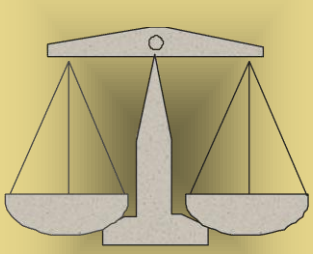
Séminaire de la FTQ sur l'arbitrage de grief – 2011

Vers de nouvelles tendances en droit du travail



État de la jurisprudence en droit du travail

Me Ronald Cloutier,
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FTQ

Barreau du Québec
Formation reconnue

21e SÉMINAIRE DE LA FTQ SUR L'ARBITRAGE DE GRIEF

Préparé par : Me Ronald Cloutier
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1. DROIT ET ASSOCIATION

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Health Services and Support – Facilities Subsector Bargaining Association, Health Services and Support – Community Subsector Bargaining Association, Nurses' Bargaining Association, Hospital Employees' Union, B.C. Government and Service Employees' Union, British Columbia Nurses' Union, Heather Caroline Birkett, Janine Brooker, Amaljeet Kaur Jhand, Leona Mary Fraser, Pamela Jean Sankey-Kilduff, Sally Lorraine Stevenson, Sharleen G. V. Decillia et Harjeet Dhami
Appelants
et
Sa Majesté la Reine du chef de la province de la Colombie-Britannique
Intimée
- et -
Procureur général de l'Ontario, procureur général du Nouveau-Brunswick, procureur général de l'Alberta, Confédération des syndicats nationaux, Congrès du travail du Canada, Michael J. Fraser, en son propre nom et au nom de United Food and Commercial Workers Union Canada, et British Columbia Teachers' Federation
Intervenants

TRADUCTION FRANÇAISE OFFICIELLE

CORAM : La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, Deschamps, Fish et Abella

MOTIFS DE JUGEMENT CONJOINTS : (par. 1 à 168) — La juge en chef McLachlin et le juge LeBel (avec l'accord des juges Bastarache, Binnie, Fish et Abella)

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health services and support *c.* c.-b.

Health Services and Support – Facilities Subsector Bargaining Association, Health Services and Support — Community Subsector Bargaining Association, Nurses' Bargaining Association, Hospital Employees' Union, B.C. Government and Service Employees' Union, British Columbia Nurses' Union, Heather Caroline Birkett, Janine Brooker, Amaljeet Kaur Jhand, Leona Mary Fraser, Pamela Jean Sankey-Kilduff, Sally Lorraine Stevenson, Sharleen G. V. Decillia

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Sa Majesté la Reine du chef de la province de la

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Répertorié: Health Services and Support – Facilities Subsector Bargaining Assn. *c.*

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Présents: La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, Deschamps, Fish et Abella.

en appel de la cour d'appel de la colombie-britannique

Droit constitutionnel — Charte des droits — Liberté d'association — Droit de négocier collectivement — Loi sur l'amélioration de la prestation des services de santé et des services sociaux qu'un gouvernement provincial a adoptée pour faire face à une crise pressante dans le secteur de la santé — Loi visant les conditions d'emploi des travailleurs de la santé — La liberté d'association garantie par la Constitution comprend-elle le droit procédural de négociation collective? — Dans l'affirmative, la loi porte-t-elle atteinte au droit de négocier collectivement? — Cette atteinte est-elle justifiable? — Charte canadienne des droits et libertés, art. 1, 2d) — Health and Social Services Delivery Improvement Act, S.B.C. 2002, ch. 2, partie 2.

Droit constitutionnel — Charte des droits — Droits à l'égalité — travailleurs de la santé — Loi sur l'amélioration de la prestation des services de santé et des services sociaux qu'un gouvernement provincial a adoptée pour faire face à une crise pressante dans le secteur de la santé — Loi visant les conditions d'emploi des travailleurs de la santé — Les effets de la loi sur les travailleurs de la santé constituent-ils de la discrimination selon l'art. 15 de la Charte canadienne des droits et libertés? — Health and Social Services Delivery Improvement Act, S.B.C. 2002, ch. 2, partie 2.

La *Health and Social Services Delivery Improvement Act* a été adoptée par suite des difficultés qui pèsent sur le système de santé de la Colombie-Britannique. Elle fut rapidement adoptée. Aucune véritable consultation des syndicats n'est intervenue avant que le projet devienne loi. La partie 2 de la Loi modifie les droits liés aux transferts et affectations dans différents lieux de travail (art. 4-5), la sous-traitance (art. 6), le statut des employés contractuels (art. 6), les programmes de sécurité d'emploi (art. 7-8), les droits de mise en disponibilité et de supplantation (art. 9). Elle accorde aux employeurs du secteur de la santé une plus grande latitude pour aménager à leur gré leurs relations avec leurs employés et, dans certains cas, pour procéder d'une manière que les conventions collectives existantes n'auraient pas autorisée, et ce, sans se conformer aux exigences de consultation et de notification qui auraient été normalement applicables. Elle a invalidé d'importantes dispositions des conventions collectives alors en vigueur et a effectivement interdit toute véritable négociation collective sur certaines questions. De plus, l'art. 10 invalidait toute partie d'une convention collective, présente ou future, incompatible avec la partie 2, et toute convention collective visant à modifier ces restrictions. Les appelants, qui sont des syndicats et des membres des syndicats représentant le sous-secteur des infirmiers, celui des installations ou le sous-secteur communautaire, contestent la constitutionnalité de la partie 2 de la Loi au motif qu'elle porte atteinte à la liberté d'association et aux droits à l'égalité garantis par la *Charte canadienne des droits et libertés*. Selon la juge de première instance et la Cour d'appel, la partie 2 de la Loi ne va pas à l'encontre de l'al. 2*d*) ni de l'art. 15 de la *Charte*.

Arrêt (la juge Deschamps est dissidente en partie) : Le pourvoi est accueilli en partie. Les paragraphes 6(2) et (4) et l'art. 9 de la Loi sont inconstitutionnels. L'effet de la présente déclaration est suspendu pour 12 mois.

La juge en chef **McLachlin** et les juges Bastarache, Binnie, **LeBel**, Fish et Abella : La liberté d'association garantie par l'al. 2*d*) de la *Charte* comprend le droit procédural de négocier collectivement. Les motifs avancés dans des arrêts antérieurs de la Cour pour exclure les négociations collectives de la protection accordée par l'al. 2*d*) ne résistent pas à un examen fondé sur les principes pertinents et devraient être écartés. L'objet général des garanties de la *Charte* et le libellé général de l'al. 2*d*) se concilient avec la reconnaissance d'une certaine protection de la négociation collective. Par ailleurs, le droit de négociation collective ne représente pas l'oeuvre récente du législateur. L'histoire de la négociation collective au Canada révèle que, bien avant la mise en place des régimes légaux actuels des relations du travail, la négociation collective était reconnue comme un aspect fondamental de la vie de la société canadienne, représentant la plus importante activité collective par l'intermédiaire de laquelle s'exprime la liberté d'association dans le contexte des relations du travail. Le droit de s'associer avec d'autres en vue de la négociation collective est reconnu depuis longtemps comme un droit fondamental au Canada, qui existait avant l'adoption de la *Charte.* On peut à juste titre considérer la protection consacrée à l'al. 2*d*) de la *Charte* comme l'aboutissement d'un mouvement historique vers la reconnaissance d'un droit procédural de négocier collectivement. L'adhésion du Canada à des instruments internationaux reconnaissant l'existence du droit de négocier collectivement appuie aussi la thèse que ce droit est protégé à l'al. 2*d*). Il faut présumer que la *Charte* accorde une protection au moins aussi grande que les instruments internationaux ratifiés par le Canada en matière de droits de la personne. Enfin, la protection de la négociation collective garantie par l'al. 2*d*) est compatible avec les valeurs reconnues par la *Charte* et avec l'ensemble de ses objectifs. Reconnaître que le droit des travailleurs de négocier collectivement est inhérent à leur liberté d'association réaffirme les valeurs de dignité, d'autonomie de la personne, d'égalité et de démocratie, intrinsèques à la *Charte*. [22] [39-41] [66] [68] [70] [86]

Le droit constitutionnel de négocier collectivement vise à protéger la capacité des travailleurs de participer à des activités associatives et leur capacité d'agir collectivement pour réaliser des objectifs communs concernant des questions liées au milieu travail et leurs conditions de travail. L'alinéa 2*d*) de la *Charte* protège non pas les objectifs particuliers que les employés cherchent à atteindre par cette activité associative, mais plutôt le processus de réalisation de ces objectifs. Cela signifie que les employés ont le droit de s'unir, de présenter collectivement des demandes à leurs employeurs du secteur public et de participer à des discussions en vue d'atteindre des objectifs liés au milieu de travail. L'alinéa 2*d*) impose aux employeurs du secteur public des obligations correspondantes d'accepter de rencontrer les employés pour discuter avec eux. Il restreint aussi le pouvoir de légiférer en matière de négociation collective. Cependant, il ne protège pas tous les aspects de l'activité associative liée à la négociation collective. Il protège uniquement contre les « entraves substantielles » à l'activité associative. Il n'est pas nécessaire de démontrer l'intention de porter atteinte au droit d'association lié à la négociation collective pour établir la violation de l'al. 2*d*. Il suffit que la loi ou l'acte de l'État ait pour effet d'entraver de façon substantielle l'activité de négociation collective. Pour qu'il s'agisse d'une atteinte substantielle à la liberté d'association, l'intention ou l'effet doit sérieusement compromettre l'activité des travailleurs qui consiste à se regrouper en vue de réaliser des objectifs communs, c'est-à-dire négocier des conditions de travail et des modalités d'emploi avec leur employeur. [89-90] [92]

Pour déterminer si une mesure gouvernementale ayant des répercussions sur le processus de négociation collective constitue une atteinte substantielle, il faut examiner successivement deux questions : (1) l'importance que les aspects touchés revêtent pour le processus de négociation collective et, plus particulièrement, la capacité des syndiqués d'agir d'une seule voix en vue de réaliser des objectifs communs ainsi que (2) l'impact de la mesure sur le droit collectif à une consultation et à une négociation menée de bonne foi. Si les aspects touchés n'ont pas de répercussions importantes sur le processus de négociation collective, la mesure n'enfreint pas l'al. 2*d*) et il se peut que l'employeur n'ait pas l'obligation de tenir des discussions et des consultations. Par ailleurs, les modifications qui ont une profonde incidence sur la négociation collective ne contreviendront pas non plus à l'al. 2*d*) si elles préservent le processus de consultation et de négociation menée de bonne foi. L'atteinte à l'al. 2*d*) ne surviendra que dans le cas où seront en cause à la fois un sujet d'importance pour le processus de négociation collective et une mesure imposée sans égard à l'obligation de négocier de bonne foi. [93-94] [109]

L'un des éléments fondamentaux de l'obligation de négocier de bonne foi consiste en l'obligation de tenir des rencontres et de consacrer du temps au processus. Les parties ont l'obligation d'établir un véritable dialogue : elles doivent être disposées à échanger et expliquer leurs positions. Elles doivent faire un effort raisonnable pour arriver à un contrat acceptable. Cependant, l'obligation de négocier de bonne foi n'impose pas la conclusion d'une convention collective ni l'acceptation de clauses contractuelles particulières. Pour déterminer si des dispositions législatives empiètent sur le droit collectif à une consultation et à une négociation menées de bonne foi, il faut tenir compte des circonstances de leur adoption. Une situation d'urgence est susceptible d'influer sur le contenu et les modalités de l'obligation de négocier de bonne foi. Différentes situations peuvent commander différents processus et échéanciers. De plus, on se gardera de tirer à la légère, en l'absence d'un dossier bien étayé, une conclusion d'atteinte à l'obligation de consulter et de négocier de bonne foi. [100-101] [103] [107]

En l'espèce, les art. 4, 5 et 9 et les par. 6(2) et (4) de la Loi, appliqués conjointement avec l'art. 10, constituent une ingérence dans le processus de négociation collective, soit en mettant de côté les processus de négociation collective antérieurs, soit en compromettant à l'avance l'intégrité des futurs processus de négociation collective sur ce sujet, ou les deux à la fois. Les articles 4 et 5 apportent des modifications relativement mineures aux régimes existants de transfert et de nouvelle affectation des employés. D'importantes protections subsistaient. Il est vrai que la Loi retirait désormais ces questions de la table des négociations collectives, mais, tout bien considéré, on ne peut pas affirmer que les art. 4 et 5 entravent de façon substantielle la capacité du syndicat d'engager des négociations collectives et qu'il s'agisse d'un cas donnant droit à la protection prévue à l'al. 2*d*) de la *Charte*. Toutefois, les dispositions concernant la sous-traitance (par. 6(2) et (4)), la mise en disponibilité (al. 9a), b) et c)) et la supplantation (al. 9d)) entravent le droit de négocier collectivement garanti par l'al. 2*d*). Ces dispositions portent sur des questions d'une importance capitale pour la liberté d'association et entravent de façon substantielle les activités associatives. De plus, elles ne respectent pas le droit à un processus de négociation collective. Même si le gouvernement se trouvait dans une situation d'urgence, les mesures qu'il a adoptées constituent pratiquement une négation du droit garanti par l'al. 2*d*) à un processus de consultation et de négociation menée de bonne foi. [128] [130-132] [134-135]

La violation de l'al. 2*d*) ne peut se justifier au sens de l'article premier de la *Charte*. Même si le gouvernement a établi que l'objectif principal de la Loi d'améliorer la prestation des services de santé ainsi que les sous-objectifs étaient pressants et réels et même s'il peut être logique et raisonnable de conclure qu'il existe un lien rationnel entre les moyens adoptés dans la Loi et les objectifs, il n'a pas été démontré que la Loi ne portait qu'une atteinte minimale au droit de négociation collective reconnu aux employés par l'al. 2*d*). Selon le dossier, le gouvernement ne s'est pas demandé s'il pourrait atteindre son objectif par des mesures moins attentatoires. Une gamme de solutions lui ont été présentées, mais il n'a offert aucune preuve expliquant pourquoi il a retenu cette solution en particulier ni pourquoi il n'a pas véritablement consulté les syndicats au sujet de la gamme de solutions qui s'offraient à lui. Le projet de loi représentait une importante mesure législative dans le domaine du travail, qui était susceptible d'avoir un effet dramatique et exceptionnel sur les droits des employés. Pourtant le gouvernement l'a rapidement adopté en sachant parfaitement que les syndicats s'opposaient fortement à de nombreuses dispositions de ce projet, sans envisager d'autres moyens qui lui auraient permis d'atteindre son objectif et sans expliquer ses choix. [143-144] [147] [149] [156] [158] [160-161]

La partie 2 de la Loi ne va pas à l'encontre de l'art. 15 de la *Charte.* Les distinctions créées par la Loi tiennent essentiellement aux différences qui existent entre les secteurs d'emploi, en raison des pratiques suivies de longue date selon lesquelles la réglementation en matière de travail est établie par des mesures législatives propres à chaque secteur du marché du travail, et elles ne constituent pas de la discrimination au sens de l'art. 15. La différenciation et les effets préjudiciables de la loi envers certains groupes de travailleurs tiennent essentiellement au genre de travail qu'ils exécutent et non à leur personne. La preuve ne révèle pas non plus que la Loi reflète une application stéréotypée de caractéristiques personnelles ou de groupe. [165] [167]

La juge **Deschamps** (dissidente en partie) : Je souscris de manière générale aux motifs de la majorité au sujet de l'étendue de la liberté d'association garantie par l'al. 2*d*) de la *Charte* en matière de négociation collective. Je conviens aussi que rien ne permet de conclure qu'il y a eu en l'espèce discrimination au sens de l'art. 15 de la *Charte*. Toutefois, je ne souscris pas à l'analyse quant à l'atteinte à l'al. 2*d*) et quant à la justification de l'atteinte selon l'article premier de la *Charte*. [170]

Étant donné que le litige, en l'espèce, porte non pas sur la portée trop limitative de la loi, mais sur l'obligation de l'État de ne pas entraver un processus de négociation collective, il ne convient pas d'imposer la norme de l'« entrave substantielle » quand il s'agit de déterminer si une mesure gouvernementale enfreint l'al. 2*d*). De plus, comme le résultat concret obtenu à l'issue d'un processus de négociation collective ne bénéficie d'aucune protection constitutionnelle, la substance du droit n'est pas la première question qu'il faut se poser pour l'évaluation de la demande selon l'al. 2*d*). Il faudrait plutôt vérifier en premier lieu si les mesures législatives entravent la capacité des travailleurs d'agir de concert pour ce qui est des questions liées au milieu de travail. En l'espèce, il est plus approprié, pour déterminer s'il y a eu atteinte à l'al. 2*d*), de se fonder sur une grille d'analyse qui peut être ainsi libellée : Les lois ou les actes de l'État qui empêchent ou interdisent la tenue de véritables discussions et consultations entre employés et employeur au sujet d'importantes questions liées au milieu travail peuvent interférer dans l'activité de négociation collective, tout comme les lois qui invalident unilatéralement des stipulations négociées à propos d'importantes questions liées au milieu de travail que prévoient des conventions collectives en vigueur. Premièrement, il faut déterminer s'il y a eu entrave de quelque façon que ce soit au processus de négociation entre employeur et employés ou leurs

représentants. Dans l'affirmative, le tribunal doit alors passer à la seconde étape et vérifier si les questions en cause sont importantes. Seules les entraves qui concernent des questions importantes dans le contexte des relations du travail sont pertinentes pour l'application de l'al. 2*d*). [175] [177-178] [180-181]

En l'espèce, la Loi constitue à plusieurs égards une atteinte à la liberté d'association des employés du secteur de la santé parce que les art. 4, 5 et 9 et les par. 6(2) et (4) (appliqués conjointement avec l'art. 10) portent atteinte à leur droit à un processus de négociation collective avec l'employeur. Les articles 4 et 5 annulent des stipulations de conventions collectives existantes, limitent la portée des négociations futures et empêchent les travailleurs de se livrer à des activités associatives concernant l'importante question des transferts et des affectations des employés. Les paragraphes 6(2) et (4) de la Loi rendent nulles les négociations collectives antérieures sur la sous-traitance et du même coup en rendent le processus inopérant; ils excluent aussi, pour l'avenir, la négociation collective de cette question. Ils traitent d'une importante question touchant la sécurité d'emploi, et la négociation des questions de cette nature est l'un des objets des activités associatives en milieu de travail. Enfin, l'art. 9 vide de sens la négociation collective de certains aspects de la mise en disponibilité et de la supplantation et invalide certaines parties de conventions collectives portant sur ces importantes questions relatives au milieu de travail. [186-188] [252]

En adoptant la partie 2 de la Loi, le gouvernement avait pour objectifs de répondre aux besoins croissants en matière de services, de réduire les obstacles structurels qui limitent l'accès aux soins, d'améliorer la planification et d'accroître l'obligation de rendre compte, de façon à assurer la viabilité à long terme du système. En plus de ces objectifs généraux, les dispositions contestées visaient à offrir un système de santé plus cohérent et flexible et à mettre en place des méthodes de travail permettant d'offrir des services de santé à moindre coût et de façon plus efficace, de manière à améliorer les soins aux patients et à réduire les coûts. Les objectifs de la partie 2 de la Loi et des dispositions contestées sont importants. Le système de santé est mis à rude épreuve et traverse une crise de viabilité. Il est peu probable qu'il puisse survivre dans sa forme actuelle. [198-200]

D'après le contexte de ces objectifs, il est clair que, même si la nature de certaines conditions de travail susceptibles d'être touchées milite en faveur d'une approche moins déférente, il faut faire preuve d'une grande déférence lorsqu'il s'agit de déterminer si les mesures adoptées en l'espèce sont justifiées au sens de l'article premier, surtout compte tenu du problème de viabilité que connaît le système de santé et de la vulnérabilité des patients. En l'espèce, il existe un lien rationnel entre les mesures prévues aux art. 4, 5 et 9 et aux par. 6(2) et (4) de la Loi et les objectifs urgents et réels poursuivis et ces dispositions, à l'exception du par. 6(4), satisfont aux exigences d'atteinte minimale et d'effets proportionnés. [193] [222-223]

En ce qui concerne l'atteinte minimale, il ressort du dossier que le gouvernement a adopté les mesures contestées après avoir examiné et rejeté d'autres options qui, à son avis, ne lui permettraient pas d'atteindre ses objectifs. De plus, la partie 2 de la Loi ne visait pas directement les droits que la *Charte* garantit aux employés concernés. L'objectif était plutôt de répondre aux besoins croissants en matière de services, de réduire les obstacles structurels qui limitent l'accès aux soins, d'améliorer la planification et d'accroître l'obligation de rendre compte, de façon à assurer la viabilité à long terme du système. L'article 4 de la Loi visait spécifiquement à faciliter la réorganisation des

services de santé en permettant aux employeurs de transférer des fonctions ou services dans un autre lieu de travail ou à un autre employeur du secteur de la santé dans la même région. Quant à l'art. 5, il porte sur l'affectation temporaire de l'employé dans un autre lieu de travail ou chez un autre employeur. Les employés ne perdent pas leur emploi du fait des art. 4 et 5, et le règlement pris en application de la Loi atténue l'impact de ces dispositions sur les employés. Selon le par. 6(2), la sous-traitance n'est pas obligatoire; sont plutôt interdites les clauses de conventions collectives qui empêchent la sous-traitance. Ainsi, bien que la densité syndicale risque d'être plus faible en cas de sous-traitance, la liberté d'association de tous les employés affectés aux services non cliniques est loin d'être compromise et il demeure tout à fait possible de participer au processus de négociation collective, même si certains de ces services sont sous-traités. Dans le cadre de la crise qui sévissait dans le secteur de la santé en Colombie-Britannique, les autres options n'auraient pas, de la même façon que l'élimination des interdictions en matière de sous-traitance figurant dans les conventions collectives, permis au gouvernement d'atteindre son objectif. Au surplus, les autres mesures que le gouvernement avait envisagées étaient problématiques parce que bon nombre d'entre elles auraient pu toucher directement d'autres droits garantis par la *Charte*. Quant à l'art. 9, il entravait le processus de négociation collective des questions relatives à la mise en disponibilité et à la supplantation, mais son application était assujettie à un délai. Il s'agissait d'une mesure transitoire, qui n'interdisait pas l'incorporation de clauses relatives à la supplantation et à la mise en disponibilité dans les conventions collectives. Elle visait plutôt à atténuer les conditions relatives à la mise en disponibilité et à la supplantation en remplaçant celles convenues lors du processus de négociation collective. Non seulement l'impact de l'al. 9d) sur les travailleurs est minimisé par les garanties prévues par l'art. 5 du règlement pris sous le régime de la Loi, mais aussi la preuve justifie qu'on conclue que l'art. 9 de la Loi a permis au gouvernement d'atteindre ses objectifs — accroître la viabilité du système de santé et améliorer les services aux patients — d'une façon que d'autres solutions ne lui auraient pas permis de le faire. Tout comme pour le par. 6(2), l'histoire des relations du travail en Colombie-Britannique tend nettement à indiquer que les conditions prévues à l'art. 9 n'auraient pu être négociées par les employeurs et les syndicats du secteur de la santé. Les articles 4, 5 et 9 et le par. 6(2) ont donc été soigneusement conçus de façon à permettre au gouvernement d'atteindre ses objectifs tout en enfreignant le moins possible l'al. 2*d*). Ils représentent une réponse proportionnée à la crise de viabilité que traversait le secteur de la santé, permettant d'établir un juste équilibre entre les objectifs du gouvernement et la liberté d'association des employés. [229-230] [232] [234-236] [238] [240] [245] [248] [250-251]

Le paragraphe 6(4) ne satisfait pas aux critères de l'atteinte minimale et de la proportionnalité et est inconstitutionnel. Le gouvernement n'a pas démontré, que ce soit par la preuve, par inférence ou en se fondant sur le bon sens, qu'on limiterait de façon déraisonnable la capacité de l'employeur de sous-traiter en exigeant qu'il consulte au préalable les syndicats concernés. Bien que le par. 6(4) n'interdise pas, à proprement parler, la tenue de consultations sur la sous-traitance, en déclarant que les clauses de conventions collectives prévoyant la tenue de consultations sont nulles, on incite les employeurs à ne pas consulter. L'interdiction de tenir des consultations — lesquelles représentent une composante importante du processus de négociation collective — est une aussi mesure disproportionnée. Les effets préjudiciables que cause aux syndicats concernés le refus de consulter l'emportent sur les minces avantages que comporte cette disposition. [242] [249] [252]

II. Ontario (procureur général) *c.* Fraser, 2011 CSC

COUR SUPRÊME DU CANADA

RÉFÉRENCE : Ontario (Procureur général) *c.* Fraser, 2011 CSC 20

DATE : 20110429
DOSSIER : 32968

ENTRE :

Procureur général de l'Ontario
Appelant
et
Michael J. Fraser en son propre nom et au nom de l'Union internationale des travailleurs et travailleuses unis de l'alimentation et du commerce — Canada, Xin Yuan Liu, Julia McGorman et Billie-Jo Church
Intimés
- et -
Procureur général du Canada, procureur général du Québec, procureur général du Nouveau-Brunswick, procureur général de la Colombie-Britannique, procureur général de l'Alberta, Fédération de l'agriculture de l'Ontario, Employeurs des transports et communications de régie fédérale, Conseil du patronat du Québec Inc., Fonds de recours juridique des membres de la Gendarmerie, Conseil canadien des employeurs, Coalition of BC Businesses, British Columbia Agriculture Council, Justicia for Migrant Workers, Industrial Accident Victims Group of Ontario, Congrès du travail du Canada, Association canadienne des policiers et Association canadienne des libertés civiles
Intervenants

TRADUCTION FRANÇAISE OFFICIELLE

CORAM : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell

MOTIFS DE JUGEMENT : (par. 1 à 118): Les juges en chef McLachlin et le juge LeBel (avec l'accord des juges Binnie, Fish et Cromwell)

MOTIFS CONCORDANTS QUANT AU RÉSULTAT (par. 119 à 296): Le juge Rothstein (avec l'accord de la juge Charron)

MOTIFS CONCORDANTS QUANT AU RÉSULTAT (par. 297 à 320): La juge Deschamps

MOTIFS DISSIDENTS (par. 321 à 369): La juge Abella

NOTE : Ce document fera l'objet de retouches de forme avant la parution de sa version définitive dans le *Recueil des arrêts de la Cour suprême du Canada*.

ONTARIO (P.G.) *c.* FRASER

Procureur général de l'Ontario *Appelant*

c.

Michael J. Fraser en son propre nom et au nom de l'Union internationale des travailleurs et travailleuses unis de l'alimentation et du commerce — Canada, Xin Yuan Liu, Julia McGorman et Billie-Jo Church *Intimés*

et

Procureur général du Canada,
procureur général du Québec,
procureur général du Nouveau-Brunswick,
procureur général de la Colombie-Britannique,
procureur général de l'Alberta,
Fédération de l'agriculture de l'Ontario,
Employeurs des transports et communications de régie fédérale,
Conseil du patronat du Québec Inc.,
Fonds de recours juridique des membres de la Gendarmerie,
Conseil canadien des employeurs,
Coalition of BC Businesses, British Columbia Agriculture Council,
Justicia for Migrant Workers, Industrial Accident Victims Group of Ontario,
Congrès du travail du Canada,
Association canadienne des policiers et
Association canadienne des libertés civiles *Intervenants*

Répertorié : Ontario (Procureur général) *c.* Fraser

2011 CSC 20

N° du greffe : 32968.

2009 : 17 décembre; 2011 : 29 avril.
Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit constitutionnel — Charte des droits — Liberté d'association — Droits de négociation collective — Législation distincte en matière de relations du travail régissant les travailleurs agricoles en Ontario — L'al. 2d) oblige-t-il le législateur à accorder aux travailleurs agricoles des droits de négociation collective d'un type particulier pour permettre un exercice réel de leur liberté d'association? — Dans l'affirmative, la législation porte-t-elle à la liberté d'association parce qu'elle ne protège pas l'exercice des droits de négociation collective? — Cette atteinte se justifie-t-elle? — Charte canadienne des droits et libertés, art. 1, 2(d) — Loi de 2002 sur la protection des employés agricoles, L.O. 2002, ch. 16 — Loi de 1995 sur les relations de travail, L.O. 1995, ch. 1, ann. A, art. 3b.1).

Droit constitutionnel — Charte des droits — Droit à l'égalité — Législation distincte en matière de relations de travail régissant les travailleurs agricoles en Ontario — La LPEA porte-t-elle atteinte au droit à l'égalité des travailleurs garanti à l'art. 15 de la Charte en leur refusant les mesures protection reconnues aux travailleurs d'autres secteurs? — Dans l'affirmative, cette atteinte se justifie-t-elle? — Charte canadienne des droits et libertés, art. 1, 15 — Loi de 2002 sur la protection des employés agricoles, L.O. 2002, ch. 16 — Loi de 1995 sur les relations de travail, L.O. 1995, ch. 1, ann. A, art. 3b.1).

En 2002, l'Ontario a adopté la *Loi de 2002 sur la protection des employés agricoles* (la « LPEA »), qui exclut les travailleurs agricoles de la *Loi sur les relations de travail* (la « LRT »), mais crée pour eux un régime de relations du travail particulier. La LPEA a été adoptée en réaction à l'arrêt *Dunmore c. Ontario (Procureur général)*, 2001 CSC 94, [2001] 3 R.C.S. 1016, dans lequel notre Cour a statué que le texte de loi antérieur contrevenait à l'al. 2*d*) de la *Charte canadienne des droits et libertés* et l'a déclaré inconstitutionnel. Elle confère aux travailleurs agricoles le droit de former une association et d'y adhérer, de participer à ses activités, de se réunir, de présenter à l'employeur par l'entremise de leur association des observations relatives à leurs conditions d'emploi et d'exercer leurs droits sans crainte d'ingérence, de contrainte ou de discrimination. L'employeur doit donner à une association d'employés l'occasion de présenter des observations au sujet des conditions d'emploi et il est tenu de les écouter ou de les lire. La LPEA confie à un tribunal la fonction d'entendre et de régler tout litige relatif à l'application de la Loi.

Après quelques démarches pour se prévaloir des nouvelles mesures de protection de la LPEA, on a contesté la validité constitutionnelle de cette loi au motif qu'elle portait atteinte aux droits des travailleurs agricoles garantis par l'al. 2*d*) et par l'art. 15 de la *Charte*, en ce qu'elle ne protégeait pas véritablement le droit de s'associer et de négocier collectivement et refusait aux travailleurs agricoles les mesures protection reconnues aux travailleurs d'autres secteurs. En 2006, la Cour supérieure de justice de l'Ontario a rejeté la demande. La Cour d'appel a accueilli l'appel et déclaré la LPEA inconstitutionnelle. Elle s'est prononcée après l'arrêt *Health Services and Support — Facilities Subsector Bargaining Assn. c. Colombie-Britannique*, 2007 CSC 27, [2007] 2 R.C.S. 391.

Arrêt (la juge Abella est dissidente) : Le pourvoi est accueilli et l'action est rejetée.

La juge en chef **McLachlin** et les juges **LeBel**, Binnie, Fish et Cromwell : L'alinéa 2*d*) de la *Charte* protège le droit de s'associer pour atteindre des objectifs collectifs. Cette protection constitutionnelle demande l'établissement d'un processus de dialogue où l'association d'employés peut présenter des observations à l'employeur, qui doit en prendre connaissance et en discuter de bonne foi. Une loi ou une action de l'État qui entrave substantiellement la capacité de réaliser des objectifs liés au travail grâce à des actions concertées fait obstacle à l'exercice du droit de libre association. Une telle loi ou action restreint donc la liberté d'association garantie à l'al. 2*d*) et devient de ce fait inconstitutionnelle, sauf justification au regard de l'article premier de la *Charte.*

Les activités de négociation en contexte de relations du travail protégées par l'al. 2*d*) comprennent la négociation de bonne foi de questions importantes liées à l'exécution des fonctions. Ce droit implique que l'employeur et les employés se rencontrent et négocient de bonne foi en vue de réaliser leur objectif commun d'accommodement par des moyens pacifiques et productifs. La négociation de bonne foi découlant de l'al. 2*d*) exige que les parties se rencontrent et qu'elles engagent un véritable dialogue; elle n'impose pas de processus particulier; elle n'oblige pas les parties à conclure une convention ou à accepter des clauses particulières; elle ne garantit pas un mécanisme légal de règlement des différends permettant de dénouer les impasses; elle ne protège que le droit à un processus général de négociation collective, et non le droit de revendiquer un modèle particulier de relations du travail ou un mode particulier de négociation. L'alinéa 2*d*) garantit, dans le contexte des relations du travail, le droit à un processus véritable.

La décision rendue dans *Health Services* découle directement des principes énoncés dans *Dunmore*. Lorsqu'on l'interprète téléologiquement et dans la perspective des valeurs canadiennes et des engagements internationaux du Canada, l'al. 2*d*) protège l'activité associative exercée collectivement pour atteindre des objectifs liés au travail. Le droit ne possède pas seulement un caractère théorique; il commande un processus qui permet véritablement la poursuite de ces objectifs. Les principes établis dans *Dunmore* et *Health Services* sont fondés en droit, ne doivent pas être écartés et permettent de régler le sort du présent pourvoi.

On ne saurait trop insister sur la gravité du renversement d'arrêts récents de la Cour qui expriment l'avis réfléchi de majorités claires. Les arguments invoqués en faveur de la rupture avec *Health Services* ne satisfont pas aux conditions strictes imposées pour le renversement d'un précédent de notre Cour, car cet arrêt prend appui dans les décisions antérieures, il est compatible avec les valeurs canadiennes, il respecte les engagements internationaux du Canada et il s'inscrit dans la foulée de l'interprétation téléologique et généreuse des autres garanties constitutionnelles. *Health Services* s'inscrit dans la lignée d'arrêts antérieurs portant sur les droits individuels et collectifs. Il reconnaît comme eux que l'al. 2*d*) confère un droit individuel. Il reconnaît aussi, comme eux, que l'al. 2*d*) peut à bon droit imposer une protection législative de l'activité collective pour assurer l'exercice véritable du droit individuel. La déférence envers le Parlement et les législatures préconisée dans *Health Services* se situe également dans le droit fil de la jurisprudence générale de notre Cour. Il faut maintenir une attitude de déférence au moment de déterminer si un régime législatif satisfait aux exigences de la *Charte* établies par les tribunaux. L'inapplicabilité de *Health Services* n'est pas établie. Rien ne démontre concrètement que les principes dégagés dans *Dunmore* et *Health Services* seraient inapplicables ou qu'ils auraient

entraîné des résultats inadmissibles. Il est prématuré de conclure à l'inapplicabilité pratique de l'arrêt *Health Services* rendu il y a seulement quatre ans.

Le législateur ontarien n'est pas obligé d'accorder aux travailleurs agricoles des droits de négociation collective d'un type particulier pour permettre un exercice réel de leur liberté d'association. En l'espèce, la Cour d'appel surestime la portée du droit protégé à l'al. 2*d*). La reconnaissance du droit de négociation collective n'est pas la consécration d'un type particulier de système de négociation collective, comme le modèle Wagner qui prédomine au Canada. L'alinéa 2*d*) protège le droit de s'associer afin de réaliser des objectifs collectifs. La loi ou la mesure de l'État qui entrave substantiellement la capacité de réaliser des objectifs collectifs a pour effet de restreindre la liberté d'association en la privant de sens. C'est dans ce sens dérivé que l'al. 2*d*) protège le droit de négociation collective. La Constitution n'exige pas que les législateurs, dans tous les cas et pour tous les secteurs d'activité, adoptent des lois établissant un modèle uniforme de relations du travail qui imposerait l'obligation de négocier de bonne foi, reconnaîtrait les principes du monopole syndical et du vote majoritaire et prévoirait un mécanisme pour dénouer les impasses des négociations et résoudre les différends relatifs à l'interprétation ou à l'application d'une convention collective. C'est l'activité associative qui est protégée, et non un processus ou un résultat particulier.

Les travailleurs agricoles de l'Ontario ont droit à un processus véritable leur permettant de réaliser des objectifs liés au travail. Le droit d'une association d'employés de présenter des observations à l'employeur et de les voir prises en compte de bonne foi est dérivé de la liberté garantie à l'al. 2*d*) de la *Charte* et il est nécessaire à l'exercice véritable du droit de libre association. La LPEA prévoit un processus qui satisfait à cette exigence constitutionnelle. Dans la LPEA, le droit d'une association d'employés de formuler des observations à l'intention de l'employeur est prévu à l'art. 5, qui dispose que l'employeur écoute les observations présentées oralement et lit celles formulées par écrit, puis informe l'association qu'il les a lues.

La LPEA n'exige pas expressément de l'employeur qu'il examine de bonne foi les revendications de ses employés; toutefois, l'obligation lui en est faite implicitement. Il faut résoudre toute ambiguïté du libellé de l'art. 5 en tenant pour acquis qu'il oblige l'employeur agricole à examiner de bonne foi les observations de ses employés, étant donné qu'une loi doit s'interpréter de manière que ses dispositions aient un sens et un objet et que le Parlement et les législatures sont présumés vouloir respecter la *Charte*. Une seule explication peut être trouvée à l'obligation imposée à l'employeur d'écouter ou de lire les observations présentées par les employés : s'assurer que l'employeur considère effectivement ces observations. Une simple obligation d'écoute ou de lecture passive ne permettra pas de réaliser cet objectif. Pour s'acquitter de son obligation, l'employeur doit examiner les observations. De plus, il doit le faire de bonne foi : une attitude fermée rend l'examen sans objet. On peut déduire des commentaires qui ont été présentés à l'Assemblée législative au cours des débats sur la LPEA et qui précisaient qu'elle ne vise pas l'application de la négociation collective aux travailleurs agricoles, que la LPEA n'instaure pas le modèle Wagner, prédominant en matière de négociation collective, et ne fait pas bénéficier les travailleurs agricoles du régime de la *LRT*. Ils ne signifient pas que la LPEA voulait priver ces employés du droit de négociation collective garanti à l'al. 2*d*). La LPEA ne porte pas atteinte à la liberté garantie à l'al. 2*d*) de la *Charte.*

L'article 5 de la LPEA, s'il est correctement interprété, protège non seulement le droit des employés de présenter à l'employeur des observations relatives au travail, mais aussi celui de les voir prises en considération de bonne foi par l'employeur. L'article 5 de la LPEA ne contrevient donc pas à l'al. 2*d*) de la *Charte*. La LPEA a pour objet l'exercice véritable du droit de s'associer et elle prévoit un tribunal pour le règlement des différends. L'article 11 de la LPEA habilite expressément le Tribunal à déterminer s'il y a eu infraction à la Loi et à rendre des ordonnances réparatrices. De plus, on peut s'attendre à ce que, conformément à son mandat, le Tribunal interprète téléologiquement ses pouvoirs de façon qu'ils soient efficaces et utiles. Les tribunaux du travail jouissent d'une grande latitude pour appliquer leur loi constitutive aux faits particuliers des affaires dont ils sont saisis.

Il n'y a pas lieu d'examiner les prétentions relatives à l'article premier. À l'instar de la demande fondée sur l'al. 2*d*), le moyen alléguant la discrimination au sens de l'art. 15 de la *Charte* ne peut être accueilli. Certes, le régime créé par la LPEA ne confère pas toutes les protections que la LRT offre à de nombreux autres travailleurs. Toutefois, une distinction législative formelle ne permet pas d'établir la discrimination visée à l'art. 15, à savoir la discrimination réelle qui, en raison de l'application de stéréotypes, a des incidences sur des individus ou a pour effet de renforcer des préjugés ou des désavantages existants. La LPEA crée un régime de relations du travail spécialement pour les travailleurs agricoles. Cependant, le dossier n'établit pas que le régime repose sur des stéréotypes inéquitables ou qu'il perpétue des préjugés ou des désavantages existants. Tant qu'il n'a pas été mis à l'épreuve, on ne peut savoir si le régime de la LPEA défavorise indûment les travailleurs agricoles. Le recours demeure prématuré.

Les juges Charron et **Rothstein :** L'alinéa 2*d*) protège la liberté des individus de s'associer et d'exercer des activités associatives. Il protège la liberté des travailleurs de s'unir, de mettre au point une position de négociation et de présenter un front commun à l'employeur. Il ne protège pas le droit à la négociation collective ni n'impose d'obligations à autrui, comme celle de négocier de bonne foi qui incomberait à l'employeur. Dans la mesure où elle constitutionnalise la négociation collective, la décision dans l'affaire *Health Services* est erronée. Il faut rompre avec cet arrêt, ce qui permettrait de résoudre le litige constitutionnel en l'espèce.

Notre Cour peut écarter ses propres précédents, mais ne devrait le faire que si des raisons impérieuses le justifient. La question qui se pose chaque fois appelle une mise en balance : les motifs qui justifient le respect d'un précédent — comme la certitude, la cohérence, la prévisibilité et la légitimité institutionnelle — l'emportent-ils sur la nécessité d'écarter un précédent dont le caractère erroné le justifie? C'est le cas en l'espèce : l'erreur commise dans *Health Services* touche une question de droit constitutionnel et n'est pas susceptible d'être corrigée de façon durable par le législateur. *Health Services* s'écarte sensiblement de bonnes décisions, dont *Dunmore*, concernant l'objet de la protection constitutionnelle de la liberté d'association; la protection constitutionnelle de la négociation collective au sens où l'entend notre Cour dans l'arrêt *Health Services* ne peut s'appliquer indépendamment d'autres éléments de la législation moderne du travail; les auteurs critiquent vivement l'arrêt *Health Services*.

L'arrêt *Health Services* constituait une rupture expresse d'avec les décisions antérieures de la Cour sur l'al. 2*d*), notamment *Dunmore*. Cette rupture est survenue lorsque les juges majoritaires de notre Cour ont conclu que l'al. 2*d*) obligeait le gouvernement à légiférer pour faciliter la réalisation des objectifs communs que visait la formation d'une association, plutôt que pour protéger la liberté d'association elle-même. Dans *Dunmore*, la nécessité pour le gouvernement de protéger les travailleurs par une loi découlait de la prémisse que certains travailleurs ne pouvaient pas s'associer sans une intervention gouvernementale. Dans *Health Services*, les juges majoritaires ont insisté sur les objectifs d'une association et la valorisation de ces objectifs, plutôt que sur la capacité des demandeurs de s'associer (ce qu'ils avaient déjà fait). En appliquant la véritable conclusion de l'arrêt *Dunmore*, la Cour aurait décidé uniquement si le gouvernement entravait de façon substantielle la capacité de s'associer.

Dans *Health Services*, la formation majoritaire de la Cour conclut à tort que l'al. 2*d*) protège la négociation collective et oblige les parties à négocier de bonne foi, et ce, pour cinq raisons. Premièrement, l'arrêt *Health Services* rompt avec les principes valables établis dans les décisions antérieures de la Cour sur la nature et la portée de l'al. 2*d*). L'alinéa 2*d*) vise à protéger les individus et non les groupements comme tels. Dans *Health Services*, les juges majoritaires réinterprètent une liberté individuelle et concluent qu'elle fait naître des droits collectifs sans assise individuelle. Sa nouvelle interprétation de la portée de l'al. 2*d*) constitue un abandon de la jurisprudence antérieure qui n'est pas justifié par l'objet de la garantie constitutionnelle.

Deuxièmement, l'al. 2*d*) protège des libertés, et non des droits. Suivant l'arrêt *Health Services*, si l'al. 2*d*) protégeait uniquement la possibilité pour les travailleurs de présenter des revendications collectives et n'obligeait pas l'employeur à négocier de bonne foi, il ne protégerait pas le droit à la négociation collective. En imposant à un tiers (l'employeur) une obligation, cette proposition fait de la liberté garantie à l'al. 2*d*) un droit « positif ». Le droit à la négociation collective n'est pas un droit dérivé d'une liberté — il s'agit d'un droit autonome créé par la Cour, et non par la *Charte*. Un droit dérivé n'existe que s'il est nécessaire pour l'exercice d'une liberté fondamentale. Un employé individuel n'a pas le droit d'obliger son employeur à le rencontrer et à faire un effort raisonnable pour arriver à un contrat de travail acceptable. Reconnaître le droit à la négociation collective sur le fondement de l'al. 2*d*) au motif qu'il dériverait de la liberté d'association est incompatible avec la jurisprudence de notre Cour en matière de droits dérivés de libertés garanties par la *Charte*.

Troisièmement, l'alinéa 2(*d*) n'autorise pas la Cour à favoriser certaines associations. Dans les décisions antérieures, la Cour interprète la liberté d'association de manière neutre quant à sa nature en ce qu'elle ne favorise pas d'associations en particulier. Dans *Health Services*, elle affirme à tort que cette démarche n'est pas téléologique. Les juges majoritaires dans *Health Services* laissent entendre qu'il ne convient pas d'interpréter la liberté d'association de manière « générale », car des groupes différents doivent avoir des libertés différentes. Cependant, le contexte pertinent pour l'interprétation téléologique d'une liberté garantie par la *Charte* ne correspond pas à celui dans lequel des individus exercent cette liberté dans un cas donné. L'interprétation téléologique de l'al. 2*d*) exige plutôt que l'on situe la liberté d'association dans ses contextes linguistique, philosophique et historique. Les origines du concept, les termes utilisés pour le définir et les principes philosophiques sur lesquels il repose circonscrivent la protection qu'offre l'al. 2*d*). L'étendue de cette protection ne devrait pas varier en

fonction de la celui qui exerce ses droits. En matière de protection des libertés fondamentales, la Cour doit se garder d'attribuer une valeur relative à la manière dont un individu exerce une liberté. Comme elle s'abstient de se prononcer sur la valeur relative d'une religion ou de ses préceptes pour l'application de l'al. 2*a*) et de déterminer la valeur relative ou la teneur d'un exercice donné de la liberté d'expression garantie à l'al. 2*b*), elle ne doit pas favoriser un type d'association plutôt qu'un autre pour l'application de l'al. 2*d*).

Quatrièmement, l'al. 2*d*) ne confère pas de protection constitutionnelle aux contrats. La formation majoritaire dans *Health Services* dit constitutionnaliser le processus de la négociation collective, et non ses fruits, mais dans les faits, cet arrêt confère une protection constitutionnelle aux conventions collectives parce qu'elles sont issues de ce processus.

Cinquièmement, dans le domaine des relations du travail, l'al. 2*d*) commande une interprétation déférente à l'endroit du législateur. Dans *Health Services*, la formation majoritaire a eu tort de dépouiller le Parlement et les législatures provinciales de leur pouvoir décisionnel en la matière. Bien qu'il appartienne aux tribunaux de protéger la faculté des individus de faire collectivement ce qu'ils ont le droit de faire individuellement, ils ne sont pas en mesure d'apporter de subtils réglages à l'équilibre des rapports de force entre syndicats et patronat en matière de relations du travail.

En outre, les motifs invoqués dans *Health Services* pour faire bénéficier la négociation collective de la protection de l'al. 2*d*) — l'histoire des relations du travail au Canada, les obligations internationales du pays et les valeurs consacrées par la *Charte* — ne justifient ni la constitutionnalisation du droit à la négociation collective ni l'obligation des employeurs d'y participer.

La thèse avancée dans *Health Services* selon laquelle le droit à la négociation collective, qui oblige l'employeur à négocier de bonne foi, caractérisait le droit canadien du travail avant l'adoption de lois en la matière contredit des versions établies de l'histoire des relations du travail au Canada et elle a récemment fait l'objet de vives critiques de la part d'auteurs. Bien qu'elle puisse constituer le précepte fondamental de la négociation collective suivant le modèle Wagner, l'obligation de négocier de bonne foi n'est pas un précepte fondamental de la négociation collective au sens où on l'entendait avant l'adoption de la *Loi Wagner* ni au sens où on l'entend encore de nos jours dans de nombreuses parties du monde.

Le droit international n'appuie pas la constitutionnalisation du droit de négocier collectivement. Selon une proposition formulée par la formation majoritaire dans *Health Services*, la négociation collective fait partie intégrante de la liberté d'association reconnue en droit international. La majorité s'appuie en particulier sur la Convention n° 87 de l'OIT. Ce faisant, elle commet deux erreurs. Le Canada a bien ratifié la Convention n° 87 de l'OIT, mais celle-ci porte sur la liberté d'association sans faire aucunement mention de la négociation collective. En outre, la formation majoritaire confond deux conventions distinctes de l'OIT, car elle se reporte à la Convention n° 87, mais utilise en fait le texte de la Convention n° 98. Or, le Canada n'a pas ratifié la Convention n° 98, de sorte qu'elle ne le soumet à aucune obligation. Même si la Convention n° 98 s'appliquait au Canada, dans

Health Services, la formation majoritaire aurait tout de même tort de s'appuyer sur elle pour constitutionnaliser la négociation collective entendue au sens où l'employeur est tenu de négocier de bonne foi. Bien que la Convention n° 98 protège le processus de négociation collective, elle y voit un processus « volontaire » fondamentalement distinct de celui que prévoit le modèle Wagner. La Convention n° 98 n'oblige pas les parties à négocier de bonne foi.

Les valeurs consacrées par la *Charte* ne peuvent être invoquées à l'appui de la constitutionnalisation du droit à la négociation collective. Selon la formation majoritaire dans *Health Services*, la reconnaissance du droit à la négociation collective de bonne foi s'intègre dans la logique, voire la défense, des autres droits, libertés et valeurs consacrés par la *Charte*, à savoir la dignité humaine, l'égalité, la liberté, le respect de l'autonomie de la personne et la mise en valeur de la démocratie. L'obligation de négocier de bonne foi peut certes permettre d'atteindre ces objectifs, mais ou bien la *Charte* exige une chose, ou bien elle ne l'exige pas. Le rôle de la Cour est de déterminer ce que la *Charte* exige ou pas et d'appliquer ensuite les exigences, s'il en est, aux faits dont elle est saisie. Il ne s'agit pas simplement de promouvoir, autant que faire se peut, les valeurs perçues subjectivement par certains comme les assises de la *Charte* en général. Comme l'alinéa 2*d*) ne prévoit rien au sujet de la politique économique et sociale, notre Cour ne peut s'immiscer dans ce domaine lorsque ni la loi ni la Constitution ne l'y autorisent.

Finalement, dans *Health Services*, l'interprétation par la majorité des juges de la négociation collective en particulier et de l'al. 2*d*) en général est inapplicable en pratique. La formation majoritaire accorde la protection constitutionnelle à l'obligation de négocier de bonne foi sans inclure d'autres volets du modèle Wagner et elle entend protéger le processus de négociation collective sans protéger aussi ses fruits; l'un et l'autre sont indéfendables. Pour que l'obligation de négocier de bonne foi ne confère pas seulement un avantage illusoire, il faut à la fois un mécanisme pour sortir les négociations de l'impasse et une réparation en cas de manquements répétés à cette obligation. Ainsi, un mécanisme doit s'appliquer automatiquement pour mettre fin à une impasse — comme la grève ou l'arbitrage exécutoire. Également, dans les cas extrêmes de manquements, un arbitre pourra imposer l'inclusion de conditions précises dans la convention collective. Chacun de ces éléments va bien au-delà du seul processus et aboutit à la protection d'une issue concrète particulière. L'incapacité de la majorité à dissocier substance et processus, et la constitutionnalisation qui s'en suit de conditions de la négociation collective font ressortir l'inapplicabilité pratique de la distinction entre la substance et le processus établie dans l'arrêt *Health Services*.

La LPEA ne contrevient pas à l'al. 2*d*) de la *Charte*. La LPEA donne précisément suite à l'arrêt *Dunmore*. Il ressort du texte, du contexte et de l'objet de cette loi que le législateur a délibérément choisi de ne pas obliger l'employeur à négocier avec une association d'employés. L'interprétation de l'art. 5 de la LPEA ne permet pas de conclure qu'il impose une obligation de négocier de bonne foi. Le libellé de l'art. 5 ne comporte aucune ambiguïté : il donne à une association d'employés l'occasion de présenter ses observations à l'employeur. Ce dernier est uniquement contraint à donner à l'association d'employés l'occasion de présenter des observations et à les écouter lorsqu'elles sont présentées oralement ou à les lire et à informer l'association qu'il les a lues lorsqu'elles sont présentées par écrit. Affirmer le contraire revient à faire fi du sens ordinaire et grammatical des

mots et de l'objet de la LPEA et à créer de toutes pièces de l'ambiguïté. Qui plus est, rien dans l'objet énoncé à l'article premier de la LPEA ni dans les propos de la ministre ayant présenté la LPEA ne permet de conclure que des employés agricoles peuvent exiger de leur employeur qu'il négocie avec eux collectivement.

Quant aux arguments relatifs à l'article 15, la fonction de travailleur agricole ne confère pas une caractéristique personnelle immuable (ou considérée comme immuable) justifiant la protection contre la discrimination garantie à l'art. 15.

La juge **Deschamps** *:* La décision rendue dans *Health Services* n'a pas la vaste portée que lui attribuent les juges majoritaires en l'espèce. Le litige ne réside pas dans la question de savoir si la LPEA prévoit un processus qui respecte le droit d'une association d'employés de présenter des observations à l'employeur et de les voir prises en compte de bonne foi. Si l'obligation d'agir de bonne foi s'inscrit dans un faisceau de dispositions législatives, il ne saurait être question en l'espèce de la tenir pour constitutionnelle. L'élargissement de la définition de « liberté d'association » résultant des conclusions prononcées dans *Health Services* n'a aucune incidence sur la protection que le législateur ontarien doit accorder aux employés agricoles.

Suivant l'arrêt *Health Services*, la liberté d'association englobe la liberté de participer à des activités associatives et la faculté des employés d'agir de concert pour réaliser des objectifs communs concernant le travail et les conditions d'emploi. Définie de la sorte, la liberté d'association ne nécessite pas une protection plus grande que celle prévue par le cadre législatif dont la Cour ordonne l'adoption dans l'arrêt *Dunmore* pour régir les employés agricoles. La LPEA respecte les principes énoncés dans l'arrêt *Dunmore* et est conforme à la *Charte*.

Même si le droit du travail offre des outils qui contribuent à atténuer la disparité des revenus, tous ses aspects ne bénéficient pas de la protection de la *Charte*. L'égalité économique ne constitue pas l'un des « droits à l'égalité » garantis à l'art. 15 de la *Charte*. L'arrêt *Dunmore* est fondé sur le principe voulant que, généralement, la *Charte* n'oblige pas l'État à agir pour faciliter l'exercice d'une liberté fondamentale. La dichotomie droits positifs/droits négatifs y est reconnue. Pour contourner la règle générale, une grille d'analyse a été établie pour les cas où la vulnérabilité d'un groupe justifierait le recours à un soutien étatique.

Pour remédier à une inégalité économique, il serait plus conforme à la structure de la *Charte* de reconnaître de nouveaux motifs analogues à ceux énumérés à l'art. 15. Il ne faut pas interpréter de manière formaliste chacune des garanties de la *Charte*. S'il est nécessaire de s'éloigner de la distinction entre droits positifs et droits négatifs utilisée dans *Dunmore*, il ne faudrait pas pour autant confondre droit à l'égalité et liberté d'association, ou tout autre droit protégé par la *Charte* susceptible d'être invoqué par une partie à un litige. L'analyse prenant appui sur les principes qui structurent la protection des droits et des libertés permet plus de cohérence judiciaire que celle qui repose sur la notion floue de « valeurs canadiennes ».

La juge **Abella** (dissidente) : La LPEA contrevient à l'al. 2*d*) de la *Charte* car elle ne protège pas les droits de négociation collective, et n'a jamais eu pour objet de les protéger. Le gouvernement a édicté la LPEA de bonne foi, en 2002, pour donner suite à l'arrêt *Dunmore*, rendu en 2001, dans lequel la Cour avait statué que l'al. 2*d*) protégeait le droit de s'organiser et de présenter des observations. En 2007, l'arrêt *Health Services* a étendu cette protection au processus de négociation collective, qui inclut notamment l'obligation de consulter et de négocier de bonne foi. Les principes de droit applicables sont par conséquent ceux qui ont été établis dans *Health Services* et la validité de la LPEA doit être examinée en fonction de cette norme constitutionnelle redéfinie.

Le libellé de la LPEA est pratiquement dépourvu de termes susceptibles de traduire une protection quelconque conférée au processus de négociation collective. Cette loi oblige seulement l'employeur à « écouter » les observations présentées oralement ou à « informer » l'association d'employés qu'il a lu celles qui lui ont été présentées par écrit. Elle n'exige de sa part aucune réponse, discussion ou négociation. En outre, lors du dépôt du projet de loi, la ministre de l'Agriculture et de l'Alimentation a exprimé on ne peut plus clairement l'intention du gouvernement d'exclure toute protection des droits de négociation collective. Le processus d'interprétation ne saurait transformer le libellé clair du texte législatif et l'intention du législateur en un régime complètement différent.

L'exercice véritable du droit à la négociation collective par les travailleurs agricoles suppose deux autres composantes. D'une part, il doit exister une voie de droit prévue par la loi pour la résolution des différends. Le refus de participer de bonne foi à un processus de négociation et de faire des efforts raisonnables pour arriver à une convention collective ne constituant pas une contravention à la LPEA, le Tribunal n'est pas compétent pour ordonner une réparation en cas de violation des droits que garantit l'al. 2*d*). D'autre part, l'employeur doit négocier uniquement avec le représentant choisi par la majorité des employés de l'unité de négociation. Ce concept du monopole syndical conféré par un vote majoritaire est un principe déterminant et d'importance capitale dans les relations du travail au Canada depuis 1944. Compte tenu de la situation professionnelle particulière désavantageuse des travailleurs agricoles, l'absence de reconnaissance légale du monopole syndical a pour effet de les priver de la capacité d'avoir une voix unie et puissante pour tenter d'alléger et d'améliorer leurs conditions de travail.

L'absence de ces protections dans la loi n'est pas justifiée au regard de l'article premier de la *Charte*. Les objectifs de cette limitation des droits — c.-à-d. du fait de ne pas accorder aux travailleurs agricoles les protections légales nécessaires à l'exercice de leur droit de négociation collective — étaient de protéger la ferme familiale ainsi que la productivité et la viabilité des exploitations agricoles. Le critère de l'atteinte minimale du test de l'arrêt *Oakes* est déterminant en l'espèce. L'absence dans la loi de toute protection du processus de négociation collective ne peut pas être considérée comme une atteinte minimale au droit garanti par l'al. 2*d*). Cette restriction n'est pas, ne serait-ce qu'un tant soit peu, adaptée à la réalisation de l'un ou l'autre objectif de l'État; en fait, elle n'est pas adaptée du tout. Priver *tous* les travailleurs agricoles d'un processus de négociation collective pour protéger les fermes familiales, sans égard à la taille ou à la nature de l'exploitation agricole, porte atteinte au droit garanti par l'al. 2*d*) dans sa totalité, non minimalement. Il convient de souligner que dans chaque province, sauf en Alberta, les travailleurs agricoles bénéficient des mêmes droits de négociation collective que d'autres

employés. Rien ne démontre que cette situation a nui à la viabilité économique des exploitations agricoles dans ces provinces ni que la nature particulière de l'agriculture en Ontario justifie une restriction aussi draconienne.

2. JURIDICTION DE L'ARBITRE

III. Syndicat de la fonction publique du Québec c. Québec (Procureur général)

COUR SUPRÊME DU CANADA

RÉFÉRENCE : Syndicat de la fonction publique du Québec *c.* Québec (Procureur général), 2010 CSC 28, [2010] 2 R.C.S. 61

DATE : 20100729
DOSSIER : 32771, 32772

ENTRE :

Syndicat de la fonction publique du Québec
Appelant
et
Procureur général du Québec
Intimé
- et -
Commission des normes du travail et Confédération des syndicats nationaux
Intervenantes

ET ENTRE :

Syndicat de la fonction publique du Québec
Appelant
et
Procureur général du Québec
Intimé
- et -
Confédération des syndicats nationaux
Intervenante

CORAM : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell

MOTIFS DE JUGEMENT : (par. 1 à 54) — Le juge LeBel (avec l'accord des juges Fish, Abella, Charron et Cromwell)

MOTIFS DISSIDENTS : (par. 55 à 117) — La juge Deschamps (avec l'accord de la juge en chef McLachlin et des juges Binnie et Rothstein)

Syndicat de la fonction publique du Québec *c.* Québec (Procureur général), 2010 CSC 28, [2010] 2 R.C.S. 61

Syndicat de la fonction publique du Québec *Appelant*

c.

Procureur général du Québec *Intimé*

et

Commission des normes du travail et Confédération des syndicats nationaux *Intervenantes*

- et -

Syndicat de la fonction publique du Québec *Appelant*

c.

Procureur général du Québec *Intimé*

et

Confédération des syndicats nationaux *Intervenante*

Répertorié : Syndicat de la fonction publique du Québec *c.* Québec (Procureur général)

2010 CSC 28

N^{os} du greffe : 32771, 32772.

2009 : 20 octobre; 2010 : 29 juillet.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

en appel de la cour d'appel du québec

Relations de travail — Congédiement injustifié — Recours — Compétence de l'arbitre ou de la Commission des relations du travail — Employés à statut précaire ne bénéficiant pas de la procédure d'arbitrage prévue à la convention collective en cas de congédiement — Loi sur les normes du travail accordant un recours en cas de renvoi sans cause juste et suffisante devant la Commission des relations du travail, sauf s'il existe une procédure de réparation équivalente ailleurs dans une loi ou une convention — Dépôt de griefs par les employés se plaignant d'un congédiement sans cause juste et suffisante — La norme du travail interdisant le congédiement injustifié est-elle incorporée implicitement dans la convention collective? — La plainte relève-t-elle de la compétence de l'arbitre ou de la Commission? — Loi sur les normes du travail, L.R.Q., ch. N-1.1, art. 124.

La convention collective de travail des fonctionnaires intervenue entre le syndicat et le gouvernement du Québec prévoit que les revendications découlant de la terminaison de l'emploi des employés occasionnels engagés pour une période de moins d'un an et cumulant moins de 12 mois de service ainsi que des employés en stage probatoire ne peuvent faire l'objet d'un grief. Il est mis fin à l'emploi de C, un employé occasionnel, et de L, stagiaire. Le syndicat dépose des griefs alléguant que leur congédiement a été effectué sans une cause juste et suffisante. À titre préliminaire, leur employeur respectif conteste la compétence de l'arbitre au motif que la plainte de congédiement injustifié relève de la Commission des relations du travail (« C.R.T. »). Le syndicat plaide l'incorporation implicite de la norme d'ordre public prévue à l'art. 124 de la *Loi sur les normes du travail* (« L.n.t. ») à toute convention collective, de façon à donner à l'arbitre la compétence nécessaire pour disposer des griefs. Dans le dossier de C, l'arbitre se déclare compétente pour entendre le grief, l'accueille et déclare le congédiement injustifié. Dans le dossier de L, l'arbitre accueille l'objection préliminaire de l'employeur à la recevabilité du grief. En révision judiciaire, la Cour supérieure conclut à la compétence exclusive des arbitres sur les griefs. La Cour d'appel infirme cette décision. Elle ne retient pas la thèse de l'incorporation implicite et conclut que la C.R.T. a compétence exclusive pour décider de la plainte de congédiement injustifié.

Arrêt (la juge en chef McLachlin et les juges Binnie, Deschamps et Rothstein sont dissidents) : Les pourvois sont accueillis.

Les juges LeBel, Fish, Abella, Charron et Cromwell : La théorie de l'intégration implicite ne respecte pas le texte de la L.n.t. et ne tient pas compte des techniques de rédaction adoptées par le législateur québécois lorsqu'il entend intégrer une norme particulière dans les conventions collectives ou les contrats individuels de travail. S'il avait voulu intégrer la norme substantielle de l'art. 124 L.n.t. à toute convention collective, il l'aurait indiqué expressément. La question du caractère d'ordre public de la L.n.t. doit être abordée sous l'angle de l'effet de la hiérarchie des sources de droit pertinentes en droit du travail sur le contenu et la mise en œuvre des conventions collectives plutôt que sous celui de la théorie de l'intégration implicite. Il revient à l'arbitre saisi du grief contre le congédiement de déterminer, à la lumière des modifications apportées à la convention collective par l'effet d'ordre public imposé par la L.n.t., si cette convention lui permet d'accorder au salarié congédié une mesure de réparation équivalente à celle qu'offre l'art. 124 L.n.t. Dans la négative, l'arbitre n'a pas compétence et doit se dessaisir en faveur de la C.R.T. En plus d'inciter au respect de la compétence arbitrale, cette approche permet à l'arbitre d'examiner la situation dans le contexte complet de la convention collective et de prendre en considération tous les facteurs pertinents à l'analyse de l'équivalence du recours. De plus, elle respecte le caractère subsidiaire du recours devant la C.R.T., puisque ce n'est que dans l'éventualité où l'arbitre ayant compétence initiale sur l'interprétation de la convention déterminerait qu'il ne peut offrir au salarié un recours équivalent à celui qu'offre la C.R.T. que cette dernière se saisira de la plainte.

C et L justifient de deux ans de service continu au sens de la L.n.t. et ils ne pouvaient donc, selon l'art. 124, être congédiés sans une cause juste et suffisante. Puisque les clauses applicables de la convention collective privent respectivement C et L de l'arbitrage de griefs pour contester leur congédiement, elles violent la norme substantielle de l'art. 124 L.n.t., sont nulles de nullité absolue et donc réputées non écrites. L'arbitre saisi doit donc examiner la convention collective afin de déterminer si elle accorde un recours équivalent à celui qu'institue l'art. 124. Pour conclure à l'équivalence des recours, chacun des décideurs doit pouvoir réviser la décision de l'employeur et ordonner des réparations appropriées dans un cadre procédural d'une efficacité comparable. En l'espèce, la C.R.T. peut annuler le congédiement, ordonner la réintégration du salarié ou fixer des indemnités. De son côté, l'arbitre de griefs, agissant en vertu de la convention collective et du *Code du travail*, qui prévoit et complète ses pouvoirs, possède une capacité d'intervention équivalente. Les procédures seraient donc engagées devant des décideurs qui détiennent des pouvoirs d'intervention similaires et offrent des garanties analogues d'indépendance et d'impartialité. Par conséquent, les arbitres avaient compétence pour entendre les griefs de C et L, examiner le fond du congédiement et prendre les mesures de réparation appropriées.

La juge en chef McLachlin et les juges Binnie, Deschamps et Rothstein (dissidents) : Il n'existe pas de règle qui confère une compétence exclusive à l'arbitre de griefs en matière de résolution d'un différend opposant un employé syndiqué à son employeur. Il faut plutôt, dans chaque cas, interpréter la loi pertinente et examiner la nature du litige afin de déterminer si la compétence de l'arbitre est exclusive.

En ce qui a trait au régime législatif applicable, rien n'indique que le législateur a considéré que les diverses mesures de protection prévues à la L.n.t. étaient incorporées implicitement dans toutes les conventions collectives. Pour l'application de l'art. 124, il a désigné un tribunal dans la loi pour les cas où la convention négociée par les parties n'en prévoit pas. L'incorporation de l'art. 124 à la convention collective ne ressort ni de l'analyse de la L.n.t., ni de celle du *Code du travail*. Le respect de la procédure d'arbitrage n'emporte pas la conclusion qu'elle revêt un caractère d'ordre public. Le monopole de représentation est confié aux syndicats par le législateur, mais ce dernier peut désigner une juridiction autre qu'un arbitre lorsqu'il l'estime approprié. Compte tenu du caractère d'ordre public de la L.n.t., la convention collective ne peut contenir de norme prohibée par cette loi ou qui représente une protection moindre. Un employeur ne peut pas congédier un employé sans une cause juste et suffisante si ce dernier justifie d'au moins deux ans de service continu au sens de la L.n.t. Toutefois, rien n'impose aux parties l'obligation de confier à un arbitre de griefs la responsabilité de mettre en œuvre cette protection. Ainsi, une convention collective ne pourrait prévoir que l'employeur peut à son gré congédier une personne qui cumule deux ans de service continu. Bien que cette disposition serait tenue pour nulle, la norme prévue à la L.n.t. ne serait pas pour autant incorporée à la convention collective. L'arbitre est lié par la convention collective et par le *Code du travail*, plus particulièrement par l'art. 100.12, par. *a*), lequel précise que l'arbitre peut « interpréter et appliquer une loi ou un règlement dans la mesure où il est nécessaire de le faire pour décider d'un grief ». Cette compétence présuppose que le grief a un fondement dans la convention collective. Les dispositions conférant à l'arbitre de griefs et à la C.R.T. leur compétence respective se trouvent toutes deux dans le *Code du travail*. Si la procédure applicable à tous les employés syndiqués qui veulent se prévaloir de l'art. 124 L.n.t. était celle prévue par leur convention, le législateur l'aurait dit clairement. Il a plutôt laissé aux parties la liberté d'inclure cette procédure dans la convention, tout en s'assurant qu'aucun employé ne soit privé de recours.

La nature du litige n'indique pas plus qu'il relève exclusivement de l'arbitre de griefs. En matière de plainte de congédiement, tant l'arbitre que la C.R.T. possèdent une expertise reconnue. Non seulement la C.R.T. est-elle le tribunal subsidiaire exclusif désigné par la L.n.t., mais l'analyse de sa constitution confirme également son expertise indéniable pour décider si un congédiement est fondé sur une cause juste et suffisante.

En l'espèce, les clauses de la convention collective qui limitent l'accès à la procédure de griefs ne sont pas contraires à l'ordre public, car elles ne privent pas C et L de la protection prévue à l'art. 124 L.n.t. Ni la L.n.t. ni le *Code du travail* n'interdisent de limiter l'accès à la procédure de griefs. Les parties n'ont pas intégré de façon générale à leur convention collective les normes établies par la L.n.t. Nulle part la L.n.t. n'impose l'obligation d'insérer dans la convention collective l'accès à la procédure de grief pour toutes les normes qu'elle établit. Elle établit plutôt un recours pour les cas où la convention n'en prévoit pas. En raison des limites assortissant la procédure d'arbitrage, C et L ne disposent pas d'une procédure de réparation adéquate au sens de l'art. 124 L.n.t. La C.R.T. est le tribunal qui doit donc décider de leur plainte de congédiement injustifié.

Le rôle des tribunaux est d'interpréter les lois d'une manière conforme à leur objet. La L.n.t. est une loi adoptée pour protéger les employés. L'interprétation retenue en l'espèce permet de réaliser cet objet de façon simple — en se reportant au texte et en évitant des débats artificiels. La L.n.t. a emprunté au régime de négociation collective une protection figurant dans de nombreuses conventions collectives. Rien ne justifie aujourd'hui d'appliquer un raisonnement qui ferait en sorte que toutes les conventions collectives devraient impérativement contenir cette protection. En fait, la réserve faite pour les cas où les conventions collectives comportent une protection adéquate reflète cette réalité historique. Pas plus le *Code du travail* que la L.n.t. ou les conventions collectives ne comportent de lacune qu'une interprétation judiciaire devrait combler. Par ailleurs, la L.n.t. constitue déjà un chantier législatif. Il ne conviendrait pas d'accepter une interprétation qui aurait pour effet de créer des failles dans un édifice érigé au terme de longs débats. Le législateur est libre d'intervenir pour ouvrir de nouvelles voies de recours, tant pour l'art. 124 L.n.t. que pour les autres normes. C'est à lui qu'il revient de le faire.

IV. Syndicat Uni du Transport, Unité 591 et Société de transport de l'Outaouais
Me Denis Nadeau, arbitre

Parties
Syndicat uni du transport, section locale 591 et Société de transport de l'Outaouais (J.L.)

Juridiction
Tribunal d'arbitrage (T.A.)

Décision de
Me Denis Nadeau, arbitre

Date de la décision
2008-08-19

Références
AZ-50545779
D.T.E. 2009T-286
Texte intégral : 24 pages (copie déposée au greffe)

Indexation
TRAVAIL — grief — preuve — conditions particulières de recevabilité — preuve extrinsèque — acte similaire — faute commise par un autre salarié ayant entraîné une mesure moindre — libellé de la clause d'amnistie — preuve recevable.
TRAVAIL — grief — preuve — conditions particulières de recevabilité — fait postérieur — règlement hors cour — litige impliquant un autre salarié — incidence sur le plaignant — revue de la jurisprudence — absence de lien avec le grief du plaignant — preuve irrecevable.
TRAVAIL — grief — mesure disciplinaire ou non disciplinaire — formalités issues de la convention collective — clause d'amnistie — applicabilité — clause précisant une limite quant au délai mais non quant au sort — distinction entre le fait qu'une mesure puisse être invoquée en arbitrage et celui de retirer une pièce du dossier — entente entre les parties — calcul du délai — applicabilité au syndicat — mise en preuve dans un dossier d'arbitrage visant un autre salarié.
TRAVAIL — grief — mesure disciplinaire ou non disciplinaire — formalités issues de la jurisprudence — obligation de traiter équitablement — discrimination — obligation de l'employeur — cohérence dans l'application des sanctions.

Interprétation
C.C.Q., art. 2633

La Dépêche

TRAVAIL : Grief; preuve: Dans le contexte d'un grief contestant un congédiement, la preuve relative à la sanction imposée antérieurement à un autre salarié est recevable, et ce, malgré la clause d'amnistie stipulant qu'aucune mesure disciplinaire ne peut être invoquée en arbitrage après un délai de 12 mois.

Résumé

Grief contestant un congédiement. Objection à la recevabilité d'une preuve. Objection accueillie en partie; l'audience quant au fond est reportée.

Dans le contexte de l'audition d'un grief contestant le congédiement du plaignant, le syndicat désire mettre en preuve deux dossiers similaires visant d'autres salariés afin de démontrer que l'employeur n'a pas fait preuve de cohérence dans l'application des sanctions relatives à des dossiers de même nature et que ce traitement est discriminatoire à l'égard du plaignant. L'employeur allègue que la preuve est irrecevable. À l'égard du premier dossier, il invoque une clause d'amnistie qui fait en sorte que le dossier disciplinaire d'un salarié ne peut plus être invoqué par l'une ou l'autre des parties après un délai de 12 mois. De plus, le dossier en question a été l'objet d'une transaction, ce qui a l'autorité de la chose jugée entre les parties. Quant au second dossier, l'employeur s'oppose à la preuve en invoquant le fait qu'elle est postérieure au congédiement du plaignant.

Décision

Relativement à la clause d'amnistie prévue à la convention collective, les parties ont convenu que les mesures disciplinaires ne pourraient être invoquées en arbitrage après 12 mois, mais elles n'ont rien précisé sur le sort même des mesures. Or, il existe une différence entre le fait qu'une mesure disciplinaire ne puisse être invoquée dans un arbitrage après un certain délai et celui de retirer une pièce d'un dossier. Ainsi, la mesure disciplinaire existe toujours. Toutefois, il faut établir le moment auquel la période de 12 mois a débuté dans le premier dossier, puisqu'il a fait l'objet d'une entente entre les parties qui substituait au congédiement une suspension de 12 mois d'une façon rétroactive. En effet, la suspension ne prenait pas naissance le jour de l'entente mais bien le jour du congédiement imposé initialement. Ainsi, au moment du congédiement du plaignant, la clause d'amnistie s'appliquait à la mesure disciplinaire imposée au salarié visé au premier dossier, car celle-ci datait alors de plus de 12 mois.

Il faut cependant lire le texte de la clause d'amnistie dans son ensemble. Ainsi, le syndicat n'est pas touché par l'interdiction de cette clause. Par contre, il faut également tenir compte de la deuxième objection de l'employeur relativement à l'entente intervenue dans le premier dossier. L'entente hors cour est silencieuse quant à son éventuelle utilisation par d'autres parties. Certes, l'article 2633 du *Code civil du Québec* prévoit qu'une transaction a, entre les

parties, l'autorité de la chose jugée, mais cela ne signifie pas qu'une telle entente, conclue dans le contexte d'un grief, ne peut être mise en preuve dans un dossier d'arbitrage visant un autre salarié. Il est certain qu'une tierce partie ne peut l'invoquer pour tenter d'en tirer un droit, mais tel n'est pas le cas en l'espèce. Enfin, la compétence de l'arbitre découle de l'article 60 (2) du *Code canadien du travail*, qui, contrairement à la convention collective, ne fait pas référence aux «circonstances de l'affaire» mais aux «circonstances». Par conséquent, la preuve du premier dossier étant pertinente, elle est recevable. Relativement au deuxième dossier, en raison de l'absence de lien entre le fait initial — le congédiement du plaignant — et les faits postérieurs visant une autre personne, cette preuve ne sera pas admise, conformément à ce que dicte la jurisprudence. En effet, il est impossible de déceler dans le deuxième dossier des «faits complémentaires» ou «intimement liés aux faits initiaux» du grief à l'étude.

Fascicule Express
D.T.E. 2009, no 16

Législation citée
C.C.Q., art. 2631 à 2637, 2631 et ss., 2633
Code canadien du travail (L.R.C. 1985, c. L-2), art. 60 (2)

Jurisprudence citée

Applique | Explique | Distingue | Critique | N'applique pas | Mentionne | Citée(s) par les parties

Applique

Paragr. 51: *Syndicat national des employés du Port de Montréal (CSN) et Administration portuaire de Montréal*, (T.A., 2006-05-16), SOQUIJ AZ-50584775

Explique

Paragr. 58: *Hooper c. Centre local de services communautaires Lamater*, (C.A., 1994-09-28), SOQUIJ AZ-94011999, J.E. 94-1747, D.T.E. 94T-1234, EYB 1994-57798
Paragr. 33: *Syndicat national des employés du Port de Montréal (CSN) et Administration portuaire de Montréal*, (T.A., 2006-05-16), SOQUIJ AZ-50584775

Mentionne

Paragr. 49: *Centre hospitalier et centre de réadaptation Antoine-Labelle c. Abramowitz*, (C.S., 2005-10-19), SOQUIJ AZ-50339055, D.T.E. 2005T-1041
Paragr. 67, 70: *Centre universitaire de santé McGill (Hôpital général de Montréal) c. Syndicat des employés de l'Hôpital général de Montréal*, (C.S. Can., 2007-01-26), 2007 CSC 4, SOQUIJ AZ-50408361, J.E. 2007-291, D.T.E. 2007T-111, [2007] 1 R.C.S. 161, [2007] S.C.J. No. 4 (Q.L.)
Paragr. 70: *Centre universitaire de santé McGill (Hôpital général de Montréal) et Syndicat des employés de l'Hôpital général de Montréal*, (T.A., 2003-11-19), SOQUIJ AZ-50227506, A.A.S. 2003A-280
Paragr. 69, 71: *Cie minière Québec Cartier c. Québec (Arbitre des griefs)*, (C.S. Can., 1995-07-20), SOQUIJ AZ-95111087, J.E. 95-1525, D.T.E. 95T-881, [1995] 2 R.C.S. 1095, 125 D.L.R. (4th) 577, EYB 1995-67724
Paragr. 58: *CLSC Lamater et Fédération des infirmières et infirmiers du Québec*, (T.A., 1990-06-04), SOQUIJ AZ-90145139, A.A.S. 90A-118
Paragr. 69: *Conseil de l'éducation de Toronto (Cité) c. F.E.E.E.S.O., district 15*, (C.S. Can., 1997-02-27), SOQUIJ AZ-97111021, J.E. 97-570, D.T.E. 97T-306, [1997] 1 R.C.S. 487, 144 D.L.R. (4th) 385, 44 Admin. L.R. (2d) 1, L.P.J. 97-0174, REJB 1997-00226, 1997 CanLII 378 (CAIJ)
Paragr. 69: *Farber c. Cie Trust Royal*, (C.S. Can., 1997-03-27), SOQUIJ AZ-97111041, J.E. 97-774, D.T.E. 97T-411, [1997] 1 R.C.S. 846, 145 D.L.R. (4th) 1, EYB 1996-00456, 1997 CanLII 387
Paragr. 49: *Syndicat canadien de la fonction publique, section locale 3535 et Société des alcools du Québec*, (T.A., 2002-06-20), SOQUIJ AZ-02142088, D.T.E. 2002T-757
Paragr. 57, 59: *Syndicat des employés de soutien du collège de Matane c. Cégep de Matane*, (C.A., 1983-11-28), SOQUIJ AZ-84149013, D.T.E. 84T-56
Paragr. 14, 30: *Syndicat national des employés du Port de Montréal (CSN) et Administration portuaire de Montréal*, (T.A., 2006-05-16), SOQUIJ AZ-50584775

Citée(s) par les parties

Paragr. 14: *Syndicat national des employés du Port de Montréal c. Foisy*, (C.S., 2006-11-15), 2006 QCCS 5390, SOQUIJ AZ-50400656, D.T.E. 2007T-28, EYB 2006-111489

Doctrine citée

Bernier, Linda, Blanchet, Guy, Granosik, Lukasz *et al*. *Les mesures disciplinaires et non disciplinaires dans les rapports collectifs du travail*. Cowansville: Y. Blais, mis à jour, I/3.115-I/3.117
Blouin, Rodrigue et Morin, Fernand. *Droit de l'arbitrage de grief*. 5e éd. Cowansville: Y. Blais, 2000. 766 p., p. 299
D'Aoust, Claude, Leclerc, Louis et Trudeau, Gilles. *Les mesures disciplinaires: étude jurisprudentielle et doctrinale*. Montréal: École des relations industrielles, Université de Montréal, 1982. 484 p., p. 204-208

Catégorie
02

Date du versement initial
2009-04-16

Date de la dernière mise à jour
2010-11-12

V. Ville de Montréal-Est et Syndicat des cols bleus regroupés de Montréal, section locale 301 Me François Hamelin, arbitre

Parties
Montréal-Est (Ville de) et Syndicat des cols bleus regroupés de Montréal, section locale 301 (France Gagnon) *

Juridiction
Tribunal d'arbitrage (T.A.)

Numéro de dossier
2011-0334

Décision de
Me François Hamelin, arbitre

Date de la décision
2011-01-31

Références
AZ-50717575
2011EXPT-432
D.T.E. 2011T-141
Texte intégral : 17 pages (copie déposée au greffe)

Indexation
TRAVAIL — grief — arbitrabilité — juridictions concurrentes — lésion professionnelle — retour au travail — limitations fonctionnelles permanentes — incapacité à exercer son emploi ou un tout autre emploi chez l'employeur — décision de la CSST — rupture du lien d'emploi — dispositions plus avantageuses (art. 4 et 244 LATMP) — compétence de l'arbitre reconnue.
TRAVAIL — accidents du travail et maladies professionnelles — retour au travail — avantages et conditions de travail — lors du retour au travail.

La Dépêche
GRIEF - ARBITRABILITÉ : La CSST n'était pas autorisée à mettre fin à l'emploi de la plaignante, cette décision ne pouvant être prise qu'après avoir déterminé si la convention collective contient des dispositions plus avantageuses que celles prévues à la *Loi sur les accidents du travail et les maladies professionnelles*; cette question relève de la compétence exclusive de l'arbitre de griefs.

Résumé

Grief contestant un congédiement. Objection préliminaire à l'arbitrabilité du grief. Objection rejetée; l'audience quant au fond est reportée.

La plaignante était chauffeuse-opératrice d'appareil motorisé à la Ville lorsque, le 2 février 2007, elle a été victime d'une récidive d'une lésion professionnelle antérieure. En mai 2010, la Commission de la santé et de la sécurité du travail (CSST) a avisé la plaignante de son incapacité d'occuper son emploi prélésionnel et que l'employeur n'avait pas d'emploi convenable à lui offrir. La lettre de la CSST indique, en objet, «Fin du lien d'emploi». La plaignante n'a pas contesté cette décision. Le 17 juin suivant, la Ville a confirmé qu'elle mettait fin à son emploi. Le syndicat a déposé un grief à l'encontre de cette mesure. La Ville s'oppose à l'arbitrabilité du grief, invoquant l'absence de compétence de l'arbitre.

Décision

L'article 349 de la *Loi sur les accidents du travail et les maladies professionnelles* (LATMP) confère à la CSST une compétence exclusive pour examiner toute question visée par cette loi et en décider. Par conséquent, la décision rendue le 6 mai 2010 est définitive et sans appel, ce qui prive l'arbitre de toute compétence en la matière. Par contre, la CSST n'était pas autorisée à mettre fin à l'emploi de la plaignante. Vu les articles 4 et 244 LATMP, une telle décision ne peut être prise qu'après avoir déterminé si la convention collective à l'étude contient des dispositions plus avantageuses que celles prévues à la loi ou des dispositions portant sur le droit de retour au travail. De telles questions ne relèvent pas de la compétence de la CSST, mais de la compétence exclusive de l'arbitre de griefs. En l'espèce, le syndicat soutient que la convention collective contient des dispositions plus avantageuses que celles de la loi. Il s'agit là d'une question qu'il appartient à l'arbitre de trancher.

Fascicule			**Express**
EXPT	2011,	no	08
D.T.E.	2011,	no	08

Historique

Suivi

Requête en révision judiciaire, 2011-03-04 (C.S.), 500-17-064136-115

Législation citée

Code du travail (L.R.Q., c. C-27), art. 100 et ss.
Accidents du travail et les maladies professionnelles (Loi sur les), (L.R.Q., c. A-3.001), art. 2 «emploi convenable», 2 «emploi équivalent», 4, 244, 349

Jurisprudence citée

Applique | Explique | Distingue | Critique | N'applique pas | Mentionne | Citée(s) par les parties

Mentionne

Paragr. 10, 28: *Société des établissements de plein air du Québec c. Syndicat de la fonction publique du Québec*, (C.A., 2009-02-19), 2009 QCCA 329, SOQUIJ AZ-50538934, J.E. 2009-462, D.T.E. 2009T-179, EYB 2009-154883

Citée(s) par les parties

Paragr. 10: *Syndicat canadien de la fonction publique, section locale 3993 (unité croupiers) et Société des casinos du Québec inc. (Danielle Meunier)*, (T.A., 2010-08-29 (décision rectifiée le 2010-09-18)), SOQUIJ AZ-50668944, 2010EXPT-2124, D.T.E. 2010T-622, [2010] R.J.D.T. 1232

Catégorie
02

Date du versement initial
2011-02-23

Date de la dernière mise à jour
2011-03-12

3. LE DEVOIR DE REPRÉSENTATION

VI. Syndicat des fonctionnaires municipaux de Montréal (SCFP) c. Francine Gauvin et Commission des relations du travail et Ville de Montréal
Les honorables André Brossard, JCA – Julie Dutil, J.C.A. – Guy Cournoyer, J.C.A (AD HOC)

Parties
Syndicat des fonctionnaires municipaux de Montréal (SCFP) c. Gauvin

Juridiction
Cour d'appel (C.A.), Montréal

Numéro de dossier
500-09-019765-098

Décision de
Juges André Brossard, Julie Dutil et Guy Cournoyer (*ad hoc*)

Date de la décision
2011-03-30

Références
AZ-50737786
2011 QCCA 605
2011EXP-1220
2011EXPT-720
J.E. 2011-656
D.T.E. 2011T-249
Texte intégral : 20 pages (copie déposée au greffe)

Indexation
TRAVAIL — Commission des relations du travail (CRT) — compétence — révision judiciaire — devoir de représentation du syndicat — grief — refus de déposer — obligation du syndicat — appréciation de la preuve — fardeau de la preuve — norme de contrôle — décision raisonnable — requête accueillie.
TRAVAIL — association de salariés et droit d'association — devoir de représentation du syndicat — conduite invoquée — grief — refus de déposer — refus de déférer à l'arbitrage —

harcèlement psychologique — obligation du salarié de collaborer — abolition de poste — enquête sérieuse — absence de décision arbitraire ou de négligence grave — plainte rejetée. ADMINISTRATIF (DROIT) — contrôle judiciaire — cas d'application — divers — Commission des relations du travail — devoir de représentation du syndicat — révision judiciaire — norme de contrôle — décision raisonnable.

La Dépêche
COMMISSION DES RELATIONS DU TRAVAIL (CRT) - COMPÉTENCE : La CRT a omis de tenir compte d'une preuve essentielle à la solution du litige et elle a erronément imposé le fardeau de la preuve au syndicat; sa décision d'accueillir la plainte formulée contre ce dernier en vertu de l'article 47.2 C.tr. est déraisonnable.

ASSOCIATION DE SALARIÉS ET DROIT D'ASSOCIATION - DEVOIR DE REPRÉSENTATION DU SYNDICAT : Le manque de collaboration du plaignant est un élément important dont la CRT doit tenir compte dans l'appréciation de l'ensemble des circonstances qui lui permettent d'évaluer le bien-fondé d'une plainte en vertu de l'article 47.2 C.tr.

ADMINISTRATIF (DROIT) : Le syndicat possède un pouvoir discrétionnaire dans l'exercice de son rôle et il n'a pas agi de manière arbitraire ni n'a fait preuve de négligence grave en décidant de ne pas déférer à l'arbitrage les griefs de la salariée.

Résumé
Appel d'un jugement de la Cour supérieure ayant rejeté la requête en révision judiciaire de deux décisions de la Commission des relations du travail (CRT). Accueilli.

La salariée a déposé des plaintes reliées à l'application de l'article 47.2 du *Code du travail* (C.tr.). Elle reprochait au syndicat d'avoir manqué à son devoir de juste représentation en refusant de déposer en son nom un grief pour harcèlement psychologique et de déférer à l'arbitrage un grief contestant l'abolition de son poste. Ses plaintes ont été accueillies par la CRT. La requête en révision a été rejetée, avec dissidence. Saisie d'une requête en révision judiciaire, la Cour supérieure a refusé d'intervenir au motif que les conclusions de la CRT étaient raisonnables.

Décision
Mme la juge Dutil: La CRT n'a pas tenu compte d'une preuve essentielle à la solution du litige, soit le contenu d'une lettre du syndicat invitant la salariée à communiquer avec une enquêteuse au sujet de sa plainte pour harcèlement psychologique. Il est établi que la salariée n'a pas donné suite à cette invitation, adressant plutôt une lettre aux dirigeants syndicaux à laquelle elle avait joint tous les documents qu'elle considérait comme son «dossier complet». Or, le manque de collaboration du plaignant est un élément important dont la CRT doit tenir compte dans l'appréciation de l'ensemble des circonstances qui lui permettent d'évaluer le bien-fondé d'une plainte en vertu de l'article 47.2 C.tr. En l'espèce, la lettre du syndicat constituait la première étape de la collecte des informations nécessaires auprès de la salariée afin de déterminer s'il y avait lieu de déposer une plainte pour harcèlement psychologique. La

conclusion selon laquelle le syndicat a fait preuve de négligence grave en menant une enquête déficiente n'est pas raisonnable dans les circonstances. Par ailleurs, la CRT a erronément imposé au syndicat le fardeau de démontrer qu'il avait procédé à une enquête lui permettant d'obtenir les informations nécessaires avant de se prononcer sur l'opportunité de déférer à l'arbitrage le grief contestant l'abolition du poste de la salariée. Sa décision d'accueillir les plaintes est déraisonnable en ce qu'elle n'appartient pas aux issues possibles et acceptables pouvant se justifier au regard des faits et du droit. Le syndicat possède un pouvoir discrétionnaire dans l'exercice de son rôle et il n'a pas agi de manière arbitraire ni n'a fait preuve de négligence grave en décidant comme il l'a fait.

Fascicule Express
EXP 2011, no 15
EXPT 2011, no 15
J.E. 2011, no 15
D.T.E. 2011, no 15

Historique

Instance précédente

Juge Geneviève Marcotte, C.S., Montréal, 500-17-042809-080, 2009 QCCS 2490, 2009-06-02, SOQUIJ AZ-50559020

Référence(s) antérieure(s)

(C.R.T., 2007-06-15), 2007 QCCRT 0296, SOQUIJ AZ-50438387; (C.R.T., 2008-04-10 (décision rectifiée le 2008-04-16)), 2008 QCCRT 0161, SOQUIJ AZ-50487296, D.T.E. 2008T-441; (C.S., 2009-06-02), 2009 QCCS 2490, SOQUIJ AZ-50559020, D.T.E. 2009T-602; (C.A., 2009-07-29), 2009 QCCA 1452, SOQUIJ AZ-50568774

Législation citée
Code du travail (L.R.Q., c. C-27), art. 15, 47.2, 127 paragr. 3
Normes du travail (Loi sur les), (L.R.Q., c. N-1.1)

Jurisprudence citée

Applique | Explique | Distingue | Critique | N'applique pas | Mentionne | Citée(s) par les parties

Mentionne

Paragr. 61, 63, 68, 90: *Dunsmuir c. Nouveau-Brunswick*, (C.S. Can., 2008-03-07), 2008 CSC 9, SOQUIJ AZ-50478101, J.E. 2008-547, D.T.E. 2008T-223, [2008] 1 R.C.S. 190, EYB 2008-130674, [2008] S.C.J. No. 9 (Q.L.), 329 N.B.R. (2d) 1, 291 D.L.R. (4th) 577, 64 C.C.E.L. (3d) 1, 69 Imm. L.R. (3d) 1, 170 L.A.C. (4th) 1, 372 N.R. 1, 2008 C.L.L.C. 220-020, 69 Admin. L.R. (4th) 1, 95 L.C.R. 65
Paragr. 76: *Fraser et Syndicat canadien des communications, de l'énergie et du papier, section locale 499 — SCEP*, (C.R.T., 2007-04-20), 2007 QCCRT 0202, SOQUIJ AZ-50429361
Paragr. 76: *Henold et Union internationale des travailleuses et travailleurs unis de l'alimentation et de commerce, section locale 1991-P (FAT-COI-CTC-TUAC Canada)*, (C.R.T., 2007-09-07), 2007 QCCRT 0444, SOQUIJ AZ-50449955
Paragr. 76: *Labbé et Syndicat des employés de magasins et de bureaux de la Société des alcools du Québec*, (C.R.T., 2007-03-28), 2007 QCCRT 0153, SOQUIJ AZ-50424530
Paragr. 76: *Landucci et Alliance des professeures et professeurs de Montréal (FAE)*, (C.R.T., 2007-04-02), 2007 QCCRT 0163, SOQUIJ AZ-50425916
Paragr. 66: *Noël c. Société d'énergie de la Baie James*, (C.S. Can., 2001-06-28), 2001 CSC 39, SOQUIJ AZ-50098272, J.E. 2001-1329, D.T.E. 2001T-669, [2001] 2 R.C.S. 207, REJB 2001-24835, [2001] S.C.J. No. 41 (Q.L.), 202 D.L.R. (4th) 1, 271 N.R. 304
Paragr. 65: *Syndicat national des employées et employés du Centre de soins prolongés Grace Dart (CSN) c. Holligin-Richards*, (C.A., 2006-02-07), 2006 QCCA 158, SOQUIJ AZ-50355095, D.T.E. 2006T-200, EYB 2006-100971
Paragr. 76: *Vigeant c. Commission des relations du travail*, (C.S., 2006-03-30), 2006 QCCS 1884, SOQUIJ AZ-50367178, D.T.E. 2006T-400, [2006] R.J.D.T. 612
Paragr. 76: *Vigeant c. Syndicat de professionnelles et professionnels du gouvernement du Québec (SPGQ)*, (C.A., 2008-01-29), 2008 QCCA 163, SOQUIJ AZ-50468461, J.E. 2008-345, D.T.E. 2008T-121, [2008] R.J.D.T. 44, EYB 2008-128941
Paragr. 76: *Vigeant et Syndicat des professionnelles et professionnels du gouvernement du Québec (SPGQ)*, (C.R.T., 2006-01-11), 2006 QCCRT 0007, SOQUIJ AZ-50353153, D.T.E. 2006T-177

Catégorie
02

Date du versement initial
2011-04-12

Date de la dernière mise à jour
2011-04-15

VII. Danielle Vallières c. Alliance du personnel professionnel et technique de la santé et des services sociaux et Commission des relations du travail et Centre hospitalier universitaire de Sherbrooke

Les honorables : André Brossard, J.C.A – Paul Vézina, J.C.A. – Guy Cournoyer, J.C.A. (AD HOC)

Parties
Vallières c. Alliance du personnel professionnel et technique de la santé et des services sociaux (CPS et APTMQ)

Juridiction
Cour d'appel (C.A.), Montréal

Numéro de dossier
500-09-019991-090

Décision de
Juges André Brossard, Paul Vézina et Guy Cournoyer (*ad hoc*) (diss.)

Date de la décision
2011-03-30

Références
AZ-50737307
2011 QCCA 588
2011EXP-1218
2011EXPT-718
J.E. 2011-654
D.T.E. 2011T-247
Retenu pour publication au R.J.D.T.
Texte intégral : 29 pages (copie déposée au greffe)

Indexation
TRAVAIL — association de salariés et droit d'association — devoir de représentation du syndicat — conduite invoquée — révision judiciaire — devoir de représentation du syndicat — congédiement pour harcèlement psychologique — refus de déposer un grief — enquête — décision arbitraire — rôle de la CRT — norme de contrôle — décision raisonnable — requête rejetée.
TRAVAIL — Commission des relations du travail (CRT) — compétence — grief — refus de déposer — imposition d'une mesure disciplinaire à la suite d'une plainte pour harcèlement

psychologique par un membre du syndicat — enquête — évaluation des chances de succès de la plainte et de la crédibilité — comportement arbitraire — plainte accueillie.
ADMINISTRATIF (DROIT) — contrôle judiciaire — cas d'application — divers — Commission des relations du travail — devoir de représentation du syndicat — révision judiciaire — norme de contrôle — décision raisonnable.

La Dépêche
ASSOCIATION DE SALARIÉS ET DROIT D'ASSOCIATION - DEVOIR DE REPRÉSENTATION DU SYNDICAT : Le syndicat a fait preuve d'arbitraire en refusant de déposer un grief au nom d'une salariée ayant fait l'objet d'une mesure disciplinaire à la suite d'une plainte pour harcèlement psychologique formulée par une collègue syndiquée.

COMMISSION DES RELATIONS DU TRAVAIL (CRT) - COMPÉTENCE : En s'érigeant en arbitre, le syndicat se devait de traiter équitablement la plaignante, «accusée» de harcèlement psychologique à l'endroit d'une collègue; son souci légitime de protéger la prétendue victime lui a toutefois fait perdre de vue le droit fondamental de la plaignante de se défendre en pleine connaissance de cause.

ADMINISTRATIF (DROIT) : La Commission des relations du travail a rendu une décision raisonnable en concluant que le syndicat avait manqué à son devoir de représentation; la Cour supérieure n'aurait pas dû intervenir.

Résumé
Appel d'un jugement de la Cour supérieure ayant accueilli la requête en révision judiciaire d'une décision de la Commission des relations du travail (CRT). Accueilli, avec dissidence.

La salariée, une infirmière, a fait l'objet d'une mesure disciplinaire pour avoir harcelé psychologiquement une collègue. Au terme d'une enquête, le syndicat a conclu que cette plainte était fondée et que la sanction imposée à la salariée était proportionnelle à sa faute. La salariée a exercé un recours en vertu de l'article 47.2 du *Code du travail* (C.tr.), reprochant au syndicat d'avoir manqué à son devoir de représentation en refusant de déposer un grief en son nom. La CRT a conclu au caractère arbitraire de la décision syndicale et a accueilli la plainte. La Cour supérieure a infirmé cette décision et a rejeté la plainte en vertu de l'article 47.2 C.tr. La salariée se pourvoit à l'encontre ce jugement.

Décision
M. le juge Brossard: Le juge de première instance a substitué son opinion à celle de la CRT et a conclu que le syndicat avait respecté son obligation de rechercher la vérité de manière juste, équitable et raisonnable. Il a qualifié la décision syndicale de «raisonnable eu égard à l'ensemble des circonstances révélées par la preuve» (paragr. 58). Il a ensuite estimé que la CRT ne pouvait intervenir et substituer son opinion à celle du syndicat. Le juge semble avoir appliqué la mauvaise norme de contrôle dans son analyse de la preuve. Afin de se prononcer sur le caractère raisonnable ou non de la décision de la CRT, il est utile de revoir les faits sur lesquels celle-ci s'était appuyée. Or, le syndicat a décidé de ne pas déposer un grief au nom de

la salariée, sans même connaître la preuve retenue contre elle par l'employeur. Ainsi, il n'a pas analysé le bien-fondé de la décision patronale, mais celui de la défense de la salariée devant les accusations portées par sa collègue, et ce, en lui imposant le fardeau de la preuve. Le juge de première instance ne s'est pas demandé si les conclusions de la CRT étaient déraisonnables. Or, ce n'est certainement pas le cas.

M. le juge Vézina: L'objectif du syndicat de faire obstacle au harcèlement psychologique de manière à favoriser l'harmonie au travail parmi ses membres n'est pas facile à atteindre lorsque le harcèlement s'exerce entre collègues syndiqués. En tentant de relever ce défi, le syndicat a oublié son rôle premier de défense de l'une de ses membres visée par une sanction patronale. C'est précisément le rôle de la CRT de contribuer par ses décisions à déterminer des paramètres qui guideront les syndicats pour faire face à ces nouvelles situations. En s'érigeant en arbitre, le syndicat se devait de traiter équitablement l'appelante, «accusée» de harcèlement. La CRT a jugé que ce dernier avait commis une faute, non pas liée à la qualité de son enquête, mais par l'orientation qu'il lui a donnée. Il s'agit d'une question de principe qui n'est pas étrangère au rôle que le législateur lui a confié. Son avis ne saurait être qualifié de déraisonnable.

M. le juge Cournoyer, dissident: La CRT n'a pas conclu que l'enquête du syndicat était superficielle ou inattentive ou encore que ce dernier n'avait pas examiné les faits pertinents. Elle a plutôt estimé que c'est la suite de celle-ci qui posait problème. Elle a reproché au comité d'avoir décidé du bien-fondé de la plainte, alors qu'il ne devait qu'en évaluer les chances de succès, et a critiqué son évaluation de la crédibilité des protagonistes sans les avoir entendues. Or, ces éléments ne lui permettaient pas d'intervenir, car elle devait respecter la discrétion du syndicat quant à la forme et à l'intensité de son enquête. Suivant les enseignements de la Cour suprême dans *Noël c. Société d'énergie de la Baie James* (C.S. Can., 2001-06-28), 2001 CSC 39, SOQUIJ AZ-50098272, J.E. 2001-1329, D.T.E. 2001T-669, [2001] 2 R.C.S. 207, le salarié n'a pas droit à l'enquête la plus poussée. Le syndicat n'a qu'une obligation de diligence en cette matière. La CRT ne pouvait qualifier l'enquête d'arbitraire ni substituer son opinion à celle du syndicat, ce qu'elle a fait. Sa décision ne peut donc être considérée comme constituant l'une des issues possibles et acceptables en fait et en droit, car la décision du syndicat était elle-même une issue possible et acceptable.

Fascicule Express
EXP 2011, no 15
EXPT 2011, no 15
J.E. 2011, no 15
D.T.E. 2011, no 15

Historique

Instance précédente

Juge François Tôth, C.S., Saint-François (Sherbrooke), 450-05-005696-097, 2009 QCCS 3839,

2009-08-27, SOQUIJ AZ-50572746

Référence(s) antérieure(s)

(C.R.T., 2008-12-18), 2008 QCCRT 0544, SOQUIJ AZ-50529634; (C.S., 2009-08-27), 2009 QCCS 3839, SOQUIJ AZ-50572746, D.T.E. 2009T-659; (C.A., 2009-09-16), 2009 QCCA 1751, SOQUIJ AZ-50575874

Législation citée

Code du travail (L.R.Q., c. C-27), art. 47.2, 47.2 et ss., 47.3, 47.5

Jurisprudence citée

Applique | Explique | Distingue | Critique | N'applique pas | Mentionne | Citée(s) par les parties

Applique en dissidence

Paragr. 105: *Noël c. Société d'énergie de la Baie James*, (C.S. Can., 2001-06-28), 2001 CSC 39, SOQUIJ AZ-50098272, J.E. 2001-1329, D.T.E. 2001T-669, [2001] 2 R.C.S. 207, REJB 2001-24835, [2001] S.C.J. No. 41 (Q.L.), 202 D.L.R. (4th) 1, 271 N.R. 304

Distingue

Paragr. 12: *Syndicat des fonctionnaires municipaux de Montréal (SCFP) c. Gauvin*, (C.A., 2011-03-30), 2011 QCCA 605, SOQUIJ AZ-50737786, 2011EXP-1220, 2011EXPT-720, J.E. 2011-656, D.T.E. 2011T-249

Mentionne

Paragr. 45, 51: *Dunsmuir c. Nouveau-Brunswick*, (C.S. Can., 2008-03-07), 2008 CSC 9, SOQUIJ AZ-50478101, J.E. 2008-547, D.T.E. 2008T-223, [2008] 1 R.C.S. 190, EYB 2008-130674, [2008] S.C.J. No. 9 (Q.L.), 329 N.B.R. (2d) 1, 291 D.L.R. (4th) 577, 64 C.C.E.L. (3d) 1, 69 Imm. L.R. (3d) 1, 170 L.A.C. (4th) 1, 372 N.R. 1, 2008 C.L.L.C. 220-020, 69 Admin. L.R. (4th) 1, 95 L.C.R. 65
Paragr. 31: *Guilde de la marine marchande du Canada c. Gagnon*, (C.S. Can., 1984-06-07), SOQUIJ AZ-84111028, J.E. 84-489, D.T.E. 84T-470, [1984] 1 R.C.S. 509, 9 D.L.R. (4th) 641, 15 C.L.L.C. 12,181
Paragr. 31, 51: *Noël c. Société d'énergie de la Baie James*, (C.S. Can., 2001-06-28), 2001 CSC 39, SOQUIJ AZ-50098272, J.E. 2001-1329, D.T.E. 2001T-669, [2001] 2 R.C.S. 207, REJB 2001-24835, [2001] S.C.J. No. 41 (Q.L.), 202 D.L.R. (4th) 1, 271 N.R. 304

Mentionne en dissidence

Paragr. 113: *Dunsmuir c. Nouveau-Brunswick*, (C.S. Can., 2008-03-07), 2008 CSC 9, SOQUIJ AZ-50478101, J.E. 2008-547, D.T.E. 2008T-223, [2008] 1 R.C.S. 190, EYB 2008-130674, [2008] S.C.J. No. 9 (Q.L.), 329 N.B.R. (2d) 1, 291 D.L.R. (4th) 577, 64 C.C.E.L. (3d) 1, 69 Imm. L.R. (3d) 1, 170 L.A.C. (4th) 1, 372 N.R. 1, 2008 C.L.L.C. 220-020, 69 Admin. L.R. (4th) 1, 95 L.C.R. 65
Paragr. 110: *Noël c. Société d'énergie de la Baie James*, (C.S. Can., 2001-06-28), 2001 CSC 39, SOQUIJ AZ-50098272, J.E. 2001-1329, D.T.E. 2001T-669, [2001] 2 R.C.S. 207, REJB 2001-24835, [2001] S.C.J. No. 41 (Q.L.), 202 D.L.R. (4th) 1, 271 N.R. 304
Paragr. 111: *Syndicat national des employées et employés du Centre de soins prolongés Grace Dart (CSN) c. Holligin-Richards*, (C.A., 2006-02-07), 2006 QCCA 158, SOQUIJ AZ-50355095, D.T.E. 2006T-200, EYB 2006-100971

Doctrine citée
Association Henri Capitant. *Vocabulaire juridique*. 8e éd. Publié sous la direction de Gérard Cornu. Paris: P.U.F., 2000. 925 p., «arbitraire»
Martel, Nancy et Moreau, Pierre E. *Le devoir de juste représentation*. Montréal: LexisNexis, 2009. 248 p., p. 103-104

Catégorie
01

Date du versement initial
2011-04-12

Date de la dernière mise à jour
2011-05-14

4. CLAUSE ORPHELIN

VIII. Commission des normes du travail c. Ville de Sherbrooke et Syndicat des pompiers du Québec, section locale Sherbrooke
Les honorables : Marc Beauregard, J.C.A. – André Rochon, J.C.A. – Guy Gagnon, J.C.A.

Parties
Commission des normes du travail c. Sherbrooke (Ville de)
(Sherbrooke (Ville de) c. Syndicat des pompiers du Québec, section locale de Sherbrooke) *

Juridiction
Cour d'appel (C.A.), Montréal

Numéro de dossier
500-09-019560-093, 500-09-019578-095, 500-09-019657-097 et 500-09-019598-093

Décision de
Juges Marc Beauregard, André Rochon et Guy Gagnon

Date de la décision
2011-02-21

Références
AZ-50723708
2011 QCCA 325
2011EXP-864
2011EXPT-509
J.E. 2011-458
D.T.E. 2011T-179
Retenu pour publication au R.J.D.T.
Texte intégral : 12 pages (copie déposée au greffe)

Indexation
TRAVAIL — normes du travail — rémunération — salaire — disparité de traitement en fonction de la date d'embauche — pompier — interprétation de l'article 87.1 L.N.T. — convention collective — ajustement salarial de 3 % versé en compensation de la perte d'un avantage — droit acquis — clause illégale.

RESPONSABILITÉ — responsabilité du fait personnel — association de salariés — devoir de représentation — convention collective — clause de disparité de traitement en fonction de la date d'embauche — recours en garantie.

Interprétation
Normes du travail (Loi sur les), (L.R.Q., c. N-1.1), art. 87.1

La Dépêche
NORMES DU TRAVAIL - RÉMUNÉRATION : Une entente ayant pour effet d'accorder à un salarié une condition de travail moins avantageuse que celle consentie à d'autres salariés qui effectuent les mêmes tâches dans le même établissement, et ce, uniquement en fonction de sa date d'embauche, est illégale, peu importe la motivation subjective des parties contractantes.

RESPONSABILITÉ : Pour les motifs exprimés dans *Progistix-Solutions inc. c. Commission des normes du travail* (C.A., 2009-10-26), 2009 QCCA 2054, SOQUIJ AZ-50581516, J.E. 2009-2045, D.T.E. 2009T-804, [2009] R.J.D.T. 1103, le recours en garantie exercé contre le syndicat pour avoir négocié une entente prévoyant une disparité illégale de traitement est rejeté.

Résumé
Appels d'un jugement de la Cour du Québec ayant rejeté des requêtes en réclamation de salaires en vertu de la *Loi sur les normes du travail* (L.N.T.). Accueillis. Appels relatifs à des recours en garantie. Rejetés.

En 1998, l'employeur et le syndicat ont signé une lettre d'entente selon laquelle les pompiers engagés antérieurement au 16 avril 1998 voyaient leur salaire haussé de 3 % afin de compenser la réduction des nombreuses heures supplémentaires qu'ils avaient l'habitude d'effectuer avant que la Ville ne décide d'embaucher du personnel temporaire. Cette entente ainsi qu'une autre semblable signée en 2004 faisaient partie intégrante des conventions collectives. La Commission des normes du travail a déposé deux requêtes réclamant le paiement du salaire dont les pompiers engagés après le 16 avril 1998 avaient été privés en violation de l'article 87.1 L.N.T. Dans chacun des dossiers, l'employeur a formé un recours en garantie contre le syndicat représentant les pompiers. Dans son jugement du 11 mars 2009, la Cour du Québec a rejeté les réclamations de la Commission ainsi que les deux recours en garantie. Elle a conclu que la «compensation» versée en vertu de la lettre d'entente ne constituait pas du «salaire» au sens de la loi étant donné qu'elle était sans lien avec la prestation de travail. Tant la Commission que l'employeur interjettent appel du jugement.

Décision
M. le juge Rochon: L'article 87.1 L.N.T. interdit les clauses dites «orphelin», soit celles qui ont pour effet de faire supporter par les seuls salariés embauchés après une date donnée les désavantages qui découlent de l'amoindrissement, quantitatif ou qualitatif, d'une condition de travail. Les parties ont clairement instauré une disparité permanente de traitement entre des salariés qui effectuent les mêmes tâches dans le même établissement, et ce, en fonction d'une

date d'embauche. Comme la majoration de 3 % est accordée dans la mesure où les pompiers visés exécutent leur prestation de travail et demeurent au service de l'employeur, il s'agit de «salaire» au sens de la loi (art. 1 paragr. 9 L.N.T.). Il ne faut pas confondre l'effet permanent de la mesure avec l'objectif visé au départ. Seul le premier doit être pris en considération aux termes de l'article 87.1 L.N.T. Il existe plusieurs raisons valables et légitimes pour deux parties de convenir de clauses «orphelin». Cependant, malgré leur caractère légitime, celles-ci peuvent être source de conflit en créant un clivage entre les anciens et les nouveaux salariés, en générant des tensions au sein des entreprises et en nuisant à la solidarité syndicale. Le législateur a tranché en décidant qu'il fallait interdire ce type de disparité de traitement. Par ailleurs, il n'y a pas en l'espèce une perte de «droits acquis». Il s'agit tout au plus de la perte d'expectative légitime d'effectuer des heures supplémentaires, expectative que perdent tant les anciens que les nouveaux pompiers engagés après la date charnière. Toutefois, seuls les premiers bénéficient de l'avantage pécuniaire de cette perte. Quant à l'appel en garantie de l'employeur, cette question a été correctement tranchée récemment dans *Progistix-Solutions inc. c. Commission des normes du travail* (C.A., 2009-10-26), 2009 QCCA 2054, SOQUIJ AZ-50581516, J.E. 2009-2045, D.T.E. 2009T-804, [2009] R.J.D.T. 1103. Il n'y a pas lieu d'y revenir, et ce, même s'il est acquis au débat que les parties patronales et syndicales ont en tout temps agi de bonne foi et dans un but légitime.

Fascicule Express
EXP 2011, no 10
EXPT 2011, no 10
J.E. 2011, no 10
D.T.E. 2011, no 10

Historique

Instance précédente

Juge Paul Dunnigan, C.Q., Chambre civile, Saint-François (Sherbrooke), 450-22-006287-057 et 450-22-006757-067, 2009 QCCQ 2477, 2009-03-11, SOQUIJ AZ-50546783

Référence(s) antérieure(s)

(C.Q., 2009-03-11), 2009 QCCQ 2477, SOQUIJ AZ-50546783, D.T.E. 2009T-276, [2009] R.J.D.T. 579; (C.Q., 2009-03-11), 2009 QCCQ 2477, SOQUIJ AZ-50546783, D.T.E. 2009T-276, [2009] R.J.D.T. 579; (C.A., 2009-04-20), 2009 QCCA 754, SOQUIJ AZ-50551746

Suivi

Requête pour autorisation de pourvoi à la Cour suprême, 2011-04-21 (C.S. Can.), 34218.

Législation citée
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Jurisprudence citée

Applique | Explique | Distingue | Critique | N'applique pas | Mentionne | Citée(s) par les parties

Applique

Paragr. 43: *Progistix-Solutions inc. c. Commission des normes du travail*, (C.A., 2009-10-26), 2009 QCCA 2054, SOQUIJ AZ-50581516, J.E. 2009-2045, D.T.E. 2009T-804, [2009] R.J.D.T. 1103, EYB 2009-165565

Doctrine citée

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Québec (prov.). Ministère du Travail. *Vers une équité intergénérationnelle. Document de réflexion sur les clauses «orphelin» dans les conventions collectives*. Québec: le Ministère, 1998. 10 p., p. 2, 6

Catégorie

01

Date du versement initial

2011-03-08

Date de la dernière mise à jour

2011-05-17

5. DOUBLE RECOURS

IX. Syndicat de la fonction publique du Québec c. Gilles Lavoie, et Procureure générale du Québec
L'honorable Catherine Mandeville, J.C.S.

Syndicat de la fonction publique du Québec c. Lavoie 2011 QCCS 1499

COUR SUPÉRIEURE
CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

NO 500-17-057183-108

DATE : Le 1er avril 2011

SOUS LA PRÉSIDENCE DE : L'HONORABLE CATHERINE MANDEVILLE J.C.S.

SYNDICAT DE LA FONCTION PUBLIQUE DU QUÉBEC
c.

GILLES LAVOIE, en sa qualité d'arbitre de grief

ET

PROCUREURE GÉNÉRALE DU QUÉBEC (Services Québec)

JUGEMENT

[1] Mme Marie-Michèle Pierre-Louis (« l'Employée ») conteste sa mise à pied par Services Québec (« l'Employeur ») au motif qu'il s'agirait d'un congédiement déguisé.
[2] À cette fin, elle entreprend deux recours : une plainte[1] auprès de la Commission des relations de travail (« La Commission ») et un grief qui est présenté devant l'arbitre Gilles Lavoie (« l'Arbitre »).
[3] La Commission rejette sa plainte et conclut que la décision de l'Employeur est sérieuse et raisonnable, et qu'elle ne résulte pas de l'exercice d'activités syndicales. Elle déclare que la mise à pied résulte plutôt d'une cause juste et suffisante, soit la réduction du volume de travail alors que l'Employée se situe au dernier rang de la liste d'employés occasionnels.
[4] L'Employeur étant d'avis que cette décision a l'autorité de la chose jugée, soulève devant l'Arbitre une objection préliminaire dont il est convenu de disposer en priorité.
[5] Dans le cadre de sa sentence arbitrale (« la Sentence »), l'Arbitre décide qu'il ne ne saurait se saisir du grief puisqu'il y a effectivement « chose jugée », la Commission ayant déterminé qu'il y avait cause légitime justifiant la mise à pied.
[6] Cette détermination est-elle correcte? La Sentence doit-elle être révisée? Voici l'essence des questions que le Tribunal doit trancher.

Les faits pertinents

[7] L'Employée est à l'emploi de l'Employeur à titre occasionnel entre le 6 mars 2002 et le 10 mars 2009[2], alors qu'elle est mise à pied au motif, selon l'Employeur, qu'il y a réduction du volume de travail et compte tenu de son rang sur la liste de rappel des employés occasionnels.
[8] Puisque l'Employée avait participé à deux griefs collectifs moins de trois mois avant sa mise à pied[3], elle dépose auprès de la Commission une plainte contestant la décision de son Employeur, plaidant qu'il s'agit d'un congédiement déguisé survenu en raison de son activité syndicale.

[9] De façon concomitante[4], l'Employée dépose aussi deux griefs individuels, le premier #142979, contestant sa mise à pied au motif qu'il s'agit d'un congédiement déguisé, qui se lit comme suit :
« Je conteste la décision de mon employeur de mettre fin à mon contrat le 10 mars 2009 puisque je considère cette décision comme un congédiement déguisé. Je réclame l'annulation de cette décision ainsi que ma ré-embauche immédiatement. Je réclame aussi tout le traitement, auquel j'ai droit depuis que cette décision a été rendue, jusqu'à ce qu'une décision soit rendue dans le présent dossier. Je réclame finalement tous les autres droits et avantages prévus dans mes conditions de travail et toutes autres lois. »
et le second # 129328, où elle invoque avoir été victime de violence, de harcèlement et de discrimination raciale dans son milieu de travail.
[10] Ce second grief n'est pas joint au premier et ne fait pas l'objet du présent litige, les parties ayant décidé de ne saisir l'Arbitre que de l'objection préliminaire de l'Employeur fondée sur la chose jugée.
[11] Le 20 mai 2009, une audience est tenue devant la Commission quant à la plainte de congédiement déguisé de l'Employée.
[12] Dès le départ, l'Employeur admet l'existence d'une présomption que l'Employée a été congédiée en raison de ses activités syndicales[5] et reconnaît qu'il lui incombe de démontrer

que sa décision se justifie par « *une autre cause juste et suffisante* ».
[13] Le 15 juin 2009, la Commission rejette la plainte de l'employée en vertu de l'article 15 du *Code du travail*[6].
[14] Elle considère que l'Employeur a démontré de façon prépondérante qu'il avait mis à pied l'Employée pour « une autre cause juste et suffisante, sérieuse et véritable », soit la réduction du volume de travail et une réorganisation des activités.
[15] Bien qu'elle reconnaisse que la communication de la mise à pied aurait pu être faite plus adroitement, elle estime que l'Employeur n'a pas usé de son droit de mettre fin à l'emploi occasionnel de l'Employée de façon abusive.

[16] La Commission conclut en rappelant que son rôle :
« …se limite à vérifier la légalité de la décision de l'employeur et non à se substituer à celui-ci.

Dans la présente affaire, la décision du DEC[7] apparaît sérieuse et raisonnable et nullement

influencée par la participation de madame Pierre-Louis au dépôt de deux griefs collectifs. »

[17] Par sentence intérimaire rendue le 18 février 2010, l'Arbitre accueille l'objection patronale préliminaire et rejette le grief de l'Employée puisqu'il conclut à la présence des trois identités : parties, objet et cause, présupposant l'existence de la chose jugée[8].
Résumé de la sentence arbitrale disposant de l'objection patronale
[18] L'Arbitre rappelle que la règle de la chose jugée vise à éviter la multiplicité des procès et la stabilité des décisions. Elle s'étend non seulement aux motifs essentiels liés à la décision mais aussi aux conclusions implicites qui en résultent.
[19] Analysant la notion d'identité des parties, l'Arbitre mentionne que c'est l'Employée qui est signataire du grief et de la plainte devant la Commission. Dans les deux cas, elle plaide le congédiement déguisé. Si le Syndicat est partie au grief, c'est simplement parce qu'il agit pour représenter son membre. Son intervention ne change pas l'identité de la partie qui entreprend le recours : l'Employée.
[20] L'Arbitre déclare ensuite qu'il y a identité d'objet puisque dans les deux recours, l'Employée réclame sa réintégration[9], alléguant être victime de congédiement déguisé.
[21] L'identité de cause est une notion « ***fort épineuse*** » affirme l'Arbitre, qui relève que celle-ci a fait l'objet de nombreux débats et décisions.

[22] Citant la définition offerte par l'auteur Royer[10] et reprenant l'analyse de cette notion d'identité par le juge Gonthier dans l'arrêt *phare Roçois*[11], l'Arbitre retient que l'identité de cause réside dans la double identité de :
1) L'ensemble des faits matériels de la cause et
2) L'essence de la qualification juridique de cet ensemble de faits, même lorsqu'en présence de

règles de droit applicables distinctes.

[23] L'Arbitre rappelle ensuite, ce sur quoi les parties s'entendent, qu'il est exceptionnellement saisi d'un grief « que n'autorise pas en soi la convention collective et qui, conséquemment, ne peut être examiné par un arbitre que dans le cadre de l'exigence de bonne foi qui participe à l'ordre public dans le contexte du contrat de travail ». **[12]**
[24] C'est ainsi que l'Arbitre détermine que son examen du grief ne doit porter que sur la

légalité de la décision de l'Employeur de mettre fin à l'emploi mais qu'il ne dispose d'aucun pouvoir pour apprécier la « *justesse* » de cette décision comme il le ferait normalement dans le contexte d'une mesure disciplinaire.
[25] Puisqu'il ne peut substituer sa propre décision à celle de l'Employeur ou la moduler en fonction des faits en litige et que ses pouvoirs se limitent à déterminer si la décision a été exercée de bonne foi, c'est-à-dire de façon *« non-abusive, discriminatoire ou déraisonnable »*, l'Arbitre conclut qu'il possède donc exactement la même juridiction que la Commission.

[26] L'Arbitre ne possédant pas de pouvoirs supplémentaires à ceux de la Commission et devant analyser la décision du congédiement strictement sous l'angle de sa légalité[13], affirme qu'il lui est impossible de faire droit au grief sans contredire la décision de la Commission.
[27] L'Arbitre conclut qu'il ne peut traiter du grief car les déterminations par la Commission du caractère légal de la fin d'emploi et du fait qu'elle résulte d'une cause juste et suffisante possèdent le caractère de la chose jugée.

Position des parties quant à la révision judiciaire

[28] Les parties soutiennent que la norme de révision applicable est celle de la décision correcte puisqu'il s'agit, selon le Syndicat, d'une question touchant directement la compétence de l'Arbitre à se saisir du litige alors que, selon l'Employeur, l'autorité de la chose jugée est un concept de droit général qui échappe à la compétence spécialisée de l'Arbitre.
[29] L'identité d'objet à laquelle a conclu l'Arbitre n'est pas contestée. Les parties convenant que par sa plainte à la CRT, tout comme par son grief, l'Employée vise à obtenir sa réintégration. Ce sont donc les identités de parties et de cause qui sont visées par la demande de révision du Syndicat.
[30] Le Syndicat soulève dans sa requête trois erreurs dans la Sentence de l'Arbitre que le Tribunal résume ainsi :
30.1. Il a incorrectement conclu à une identité des parties puisque la plainte de l'Employée est un recours personnel qui vise directement l'Employeur alors que le grief appartient au Syndicat.
30.2. Il a incorrectement conclu à une identité de cause alors que les faits générateurs de droit dans le contexte de la plainte à la CRT se limitaient à l'activité syndicale de l'Employée et que ceux liés au grief relevaient plutôt de la conduite abusive, harcelante et discriminatoire de l'Employeur à l'égard de son Employée.
30.3. Il a incorrectement identifié et exercé ses pouvoirs dans le contexte d'un grief présenté par une salariée occasionnelle, limitant son intervention à une simple vérification de la légalité de la décision, alors qu'il devait se pencher sur les possibles causes de congédiement soulevées par l'Employée (harcèlement, abus de droit et discrimination) car elles découlent de l'exigence de la bonne foi et du respect des droits garantis par les Chartes auxquels l'Employeur demeure tenu même dans le contexte d'un salarié n'ayant pas droit au grief en vertu de la convention collective.
[31] Selon le Syndicat, en refusant d'entendre le grief, l'Arbitre a privé l'Employée de sa seule opportunité de prouver que son congédiement constituait un abus du droit de gérance de l'Employeur ou l'aboutissement de harcèlement et de discrimination dont elle était victime.

Ceci, puisque la Commission n'a pas le pouvoir de traiter de ces aspects, son rôle se limitant à s'assurer que le motif du congédiement est sérieux et véritable et qu'il n'est pas lié aux activités syndicales de l'Employée.

ANALYSE

La norme de contrôle

[32] Lorsque la jurisprudence a déjà établi de façon concluante la norme de contrôle qui doit être utilisée pour réviser certaines catégories de décisions, il n'y a pas lieu de se livrer à une analyse exhaustive aux fins de l'identifier[14].

[33] Les parties plaident avec justesse que la norme applicable à l'analyse de la décision de l'Arbitre est celle de la décision correcte. En effet, la Cour suprême a déjà déterminé que la question de l'autorité de la chose jugée en est une de droit, qui ne relève pas de la compétence spécialisée des arbitres et qui, de surcroît, est d'une importance capitale pour le système juridique dans son ensemble[15]. Il faut donc réviser les décisions qui relèvent de ce principe selon la norme de la décision correcte.

Analyse de la chose jugée

Identité de parties

[34] L'identité de parties réside dans l'identité juridique et non dans l'identité physique[16].

[35] Bien que le grief appartienne au Syndicat, celui-ci n'est pas le bénéficiaire de ce recours puisque c'est l'employée qui, tant par sa plainte que par son grief, conteste sa fin d'emploi et cherche à obtenir sa réintégration.

[36] L'Arbitre a donc correctement conclut à l'identité juridique de parties puisque le bénéficiaire des droits sur lesquels se fonde la plainte et le grief est la même personne, l'Employée et que, dans le cas du grief, cette identité s'effectue par le mécanisme de la représentation[17].

Identité d'objet

[37] Puisque l'existence de la chose jugée requiert la présence de cette identité d'objet, le Tribunal doit vérifier que l'Arbitre a correctement examiné cette question, bien que celle-ci ne fasse pas l'objet de contestation.

[38] C'est le cas. L'Arbitre a, en ce sens, suivi les enseignements de la jurisprudence en concluant que l'objet, soit le bénéfice recherché au terme des deux recours, était le même, la réintégration.

Identité de cause

[39] L'identité de cause est un concept plus difficile à cerner. Il exige un regard plus global de l'ensemble de la situation et requiert l'identification d'une double identité, celle des faits matériels en cause, de même que la qualification juridique de ces faits.

[40] De plus, même si des règles de droit différentes peuvent trouver application à une même série de faits, ceci ne signifiera pas, nécessairement, que la qualification juridique de ces faits sera différentes.

[41] Pour cerner la cause, il faut évaluer le terreau des faits matériels présents afin d'y retrouver les racines des droits auxquels il peut donner naissance.

[42] Lorsqu'on projette un tel regard global sur les deux recours qui sont soumis par l'Employée, on constate que les faits matériels soulevés sont les mêmes. Dans les deux cas, l'Employée décrit avoir subi un « congédiement déguisé » alors que l'Employeur justifie la mise à pied par une décision administrative basée sur une diminution dans le volume de travail et l'occupation du dernier rang sur la liste d'appel par l'Employée, qui est une employée « occasionnelle ».

[43] De façon évidente, les deux recours, la plainte et le grief, ne procèdent pas des mêmes dispositions légales ni devant le même type de décideur.

[44] Le statut d'employée occasionnelle est ici important. Il limite l'étendue des droits dont l'Employée peut se réclamer suite à un congédiement, puisqu'elle n'a pas droit au grief en vertu de la convention collective[18].

[45] Ceci ne signifie pas, comme l'a décidé avec justesse l'Arbitre, que la décision de l'Employeur est entièrement soustraite du regard de l'Arbitre. Ce dernier doit néanmoins s'assurer que l'exercice de la discrétion dont bénéficie l'Employeur; celle de ne pas renouveler le contrat ou d'y mettre fin; respecte les exigences de la bonne foi et les droits fondamentaux qui participent de l'ordre public.

[46] Autre constatation: le fardeau de l'Employée est facilité dans le cadre de la plainte auprès de la Commission, la décision de l'Employeur étant présumée illégale, puisque le congédiement est contemporain aux activités syndicales de l'Employée.

[47] Après analyse des dispositions encadrant la plainte devant la Commission et une lecture attentive de la décision de la Commission, le Tribunal ne peut cependant adhérer à la position du Syndicat, pour qui le rôle de la Commission semble se limiter à déterminer si le congédiement est un simple prétexte parce que réellement effectué en raison des activités syndicales de l'Employée.

[48] En effet, la Commission doit[19] évaluer la preuve de façon à déterminer si le congédiement résulte d'une « *autre cause juste et suffisante* ».

[49] La question n'est pas de vérifier si l'Employée a ou non offert devant la Commission de la preuve pour appuyer ses affirmations à l'effet que son congédiement résultait d'un abus de droit de l'Employeur ou constituait l'aboutissement de harcèlement et de discrimination à son endroit. Son choix ou son défaut de faire une telle preuve lui appartient.

[50] Il s'agit plutôt de déterminer si ces motifs allégués pour soulever l'illégalité du congédiement formaient partie de l'étude de cette plainte devant la Commission.

[51] De l'avis du Tribunal, on doit répondre de façon affirmative à cette question car les motifs d'abus ou de discrimination pouvaient être soulevés dans le cadre de la preuve d'une autre cause juste et suffisante, et ce, pour contrer la démonstration de l'Employeur à l'effet que la diminution du volume de travail était un motif véritable du congédiement.

[52] De surcroît, il m'apparaît que les motifs avancés par l'Employée doivent être considérés dans le cadre de la détermination d'une autre cause juste et suffisante et de la légalité de la décision de l'Employeur.

[53] La Commission se devait, au même titre qu'un arbitre, d'examiner ces questions.

[54] D'ailleurs, elle l'a fait, comme l'illustre la question suivante que la Commission se pose dans sa décision : *« Est-ce que le DEC**[20]** a utilisé ce droit de façon abusive dans la présente affaire? La Commission ne le croit pas. Confrontée à un environnement interne et externe qui change, il a pris une décision raisonnable pour s'y adapter et utiliser ses ressources de façon*

*optimale, tel que demandé dans la note du 17 février 2009.**[21]** »*

[55] Aux fins de contrôler la légalité de la décision de l'Employeur, la Commission se devait d'aller au-delà du simple exercice de l'impact des activités syndicales sur cette décision.

[56] C'est d'ailleurs ce qu'elle a fait, lorsqu'elle s'est demandée si la décision constituait un abus de la part de l'Employeur, si cette décision avait été prise de bonne foi et, également, si le motif avancé par l'Employeur pour la mise à pied était juste**.**

[57] Pour qu'une décision se qualifie de « juste », elle doit présenter les caractéristiques du respect des droits qui sont protégés par la Charte et ne pas être discriminatoire.

[58] Ceci fait partie du contrôle de la légalité de la décision de l'Employeur, que tant l'Arbitre que la Commission ont le devoir et le pouvoir d'examiner.

[59] Le Tribunal considère correcte l'analyse qui a été faite par l'Arbitre de son rôle dans le contexte spécifique du grief qui n'est pas autorisé par la convention collective, tel celui en l'espèce.

[60] Dans le cas des recours de l'Employée, tant l'Arbitre que la Commission devaient limiter leur examen à celui de la légalité[22] de la décision de l'Employeur et leur analyse quant à la présence d'une cause juste et suffisante ou sincère et véritable requérait le même processus.

[61] Puisque les deux recours de l'Employée, la plainte et le grief, trouvent leur source dans la même trame de faits et que ces derniers doivent être qualifiés et évalués à la lumière de la même perspective, le Tribunal conclut qu'il est effectivement en présence d'une identité de cause.

[62] La triple identité de partie, de cause et d'objet ayant été correctement évaluée par l'Arbitre, il n'y a pas lieu de réviser sa décision qui conclut à chose jugée.

POUR CES MOTIFS, LE TRIBUNAL :

[63] **REJETTE** la requête en révision judiciaire, **avec dépens.**

_____

Catherine Mandeville, j.c.s.

Me Marc Hurtubise

Procureur de la partie demanderesse

Me Nathalie Fiset

BERNARD ROY & ASS.

Procureure des parties défenderesses

Date d'audience : Le 24 septembre 2010

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[1] En vertu de l'article 15 du *Code du travail*, L.R.Q. c.c.-27 qui concerne le congédiement

pour activités syndicales.

[2] Il y a cependant eu une mise à pied d'environ 4 mois en 2004, en raison d'une réduction du volume de travail.

[3] Plus précisément les 22 décembre 2008 et 16 février 2009.

[4] La plainte auprès de la Commission et les deux griefs individuels sont tous datés du 17 mars 2009.

[5] Cette présomption simple en faveur de l'Employée découle de l'application de l'article 17 du *Code du* travail, L.R.Q., c. C-27.

[6] Précité, note 1.

[7] Directeur de l'état civil.

[8] Il réfère au principe décrit à l'article 2848 du *Code civil du Québec.*

[9] L'arbitre réfère alors à la définition d'objet selon l'auteur Royer dans *La preuve civile*, troisième édition, Cowansville, Yvon Blais éditeur, 2003, qui affirme que « …l'objet d'une action en justice est le bénéfice qu'un plaideur recherche ou le droit qu'il désire faire sanctionner, réduire ou annuler. »

[10] « La cause d'une action consiste dans les faits allégués dans une procédure qui ont des effets de droit. Elle comptera un élément matériel et concret, soit l'effet matériel et les actes juridiques allégués dans les procédures écrites, et un élément formel et abstrait, soit la qualification juridique de ces faits. L'identité de cause suppose une identité de ces deux éléments. »

[11] *Roçois Construction inc*. c. *Québec Ready Mix inc*., [1990] 2 R.C.S. p.453-454. Cette analyse a été réitérée par la Cour Suprême dans l'arrêt *Pelletier c. Roberge* c. *Bolduc* [1991] 1 R.C.S. 374 .

[12] Voir paragraphe 44 de la Sentence, P-6 ainsi que les paragraphes 4-14.16 et 4-14.28 de la convention collective qui n'autorisent pas le recours au grief pour les employés occasionnels.

[13] L'Arbitre précise que son rôle dans le présent dossier est limité par le contexte du grief non autorisé par la convention collective et du congédiement qui n'est pas intervenu dans un contexte disciplinaire mais plutôt administratif. Cette situation se distingue, selon lui, de celle visée par l'abondante jurisprudence sur la question d'autorité de chose jugée qui a établi qu'en présence d'un recours de nature disciplinaire, le mandat de l'arbitre est différent de celui du commissaire; l'arbitre ayant comme devoir d'apprécier la justesse de la décision de l'employeur

et le pouvoir d'y substituer la mesure ou sanction qu'il estime aurait dû être rendue, ce que ne peut faire la Commission.

[14] *Dunsmuir* c. *Nouveau-Brunswick*, [2008] 1 R.C.S. 190 .

[15] Voir arrêt *Toronto (Ville*) c. *S.C.F.P., section locale 79* [2003] 3 R.C.S.77, paragrs 15 et 62.

[16] *Roberge c. Bolduc*, [1991] 1 R.C.S. 374 , paragrs. 410-411.

[17] *Roberge c. Bolduc* précité, *Centre d'hébergement de soins longue durée Champlain – Manoir de Verdun c. Commission des droits de la personne et des droits de la jeunesse* A.Z.99029007 (C.S.), pp. 8 et 9 sur 11.

[18] Ce qui découle des paragraphes 4-14.16 et 4-14.28 de la convention collective.

[19] Article 17 du *Code du travail,* L.R.Q., c. C-27.

[20] Directeur de l'État civil, l'Employeur en l'espèce.

[21] Décision de la *Commission des relations de travail*, P-1, paragr. 28.

[22] Ce qui diffère des cas visés par la jurisprudence soumise qui traitent de situations où les pouvoirs des arbitres les autorisent à évaluer la proportionnalité ou l'adéquation d'une mesure, par exemple, lors de l'examen d'une mesure disciplinaire.

6. HARCÈLEMENT PSYCHOLOGIQUE

X. Institut universitaire en santé mentale de Québec c. Me Denis Gagnon, et Syndicat des éducateurs professionnels et techniciens du Centre hospitalier Robert-Giffard (FP-CSN)
L'honorable Normand Gosselin, JC.S.

Parties
Institut universitaire en santé mentale de Québec c. Gagnon *

Juridiction
Cour supérieure (C.S.), Québec

Numéro de dossier
200-17-012438-107

Décision de
Juge Normand Gosselin

Date de la décision
2010-12-16

Références
AZ-50707645
2010 QCCS 6488
2011EXP-419
2011EXPT-275
J.E. 2011-230
D.T.E. 2011T-87
Texte intégral : 29 pages (copie déposée au greffe)

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ADMINISTRATIF (DROIT) — contrôle judiciaire — cas d'application — grief — arbitre de griefs

— harcèlement psychologique — fardeau de la preuve — appréciation du caractère vexatoire de la conduite — droits de la direction — norme de contrôle — décision raisonnable.

La Dépêche
GRIEF - HARCÈLEMENT PSYCHOLOGIQUE : En mettant l'accent sur l'exactitude des actes de l'employeur ainsi que sur leur effet à l'endroit la plaignante sans vérifier leur raisonnabilité, l'arbitre a éludé une étape essentielle dans l'étude du caractère vexatoire ou non de la conduite reprochée.
ADMINISTRATIF (DROIT) : La sentence arbitrale ayant conclu que la plaignante — une physiothérapeute — avait subi du harcèlement psychologique de la part de sa supérieure immédiate est annulée en raison de son caractère déraisonnable.

Résumé
Requête en révision judiciaire d'une sentence arbitrale de grief. Accueillie.

La plaignante, une physiothérapeute, a déposé un grief dénonçant le harcèlement psychologique exercé à son endroit par sa supérieure immédiate ainsi que la décision de l'employeur de lui retirer son mandat de coordonnatrice. L'arbitre a retenu que plusieurs comportements reprochés constituaient des actes vexatoires permettant de conclure à du harcèlement psychologique. Il fait état, notamment, des motifs injustifiés invoqués au soutien du retrait du mandat de coordonnatrice et de l'absence de preuve de relations conflictuelles entre la plaignante et ses collègues. Selon l'arbitre, le fait d'avoir mis en doute la loyauté de cette dernière dans une lettre l'avisant du retrait de son mandat constituait également un acte vexatoire. De plus, l'employeur aurait mis en évidence des critères de sélection basés sur l'attitude reprochée à la plaignante afin de lui trouver une remplaçante, ce qui l'a blessée inutilement. Enfin, l'arbitre a retenu que l'employeur avait adopté une conduite vexatoire en adressant des reproches à la plaignante devant ses collègues. L'employeur soutient que l'ensemble des gestes et paroles retenus par l'arbitre s'inscrivent dans les limites de l'exercice normal des droits de la direction et ne sauraient constituer du harcèlement psychologique.

Décision
La norme de contrôle applicable est celle de la décision raisonnable. Le harcèlement psychologique peut résulter des gestes de l'employeur ainsi que des décisions qu'il prend dans l'exercice de ses droits de direction. La prudence s'impose alors dans l'application des critères prescrits à l'article 81.18 de la *Loi sur les normes du travail*. En effet, il est plutôt rare qu'un déclassement, une réprimande ou une autre sanction disciplinaire soient «désirés» par le salarié, qui, dans bien des cas, s'en trouvera vexé. De la même façon, les avis répétés et les sanctions progressives auxquels l'employeur doit recourir en matière disciplinaire risquent d'être contrés par des allégations de harcèlement psychologique de la part du salarié visé. Dans l'évaluation du caractère vexatoire de la conduite reprochée, le Tribunal d'arbitrage doit d'abord se demander si les gestes de l'employeur sont déraisonnables et abusifs. En l'espèce, cet élément du fardeau de la preuve, qui incombait à la plaignante, a été complètement occulté par l'arbitre. Tout au long de son analyse de la conduite des parties, il a accordé une importance capitale au caractère «non désiré» des gestes et des décisions de la supérieure

immédiate, sans jamais s'interroger sur leur caractère abusif ou déraisonnable. Or, il appert que les actes reprochés constituaient l'exercice normal, de bonne foi et sans intention hostile, des droits de la direction. En mettant l'accent sur l'exactitude des actes faits par l'employeur ainsi que sur leur effet sur la plaignante, sans vérifier leur raisonnabilité, l'arbitre a éludé une étape essentielle dans l'étude du caractère vexatoire ou non de la conduite reprochée. Les faits retenus par l'arbitre de même que son constat relativement à la bonne foi de l'employeur permettent de conclure que ce dernier a eu un comportement raisonnable, d'où l'absence de conduite vexatoire. La sentence arbitrale est annulée parce qu'elle n'est pas raisonnable.

Fascicule Express
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D.T.E. 2011, no 05

Historique

Instance précédente

Me Denis Gagnon, arbitre, T.A., 2009-12-15, SOQUIJ AZ-50707853

Référence(s) antérieure(s)

(T.A., 2009-12-15), SOQUIJ AZ-50707853

Suivi

Requête pour permission d'appeler accueillie (C.A., 2011-03-04), 200-09-007275-115, 2011 QCCA 404, SOQUIJ AZ-50729178

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Jurisprudence citée

Applique | Explique | Distingue | Critique | N'applique pas | Mentionne | Citée(s) par les parties

Mentionne

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Paragr. 52: *Leclerc c. Laforest*, (C.S., 2009-08-04), 2009 QCCS 3917, SOQUIJ AZ-50573469, D.T.E. 2009T-663
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Paragr. 52: *Syndicat des agents de la paix en services correctionnels du Québec c. Saintonge*, (C.S., 2009-11-04), 2009 QCCS 5097, SOQUIJ AZ-50583816, D.T.E. 2009T-854, EYB 2009-166104

Catégorie
02

Date du versement initial
2011-02-02

Date de la dernière mise à jour
2011-03-19

7. COURRIEL INTERCEPTÉ

XI. Université Laval et Association du personnel administratif professionnel de l'Université
Me Serge Brault, arbitre unique

Parties
Université Laval et Association du personnel administratif professionnel de l'Université Laval (APAPUL), (grief syndical)

Juridiction
Tribunal d'arbitrage (T.A.)

Numéro de dossier
2011-0326

Décision de
Me Serge Brault, arbitre

Date de la décision
2011-02-03

Références
AZ-50721993
2011EXP-921
2011EXPT-541
D.T.E. 2011T-189
Retenu pour publication au R.J.D.T.
Texte intégral : 34 pages (copie déposée au greffe)

Indexation
TRAVAIL — grief — droits de la direction — gestion des ressources humaines — surveillance — interception d'un courriel — institution universitaire — information transmise par un salarié à son syndicat — politique de l'employeur — utilisation du courriel et de l'Internet — vie privée — protection du droit à la confidentialité — droit d'association — exercice abusif des droits de la direction — grief accueilli.
DROITS ET LIBERTÉS — droits et libertés fondamentaux — vie privée — emploi — secteur de l'éducation — surveillance électronique — utilisation du courriel — expectative raisonnable du caractère privé d'une communication — politique de l'employeur — absence de motif

raisonnable justifiant une atteinte — droit à la confidentialité — contenu du message incluant l'identité des usagers — cessation de la pratique et droit à des dommages exemplaires.
DROITS ET LIBERTÉS — réparation du préjudice — dommage exemplaire — caractère intentionnel — absence de correction de la politique de l'employeur — critères à considérer — objectif de dénonciation — quantum — condamnation à un montant équivalant aux frais.

La Dépêche
GRIEF - DROITS DE LA DIRECTION : L'employeur exerce ses droits de direction de façon abusive et porte atteinte au droit à la vie privée en interceptant sans motif raisonnable le courriel envoyé par une salariée à son syndicat; il ne respecte pas la politique qu'il a adoptée en matière d'utilisation du courriel, qui reconnaît la confidentialité d'un tel message et précise les circonstances permettant de passer outre à son caractère privé.
DROITS ET LIBERTÉS : L'employeur a violé la convention collective et le droit à la vie privée en interceptant sans justification un courriel de nature privée adressé par une salariée à son syndicat.

Résumé
Grief relatif à l'exercice des droits de direction et contestant une atteinte à la vie privée. Accueilli.

L'employeur met son réseau Internet à la disposition de l'ensemble de la communauté universitaire, et son personnel utilise obligatoirement un compte de courrier électronique pris en charge par ce réseau. Celui-ci dessert aussi différents organismes se trouvant sur le campus, dont le syndicat. Une employée syndiquée, informée par son supérieur immédiat d'une réorganisation du travail au service de sécurité et de prévention, a communiqué par courriel avec le président de son syndicat afin de l'en informer. À la suite de discussions entre le syndicat et le supérieur, ce dernier a voulu savoir qui avait annoncé ce projet au syndicat. Le directeur et le directeur adjoint du service, soit des représentants de l'employeur, ont demandé à avoir accès au courriel transmis au syndicat. Le syndicat a déposé un grief, reprochant à l'employeur d'avoir contrevenu à la politique de sécurité sur les technologies de l'information et des télécommunications ainsi que d'avoir porté atteinte à son droit à la vie privée de même qu'à celui d'un membre. Il invoque la *Charte des droits et libertés de la personne*, les articles 35 et 36 du *Code civil du Québec* (C.C.Q.) et l'article 1 de la convention collective. Il prétend que tout syndiqué a une expectative raisonnable de respect du caractère privé de ses communications électroniques avec son syndicat qui découle de la politique adoptée par l'employeur. Il réclame la cessation de cette pratique et l'attribution de dommages exemplaires en vertu de l'article 49 de la charte. De son côté, l'employeur soutient que des dommages exemplaires ne sont pas justifiés puisqu'il a entrepris une révision de ses règles afin que ce genre d'incident ne se reproduise plus. Il fait valoir que son seul but était de prévenir la fuite indue de renseignements, particulièrement du service de sécurité et de prévention.

Décision
La protection du droit à la vie privée est assurée notamment par les articles 3 et 35 C.C.Q. de même que par l'article 5 de la charte. L'état du droit actuel n'exclut pas de manière absolue

qu'un employeur puisse consulter les courriels d'un employé au travail à l'insu de ce dernier et il n'indique pas non plus que pareille initiative porte nécessairement atteinte au droit à la vie privée de l'intéressé. La Cour d'appel s'est penchée sur un cas d'interception d'une conversation dans *Ste-Marie c. Placements JPM Marquis inc.* (C.A., 2005-03-18), 2005 QCCA 312, SOQUIJ AZ-50305595, J.E. 2005-711, D.T.E. 2005T-389, [2005] R.R.A. 295, et, dans *Srivastava c. Hindu Mission of Canada (Quebec) Inc.* (C.A., 2001-04-30), SOQUIJ AZ-50085995, J.E. 2001-1055, D.T.E. 2001T-545, [2001] R.J.Q. 1111, [2001] R.R.A. 336 (rés.), elle s'est demandé si une écoute téléphonique pouvait porter atteinte au droit à la vie privée garanti par l'article 5 de la charte. Elle s'est attardée sur le facteur de l'existence chez la victime d'une expectative subjective du caractère privé de l'échange intercepté. En l'espèce, même si l'objet de l'information acheminée concernait le travail et non pas un fait personnel ou privé, la salariée ne s'attendait aucunement à ce que sa dénonciation d'une irrégularité soit portée à la connaissance de l'employeur. Ce dernier a d'ailleurs admis implicitement que pareille attente du syndicat et des employés au sujet du caractère privé de leur courriel était légitime, raisonnable et conforme à sa politique. En effet, non seulement l'utilisation personnelle de la messagerie par les salariés est tolérée par la politique de l'employeur, mais elle est explicitement reconnue et permise. Celle-ci reconnaît expressément la confidentialité d'un courriel et énumère les circonstances susceptibles de mener à la levée du caractère privé de celui-ci. La politique témoigne donc de l'expectative légitime, raisonnable et concrète en matière de confidentialité des courriels de la communauté desservie par le réseau de l'employeur, dont le syndicat fait partie selon la convention, et ce, sans même prendre en considération la protection due à la correspondance dans l'exercice du droit d'association qui fait partie des droits fondamentaux protégés. Au surplus, cette protection s'étendait non seulement au message du courriel, mais aussi à son en-tête, donc à l'identité de son expéditeur et de son destinataire, conformément à la notion de «contenu» définie à la politique. Une telle violation de la confidentialité constitue un exercice abusif des droits de direction. Par ailleurs, le caractère intentionnel d'une atteinte illicite à un droit protégé par la charte est essentiel à l'attribution de dommages exemplaires.

En l'espèce, l'interception du courriel a été autorisée et menée dans le seul but de vérifier l'existence d'une communication par courriel et de connaître l'identité de l'expéditeur. L'employeur savait que celle-ci était privée. De plus, la demande d'accès au courriel ne satisfaisait pas aux conditions mentionnées dans la politique ou dans la jurisprudence afin de permettre une intrusion dans une communication privée. Quant au quantum à accorder, l'article 1621 C.C.Q. énonce les fonctions préventives et dissuasives des dommages exemplaires. À ces fonctions, la Cour suprême, dans *de Montigny c. Brossard (Succession)*, (C.S. Can., 2010-11-10), 2010 CSC 51, SOQUIJ AZ-50688131, 2010EXP-3601, J.E. 2010-1962, [2010] 3 R.C.S. 64, a établi que s'ajoutait désormais celle de la dénonciation lorsque l'enjeu est le respect des droits et libertés garantis par la charte. Or, en l'espèce, il y a eu atteinte au droit à la vie privée garanti par la charte survenue dans un contexte d'insouciance à l'égard de la liberté d'association, laquelle est également garantie par cette dernière. À titre de circonstances atténuantes, l'employeur a fait valoir sa qualité d'organisme public, sa situation financière précaire ainsi que le fait qu'il s'agit d'un cas isolé. Cependant, il n'a pas encore corrigé sa politique trois ans après le fait malgré sa promesse en ce sens. Aux fins de quantifier

le montant des dommages exemplaires, il faut tenir compte du fait que ce dossier aurait pu se régler sans recourir à la procédure de grief. Une somme équivalant aux frais que le syndicat aura directement supportés pour l'arbitrage du grief est une façon raisonnable de les évaluer. Il ne s'agit pas de condamner l'employeur aux frais, mais plutôt d'adjuger un montant réparateur punitif équivalant à ceux-ci.

Fascicule Express
EXP 2011, no 11
EXPT 2011, no 11
D.T.E. 2011, no 11

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Jurisprudence citée

Applique | Explique | Distingue | Critique | N'applique pas | Mentionne | Citée(s) par les parties

Applique

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Catégorie
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Date du versement initial
2011-03-14
Date de la dernière mise à jour
2011-04-14

XII. Carter c. Connors
Le juge F. Ferguson

Traduction **

Intitulé de la cause :

Carter c. Connors

Entre
Rosemary Carter, demanderesse intimée, et
Herbert Connors, défendeur requérant, et
Rosemary Carter, demanderesse, et
La Compagnie d'assurance générale Dominion du Canada, défenderesse

[2009] A.N.-B. no 403

[2009] N.B.J. No. 403

2009 NBBR 317

Dossier no N/C/66/07

Cour du Banc de la Reine du Nouveau-Brunswick
Division de première instance
Circonscription judiciaire de Miramichi

Le juge F. Ferguson

Entendu : le 25 novembre 2009.
Rendu : le 2 décembre 2009.

(46 paragr.)

Traduction : Centre de traduction et de terminologie juridiques, Université de Moncton.

Avocats :

Barry R. Morrison, c.r. pour le requérant.

Louis M. Boudreault pour l'intimée.

Stephen Barnett pour la compagnie défenderesse.

LE JUGE F. FERGUSON :--

INTRODUCTION

1 Le défendeur requérant a déposé une motion en vue d'obtenir une ordonnance enjoignant à la demanderesse, qui fait actuellement l'objet d'un interrogatoire préalable de la part de l'avocat du requérant, de prendre l'engagement d'amener son fournisseur de services Internet, Bell Aliant, à divulguer l'historique de l'utilisation qu'elle a faite d'Internet, chez elle, à compter de la date d'un accident de véhicule à moteur survenu en 2004 jusqu'à aujourd'hui. Cette requête comprend une requête accessoire précise, savoir que pour le cas où la motion serait accueillie, le technicien qui établira le relevé de l'utilisation d'Internet dresse un relevé distinct, si possible, du temps passé dans le site de réseautage social Facebook selon ce que peut révéler le compte d'utilisation d'Internet de la demanderesse. La demanderesse a reconnu, pendant son interrogatoire, qu'elle a également un compte auprès du site de réseautage social Facebook. La motion a été déposée conformément à la règle 33.12 des *Règles de procédure*, mais sur le plan pratique, sous le régime des règles 32.06 et 33.08(3) des *Règles de procédure*.

2 La demanderesse est actuellement partie à une instance devant notre Cour qui a été engagée en 2006 pour des dommages qu'elle prétend avoir subis par suite d'un accident de la circulation mettant en cause le défendeur, M. Connors, qui a eu lieu le 27 novembre 2004.

3 Elle a refusé de donner l'engagement demandé, sur les conseils de son avocat, pour le motif que les renseignements demandés relativement à l'historique du compte ne sont pas pertinents ou constituent une atteinte à son droit au respect la vie privée ou les deux à la fois. Aucune question n'a été soulevée à propos de la nature des renseignements demandés, c'est-à-dire que les renseignements en question sont probablement stockés sous forme électronique seulement.

4 L'issue de la motion dépend de la question de savoir si les renseignements demandés sont pertinents au sens qui a été attribué à ce mot en common law et selon la définition précise qui en a été donnée dans les *Règles de procédure* et la jurisprudence qui régissent l'enquête préalable. L'issue de la motion dépend également de la mesure dans laquelle une partie à un litige peut refuser de divulguer ce genre de renseignements pour le motif que la requête porte atteinte à une attente raisonnable en matière de vie privée qu'elle a à l'égard des renseignements demandés.

LES RELEVÉS

5 Le 2 juillet 2009, pendant ce qui semble avoir été et est toujours un long interrogatoire préalable, pour ne pas dire interminable, Me Morrison, l'avocat du requérant, pendant qu'il interrogeait la partie adverse, la demanderesse Mme Carter, a obtenu une réponse à une question qu'il lui avait posée, réponse qui établissait qu'elle avait un compte Internet pour son ordinateur et qu'elle se servait d'Internet chez elle en vertu d'une convention passée avec le fournisseur des services, Bell Aliant. Elle a également reconnu avoir un compte auprès du site de réseautage social Facebook.

6 cette étape de l'interrogatoire, Me Morrison lui a demandé ainsi qu'à son avocat, Me Boudreault, de lui fournir un engagement:

> [TRADUCTION]
>
> J'aimerais que vous preniez l'engagement d'obtenir tous les relevés d'Aliant concernant l'utilisation de l'ordinateur au domicile de la demanderesse à compter de la date du sinistre et par la suite.

7 L'avocat de Mme Carter a immédiatement refusé d'accéder à cette demande pour le motif qu'elle constituait une atteinte à la vie privée de sa cliente. Me Morrison a alors dit qu'il déposerait une motion afin qu'une ordonnance judiciaire prescrive la divulgation de ces renseignements. Me Boudreault, au nom de Mme Carter, a maintenu sa prétention d'atteinte en matière de vie privée à l'égard des données demandées et a défié Me Morrison de déposer une motion.

8 Me Morrison a ensuite élargi et précisé sa requête:

> [TRADUCTION]
>
> Et la demande ne vise pas seulement le temps passé à l'ordinateur mais également le temps précis passé, s'il est possible d'obtenir ce renseignement, avec l'aide du technicien, sur Facebook. Bien.

9 Le fait que la demanderesse était commise à l'administration à l'hôpital de la région avant l'accident et n'avait pas repris son travail à temps plein pour cet employeur depuis le jour de l'accident est également pertinent en ce qui concerne l'issue de la motion. Selon Me Morrison, fait que Me Boudreault ne conteste pas, elle a essayé de reprendre son travail mais n'a été capable de le faire que pendant de courtes périodes. Selon la demanderesse, cela est en partie imputable aux lésions des tissus mous qui, prétend-elle, ont résulté de l'accident.

LA QUESTION TRANCHER

10 Les règles de droit qui régissent, au Nouveau-Brunswick, la divulgation dans une cause civile autorisent-elles une partie à exiger du fournisseur de services d'une demanderesse qui occupait une poste de commise à l'administration avant un accident de véhicule à moteur qu'il produise des relevés d'utilisation d'Internet et de Facebook lorsque le fondement de la

demande qu'elle a déposée est une lésion des tissus mous qui serait imputable à l'accident et qui l'empêcherait de reprendre son travail à temps plein?

ANALYSE

La pertinence -- En général

11 Avant d'exposer les principes de common law qui régissent l'admissibilité pour des raisons de pertinence, il faut savoir que ce résumé initial des principes ressortissant à la pertinence a un caractère général. Ces principes généraux ne rendent pas pleinement compte des règles particulières applicables au processus d'interrogatoire préalable qui, par l'intermédiaire des dispositions législatives et de l'interprétation retenue dans la jurisprudence, sont venues à la fois préciser et élargir les principes généraux relatifs à la pertinence. Ces règles particulières seront examinées sous une rubrique séparée.

12 Sont admissibles dans une instance tous les éléments de preuve logiquement pertinents en ce qui concerne un fait en litige qui ne sont pas inadmissibles en raison d'une règle de droit ou de preuve ou parce que leur valeur probante est inférieure à l'effet préjudiciable qui résulterait de leur admission. La pertinence dépend beaucoup des autres éléments de preuve et des autres points en litige dans une affaire. Ces énoncés ont été faits par le juge Sopinka relativement à des témoignages d'expert, dans l'arrêt *R. c. Morin*, [1988] 2 R.C.S. 345, 44 C.C.C. (3d) 193, à la p. 218 (C.C.C.) (par. 64 et 66, R.C.S.).

13 En général, la Cour suprême a dit de la pertinence qu'elle trouvait son origine dans la logique, le bon sens et l'expérience humaine. L'arrêt de principe en matière de pertinence au Canada est l'arrêt *R. c. Morris*, [1983] 2 R.C.S. 190, 7 C.C.C. (3d) 97 (C.S.C.). Dans l'arrêt *R. c. Corbett*, [1988] 1 R.C.S. 670, 41 C.C.C. (3d) 385 (C.S.C.) au par. 112 (R.C.S.), p. 421 (C.C.C.), le juge La Forest, dissident, a dit (et plusieurs juges de la Cour ont souscrit à sa dissidence sur la question de la pertinence -- voir aussi les commentaires du juge en chef Dickson, à la p. 404 (C.C.C.)):

> [...] Comme je l'ai fait remarquer auparavant, au stade de l'enquête préliminaire sur la pertinence, les principes fondamentaux du droit de la preuve expriment une politique d'inclusion suivant laquelle tout élément de preuve qui, selon le bon sens, la logique et l'expérience humaine, tend <u>le moindrement</u> à prouver un fait en litige devrait, à première vue, être admis pour aider à découvrir la vérité parce que l'effet cumulatif d'une telle preuve peut s'avérer suffisant pour établir un fait en litige.
>
> [Souligné dans l'original.]

14 De plus, dans l'arrêt *R. c. Underwood* (2002), 9 C.R. (6th) 354 (C.A. Alb.), la Cour a statué qu'un élément de preuve ne perd pas sa pertinence pour la simple raison qu'il peut recevoir plus d'une interprétation ou peut étayer plus d'une inférence. Pour établir la pertinence, la personne qui présente l'élément de preuve n'a qu'à montrer qu'une des interprétations auxquelles donne lieu l'élément de preuve est pertinente en ce qui concerne une question en

litige au procès. C'est au juge des faits qu'il appartient de se prononcer sur la force probante de l'élément de preuve.

15 Dans l'affaire *Underwood*, le juge du procès avait écarté certaines déclarations attribuées à un tiers, décédé au moment du procès, qui tout en étant plutôt indirectes tendaient à appuyer la position de l'accusé selon laquelle le tiers avait commis le meurtre. Un nouveau procès a été ordonné.

16 L'examen récent de l'homicide historique dont a été accusé Steven Truscott, publié à *R. c. Truscott*, [2006] O.J. No. 4171 (C.A. Ont.) a également porté sur la question de la pertinence, mais dans un contexte différent. Dans cet arrêt, le juge en chef McMurtry a dit ceci à propos de l'analyse de la pertinence, au par. 23:

> [TRADUCTION]
>
> La pertinence est contextuelle en ce sens qu'elle dépend des faits en litige, de la position qu'ont adoptée les parties en ce qui concerne ces faits et des autres éléments de preuve produits relativement à ces faits: voir l'arrêt *R. c. Arp* (1998), 129 C.C.C. (3d) 321, à la p. 338 (C.S.C.). Du fait que la pertinence est contextuelle, la Cour est souvent incapable de se prononcer sur la pertinence au moment où l'élément de preuve est présenté, mais elle le reçoit sous condition et détermine sa pertinence après que l'ensemble des éléments de preuve sont connus. Il ne s'ensuit pas, toutefois, que parce qu'il arrive souvent que la pertinence ne peut être déterminée au moment où l'élément de preuve est présenté, elle ne devrait pas être examinée au moment où l'élément de preuve est présenté. Si la Cour est convaincue, au moment où il est présenté, que l'élément de preuve n'est pas pertinent, elle devrait le déclarer non pertinent et refuser de l'admettre. La Cour ne devrait pas entendre une preuve pour le cas où cette preuve pourrait, on ne sait trop comment, à un certain moment et à certains égards, devenir pertinente pour les fins de l'instance.

17 On peut ajouter à ces principes les énoncés généraux suivants concernant la pertinence qui ont été faits dans l'arrêt *R. c. Blackman*, 2008 CSC 37, le tout dernier jugement de la Cour suprême sur le principe de la pertinence en common law. Voici ce qu'a dit le juge Charron aux par. 29 et 30:

> Le principe le plus fondamental de notre droit de la preuve est que, de façon générale, tout renseignement pertinent se rapportant à une question en litige est admissible en preuve. En d'autres termes, une preuve ne peut être admise que s'il existe un lien logique entre l'élément de preuve et une question faisant l'objet du litige. Sans ce lien, la preuve proposée, qu'il s'agisse ou non d'une preuve par ouï-dire, n'a aucune valeur probante et est donc inadmissible. Compte tenu de ce principe essentiel, le juge du procès a à juste titre vérifié la pertinence des déclarations extrajudiciaires pendant le Voir Dire. Bien entendu, il n'y a pas lieu de procéder à un Voir Dire si la

preuve n'est pas pertinente. la fin du Voir Dire, la défense a notamment fait valoir qu'aucun élément de preuve n'établissait un lien entre la personne que M. Ellison aurait poignardée et l'accusé. L'avocat de l'accusé a soutenu que sans un tel lien, les déclarations extrajudiciaires de M. Ellison n'étaient pas pertinentes. Bien qu'il n'ait pas repris cet argument devant la Cour, il s'agit d'un point important, qui mérite qu'on s'y attarde. Par conséquent, avant d'aborder la question de savoir si le juge du procès a eu raison d'admettre selon l'approche raisonnée en matière de ouï-dire les déclarations de M. Ellison, j'examinerai le critère préliminaire de la pertinence.

5.1 *Critère préliminaire de la pertinence*

Pour évaluer *pleinement* la pertinence d'un élément de preuve, il faut tenir compte des autres éléments présentés pendant le procès. Toutefois, en tant que critère d'admissibilité, l'appréciation de la pertinence est un processus continu et dynamique dont la résolution ne peut attendre l'issue du procès. Selon l'étape du procès, le "contexte" de l'appréciation de la pertinence d'un élément de preuve peut très bien être embryonnaire. Souvent, pour des raisons pragmatiques, il faut s'appuyer sur les observations des avocats pour décider de la pertinence d'un élément de preuve. Dans *The Law of Evidence* (4e éd. 2005), p. 29, les professeurs D. M. Paciocco et L. Stuesser expliquent pourquoi, en réalité, le critère préliminaire de la pertinence ne peut être un critère strict et, comme les auteurs le soulignent, les propos suivants du juge Cory dans *R. c. Arp*, [1998] 3 R.C.S. 339, par. 38, rendent bien compte de ce point de vue:

> Pour qu'un élément de preuve soit logiquement pertinent, il n'est pas nécessaire qu'il établisse fermement, selon quelque norme que ce soit, la véracité ou la fausseté d'un fait en litige. La preuve doit simplement tendre à [TRADUCTION] "accroître ou diminuer la probabilité de l'existence d'un fait en litige".

18 Comme le montre ce court résumé de la common law en ce qui concerne le principe de la pertinence, le critère d'admissibilité pour cause de pertinence n'est pas strict.

La pertinence dans le contexte de l'interrogatoire préalable

19 La portée, établie par la loi, de l'interrogatoire au préalable d'un témoin pour le motif que les réponses aux questions posées ou les renseignements demandés sont pertinents est codifiée à la règle 32.06(1) des *Règles de procédure* du Nouveau-Brunswick. Cette règle est en partie rédigée ainsi:

> Sauf ordonnance contraire, la personne interrogée au préalable doit répondre selon ce qu'elle sait, ce qu'elle a appris ou ce qu'elle croit à *toute question légitime qui se rapporte à un des objets du litige* [...]

> [L'italique est de moi.]

20 Le même principe est réitéré à la règle 33.08(3) en ce qui concerne la production d'autres choses. Cette règle est en partie rédigée ainsi:

> Celui qui, durant son interrogatoire, admet avoir la possession, la garde ou le contrôle d'une chose qui n'avait pas été divulguée mais *qui a rapport au litige* et n'est pas privilégiée, doit la produire comme suit pour que la partie interrogeante puisse l'examiner [...]
>
> [L'italique est de moi.]

21 Ces deux règles ont essentiellement le même effet bien qu'elles visent des genres et des formes de preuve différents. Je précise, tout d'abord, que je crois que la règle a une portée suffisamment large pour englober implicitement un [TRADUCTION] "droit de contrôle", de sorte que les relevés d'utilisation que peut avoir Bell Aliant en ce qui concerne l'Internet et d'autres relevés électroniques ressortissant précisément au compte de la demanderesse constituent "une chose" au sens de la règle.

22 Dans l'arrêt *Seely c. Corrier*, [2009] A.N.-B. no 6 (C.A.N.-B.), le juge en chef Drapeau a fait une analyse approfondie de l'expression déterminante, "qui se rapporte à un des objets du litige", ou "qui a rapport au litige", et a accompagné son analyse de certaines orientations, mais relativement à la règle 32.06(1).

23 Dans cette décision, le juge en chef Drapeau a fait plusieurs observations préliminaires qui nous aident à bien formuler la question. Voici ce qu'il a dit aux par. 23, 25 et 27:

> En vertu de la règle 32.06(1), la personne interrogée au préalable doit répondre à toute question "légitime qui se rapporte à un des objets du litige". Cette personne doit répondre aux questions posées selon ce qu'elle sait, ce qu'elle a appris ou ce qu'elle croit.
>
> Dans l'arrêt *Juman c. Doucette*, [2008] 1 R.C.S. 157, [2008] A.C.S. no 8 (QL), 2008 CSC 8, par. 24, le juge Binnie fait remarquer que l'interrogatoire préalable, d'une manière ou d'une autre, joue un rôle essentiel pour prévenir les surprises ou les "litiges par guet-apens", pour encourager les règlements et pour circonscrire les questions en litige lorsqu'un procès s'avère nécessaire. Il va sans dire que les différences dans le libellé des règles procédurales applicables peuvent avoir pour effet d'élargir ou de rétrécir la portée de l'interrogatoire préalable dans divers ressorts. Toutefois, dans son analyse des objectifs de l'interrogatoire préalable, le juge Binnie a adopté essentiellement le point de vue du juge Dickson dans l'arrêt *Seven Seas Restaurant Ltd. c. Central and Eastern Trust Co.* (1978), 26 R.N.-B. (2e) 533, [1978] A.N.-B. no 341 (QL), affaire qui a été tranchée sous le régime de nos anciennes *Règles*, ainsi que le point de vue du juge d'appel Ryan, de notre Cour, dans l'arrêt *Violette et al. c. Wandlyn Inns Ltd. et al.* (1995), 169 R.N.-B.

(2e) 374 (C.A.), [1995] A.N.-B. no 574 (QL), concernant les *Règles de procédure* actuelles. sa manière habituelle de dire les choses sans équivoque, le juge d'appel Ryan a résumé comme suit les principaux objectifs et les éléments essentiels de nos règles actuelles en matière d'interrogatoire préalable:

> [TRADUCTION]
>
> L'un des objectifs de l'interrogatoire oral de l'enquête préalable est de permettre à la partie adverse de savoir quelle preuve elle doit contrer; il vise également à simplifier le procès en procurant des aveux (*Graydon c. Graydon* (1921), 51 O.L.R. 301 (H.C.)). La tendance des tribunaux n'est pas de borner les voies d'enquête préalable, mais de les élargir (*Henderson c. Mercantile Trust Co.* (1922), 52 O.L.R. 198).
>
> Les objectifs susmentionnés s'inscrivent dans le but général de l'enquête préalable, laquelle comporte les précisions, la divulgation de documents, l'examen de documents, la reconnaissance de documents, l'examen physique, la production de rapports, l'examen de biens et les interrogatoires écrits. Le but général de l'interrogatoire préalable peut se résumer en ces termes:
>
> 1. permettre à la partie interrogeante de savoir quelle preuve elle doit contrer;
> 2. permettre à une partie d'obtenir des aveux qui lui éviteront de devoir faire la preuve de ses propres prétentions par d'autres moyens;
> 3. obtenir des aveux qui permettront de démolir l'argumentation de l'adversaire;
> 4. faciliter un règlement.
>
> [Voir les par. 2 et 3.]

Voir également *Doucett c. Crowther et al.* (1992), 129 R.N.-B. (2e) 1 (C.B.R.), [1992] A.N.-B. no 507 (QL), le juge McLellan, par. 8 et 9.

L'interrogatoire oral éclipse tous les autres modes de divulgation qui existent pour ce qui est de son importance et de son efficacité. Dans *Guimond et al. c. Fiberglas Canada Inc. et al.* (1996), 173 R.N.-B. (2e) 25 (C.B.R.), [1996] A.N.B. no 53 (QL), le juge McLellan a fait remarquer à bon droit, après avoir mentionné *Hauck c. Cavendish Farms Ltd. -- Les Fermes Cavendish Ltée* (1984), 56 R.N.-B. (2e) 238 (C.B.R.), [1984] A.N.-B. no 247 (QL), p. 245, décision rendue par le juge Meldrum, que l'exigence "de divulgation entière de tous les faits avant le procès

> marque profondément les *Règles de procédure* actuelles de notre province". En effet, l'obligation qu'a la partie interrogée de répondre selon ce qu'elle sait, ce qu'elle a appris et ce qu'elle croit est probablement l'indice le plus révélateur du fait que le législateur privilégie une divulgation aussi complète que possible et je n'ai pas le moindre doute que les rédacteurs des règles en matière d'enquête préalable étaient conscients de l'évidence suivante: la divulgation complète préalable au procès favorise les tentatives de règlement amiable en supprimant les obstacles que posent les spéculations mal fondées concernant la solidité de la preuve de la partie adverse.

24 Toutefois, c'est aux paragraphes 28 et 29 (en partie) qu'il a clairement établi les paramètres de la pertinence dans le contexte de l'interrogatoire préalable:

> La méthode d'interprétation des règles de divulgation axée sur une "divulgation complète" a été approuvée par notre Cour. (Voir *Kay c. Kay* (1999), 215 R.N.-B. (2e) 291 (C.A.), [1999] A.N.-B. no 289 (QL), par. 26, et *Reilly c. Paul* (2006), 305 R.N.-B. (2e) 146 (C.A.), [2006] A.N.-B. no 380 (QL), par. 20). Les mots "question légitime qui se rapporte à un des objets du litige" figurant à la règle 32.06(1), ont davantage de sens si l'on opte pour une interprétation qui favorise une divulgation générale de l'information (voir *Société canadienne des postes c. Euclide Cormier Plumbing and Heating Inc.*, par. 49). Comme l'a fait remarquer le juge Russell dans la décision *Rocca Enterprises Ltd. et al. c. University Press of New Brunswick Ltd. and Crowther* (1989), 103 R.N.-B. (2e) 224 (C.B.R.), [1989] A.N.-B. no 621 (QL), nos *Règles de procédure* autorisent des interrogatoires préalables "menés sur une base large" [par. 9]. Dans le contexte de l'interrogatoire préalable, il convient d'évaluer de façon large ce qui constitue la pertinence de l'information (voir *Stamper and Di Domenicantonio c. Canadian National Railway Company* (1985), 63 R.N.-B. (2e) 342 (C.A.), [1985] A.N.-B. no 218 (QL), par. 17, le juge d'appel Hoyt (tel était alors son titre). Par conséquent, une question remplit l'exigence de connexité si elle touche un sujet ayant un "air de pertinence". Ce critère, qui constitue depuis longtemps le critère de base en Ontario, est repris, quoique formulé de diverses manières, partout dans la jurisprudence de notre province (voir, par exemple, *Rocca Enterprises Ltd.* et *Fougère c. Acadia Drug (1969) Ltd. et al.* (1993), 206 R.N.-B. (2e) 1 (C.B.R.), [1993] A.N.-B. no 405 (QL), le juge Riordon. Toute question qui "peut" présenter une certaine importance pour les points en litige doit obtenir une réponse. (Voir *Williams et al.*, au par. 19, et *Ross c. New Brunswick Teachers' Association and Beutel* (1996), 174 R.N.-B. (2e) 236, [1996] A.N.-B. no 160 (QL), par. 10). Tous conviennent que l'interrogatoire préalable ne doit pas porter sur des sujets qui n'ont aucun rapport avec les questions soulevées dans les plaidoiries; toutefois, il est généralement reconnu que la pertinence doit être établie au moyen d'une interprétation large des allégations contenues dans

> les plaidoiries (voir *Seven Seas Restaurant*, par. 6). Dans la décision *Slattery (Bankrupt) c. Slattery et al.* (1989), 95 R.N.-B. (2e) 422 (C.B.R.), [1989] A.N.-B. no 310 (QL), par. 10, le juge Jones a reconnu que [TRADUCTION] "[l]es tribunaux ont généralement donné une interprétation assez large à la question de la pertinence" avant de citer, avec approbation, le point de vue énoncé à ce sujet par le juge Dickson dans l'arrêt *Seven Seas Restaurant.*
>
> La jurisprudence de notre province ayant trait à la portée de l'interrogatoire oral ressemble à tous points de vue à la jurisprudence de l'Ontario sur le sujet. Dans l'ouvrage *Choate on Discovery*, feuillets mobiles, 2e éd. (Scarborough, Ont.: Carswell, 1993), aux pages 2-94.2 et suiv., les auteurs expliquent qu'une "grande latitude est accordée à la personne qui interroge de sorte qu'un interrogatoire complet puisse être mené sur les questions en litige". Ils ajoutent que la question de savoir ce qui est pertinent dans ce contexte doit être examinée "avec une certaine latitude" eu égard aux plaidoiries. mon avis, les mots "toute question légitime qui se rapporte à un des objets du litige", qui figurent à la règle 32.06(1), tout comme le groupe de mots correspondant et très semblable contenu dans la règle 31.06(1) des *Règles de procédure civile* de l'Ontario ("aux questions légitimes qui se rapportent à une question en litige") permettent une plus grande latitude dans la démarche interrogatoire que celle autorisée par les règles de preuve applicables au procès. Plus important encore pour les fins de l'espèce, <u>j'accepte la proposition selon laquelle une question remplit le critère dit de la question ayant un "air de pertinence" si, vu la grande latitude accordée à l'avocat qui interroge, la réponse peut mener à la divulgation d'une preuve admissible</u> (voir Holmested et Watson, *Ontario Civil Procedure*, aux pages 31 à 66).
>
> [C'est moi qui souligne.]

25 Ainsi, les pierres de touche, aux fins de la détermination de la pertinence à l'étape de l'interrogatoire préalable, sont "un air de pertinence" ou le fait que "la réponse peut mener à la divulgation d'une preuve admissible". Il est donc clair que les exigences de pertinence posées par la common law aux fins de l'admissibilité dans le cadre du procès sont davantage réduites à cette étape préliminaire de l'instance.

Le respect de la vie privée -- En général

26 Comme nous le verrons, il est, dans une certaine mesure, possible de déterminer l'étendue du droit d'une personne au respect de la vie privée en analysant certains des jugements rendus sur le droit au respect de la vie privée en matière criminelle. La Cour suprême a prévenu les juges qu'ils ne devaient pas utiliser directement cette jurisprudence fondée sur la *Charte* comme bouclier dans le cadre d'un litige privé. Dans l'arrêt *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130, le juge Cory a formulé la chose ainsi, aux par. 93 à 96:

Lorsqu'il s'agit de déterminer de quelle façon la *Charte* s'applique à la common law, il est important de faire la distinction entre les cas où la constitutionnalité de l'action gouvernementale est contestée, et ceux où il n'y a aucune action gouvernementale. Il y a lieu de veiller à ne pas importer dans la sphère du litige privé l'analyse que l'on effectue lorsqu'il y a action gouvernementale.

Dans *Dolphin Delivery*, précité, on a signalé que la *Charte* prescrit les obligations constitutionnelles précises auxquelles l'État est tenu envers ses citoyens. Lorsque l'action gouvernementale est contestée, qu'elle repose sur la loi ou sur la common law, la cause d'action est fondée sur un droit garanti par la *Charte*. Le demandeur allègue que l'État a violé son obligation constitutionnelle et, à son tour, l'État doit justifier cette violation. Si les affaires criminelles offrent l'exemple par excellence de l'action gouvernementale, les contestations visant une action gouvernementale peuvent également survenir dans des affaires civiles. Le devoir de l'État de respecter ses obligations constitutionnelles n'est pas moins pressant dans le domaine civil que dans le domaine criminel. Les deux arrêts *B.C.G.E.U.* et *Dagenais*, précités, présentent une forme très particulière d'"action gouvernementale" dans le contexte civil. Dans les deux cas, la Cour a été appelée à considérer son propre fonctionnement et à déterminer la mesure de sa compétence pour considérer des questions essentiellement publiques. Il ne s'agissait pas de litiges purement privés. Pour cette raison, ces deux affaires doivent être considérées avec prudence dans la détermination de l'analyse applicable à un litige civil purement privé.

Les particuliers ne se doivent réciproquement aucune obligation constitutionnelle et ne peuvent fonder leur cause d'action sur un droit garanti par la *Charte*. La partie qui conteste la common law ne peut alléguer que celle-ci viole un droit garanti par la *Charte*, tout simplement parce que les droits garantis par la *Charte* n'existent pas en l'absence d'une action de l'État. Tout ce que le particulier peut prétendre, c'est que la common law est incompatible avec les valeurs de la *Charte*. Il est très important d'établir une distinction entre les droits garantis par la *Charte* et les valeurs de la *Charte*. Il faut prendre soin de ne pas élargir l'application de la *Charte* au-delà de ce qui est établi au par. 32(1), soit en créant de nouvelles causes d'action, soit en assujettissant toutes les ordonnances judiciaires au contrôle fondé sur la *Charte*. Par conséquent, dans le contexte d'un litige civil qui n'oppose que des particuliers, la *Charte* "s'applique" à la common law dans la mesure seulement où elle est jugée incompatible avec les valeurs de la *Charte*.

Les tribunaux ont traditionnellement été prudents quant à l'étendue des modifications à apporter à la common law. De la même manière, ils doivent veiller à ne pas aller plus loin que nécessaire lorsqu'ils tiennent compte des

> valeurs de la *Charte*. Les changements d'ampleur à la common law doivent être laissés au législateur.
>
> [Souligné dans l'original.]

27 Par la suite, dans l'arrêt *M. (A.) c. Ryan*, [1997] 1 R.C.S. 157, la juge McLachlin, tel était alors son titre, a jeté davantage de lumière sur l'interrelation entre les deux genres de poursuites, aux par. 22 et 30 (en partie) et 38:

> Je prends ici le temps de souligner qu'en examinant la *Charte* il importe de garder à l'esprit la distinction que notre Cour a établie entre appliquer la *Charte* à la common law, d'une part, et garantir que la common law reflète les valeurs de la *Charte*, d'autre part. [...]
>
> Comme je l'ai dit, la common law doit évoluer de manière à refléter les nouvelles valeurs consacrées par la *Charte*. Il s'ensuit que les facteurs soupesés en vertu du quatrième volet du critère applicable pour déterminer l'existence d'un privilège devraient être mis à jour de manière à refléter les valeurs pertinentes de la *Charte*. L'une de ces valeurs est le droit à la vie privée que l'art. 8 de la *Charte* garantit à chacun. Il y a aussi le droit à l'égalité de traitement et de bénéfice de la loi que l'art. 15 de la *Charte* garantit à toute personne. [...]
>
> Il reste à examiner l'argument voulant qu'en engageant des procédures contre l'intimé le Dr Ryan, l'appelante ait renoncé à son droit à la confidentialité. Je reconnais qu'un plaideur doit accepter les atteintes à sa vie privée qui sont nécessaires pour permettre au juge ou au jury de découvrir la vérité et de prononcer un verdict juste. Mais je n'accepte pas qu'en demandant les dommages-intérêts permis par la loi, un plaideur autorise la partie adverse à fouiller dans les aspects de sa vie privée qui n'ont pas besoin d'être scrutés pour bien trancher le litige.
>
> [Souligné dans l'original.]

28 Ces directives fournissent des orientations utiles en ce qui concerne le recours limité à la jurisprudence fondée sur la *Charte* aux fins d'évaluer le droit au respect de la vie privée dans le cadre d'un litige privé.

29 Les préoccupations de la société envers le droit de chacun au respect de la vie privée se sont considérablement accrues récemment, au Canada, principalement en raison des facteurs suivants: 1) la pléthore de dispositions législatives qui est venue élargir la protection du droit de chacun au respect de la vie privée, 2) l'évolution de la *Charte canadienne des droits et libertés* (la *Charte*) et 3) le développement qu'a connu la common law pendant la même période. Au cours des dernières années, étant donné, principalement, les progrès rapides de la technologie, la Cour suprême a tourné son attention vers ce domaine du droit et aidé considérablement les Canadiens à comprendre quels droits à la vie privée une personne peut raisonnablement

s'attendre à voir protégés dans un pays aussi avancé sur le plan technologique que le Canada où l'évolution de la science technologique et sa prolifération font qu'il est devenu difficile de se protéger contre les atteintes à la vie privée.

30 La Cour suprême a logiquement divisé ce domaine en trois aspects importants du droit à la vie privée. Au sommet de ce paradigme se trouve le droit à la vie privée qui a trait à la personne, principalement en ce qu'il concerne l'intégrité corporelle. Viennent ensuite les droits à la vie privée qui ressortissent aux lieux et à l'information. La présente requête concerne cette dernière sous-catégorie.

31 La détermination de la frontière qui sépare l'attente raisonnable en matière de vie privée de l'attente déraisonnable a été précisée davantage par la décision de principe rendue, en matière criminelle, dans l'affaire *R. c. Tessling*, [2004] 3 R.C.S. 432, où le juge Binnie a fait, au par. 25, les observations générales et importantes suivantes en ce qui concerne l'aspect informationnel du droit à la vie privée:

> La vie privée étant une notion protéiforme, il est difficile de fixer la limite du "caractère raisonnable". Dans l'arrêt *Plant*, précité, p. 293, le juge Sopinka a proposé la solution suivante relativement à l'aspect informationnel du droit à la vie privée:
>
> > Étant donné les valeurs sous-jacentes de dignité, d'intégrité et d'autonomie qu'il consacre, il est normal que l'art. 8 de la *Charte* protège <u>un ensemble de renseignements biographiques d'ordre personnel</u> que les particuliers pourraient, dans une société libre et démocratique, vouloir constituer et soustraire à la connaissance de l'État. Il pourrait <u>notamment</u> s'agir de renseignements tendant à révéler des <u>détails intimes sur le mode de vie et les choix personnels de l'individu</u>.
>
> [C'est le juge Binnie qui souligne.]

32 Il avait auparavant exposé les paramètres généraux de l'attente raisonnable en matière de vie privée, au par. 23, lorsqu'il avait dit ceci:

> Au-delà de notre intégrité corporelle et des lieux où nous vivons et travaillons, toutefois, se pose l'épineuse question des *renseignements* qui nous concernent et des activités que nous pouvons soustraire à la curiosité de l'État (*R. c. S.A.B.*, [2003] 2 R.C.S. 678, 2003 CSC 60). Cela englobe les renseignements commerciaux conservés dans un coffre-fort dans un restaurant appartenant à l'accusé (*R. c. Law*, [2002] 1 R.C.S. 227, 2002 CSC 10, par. 16). Le droit au respect du caractère privé des renseignements personnels a été défini comme [TRADUCTION] "le droit revendiqué par des particuliers, des groupes ou des institutions de déterminer eux-mêmes le moment, la manière et la mesure dans lesquels des renseignements les concernant sont communiqués": A.F. Westin, *Privacy and Freedom* (1970), p.

> 7. La protection de ce droit repose sur [le] postulat selon lequel l'information de caractère personnel est propre à l'intéressé, qui est libre de la communiquer ou de la taire comme il l'entend.
>
> Rapport du groupe d'étude établi conjointement par le ministère des Communications et le ministère de la Justice, *L'ordinateur et la vie privée* (1972), p. 13.)

33 Comme nous l'avons vu, pour définir le droit à la vie privée qui a trait à l'information dont on sollicite la protection en l'espèce, il importe de se rappeler que les principes exposés ci-dessus proviennent d'instances criminelles dans lesquelles c'est l'empiètement de l'État sur le droit de chacun au respect de la vie privée qui était examiné. Comme on l'a dit, des règles quelque peu différentes issues des mêmes principes généraux fondamentaux orientent l'analyse dans un litige privé comme celui qui nous occupe en l'espèce.

L'attente en matière de vie privée à l'étape de l'interrogatoire préalable

34 L'intimée a revendiqué un droit au respect de sa vie privée relativement aux relevés généraux de son utilisation d'Internet ainsi que de son utilisation du site de réseautage social Facebook que tient son fournisseur de services Bell Aliant. Nous ne savons pas très bien, à ce moment-ci, si Bell Aliant a la capacité de produire des relevés distincts de l'utilisation de Facebook et l'ordonnance demandée est conditionnelle à l'existence de ces relevés ou à la possibilité de les identifier spécifiquement et de les produire.

35 Des questions semblables à celles qui sont soulevées en l'espèce ont été examinées dans plusieurs instances. Ces instances nous aident à déterminer la portée ou l'étendue des droits au respect de la vie privée lorsqu'il s'agit de relevés et données informatiques dans une instance civile:

> [1] *Park c. Mullin*, [2005] B.C.J. No. 2855 (C.S.C.-B.). Il s'agissait d'une demande en dommages-intérêts pour dysfonctionnement cognitif. On demandait une liste détaillée de tous les dossiers stockés dans l'ordinateur de la demanderesse sur une période de trois ans et demi. Celle-ci était, tant avant qu'après l'accident, conseillère en ressources humaines et elle utilisait son ordinateur pour le travail et à des fins personnelles chez elle. Plusieurs autres personnes se servaient de l'ordinateur. Il était entendu que les dossiers de certains clients faisaient partie de l'inventaire stocké électroniquement. La demande a été rejetée parce qu'elle était trop large et aurait donné lieu à une intrusion injustifiée dans la vie privée de la demanderesse et dans celle d'autres personnes qui n'étaient pas parties à l'instance. De plus, on n'avait pas établi que la production de la liste des dossiers était pertinente en ce qui concernait la question faisant l'objet du litige.
>
> [2] *Ireland c. Low*, [2006] B.C.J. No. 1592 (C.S.C.-B.). Le demandeur a engagé une action pour des blessures subies lors d'un accident de voiture, action

dans laquelle il a prétendu avoir subi une perte de capacité de gagner un revenu. Pendant ses loisirs, il exploitait, chez lui, une entreprise de construction et de vente de remorques. Les défendeurs ont prétendu que l'activité enregistrée sur l'ordinateur pourrait être révélatrice du niveau d'activité commerciale que le demandeur avait pu conserver après l'accident. On a expressément demandé que l'unité de disque dur ou la mémoire de l'ordinateur soient remises à un expert afin d'être copiées et qu'une liste de tous les fichiers, dossiers, courriels, communications par messagerie instantanée et dossiers et fichiers effacés soit remise aux défendeurs. D'autres personnes, savoir l'épouse et le beau-fils du demandeur, utilisaient aussi l'ordinateur. La création d'une liste des fichiers aurait nécessairement obligé l'expert à examiner certains des fichiers et supposé également une analyse des données. La motion a été rejetée pour le motif qu'elle constituait une intrusion injustifiée dans la vie privée de tiers et que les frais qu'il aurait fallu engager pour obtenir les renseignements en question étaient excessifs. La Cour a rendu une ordonnance partielle enjoignant au demandeur d'attester que sa liste des documents faisait état de tous les fichiers électroniques et courriels qu'il avait pu récupérer dans sa corbeille et qui étaient pertinents.

[3] *Bishop (Litigation guardian of) c. Minichiello*, [2009] B.C.J. No. 692 (C.S.C.-B.). Les défendeurs dans une demande en dommages-intérêts pour lésion cérébrale ont présenté une requête en vue de la production de l'unité de disque dur de l'ordinateur familial et ont expressément demandé un compte rendu du temps que le demandeur passait dans le site de réseautage social Facebook entre 23 heures et 5 heures. La requête visait à établir la question de ses heures de sommeil habituelles et de son aptitude au travail. Le demandeur avait prétendu que la fatigue l'empêchait d'occuper un emploi. L'ordonnance a été accordée pour le motif qu'elle était pertinente en ce qui concernait la perte de salaire actuelle et future et avait une portée tellement restreinte qu'elle ne donnerait pas lieu à une intrusion inutile dans la vie privée du demandeur.

[4] *Pritchard c. Crosfield*, [2005] B.C.J. No. 3032 (C.S.C.-B.), le conseiller-maître Patterson (en cabinet). La demande a été déposée par suite d'un accident de voiture dans lequel la demanderesse avait prétendu avoir subi un traumatisme crânien et un possible dommage neurologique. Après l'accident, la demanderesse avait commencée à travailler dans une entreprise familiale, chez elle, en se servant d'un ordinateur. Dans la requête, on demandait le quasi-dépouillement de l'unité de disque dur de l'ordinateur. La demanderesse a accepté de produire tous les documents, fichiers et courriels pertinents produits au moyen de l'ordinateur. La requête a été rejetée dans la mesure où elle se rapportait à des courriels et des recherches sur Internet, ce qui constituait une atteinte injustifiée à la vie

privée de la personne en question. La Cour a ordonné à la demanderesse de préparer et de produire une liste des documents relatifs à l'entreprise qui se trouvaient dans l'ordinateur.

[5] *Leduc c. Roman*, [2009] O.J. No. 681 (C.S.J. Ont.). Le demandeur avait subi un accident de voiture, ce qui, prétendait-il, l'empêchait de prendre part à des activités sportives. D'autres éléments de preuve ont établi qu'il avait un compte sur Facebook. La défenderesse a sollicité la production de son profil Facebook. L'ordonnance a été accordée dans une mesure restreinte. Il semblait que la page exposant le profil du demandeur était susceptible d'avoir un contenu pertinent en ce qui concernait le style de vie du demandeur après l'accident et il ne s'agissait pas d'une demande à l'aveuglette. Toutefois, le conseiller-maître dont la décision avait été portée en appel aurait pu éviter la décision rendue en appel s'il avait autorisé le contre-interrogatoire du demandeur sur son affidavit de documents supplémentaire afin de pouvoir déterminer la pertinence du contenu affiché par le demandeur.

36 Il ressort clairement de ces jugements que la question de savoir s'il y a lieu d'accueillir une requête en vue d'obtenir les données électroniques et informatiques d'une personne dépend principalement du degré d'intrusion dans les choix que fait l'utilisateur d'Internet en ce qui concerne son mode de vie privé et dans son activité électronique, ainsi que de la valeur probante des renseignements sollicités.

37 Il existe une question distincte qui concerne la probabilité que la divulgation ait une incidence sur les droits d'un tiers au respect de sa vie privée. Il faut prêter une attention particulière au droit des tiers au respect de la vie privée lorsque les tiers en question ne sont pas parties à l'instance. Voir, par exemple, les préoccupations qu'a exprimées le juge d'appel Robertson en ce qui concerne le droit au respect de la vie privé des contribuables qui n'étaient pas parties à l'instance dans l'affaire *Chapelstone Developments Ltd. c. Canada*, [2004] A.N.-B. no 450 (C.A.N.-B., à partir du par. 30).

CONCLUSION

38 En l'espèce, je crois que la valeur probante des renseignements demandés est telle que la divulgation de ces renseignements ne portera pas atteinte à une attente raisonnable en matière de vie privée. Il en est ainsi parce que les renseignements demandés ne sont pas, du moins à cette étape de l'instance, des renseignements qui pourraient être considérés comme révélant des renseignements d'ordre très personnel relativement auxquels la plupart des Canadiens sensés auraient des attentes raisonnables en ce qui concerne le respect de leur confidentialité. Autrement dit, ils ne révèlent pas de "détails intimes sur le mode de vie et les choix personnels de l'individu".

39 Cela dit, il semble clair qu'il pourrait ne s'agir que de la première des autres questions que l'avocat du défendeur, Me Morrison, pourrait poser à la demanderesse lors de l'interrogatoire préalable en ce qui concerne l'utilisation générale qu'elle fait d'Internet et plus précisément de Facebook. Si les questions posées essaient de fouiller plus loin dans le mode de vie de la

demanderesse pour ce qui concerne l'utilisation de ces réseaux, il faudra, pour les fins de la pertinence et du respect de la vie privée, réexaminer les limites raisonnables de cet interrogatoire. Ainsi, ce réexamen portera notamment sur la mesure dans laquelle une personne peut revendiquer une attente raisonnable en matière de vie privée pour ce qui est de l'utilisation des données électroniques ressortissant à un site de réseautage social.

40 Cela dit, on ne saurait raisonnablement conclure que les renseignements précis dont on sollicite la production dans le cadre de la présente motion ne satisfont pas au critère voulant qu'ils aient un "air de pertinence", critère auxquelles ils doivent répondre, à cette étape-ci, pour qu'une ordonnance soit rendue. Ils y satisfont parce qu'ils permettraient peut-être de savoir dans quelle mesure la demanderesse a la capacité physique d'utiliser un clavier, d'accéder à Internet et de communiquer avec sa famille, ses amis et ses contacts sur Facebook et donc de déterminer son éventuelle aptitude au travail. En ce sens, ils peuvent "mener à la divulgation d'une preuve admissible", critère préliminaire qui doit être rempli pour que la preuve en question soit produite.

41 Incidemment, il ne faut pas oublier que c'est la demanderesse qui a engagé la poursuite en justice qui nous occupe en l'espèce et en introduisant cette poursuite, elle a implicitement accepté certaines intrusions dans ce qui serait par ailleurs des renseignements confidentiels dont la divulgation relèverait ordinairement de sa décision personnelle. Il va sans dire que ces intrusions sont assujetties à l'engagement implicite de confidentialité sauf en ce qui concerne l'instance en cours.

42 L'intimée a prétendu que si une ordonnance prescrivant la communication des renseignements demandés est rendue, cette ordonnance fera apparaître des données, sous la forme de relevés d'utilisation, touchant d'autres personnes, y compris des membres de la famille, qui ont eu accès à l'ordinateur de la demanderesse pendant qu'elles lui rendaient visite. Sur cette question, il importe de souligner que les renseignements demandés n'empiètent pas sur les droits de tiers au respect de la vie privée que la Cour doit protéger dans les circonstances qui nous occupent où, parce qu'ils ne sont pas parties à l'instance, ces tiers n'ont pas légalement le droit d'être entendus. cette étape-ci, la requête relative à un compte spécifique et à des données personnelles ne concerne que l'utilisation que fait la demanderesse de son comte Facebook personnel. Même dans ces circonstances, la requête ne vise que le temps d'utilisation du compte. En rendant l'ordonnance demandée, on se trouverait à appliquer la common law d'une façon qui est conforme aux valeurs exprimées dans la *Charte* en matière de respect de la vie privée.

43 L'intimée a également fait valoir que la pertinence, sur le plan de la valeur probante, des relevés d'utilisation susceptibles d'être produits a été compromise à un point inacceptable par les autres utilisateurs qui se sont servis du compte Internet pendant qu'ils rendaient visite à la demanderesse. C'est au procès que cet argument devrait plutôt être invoqué pour le cas où les éléments de preuve faisant état de l'utilisation du compte seraient admis dans le cadre de la preuve du défendeur. Voir, à cet égard, la décision *Bishop (Litigation guardian of) c. Minichiello*, précitée, au par. 54.

44 Se pose également la question de la confidentialité des renseignements qu'une recherche quelconque pourrait révéler. Cet aspect est, bien entendu, couvert par l'engagement implicite

que toutes les parties et leurs avocats sont réputés accepter et appliquer, savoir qu'ils n'utiliseront ni ne communiqueront les renseignements reçus sauf dans le cadre de l'instance dans laquelle leur divulgation est ordonnée. *Clements c. Fougère*, [2007] A.N.-B. no 18 (C.A.N.-B.), le juge en chef Drapeau, au par. 5.

45 Finalement, dans un certain nombre des décisions susmentionnées où les requêtes en vue d'obtenir des renseignements du même genre ont été rejetées, les tribunaux ont souligné les coûts considérables que supposent la collecte de ces données électroniques et leur conversion en une forme accessible. Ces facteurs ont été isolés comme étant une des raisons justifiant le rejet d'une demande de ce genre. La question des coûts ne se pose pas seulement en matière civile. Elle se pose sérieusement lorsqu'une ordonnance de communication est rendue sous le régime de l'art. 487.013 du *Code criminel* afin de forcer la production de dossiers bancaires volumineux dans une instance. Les coûts sont invariablement une préoccupation importante. En l'espèce, le défendeur a accepté d'acquitter tous les frais associés à la recherche et à la production des données, ce qui élimine toute préoccupation relative aux coûts.

46 L'ordonnance suivante est donc rendue en faveur du requérant:

1) La demanderesse, Rosemary Carter, devra obtenir de Bell Aliant, son fournisseur de services Internet, l'historique de l'utilisation qu'elle a faite de son compte sur son ordinateur à son domicile, du 27 novembre 2004 jusqu'à la date du présent jugement.
2) La demanderesse, Rosemary Carter, devra demander à Bell Aliant, son fournisseur de services Internet, d'essayer d'établir un historique de l'utilisation de son compte du 27 novembre 2004 jusqu'à la date du présent jugement faisant état de l'utilisation qu'elle a faite du site de réseautage social Facebook, à supposer qu'il soit possible d'établir un relevé de cette nature.
3) Une fois que la demanderesse aura obtenu les historiques de l'utilisation du compte mentionnés aux par. 1) et 2), elle les remettra aux défendeurs en l'espèce.
4) Les défendeurs préserveront la confidentialité des renseignements contenus dans ces documents et ne les utiliseront que dans le cadre de la présente instance et pour des fins légitimes qui ont un rapport avec l'instance sous-jacente. Ils n'en divulgueront aucune partie, sous aucun prétexte, à quiconque n'est pas autorisé, par la présente ordonnance, à y avoir accès ni à aucun expert dont les services n'ont pas été expressément retenus par une partie aux présentes afin qu'il prépare une opinion sur une question ayant un rapport direct avec la présente instance ou l'instance sous-jacente.
5) Le défendeur Herbert Connors supportera les coûts associés à la récupération et à la réunion des renseignements relatifs à l'historique de l'utilisation du compte dont il est question dans la présente ordonnance.

Mme Carter est condamnée aux dépens, fixés à 500 $, qu'elle devra verser à l'intimé Herbert Connors seulement, puisque la compagnie défenderesse n'a pas pris part activement à la motion.

cp/e/qlrxg

Document(s) sélectionné(s): Document en cours de visualisation: 2
Date / Heure: lundi, 21 juin 2010, 10:00:48

XIII. Leduc v. Roman
D.M. Brown J.

Case Name:

Leduc v. Roman

RE: John E. Leduc and Zeana Myerscough-Leduc, Joey Myerscough and Ronald Myerscough, represented by their litigation guardian John E. Leduc, and Janice L. Roman

[**2009] O.J. No. 681**

308 D.L.R. (4th) 353

73 C.P.C. (6th) 323

2009 CarswellOnt 843

2009 CanLII 36310

Court File No. 06-CV-3054666PD3

Ontario Superior Court of Justice

D.M. Brown J.

Heard: February 2, 2009.
Judgment: February 20, 2009.

(38 paras.)

Information technology -- Electronic evidence -- Documentary evidence -- Discovery -- Appeal by the defendant from the dismissal of her motion to compel the plaintiff to produce pages from his social networking website allowed in part -- The Master determined that the defendant failed to show that the plaintiff's Facebook profile contained evidence relevant to the defence of the plaintiff's personal injury action -- The appellate court found that the nature of Facebook permitted an inference of relevance -- Having ordered the plaintiff to preserve his postings and

deliver a supplementary affidavit of documents, the Master should have permitted cross-examination on the affidavit to ascertain relevance of the content -- Ontario Rules of Civil Procedure, Rule 30.06.

Information technology -- Personal information and privacy -- Data -- Disclosure -- Sale or sharing of data -- Appeal by the defendant from the dismissal of her motion to compel the plaintiff to produce pages from his social networking website allowed in part -- The Master determined that the defendant failed to show that the plaintiff's Facebook profile contained evidence relevant to the defence of the plaintiff's personal injury action -- The appellate court found that the nature of Facebook permitted an inference of relevance -- Having ordered the plaintiff to preserve his postings and deliver a supplementary affidavit of documents, the Master should have permitted cross-examination on the affidavit to ascertain relevance of the content -- Ontario Rules of Civil Procedure, Rule 30.06.

Civil litigation -- Civil procedure -- Discovery -- Electronic discovery and production -- Scope -- Duties respecting production of electronic evidence -- Affidavit or list of documents -- Appeal by the defendant from the dismissal of her motion to compel the plaintiff to produce pages from his social networking website allowed in part -- The Master determined that the defendant failed to show that the plaintiff's Facebook profile contained evidence relevant to the defence of the plaintiff's personal injury action -- The appellate court found that the nature of Facebook permitted an inference of relevance -- Having ordered the plaintiff to preserve his postings and deliver a supplementary affidavit of documents, the Master should have permitted cross-examination on the affidavit to ascertain relevance of the content -- Ontario Rules of Civil Procedure, Rule 30.06.

Appeal by the defendant, Roman, from a Master's order dismissing her motion for an order to compel production from the plaintiff, Leduc, of his profile pages from an online social networking site, Facebook. The plaintiff was involved in a car accident that he claimed was caused by the defendant's negligent driving. He claimed that his enjoyment of life was diminished and that he was no longer able to engage in sporting activities. In November 2006, the plaintiff was examined for discovery. No questions were asked regarding his Facebook profile. In September 2007, the defence conducted a psychiatric evaluation of the plaintiff. The medical report indicated that the plaintiff mentioned having several friends on Facebook. Defence counsel located the plaintiff's Facebook account, but access to his site was restricted to his Facebook friends. In June 2008, the defendant moved for, among other things, production of all information in the profile. The Master found that the Facebook profile pages were documents that lay within the control of the plaintiff. The Master concluded that the profile could potentially contain information that had relevance to demonstrating the plaintiff's physical and social activities, his enjoyment of life, and his psychological well-being. However, the Master refused to order production on the basis that the defendant failed to demonstrate that the plaintiff actually had relevant materials on his website. The Master noted that no questions were asked at discovery related to whether the defendant had online materials that were demonstrative of his lifestyle. The Master noted that had the plaintiff posted such lifestyle

information on his Facebook profile, those documents should be listed in his supplementary affidavit of documents. The defendant appealed.

HELD: Appeal allowed in part. In contrast to the Master's ruling, it was reasonable to infer that the plaintiff's Facebook site potentially contained content relevant to the issue of the plaintiff's post-accident lifestyle given the social networking nature of Facebook. The defendant's request for production was not a fishing expedition, as characterized by the Master. However, mere proof of the existence of a Facebook profile did not entitle the defendant to access to all of the material placed on that site. As correctly noted by the Master, Rule 30.06 required some evidence of relevant content in order to compel production. Trial fairness dictated that the defendant should be permitted an opportunity to test whether the plaintiff's Facebook profile was relevant to any matter in issue. Having granted a consent order to serve a supplementary affidavit of documents, the Master should have permitted the defendant to cross-examine the plaintiff on the affidavit in order to ascertain the relevance of the content posted by the plaintiff on his site.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 134(1)

Ontario Rules of Civil Procedure, Rule 30.02(1), Rule 30.02(2), Rule 30.03(4), Rule 30.06, Rule 30.07

Counsel:

J. Strype, for the Plaintiffs/Respondents.

B. Marta, for the Defendant/Appellant.

ENDORSEMENT

D.M. BROWN J.:--

I. Overview

1 Over the past few years Canadian popular culture has embraced www.facebook.com ("Facebook"), a social networking website, as a means by which to reveal one's personal life to other members of the community - one's "Facebook friends". In this motor vehicle action the defendant, Janice Roman, appeals from the decision of Master Dash made August 14, 2008, dismissing her motion to compel production from the plaintiff, John Leduc, of all pages on his Facebook webpage (also called a Facebook profile).

II. Background facts

2 John Leduc was involved in a car accident on February 7, 2004, in Lindsay, Ontario. In this action he claims that as a result of the defendant's negligent driving his enjoyment of life has

been lessened and the accident caused limitations to his personal life (Statement of Claim, paras. 9 and 11).

3 Mr. Leduc was examined for discovery in November, 2006; no questions were asked whether he maintained an active Facebook profile. Mr. Leduc underwent several medical examinations. During an examination in May, 2006, he advised the psychologist that he was not able to engage in the sporting activities he had enjoyed before the accident. In September, 2007, Dr. Bruun-Meyer conducted a defence psychiatric evaluation of Mr. Leduc. The resulting medical report recorded that Mr. Leduc had told Dr. Bruun-Meyer that he did not have friends in his current area, although he had "a lot on Facebook".

4 Mr. Leduc served an unsworn affidavit of documents in August, 2006. On May 28, 2008, defence counsel wrote Mr. Leduc's lawyer requesting a sworn up-to-date Affidavit of Documents.

5 At the same time defence counsel's office conducted a search of Facebook profiles and discovered that Mr. Leduc kept a Facebook account. Mr. Leduc's publicly available Facebook profile showed only his name and picture. Because Mr. Leduc had restricted access to his site only to his "Facebook friends", defence counsel's office was not able to view the content of his site.

6 Early in June, 2008, the defence moved for several production-related orders, including orders for (i) the interim preservation of all information contained on Mr. Leduc's Facebook profile, (ii) production of all information on the Facebook profile,[1] and, (iii) the production of a sworn Supplementary Affidavit of Documents.

III. Decision of the Master

7 On the initial return of the motion Master Dash ordered Mr. Leduc to copy and preserve every page from his Facebook profile until the main hearing of the motion.

8 On the further return of the motion on August 14, 2008, the plaintiff consented to an order to produce a supplementary affidavit of documents. As to the request that Mr. Leduc produce his Facebook pages, Master Dash held that (i) the Facebook profile pages were "documents" and (ii) they lay within the control of the plaintiff. The master also concluded that the Facebook profile could contain information that "might have some relevance to demonstrating the Plaintiff's physical and social activities, enjoyment of life and psychological well being".

9 Master Dash, however, refused to order Mr. Leduc to produce the pages from his Facebook profile. He held that the defendant bore the onus "to demonstrate that this Plaintiff has relevant materials on this Plaintiff's website." He continued:

> I agree with the sentiments expressed in paragraph 30 of the Plaintiff's factum with respect to the precedent that would be created by allowing a Defendant to gain access to any Plaintiff's Facebook merely by proving its existence. Same would be true of a photo album or a diary. The Defendant had an opportunity to ask at discovery whether the Plaintiff had photos -

> either a hard album or electronically that are demonstrative of his lifestyle but I have no evidence such questions were asked.
>
> In my view speculation of what may be on the Plaintiff's site or what is on a 'typical' site is insufficient. Surely the one head shot produced on the one public page is neither relevant nor indicative of what may be on the site. I am also concerned about the Plaintiff's privacy interests; however I am bound by the decision of Rady J. in *Murphy v. Preger* (October 3, 2007, Court File 45623/04, unreported). I do however agree that that decision may be distinguished as set out in paragraphs 27 to 29 of the Plaintiff's factum. In my view, unlike in *Murphy*, the request by the Defendant herein is clearly a fishing expedition. Even if I were to consider a production order, the Defendant's request for the entire site is far too broad and has not been restricted to specified relevant items. The motion will be dismissed.

10 Master Dash went on to note that if Mr. Leduc had posted photographs or other information on his Facebook profile depicting his activities or other enjoyment of life, those documents should be listed in his supplementary affidavit of documents. The master commented that if the production of Facebook profiles should become the new standard in personal injury actions, the decision in *Murphy v. Preger* should be reviewed at an appellate level.

IV. Standard of review

11 An appellate court should only interfere with a decision of a master if he made an error of law, exercised his discretion on the wrong principles, or misapprehended the evidence such that there was a palpable and overriding error. Where the master has erred in law, the standard of review is one of correctness: *Zeitoun v. Economical Insurance Group* (2008), 292 D.L.R. (4th) 313 (Ont. Div. Ct.), paras. 40 and 41.

V. Analysis

A. The obligation to identify and produce relevant documents

12 Our *Rules of Civil Procedure* impose on each party a positive obligation to disclose "every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party" and to produce each such document unless privilege is claimed over it: Rules 30.02(1) and (2). Proper compliance with this obligation is so critical to the functioning of our civil system of justice that each party must produce a sworn affidavit identifying relevant documents. This obligation to disclose continues throughout the course of the action: Rule 30.07.

13 One mechanism established by the Rules to monitor compliance with this disclosure duty consists of permitting an opposite party to move for relief before the courts where it has reason to believe that the other party has not complied with his disclosure obligations. On its motion to secure the production of Mr. Leduc's Facebook profile the appellant relied on Rule 30.06 which provides:

> Where the court is satisfied by any evidence that a relevant document in a party's possession, control or power may have been omitted from the party's affidavit of documents ... the court may
>
> order cross-examination on the affidavit of documents;
> 1. order service of a further and better affidavit of documents;
> 2. order the disclosure or production for inspection of the document, or a part of the document, if it is not privileged ...

14 Rule 30.06 does not detract from the governing principle that the onus for reviewing documents to determine their relevance rests, in the first instance, with the party bearing the obligation to produce. Nonetheless, a motion under Rule 30.06 requires evidence, as opposed to mere speculation, that potentially relevant undisclosed documents exist. However, the level of proof required should take into account the fact that one party has access to the documents and the other does not: *RCP Inc. v. Wilding*, [2002] O.J. No. 2752 (Master), para. 12. When dealing with categories of documents it may not be possible to determine the extent or depth of required production until preliminary questions have been asked, or a preliminary level of production of a category of documents has been made: *RCP Inc., supra*.

15 Master Dash did not err in his articulation of the law regarding motions under Rule 30.06. He acknowledged that Mr. Leduc had an obligation to produce all relevant documents in his possession, including any information posted on his private Facebook profile demonstrating activities and enjoyment of life, "even if it is contrary to his interests in this action". Master Dash also correctly noted that where, on a Rule 30.06 motion, the defendant contends that the plaintiff has not met his obligation to produce relevant documents, then the defendant must provide some evidence that the plaintiff has relevant materials in his possession or control.

B. The existence of relevant information on Mr. Leduc's Facebook profile

16 Master Dash had before him two kinds of evidence: general evidence about Facebook, and specific evidence concerning Mr. Leduc's profile on it.

B.1 General evidence about Facebook

17 The general evidence described Facebook as a "social website" or, as put by its Terms of Use, "a social utility that connects you with the people around you". As of June, 2008, Facebook had more than 70 million active users. Although originally designed for use by American college students, more than half of Facebook's users now are outside of college, and users over 25 years of age make up its fastest growing demographic.

18 The site is available for the personal, non-commercial use of its users. Content which users may post on Facebook includes photos, profiles (name, image, likeness), messages, notes, text, information, music, video, advertisements, listing and other content. The sites' "Facebook Principles" indicates that a user may "set up your personal profile, form relationships, send messages, perform searches and queries, form groups, set up events, add applications, and transmit information through various channels."

19 When a person registers with Facebook, he creates his own profile and privacy settings. Profile information is displayed to people in the networks specified by the user in his privacy settings - e.g. a user may choose to make his private profile information available to others within his school, geographic area, employment network, or to "friends" of "friends". A user can set privacy options that limit access to his profile only to those to whom he grants permission - the so-called "friends" of the user.

20 Facebook contains several applications. A user can post basic personal information - age, contact information, address, employment, personal facts, relationship status, etc. A user can post Photo Albums; Facebook is the largest photo-sharing application on the Web, with more than 14 million photos uploaded daily. A user can create a "wall", or chat board, where friends can post messages to each other. These postings can be viewed by all friends looking at the webpage, unlike emails which only the recipient can read. A user also can join a Facebook "group", essentially a community based on common interests.

B.2 Specific evidence about Mr. Leduc's Facebook profile

21 Turning to the specific evidence that was before Master Dash about Mr. Leduc's Facebook profile, the defence filed a copy of the plaintiff's publicly available Facebook profile which showed his name, photo, and city of residence, Toronto. Mr. Leduc set his privacy options to limit access to his posted material to "friends", so the defence was not able to view any content posted by Mr. Leduc on his profile. According to Mr. Leduc's statement to Dr. Bruun-Meyer, he had "a lot" of friends on Facebook.

22 Master Dash concluded that it would be speculative to infer from the various applications available to a Facebook user what content might exist on a specific Facebook site. He was not prepared to conclude that the one head shot of Mr. Leduc was indicative of what else might be on his site.

C. The approach of other courts to Facebook postings

23 That a person's Facebook profile may contain documents relevant to the issues in an action is beyond controversy. Photographs of parties posted to their Facebook profiles have been admitted as evidence relevant to demonstrating a party's ability to engage in sports and other recreational activities where the plaintiff has put his enjoyment of life or ability to work in issue: *Cikojevic v. Timm*, [2008] B.C.J. No. 72, 2008 BCSC 74 (Master), para. 47; *R.(C.M.) v. R.(O.D.)*, [2008] N.B.J. No. 367, 2008 NBQB 253, paras. 54 and 61; *Kourtesis v. Joris*, [2007] O.J. No. 2677 (Sup. Ct.), paras. 72 to 75; *Goodridge (Litigation Guardian of) v. King*, [2007] O.J. No. 4611, 161 A.C.W.S. (3d) 984 (Ont. Sup. Ct.), para. 128. In one case the discovery of photographs of a party posted on a MySpace webpage formed the basis for a request to produce additional photographs not posted on the site: *Weber v. Dyck*, [2007] O.J. No. 2384 (Sup. Ct., Master).

24 The only case, however, to which counsel referred me on the question of the production of the access-limited contents of a Facebook profile was that of Rady, J. in *Murphy v. Perger*, [2007] O.J. No. 5511 (S.C.J.). That case also involved a claim for damages resulting from injuries suffered in a car accident, including a claim regarding loss of enjoyment of life. The plaintiff had posted photographs on her publicly-accessible Facebook profile showing her engaged in various social activities. The defendant moved for production of any photographs maintained on the

private Facebook profile over which the plaintiff had control. In considering whether the defendant's request represented a mere fishing expedition or whether relevant photographs likely were posted on the private site, Rady J. stated:

> 17 It seems reasonable to conclude that there are likely to be relevant photographs on the site for two reasons. First, www.facebook.com is a social networking site where I understand a very large number of photographs are deposited by its audience. Second, given that the public site includes photographs, it seems reasonable to conclude the private site would as well.
>
> 18 On the issue of relevancy, in this case, clearly the plaintiff must consider that some photographs are relevant to her claim because she has served photographs of her prior to the accident, notwithstanding that they are only "snapshots in time".

25 Rady J. discounted that any significant privacy concerns arose in the circumstances before her:

> 20 Having considered these competing interests, I have concluded that any invasion of privacy is minimal and is outweighed by the defendant's need to have the photographs in order to assess the case. The plaintiff could not have a serious expectation of privacy given that 366 people have been granted access to the private site.

Rady J. ordered the plaintiff to produce copies of the web pages posted on her private site, subject to the ability of plaintiff's counsel to make future submissions in the event that any of the photographs personally embarrassed the plaintiff.

26 Master Dash was not prepared to follow the principle articulated by Rady J. in *Murphy v. Preger* that one could infer from the nature of the Facebook service the likely existence of photographs on the plaintiff's private profile. Master Dash characterized as "speculation" the drawing of any inferences from a "typical" Facebook profile about what content likely would be found on a specific Facebook profile. Master Dash also distinguished the *Murphy* decision on the basis that in that case the plaintiff had posted photographs on her public Facebook profile, had given the defence photographs as part of her productions, and evidence existed that 366 people had access to her site.

D. Review of Master Dash's decision

27 Although web-based social networking sites such as Facebook and MySpace are recent phenomena, their posted content constitutes "data and information in electronic form" producible as "documents" under the *Rules of Civil Procedure*. Facebook's Terms of Use and Principles make it clear that a person's postings fall under that party's control or power since the account user may post or remove content. If a party to an action posts on Facebook content that "relates to any matter in issue in an action", that party must identify such content in his affidavit of documents. Master Dash re-iterated this obligation in his reasons.

28 The *Rules of Civil Procedure* also impose an obligation on a party's counsel to certify that he has explained to the deponent of an affidavit of documents "what kinds of documents are likely to be relevant to the allegations in the pleadings": Rule 30.03(4). Given the pervasive use of Facebook and the large volume of photographs typically posted on Facebook sites, it is now incumbent on a party's counsel to explain to the client, in appropriate cases, that documents posted on the party's Facebook profile may be relevant to allegations made in the pleadings.

29 Where a party makes extensive postings of personal information on his publicly-accessible Facebook profile, few production issues arise. Any relevant public postings by a party are producible. An opposite party who discovers and downloads postings from another's public profile also operates subject to the disclosure and production obligations imposed by the Rules.

30 Where, in addition to a publicly-accessible profile, a party maintains a private Facebook profile viewable only by the party's "friends", I agree with Rady J. that it is reasonable to infer from the presence of content on the party's public profile that similar content likely exists on the private profile. A court then can order the production of relevant postings on the private profile.

31 Where, as in the present case, a party maintains only a private Facebook profile and his public page posts nothing other than information about the user's identity, I also agree with Rady J. that a court can infer from the social networking purpose of Facebook, and the applications it offers to users such as the posting of photographs, that users intend to take advantage of Facebook's applications to make personal information available to others. From the general evidence about Facebook filed on this motion it is clear that Facebook is not used as a means by which account holders carry on monologues with themselves; it is a device by which users share with others information about who they are, what they like, what they do, and where they go, in varying degrees of detail. Facebook profiles are not designed to function as diaries; they enable users to construct personal networks or communities of "friends" with whom they can share information about themselves, and on which "friends" can post information about the user.

32 A party who maintains a private, or limited access, Facebook profile stands in no different position than one who sets up a publicly-available profile. Both are obliged to identify and produce any postings that relate to any matter in issue in an action. Master Dash characterized the defendant's request for content from Mr. Leduc's private profile as "a fishing expedition", and he was not prepared to grant production merely by proving the existence of the plaintiff's Facebook page. With respect, I do not regard the defendant's request as a fishing expedition. Mr. Leduc exercised control over a social networking and information site to which he allowed designated "friends" access. It is reasonable to infer that his social networking site likely contains some content relevant to the issue of how Mr. Leduc has been able to lead his life since the accident.

33 I do agree with Master Dash that mere proof of the existence of a Facebook profile does not entitle a party to gain access to all material placed on that site. Some material may relate to matters in issue; some may not. Rule 30.06 requires the presentation of some evidence that a party possesses a relevant document before a court can order production. Most often such evidence will emerge from questions asked on a party's examination for discovery about the

existence and content of the person's Facebook profile. Where the party's answers reveal that his Facebook profile contains content that may relate to issues in an action, production can be ordered of the relevant content.

34 Here, the defendant did not ask Mr. Leduc any questions about his Facebook profile on his November, 2006 discovery; the defence only learned about the existence of the profile following a medical examination of the plaintiff. Simplified Rules cases do not permit discovery as of right, so other circumstances may arise where a party learns of the existence of another's Facebook profile, but cannot examine the person on the site's content. In such cases trial fairness dictates that the party who discovers the Facebook profile should enjoy some opportunity to ascertain and test whether the Facebook profile contains content relevant to any matter in issue in an action. One way to ensure this opportunity is to require the Facebook user to preserve and print-out the posted material, swear a supplementary affidavit of documents identifying any relevant Facebook documents and, where few or no documents are disclosed, permit the opposite party to cross-examine on the affidavit of documents in order to ascertain what content is posted on the site. Where the parties do not consent to following this process, recourse to the courts may be made.

35 Master Dash adopted the first two steps: he ordered Mr. Leduc to preserve his Facebook postings and to deliver a supplementary affidavit of documents. However, he dismissed the defendant's motion for production of all site materials as overly broad. While I share the Master's concern about the breadth of the defendant's request, I think the court should have permitted the defendant to cross-examine on the supplementary affidavit of documents to learn what relevant content, if any, was posted on Mr. Leduc's Facebook profile. To permit a party claiming very substantial damages for loss of enjoyment of life to hide behind self-set privacy controls on a website, the primary purpose of which is to enable people to share information about how they lead their social lives, risks depriving the opposite party of access to material that may be relevant to ensuring a fair trial.

36 To summarize, Master Dash correctly stated the law that postings on Facebook profiles are documents within the meaning of the *Rules of Civil Procedure* and a party must produce any of his Facebook postings that relate to any matter in issue in an action. Although the Master correctly interpreted Rule 30.06 as requiring some evidence from a moving party pointing to the omission of a relevant document in the other's affidavit of documents, in my view the learned Master erred in exercising his discretion under that rule without applying the principle articulated by Rady J. in *Murphy v. Preger* that a court can infer, from the nature of the Facebook service, the likely existence of relevant documents on a limited-access Facebook profile. Further, having granted a consent order that Mr. Leduc serve a supplementary affidavit of documents, in my view the Master erred in dismissing the motion to produce without affording the defendant an opportunity to cross-examine Mr. Leduc on that affidavit regarding the kind of content posted on his Facebook profile.

37 I therefore allow the appeal to the extent of setting aside paragraph 3 of the order of Master Dash made August 14, 2008. Pursuant to section 134(1) of the *Courts of Justice Act*, I grant leave to the defendant to cross-examine Mr. Leduc on his supplementary of affidavit of documents about the nature of the content he posted on his Facebook profile.

V. Costs

38 As Master Dash observed in his endorsement, only in very recent times have courts turned to considering production requests involving Facebook profiles. In those circumstances, my inclination would be to order costs of this appeal and the motion before Master Dash payable in the cause. However, if the parties wish to make submissions on costs, the defendant may serve and file with my office written cost submissions, together with a Bill of Costs, by Friday, February 27, 2009. The plaintiff may serve and file with my office responding written cost submissions by Friday, March 6, 2009. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

D.M. BROWN J.

cp/e/qlbxm/qlmxb/qlrxg/qlaxw/qlhcs/qlhcs/qlana

1 In its Notice of Motion the defendant sought an order for production to her counsel "of copies of all pages, photographs, profiles, groups, applications, friend lists, wall and funwall postings and video and inspection by [defendant's counsel] of all information contained in the Facebook webpage of the Plaintiff John E. Leduc on or before June 9, 2008".

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Date / Heure: lundi, 21 juin 2010, 09:47:57

XIV. Lougheed Imports Ltd (c.o.b. West Coast Mazda) (Re)
Panel : Allison Matacheskie, Vice-Chair and Registrar

Case Name:

Lougheed Imports Ltd. (c.o.b. West Coast Mazda) (Re)

Lougheed Imports Ltd. operating West Coast Mazda doing business as West Coast Detail & Accessory Centre (the "Employer"), and United Food and Commercial Workers International Union, Local 1518 (the "Union")

[2010] B.C.L.R.B.D. No. 190

186 C.L.R.B.R. (2d) 82

[2011] CLLC para. 220-003

BCLRB No. B190/2010

Case No. 61304

British Columbia Labour Relations Board

Panel: Allison Matacheskie, Vice-Chair and Registrar

Heard: October 15 and 18, 2010.
Decision: October 22, 2010.

(116 paras.)

Appearances:

Donald L. Richards, for the Employer.

Jason Mann, for the Union.

DECISION OF THE BOARD

NATURE OF APPLICATION

1 The Union alleges that the Employer breached Sections 5, 6 and 9 of the *Labour Relations Code* (the "Code") when it terminated the employment of two employees in the bargaining unit. The Employer asserts that it had proper cause to terminate the employment of the employees and therefore did not breach the Code. The Union says that the Employer did not have proper cause and even if it did, the terminations were motivated at least in part by anti-union animus and therefore the Employer committed an unfair labour practice and the terminations should be rescinded by the Board.

2 Due to the embarrassing and offensive nature of some of the comments made about individuals that form part of the evidence in this matter, I have decided to identify all witnesses by initials only.

FACTS

3 The Employer operates an automotive detailing and accessory shop in Pitt Meadows, BC (West Coast Mazda).

4 On August 26, 2010, the Union applied for certification of a bargaining unit of "employees at and from 19120 Lougheed Highway, Pitt Meadows, BC, except sales, office employees and glass installers". The Board sent the Employer notice of the application on August 27, 2010.

5 The Union was certified on September 8, 2010. The parties are in collective bargaining.

6 On August 31, 2010 and on September 8, 2010, the Union filed two unfair labour practice complaints alleging that the Employer had breached the Code. The complaints were resolved and the Union withdrew the complaints.

7 J.T. was employed as a detailer at West Coast Mazda for approximately four years. J.T. was one of the key inside organizers during the organizing campaign and was a vocal and visible supporter of the Union. The Employer was aware of his support for the Union from at least August 27, 2010.

8 A.P. was employed as an installer at West Coast Mazda for approximately two years. A.P. was a Union supporter and the Employer was aware of his support from at least August 27, 2010.

9 F.Y. is the reconditioning manager at West Coast Mazda. He has been employed in that capacity for the past four and a half years. J.T. reported directly to him. A.P. reported to a different manager but took direction from F.Y. as well.

10 F.Y., J.T. and A.P. were all friends on Facebook. Facebook is a social networking website where members display information about themselves for people who are accepted as their friends on their Facebook account.

11 J.T. has almost 100 friends on Facebook including some present and former employees of the Employer. A.P. had 377 friends including some present and former employees of the Employer. A.P. deleted his account on October 1, 2010.

12 F.Y. checks his Facebook account on a daily basis. He has an application on his phone that enables him to access Facebook directly from his phone. Facebook has a feature where members can state their status as an introduction or title to their Facebook profile. When F.Y. enters the application on his phone, it provides a newsfeed which automatically pops up on his home page screen to show him if any friends on Facebook changed their status.

13 On August 27, 2010, F.Y. went on his Facebook account and the newsfeed showed him that J.T.'s status had the following comment:

> 1. Sometimes ya have good smooth days, when nobodys fucking with your ability to earn a living. ... and sometimes accidents DO happen, its unfortunate, but thats why there called accidents right?

14 F.Y. brought this to the attention of J.C. who is the Fixed Operations Manager at West Coast Mazda. The main factual dispute in this case is the reason F.Y. brought this to the attention of J.C. The Union asserts that the Employer was aware that J.T. was the key organizer and compiled a file on J.T for the purpose of having evidence to terminate his employment. The Union does not dispute that the Employer first learned of J.T.'s work related postings through F.Y. However it says the Employer's continued monitoring was due to anti-union animus. Concerning this first posting, F.Y. testified he was concerned about what J.T. meant by "accidents happen". He said he was concerned that something might have happened to his property or that J.T. had plotted against him as J.T. had been confrontational with him before.

15 On September 8, 2010, J.T. posted on his Facebook page:

> 1. When a labour relations lawyer calls ya at 7PM and ya fax him 25 task sheets, ya gotta wonder??? Unfair labour practices, coupled with workplace harassment. ... C'mon Guys??? At least read up on the laws before ya throw the first punch ... because that second punch can by a DOOZY. ...

16 Concerning this posting, F.Y. says he felt a little bit threatened and told J.C. about this posting.

17 On September 17, 2010, J.T. posted as a status update:

> 1. If somebody mentally attacks you, and you stab him in the face 14 or 16 times. ... that constitutes self defence doesn't it????

18 When F.Y. saw this posting as a newsfeed on his phone, he entered J.T.'s Facebook site and saw a posted conversation between J.T. and a non-work related friend. J.T. said:

> 1. .... Works been a shit-storm lately, our shop is a certified union now, so been stressed rt out (Management needs somebody to blame & Im that guy). ... so yeah if you see summa my ANGRY statuses lately, that's why. ...

19 Further down in the postings, J.T. stated his status as "stress relief anyone" and then posted the top five kills from Dexter, which is a television show concerning a vigilante killer.

20 F.Y. brought these postings to J.C.'s attention. J.C. said he was not sure what to do. The atmosphere or mood around the shop was getting darker and now the postings about stabbing and anger concerned him.

21 On September 17, 2010, a friend of F.Y. told him that he was no longer a Facebook friend with J.T. This means F.Y. no longer had access to J.T.'s Facebook page. The friend also told him that J.T. had posted on his Facebook that it is supposed to be a friend's list, not a goof's list.

22 The friend of F.Y., who told him he was no longer a friend of J.T., was a previous employee of the Employer. J.C. asked this former employee to tell him if he saw anything concerning on J.T.'s Facebook. The former employee let J.C. log onto his Facebook account and then together they looked at J.T.'s postings. J.C. printed anything that concerned him.

23 On September 23, 2010, there was a meeting at the workplace with a representative from WorkSafe BC, J.C., F.Y., the other manager, Marco, A.P. and two employees. The Union disputes part of the Employer's evidence concerning this meeting. J.C. and F.Y. testified that about three minutes into the meeting, J.T. burst into the shop and said "just so you know I'm the one who called you and I should be in this meeting". J.C. told J.T. to get back to work. J.T. came closer to J.C. and was agitated. J.T. said he should be part of the meeting. He then said "I know the games you are playing, I will call the Union". He then said directly to the WorkSafe BC representative, "I am [J.T.] and I will be over there" and left the meeting. J.C. apologized to the WorkSafe BC representative and continued the meeting.

24 J.T. disputes that he "burst" into the meeting. He also disputes that he was agitated or spoke loudly. He also denies making the comment about saying the Employer was playing games and that he was going to call the Union. J.T. was concerned because he says the employees that J.C. chose to attend the meeting both voted no in the representation vote and one had already given his notice and was quitting and the other employee was a glass installer who was rarely in the shop. He says he just interrupted the meeting to let them know he thought he should be at the meeting and let the WorkSafe BC representative know his name and where he could find him if he wanted to speak with him. J.T. also says he later spoke in the parking lot to the WorkSafe BC representative and apologized if he had made him feel uncomfortable. He said the representative told him he would call him later and he did.

25 After the meeting, J.C. told J.T. he would be writing him up. He then issued him a written warning which said:

> 1. We have discussed with [J.T.] about his Disruptive and Confrontational behaviour on September 23, 2010. [J.T.] disrupted all staff, during working hours preventing West Coast Detail from performing their regular business. [J.T.] was confrontational and interruptive when management was meeting with WorkSafe BC.

1. Any further disruptive or confrontational behaviour will lead to termination of employment.

26 J.C. says he did not mention anything about his concerns about the Facebook postings in the disciplinary letter as he was not sure what to do about them. He says he was hopeful that the disciplinary letter would generally calm down J.T. He said he was attempting to address J.T.'s volatile behaviour.

27 On September 23, 2010, J.T posted as his status update:

1. 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. One strike in 4 years aint bad, I guess.

28 On September 24, 2010, J.T. posted:

1. Hhhmmmm??? According to this reprimand at work, Im confrontational & disruptive to the WHOLE shop ... AND .... My outburst yesterday was threatening and didn't allow The WestCoastAutoGroup to conduct regular business .... well????All I Gotta say is they pissed off the WRONG GUY ....big time.

29 J.C. viewed the September 23 and 24 posting with the help of the former employee. He says he was concerned because J.T. was now posting about the whole Auto Group and not just the Employer. He was also concerned about J.T. questioning the reprimand and making aggressive statements. He was also offended by the personal insult as he understood, and thought anyone from the workplace reading the posting would understand, that J.T. was referring to him as the "Fixed Ops/Head Prick".

30 J.T. admits he made the postings and says he was a little pissed off as he felt he should be at the meeting as he raised the initial concerns with WorkSafe BC. J.T. felt that his interruption of the meeting did not warrant any discipline.

31 On September 27, 2010, J.T. wrote another posting. He said:

1. Is wondering if his 2 supervisors at work, go to the bathroom together?? And who holds who's penis while pissing??

32 Concerning this posting, F.Y.'s reaction was disgust. He felt very uncomfortable and offended about these inappropriate comments.

33 J.C. says his concerns escalated as J.T. was now making personal derogatory comments about supervisors and lots of people would see it including other employees.

34 On September 28, 2010, there was a safety meeting to update the shop on the meeting with WorkSafe BC. The meeting went well. At the end of the meeting, J.C. asked J.T. if he had any comments or concerns and J.T. responded "no comment". J.C. asked if he was sure and J.T. responded in a loud voice, "what part don't you understand?". J.T. denies using a loud voice

and says that J.C. was repeatedly asking for his comment until he finally said "no, do you not comprehend no". He thought J.C. was picking on him by repeatedly asking for his comment.

35 On the same day as the meeting, J.T. posted on Facebook:

1. Was asked for my opinions at a morning safety meeting...I replied "No comment"... Seems my Boss, whos owned the business 25 yrs & is fixed operations director of 2 dealerships as well ... couldnt comprehend my reply?? So its confirmed...HE'S A COMPLETE JACK-ASS... not just Half-a Tard.

36 On September 28, 2010, J.T. also posted the following comment along with a photograph of a boat owned by the owner of West Coast Mazda:

1. A sure sign summers done .... Detailing the owners boat for storage.

37 On September 30, 2010, there was a posting on A.P.'s Facebook. It stated:

1. west coast detail and accessory is a fuckin joke....dont spend your money there as they are fuckin crooks and are out to hose you... there a bunch of greedy cocksucin low life scumbags... wanna know how I really feel??????

38 A posted Facebook conversation follows which includes J.T. posting:

1. I heard that Marco and [F.Y.] were seen fondling each others nut sack in the shop bathroom?? Any truth to that? That shop ripped off a bunch ppl I know.

1. All in humour, however, none of the stereo shit I bought there works, at all...Deck only plays store bought discs and subs are blown and amp is fried, again. The alpine stuff I bought from A&B works awesome tho.

39 In the same Facebook conversation, there was another posting under A.P.'s name that stated:

> I dont think theres enough room on Facebook to type all the bullshit out... gloves are off now....its game time

40 The Facebook conversation continued with a post from A.P.'s girlfriend. She posted:

1. Somethings just shouldn't be broadcasted on facebook, especially when you still work there.

41 A.P. appears to have posted back:

> That's the whole point honey

42 A.P. denies making any of these postings on September 30, 2010. This critical evidentiary dispute will be dealt with in more detail below.

43 On September 30, 2010, F.Y. got a phone call from a former employee who asked F.Y. if everything was okay at West Coast as he saw the posting from A.P. F.Y. then checked his

Facebook account and saw the posting and the following conversation. He brought it to the attention of J.C.. J.C. says he was concerned about these postings as J.T. was being completely disrespectful to managers and referred to the shop as ripping people off. He was concerned as it criticized the products sold by the Employer and recommended A & B which is a competitor. J.C. brought these postings to the attention of the owners and they were very upset. The owner knew the show Dexter and was very upset.

44 J.C. felt that everyone on the shop floor, including himself, was on edge. Then on October 1, 2010, J.T. posted:

1. [J.T.'s] feeling tactical, and vengefull, and retaliatory.

45 J.C. was concerned about the posting. The owner was informed and legal counsel was consulted to see what the appropriate action was. J.C. says he did not speak to J.T. about his postings as he was not sure what to do. The Employer had never encountered a situation involving Facebook postings before.

46 Earlier on the day of the posting on A.P.'s account, A.P. had been sent home early from work. A.P. was paid on a piece basis. A.P. was angry. He told F.Y. it was a conspiracy and F.Y. said no, it is slow and it is slow at all the dealerships. A.P. says he was only sent home early after the certification. F.Y. says the Employer has always sent home employees working on a piece basis when there was no work so they could use their time for their own purposes.

47 Later that day, F.Y. received the phone call from the former employee expressing concern about A.P.'s posting.

48 F.Y. called A.P. in to work the next day. It was A.P.'s day off, but a customer required installer work at the shop and he called to give A.P. the first right of refusal. A.P. came into work and apologized to F.Y. F.Y. and A.P. have different versions of the content of the apology. F.Y. recalls A.P. apologizing and saying he had written things in the heat of the moment and did not mean anything personally against him and the other supervisor. F.Y. says he did not say much in reply and just kept working. A.P. says he did not say he had written things in the heat of the moment. He says he apologized to F.Y. and said he was sorry for what was posted on his website and asked F.Y. not to take it personally. A.P. says F.Y. told him everything was fine.

49 A.P. says he went home for a few minutes after being sent home from work on September 30 but went out to go to the hospital to visit his grandfather. When he was driving he got a phone call from a friend asking him about some pretty harsh stuff on his Facebook. He sent a text message to his girlfriend and asked her to look at his Facebook. However, he says, at the time he sent her the message he had not seen the posting. He says when he arrived home he saw the posting and the following conversation and deleted them. The next day, he deleted his Facebook account and does not have one anymore.

50 A.P. also says he has had problems with his Facebook before when someone else posted things on it in his name. He said he changed his password.

51 On October 6, 2010, the Employer conducted separate investigatory meetings with J.T. and A.P. They were represented by the Union at the meetings. They were provided with copies

of the Facebook postings. At the beginning of the meeting, the Employer emphasized the importance of being honest at the meeting.

52 At the meeting, the Employer first asked general questions about whether J.T. or A.P. made inappropriate or critical comments about the Employer's business or disrespectful or derogatory comments about management or owners of West Coast Mazda. Both J.T. and A.P. denies making any such postings. They were then asked specific question with quotes from the various postings. They both denied making the postings. J.T. admitted posting a picture of the owner's boat on his Facebook page. He also admitted posting that he was feeling tactical, vengeful and retaliatory but said it had nothing to do with the shop. He also admitted posting that Dexter was a role model but said it had nothing to do with the shop. In response to questions about the derogatory comments about the supervisors, he said he had left Facebook logged on and anyone could have written that.

53 In the investigatory meeting, A.P. denied making the postings on September 30. He said he did not have Facebook anymore and told the Employer he had problems with people hacking into his Facebook account and he had left it logged on at work.

54 On October 7, 2010, J.T. and A.P. were advised that their employment was terminated and were given letters setting out the reasons. They were terminated for making disrespectful, damaging and derogatory comments on Facebook. The Employer found the comments were inappropriate and insubordinate and created a hostile work environment for co-workers and supervisors. It also said they were likely to damage the reputation and business interests of the Employer. The Employer also relied on the Complainants' denials during the investigation meeting and said that they had compounded their wrongdoing by being dishonest during the interview.

55 At this time, J.T. apologized and said he did not mean to hurt anyone and if anyone took anything out of context, he was sorry if he hurt anyone.

2. SUBMISSIONS OF THE PARTIES

[PARA56] The Employer submits that it has proper cause to terminate the employment of both the Complainants. It asserts that it has sufficient grounds to meet the higher test required in the arbitration context by *Wm. Scott & Company Ltd.*, BCLRB No. 46/76, [1977] 1 Can LRBR 1. However, it relies on the proper cause test set out in *White Spot Limited*, BCLRB No. B437/93 (Reconsideration of BCLRB No. B120/93), 21 C.L.R.B.R. (2d) 146. It says a reasonable relationship exists between the misconduct in question and the penalty imposed. There are no persuasive mitigating factors which were not considered and the penalty is not out of proportion to the misconduct. It says the Board's scrutiny is less rigorous than an arbitrator's and grants greater deference to the Employer's decision.

57 The Employer submits that A.P.'s claim that a hacker, or someone else, made the September 30 posting on his Facebook is not credible. It says A.P. was not honest in the investigation meeting and continued to be dishonest when he testified under oath in these proceedings. It says all of the circumstances in this case lead to the conclusion that A.P. made the postings. It says he had the motivation as he was angry at the Employer for being sent

home, he had the opportunity as he was home at the time that the posting was made and admits making a posting later that day on the same Facebook account. It also relies on the stream of comments that follow the post and says A.P. was communicating with other friends, including his girlfriend and J.T. who both thought, at the time, that they were communicating with A.P.

58 The Employer says I should not accept his version of the apology made to F.Y. the next day. It says I should accept F.Y.'s version and the apology further establishes that A.P. made the posting.

59 It says the posting is extremely serious as it names the Employer and clearly damages their reputation as it calls them crooks that are out to hose the public and urges people to not spend their money there.

60 The Employer submits that J.T. was dishonest during the investigating meeting and the fact that he admitted the misconduct at the hearing does not negate proper cause. It says his posting were extremely damaging to the Employer's reputation and created a hostile and poisoned work environment.

61 The Employer submits that there does not have to be a workplace rule prohibiting putting inappropriate postings on Facebook. It relies on *Chatham-Kent (Municipality)*, 159 L.A.C. (4th) 321, paras. 21 and 22 *("Chatham-Kent*") for the principle that there does not have to be a specific rule prohibiting such conduct as insubordination. In particular, at para 7:3660 in Brown and Beatty, Canadian Labour Arbitration (4th ed.), it stated:

> 1. Conduct that is threatening, insolent, or contemptuous of management may be found to be insubordinate, even if there is no explicit refusal to comply with a directive where such behaviour involves a resistance to or defiance of the employer's authority.

62 In *Chatham-Kent,* the arbitrator upheld the termination of an employee for posting comments about work on her personal blog on the internet. The arbitrator found, at para. 25, that the comments put on the internet were insolent, disrespectful and contemptuous of management and were an attempt to undermine the reputation of management and undermine their authority. The arbitrator concluded this was insubordinate behaviour.

63 In *Alberta v. Alberta Union of Provincial Employees*, 174 L.A.C. (4th), 371 ("*Alberta*"), the arbitrator upheld the termination of an employee's employment for posting comments on her personal blog site on the internet concerning her co-workers and management. At para. 97, the arbitrator concluded:

> 1. 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 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.

64 The Employer submits that the employment relationship in this case is also irreparably severed by the conduct of the grievors. It relies primarily on the comments concerning F.Y. and the other manager conducting sexual acts in the workplace washroom and how F.Y. testified how personally disgusted and offended he was by these untrue derogatory comments. As well, the head manager was called a "jack-ass" and "half-a-tard" causing him discomfort as well.

65 The Employer says it is an aggravating factor that the comments were made about a supervisor and manager. In *British Columbia Forest Products,* [1988] B.C.C.A.A.A. No. 154 ("*BCFP*"), the arbitrator found:

> 1. The use of foul language, while common in the workplace, is not acceptable when directed at a Supervisor at any time, but particularly so in the presence of other employees. Foul language when used as a verbal weapon to degrade a Supervisor in front of others is unacceptable. It is totally unacceptable when such an attack is made on a Supervisor without provocation (para. 41, *emphasis in original*).

66 The Employer submits that for J.T. this is not a momentary aberration. It escalated to the point of being unbearable for the Employer to not intervene. It says J.T. was extremely hostile and threatening. Concerning A.P., the Employer says his one posting was extremely egregious and he continues to lie and say he did not post it. It says in these circumstances, the Complainants cannot be returned to the workplace.

67 The Employer relies on *Leduc v. Roman*, 2009 CanLII 6838 (Ont) ("*Leduc v. Roman*") for general court findings about the nature of Facebook and the ultimate conclusion of the court that the plaintiff in that case "could not have a serious expectation of privacy given that 366 people have been granted access to the private site". In this case, A.P. had 377 friends on Facebook and J.T. had almost 100. Most importantly, both Complainants had fellow co-workers, friends who were previously employees of the Employer and F.Y., a current manager as friends on their Facebook accounts. The Employer says that due to the existence of other employees as Facebook friends, posting comments on their Facebook accounts is the same as making the statements on the shop floor at the worksite.

68 The Employer says it is not a mitigating factor in this case that there may have been inappropriate racial or sexist comments made at the workplace by other employees and management. It says:

> 1. ... this whole "common shop talk" approach that has been adopted in the past for reducing disciplinary penalties is becoming less and less sustainable. One might as well say that bigotry or bullying is a norm in a workplace therefore they should be condoned.

1. In today's industrial society one of the major overall goals is to create and maintain respectful workplace environments that are free from abuse. (*Northwest Waste System,* at para 317*).*

69 It also says that the comments made by the Complainants were far worse than any alleged comments made at the workplace such as calling an employee a "spook".

70 The Employer submits that there is no evidence of any anti-union animus in this case. It says the Union's reliance on the fact that the Employer printed out the first posting from J.T.'s Facebook account on the same day that it received the notification from the Board of the certification application does not establish anti-union animus. It acknowledges that it knew at that time that the Complainants were union supporters but maintains that it did not start a search for any grounds upon which it could discipline the Complainants. It says F.Y. and J.C. are credible witnesses and their evidence concerning how the postings came to their attention and why they took the actions they did, when they did, should be accepted.

71 It says any evidence the Union led through its witnesses concerning any anti-union behaviour should not be considered as it was not put to the Employer witnesses when they testified. It acknowledges that two unfair labour practice complaints were filed at the Board during the certification process. However, both complaints were resolved and withdrawn by the Union.

72 The Union submits that under Section 14(7) of the Code, the onus is upon the Employer to establish that its action were not in any way motivated by anti-union animus. It says the Employer has not met this onus and therefore, even if the Board finds there was proper cause for the terminations, it must overturn them if it finds that even one per cent of the Employer's motivation was due to anti-union animus. It says "if union membership can be found to be a proximate cause for the dismissal, even if there existed other proximate causes, the union's complaint will be upheld": *Crown Zellerbach,* BCLRB No. 10/82 at page 4.

73 The Union submits the Board must look at a web of circumstantial evidence to determine if the Employer was motivated by anti-union animus. It relies on *ETL Environmental Technology*, BCLRB No. B195/93 ("*ETL*"), where the Board stated:

3. It is trite to say that an employer does not ordinarily admit that its actions are motivated by anti-union sentiments. Consequently, the Board must conduct its analysis by examining a web of circumstantial evidence. In assessing the evidence and considering the Employer's justification for its actions the Board will look at a number of factors:

4. The employer's previous attitude towards and treatment of similar conduct
4. The employee's previous disciplinary record
4. The seriousness of the work offence
4. The employee's level of union activity and role in the union
4. The employer's knowledge of union activity

4. The manner in which the employer investigated and carried out the discipline/discharge
4. The existence or absence of reasonable justification for the discipline/discharge. (p. 15)

74 The Union submits that the Employer led little evidence to support any of these factors to establish it did not act upon anti-union animus.

75 First, the Union says it is very puzzling that the Employer was concerned enough to keep a file on J.T.'s Facebook postings but did not tell him. It says the Employer went to the extent of involving third parties such as former employees to document what J.T. posted on Facebook and was concerned enough to tell the owner of the business, but did not tell J.T. The Union says the Employer tracked J.T. for quite some time and did not even raise it in a disciplinary meeting which occurred during the course of the Employer's monitoring. The Union says the only reasonable explanation is that the Employer was trying to build a file on J.T to terminate his employment rather than attempt to correct his behaviour.

76 The Union says it is very significant that it started to build a file on J.T on the same day that it learned of the certification application. It says that F.Y. had access to J.T.'s Facebook for a long time and J.T. has vented angry feelings on Facebook before and posted similar comments. In these circumstances, the only rational conclusion that makes sense is that the Employer started documenting on August 27, 2010 because that was the day they learned of the certification application.

77 The Union also says it makes no sense for the Employer to have kept J.T.'s postings on union activity if it was truly just monitoring his misconduct. However, the documents disclosed to the Union as part of this proceeding also included postings about union activity such as the filing of the previous unfair labour practice complaints. The Union submits this is evidence of anti-union animus as the Employer was documenting his union activity.

78 The Union submits that it is also evidence of anti-union animus that the Employer sent A.P. home early on several occasions following the certification application being filed. It says, as A.P. was paid on a piece basis, it makes no sense for them to send him home. There is no cost to the Employer to keep him there the full day and there is no way for the Employer to be certain that a customer will not walk in later in the day. It says A.P. expressed his wish to stay the full day, but the Employer still made him go home early.

79 The Union says the Board can also infer anti-union animus from the way that the Employer handled J.T.'s alleged misconduct. It says it is puzzling that the Employer did not immediately take him aside to have a discussion concerning violence in the workplace if it was truly concerned about the Dexter comments or other violent comments on his Facebook. The Union says it is puzzling unless the Board concluded that it is not a concern about violence but really anti-union animus and the building of a file to be able to terminate the inside union organizer.

80 The Union submits the Employer has not established that it did not act upon its anti-union animus. Turning to the factors in *ETL,* the Union submits that the Employer has not acted consistently with its previous attitude towards and treatment of similar conduct. It says that J.T.'s letter of termination referenced homophobic comments on his Facebook. It say the

Employer has not treated homophobic comments as warranting discipline except in one instance where an employee was given a written warning for calling another employee a racist comment. The Union also submits that it is common to use racist, sexist, homophobic, and xenophobic comments at the workplace. It also says that F.Y. printed a Facebook photo of J.T. on which he had posted the comment "fucking fag" and displayed it at the workplace and there was no discipline for this. The Employer disputes that F.Y. was involved in this incident but does not dispute that it happened. The Union submits that regardless of who posted it, the Employer has not treated similar conduct in a similar manner.

81 Concerning the *ETL* factor of the employee's previous disciplinary record, the Union submits that both Complainants had no previous discipline. The Union submits that the written warning issued to J.T on September 24, 2010 is not previous discipline as it is really a part of this continued monitoring of J.T. that is motivated by anti-union animus.

82 Concerning the seriousness of the work offence, the Union acknowledges that the comments were inappropriate but says they are not a serious workplace offence as the Employer's expectations concerning Facebook use were not made clear. It also says that J.T. worked for a significant period of time after the alleged first workplace offence and so if it was serious, the Employer would not have continued to employ him after the first offence.

83 Concerning the Complainant's union activity, the Employer has acknowledged that it knew they were union supporters and in particular, that J.T. was the most vocal and obviously in support of the Union.

84 The Union submits that the manner in which the Employer investigated the conduct is evidence of it acting upon anti-union animus. It says the Employer started the file on the same day of the notification of the certification application and maintained a file until it had enough to terminate J.T.'s employment. It says the Employer could have told J.T. of its expectations concerning the use of Facebook. It could have taken corrective action but chose not to. The Union says it is highly suspicious that the Employer issues a written warning to J.T on September 24, 2010 and does not mention the Facebook postings or even raise the issue with him in the disciplinary meeting. It says the Employer let small infractions build up so they could eliminate the Union's strongest supporter.

85 Concerning A.P., the Union submits if the Board finds anti-union animus motivated the Employer to take the actions it did concerning J.T., this should be taken into account, and lead to the conclusion that anti-union animus also motivated the Employer to take the action it did against A.P.

86 The Union submits that applying the *ETL* factors to the Employer's action in terminating the employment of A.P. also leads to the conclusion that the Employer was motivated by anti-union animus. It relies on the same arguments it did with respect to J.T. and also argues that the Employer did not investigate A.P.'s assertion that he did not write the Facebook posting on his account on September 30, 2010. It says the action the Employer took after its decision to terminate was to prepare for the hearing and does not assist the Employer in arguing it conducted an adequate investigation. The Union says it would have done an adequate investigation before deciding to terminate if it was not motivated by anti-union animus. It says

there was a lack of due diligence in investigating A.P.'s version of events. The Union says the Employer also gave no consideration to the fact that A.P. immediately deleted the posting which is consistent with his version of facts that he did not write it. It also did not interview his girlfriend to determine what discussions A.P. had and did not investigate the internet usage at the work site until after the termination. The Union submits that the method of investigation used by the Employer shows it was motivated by anti-union animus.

87 The Union says the Employer has been motivated by anti-union animus and therefore, there is no need for the Board to consider whether there was also proper cause for the terminations. If the Board finds that the decisions were motivated by even one percent anti-union animus, it must find an unfair labour practice has occurred when the Employer terminated the employment of J.T. and A.P., even if it also concludes there was proper cause for the terminations.

88 Turning to the issue of proper cause, the Union submits that there is no proper cause for the termination of A.P.'s employment as he did not write the posting on September 30. It says the Board should accept his evidence that someone else did it. The Union also submits that even if the Board determined that he did write the posting, the Employer let him continuing working after it saw the posting and therefore the employment relationship is not irreparably severed.

89 Concerning J.T., it says the penalty imposed is out of proportion to the conduct as the employment relationship is not irreparably severed. It says J.T. apologized for his actions and the Employer had no problem with him continuing to work after it saw his first postings. The Union say if the Employer can let him work during that period, there is no problem with him continuing to work now.

90 The Union submits that in all areas of the evidence where F.Y. and J.C.'s evidence contradicts the Complainants' evidence, the Board should prefer the Complainants.

91 In reply, the Employer submits that there was no unreasonable delay in investigating the misconduct. It says it is measured in a matter of days or weeks. It says this limited time of continued working does not establish that the employment relationship has not been irreparably severed. It also says this limited time cannot be seen as condonation of such serious misconduct.

92 The Employer submits that the facts in this case are distinguishable from the facts in *ETL.* It says the fact that the first posting F.Y. brought to J.C.'s attention was the day of the notification of certification is just a coincidence. It says the Union's theory that it was building a case against J.T. does not make sense as the Employer did not know the postings were going to continue and get worse. It argues that there was no similar previous conduct in the workplace as the Employer had never encountered a situation involving the use of Facebook. It says it was unsure what to do and so it monitored the situation and when it became intolerable to the Employer's business interests it sought legal advice and took appropriate action. The Employer says its manner of investigating and taking action is consistent with prudent business conduct and is not evidence of anti-union animus.

ANALYSIS AND DECISION

[PARA93] The Union's primary argument is that the Employer was motivated by anti-union animus when it terminated the employment of the Complainants. The Union attempts to establish a case of anti-union animus by relying on some of the events that led to the previous two unfair labour practice complaints. However, the complaints were withdrawn by the Union and cannot be relied on in this case to establish anti-union animus.

94 The Union argues that sending A.P. home early is evidence of anti-union animus. It says that as there are no cost savings to the Employer when it sends A.P. home as he is paid on a piece basis, the only rational conclusion is that it is sending him home because he is a Union supporter. The Employer's explanation is that as it did not expect any work to come in, it made more sense to let the employee go home and then he could use his time for his own purposes. I find the Employer's explanation is reasonable. The Employer's claim that there was a seasonal downturn in business was not questioned by the Union in cross-examination. As well, I find the Union's theory is directly contradicted by the fact that, after sending A.P. home on September 30, 2010, F.Y. called him the next day and gave him the first right of refusal on work that had come in for that day. I therefore do not find that the Employer's actions in sending A.P. home early are evidence of anti-union animus.

95 The Union also alluded at times to the Complainants being picked on and conversations about decertification around the workplace. However, it was not fully canvassed or put to the Employer witnesses.

96 The Union's main argument concerning anti-union animus is that the circumstances in this case establish that the Employer was motivated by anti-union animus. It relies on the factors set out in *ETL.* I accept that the *ETL* factors of the employee's high level of union activity, the Employer's knowledge of that union activity and no previous disciplinary record for the Complainants are factors which support the Union's argument that there is anti-union animus.

97 Turning to the factor of whether the Employer has treated similar conduct with a similar attitude, I do not agree that the racist, sexist, or otherwise inappropriate comments previously made on the shop floor are similar conduct. The comments made by the Complainants on Facebook were damaging comments about the Employer's business such as don't spend your money at West Coast Mazda as they are crooks out to hose you and the shop ripped off a bunch of people I know. These Facebook comments were made to either almost 100 or 377 people including employees. I find, based on those facts and the analysis in *Leduc v. Roman* that the Complainants could not have a serious expectation of privacy when publishing comments on their Facebook websites and therefore the comments are damaging to the Employer's business.

98 The comments also included very offensive, insulting and disrespectful comments about supervisors or managers. As the Facebook comments were also made to other employees and former employees that were friends with J.T. and A.P. on Facebook, I accept the Employer's assertion that these comments are akin to comments made on the shop floor. The comments about the supervisors amount to insubordination within the meaning of *BCFP* as they are "used as a verbal weapon to degrade a Supervisor in front of others". J.T. also made comments that

clearly identified and referenced discipline he had received at work. He also identified the manager and called him derogatory and insulting names. I therefore find the Facebook postings are not similar conduct to the inappropriate comments made on the shop floor on a regular basis.

99 The most important *ETL* factor is the manner in which the Employer investigated and carried out the discipline. The main argument raised by the Union to establish its claim of anti-union animus is that the Employer started to compile a file on J.T.'s Facebook postings on August 27, 2010, the date of the certification application, and continued to monitor his Facebook account until October 6, 2010 without making any attempt at earlier corrective action before terminating his employment.

100 The key credibility issue I must determine in this case is the reason the Employer started a file on J.T's Facebook postings on August 27, 2010. I agree with the Union that it is puzzling or suspicious considering the fact that it is the exact same day that the Employer was notified of the certification application and it knew at that time that J.T. was a strong supporter of the Union.

101 The first posting on August 27 was:

> 1) Sometimes ya have good smooth days, when nobodys fucking with your ability to earn a living ... and sometimes accidents DO happen, its unfortunate, but thats why there called accidents right??

102 F.Y. testified that he was concerned about what J.T. meant by "accidents DO happen". He was concerned that something might have happened to his property or that J.T had plotted something against him as J.T. had been confrontational with him before. The Union challenged F.Y.'s credibility with respect to other specific aspects of his testimony (such as the apology made by A.P. the day after the posting) but did not directly challenge F.Y. on his stated concerns about the August 27 posting. When J.T. testified, he did not dispute the assertion that he had been confrontational with F.Y. previously. J.T also did not put forward any explanation for why he deleted F.Y. as a friend on Facebook shortly after making this posting.

103 The Union asserted that J.T. made similar Facebook postings before August 27, 2010 that F.Y. would have seen and therefore the only reasonable explanation for F.Y. to bring the posting to the attention of J.C is because the Employer was looking for reasons to terminate J.T.'s employment. However, the Union was unable to provide any particulars as to the similarity of other postings. In these circumstances, I accept F.Y.'s assertion that he did not consider other Facebook comments he saw to be work-related and they did not cause him the concern that the August 27 posting did.

104 However, even though I accept that the Facebook postings first came to the Employer's attention through a legitimate personal concern raised by F.Y., it does not answer the question of why the Employer monitored J.T.'s Facebook postings from August 27 until October 6, 2010 without raising them with Turner. I agree with the Union that it is puzzling or suspicious that the Facebook postings were not raised at the time that the Employer issued the September 24 disciplinary letter for disruptive and confrontational behaviour in the workplace.

105 When determining issues of credibility, the leading authority is *Faryna v. Chorny*, [1951] 4 W.W.R. (NS) 171, (1952), 2 D.L.R. 354 (B.C.C.A.) ("*Faryna*"). Following the principles in that case, I must determine which version of events is more in keeping with the preponderance of probabilities. In other words, did the Employer monitor for the purpose of building a file on his Facebook postings until a case for termination of the Union's key supporters was established or did the Employer monitor the postings as it was concerned but unsure how to proceed and terminated the Complainant's employment when it considered it intolerable?

106 The Facebook postings became more serious than the "accidents DO happen" posting. There is a ring of truth to the Employer's assertion that it did not know that the postings were going to continue or that they were going to get worse. However, the postings continued and they escalated in seriousness.

107 I conclude that if the Employer was purposefully looking to terminate J.T.'s employment, it makes sense that they would have done so after the September 24 posting. To use the terminology in *Faryna*, it fits within the "preponderance of probabilities" that if the Employer was monitoring solely to find grounds to get rid of the inside union organizer, they would have acted on the September 23 and 24 postings. On September 24, 2010, the Employer issued J.T. a disciplinary letter for disruptive and confrontational behaviour in the workplace on September 23, 2010. On September 23 and 24, 2010, J.T. made postings that identified his employer as WestCoastAutoGroup, called the head manager the "FixedOp/Head Prick", directly referenced the discipline he received and said the "FUKN gloves are off" and "they pissed off the WRONG GUY". J.T. is entitled to his opinion. However, displaying his opinion about work related issues may have consequences within the employment relationship: *Alberta* at para. 97.

108 The fact that the Employer continued to monitor and did not take any disciplinary action when there were further insubordinate postings on September 27, 28 and 30, 2010 supports the Employer's assertion that it was uncertain as to how to handle the situation. Thus, I find that the Employer's explanation for its manner of investigation fits within the preponderance of probabilities. I accept J.C.'s explanation of the Employer's conduct; that it did not attempt to correct J.T.'s behaviour because the Employer was uncertain what to do as it had never encountered a situation which involved an employee's use of Facebook. It continued to monitor until it became intolerable and then it consulted the owner and legal counsel on the appropriate action to take.

109 At that time, they conducted detailed interviews. The Complainants were provided with an opportunity to meet with Union representatives and review copies of the Facebook postings before they were asked about them. At the interviews, the Union representatives were present. Both Complainants denied making the postings. The Employer considered this dishonest and found it compounded the misconduct. The investigation was not over until the interviews were conducted. I find the Employer could have taken action earlier but followed a process which provided the Union with an opportunity to represent the Complainants and provided the Complainants a chance to explain their conduct. I therefore conclude that the Employer was not motivated by anti-union animus in the manner in which it investigated.

110 On a consideration of all the *ETL* factors, I find that the Employer was not motivated by anti-union animus. The fact that the Complainants had no previous discipline and the Employer

knew they were key supporters of the Union does not outweigh the fact that the Employer had never encountered similar conduct, and the work offence was serious insubordination and conduct damaging to the Employer's reputation. The manner of the Employer's investigation was the most important factor to determine if there was anti-union animus in this case. However, for the reasons noted above, I find that it does not support a finding that the Employer was motivated by anti-union animus.

111 I turn to the issue of whether there was proper cause for the termination of the employment of the Complainants. The Union argues that there was no proper cause for the termination of the employment of J.T.'s employment because the penalty imposed is out of proportion to the conduct. However, the only basis upon which is argues this point is that it says the employment relationship is not irreparably severed. It says the Employer had no problem with him continuing to work after it saw his first postings and therefore there is no problem with him continuing.

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. The fact that the Employer allowed this insubordinate conduct to continue for a matter of weeks does not mitigate against a finding of proper cause. I therefore find the penalty is not out of proportion with the misconduct and there is proper cause for the decision to terminate the employment of J.T.

113 Turning to A.P., the Union argues there is no proper cause, as A.P. did not make the postings on September 30, 2010. I rely again on the test in *Faryna.* A.P was angry with the Employer on September 30 because he was sent home. He was angry because he thought it was a conspiracy and he was sent home because of his support for the Union. He admits he was home for a few minutes around the time that the posting was made. As well, A.P. admits making postings on his Facebook later that day. So there is a small window of opportunity for some unknown hacker to enter his account and express anger about the Employer under his name. His assertion that he left his Facebook page logged on at work does not make sense considering the fact that he had problems in the past where someone had hacked into his Facebook and posted comments under his name on his page.

114 Most significantly, he admits apologizing to F.Y. the next day. This makes sense as there were very offensive comments about F.Y. posted by J.T. in the conversation that flowed from the initial status posting. However, even if I accept A.P.'s version that he apologized for comments "made" on his Facebook page rather than for comments "he made" on his Facebook page, it does not make sense for him to not clearly express that he did not make the postings and someone had hacked into his account. The comments concerned him to the point that he immediately deleted the postings and then closed his Facebook account the next day. I take from this that he understood how inappropriate and serious the comments were. However, when he apologized to F.Y., he did not expressly say that someone had hacked into his account. This does not fit into the preponderance of probabilities.

115 I found A.P.'s testimony that a friend called him and told him there was harsh stuff on his Facebook to be believable. However, as set out in *Faryna*, the demeanour of a witness is not always a reliable indicator of the truth. When I consider the totality of the evidence, I find that

he had the motivation and the opportunity to make the postings. I also find making his apology without saying at that time that someone hacked into his Facebook account leads me to conclude that A.P. made the Facebook posting on September 30, 2010. The comment was very egregious in that it named the Employer and attempted to encourage people not to spend money at the Employer's business. A.P. only made the comments on September 30 and therefore it is an isolated incident. He also apologized to F.Y. who was the person most personally insulted during the ensuing Facebook conversation. A.P. apologized the very next day before he was aware that the Employer knew about the posting. If A.P. had admitted the postings and been honest during the investigation meeting and these proceedings, my conclusion may have been different. However, the Employer found that the dishonesty in the investigation meeting compounded the misconduct and determined that it justified termination. I agree and find that there is proper cause for the termination of A.P.

116 I find the Employer has not breached the Code and dismiss the Union's application.

ALLISON MATACHESKIE
VICE-CHAIR AND REGISTRAR

cp/ci/e/qllqs/qlhcs/qlced

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XV. Murphy v. Perger
H.A. Rady J.

Case Name:

Murphy v. Perger

RE: Jill Murphy, Anne Murphy and Doug Murphy, and Patricia Perger

[2007] O.J. No. 5511

67 C.P.C. (6th) 245

2007 CarswellOnt 9434

Court File No. 45623/04

Ontario Superior Court of Justice

H.A. Rady J.

Heard: September 24, 2007.
Judgment: October 3, 2007.

(21 paras.)

Counsel:

James J. Mays, for the Plaintiffs.

Dara M. Lambe, for the Defendant.

ENDORSEMENT

1 H.A. RADY J.:-- The defendant moves for production of copies of a webpage bearing the plaintiff's name on the www.facebook.com web site. Access to this site is controlled by the plaintiff and she must grant permission to anyone who wishes to view the material that is

posted there. The defendant does not seek access to email communications contained on the site.

2 The plaintiff claims damages for personal injuries that she alleges that she sustained in a motor vehicle accident that occurred on January 22, 2003. She is advancing a claim for general damages for pain and suffering and loss of enjoyment of life. She has served certain expert reports, including a report respecting future economic loss. The trial is scheduled to proceed later this month. The plaintiffs physicians have diagnosed her as suffering from temperomandibular joint dysfunction and fibromyalgia.

3 Mr. Mays has served photographs showing Ms. Murphy participating in various forms of activities pre-accident. Ms. Murphy and other witnesses to be called at trial will testify about the detrimental impact that the accident has had on her enjoyment of life and her ability to participate in avocational and social activities.

4 The defendant has had access to a publicly accessible site called "The Jill Murphy Fan Club" that contains photographs of her engaged in various social activities. However, the defendant wishes access to the private site, which was created by Ms. Murphy's sister but over which Mr. Mays, with his usual candor, conceded Ms. Murphy has control.

5 The defendant submits that this information is relevant to the assessment of the plaintiff's claim; there is no or very little prejudice given that 366 people have been given permission by Ms. Murphy to access the site; and the information would be shielded from disclosure in future by virtue of the implied undertaking rule.

6 The defendant relies on the decision of Browne J. in Kourtesis v. Joris, which was a mid-trial ruling involving a similar situation. During the course of trial and after the plaintiff had testified, the defendant became aware of a website controlled by the plaintiff which contained post accident photographs of her at a party. The defendant was permitted to introduce the photographs into evidence, with leave for the plaintiff to be recalled. Justice Browne's findings may be summarized as follows:

> the photographs were not analogous to surveillance, of which the party is not aware and over which she has no control;
> the photographs were "highly relevant";
> the photographs had minimal probative value but they related to a material issue, namely the assessment of general damages;
> the images themselves were not prejudicial although there might be prejudice to the extent they were contrary to the plaintiff's evidence, a prejudice that could be overcome by permitting the plaintiff to be recalled.

7 Mr. Mays' position can be summarized as follows:

> The defendant is on a "fishing expedition" and does not know if there is anything of relevance on the site.

1. Photographs are "tagged" to the site and they are taken of and by friends. As a result, there is a degree of separation between the plaintiff and the site, which I understood to mean that the plaintiff could not necessarily control content and a higher degree of privacy is expected.
2. There is little prejudice to the defendant because she has already had access to the public site.
3. The request is unfair, made as it is, some four weeks before trial.

8 In respect of the last point, the court's attention was drawn to a decision of Master Pope in Weber v. Dyck, [2007] O.J. No. 2384, where she refused to order production of certain photographs and video recordings of the plaintiff on the eve of trial. The basis for her order was that the parties had consented to the action being set down for trial, but more importantly, the defendants had not requested such material at the plaintiff's examination for discovery for a trip she had taken the year before her discovery. Master Pope reasoned that the defendants must not have considered that material relevant and as a result the post examination material could not really be relevant. Master Pope further noted that the plaintiff had testified that her injuries did not have any impact on heir ability to travel.

ANALYSIS

9 The photographs are, of course, documents: Rule 30.01(1)(a); to the extent that they relate to any matter in issue, their existence must be disclosed: Rule 30.02(1); and they shall be produced for inspection if requested, unless privilege is claimed Rule 30.02(2).

10 In determining whether a document should be disclosed, the court must be satisfied that it is relevant to an issue in the proceeding. These is authority for the proposition that the production of documents should not be compelled for the sole purpose of testing credibility: Glowinsky v. Stephens and Rankin, Inc. (1989), 38 C.P.C. (2d) 102 (Ont. H.C). It is important to outline the facts in the Glowinsky case in order to understand its ratio. The plaintiff had commenced a personal injury action and claimed, in part, for lost wages, past and future. At discovery, he agreed to produce income lax returns. Subsequently, he withdrew any claim for wage loss. One of the defendants insisted that the plaintiff comply with his undertaking and both defendants brought motions compelling the plaintiff to do so. The motions were dismissed, Master Donkin concluding that the income tax returns were no longer relevant given that no wage loss claim was being advanced. Clearly, the defendants were seeking the information only to challenge the plaintiff's credibility.

11 It is possible that the documents sought in this case might be used by the defendant in order to impeach the plaintiff's credibility regarding the impact of the accident on her life, depending on what her evidence will be at trial and what the photographs depict. However, it cannot be said that this is the sole purpose. The photographs might also be useful as a means to assess the value of Ms. Murphy's claim for damages.

12 This leads to the next issue, namely whether this is a fishing expedition by the defendant and there exists merely the possibility of relevant material. The plaintiff relies on Desgagne v. Yuen (2006), 56 B.C.L.R. (4th) 157 (B.C.S.C.) which involved a claim for damages for personal

injury and future income loss following a bicycle accident. The defendants wanted production of the plaintiff's hard drive from her home computer because it might contain possible admissions against interest. The request was denied because it was speculative. The court observed that electronic documents "stand in no different light than paper documents, and the hard drive is the digital equivalent to a filing cabinet or document repository. A request to be able to search a party's filing cabinets in the hopes that there might be found a document in which an admission against interest is made would clearly not be allowed. Its digital equivalent should also not be allowed."

13 In addition to the hard drive, the defendants sought production of a number of things, including photographs. The court referred to a number of decisions commencing with Tupper (Guardian ad litem of) v. Holding, [2003] B.C.J. No. 216, 2003 BCSC 153 (B.C. Master) where photographs were ordered produced from a number of vacations taken by the plaintiff because they were relevant to her claim for loss of enjoyment of life.

14 Similar requests were refused in Gasior v. Bayes, [2005] B.C.J. No. 2944, 2005 BCSC 1828 (B.C. Master) and Watt v. Meier, [2005] B.C.J. No. 2950, 2005 BCSC 1834 (B.C. Master). In the Gasior decision, Master Caldwell found that the photographs were "snapshots in time ... taken at best out of context" and considered that the request was "far more invasive than probative". In Watt, Master Bolton considered that the photographs wore not relevant to the cognitive injuries pleaded.

15 Having considered these decisions, Justice Myers in Desgagne concluded that the photographs sought had a limited probative value, if any, because the plaintiff's injury was primarily cognitive and photographs of the plaintiff with family or friends or on vacation would provide no insight into her limitations.

16 So here, the issue is whether if the defendant's assertion rises no higher than there may be photographs of the plaintiff on the website and whether they are likely to be relevant.

17 It seems reasonable to conclude that there are likely to be relevant photographs on the site for two reasons. First, www.facebook.com is a social networking site where I understand a very large number of photographs are deposited by its audience. Second, given that the public site includes photographs, it seems reasonable to conclude the private site would as well.

18 On the issue of relevancy, in this case, clearly the plaintiff must consider that some photographs are relevant to her claim because she has served photographs of her prior to the accident, notwithstanding that they are only "snapshots in time".

19 Turning to the privacy issue raised here, I was referred to British Columbia authority for the proposition that a court retains jurisdiction to refuse disclosure where the information is of minimal importance to the litigation but may constitute a serious invasion of privacy: United Services Funds v. Carter (1986), 5 B.C.L.R. (2d) 222 (B.C.S.C.); leave to appeal dismissed (1996), 5 B.C.L.R. (2d) 379 (B.C.C.A.) and M.(A.) v. Ryan (1994), 98 B.C.L.R. (2d) 1 B.C.C.A.; aff'd [1997] 1 S.C.R. 157. In the latter case, at the British Columbia Court of Appeal, Southin J.A. dealt with a psychiatrist's appeal of an order for production of her records of visits with the plaintiff, her patient. The court had this to say:

4. In considering whether to make an order compelling disclosure of private documents, whether in possession of a party or a non-party, the Court ought to ask itself whether the particular invasion of privacy is necessary to the proper administration of justice and, if so, whether some terms are appropriate to limit that invasion. There need not be a privilege against testimony in the classic sense for this to be a relevant question. By "private documents" I mean documents which are not public documents. I do not limit this question to what might be thought of as personally embarrassing documents.

4. On the one hand, a person who has been injured by the tort or breach of fiduciary duty of another ought not to be driven from the judgment seat by fear of unwarranted disclosure a sort of blackmail by legal process. If such a thing were to happen, the injured person would be twice a victim.

4. But, on the other hand, a defendant ought not to be deprived of an assessment of the loss he actually caused, founded on all relevant evidence. It would be as much a miscarriage of justice for him to be ordered to pay a million dollars when, if all the relevant evidence were before the court, the award would be for one-tenth that sum, as it would be for the injured person to feel compelled to retire from the field of battle because of a demand for documents containing intensely personal matters of little relevance.

20 Having considered these competing interests, I have concluded that any invasion of privacy is minimal and is outweighed by the defendant's need to have the photographs in order to assess the case. The plaintiff could not have a serious expectation of privacy given that 366 people have been granted access to the private site.

21 As a result, the defence is to be provided with copies of the web pages posted at the plaintiff's private site. If there are concerns, however, respecting the contents of any photographs (in the sense that they are personally embarrassing to the subject) counsel may arrange to speak to me.

H.A. RADY J.

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XVI. Wasaya Airways LP v. Air Line Pilots Assn., International (Wyndels Grievance) Panel : William A. Marcotte (Arbitrator)

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.)

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:

2. the Aboriginal value of sharing what one can contribute;
2. the spirit of self-reliance by use of one's own knowledge, capabilities and whatever other resources one has;
2. the spirit of working together, acknowledging each other's humanity;
2. respect for one's peers, supervisors, clients and individual First Nations members;
2. respect for the Air, Land and Waters by controlling the environmental impacts of one's activities;
2. respect for the elected Chiefs and Councils of the Wasaya First Nations and other First Nations;
2. respect for the Elders of the community and depending on their wisdom for guidance;
2. commitment to the development of the youth of the Wasaya First Nations as leaders of the future;
2. respect for all people: men, women, elders, children, youth and being inclusive of all facets of the community;
2. working together in a partnership of trust and respect and striving to establish and maintain harmonious working relationships;
2. 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 change 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:

> 3. **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] is 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 Facebook. "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 mis-conduct. 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 Torngait 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. 1-2995 (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 barbeque" 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
>
> 4. the conduct of the grievor harms the Company's reputation or product the grievor's behaviour renders the employee unable to perform his duties satisfactorily
> 1) the grievor's behaviour leads to refusal, reluctance or inability of other employees to work with him

2) 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

3) 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 misconduct 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:

4) the spirit of working together, acknowledging each other's humanity;
4) respect for one's peers, supervisors, clients and individual First Nations members;
4) respect for all people: men, women, elders, children, youth and being inclusive of all facets of the community;
4) 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:
>
> 5) 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 he 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 who's 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 "Confidentially 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 unbefitting 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 negativing 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 incidents 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 negativing 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 reluctant 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

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XVII. York University Board of Governors v. York University Faculty Assn. (Laurendeau Grievance)
Panel : Gail Brent (Arbitrator)

Case Name:

York University Board of Governors v. York University Faculty Assn. (Laurendeau Grievance)

IN THE MATTER OF an Arbitration
Between
York University Board of Governors (Hereinafter referred to as the Employer), and
York University Faculty Association
(Hereinafter referred to as the Association)
AND IN THE MATTER OF the Grievance of P. Laurendeau

[**2009] O.L.A.A. No. 270**

183 L.A.C. (4th) 404

No. MPA/Y900358

Ontario
Labour Arbitration
Toronto, Ontario

Panel: Gail Brent (Arbitrator)

Heard: November 6 and 14, 2007; June 21-22, 2008; February 5 and May 1, 2009.
Award: May 8, 2009.

(24 paras.)

Labour Arbitration -- Discipline and Discharge -- Grounds -- Harassment and intimidation -- Sexual harassment.

Labour Arbitration -- Evidence -- Admissibility and weight -- Electronic surveillance.

The grievor employee alleged unjust dismissal. The employee was a tenured professor. A student alleged that the employee offered to improve her grade in return for sexual favours and provided an audio-recording of the employee's offer. The employee was discharged for gross professional misconduct.

HELD: Grievance denied. Credibility was the determining factor. The student's evidence that the employee offered her marks in return for sexual favours was consistent and unshaken, there was no suggestion that she had anything to gain by the accusation or that there was malicious intent on her part. No technical evidence was provided to suggest tampering with the original audio-recording. It was highly improbable that the student manufactured the audio-recording and had an imposter imitate the employee. It was far more probable than not that the employee engaged in conduct which was sexual harassment.

Cases cited:

F.H. v McDougall, [2008] 3 S.C.R. 41

Faryna v Chorny, [1951] B.C.J. No. 152; [1952] 2 D.L.R. 354 (B.C.C.A.)

Arvinmeritor and International Assn. of Machinists and Aerospace Workers, Local 1295 (Onyeani Grievance), [2001] O.L.A.A. No. 833 (Brent)

Ontario Secondary School Teachers' Federation, District 19 and Peel District School Board (Mollenhauer Grievance), [2007] O.L.A.A. No. 151 ; 159 L.A.C.(4th) 407 (Howe)

Okanagan University College and Okanagan University College Faculty Association (Craig Grievance), [1997] B.C.C.A.A.A. No. 313; 64 L.A.C.(4th) 416 (Lanyon, B.C.)

Lethbridge College and Lethbridge College Faculty Association (Bird Grievance), [2007] A.G.A.A. No. 67; 166 L.A.C.(4th) 289 (Ponak, Alta)

Trilium Health Centre and Canadian Union of Public Employees, Local 4191 (Borgona Grievance), [2001] O.L.A.A. No. 789; 102 L.A.C.(4th) 48 (Surdykowski)

City of North York and C.U.P.E. Local 94, [1990] O.L.A.A. No. 142; 16L.A.C.(4th)287(Burkett)

Canadian Airlines International Ltd and International Association of Machinists and Aerospace Workers, District 140 (2000), 92 L.A.C.(4th) 153 (Keras, Can.)

Appearances:

For the Employer: John E. Brooks, counsel, Barry Miller, Executive Director, Employee Relations, Leanne De Filippis, Associate Director, Employee Relations.

For the Association: James K. McDonald, counsel, Brenda Hart, YUFA Staff Representative, Professor Penni Stewart, YUFA ChiefStewart, Professor Paul Laurendeau, Grievor.

DECISION

1 The grievance (Ex 24) is dated May 7, 2007. The grievor was discharged by the Employer for "gross professional misconduct", which is particularized in Exhibit 23 as offering "to improve a student's grade in one of your courses in return for 'sexual favours'". There were no preliminary objections regarding jurisdiction or arbitrability.

2 Before looking at the merits of the case, I want to deal with the following matters:

> The parties are in agreement that the student who made the complaint against the grievor can be referred to in a manner which will shield her identity. Therefore, I will refer to her throughout this award as X. The Association has also indicated that it has no objection to the grievor being referred to by name, and that it takes this position without prejudice to the position it may take in any other case.
>
> 1. The Association has taken the position that if it is found that the grievor offered to exchange marks for sexual favours, then the appropriate penalty in the circumstances of this case is discharge. It takes this position without prejudice to the position it may take in any other case and strictly on the facts of this case.
>
> 2. There was evidence led regarding certain activity on X's Facebook site. I allowed this evidence to be heard over the objection of the Association because of my concern that some person or persons were attempting to interfere with a witness in this case. I indicated that I would not draw any conclusion regarding the origin of these communications unless it could be shown on balance who was behind them. It cannot be so shown. I therefore re-affirm that I will neither attribute those communications to anyone nor rely on those communications for any purpose in this case. I remain concerned, though, as everyone must, that someone would try to influence this process by such means, and that there appears to be no way to ascertain who was making those efforts.

3 This is a case where the parties have no disagreement on the applicable law. They agree that the Employer must prove the allegations against the grievor on the balance of probabilities in order to sustain the discharge. In the words of the Supreme Court of Canada in ***F.H. v McDougall*** at paragraph 40:

> 3. Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or

> improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof....

In reaffirming that statement the court said the following at paragraph 49:

> 3. In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

I accept that standard.

4 The parties also agree that credibility will be the determining factor in this case. To that end they accept the decision in ***Faryna v Chorny*** as setting out the correct test for assessing credibility. In particular I was referred to and accept the following statements found at paragraphs 10 and 11 of the decision:

> 4. If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling th truth is but one of the elements that enter in the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility.... A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.
>
> The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions....

5 All of the cases cited to me are listed in the appendix to this award.

6 The central question to be determined is whether the grievor asked X to engage in sexual activities with him in exchange for marks in his course. Not surprisingly that is the most significant area of conflict between the evidence given by X and the grievor.

7 There are many facts that either are not disputed, or are not matters of significant dispute. At all material times the grievor was a tenured professor in the Department of French Studies. He had been employed by the Employer since 1988. His curriculum vitae (Ex 25) sets out his degrees, appointments, publications, etc. He was also Undergraduate Program Director at the relevant time and, as such, one of his responsibilities was to endorse the letter of appointment for language assistants from the University of Bordeaux. In carrying out that particular responsibility he was assisted by Liliana Guadagnoly, the Assistant to the Department Chair. More will be said about her later.

8 In 2006 X was a fourth year student at York. In October she enrolled in a class taught by the grievor after the class had commenced for the term, The final mark in the class was to be assessed on the basis of tests and assignments. X experienced difficulty with the course. She also did not attend classes as frequently as she should have. During the term she engaged the grievor in conversations after class and in the classroom expressing concerns about her marks and the difficulties she was having with the course.

9 In the spring of 2006 X checked her grades online and discovered that there was no grade reported for the grievor's course. This caused her to contact the grievor. It is clear that in May there was at least one meeting between the grievor and X in the grievor's office in the French Studies Department. During that meeting there was a dispute between X and the grievor about whether or not two assignments had been handed in; X asserting that she had submitted every assignment and the grievor disputing that assertion. There was also an undertaking by X to submit the two disputed assignments which the grievor agreed to mark and thereby provide her with a final mark in the course. The two assignments were submitted; they were marked; and X received a grade for the course. There was no appeal ever submitted by X regarding the fairness or accuracy of the mark assessed.

10 On June 30, 2006 X met with Selwyn McSween, who was then a Senior Advisor in the Employer's Office of Ombudsperson and Centre for Human Rights (hereinafter referred to as the Centre). At that meeting X told McSween that she had been sexually harassed by the grievor and that she had a recording of her last meeting with the grievor. She then produced a digital recorder roughly 6" X 2" X 1/2" similar to the photograph of the Sony recorder in Exhibit 27 and played the recording for McSween. A second intake meeting at the Centre was scheduled for July 7th and McSween retained the recorder.

11 At that second meeting X met with Mary Collins, who was an Advisor at the Centre. Prior to the meeting Collins had discussed the allegations with McSween and listened to the recording several times. During the meeting both X and Collins listened to the recording again. The recording had a great deal of background noise on it; however, both Collins and McSween testified that they heard the male voice suggest to the female that it would be possible to improve her grades if she granted him "sexual favours". Because of the background noise Collins wanted to have a clearer copy of the recording and to that end contacted someone employed by the Employer in a technical capacity. He informed her that he needed a CD of the recording because he lacked the means of downloading the recording from the Sony recorder. Collins then gave X the recorder so that a CD could be made, and on July 25th or 26th X returned both the recorder and the CD she had made to Collins. The technician was given the

CD on July 26th and produced enhanced versions of the recording trying to get rid of as much background noise as possible. On August 14th the Centre returned the recorder to X and it is no longer available. Several CD versions were introduced into evidence at the hearing, but the one which the parties agreed I could refer to, and the one which was played most often for the witnesses is Exhibit 39.

12 On August 14th X signed a formal complaint against the grievor (Ex. 3). In that complaint there was no mention of a recording of their meeting. In paragraphs S to 10 of that complaint the explicit reference to "sexual favours" is recounted as follows:

> 1) About one week later, I again met with Professor Larendeau by appointment, at his office. I asked him to identify the shortcut to obtaining a belter mark to which he had referred during our previous meeting. I told him that 1 had been at York University for four years, and had not found any shortcuts, so I would prefer that he state exactly what he was talking about.
>
> 2) He said to me "So you have no idea what it is?" I told him, "I would ratheryou just tell me." He said to me "Well I think you could do what ever you want," When i asked for examples he said "favours". When I asked him to be specific he stated "Sexual favours".
>
> 3) I told him in the four years I had been a student at York I had never done anything to break the rules. He stated that "if you would, then you would recognize you're just wasting your time on the assignment"

13 The grievor was given a copy of the complaint, and on September 12, 2006 he submitted a written response (Ex 6). In that response he denied making "any remark or proposition of a sexualnature to" X.

14 At this juncture it is appropriate to point out that the Employer has a Policy regarding Sexual Harassment which applies to students, faculty and staff (Ex. 1). One definition of Sexual harassment in the policy is:

> 1. The making of an implied or express promise of reward for complying witha sexually oriented request.

The policy also states that such incidents will be investigated according the guidelines and procedures in place at the relevant time. In Appendix Q to their collective agreement (Ex 2) the parties have agreed upon a procedure for dealing with complaints of sexual harassment. That procedure was followed in this case, and there is no allegation that the parties deviated from it in any way. In accordance with that procedure an investigator was appointed by the Employer on September 21, 2006. I should also add that at all material times following the filing of the complaint the grievor has had representation by the Association.

15 On October 27th X filed an amended complaint (Ex 11) on the advice of the Centre. That complaint made reference to the existence of an audio recording of the meeting where X

alleged the sexual request was made. The investigator provided the grievor with a copy of the amended complaint and, at his request, three copies of the audio recording referred to by X (the original plus two copies with the background noise reduced). On November 27th the grievor responded to amended complaint (Ex 15). Portions of that response are reproduced below:

> 3. With regard to the recording, the quality is extremely poor and difficult to understand, particularly the male voice. I did have a meeting with the student in my office to discuss her performance in the course. I don't recall the specifics of our discussion during that meeting. However I acknowledge that the beginning of the recording, where a discussion takes place regarding the nature of an assignment, and the end, (where the male speaker is apparently objecting to the female speaker's attempt to convince the male speaker that she had lost the computer file containing her assignment), generally correspond with my recollection of what we would likely have discussed at that meeting. It is possible that the male voice in some or all of those portions of the recording (i.e. the beginning or the end) is my voice, but the quality of the recording is so poor, I cannot confirm it.
>
> 3. However, the portion of the recording from approximately 4:45 minutes to 8:16 minutes, in the course of which the male speaker suggests "sexual favours", is a fabrication, and I never made such a statement or suggestion....

16 Based on its investigation the Employer concluded that the grievor had engaged in sexual harassment and ultimately he was discharged.

17 Both parties made submissions concerning the credibility of both X and the grievor. I agree that there are inconsistencies in the evidence given by X regarding the number of meetings she had with the grievor in his office, whether or not the meeting she recorded was by appointment, and how the two missing assignments were given to the grievor. However, X's evidence was consistent and unshaken regarding her assertion that the grievor had offered her marks in return for sexual favours. There was no suggestion that X had anything to gain by this accusation or that there was any malicious intent on her part. The grievor has consistently denied making any request of a sexual nature to X. There is no suggestion that the marks he assigned to X were improper or unfair. But for the recording, it would be her word against his.

18 I heard no technical evidence which would suggest that the original recording had been tampered with in any way. Naturally, there must be some concern about the time lapse between the date of the meeting with the grievor and X's first meeting with personnel from the Centre. If someone were going to manufacture a false recording there would have been the opportunity to do so during this period. That being said, however, can the recording be dismissed as being a falsification? I think not for the reasons that follow.

19 To begin with, the grievor in his response to the amended complaint acknowledged that the male voice on parts of the recording could have been his. In his testimony, however, he claimed that the male voice on the recording was an imitator, a "look alike". Therefore, it is

reasonable to conclude that even the grievor acknowledged what seems apparent from listening to the recording, that is, that the male speaker sounds like him.

20 During the recording a knock on the office door is heard and another person enters the office and engages the male speaker in conversation. Lilian Guadagnoly testified that she was that person. She said that she recognized both her voice and the grievor's on the recording. It was also her evidence that she would have gone to the grievor's office in her capacity as the Assistant to the Chair of the Department in conjunction with a letter that the grievor had to approve in order to appoint assistants from the University of Bordeaux. She said that such letters have to go out every year in May. Guadagnoly said that she has known the grievor for approximately twenty years and was certain that it was his voice on the recording. Other than testifying about the voices on the recording Guadagnoly has no connection with this case, with the grievor or with X.

21 If the male voice is that of an imposter, then how does one account for the presence of Guadagnoly on the recording in conversation with the imposter? Did X or an unknown accomplice somehow manage to splice together a recording which would insert Guadagnoly's recorded voice into a recording with the imposter playing the role of the grievor? The suggestion that X manufactured a recording and got an imposter to do an imitation of the grievor which was good enough to fool someone who had known him for twenty years is in my view highly improbable. I accept the recording as accurate.

22 I was asked to conclude that it was highly improbable that someone with the grievor's professional accomplishments would risk his career by making an out of the blue one time sexual request of a student. With respect, such requests are not completely unknown as indicated in the cases cited to me by the Employer. Moreover, X testified that in her other encounters with the grievor she suspected that he was hinting at a sexual encounter. If nothing regarding "sexual favours" had been heard on the recording, it would have been possible to dismiss her suspicions as unfounded. However, the grievor is clearly heard on the recording telling X that she could gain marks for "sexual favours" and it is a topic that he revisits again before the meeting is concluded. On the balance of probabilities, I conclude that it is far more probable than not that the grievor engaged in conduct which was sexual harassment.

23 For all of the reasons set out above, the grievance is dismissed and the discharge is confirmed.

DATED AT LONDON, ONTARIO THIS 8TH DAY OF MAY, 2009.

Gail Brent

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APPENDIX

CASES CITED

24

F.H. v McDougall, [2008] 3 S.C.R. 41

Faryna v Chorny, [1951] B.C.J. No. 152; [1952] 2 D.L.R. 354 (B.C.C.A.)

Arvinmeritor and International Assn. of Machinists and Aerospace Workers, Local 1295 (Onyeani Grievance), [2001] O.L.A.A. No. 833 (Brent)

Ontario Secondary School Teachers' Federation, District 19 and Peel District School Board (Mollenhauer Grievance), [2007] O.L.A.A. No. 151 ; 159 L.A.C.(4th) 407 (Howe)

Okanagan University College and Okanagan University College Faculty Association (Craig Grievance), [1997] B.C.C.A.A.A. No. 313; 64 L.A.C.(4th) 416 (Lanyon, B.C.)

Lethbridge College and Lethbridge College Faculty Association (Bird Grievance), [2007] A.G.A.A. No. 67; 166 L.A.C.(4th) 289 (Ponak, Alta)

Trilium Health Centre and Canadian Union of Public Employees, Local 4191 (Borgona Grievance), [2001] O.L.A.A. No. 789; 102 L.A.C.(4th) 48 (Surdykowski)

City of North York and C.U.P.E. Local 94, [1990] O.L.A.A. No. 142; 16L.A.C.(4th)287(Burkett)

Canadian Airlines International Ltd and International Association of Machinists and Aerospace Workers, District 140 (2000), 92 L.A.C.(4th) 153 (Keras, Can.)

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