. Beckson's Report goes on to say:

Mr. Norman has been immature and irresponsible, frequently making choices that demonstrate poor judgement.

Mr. Norman missed work due to illness some 44 days during a period of approximately 16 months. The medical record, including doctor visits and laboratory tests, is not indicative of any serious illness that would prevent him from working, and often Mr. Norman would report having gotten better since the day he missed work, receiving notes of excuse after the fact, nonetheless. Furthermore, there are reports that Mr. Norman was seen out on the town in bars on the days that he had supposedly been too sick to work. Mr. Norman continues to maintain that his absenteeism was due to medical illness relating to his stomach and his bowels, as well as being "hung over" after drinking on his days off. Mr. Norman continued to deny that he lied to his employer pertaining to his absenteeism.

21 Dr. Beckson concluded that the Grievor's "poor judgement, irresponsibility and apparent dishonesty have not resulted from a medical or psychiatric disease or illness. Rather, they are characteristic, albeit maladaptive, of his long-term difficulties coping successfully with life." (emphasis added)

22 The Union fastened on what Dr. Beckson called the Grievor's "severe character pathology" to found its argument that the Grievor suffered from a mental disorder. Dr. Beckson said:

Mr. Norman's symptoms of intermittent and intense sadness, anxiety, irritability, and rage are common for severe character pathology.

Because of his poor coping skills, Mr. Norman is having a particularly difficult time coping with his current occupational and financial stresses, however this is not reflective of a major mental disorder.

23 It seems to me indisputable that one's character is an amalgam of traits and qualities which distinguish the individual nature of a person. We are all subject to variations that make us better or less able to perform work. Those variations which result from genetic variability or social conditions beyond our control, might well be considered, from the perspective of those experiencing them, to be arbitrary. But if arbitrary, it is arbitrariness to which we are all subject for we are all subject to variations. Sometimes called "personality traits". We all have them. Some serve us well -- others don't. There are patterns of behaviour to which we must adapt to get along. One of those adaptations is presence on the job and the related performance of work. Even if one would rather

not attend work, most (in the absence of winning the lottery) adapt to doing so. It might not be the favorite thing to do but we do it.

24 Now, the Grievor's clear preference was to drink, party and be with friends. He preferred this over going to work. This is confirmed by his doctor's clinical note of October 8, 2009:

generally just feels angry about living working life when having to leave 'party friends'.

This was a maladaptive pattern of behaviour. He also drove recklessly and while impaired, was involved in police pursuits, had accidents and tempestuous personal relationships. Thus, Dr. Beckson describes "maladaptive patterns of behaviour that have caused significant impairment in his social and occupational functioning." There is no doubt about that. The Grievor described stormy social relationships. His level of occupational functioning is apparent from the findings of fact in this Award.

25 Dr. Beckson says the maladaptive patterns of behaviour are "enduring, inflexible and pervasive" and were the primary cause of the Grievor's termination from employment. He could not or would not adapt to patterns of behaviour necessary for reliable presence at work. Is this a mental disorder? The parties did not point me to any authority which has defined that term and the Union has not established that it encompasses the Grievor's situation in this case. Dr. Beckson says:

Because of Mr. Norman's immaturity, poor coping skills, and difficulty functioning, all of which are enduring, abstinence from alcohol and drugs would be a necessary, though not sufficient condition for him to function more successfully in the future; reduce his overall distress in interpersonal relationships; or improve his success in the face of life's challenges. Mr. Norman would have to participate in long-term psychotherapy in order to gradually improve his ability to function; supplemental medication could potentially play a supporting role in any such improvement. Without sufficient support, he may shy away from facing difficult realizations and accepting responsibility for his actions. He would also have to maintain a great deal of motivation to change for the better.

26 Dr. Beckson has not described a mental disorder. He has described an individual with personality problems. A person who has yet to grow up, take responsibility for his actions, adapt to patterns of behaviour which will enable him to attend work regularly and be otherwise successful. The Grievor made the deliberate choice to abuse alcohol, party with his friends and not attend work. Those were conscious and deliberate choices. As Dr. Beckson observes, the Grievor needs help in breaking those maladaptive patterns of behaviour. We all have personality traits and characteristics that get in the way. Those cannot be laid at the feet of employers. Employers cannot be expected to be responsible for character flaws. Many people find it necessary to engage in psychotherapy, take medication and not abuse alcohol. But they attend regularly at work. They might prefer not to but they do. Attending a psychiatrist or other mental health professional and taking medicine in order to navigate life's trials and tribulations does not mean one has a mental disorder. It means recognition that one needs help to function to an acceptable standard.

27 This is not to minimize the Grievor's problems. It is not to say that he does not have personality traits and character flaws which have caused him significant dysfunction and for which he needs medical intervention. It is not to overlook he is immature, has poor coping skills, drinks too

much and makes poor choices. But, in my view, the Union has not, on a balance of probabilities, made out a case of mental disability within the meaning of the *Act*.

28 I should add that Dr. Caffaro agreed that for the period January 28, 2009 to September 2009, there is nothing in the clinical notes related to mental health issues. The notes do refer to depression and abuse of alcohol. Likewise, there is no evidence that the Grievor attended upon his counselor for mental health issues. He was concerned with drinking, personal relationships, overspending, cleanliness of his house and so on. All matters related to personal choice and immaturity. The Grievor agreed he did not seek any psychiatric help for his claims of depression and anxiety. He further agreed there was no diagnosis for those claimed maladies.

29 The Union skillfully tried to make a case for a personality disorder within DSM-IV. It is true that dishonesty, poor judgement, irresponsibility are maladaptive behaviours which can be found in the DSM-IV symptoms of personality disorders. But the evidence falls far short of establishing a DSM-IV personality disorder and far short of establishing a mental disability on which to ground a *prima facie* case of discrimination. The Grievor's evidence with respect to the reasons for his absences and his state of mind at those times was so entirely unreliable (see paras. 5(k)-5(mm), and in particular 5(m)-(p), 5(r)-(t)) that there is no evidentiary basis for a finding that he had a disability. Nor does the medical evidence support a finding of mental disorder. The evidence does establish a troubled young man of immaturity who has chosen a lifestyle which is incompatible with attending work on a regular basis. Just as he made the conscious choice to adopt that lifestyle, he will, to be successful, have to make the conscious choice to change and adopt a lifestyle which does not include the behaviour which has resulted in this arbitration. But the Employer should not have to bear the responsibility for the Grievor's choices that are the complex product of variations, good and bad, resulting from social conditions, experiences and genetic make-up beyond our control. We all must contend with that by adapting to personality traits which result in shortcomings.

30 I find that the Union has failed to make out a case of *prima facie* discrimination. The evidence does not establish the Grievor suffered from a mental disorder.

31 This case falls to be determined within a disciplinary framework.

32 In his short period of employment (twenty seven months), the Grievor proved to be an unreliable and dishonest employee. He lied to the Employer and to his doctors who were manipulated into documenting many of the Grievor's absences from work as illness. There were many occasions when the Grievor was not fit to be at work. But for the most part, such absences were the result of the Grievor's chosen lifestyle -- one of excess drinking and partying with his friends.

33 The Employer, with good reason, has lost confidence and trust in the Grievor. It did everything it reasonably could to assist him. But the Grievor simply preferred the company of his friends, drinking and parties to working. When this came crashing down on October 8, 2009, the Grievor took the last refuge available to him. He claimed to be an alcoholic. Indeed, throughout his testimony in these proceedings, the Grievor made constant and frantic pleas to be labeled an alcoholic. The fact is that he is not an alcoholic. The Grievor is an irresponsible and immature adult who chose a lifestyle which did not include regular attendance at work.

34 It is often said that honesty is the touchstone element in the employment relationship. Employers are entitled to rely on the honesty of employees in all matters including claims for benefits. Here, the Grievor abused sick leave benefits.

35 The Grievor was repeatedly put on notice that his attendance would have to improve. He was told of the negative impact his absences caused the plant. He was repeatedly offered assistance. All to no avail. The Grievor has shown no remorse for his failings. He retreated to the last refuge -- alcoholism -- which he demands be accepted as the reason for his conduct.

36 The Grievor persisted in his dishonesty, both with the Employer and his doctors. The Employer cannot trust him when he claims to be sick. He manipulated his doctors to write notes based on subjective complaints and he claimed and accepted sick leave benefits when he should have been working.

37 After the fact, the Grievor claimed that his absences were due to alcoholism. The medical evidence conclusively proves he was not addicted to alcohol (nor did the Union advance that argument). The absences were due to irresponsibility and a clear preference to engage in activities other than work. The Grievor got away with this for a long time by claiming he was too sick to work.

38 Presence on the job and acceptable conduct are requirements of the job. The Employer could not be expected to tolerate continuing and unpredictable leaves of absence and dishonesty, particularly from a short term employee with an appalling attendance record and two incidents of discipline during his short service. Whether an employee is able to attend work on a regular basis and avoid misconduct are questions integral to employment decision making.

39 I conclude that the Grievor was dismissed for just and reasonable cause and there are no grounds for interfering with the Employer's decision.

40 The grievance is denied.

Dated at Vancouver, British Columbia this 26th day of April 2010.

Colin Taylor, Q.C.

cp/e/qlspi

Case Name:
**Wasaya Airways LP v. Air Line Pilots Assn., International
(Wyndels Grievance)**

**IN THE MATTER OF an arbitration
Between:
Wasaya Airways LP (The "Company"), and
Air Line Pilots Association, International (The "Association")
AND IN THE MATTER OF the individual grievance of Cpt. John
Wyndels**

[2010] C.L.A.D. No. 297

Reported at 195 L.A.C. (4th) 1

Canada
Labour Arbitration

Panel: William A. Marcotte (Arbitrator)

Heard: Thunder Bay, Ontario, April 8 and 9, 2010.
Award: May 12, 2010.

(123 paras.)

Labour arbitration -- Discipline and discharge -- Grounds -- Conduct outside of the workplace.

Labour arbitration -- Awards -- Considerations.

Labour arbitration -- Awards -- Variation of penalty.

The union filed a grievance alleging that the grievor was dismissed without just cause. The grievor was a pilot with the employer airline. His employment was terminated after he posted comments on his Facebook page about the employer. The comments were taken down by the grievor less than a month later. He sent a letter to the employer apologizing for posting the comments. The union conceded that the employer had just cause to discipline the grievor for the Facebook comments. It submitted that dismissal was excessive and that less severe discipline ought to be levied against the grievor. The airline was owned by a number of First Nations. The grievor was dismissed because his Facebook statements evidenced disrespect for First Nations people, which requirement for re-

spect was articulated as part of the employer's "First Nations values", as stated in the Employee Policies and Procedure Handbook.

HELD: Grievance allowed in part. The employer discriminated against the grievor by terminating his employment but only giving a one-day suspension to a co-worker who responded on Facebook to the grievor's comments. However, the grievor's off-duty misconduct created potential harm to the employer's reputation and its ability to efficiently manage its business. His misconduct created a circumstance where his supervisor and senior managers were at least reluctant to work with him. The grievor's misconduct rendered the employment relationship untenable. Reinstatement was not appropriate. The termination was set aside and a four-month suspension substituted. The grievor was to be paid full compensation and benefits effective January 10, 2010 to April 9, 2010. The grievor was to resign from the employer, effective April 10, 2010.

Statutes, Regulations and Rules Cited:

Canada Labour Code, s. 36

Appearances:

For the Company:

D. Shanks, counsel.
 D. Van Sickle, art. stu. D. Macklin, Chief Pilot.
 T. Murdoch-Woods, Dir., H.R.
 J. Beardy, comm. rel. & bus. dvpt.

For the Union:

P. Toop, counsel.
 J. Braun, master chair J. Harding, vice-chair.
 J. Wyndels, grievor.

AWARD

1 In its October 16, 2009 letter to the Company, the Association claims that Captain John Wyndels (the "grievor") was dismissed without just cause effective September 9, 2009. The Company position is that it has just cause to terminate the grievor's employment for reasons stated in its September 9, 2009 letter of dismissal, under the signature of Mr. Donovan Macklin, Chief Pilot for the Company, as follows, relevant to our purposes:

It was brought to the attention of Wasaya Management in early September of 2009 that you posted the attached statements on your Facebook account. The scurrilous comments within this note are shocking and appalling coming from a professional pilot in the employ of Wasaya Airways; a first nation owned and operated company. You have publicly degraded and belittled the customers we serve, who are also the proud owners of this airline. It is impossible to account for the number of people, employees and customers, who could have read these

comments. I am attaching several excerpts from Wasaya's Employee Policy Manual which includes our Code of Ethics. This type of insulting behaviour cannot be tolerated.

Your disciplinary remarks, along with racial overtones which have denigrated the Company, our valued customers and our owner shareholders have led us to the decision to terminate your employment for cause effective immediately.

2 The Association is the certified bargaining agent for the Company's pilots, including the grievor. As at the date of hearing of the grievance, a first collective agreement has yet to be negotiated between the parties. Nonetheless, the parties are agreed that, under section 36 of the *Canada Labour Code*, I have the proper jurisdiction to decide the merits of the Association claim.

3 There is no issue that the Company bears the onus of proving, on the evidence on a balance of probabilities, it has just cause to dismiss the grievor. There is, also, no issue that in a case dealing with the discipline of an employee -- discharge being a severe form of discipline -- the appropriate arbitral approach to determining the matter is addressed in *Re Wm. Scott & Company Ltd. and Canadian Food And Allied Workers Union, Local P-162*, [1976] B.C.L.R.B.D. No. 98, BCLRB 46/76 (P.C. Weiler), at p.5:

... arbitrators should pose three distinct questions in the typical discharge grievance. First, has the employee given just and reasonable cause for some form of discipline by the employer? If so, was the employer's decision to dismiss the employee an excessive response in all of the circumstances of the case? Finally, if the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?

4 I concur with the above approach for purposes of deciding the matter before me.

5 The Association does not take the position the Company did not have just cause to discipline the grievor for his August 16, 2009 Facebook note. Rather, it submits that dismissal is excessive in the instant case and less severe discipline ought to be levied against the grievor in all the circumstances.

6 There is no dispute that on August 16, 2009, the grievor posted on his Facebook account, a "note" identified under the caption "You know you fly in the north when ...", and which statement is identified as "share", i.e., available to the grievor's Facebook "friends". That statement lists ten items followed by a "Disclaimer" which states:

The views and opinions expressed in this "note" are not those of the facebook user. The facebook user loves his/her job and couldn't imagine doing anything better in life. Direct all negative feedback and/or comments into the intake of a jet engine. Head first please. Merci!

(Since the Association does not dispute the Company has just cause to discipline the grievor and due to the Company's concerns regarding the public impact of the statements made in the Facebook account, I do not reproduce those statements in this award.)

7 There is no dispute the grievor is the author of the statements and no dispute he took it off his Facebook account on September 8 or 9, 2009. While it is not known how many Facebook friends the grievor has, or, whether or not he had "locks" on his account that would serve to limit which friends had access to his note in issue, it is not in dispute that his account was shared with another Company employee, and which two Facebook accounts had 27 friends in common, including an employee of another airline which services Northern Ontario, and, an employee of Health Canada, which agency was described as one of the Company's "biggest users". Also relevant for our purposes, on the copy of the grievor's Facebook note, four "friends" had made comments on either the day of the posting or the next. Two are former employees, one of whom made a fairly innocuous remark, and the other's comment was quite less so: "It ain't racist if its true." A current fellow employee, Cpt. Power, referred to one statement (which actually indicates disrespect for Company employees) and added a disparaging remark. The fourth friend was the grievor's wife, a First Nations person who commented "Lol", which apparently stands for "laugh out loud."

8 In a letter to the Company dated September 17, 2009, the grievor wrote an apology for his actions, as follows:

I would like to express my deep regret for the note that was posted on Facebook on August 16th of 2009.

It was never my intention to cause any harm to Wasaya Airways, its customers, and its employees. I never expected the note I posted to cause such a troubling situation for Wasaya Airways or myself. I would never intentionally attempt to insult or belittle this company. I understand that my comments had a major impact on some individuals within the company, and at this time all I can do is sincerely apologize for that. I've spent 3 years away from my family and home to work for this company, and as such, I would never attack it with intent. I've enjoyed the flying I have done here and the communities I have served. I've enjoyed the people and the aircraft a great deal.

Although my comments may be seen differently, I assure you it was simply just a matter of venting frustrations on that given day. If I seriously felt the way it may appear I do, I would not have stayed at this company or flown in the north. If I felt the statement made would get out into the general public and reach Wasaya customers I would have never posted them. I've always been polite and respectful towards the customers of Wasaya and have done all that I can to assist them through-out my employment with Wasaya.

Regardless of this, I understand the place, and way I vented those frustrations, was a poor choice. It has caused hurt within the company. The statements were removed on Sept. 8th of 2009. I can't undo the hurt that has been caused. All I can do is to sincerely extend my deepest apologies to anyone who has been negatively impacted by these statements.

It is my wish to return to work if Wasaya Airways would have me back. I miss working for this company a great deal. I would ask that my return be at least

considered as I feel I still have a great deal to contribute to the growth and success of Wasaya Airways.

I wish the company all the best and I am thankful for the 3 years of employment I've had with them. It has been an excellent opportunity for me, one in which I am very thankful.

Sincerely,

9 The "Employee Policies and Procedure Handbook" contains a description of how the Company was formed. In 1989, six First Nation communities in Northern Ontario, self-described as "isolated" communities (joined by two more in 1992, and a ninth later on) became partners and owners of the airline. Some of the benefits of ownership of the Company by First Nations are (p.2):

... pride of ownership & management, the ability to compete in an open marketplace, enhanced employment opportunities, business training for community members - especially the growing youth population, distribution of profit, enhancement of community programs and the possibility of additional economic spin-offs in the future.

10 Further, certain "First Nation Values" are viewed as "guiding principles" for the Company, at p.4:

1. First Nation Values:

It is the intention of the Wasaya First Nations that the Wasaya Group practice and maintain

Aboriginal values and use them as guiding principles. Some of these values are:

- * the Aboriginal value of sharing what one can contribute;
- * the spirit of self-reliance by use of one's own knowledge, capabilities and whatever other resources one has;
- * the spirit of working together, acknowledging each other's humanity;
- * respect for one's peers, supervisors, clients and individual First Nations members;
- * respect for the Air, Land and Waters by controlling the environmental impacts of one's activities;
- * respect for the elected Chiefs and Councils of the Wasaya First Nations and other First Nations;
- * respect for the Elders of the community and depending on their wisdom for guidance;
- * commitment to the development of the youth of the Wasaya First Nations as leaders of the future;
- * respect for all people: men, women, elders, children, youth and being inclusive of all facets of the community;

- * working together in a partnership of trust and respect and striving to establish and maintain harmonious working relationships;
- * working co-operatively to maximize the profitability of Wasaya businesses for the collective benefit of the Wasaya First Nations people;

11 The above guiding principles are reflected in the Company's "Non-discrimination", "Ethical Conduct", "Ethical Hiring Practices", and, "Human Rights" policies, including in the last, that the Company "further recognizes the sovereignty of First Nations governments to exercise control over their territory." The Handbook also includes a section on, "Employee Concerns or Complaints", the processes therein providing for procedures of resolution of a complaint that begin with discussions between the employee and his or her immediate supervisor and continue, if unresolved, to inclusion of the Company president for a recommended resolution.

12 Mr. Macklin, the Chief Pilot for the Company, is a member of a First Nations. His evidence is that in conducting its business, the Company does attend to the guiding principles which, he said, "basically require us to show respect for First Nations people and their ways." First Nations people are employed "at all levels of management and are a lot of front-line employees, especially on reserves [i.e., the First Nations communities], for example customer service agents." The Company president, Mr. Tom Morris, and the vice-president, Mr. Jonathan Mamakwa, are First Nations people. At present, there is scheduled air service for twenty-seven First Nations communities, and some eight to thirteen other such communities are also provided with air service on a non-regular basis. The Company's service covers a broad geographic region, largely centred in Northern Ontario, but extending as far north as Hudson Bay, west to the Saskatchewan border, and, east into Central Ontario. The percentage of its regularly scheduled passenger service is, "at least ninety percent" First Nations people, according to Mr. Macklin.

13 As Chief Pilot, Mr. Macklin oversees the hiring, training, scheduling, and, discipline of the some seventy-five members of the flight crews as their direct supervisor. The grievor is a captain on a Beech 1900D who lives in Sioux Lookout. Mr. Macklin was aware the grievor's parents and grandparents also lived in Sioux Lookout. Sioux Lookout is a Company base for air services into remote Northern communities. The grievor, who had some 3 1/2 years of service with the Company "knew how to fly a plane well."

14 One concern Mr. Macklin had with the grievor was that he had "a bit of an issue with anger", and some of his fellow employees used the sobriquet, "Angry John", when referring to him. In that regard, Mr. Macklin issued the grievor with a written warning, dated February 4, 2008. Mr. Macklin's evidence is on that same date, the supervisor at Pickle Lake informed him of the grievor "showing extreme anger to a fellow employee." Apparently, the grievor "tore a strip off the person" who had failed to have his airplane's load ready when the grievor was scheduled to depart. While noting in his e-mail of February 4, 2008 to his superiors that, "I can understand his [sic] being upset as it is a constant struggle in Pickle [Lake] to get things accomplished in a timely manner", Mr. Macklin determined that the grievor had breached the Company's "No harassment" policy and issued him with the following letter:

As you are fully aware, Wasaya Airways LP strives to be a modern, professional and enjoyable place for our employees to work. As per our employee policy manual, *Employees who subject others to harassing behaviour shall be subject to*

discipline or termination. Any of the above behaviour need not be intentional in order to be considered harassment. If any of the above are offensive, intimidating or make an employee feel uncomfortable, it will be deemed to be harassment and will not be acceptable behaviour within the company.

All employees are entitled to a respectful, friendly workplace - behaviours that you tend to exhibit when stressful situations arise will not be accepted. When situations arise that are not conducive to a smooth operating environment, there are reporting systems in place to deal with the different situations. Any further incidents involving harassment or bullying will be subject to a harsher form of discipline.

If you are having difficulty in dealing with stressful situations, there are counselling services available through the employee assistance program. This service is provided through Human Solutions and is completely confidential and free of charge for all Wasaya employees. I am enclosing a brochure for your convenience.

I trust that you will conduct yourself appropriately in the future, as you are a valuable part of the Wasaya team.

15 Mr. Macklin believed the grievor did apologize to the fellow employee who he had confronted. He did not know if the grievor followed up on his suggestion, that he seek counselling or assistance.

16 On August 28, 2009, Mr. Macklin assigned the grievor to perform "night circuit" flying in order to maintain his flying credentials. The grievor, "reported he was not feeling well." Mr. Macklin, however, was made aware by other employees that on his Facebook account, the grievor had indicated he "was heading out for beers and a barbeque", on that day. Mr. Macklin said, "I felt if he can do that, he was well enough to fly." Mr. Macklin spoke with the grievor the next day; "Basically, he said he had a bit of a headache and went out for beers and barbeque. I thought that was unacceptable. If there is no medical reason not to go flying, I felt [he] should fulfill his duties. I [also] said because of friends who have friends [in Facebook], it's not the wisest place to put information of this nature or any nature."

17 On September 4, 2009 Mr. Macklin received a copy of the grievor's August 16, 2009 Facebook note as an attachment to an e-mail, which had also been sent to senior Company managers including the president, by a Ms. Andrea Ackewance, the Company's reservation manager at Sioux Lookout and who had the twenty-seven Facebook friends in common with the grievor. Mr. Macklin's notes of his discussion with Ms. Ackewance, who is not First Nations but is married to someone who is, indicate she said to him: "'When I first saw it I was so upset' She found the comments racist and she was offended saying, 'These are our customers, First Nations people.' She said she ... thinks this is very damaging to [the Company]." When he read the grievor's note, Mr. Macklin said that his first emotion was "shock ... how could someone put this out in public? Second, disappointment ... how someone in my employ could have these thoughts and put them in public. It blew my mind more because [the grievor] lives in Sioux Lookout. Third, anger... to think this low of us [i.e., First Nations people] and our customers and the potential harm to our Company and what we are all about." He said that his anger arose from reading the note as a First Nations person; "I'd

flown on his aircraft as a passenger and felt [his statements] were directed towards me. I felt this was extremely disrespectful of myself." In reading the grievor's Facebook note and how it could affect the Company's reputation, "My first thought was that if this was made public, we'd be done." Moreover, if a First Nations newspaper that is distributed to nine of the communities serviced by the Company reported the matter, Mr. Macklin said, "I don't think we could ever recover from the economic impact. I could see communities denying us service to them. I could see First Nations people refusing to fly with us."

18 Mr. Macklin met with Association representatives, on September 8, 2009, to make them aware of the grievor's August 16th Facebook note and provided them with a copy of it. While Mr. Macklin said his first thoughts were to dismiss the grievor, he had never before worked with a union and discussed the matter with the Director of Human Resources, Ms. Patricia Murdoch-Woods. By the time of the meeting on September 8th, he was "still unsure" of what discipline he would impose on the grievor. A meeting was arranged for the grievor to attend, the next day.

19 Prior to the September 9, 2009 meeting, the vice-president, Mr. Mamakwa, had written an e-mail on September 4, 2009, after reviewing the grievor's Facebook statements stating, "Pretty despicable comments I would say and on a public social forum?" Mr. Macklin also discussed the grievor's Facebook note with the Company president, Mr. Morris. Mr. Macklin said Mr. Morris' reaction was "anger and disappointment." Mr. Macklin "felt I'd get [that reaction] from any First Nations person who read it. I decided that termination of employment was the only outcome, this wasn't going to work out."

20 At the meeting on September 9, 2009, attended by Mr. Macklin, the grievor, two Association representatives, Ms. Murdoch-Woods, Mr. Morris, and Mr. Marc Boisvert, director of flying operations and who had attended the September 8th meeting, the grievor was given an opportunity to speak, but did not do so. Mr. Macklin then handed the grievor his letter of dismissal.

21 As to the effect of his Facebook note on the grievor's ability to perform his duties for the Company, Mr. Macklin said, "I don't think he could. If anyone from the communities put two-and-two together, I could see him being denied landing in a community, or, hostility towards him would be severe ... I just felt he could no longer have a good or even do-able relationship with these people." Mr. Macklin said the grievor's apology did not make a difference to his decision to dismiss him. "I still went back to my initial feelings [about the Facebook note] and a letter of apology doesn't cover that up. As well, I had spoken to [the grievor] before, about the anger thing. I didn't know in my heart that the apology would end my concerns... I don't think [the apology] was a cure for the problem." Further, in regard to the grievor's comment in the letter of apology, i.e., "just a matter of venting frustrations on that given day [August 16, 2009]" Mr. Macklin reviewed the grievor's flying schedule for the weeks prior to the August 16, 2009 Facebook note. That schedule revealed the grievor had not been assigned duties for the days prior to it and had flown very few hours in the two weeks prior to that date.

22 Mr. Macklin said that if the grievor were re-instated, he "absolutely" would have concerns. "[The grievor's] been off work for six, seven months. People would know why because of the structure of our Company, [the reason] would get around. It'd get back around to our customers and employees. ... If it became widely-known in the community, it would destroy our base and everything we've done [as a First Nations enterprise]. A downturn would be the result ... As a First Nations person ... his lack of respect if that's what he really thinks of us."

23 In regard to Cpt. Power's comment on the grievor's Facebook note, Mr. Macklin issued him with a 1-day disciplinary suspension; "Something had to be done. He showed support for [the grievor's] remarks." In deciding on that level of discipline, Mr. Macklin took into account that Cpt. Power had ten years of service with the Company and a clean discipline record.

24 In cross-examination, Mr. Macklin disagreed the Company had a monopoly on air service to communities in the North, rather, he described it as the, "prime supplier", and that communities can ask for bids for that service. He did agree some seven or so of the twenty-seven communities served do not have access to an alternative air service. He agreed the grievor has some 3 1/2 years of service, which placed him roughly half-way on the seniority list. He agreed the grievor was upgraded to captain after six months of employment on a small aircraft, then progressed to captain on the larger plane he was flying at the time of his dismissal, i.e., "steady progress" through the ranks. It was while investigating the incident at Pickle Lake when Mr. Macklin heard another pilot and flight crew and ground staff personnel refer to the grievor as "Angry John". Mr. Macklin was not aware the grievor's aunt and uncle also live in Sioux Lookout, or, that the grievor, some seventeen years ago, had received a community award for saving a child from probable death. In regard to his comments about the Pickle Lake incident, viz., "I can understand his being upset", and "we understand his frustrations", Mr. Macklin agreed that it can be difficult, "at times", to get ground staff to have loads ready in order for flights to keep to their schedules, but said, "Yelling at people isn't the only way out of it, they can come and talk to me."

25 As to the "beers and barbeque" incident on August 28, 2009, Mr. Macklin was not sure if he actually saw the grievor's Facebook note, but did confirm it with the grievor. The grievor said nothing to Mr. Macklin to dissuade him from concluding that the grievor had actually gone for beers and barbeque. He agreed he is aware of flight regulations that prohibit a pilot from flying if he or she is not fit and that it is the pilot's professional responsibility to not accept a flight assignment should that be the case. Mr. Macklin said, "My understanding was he was already flying that day, but [when reviewing the schedule] it was not showing he was. Maybe I was wrong." When asked if a headache was a legal requirement for the grievor not to accept a flight assignment, Mr. Macklin said, "If he is medically unfit to fly."

26 When asked if there was any reference to First Nations people in the grievor's August 16, 2009 Facebook note, Mr. Macklin said it states "flying in the North You have to assume he's talking about First Nations people." Mr. Macklin has seen a, "David Letterman Top 10 List", but disagreed the grievor's statements were an attempt at humour; "Not the way I read it." He did not ask the grievor if he was attempting to be humourous. Mr. Macklin said, "At first, yes", his reaction of anger when he read the grievor's statements did affect his view of the level of discipline he considered imposing on the grievor, "but after a breath, no." He took the statements personally, "because I've flown [as a passenger] on his airplane." He agreed someone who did not know the grievor or had not flown with him might have a different reaction, "but they would see he is associated with [the Company]", in reading his Facebook note "as part of his home page." He then added, "I don't know for sure if he listed us as his employer, but I know he was part of the Company's group."

27 In regard to the process identified in the Employee Policies and Procedure Handbook for investigating complaints, Mr. Macklin agreed he did not follow those, in particular interviewing the grievor prior to imposing discipline in the form of dismissal; "I was comfortable with what I received [from Ms. Ackewance]," but would have "If there was anything I didn't feel that was important [i.e., to hear his reasons]. It was more important as to what the reader understood [from

the Facebook statements]." As to the "Disclaimer" in that note, "I did not feel it was important to get information on that. I was comfortable with my reaction and how I believe other First Nations people would feel." He said, "I probably should have", when asked if he felt it was important to tell the grievor he thought the statements were offensive. Mr. Macklin did not feel it important to ask the grievor about his Facebook privacy settings or the number of his Facebook friends, "No, a number of people on it worked for us. I was comfortable with that." He said, "It possibly could have been" relevant to his decision as to the number of people who might have seen the comments, but said, "To me, two, three people is enough ... I felt the potential for other people [aside from Ms. Ackewance and Company managerial staff] to see it was enough." As to the actual number of people in the Company who saw it, Mr. Macklin said, "Just the ones [listed in the intra-Company e-mails concerning the statements]. That's why we acted as fast as we did ... I didn't want it getting out there. Our Company is not a typical airline company. Our employees work in the communities and have tight bonds within them. So, it would get out fast." Mr. Macklin agreed he did not ask the grievor to remove his August 16, 2009 Facebook note. To Mr. Macklin's knowledge, the grievor was first made aware of the Company's reaction either the evening of September 8, or, on September 9, 2009.

28 Mr. Macklin said he prepared the grievor's September 9, 2009 letter of dismissal prior to the meeting with him in late morning that day. His intention for the meeting was only to inform the grievor he was being dismissed. He had already given the grievor that letter when he asked him if he had anything to say. "I'd made up my mind, I'd decided." Mr. Macklin had no reason to doubt the sincerity of the grievor's September 17, 2009 letter of apology.

29 In regard to Cpt. Power, Mr. Macklin's evidence is that, shortly after his meeting with the grievor on September 9, 2009, he met with Cpt. Power and Association representatives and gave him his 1-day disciplinary suspension letter, which had also been prepared beforehand. He also gave Cpt. Power opportunity to explain his actions, again, after providing him with the discipline letter. When asked if he raised concerns about public reaction to the grievor's Facebook note, Mr. Macklin said, "Each First Nations community has one council and a chief. All it would take is for one chief or one person to raise his voice, and it would compound. Any time a First Nations person feels disrespect from an outside agency, they take it to heart and there are repercussions." When asked why those same concerns would not apply to Cpt. Power's comment, Mr. Macklin said, "The one line he put down basically showed support [for the grievor's statements], almost that he agrees with what was stated. But if you read that statement alone and he put no header on it, with his length of service and record, I would argue out any concerns of any party." Mr. Macklin did not know if Cpt. Power did attend sensitivity training by way of a "Cultural Awareness Workshop", as he was directed to in his disciplinary letter.

30 In re-examination, Mr. Macklin said he did not ask the grievor to remove his August 16, 2009 Facebook note because, "I don't know if I do have that right."

31 Ms. Tricia Murdoch-Woods, the Company's Director of Human Resources, is not a First Nations person but is married to one. Her evidence is that the Company's Employee Policies and Procedure Handbook is available to employees on a Company intra-net website about which they are told and to which they all have access. The Handbook is not available in hard copy. She was referred to a, "Terms Of Employment With [the Company]", form which the grievor had signed when first employed. Relevant to our purposes, that one-page form includes:

4. **ATTITUDE.** [The Company] feels that all of its employees must have a good attitude towards their fellow employees and the employer. Talking about fellow employees or [the Company] in a detrimental fashion is not acceptable. The management maintains an open door policy and feels if an employee is unhappy with a certain situation that they should be bringing their concern directly to management, and not be discussing it with others beyond [the Company].

32 Ms. Murdoch-Woods was first made aware, as part of the senior management group, of the grievor's August 16, 2009 Facebook note on September 4, 2009. She believes the grievor and Ms. Ackewance grew up together in Sioux Lookout. When she read the grievor's statements, her first thoughts were that of, "shock and just disappointment that an employee of the Company would post something of this nature -- derogatory, racist remarks. I was personally upset with it. My husband is First Nations and we have a commitment to the communities. My second reaction was, Oh, my gosh, being a Facebook user, how many people have seen it, just knowing the Facebook world. Anybody who was the grievor's friend would see it. So, if he had a couple of hundred friends and they have friends, they would [all] see it. People can also google [the grievor]."

33 In the meeting with Association representatives on September 8, 2009, Ms. Murdoch-Woods provided them with a copy of the grievor's Facebook note, "So they would be aware a complaint had been raised and we would investigate. [The grievor] was flying so we also gave them time to meet with him to see if they could get more information", which more information was not provided prior to the September 9, 2009 meeting with the grievor.

34 Ms. Murdoch-Woods was referred to an incident she was involved with concerning Mr. Angus Chapman, a customer service manager for the Company who also hosts a, "Wasaya Hour", radio show, and who is featured in the Company's in-flight magazine. On his MSN Messenger web page, apparently sometime in the Fall of 2009, there is a picture of a golf ball with the Company's logo on it, and he uses the header, "ANGUS[CS Boss]", and under that wrote, "Unions r killers for ab bus." Nine people, all of whom save one or two who work for the Company, are indicated as having seen that web page. In a letter dated November 19, 2009, the Association wrote to Ms. Murdoch-Woods as follows:

It has come to the attention of the Association that a manager in the employ of the Company has been engaged in MSN communications with other Company managers using the handle "Unions r killers for ab bus".

We are attaching a paper copy of the posting, as well as a list of managers with whom we believe such communications have taken place.

It appears that the manager in question is Customer Service Manager Angus Chapman. The MSN handle specifically identifies the individual as "CS Boss", suggesting that the communication is one made by and on behalf of the Company.

We assume that the handle is a short-form text for "Unions are killers for aboriginal business".

Such a posting raises a number of concerns.

As you are aware, the Air Line Pilots Association, Intl. is the legal certified bargaining agent for pilots in the employ of Wasaya Airways. As a consequence, the Company is obliged to recognize and respect the representative bargaining rights of the Association and the pilots it represents.

It is an unfair labour practice prohibited by the Canada Labour Code for the Company to undermine that representative authority.

We are aware that in other circumstances the Company has purported to apply a policy of "zero tolerance" with respect to postings having a negative impact on the Company and the workplace. It would seem, however, that this policy is not applied consistently or with the same vigor when the posting displays anti-union animus or seeks to "racialize" the employer-union relationship

We expect the Company to take immediate action on this matter and to advise us according [sic] so that the Association may consider its legal options.

35 As a result of the receipt of that letter, Mr. Woloschuk, a senior Company manager, in a letter addressed to Mr. Chapman states, in part:

The message read "unions r killer for ab business" and you have confirmed that the abbreviation 'ab' was intended to mean 'aboriginal' and the handle was a short cut with abbreviations that meant "unions are killers for aboriginal business." You indicated that this was just an irrational statement that was of your own personal opinion, but that you were not familiar with unions in general having never worked in an environment with unionized employees. You provided an example that was behind your thoughts, "if a pilot says they do not want to load patients with the loading chairs, it would affect Wasaya's business" and that is was [sic] a general thought, not specific.

You did indicate that you were aware who your MSN contacts are and that you knew that these individuals would see your comment. You also provided some additional context to the feelings you had by indicating it was precipitated by things you have heard other people in the company saying things like "unions can cripple a company" If it ends up that our pilots become like pilots at major airlines (i.e.: fly only, when flight is done pick up their suitcase and go to hotel), it will hurt our business.

I asked if you were aware of the phrase "unfair labour practice" to which you responded you had not and that you were not aware of the regulations or guidelines surrounding unionized groups of employees in terms of the labour relations or Industrial Relations Board. I further explained that the situation is being considered serious and that there had also been racial aspect to the allegations because of the use of certain words in the header.

Any communication that you have, whether it is verbal, posts electronically, or any other written or other medium, may be perceived as speaking for and on behalf of the Company and your opinion although it is your personal opinion, may be perceived as the company's opinion because of your position as a Manager.

I indicated in our meeting, the company is reviewing and investigating this situation and is considering all matters including disciplinary outcomes. You have further responded that you have spent almost all of you working career in business where there are natives and non-natives working together, and that you have no issue with nationalities, it is not in my heart to have an intention of discrimination, that it was done off the top of my head without thinking.

I have attached a copy of the information that was sent to all management in 2008 that that [sic] is to guide our management in these matters. As a Manager, you are expected to uphold these guidelines, and review from time to time to remain aware of the Company's position.

36 Ms. Murdoch-Woods said that, in addition to the letter, Mr. Chapman was spoken to by his supervisor. He was informed not to use his MSN Messenger "while at work". She said Mr. Chapman's actions were such that, "he was allowed his own personal opinion, how he felt about unions." She said that Mr. Chapman's statement was "not comparable in any way" to the grievor's; "his [i.e., the grievor's] remarks were directed to our own passengers and are racist."

37 In cross-examination, Ms. Murdoch-Woods' evidence is that the Company would have no way of knowing whether or not its employees access the Employee Policies and Procedure Handbook online; "They are told where it is." They are also so informed in periodic "e-blasts" to them from the Company. She said, "We were not sure if we could," when asked if the Company had requested the grievor to remove his Facebook note in issue. She said it was not important to speak with the grievor prior to dismissing him. "We felt we had enough information from e-mails from Ms. Ackewance and there was no new information from the Association. It was not a circumstance where we felt anything [the grievor] could say that would affect the final outcome." She did not verify Ms. Ackewance's information as to the number of shared friends with the grievor, "because Ms. Ackewance was a long-term employee." When asked if it did not matter as to how many friends has accessed the grievor's Facebook note, Ms. Murdoch-Woods said, "It was the impact on people." She believes one of the Association representatives contacted the grievor after the meeting with them on September 8, 2009. She said the letter given to Mr. Chapman is not a discipline notice. While she did question Mr. Chapman before issuing him with his letter, she did not speak with the grievor prior to his dismissal. "There are certain situations where we feel we have enough information."

38 In re-examination, Ms. Murdoch-Woods said that Cpt. Power has yet to undergo sensitivity training, due to financial restraints.

39 Mr. John Beardy, a First Nations person, has worked for eight years in community relations and business development for the Company. In that capacity, one of his roles is to travel to the communities serviced by the Company to deal with "any issues or concerns" regarding the service provided to them. Based on his experience, he said that First Nations people would react to the grievor's Facebook note if they had seen, as being "very offensive. I personally saw racial undertones to this", when shown the grievor's Facebook note, which he, himself, did not view on Face-

book. "I'm pretty sure any First Nations person from my area would probably feel the same thing. It hits home." He said that if First Nations community leaders saw the grievor's Facebook note, the result, "probably, would be as far as public outrage. Most of us know this is a very sensitive issue. Now that I know more about the note and the person who made it, it makes me shake my head. He's from Sioux Lookout and he is aware of the issues. Many of the Company's staff are First Nations. It's very disturbing. There is no doubt in my mind the majority, if they saw this, would have the same reaction. I'm surprised this hasn't come out publicly. If it did, individuals would complain about [the Company] by going to the elders, to council, to express their complaints and concerns. The community leadership would write to [the Company] - why has this happened? What did you do about it? If we did nothing it would go farther, to a band council resolution asking that [the Company] not provide service to their Nation."

40 Mr. Beardy recalled a recent incident in Red Lake where, a "First Nations staff felt [a non-First Nations staff member] had shown disrespect for a First Nations staff member. It went to council and they told [the Company] to address that concern. [The Company's] staff said we were pretty much given an ultimatum, either deal with it or they would ask [the Company] not to service their community. This [i.e., the grievor's Facebook note] is more serious than what happened in Red Lake, more far-reaching effects If we kept an employee who did [what the grievor did], yes, our reputation would be a concern. That's why the decision [to dismiss the grievor] was made so quickly. We're about diversity. We don't want to harbour or condone anyone in the Company who has these inclinations that are racist and who express these opinions."

41 In cross-examination, Mr. Beardy said he first became aware of the grievor's Facebook note in, roughly, late March, 2010. He does not know when it was posted on Facebook, or for how long. That it had been posted for three weeks and not for eight months would not change his opinion; "No, even if it was up for one day and one person saw it and made a complaint it would be the same." He does not know of anyone from a First Nations community, other than Company senior management, to have seen the Facebook note in issue.

42 Mr. James Harding has been a pilot for the Company for about nine years, is currently a captain and is the vice-chair of the bargaining unit. Mr. Macklin called him on September 4th, said he had "a serious issue with a pilot", did not wish to identify who, and a meeting with Cpt. Harding and Mr. Braun, the Association chair, was arranged for September 8, 2009. He and Mr. Braun had no foreknowledge whatsoever as to the content of the meeting, and, neither had seen the grievor's Facebook note prior to September 8, 2009. In cross-examination, Cpt. Harding agreed his notes of the September 8, 2009 meeting, indicate Mr. Braun said that he, "didn't support anything said in [the grievor's Facebook note]." Cpt. Harding holds no personal position on it.

43 The Company submitted that the relevant facts are not in issue based on the evidence presented by it, and there is no evidence from the Union which contests those facts. Moreover, cross-examination of Company witnesses did not change the strength of its evidence which, as provided, is logical, coherent, and cogent. Thus, on August 16, 2009 the grievor posted his Facebook note in issue. And while in his September 17, 2009 letter of apology, he speaks of "venting frustrations on that given day", there were certainly no work-related pressures on him that day, in that he did not fly, nor did so in the two weeks prior to August 16, 2009, in that he was not scheduled, and did not fly, on the vast majority of those days. That is, the grievor is not apologizing, but is attempting to explain his actions, which compounds and worsens the circumstances; his letter is an attempt at cover-up and explains a false position. Moreover, the grievor had been informed by Mr.

Macklin, as a result of the Pickle Lake incident, there were other avenues available than venting his frustrations but, rather, on August 16, 2009, he chose to vent them on his Facebook.

44 As to the statements on his Facebook note, there is no doubt from his letter of apology, the grievor, himself, knew what he did was a serious matter and a significant cause for concern for the Company. The Company's three witnesses confirmed that significance; they were angry and experienced profound upset as a result of the grievor's Facebook note. Moreover, these three witnesses all had a clear and unequivocal understanding - the Facebook statements were of a racial nature directed towards First Nations people who fly on the grievor's Company aircraft. If the grievor was of the view those comments were not the least bit racial in nature and had no such effect, he would have testified to that, but he did not since he was not called as a witness. In that regard, the Association witness, Mr. Harding, agreed that Mr. Braun, for the Association, stated it did not support the grievor's statement, and, Ms. Murdoch-Woods' testimony, that Mr. Braun was shocked when he read was not contradicted. While there is no direct reference to First Nations people in the statements, it does not have to be stated -- everyone knows exactly who the grievor is talking about. If there is any doubt as to their racist nature, one only need look at the one former employee's remark on the grievor's Facebook note, namely, "It ain't racist if its true." Given no evidence otherwise, that is how those statements are viewed and that was the purpose in presenting them. The statements, further, are despicable and the denigration of the Company's customers who are First Nations and owners of the Company is crystal clear. The Facebook note is racist in nature and must be dealt with in that vein and, as confirmed by all these Company witnesses.

45 The Company submitted that its airline service is no ordinary service has been made clear. The Employee Policies and Procedure Handbook explains its origin, that it is owned by the communities it services, and is virtually a First Nations organization; run, serviced and used by First Nations people. When the grievor signed on, his Employment Form clearly indicated the expectations on him in becoming a member of the Company and he agreed to respect those matters, but he did not. As to the Company's reactions to the Facebook note, Ms. Askewance and senior management staff, including the president, vice-president, Mr. Macklin and Ms. Murdoch-Woods, held the same view, that the statements were racist, offensive, and, damaging to the Company's reputation. While the Association may say only one of those people, Ms. Ackewance, saw it originally the evidence is she and the grievor had twenty-seven friends in common who could have seen the statements, among those an employee of a rival airline and an employee of one of the Company's biggest clients. Significantly, the grievor was not called to testify and, thus, did not say none of his friends saw it beyond the four indicated in evidence, rather, his testimony would have revealed a significant number of his Facebook friends, which would cause substantial harm to the Company over and above what is shown in the evidence. As to harm to the Company, in addition to the evidence of Mr. Macklin and Ms. Murdoch-Woods, Mr. Beardy, who is the Company's representative in the First Nations communities, viewed the grievor's statements as extremely offensive and that any First Nations person would say the same thing. Moreover, he testified to a circumstance in Red Lake where a First Nations employee believed he had been shown disrespect by a non-First Nations employee and explained that if the Company had not dealt with the matter, the result could be a Band Council resolution not to deal with the Company. While it may be that alternative air service may be available in such a case, both Messrs Macklin and Beardy testified as to the financial consequences to the Company that could be potentially devastating, let alone adverse effects to the Company's reputation, had the grievor's Facebook statements been made public in the communities the Company services. That is why the Company, for valid reasons, dealt with the matter quickly, and determined

the grievor's discipline quickly, given the significant ramifications had it not done so. Nonetheless, the Company did meet with Association representatives prior to dismissing the grievor and received no information from them to mitigate the circumstances, nor, did they request more time to deal with the issue.

46 The Company submitted that while the grievor's August 16, 2009 Facebook statements can be considered as off-duty conduct, the Company correctly disciplined him for those actions. The grievor's Facebook statements harm the Company's reputation, as was the testimony of its witnesses. The grievor's misconduct, had it become known in the First Nations communities, could lead to his non-acceptance by them. Mr. Macklin made it clear that he would not be able to continue working with the grievor and which sentiment would be similar to those of other First Nations employees if made aware of the grievor's statements. The grievor's comments are racially-motivated and, hence, a violation of the *Human Rights Code*. In addition, the Company is owned by the First Nations communities it services. Mr. Beardy's evidence regarding the incident in Red Lake indicates that if those communities become aware of the grievor's statements, it would be difficult for the Company to provide its services to them should it continue to employ the grievor. While there is no direct evidence that those communities are aware of the grievor's statements, the proper test in this circumstance is to consider what would a reasonable and fair-minded member of those communities think if apprised of the grievor's statements. As against that test, and in light of evidence of its witnesses, the Company cannot, and must not, continue to employ the grievor.

47 The Company argued that the dismissal of the grievor is not excessive discipline. The grievor's Facebook statements are extremely serious, offensive, and, derogatory remarks concerning the Company's owners and customers. By way of Cpt. Power's comment on Facebook, the grievor must have known his comments were racist. Their posting on Facebook cannot be viewed as a momentary and emotional aberration, in that they were posted for some twenty-three days, and taken down only after the Company expressed its shock. The posting was at a time when there was no workplace-related stress; his flying duties in August prior to and including the 16th, were not at all onerous. The grievor is not a long-service employee and does not have a discipline-free record. Moreover, in regard to the grievor's display of anger in the Pickle Lake incident, Mr. Macklin cautioned him against that sort of behaviour and offered assistance and procedures available to him should that circumstance arise in the future, yet, the grievor's claim of, "venting frustration", in his September 17, 2009 letter of apology indicates that Mr. Macklin's prior intervention was not successful. There is no evidence put forward by the Association which indicates the level of discipline imposed on the grievor is somehow inconsistent with its policies. While its procedures for dealing with an incident such as the grievor's August 16, 2009 Facebook note were not followed, this procedural flaw, including the lack of opportunity for the grievor to explain his actions prior to dismissal - which was remedied by way of notification to Association representatives of its concerns on September 8, 2009 - does not diminish the Company's decision to discharge the grievor, nor, can that flaw be said to be fatal to the Company's case in all the circumstances.

48 The Company argued that the difference between the grievor's disciplinary penalty and Cpt. Power's disciplinary penalty does not establish discriminatory treatment against the grievor due to the materially different circumstances of their misconduct. The grievor itemized ten statements and put them on a social forum for comments by others. In contrast, Cpt. Power's single remark is qualitatively and substantially different from those of the grievor. Further, Cpt. Power had significantly greater seniority than did the grievor and a discipline free record. That is, there is a valid and substantive reason for the different penalties.

49 In regard to Mr. Chapman, his comment was not racial in nature and but expressed his personal view of unions, and, it was properly dealt with as a personal choice on his part. The Company dealt with Mr. Chapman when the Association expressed its concern and confirmed with the Association it was not accepting Mr. Chapman's personal opinion as representing the Company's position. There is no relationship, whatsoever, between the grievor's Facebook statements and Mr. Chapman's personal choice of opinion.

50 In the alternative, the Company submitted that if it is concluded it did not have just cause to discharge the grievor, re-instatement would not be appropriate, given the circumstances of his dismissal. Rather, compensation in lieu of re-instatement would be appropriate, reduced by a period of disciplinary suspension.

51 In support of its position on the merits of the grievance, the Company submitted *Re Ottawa-Carleton District School Board v. Ontario Secondary School Teachers' Federation, District 25 (Plant Support Staff) (Cobb Grievance)*, [2006] O.L.A.A. No. 597, 154 L.A.C. (4th) 387 (Goodfellow); *Re Ontario Public Service Employees Union v. Ontario (Ministry of Natural Resources) (Wickett Grievance)*, [2005] O.G.S.B.A. No. 93, 143 L.A.C. (4th) 14 (Petryshen); *Re Universal Showcase Ltd. v. United Brotherhood of Carpenters and Joiners of America, Local 1072 (Da Rosa Grievance)*, [2005] O.L.A.A. No. 388, 141 L.A.C. (4th) 437 (Surdykowski); *Re Community Living South Muskoka v. Ontario Public Service Employees Union (Walla Grievance)*, [2000] O.L.A.A. No. 820, 92 L.A.C. (4th) 384 (Mikus); *Re Slocan Forest Products and I.W.A., Local 1-424 (Kelly termination)*, [1997] B.C.C.A.A.A. No. 262, 63 L.A.C. (4th) 1 (Albertini); *Re Maple Leaf Foods Inc. v. United Food and Commercial Workers Union, Local No. 832*, [2005] M.G.A.D. No. 22, 82 C.L.A.S. 39 (Graham); *Re Central Care Corp. v. Christian Labour Assn. of Canada (Free Grievance)*, [2008] O.L.A.A. No. 279 (Whitehead); Brown and Beatty, *Canadian Labour Arbitration*, 4th ed. (Aurora, Ont.: Canada Law Book, Inc.) para. 7:4414, and an Ontario Human Rights Commission document, entitled "Racism & Racial Discrimination: Your Rights and Responsibilities, (2008).

52 The Association submitted that this case involves a single incident of Facebook information alleged to be harmful to the Company. The August 16, 2009 Facebook note was not posted while the grievor was at work; it was not done on a Company computer; there is no evidence of other discriminatory action on the part of the grievor; he cannot be branded as "racist" for one event, nor should one attempt to construe him as one where it is not so contended by the Company in dealing with the grievor. In that regard, the grievor's dismissal letter speaks of "racial overtones" rather than "racist overtones". That is, the Company, in its submissions, has broadened that perspective in an unjustified manner. The Association submitted that the grievor's Facebook note is not clear and cogent evidence, as is required in a case such as the one at hand, of an intent of racism, or, of intent to harm the Company: there is no use of the Company name on the Facebook note, there is no derogatory term in respect to First Nations people, and, no specific reference to First Nations. Rather, what one sees "really objectively", concerning the Facebook note is nothing more than an attempt to make a "David Letterman Top 10 List" intended to be humourous, but with tragic consequences. The "Disclaimer" on the Facebook note indicates misplaced humour as opposed to an attempt to harm. Further, no one has alleged that the grievor is racist and it is hard to see racist intent in the Facebook note. Mr. Macklin did not doubt the sincerity of the grievor's September 17, 2009 apology, and which apology followed the immediate removal of the note on September 8, 2009, as soon as the Company's concerns were raised. It is clear the grievor has come to understand his Facebook note was unwelcome and harmful.

53 The Association argued that the Company has no specific rule in regard to Facebook and social media. Consequently, some leeway and benefit of the doubt ought to be extended to the grievor in the instant case, given that these types of social forums are something new and unfamiliar. Indeed, Mr. Macklin and Ms. Murdoch-Woods both testified as to their uncertainty in how to deal with Facebook or Facebook issues. While it is not in dispute that the Company can make rules governing its employees, it cannot over-reach when dealing with matters outside the workplace. In the instant case, it must demonstrate concrete harm as a result of the grievor's off-duty conduct. Further, since the Company's expectations are that employees will find for themselves policies and procedures applying to them on Company computers, how can its witnesses say employees know Company expectations of them, particularly since Ms. Murdoch-Woods' evidence is that the Company does not have a system which identifies employees having accessed those policies and procedures? Again, it was said, benefit of doubt ought to be extended to the grievor in this regard, given the ambiguity around the availability of the Employee Policies and Procedure Handbook.

54 The Association submitted that the Company in the instant case did not follow its own procedures in dealing with the grievor. Under its own procedures, the Company did not follow the critical step of interviewing the grievor prior to disciplining him, and which step is fundamental to procedural justice. Yet the Company, under its policies which emphasize fairness and consistency, holds itself to standards of clearly-stated expectations and integrity of its actions, but did not act with integrity or fairness in dealing with the grievor yet, nonetheless, holds the grievor to those standards. Rather, on the basis of but a single complaint, the Company chose only to speak with Ms. Ackewance and accepted her information at face value. Fairness dictates that the grievor should have been given the same opportunity to be interviewed, but he was not. Instead, the Company called him into a short meeting and handed him his letter of dismissal even prior to providing the grievor with an opportunity to explain himself. The Association submitted that the Company had already made its mind up to dismiss the grievor and did not ask about his intent behind his Facebook note; did not ask anything about the statements in; did not ask who or how many people may have seen it; did not ask about his privacy settings. Rather, as was Ms. Murdoch-Woods' testimony, it did not matter at all to the Company how many people may have seen the grievor's Facebook note. Thus, the decision to dismiss the grievor was made quickly, perhaps emotionally, but without hearing his side of the story. In that regard, Mr. Macklin said he was angry when he saw the grievor's Facebook note and Mr. Morris, the Company president, became angry when shown it. The significance of these reactions is that, initially, Mr. Macklin considered a two-or-three week suspension as the Company's disciplinary response. The only difference between that initial assessment and the decision to dismiss the grievor is Mr. Morris' anger. Given that circumstance, a reasonable inference is that the Company was of the view that "the genie was out of the bottle", the grievor had to be fired, and a full investigation was not what the Company wanted to do; it wanted to fire the grievor.

55 In regard to the matter of harm to the Company *vis-a-vis* the grievor's August 16, 2009 Facebook note, the Association argued that there was a single complaint, from Ms. Ackewance, who is a Company employee. Nine months later at the hearing of the grievance at hand, there is no evidence from the Company of actual harm, rather, only speculative harm. The event is now in the distant past, there is no evidence of any impediment to the Company's operations, rather, all that was heard is in regard to potential harm. Had there been actual harm, the Company would have presented evidence of such, but did not; the Facebook note did not exist in concrete form until after the fact of dismissal. Moreover, if the Company was sincere about harm, it could have asked him to

remove the Facebook note but it did not, nor, even ask the grievor if he had prior to his dismissal. The only people known to have seen the Facebook note, aside from those four listed on it and Ms. Ackewance, are senior management of the Company, who kept it alive. In that respect, Mr. Beardy appears to not having even been aware of the grievor's Facebook note prior to his involvement in this hearing. The Association argued that the evidence as to harm to the Company falls short of plain and cogent evidence, especially since the grievor's career is at stake. As well, if the Company's concerns are taken at face value, one wonders why it continues to let Cpt. Power fly in the North, even though Cpt. Power clearly remarked in support of the grievor's statements.

56 In regard to the grievor, the evidence establishes a spontaneous apology on his part to the Company for the hurt he may have caused and which clarified his intent. Mr. Macklin had no reason to doubt the sincerity of that apology, and the evidence is that the grievor spontaneously removed, on his own accord, the Facebook note when made aware of the Company's concern. As to his employment record, the grievor is a medium-term employee and, prior to his Facebook note, there is in actuality but one discipline on his record, i.e., the Pickle Lake incident. In regard to that event, Mr. Macklin noted that the grievor was well-intentioned to ensure a quick turnaround of his aircraft and stated he understood the grievor's frustration. That is, the Company did not view the matter as warranting severe discipline and expressed some sympathy for the grievor.

57 As to the disciplinary penalty imposed on the grievor on September 9, 2009, the Association argued that the grievor has improperly been disciplined twice for a Facebook posting. Mr. Macklin brought his attention to his "beers and barbeque" facebook and warned him about it. Therefore, he was disciplined twice for the same event.

58 The Association submitted that, in regard to the grievor's discipline record, it is a "large step" to move from a letter of warning to dismissal; the Company failed to consider an intermediate step. This failure is underscored by the disparate penalties imposed on the grievor and Cpt. Power. While it is acknowledged that Cpt. Power has longer service than the grievor and a clean discipline record, it is hard to see a qualitative difference between his remark and the grievor's, albeit more numerous, remarks. Moreover, Mr. Chapman received no discipline, whatsoever, when he posted his anti-union remark, which has elements more egregious than those of the grievor, and he clearly identified his remark with the Company. He is a manager, a public personality, is in a position of power and, yet, he was not disciplined, but only told to remove his note, an opportunity that was not extended to the grievor. The Association submitted that the Company is not at all consistent in administering its policies regarding employee mis-conduct. Rather, it can only justify its decision to dismiss the grievor on the basis that Messrs. Macklin and Morris were angry about the grievor's Facebook note.

59 The Association submitted there exists a number of reasons to mitigate the penalty imposed on the grievor and to extend the benefit of the doubt to him. Facebook is new technology in the labour relations context; there are unclear workplace rules surrounding this new technology; the Company did not properly apply its own procedures in the grievor's case; it applied its own policies on discipline inconsistently and, perhaps, on speculative harm that did not come to pass, and which harm can be prevented. Whatever remedy imposed, it ought to allow the grievor to get on with his life; he is not a racist and loves flying in the North. Further, remedy should include expunging the record.

60 In support of its position on the merits of the grievance, the Association submitted *Re Wm. Scott, supra; Re Lumber & Sawmill Workers' Union, Local 2537 and KVP Co. Ltd.* (1965), 16

L.A.C. 73 (Robinson, C.C.J.); *Re Kemess Mines Ltd. and I.U.O.E., Loc. 115 (Goudreau)* (2006), 152 L.A.C. (4th) 232 (Hope); *Re Sudbury Mine, Mill & Smelter Workers, Local 598 and Falconbridge Nickel Mines Ltd.* (1965), 15 L.A.C. 416 (Sheppard, C.C.J.); *Re Waste Management of Canada Corp. and U.F.C.W., Loc. 175 (Mikhail)* (2009), 186 L.A.C. (4th) 129 (Watters); *Re Tornogait Services Inc. and U.S.W., Local 6480 (Saunders)* (2008), 172 L.A.C. (4th) 43 (Oakley); *Re Extra Foods #8566 (Squamish) and U.F.C.W., Loc. 1518 (Morin)* (2000), 92 L.A.C. (4th) 321 (Sanderson); *Re Kenora Assn. for Community Living and O.P.S.E.U., Loc. 702 (Pride)* (2005), 141 L.A.C. (4th) 160 (Springate); *Re Toronto Transit Commission and A.T.U. (Norman)* (2008), 173 L.A.C. (4th) 97 (Saltman); *Re Toronto District School Board and C.U.P.E., Local 4400 (Van Word)* (2009), 181 L.A.C. (4th) 49 (Luborsky); *Re Chatham-Kent (Municipality) and CAW.-Canada, Loc. 127 (Clarke)* (2007), 159 L.A.C. (4th) 321 (Williamson); *Re Alberta and A.U.P.E. ("R")* (2008), 174 L.A.C. (4th) 371 (Ponak), quashed (2009), 183 L.A.C. (4th) 1 (A.C.Q.B.); *Re School District No. 83 and North Okanagan-Shuswap Teachers' Assn. (Munton)* (2008), 175 L.A.C. (4th) 101 (Sullivan); *Re Owens-Corning Canada Inc. and C.E.P., Loc. 278 (Gorgichuk)* (2002), 113 L.A.C. (4th) 97 (Price); *Re Kativik Regional Government and Kativik Regional Government Employees' Union (Keelan)* (2006), 147 L.A.C. (4th) 15 (Bastien), and *Re Lecours Lumber Co. and U.S.W.A., Loc. I-2995 (Louttit)* (2006), 150 L.A.C. (4th) 357 (Marcotte).

61 In reply, the Company submitted there is no factual basis to support a submission that the Company's Harassment Policy was not followed in the instant case. The grievor did have full opportunity to respond to the Company's concerns in that he did have Association representation; there was an opportunity for the Association to provide more information to the Company but it did not, nor did the Association ask for more time to deal with the Company's concerns or complain that it was given insufficient time to deal with the matter. It is not factually correct to say that Mr. Morris became angry on September 8, 2009; he received Ms. Ackewance's e-mail about the Facebook note on September 3, or 4, 2009. The harm addressed by the Company is not speculative, in that Mr. Beardy's evidence regarding the Red Lake incident spoke to what results when a First Nations person believes he or she has been disrespected by a non-First Nations person, i.e., a number of Northern communities would not deal with the individual believed to show disrespect. There is no double jeopardy at play in the instant case; nothing could be further apart than the grievor's "beers and bar-beque" note and this August 16th note, and which notes, moreover, are separated by time.

62 The issue to be determined in this award is whether or not the Company had just cause to dismiss the grievor. Since there is no dispute the Company had proper cause to discipline the grievor, it remains to be determined whether or not the disciplinary penalty of dismissal decided upon by the Company is appropriate or warranted in all the circumstances. Should it be found that discharge is not warranted, it must be determined what would constitute appropriate discipline in all those same circumstances *Re Wm. Scott, supra*.

63 The grievor's September 9, 2009 letter of dismissal indicates he was discharged for reason of his August 16, 2009 Facebook note, deemed by the Company to be, "insulting behaviour [which] cannot be tolerated", and the statements in it were viewed by it as "disparaging remarks, along with racial overtones which have denigrated the Company, our valued customers and our owner shareholders..."

64 It is not in dispute that the grievor's Facebook note was made on his own computer at a time when he was not at work, i.e., his actions constitute off-duty conduct. The *Ottawa-Carleton* case

addresses the arbitral standard of review where an employee is disciplined on the basis of off-duty conduct.

65 In *Re Ottawa-Carleton, supra*, the grievor, a school chief custodian with 18 years of service, robbed a bank during the lunch-hour break, was caught, confessed to his crime, sentenced to jail, and, discharged from his employment. The grievor's evidence enumerated a number of personal problems, "the clear implication [being these circumstances] led him to the commission of the crime in a kind of trance or dissociative state" (paras. 6 and 7). The majority noted, however, there was "no medical evidence ... in support of [the grievor's] alleged mental health difficulties or that might explain his actions in the way he described" (para.11). Relevant for our purposes, the majority, at para. 15, assessed the grievor's off-duty conduct in light of a five-fold test developed in *Re Millhaven Fibres Ltd., Millhaven Works and Oil, Chemical & Atomic Workers Int'l Union, Loc. 9- 670* (1967), [1967] O.L.A.A. No. 4, 1(A) Union-Management Arbitration Cases 328, cited in *Re Lethbridge (City) and A.T.U., Loc. 987 (Grant)* (2000), 98 L.A.C. (4th) 264 (Tettensor) (pp.278-9):

"... It is agreed the principles relating to off-duty misconduct are set out in *Re Emergency Health Services Commission and Ambulance Paramedics of British Columbia, C.U.P.E., Loc. 873*, [1987] B.C.C.A.A.A. No. 391: These tests are further refined in the second leading case, *Re Millhaven Works, and Oil, Chemical & Atomic Workers Int'l Union, Loc. 9-670* (1967), (quoted in *Re Air Canada Workers Int'l. Assoc. of Machinists, Lodge 148* (1973), 5 L.A.C. (2d) 7 (Andrews) at p.8):

"... if the discharge is to be sustained on the basis of a justifiable reason arising out of conduct away from the place of work, there is an onus on the Company to show that

- (1) the conduct of the grievor harms the Company's reputation or product
- (2) the grievor's behaviour renders the employee unable to perform his duties satisfactorily
- (3) the grievor's behaviour leads to refusal, reluctance or inability of other employees to work with him
- (4) the grievor has been guilty of a serious breach of the Criminal Code and, thus, rendering his conduct injurious to the general reputation of the Company and its employees
- (5) places difficulty in the way of the Company properly carrying out its function of efficiently managing its works and efficiently directing its work forces."

"I would add ... that the general consensus amongst arbitrators is that it is not necessary for an employer to show that all the [above] criteria exist, but rather that, depending on the degree of impact of the offence, any one of the consequences may warrant discipline or discharge ..."

66 In the *Ottawa-Carleton* case, the majority agreed, at para. 16, with the employer that the first, fourth and fifth-above tests had been met by the employer in terms of bearing the onus on it. In

so doing, the majority addressed the matters of the employer's reputation and ability to fulfill its obligations *vis-a-vis* the grievor's role and duties in the workplace, at para. 16:

As a chief custodian of an elementary school, [the grievor] was in a position of trust both with respect to school property and people. He was required to interact with children, parents, and members of the public on a daily basis. While he was not ... a teacher or principal, his actions and interactions are nonetheless significant: [the grievor] was responsible for the care of the school from a safety point of view. Children and parents must feel that they can turn to the custodian, like teachers and principals, whenever they are in need of help or protection The reputation, and successful operation, of the School Board demand it. It is why, among other things, the Board has Safe Schools and Weapons policies.

67 The majority acknowledged that off-duty mis-conduct will not always have detrimental, or adverse, effects on an employer's reputation and ability to conduct its operations, and, that people "do not surrender personal autonomy when they commence an employment relationship" (para. 17). Rather, at that same paragraph:

In order for an employee's off-duty conduct to provide grounds for discipline and discharge, it must have a real and material connection to the workplace, in the manner described above [*Re Millhaven Fibres, supra*]. And where the interest asserted by the employer, as it is here, is in its public reputation and its ability to be able to successfully carry out its works, the concern must be both substantial and warranted. The test, so far as possible, is an objective one: what would a reasonable and fair-minded member of the public (in this case, the school community), think if apprised of all of the relevant facts. Would the continued employment of the grievor, in all of the circumstances, so damage the reputation of the employer as to render that employment impossible or untenable?

68 The majority upheld the discharge and, in so doing, addressed the implications of the grievor's mis-conduct for the employer's reputation and ability to conduct its business, as connected with his role and responsibilities, at para. 18:

[The grievor] committed a very serious criminal offence The crime carried with it the implied threat of extreme physical violence [i.e., the note he gave to the bank teller said, "I Have a Gun"] All of this has serious and obvious implications for the safety and security of members of the school community from someone whose role includes, as prominently listed in the job description, "ensur[ing] a safe, healthy and secure environment for staff, students, and the public at the school/facility."

69 Relevant for our purposes, the *Ottawa-Carleton* case indicates that where an employer disciplines an employee for actions or behaviours that occur when the employee was off duty, the onus is on the employer to establish, generally, that the employee's actions are such that the off-duty conduct harms its public reputation, or product, or, adversely affects its ability to conduct its affairs and direct its workforce in an efficient manner, or, adversely affects other employees' ability to work with the employee, apparently regardless of his or her workplace duties and responsibilities. Further, as concerns the matter of the employer's reputation, assessment of the employee' off-duty

conduct entails consideration of the response of the particular sector of the community to which it provides services or product should, or if, members of that sector become aware of the conduct in issue. In that regard, the employer's reputational concerns must be "both substantial and warranted" *Re Ottawa-Carleton, supra*, (para. 17). Whether or not those concerns can be said to be substantial or warranted so as to render the employment relationship untenable, is to be determined on an "as far as possible ... objective test: what would a reasonable and fair-minded member of the public [sector to which the employer provides services or product] think of [the employee's off-duty conduct] if apprised of all of the relevant facts" (para. 17). The *Toronto District School Board* case elaborates on the arbitral approach to the test of determining reputational harm in the context of the *Millhaven Fibres* five-fold test.

70 In *Re Toronto District School Board, supra*, the grievor was discharged from his position as a "School Based Safety Monitor", after an incident when, while inebriated and off duty, he assaulted a man. He was criminally charged, but the charges were later withdrawn when the grievor entered into a "peace bond" (para. 51). The man he assaulted was not known to the grievor as the father of a student in one of the schools where he worked as a safety monitor. The employer argued, at para. 35, that the grievor's "violent attack on the father of one of the ... students, even though outside of school hours and off school property was ... fundamentally inconsistent with the Grievor's employment obligations as a person expected to monitor and enforce (within limitations) the school rules", and, that there was "a clear nexus between the Grievor's off-duty misconduct and his employment as a person responsible for upholding 'law and order' or acting as a 'peacekeeper' within the school" (para. 48). As to the employer's reputation within the community and ability to efficiently conduct its business, the employer submitted, at para. 48:

... any parent looking at the present situation objectively would be 'appalled at the thought of leaving his or her child in the care of someone who, without provocation, committed these acts of violence' with an attendant loss of reputation by the Employer, notwithstanding the Grievor's mis-conduct had not been publicized or become a matter of controversy. It was submitted the Employer need not prove that its reputation was actually harmed, only that the Grievor's misconduct could result in potential harm to its reputation.

71 Relevant for our purposes, arbitrator Luborsky cited *Re Millhaven Fibres, supra*, in regard to the five-fold test for purposes of assessing whether or not the grievor's mis-conduct warranted discipline, including discharge. As to the matter of harm to a public school board's reputation, he states, at para. 65:

Actual or potential reputational damage to a public school board as a result of an employee's off-duty misconduct need not be proven through direct evidence of negative press scrutiny and/or public controversy or similar substantiation ... it is 'the extent to which conduct has the *potential for significant detrimental impact* on the employer's business reputation or ability to operate its business effectively' [*Badder Bus Service Ltd. v. Reavely*, [2000] C.L.A.D. No. 648 (Etherington)] (emphasis added [in original]) that is a key consideration, as opposed to whether the conduct is inherently immoral or illegal. The task of the arbitrator is to assess, considering all of the evidence and the nature of the employment, what a "fair-minded and well-informed member of the public or relevant constituency

may think about [the off-duty conduct]" ... *Re British Columbia (Workers' Compensation Board [and E.C.E.U. (Campbell)* (1997), 64 L.A.C. (4th) 401 (Glass) p.414]."

72 On that test of potential for significant detrimental impact to the employer's reputation, the arbitrator found that the facts, at para. 66, "... do not support the conclusion that a fair-minded and well-informed member of the public ... would reasonably lose confidence in the ability of the Employer to discharge its responsibilities for the care of children in a secure environment ... there is little connection between the Grievor's misconduct and his job ..." The arbitrator did not uphold the discharge, at para. 73: "In these circumstances the Employer's legitimate interest in the Grievor's off-duty conduct would have been satisfied with a progressive disciplinary response" and, at para. 74: "... this case is about the uncharacteristic actions of a man on a single occasion, contrary to his usual judgment and undisputed past accomplishments in diffusing violence within the schools, compromised his otherwise good name away from the workplace when he was intoxicated, which while partially explaining his misconduct is not a proper reason to excuse it." The arbitrator imposed a suspension "pending the outcome of the criminal proceedings" (para. 76).

73 The *Toronto District* case would seem to indicate it is sufficient that there be "potential for significant detrimental impact" (para. 65) on an employer's public reputation, rather than "direct evidence" (para. 65) thereof resulting from an employee's off-duty misconduct but, again, such potentiality assessed in term of what "a fair-minded and well-informed member of the public or relevant constituency may think" if, and not actually, made aware of the mis-conduct in issue. (para. 65). The *Kenora Association* case deals with the employee's off-duty misconduct as it affects an employer's public reputation, also in terms of the employer's business or activities and the employee's organizational role.

74 In *Kenora Association of Community Living, supra*, the grievor, who had some thirteen years of seniority, was arrested for conducting a marijuana operation on his farm. After the charges were reported in the local press -- the criminal case was extensively covered by the local press -- the employer suspended him and, after he pleaded guilty, he was discharged. He had earlier been convicted of a similar criminal offence. The grievor was employed as a Community Support Worker in employer facilities or houses for persons "developmentally handicapped, seniors with dementia or Alzheimer's disease and children with special needs" (p.162). Some three years after he became a full-time employee, the grievor became involved in a number of disciplinary matters, such that he had a relatively extensive discipline record. The employer argued, among other things, that "there is a public quality to employment with the employer, involving as it does the care of children and vulnerable individuals that is incompatible with the grievor's continued employment." (p.176). Also, that the "length of time [the grievor's criminal circumstance] was in the [newspaper] headlines increased the seriousness of the grievor's conduct in terms of damage to the employer's reputation and raising questions in the mind of the community" (p.177). As to the grievor's misconduct, "There has been a continued neglect of duty which endangered the peace of mind, security, well-being and safety of the clients who he was supposed to be caring for ..." (p. 177).

75 Arbitrator Springate noted, at p.185, that while the grievor "was and likely still is a user of marijuana ... there is nothing to suggest that the criminal charge and subsequent conviction of the grievor rendered him unable to properly discharge his employment obligations, caused other employees to refuse or be reluctant to work with him or inhibited the employer's ability to efficiently manage its operations or efficiently direct its workforce" (p. 187). As to whether or not the grievor's

misconduct could be said to have adversely affected the employer's reputation and impacted its legitimate interests so as to warrant discharge, arbitrator Springate states, at pp. 187-88:

... there is a public aspect to the employer's operation. The employer, however, is not engaged in law enforcement activities that may give rise to a special concern about the impact on its reputation of any illegal conduct on the part of its employees The grievor's personal reputation likely suffered in consequence of his conduct however, I do not believe that the grievor's activities would have detrimentally affected the general reputation of the employer or its employees so as to impact on the employer's business interests.

76 The arbitrator re-instated the grievor without loss of compensation or seniority.

77 Relevant to our purposes, the *Kenora Association* case indicates that where the employer's services may be said to fall within the public domain as opposed to, for example, a private sector manufacturer of goods whose enterprise does not ordinarily fall within that domain, the degree or "quality" *Re Kenora Association, supra*, (p. 80) of its public exposure ought to be assessed in light of the employee's actual off-duty misconduct and his or her role in the organization. Further, where there is a claim that co-workers would be reluctant or refuse to work with that employee, there must be evidence in support of that contention. In the *Community Living* case, the matter of workplace relationships with co-workers was central to the determination of the grievance dealt with by arbitrator Mikus.

78 In *Re Community Living South Muskoka, supra*, the grievor was discharged "on two distinct and separate grounds: alleged sexual harassment of his [female] co-workers and alleged excessive force against a client." (para. 1). On agreement of the parties, the arbitration only dealt with the first ground and the hearing to be reconvened, if necessary, to deal with the second ground. The grievor, who had some 10 years of seniority, was one of a group of residential counsellors in a facility, at para. 2: "... to provide support services to persons with developmental disabilities. It provides a broad spectrum of services, including personal care and grooming and financial assistance to clients 18 years of age and older." The grievor had some thirty years in total of service in similar work and for the employer "never had a complaint against him and has an exemplary work record." (para. 3).

79 Relevant for our purposes, arbitrator Mikus found the grievor had engaged in activities of sexual harassment against a number of female staff members, all of which activities the grievor initially denied, but as the investigation progressed he conceded, in subsequent interview meetings, that certain of the allegations were true, but, said he did not believe they were in the nature of sexual harassment. The arbitrator states, at paras. 31 and 32, as follows:

We do not accept his claim of total innocence. He had to have known his actions were unwelcome We do not accept his assertion that he was totally unaware of how inappropriate his conduct was until it was brought to his attention through this complaint that his co-workers found his actions objectionable.

Neither do we believe that he now understands sexual harassment The fact is that he has created an environment of distrust and unease amongst his co-workers that persists today. The witnesses continue to fear him and were most reluctant to appear [under summons] at the hearing for this reason. Whether their fears are

valid is immaterial. The work environment is so tainted that it is our opinion that the grievor could not return to work in the circumstances. He would of necessity be scheduled to work alone with these women in separate residences with no supervision It is our view in the circumstances that, while we might have allowed the grievance on the basis of the lack of warning to him about the inappropriateness of his conduct, reinstatement is not an option. The employment relationship has been so fundamentally breached that it is unlikely that this grievor can return to the workplace without great rancor [sic] and more importantly, great suspicion about his future.

80 As can be seen from the above, where there is evidence of co-workers' reluctance to work with an employee as a result of his or her misconduct, as opposed to potential reluctance to do so, that circumstance may lead to the conclusion by the arbitrator that reinstatement, while otherwise possible, is not a viable remedy.

81 In applying the above *Millhaven Fibres* five-fold test to the matter at hand, the first consideration is whether or not "the conduct of the grievor harms the Company's reputation or product" *Re Ottawa-Carleton, supra* (para. 15). The Company, while not a public-sector employer *cf., Ottawa-Carleton, Toronto District School Board, Kenora Association and Community Living*, provides airline services to the public. To that extent, its reputation is subject to public scrutiny, particularly by the communities its services, the majority of which are First Nations communities in Northern Ontario. Significantly for our purposes, nine of those some twenty-seven communities are also the owners of the Company. In that regard, in the Employee Policies and Procedure Handbook, the owners identify, at p. 4, "First Nation" or "Aboriginal values", *supra*, that are to be practiced and maintained by the Company, including:

- * the spirit of working together, acknowledging each other's humanity;
- * respect for one's peers, supervisors, clients and individual First Nations members;
- * respect for all people: men, women, elders, children, youth and being inclusive of all facets of the community;
- * working together in a partnership of trust and respect and striving to maintain harmonious working relationships;

82 Further, on pages 4 and 5, the owners address the Company's "Business Principles" which emphasize economic benefits "while maintaining cultural principles", and, "Human Resources Principles", which emphasize training and employment opportunities of First Nations members. Further, the "Non-discrimination" policy (p.6) includes: "Our approach to business and employee relations necessitates affording all people treatment with dignity." Its "Ethical Conduct" policy, (p.7), is that the Company "and its employees must value and preserve their established reputation for integrity. This value must apply to all our actions and pursuits." That is, the Company owners have identified that its business practices are to be conducted in a manner that recognizes their First Nations culture and values and emphasizes those of harmony, respect, dignity, and, trust, between employees in the workplace and, as well, in regard to the Company's clients, all of which contribute to, and are to maintain, the Company's "established reputation for integrity". (p.7). Relevant for our purposes, it can be said there exists a heightened awareness for First Nations cultural values and for Company employees to recognize those values and be guided by them in their conduct. Thus, where an employee's conduct does not demonstrate respect for First Nations values or people, such mis-conduct

is of greater import than where those values are not specifically identified as significant, in that respect for those values is integral to the Company's reputation.

83 A review of the grievor's Facebook note reveals that, save for one of the ten statements, they are not the least bit complimentary towards the Company's clients, and it is extremely difficult to see humour in them. They indicate a lack of respect for the Company clients and besmirch their dignity. Since the Facebook note begins with, "You know you fly in the north when ...", and approximately ninety percent of the Company's clients are First Nations people who live in the north, a "reasonable and fair-minded member" *Re Ottawa-Carleton, supra*, (para.17) of those communities would have little, if any, difficulty in concluding that the grievor was including First Nations people in his remarks. In that the Company's values, as Mr. Macklin stated, are designed for First Nations people to be respected, including by non-First Nations individuals, it can be said that the grievor's Facebook statements do not reflect Company values. However, unlike Ms. Murdoch-Woods and Mr. Beardy, I do not conclude that the grievor is a racist. While I agree that by virtue of the majority of the Company's clients being First Nations people, the grievor's statements have "racial overtones", not all such statements are made exclusively by racists.

84 In *Re Kemess Mines Ltd., supra*, the grievor was suspended and then dismissed "in response to what the Employer viewed as separate incidents of racial harassment contrary to its Human Rights Policy" (para.1). The complaints against the grievor were made by an employee, of Japanese origin, who worked for the company which operated the residences and meal services at a remote employer mine-site. In one incident, the grievor was looking for something in the food line and when he saw him, the complainant reported that the grievor said, "I'll go down the road to get some Chinese food." The complainant indicated, "I feel this is a racist comment." (para.5). The complainant reported that on another occasion, when he had served the grievor the same amount of food as others, the grievor had said the complainant was being "cheap ... we were in Canada are a meat and potato country, not China." (para.5). In an investigative meeting, the grievor acknowledged his "Chinese food" remark and had said, "he did not view his exchange with [the complainant] as racist, nor did he intend any racial implication in his reference to a Chinese restaurant." (para.8). The grievor had said that after his meal, he attempted to apologize to the complainant.

85 Another incident occurred when the grievor, on entering a company bus, found that it was crowded and had said, "all coloured people to the back", where there were empty seats. A First Nations person, the complainant, who was near the grievor when the comment was made, rejoined with the remark, "fuck you", and, "coloured people!", to which the grievor said to the complainant, "I'm glad your learned how to speak English." (para.13). The grievor reported that he had not addressed his "back of the bus" to the complainant, had not heard the complainant say, "coloured people!", but only "fuck you", and, that his "learned English" remark was in response to the latter words. (para. 18).

86 The arbitrator noted that while there were "variations" (para. 30) in witnesses' testimony as to the exact words spoken in the "Chinese food" incident, they do "not detract from the fact the Grievor made a comment which incorporated what may be described as racial innuendo. What is significant is that the comment was not overtly malicious or racist", but, "that statements which incorporate words that can be taken as racist are to be read objectively and that a belated assertion that the words were not intended to be racist is no answer" (para. 30). As to the "meat and potato" comment, arbitrator Hope states, "... applying the objective test favoured by the authorities, I conclude that the comments in both cases invoked stereotyping which carried the mistaken implication [the

complainant] was Chinese" (para. 32), but gave no weight to that evidence for purposes of assessing the level of discipline because the complainant had not earlier reported it.

87 As to the "back of the bus" incident, the arbitrator found, at para. 36:

There was nothing in the context recited in the evidence to suggest [the grievor] was meaning that [the complainant] should move to the back of the bus. When the totality of the evidence is weighed, the facts do not support a conclusion that either of the two incidents were racially motivated as opposed to isolated and ignorant jousting in a closed work environment.

88 Arbitrator Hope found that, in regard to the food line incident, "the comments made by the Grievor.

... constituted racial harassment (para. 43) ... despite the Grievor's assurance that the comments were not racially motivated and that he is not a racist" (para. 44). While finding the comments to be racial discrimination, the arbitrator did not find they were "spurred by a racist attitude Arrayed against the inferences to be drawn from the brief facts is the improbability that [the grievor], with approximately eight years of service in that close work environment, could have succeeded in suppressing racist attitudes in all those years." (para. 44). Further, arbitrator Hope found the food line comments to have been "motivated by ignorance rather than malice. It must be assumed that if the fact was he was a racist, expressions of it would have surfaced long since." (para. 45). He further comments, at para. 46:

I accept the evidence of the Grievor that his comments were not intended as a racial slur, however naïve and insensitive that assertion appears in retrospect. But whether or not the comments were intended as a racial slur and whether or not they were intended to create offence, the fact is they did create offence and, viewed objectively, they would be expected to have created offence.

89 In regard to the "back of the bus" episode, the arbitrator found, at para. 48 and para. 49:

... the "back of the bus" comment was offensive and racist in innuendo, even accepting that it was not directed at any one on the bus. In that context, the Grievor, having uttered a racist comment, was accountable for the reaction it triggered in [the complainant]. In that same vein, the Grievor was clearly accountable for his, "speaking" English", comment ...

On the facts, it is more likely that the Grievor's comment ... was motivated by his self-consciousness rather than a racial slur directed for no apparent reason at [the complainant]. In that context, the Grievor's history of employment ... mitigates [sic] against a finding that he was a racist. More singularly, there was nothing in the evidence to explain why he would make such a comment to [the complainant]. There was no history of any animosity or racial tension between the Grievor and First Nations employees generally or [the complainant] specifically.

90 Arbitrator Hope found that the grievor's comments in the above episode, as in the other episodes, warranted discipline, at para. 50:

... I agree with the arbitral authorities ... to the effect that actions can be viewed objectively as racially motivated create an accountability in the employee who is responsible for the conduct. Whatever its motivation, the multi-racial setting found in the Mine Site in general ... risks the incitement of an adverse reaction from one or more of the employees. That is, the comment, at best, was a clumsy attempt at humour that betrayed an insensitivity and ignorance which has long been viewed as unacceptable, particularly in a workplace. Further, the comment about "speaking English", which was directed specifically at [the complainant], was an insidious form of racial stereotyping which was equally unacceptable and, in that sense, constituted racial harassment as defined by the Employer's policy.

91 Arbitrator Hope found, however, that discharge was excessive discipline. He noted certain mitigating factors: that the grievor's mis-conduct was the first disciplinary offence in his eight years of employment and, therefore, warranted consideration of progressive discipline (para. 55); the isolated nature of his comments; that neither incident could be described as premeditated *Re Wm. Scott, supra*, and, that the grievor "had not intended to insult either of the two Complainants" (para. 57). Further, the arbitrator noted that discharge had "special economic implications for the Grievor" (para. 58), noting his age as resulting in the unlikelihood of finding alternate employment (and had found none after his dismissal), and, having a young family; "In the long term his age and a finding that he was racist would seriously impair his prospects for future employment." (para. 58). The arbitrator found, at para. 61, "... there was no basis for concluding that corrective discipline would prove unsuccessful in correcting his first instances of misconduct; and, at para. 62: "... the events in question do not support a finding that the employment relationship was incapable of being restored", in light of the grievor's employment circumstances of "no prior complaint about his racial attitudes and with no apparent difficulty in meeting and maintaining a proper standard of conduct." Further, at para. 63, the arbitrator took into account that the two complainants were opposed to the grievor's re-instatement: "But, the interests of those two employees should not so greatly outweigh the interests of the Grievor to the point that he is to be left late in his working life with little likelihood of obtaining alternate employment income with which to support his young family." The arbitrator imposed a 28-working day suspension.

92 In adopting arbitrator Hope's analysis as to the distinction between a racist and someone who makes a remark that has racial overtones, it is difficult to conclude that the grievor is a racist. His wife is a First Nations person (and whose Facebook comment concerning the grievor's statements is "Lol" i.e., "laugh out loud") and the grievor has long roots in a predominantly First Nations community where he was born, and as does his family. There is no evidence before me to suggest that the grievor's Facebook statements are anything but an isolated instance of public statements that have racial overtones. It would be highly improper to conclude on the basis of this one instance that the grievor is a racist.

93 In any event, because the grievor's Facebook statements do not reflect Company values but are disrespectful and impugn the dignity of its First Nations clients, the matter of harm to its reputation is a necessary consideration. In that regard, I agree that, as stated in *Re Toronto District School Board, supra*, at para.65:

Actual or potential reputational damage to [an employer] as a result of an employee's off-duty misconduct need not be proven through direct evidence of negative press scrutiny and/or public controversy or similar substantiation ... it is "the extent to which conduct has the potential for significant detrimental impact on the employer's business reputation or ability to operate its business effectively" ... that is a key consideration ...

94 The evidence is incomplete as to the total number of individuals who may have viewed the grievor's Facebook note, or, whether or not access to it was limited in some way by "locks" on that account. Be that as it may, the medium chosen by the grievor to express his statements lies within the public domain. The significance of that communications vehicle for our purposes is addressed in the *Alberta and A.U.P.E.* case.

95 In *Re Alberta and A.U.P.E.*, *supra*, the grievor, who worked in the public service, was discharged after "the Employer became aware of the contents of her personal blog" (p. 373). In dismissing the grievance, the majority states, at p. 412 as follows, relevant for our purposes:

While the grievor has a right to create personal blogs and is entitled to her opinions about people with whom she works, publicly displaying those opinions may have consequences within an employment relationship. The Board is satisfied that the Grievor, in expressing contempt for her managers, ridiculing her co-workers, and denigrating administrative processes, engaged in serious misconduct that irreparably severed the employment relationship, justifying discharge.

That a blog is a form of public expression is, or ought to be, self-evident. Unless steps are taken to prevent access, a blog is readable by anyone in the world with access to the internet. The Grievor took no steps to prevent access. On the contrary, the tone of her blogs placed them very much in the public arena and suggested that the Grievor relished addressing a wider audience.

And further, at p. 413:

The Union argued that few people in the workplace had discovered the Grievor's blogs at the time they came to management's attention, minimizing any damage. In the Board's view that is not the issue: *the issue is their content and public access to that content.* [Emphasis added.] The fact remains that some Department employees and managers had already read the blogs and were highly offended. Had management not intervened, there would have been nothing to prevent other Department members from reading them once word of the blog spread. Furthermore, one has no way of knowing how many other people ... had read the blogs. The point is, once the blogs were posted, they were in the public domain and the Grievor lost control over who read them.

96 Similarly, in the *Chatham-Kent* case, the grievor had also chosen an internet site to make disparaging remarks about the employer and its clients. In *Re Chatham-Kent*, *supra*, the grievor was discharged at p.322, when the employer, "discovered [the grievor] had created a website accessible to anyone with internet access, and where she had published resident information and pictures

without resident consent and had made inappropriate comments on this site about residents entrusted to her care."

97 The grievor had signed a "Confidentiality Agreement" which was "reviewed annually" (p. 322). The grievor had also posted on the website, from the employer's point of view, "comments ... about fellow employees [that] were of an inappropriate nature and that other comments demonstrated an insubordination towards management and the workplace in general." (p. 323). The arbitrator upheld the discharge, at p. 335:

Having reviewed the evidence the conclusion that must be reached in this case is that by her actions Ms. Clarke has provided the employer with just cause to impose discipline on a number of grounds, and that the basis for the just cause are those reasons set out in the Employer's letter of termination. First, by a breach of the confidentiality agreement and disclosing residents' personal information on a blog accessible to the public. Second, by making insubordinate remarks about management, work procedures, management decisions, and the general running of the Home and placing these on a blog available to members of the public. Third, that the nature of her comments, their hostility, and the language used to express them, demonstrated a disregard for residents' need for care, and that this was conduct unbecoming a Personal Care Giver in a Home for the Aged, as well as it being inappropriate for her to make the critical comments that she did on a public blog about some of her fellow employees.

98 The *Alberta* and *Chatham-Kent* cases indicate that where the internet is used to display commentary or opinion, the individual doing so must be assumed to have known there is potential for virtually world-wide access to those statements.

99 In the instant case, it is not unreasonable to assume the grievor knew his comments could have wide access, i.e., broad exposure in the public domain. I find that in using the internet as his medium for communicating his statements, the grievor did create a circumstance of potential harm to his Company's reputation. In both the *Alberta* and *Chatham-Kent* cases, the grievors did identify their workplaces, co-workers, and managers (and in the latter case, some of the individual clients) such that those individuals readily recognized themselves, and, hence, the workplace and they were in the public domain. However, in the instant case, the grievor does not identify the Company nor that he is an employee of it, and, does not indicate anywhere in his statements that those who fly in the Company's airplanes are First Nations people. The Company is not the only airline service in "the north", nor is there any indication that "the north" he is referring to is in Ontario or, indeed, in any specific country, bearing in mind world-wide access to the internet. Further, none of the four friends who commented on the grievor's Facebook note provide any indication as to the identity of the Company or of the grievor as its employee. That is, on the face of the grievor's Facebook note, what is reasonable to assume is that its author works in some capacity on airplanes that fly in "the north", wherever that may be, and has encountered incidents of poor behaviour by the travelling public, but which poor behaviour is not confined to any particular race, nationality, ethnic group, or, to any particular geographic area, as anyone who uses any kind of transport servicing the public can attest. That is, unlike the circumstances in the *Alberta* and *Chatham-Kent* cases, there is nothing in the grievor's Facebook note that identifies the Company, the grievor as an employee of it, or, that the clientele he is referring to are First Nations people. Nonetheless, the Company does provide airline service in "the north" and to that extent, his remarks do have a "real and material" connection to

the Company, albeit much less so than in the *Alberta* and *Chatham-Kent* cases. Given the nature of the grievor's Facebook statements, I find they not unreasonably give the Company cause to have "both substantial and warranted" concerns about potential reputational harm *Re Ottawa-Carleton, supra*, (para. 17). In that respect, while there is no evidence before me as to how many people saw the grievor's Facebook statements aside from the four friends, Ms. Ackewance, and, senior Company management personnel over the some 3-week period of the posting prior to its removal by the grievor, apparently on September 8, 2009, as stated, at p. 413, in *Re Alberta and A.U.P.E., supra*, it is not necessarily how many individuals actually viewed the statements, rather, "... the issue is their content and public access to that content."

100 The second consideration in the *Millhaven Fibres* case is whether or not the grievor's misconduct "renders the employee unable to perform his duties satisfactorily" *Re Ottawa-Carleton, supra* (para.15). In the instant case, the grievor's duties are those of an airplane pilot. I find his off-duty misconduct, as was the circumstance in the *Kenora* case, does not directly affect his ability to perform those duties (*cf.*, the school custodian in *Ottawa-Carleton* who robbed a bank, and the "school safety monitor" in *Toronto District* who assaulted a man while inebriated). However, due to his position as a pilot, the grievor does travel to First Nations communities, thereby bringing him into direct contact with First Nations people. Given that his misconduct has the potential to harm the Company's reputation, his presence in those communities could have that same effect. Thus, I find the grievor's misconduct does have potential to render him unable to satisfactorily perform his duties.

101 The third *Millhaven Fibres* consideration is whether or not the grievor's misconduct "leads to the refusal, reluctance or inability of other employees to work with him." *Re Ottawa-Carleton, supra*, (para. 15). Mr. Macklin, a First Nations person and as Chief Pilot the grievor's immediate supervisor, testified that he experienced, "shock, disappointment, and anger", when he read the grievor's statements in his Facebook note. Ms. Murdoch-Woods, a non-First Nations person and director of human resources, while too quick to and incorrectly labelled the grievor a "racist", testified her reactions to those statements were "shock, disappointment and [becoming] upset." In her September 3, 2009 e-mail to the Company president and vice-president (who are, both, First Nations persons) which, apparently, included the grievor's Facebook note, Ms. Ackewance, who is not a First Nations person, stated that she was "disappointed" with the grievor's statements. Ms. Murdoch-Woods testified that Ms. Ackewance told her she was "very upset" about the grievor's statements. Among the other seven or so senior managers who were addressed directly on or copied on e-mails that, apparently, contained or attached the grievor's Facebook note, the vice-president commented that it was "despicable", and Mr. Macklin's uncontradicted evidence is that the president was "angry" upon reading the grievor's statements.

102 Given the reactions to his Facebook note by, at least, the grievor's immediate supervisor, president and vice-president of the Company, and director of human resources, it is not unreasonable to conclude, and I so find, they would be reluctant to, and perhaps unable to, work with the grievor, in noting that those first three senior managers are First Nations persons who were involved in the decision to dismiss the grievor. Given Ms. Murdoch-Woods evidence, it is also not unreasonable to reach that same conclusion in her case. While Ms. Ackewance's reactions were disappointment and upset, I also note that she and the grievor grew up together and, thus, am uncertain of how that existing relationship affects her ability to work with the grievor. Further, it is evident from Mr. Beardy's testimony that, as a First Nations person who characterized the grievor's Facebook

statements as at least disrespectful of First Nations people, it is not unreasonable to conclude, and I so find, that he would be reluctant to work with the grievor.

103 The fourth *Millhaven Fibres* test is whether or not the grievor, "has been guilty of a serious breach of the Criminal Code and, thus, rendering his conduct injurious to the general reputation of the Company and its employees" *Re Ottawa-Carleton, supra*, (para. 15). In the instant case, there is no breach of the Criminal Code. However, because there are racial overtones in the grievor's Facebook statements, they run afoul of the Ontario *Human Rights Code*, R.S.O. 1990, c H.19 at section 1:

Every person has a right to equal treatment with respect to services, goods and facilities without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.

104 Further, the Company's Employee Policies and Procedure Handbook states, at p.8: "[The Company] values human rights and promotes the protection of recognized human rights codes, consistent with the policies of the government of Canada." Also, as previously indicated, the grievor's Facebook statements are not in accord with the Company's "First Nations Values", at p.4; "respect for one's peers, supervisors, clients and individual First Nations members." A reading of the Company's policies as they concern human rights, clearly indicates that respect for First Nations people is of paramount concern. As discussed in consideration of the first of the *Millhaven Fibres* test, I find the grievor's misconduct has the potential of being injurious to the general reputation of the Company.

105 The fifth *Millhaven Fibres* test is whether or not the grievor's misconduct "places difficulty in the way of the Company properly carrying out its function of efficiently managing its works and efficiently directing its work forces" *Re Ottawa-Carleton, supra*, (para. 15). In the instant case, both Messrs. Macklin and Beardy testified as to the effects the grievor's statements in his Facebook note would have on the Company's reputation and consequent ability to carry out its services to the First Nations communities and, in particular, its First Nations community-owners. I say "would have" because it would seem from the lack of evidence before me as to knowledge of the grievor's statement from anyone other than Ms. Ackewance, the four friends who commented on them, and, Company senior management personnel as to the content of his Facebook note, would suggest, as does Mr. Beardy, in his *viva voce* evidence, that those statements have not generated complaints from First Nations communities. However, the test is the "potential for detrimental impact on the employer's business ..." by way of those statements *Re Toronto District School Board, supra* (para. 65).

106 As concerns potential detriment to the Company's business, both Messrs. Macklin and Beardy indicated that because the grievor's Facebook statements would or could be viewed by First Nations persons as disrespectful of them, a possible response from First Nations communities would be to deny the Company permission to enter those locations (presumably where alternative air service is available on a regular basis). In that regard, Mr. Beardy's evidence, as concerns an incident in a northern community that included First Nations people, is that when it became known that a non-First Nations person had been disrespectful to a First Nations person, that community's "First Nations Council told [the Company] to address the concerns [the non-First Nations person] had created." Mr. Beardy said he was informed by Company staff in that community that, "We were

pretty much given an ultimatum - deal with or they'd ask [the Company] not to service [that] community." Mr. Beardy said the grievor's Facebook comments were "more serious than what happened in [that other community]." That is, both Messrs. Macklin and Beardy indicated, and I so find, that First Nations community responses to the grievor's Facebook statements could entail detrimental financial consequences for the Company.

107 On the basis of the above application of the five-fold *Millhaven Fibres* test for purposes of assessing the effects on the grievor's off-duty conduct in the form of his Facebook note, I find on the evidence on a balance of probabilities, that the Company's concerns about potential harm to its reputation and ability to carry out its business are "substantial and warranted" *Re Ottawa-Carleton, supra*, (para.17). I find the grievor's misconduct has a "real and material" connection to the Company; *Re Ottawa-Carleton, supra*, (para. 17), on the basis of the potential harm to its reputation given the grievor's role in the Company. I find the grievor's misconduct does render him unable to perform his duties as a Company pilot in a satisfactory manner. I find the grievor's misconduct has led to at least a reluctance on the part of his immediate supervisor and senior Company management personnel to work with him.

108 In further regard to determination of the appropriateness of the level of discipline imposed on the grievor, in *Re Wm. Scott, supra*, arbitrator Weiler cites, at p. 4, certain often referred-to arbitral factors in *Re Steel Equipment Co.* (1964), 14 L.A.C. 356 (Reville) that are considered in deciding whether or not the discipline imposed is excessive:

1. The previous good record of the grievor.
2. The long service of the grievor.
3. Whether or not the offence was an isolated incident in the employment history of the grievor.
4. Provocation
5. Whether the offence was committed on the spur of the moment as a result of a mandatory aberration, due to strong emotional impulses, or whether the offence was premeditated.
6. Whether the penalty imposed has created a special economic hardship for the grievor in the light of his particular circumstances.
7. Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination.
8. Circumstances negating intent e.g., likelihood that the grievor misunderstood the nature or intent of an order given to him, and as a result disobeyed it.
9. The seriousness of the offence in terms of company policy and company obligations.
10. Any other circumstances the board [of arbitration] should take into consideration.

109 I concur with the arbitral view that the above factors are useful for determining whether or not the level of discipline imposed on an employee is appropriate and apply them to the matter before me.

1. The previous good record of the grievor. The Company referred to two incidents said to reflect prior disciplining of the grievor. The first consists of a written warning to the grievor in regard to the Pickle Lake incident wherein the grievor became angry with a fellow employee. The warning states: "Any further inci-

dents involving harassment or bullying will be subject to a harsher discipline." The evidence is the grievor did apologize to his co-worker. The second incident referred to is the "beers and barbeque", wherein Mr. Macklin said the grievor ought to have accepted his flying assignment but had claimed to have had a headache. This incident, however, is of no import for purposes at hand. Firstly, Mr. Macklin erroneously believed the grievor had previously flown on the day in question. Secondly, Mr. Macklin agreed that it is the pilot's professional responsibility to decide whether or not he or she is fit to fly. In that case, the grievor, in claiming a headache, effectively determined he was unfit to fly. Moreover, determining one's own medical fitness for purposes of performing professional duties, or, engaging in a social event are completely un-related issues. I find, therefore, that the grievor's discipline record consists of a written warning.

2. The long service of the grievor. The grievor has some 3 1/2 years seniority. While not a lengthy amount of service, it places him, as was the evidence, roughly mid-way on the pilot seniority list. In any event, I find the grievor is not a long-service employee.
3. Whether or not the offence was an isolated incident in the employment history of the grievor. There is no evidence before me of any other instance where the grievor expressed statements that had racial overtones or had shown disrespect towards First Nations people.
4. Provocation. There is no evidence of any sort or form of provocation in the instant case.
5. Whether the offence was committed on the spur of the moment as a result of a momentary aberration due to strong emotional impulses, or whether the offence was premeditated. In his letter of apology, he states that on the day he posted his Facebook note, August 16, 2009, "... it was simply just a matter of venting frustrations on that given day." The Company records indicate that on August 16, 2009, the grievor was assigned "on reserve" and did not fly that day. Moreover, in the week preceding, he only flew on August 9th, and, on three occasions the week before. Thus, it would seem that whatever frustrations he was feeling on August 16, 2009, did not arise from performing his flying duties. Frustrations, however, do not only result from one's employment.
6. Whether the penalty imposed has created a special economic hardship for the grievor. There is no evidence before me to suggest the grievor has experienced special economic hardship as a result of his dismissal.
7. Evidence that the company rules of conduct either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination. It is not necessary for there to be a rule, written or otherwise, which indicates that public displays of disrespect by an employee towards an employer's clients or co-workers is unacceptable behaviour and that disciplinary action can result from such conduct. However, where an employer disciplines employees for this sort of misconduct, there is an obligation on it to uniformly enforce transgressions, i.e., similar offences ought to receive similar discipline. *Re KVP, supra*, p.85.

110 In the instant case, while the grievor was dismissed for posting his Facebook note, a co-worker, Cpt. Power, received a one-day suspension for his response to one of the grievor's statements, and which response is disrespectful of the Company's clients. As to whether or not the

grievor's more severe discipline is a form of discrimination, in *Re Universal Showcase, supra*, the union claimed, among other things, that a 3-day suspension issued to the grievor for his mis-conduct during an employer training session was discriminatory when another employee, who had also mis-conducted himself in another of the training sessions, was not disciplined. In the grievor's case, he resisted repeated attempts by the presenters and a fellow employee to cease his disruptive and, apparently, belligerent behaviour. He did not apologize for his behaviour. In the case of the other employee; "Although the conduct [of the other employee] is similar to the grievor's conduct the next day, I am satisfied that it was less extreme. Also [the presenter] says that when she insisted that [the other employee] stop he did so, and that he approached her at the end of the session and said words ... which she took to be his way of apologizing." (para. 18). Arbitrator Surdykowski found that the grievor had not been discriminated against, at para. 35:

I am not satisfied that the discipline imposed on the grievor was discriminatory. First of all, the evidence suggests that [the other employee] did not behave as badly as the grievor. Second, [the other employee] was a senior employee, and unlike the grievor he had a clean disciplinary record, he ceased his disruptive behaviour when instructed to do so, and he apologized to the satisfaction of [the presenter] and the Company. I am satisfied the grievor was not in substantially the same position ...

111 Relevant for our purposes, the above indicates that similar improper behaviour by two employees can properly result in different discipline without being discriminatory, based on such factors as the extent of the behaviour, the employees work record, and, activities on the part of the employees which serve to lessen the offensiveness of their conduct, for example, an apology. Similarly, in the *Ontario (Ministry of Natural Resources)* case, the arbitrator took into account the extent to which the grievors had engaged in the same type of inappropriate use of the employer's equipment in deciding on different levels of discipline.

112 The *Universal Showcase* and *Ontario (Ministry of Natural Resources)* cases establish that it is not discriminatory to impose different levels of discipline on employees who engage in similar types of misconduct in consideration of the extent of that conduct, the circumstances of its occurrence, the employees' discipline records, and, factors unique to the employee or circumstances which may tend to lessen the penalty, i.e., mitigating factors or, conversely, factors that justify discipline, i.e., aggravating factors. In the instant case, as concerns the different levels of discipline imposed on Cpt. Power and the grievor, there is a significant circumstance that tends to militate against justification for that difference.

113 The grievor was dismissed because his Facebook statements evidenced disrespect for First Nations people, and which requirement for respect is articulated as part of the Company's "First Nations values", as stated in the Employee Policies and Procedure Handbook. The Company disciplined Cpt. Power because his Facebook comment was viewed by it as supportive of the grievor's statements. That is, Cpt. Power was disciplined because his comment showed disrespect for First Nations people, i.e., a fundamental breach of the Company's values. Given that both the grievor's and Cpt. Power's statements represent single incidents that breach fundamental Company values, the difference in the levels of discipline, while somewhat justified on the basis of seniority and discipline records and, to a degree, the number of disrespectful statements, the identical nature of the misconduct does not justify a one-day suspension for Cpt. Power and the dismissal of the grievor. I find, in the particular circumstances of the instant case, that the Company did discriminate against

the grievor in the form of a much more severe disciplinary response to his misconduct as compared to its disciplinary response to Cpt. Power.

114 Further, I find the Company discriminated against the grievor in relation to its response to Mr. Chapman's public statement about the Association. On his website, Mr. Chapman clearly identified himself with the Company and made a remark that is blatant in its anti-union animus and disrespect to unionized members of the public and to those employees who support unions. Moreover, Mr. Chapman is a public figure for the Company and identified himself as a "boss". Similar to the grievor's Facebook note, a number of people in Mr. Chapman's case, approximately ten, including co-workers, indicated they had viewed Mr. Chapman's remark. While the Company submitted that Mr. Chapman's remark was his "personal opinion", that opinion clearly associated the Company, in the public domain, with anti-union animus and which association would be harmful to its reputation, at least among unions and union members in that domain. I find, therefore, that the Company, which did not discipline Mr. Chapman, did discriminate against the grievor to the extent that both the grievor's and Mr. Chapman's statements are harmful to its reputation.

8. Circumstances negating intent. As I have found, the grievor's statements have racial overtones. As to whether or not the grievor intended them to be of that nature, his intention does not negate that there exists those overtones *Re Kemess Mines Ltd., supra*. However, that does not mean, for purposes at hand, his intentions are not subject to assessment. In that regard, the evidence is that the grievor is married to a First Nations person (who, on the day the grievor posted his Facebook note responded with "laugh out loud", i.e., did not read the statements as being offence). Further, he lives, as did his grandparents and as does his mother, aunt and uncle, in a First Nations community. Surely, these circumstances tend to militate against an intention on his part to show disrespect to First Nations people, particularly where there is no evidence of statements with racial overtones having been previously made by him. Nonetheless, his statements do exhibit racial overtones.
9. The seriousness of the offence in terms of company policy and its obligations. This factor has been extensively dealt with under the rubric of the *Millhaven Fibres* five-fold test with the result of a finding that the grievor's off-duty misconduct has given the Company substantial and warranted concerns regarding the potential harm to its reputation and ability to conduct its business as a result of that misconduct.
10. Any other circumstances the board [of arbitration] should take under consideration. A circumstance that draws attention in the instant case is the Company's decision to dismiss the grievor prior to meeting with him on September 9, 2009. That is, the Company did not meet its "... general duty of procedural fairness owed ... to the Grievor" *Re Maple Leaf Meats Inc., supra*, at para. 71, as argued by the union in that award and found by the arbitrator Graham to be "logical and compelling" (para.80).

115 In the *Re Maple Leaf Meats* case, the union contended that the grievor had been unjustly discharged for alleged "deliberately and fraudulently charged amounts of money, representing purchases by her of various food items from a Company cafeteria, to the account of another employee, without the knowledge or permission of the other employee ... not more than \$18.68." (para. 3).

The grievor denied any wrongdoing on her part and relevant for our purposes, "asserts the Company's investigation of the relevant background facts was seriously flawed and that the manner in which the Company communicated to her with respect to these matters compromised her ability to defend herself against the allegations of misconduct" (para. 4). The Company did not interview the grievor prior to deciding to discharge her. Arbitrator Graham found that the provisions of the collective agreement did not provide for "specific requirements which the Company must fulfill prior to imposing discipline" (para. 70). The union, at para. 71, argued that:

"... there is nonetheless a general duty of procedural fairness owed by the Company to the Grievor which required the Company to conduct its investigation of the questionable transactions fairly and reasonably. According to the Union, such a general duty of fairness required the Company to interview the Grievor before reaching any disciplinary decision, and to provide the Grievor with sufficient information to enable her to understand the specific allegations against her, and to afford the Grievor a reasonable opportunity to respond to those allegations.

116 In recognizing, at para. 80, that the above union's argument "is logical and compelling," the arbitrator then states, "but the Company has both a practical and a legal response to that argument." As to the practical response, at para. 81: "the practical response is that the Company considered the evidence of wrongdoing on the part of the Grievor so strong that they considered a pre-termination interview ... to be unnecessary." In regard to the legal response: "[It] is based on a line of cases starting with *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 ... in which the court ruled that any procedural unfairness which arose from the manner in which statements were taken from an employee involved in that case by his superiors, was wholly cured by the hearing *de novo* before an adjudicator ..." (para. 82). Thus, while the arbitrator states, at para. 87, "it would clearly have been preferable for the Company to have interviewed the Grievor ... prior to deciding to terminate her employment.", he then states at para. 88:

However, the Grievor was given full particulars of the allegations against her prior to this hearing, and afforded an opportunity to challenge the Company's case and to introduce her own evidence at the hearing. In such circumstances, I have concluded that although the lack of a pre-termination interview was a flaw, it was rectified by the grievance proceedings including this arbitration hearing. The flaw, so rectified, will not void or vitiate the employer's decision, provided the Company is ultimately able to discharge the onus of proving, on a balance of probabilities, that the Grievor used [a co-worker's] employee number to purchase food items.

(See also *Re Central Care Corp.*, *supra*, where the union grieved the discharge of two employees on the alleged grounds that "... on numerous occasions you have been abusive to residents violating their rights and dignity. In addition, your behaviour has created an atmosphere of intimidation, harassment and poisoned work environment for the residents and staff." (para. 4). Relevant for our purposes, arbitrator Whitehead found, "There were significant irregularities and deficiencies in the employer's investigation", but also found, "on the facts that these deficiencies in the investigation were not fatal to any discipline imposed." In that regard, he cited, with approval, the statement, at para. 88 in *Re Maple Leaf Meats Inc.*, *supra*.)

117 Relevant for our purposes, while the Company did not provide the grievor with an opportunity to defend himself prior to the decision to dismiss him, that defect has been cured in the instant case. The grievor was made aware of the reason for the September 9, 2009 meeting and, when faced with the Company's decision, remained silent. Further, the hearing of the grievor's complaint of dismissal is *de novo* and, thus, he was provided with the opportunity to testify as to the circumstances of his dismissal. That he chose not to do so does not in any way diminish the cure provided for by this hearing to the Company's failure to follow procedural fairness. However, I note that by not following a procedure which would have provided it with an opportunity to discuss with the grievor his Facebook note prior to deciding upon the level of discipline, the Company deprived itself of the chance to explore with the grievor as to whether or not, in Mr. Macklin's words said during his testimony, "If this is what [the grievor] really thinks of us."

118 Another circumstance to be considered is whether or not the Company has "attempted earlier and more moderate forms of corrective discipline" *Re Slocan Forest Products, supra*, (para. 27). In the instant case, earlier corrective discipline consists of a written warning to the grievor for demonstrating anger towards a co-worker, but which circumstance is not at all similar to the matter at hand.

119 On the basis of the above application of the arbitral approaches to assessing the grievor's off-duty conduct and consideration of well-known factors that tend to mitigate the level of discipline imposed by an employer on an employee, I find the grievor's off-duty misconduct does create potential harm to the Company's reputation and its ability to efficiently manage its business. I find the grievor's misconduct creates a circumstance where his supervisor and senior Company managers are at least reluctant to work with him. As to mitigating factors, I find the grievor's short-term service and prior discipline consisting of a written warning tend not to lessen the level of discipline imposed by the Company. I find there was no provocation so as to cause an emotional response in the form of his misconduct. I find the grievor's misconduct is but a single incident of statements with racial overtones which seems out of character with his personal circumstances, thereby leading me to conclude he is not a racist. I find that, while the grievor's remarks breach human rights legislation, I accept, by way of his letter of apology, that he did not intend to so breach the legislation. I find there is no evidence of his dismissal having created special economic hardship. I find the grievor's misconduct is a serious breach of the Company's policies, in particular, its First Nations values. I find the level of discipline imposed on the grievor is discriminatory against him and that the Company is inconsistent in enforcing breaches of those values in instances of breach by way of disrespect towards clients and co-workers. I find the Company's decision to discipline the grievor does not reflect procedural fairness but which breach of fundamental justice in the instant case has been cured by way of this arbitration hearing. I find that the Company did consider a lesser level of discipline prior to its decision to impose dismissal.

120 As to whether or not consideration of the above mitigating factors in a case of off-duty conduct would cause a lessening of the level of discipline imposed on the grievor, in the *Ottawa-Carleton* case, the arbitrator, at para. 15, would seem, in regard to the *Millhaven Fibres* five-fold test, to have approved of the statement in the *Millhaven Fibres* case that "... it is not necessary for an employee to show that all criteria exist, but rather, depending on the degree of impact of the offence, any one of the consequence may warrant discipline or discharge." In the instant case, the grievor's misconduct, in the form of disrespect and breach of fundamental Company values, has been found to have the potential to harm the Company's reputation, to have the potential to harm its ability to efficiently conduct its business, and, to cause management personnel to be at least reluc-

tant to work with him. However, I have also found that the Company did discriminate against the grievor in that while he was dismissed, neither Cpt. Power nor Mr. Chapman, who both demonstrated lack of respect in their actions -- hence, breaches of fundamental Company values, drew a one-day suspension in the case of the former and no discipline whatsoever in the case of the latter. Moreover, there is no evidence that supervisors or co-workers are not prepared to work with Cpt. Power and Mr. Chapman.

121 Based on all the foregoing, I find that while in other circumstances, the level of discipline imposed on the grievor is excessive in consideration of mitigating factors, thereby warranting re-instatement following a period of suspension, re-instatement is not appropriate in all the circumstances at hand. The grievor's misconduct has the potential for significant detrimental effect on the Company's reputation and ability to conduct efficiently its business. His misconduct has also poisoned the work environment, given the evidence of his immediate supervisor and other senior managers of the Company. In these circumstances, I find the grievor's misconduct has rendered the employment relationship untenable.

122 On the basis of the above findings, the following represents an appropriate award:

1. The grievor is suspended for 4 months, effective to January 9, 2010.
2. The grievor is entitled to full compensation and benefits effective January 10, 2010 to April 9, 2010.
3. The grievor is to resign from the Company, effective April 10, 2010.
4. The letter of dismissal is to be expunged from the grievor's employment record.

123 I remain seized of my jurisdiction in the event the parties experience any difficulty in implementing this decision.

Dated at Toronto, this 12th day of May, 2010.

"William A. Marcotte"

William A. Marcotte
Arbitrator

qp/e/qlhbb/qlced