

Case Name:

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

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

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

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

110 C.L.A.S. 53

Canada
Labour Arbitration
Edmonton

Panel: Allen Ponak (Arbitrator)

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

Award: March 21, 2012.

(134 paras.)

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

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

The grievor, a postal clerk with 31 years of service, was discharged after management became aware of her postings on her Facebook account. The postings were made over a one-month period and contained a number of derogatory, mocking statements about her supervisors and the employer. The employer argued that the postings were grossly insubordinate, had the potential to damage the reputation of the employer, and had greatly harmed the supervisors. The employer pointed out that the grievor was unapologetic, blaming her supervisors for creating an intolerable work environment that justified her postings. The union accepted that the postings were regrettable but argued that they were the result of a toxic work environment. The grievor also thought her postings were private. The union submitted that dismissal was too harsh a penalty.

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

Appearances:

For the Union: Rhonda Hilton and Gordon Fischer.

For the Employer: Kevin Feth.

AWARD OF THE ARBITRATOR

ISSUE

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

Employer pointed out that the Grievor was unapologetic, blaming her supervisors for creating an intolerable work environment that justified her postings. Under the circumstances, and despite the Grievor's long service, it was the Employer's position that termination was warranted.

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

EXHIBITS

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

1. Urban collective agreement, expiring January 31, 2011.
2. Grievance 730-07-0912, December 3, 2009.
3. Grievance reply, February 2, 2010.
4. Letter of discharge, November 26, 2009, plus attachments.
5. Canada Post Code of Conduct, December 2005.
6. Canada Post brochure "Respect and Fairness".
7. Notes of Supervisor M, October 8, 2009.
8. Addressed admail, depot productivity report for December 2008 - September 2009.
9. Notes of Supervisor M, October 9, 2009.
10. 24 hour Notice of Interview for Grievor, October 9, 2009.

11. Three photos taken by Supervisor M.
12. Notes of Supervisor M, October 14, 2009.
13. 24 hour Notice of interview for Grievor, October 14, 2009.
14. Emergency suspension of Grievor, October 14, 2009.
15. Notes of Supervisor M.
 16. Power point slides from Sensitivity and Respect in the Workplace presentation, November 3, 2009.
 17. Power point slides from Bullying prevention presentation, November 3, 2009.
 18. Grievor's Facebook posting discovered by Supervisor M on November 19, 2009.
19. Additional Facebook postings collected by Supervisor M.
20. Notes of Superintendent D, October 9, 2009.
21. Notes of Superintendent D, October 9, 2009.
22. Notes of Superintendent D, October 9, 2009.
23. Calendar for October and November 2009.
24. Newsletter of CUPW Edmonton Local, June 2009.

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

39. Curriculum Vitae of Dr. Pugh.
40. Letter from Ms. Ray to Dr. Pugh, July 29, 2011.
41. Agreed Statement of Facts regarding Facebook, September 1, 2011.

AGREED FACTS REGARDING FACEBOOK

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

1. Facebook is a social media website that had more than 250 million users worldwide and more than 12 million users in Canada during October and November 2009.
2. To become a Facebook user, one must sign up for an account and provide the information requested by Facebook. Signing up for Facebook is free.
3. During 2009, the account sign-up page on Facebook indicated that the objective of Facebook is to create an online space in which people can connect with one another and share information.
4. In 2009, any individual with a Facebook account could access any other Facebook user's site through the internet, unless a user had enabled Facebook's Privacy Settings. The Privacy Settings available to users in 2009 are discussed in more detail at paragraphs 17-29.
5. In 2009, Facebook users connected with other Facebook users by becoming Facebook "Friends." Potential Friends could be located by searching an individual's name on Facebook. The user conducting the search could then click on the potential Friend's name in order to send a Friend request. Two Facebook users would become Friends when the Friend request sent by the first user was accepted by the other user.
6. In 2009, once two users had become Friends, they appeared on one another's Friend List, and had access to the contents of each other's

Facebook site. Further, they could gain access to a whole new network of Friends by extending Friend Requests to the Friends of their Friends.

7. The average Facebook user in 2009 had 130 Friends.
8. An integral part of every Facebook user's Facebook page is that user's Wall. The Wall is a virtual white board on which the user and the user's Friends may post messages. In 2009, the messages posted to the Wall identified the author of the post by designating the author next to the message, and each post indicated the date and time that author posted the message to the Wall. The date and time were controlled by Facebook and reflected the local date and time of the Facebook user on whose Wall the message was posted.
9. In 2009, Facebook users could post messages and images on their own Walls, and on the Walls of their Friends.
10. In 2009, a Facebook user posted on his or her Wall by selecting the Wall tab from the profile page, typing text into the text box that prompted him or her to "write something," and then clicking the "share" button. The message or image was then posted to the Wall.
11. In 2009, Facebook users could post material on a Friend's Wall by selecting the Friend's Wall tab from the profile page, typing text into the text box that prompted the user to "write something", and then clicking on the "share" button.
12. In 2009, whenever Friends replied to one another's Wall posts, a Wall-to-Wall discussion resulted, and this discussion was posted on the Walls of both users. The Wall discussion depicted the author of the posted messages next to each message, along with the date and time of the post.
13. In 2009, Facebook had a standard feature by which Friends were automatically updated about one another's Facebook postings through Facebook's News Feed function. The Facebook News Feed function automatically directed new postings on the user's Wall to all of the user's

Friends, unless the user expressly reduced the selection of Friends who received the News Feed.

14. In 2009, the News Feed feature of Facebook could not be disabled entirely, but it could be customized to show only the News Feed of certain users, and to hide the News Feeds of other users.
15. In 2009, whenever a user posted material to his or her Wall, the contents would appear on both the user's Wall and the user's News Feed, almost immediately.
16. In 2009, a Facebook user could access his or her Facebook site through a handheld mobile device like a cellular telephone or Blackberry utilizing the Internet. The News Feed function could also be enabled to forward each News Feed to a user's handheld mobile device.
17. In 2009, Facebook enabled users to select and customize privacy settings for their Facebook account, thereby controlling who could access and view the contents of their Facebook account.
18. In 2009, Facebook provided information to users about Privacy Settings in two main ways: by clicking on the "help" link or by clicking on the "privacy" link, both of which appeared at the bottom of the Facebook homepage on the user's account. By clicking on the "privacy" link, a user was taken to a page entitled "Controlling How You Share," which provided a detailed overview of Facebook's privacy controls.
19. In 2009, the portion of the "Controlling How You Share" page entitled "Additional Controls" informed users that each time they post, they are able to choose which privacy setting will apply to that individual post.
20. In 2009, Facebook provided its users with three different methods through which they could select and adjust their privacy settings.
21. First, users could click on the "Account" button located on the upper right

hand corner of their screen, and select the "Privacy Settings" option from the drop-down menu.

22. Second, users could enter the term "Privacy" into the search bar located on the top of the screen.
23. Both of these options would direct the user to a page entitled "Privacy," at which point a users could select the Privacy Settings described below at paragraphs 25-29.
24. The third way through which Facebook users could change their Privacy Settings was by clicking the "Privacy" link located on the bottom left-hand corner of their screen, which would direct them to the "Privacy" page referenced above.
25. In 2009, the five Privacy Settings Facebook made available to users were:
 - a. Everyone
 - b. Friends and Networks
 - c. Friends of Friends
 - d. Friends
 - e. Custom
26. In 2009, the "Everyone" setting meant that a user's information was available to anyone on the Internet who had a Facebook account.
27. In 2009, the "Friends and Networks" setting meant that a user's information was available to that user's Friends, and anyone in that user's Networks. Networks refers to a Facebook option in 2009 that permitted

users to join Networks consisting of other Facebook users with whom they went to high school, college, as well as Networks consisting of co-workers and users living in the same geographical region.

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

Risks inherent in sharing information. Although we allow you to set privacy options that limit access to your information, please be aware that

no security measure are perfect or impenetrable. We cannot control the actions of other users with whom you share your information. We cannot guarantee that only authorized persons will view your information. We cannot ensure that information you share on Facebook will not become publicly available.

35. In 2009, the Privacy Policy also contained a link to Facebook's "Statements of Rights and Responsibilities," which set out the terms of use for Facebook that all users were required to agree to and abide by. Under the "Safety" sub-heading of the Statement of Rights and Responsibilities, Rule 6 and Rule 7 expressly prohibited users from posting content that was "harassing, threatening, harmful, intimidating, or that may incite violence".
36. In 2009, if users clicked on the "help" link, they were directed to a screen that offered a series of help icons, one of which addressed privacy. By clicking on the privacy icon, users were directed to a page that offered a list of links that offered additional information on Facebook-related privacy issues.
37. In 2009, the "Privacy Settings and Fundamentals" link provided a user with detailed instructions about how to control privacy settings.
38. In 2009, users could also select from a menu on certain Facebook features, such as Walls and News Feed, in order to access privacy information that relates specifically to these features.
39. In 2009, the feature on Wall Privacy provided a user with detailed information about how to edit Wall privacy settings, hide wall content, and who was capable of viewing their Wall.
40. On July 16th, 2009, the Office of the Privacy Commissioner of Canada issued a News Release entitled "Facebook Needs to Improve Privacy Practices, Investigation Finds." This News Release provided an overview of serious "privacy gaps" identified by an investigation undertaken by the Privacy Commissioner relating to Facebook and its use of personal information.

41. The News Release stated that the Privacy Commissioner recommended improved transparency about Facebook's privacy practices in order to "ensure that the social networking site's nearly 12 million Canadian users have the information they need to make meaningful decisions about how widely they share personal information." A copy of this News Release is attached as TAB 1.

42. The Privacy Commissioner's investigation received immediate attention from major Canadian news media, including the following:
 - a. The Edmonton Journal ran a story on July 16th, 2009 on page A3 entitled "Facebook Runs Afoul of Privacy Laws", a copy of which is attached as TAB 2.

 - b. The Globe and Mail ran a story on July 16th, 2009 entitled "Ottawa takes on social media giant for violating Canada's law", a copy of which is attached as TAB 3.

 - c. CBC.ca ran a story on July 16th, 2009 entitled "Facebook Breaches Canadian Privacy Law: Commissioner", a copy of which is attached as TAB 4.

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

EVIDENCE

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

6 The material events unfolded at a postal depot in Edmonton which will be referred to as "Midtown Depot". At the time of her dismissal, the Grievor had been an employee of Canada Post since 1977 and was in her early 50's. She was a full time PO4 and had worked at Midtown in City

Finals since May 2007. Prior to accepting this inside position, the Grievor had worked many years driving a mail truck. Physical restrictions had triggered the move from outside to inside work. There were eight other bargaining unit employees on her City Finals shift and her regular hours of work were 11 PM - 7 AM. City Finals employees unload and prepare mail for final sortation and delivery by letter carriers. Midtown Depot had a total complement of over 150 employees across its various shifts, the majority of whom are letter carriers who begin reporting to work at 5 AM.

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

Midtown Depot Background Prior to October 2009

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

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

10 Superintendent D's self perception was not universally shared and several employees testified about how they were treated. Employee B is a 17 year employee who worked in City Finals for three years. Prior to transferring to Midtown, she had worked with Superintendent D in another depot, describing her as "the nicest person", "kind-hearted and reasonable". According to Employee B, Superintendent D's approach at Midtown was different, with much closer monitoring and

"impossible" expectations for moving mail. She believed Midtown staff worked hard and were very conscientious but their dedication had not been recognized by their supervisors. She testified that Superintendent D usually spoke in a loud voice, "enough to make me uncomfortable" but could provide few specific examples of shouting or yelling.

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

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

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

Incidents in October and November 2009

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

I. October 8/9 Shift

15 On instructions from Superintendent D, Supervisor M called a staff meeting in the lunch room at the start of the City Finals shift to address productivity concerns. Supervisor M conducted the meeting by himself; the superintendent did not attend. Supervisor M testified that the purpose of the

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

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

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

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

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

II. October 13/14 Shift

20 The Grievor was off work for the next three shifts because of the Thanksgiving long weekend. The October 12/13 shift, her first shift back, was uneventful. On October 13/14, Superintendent D was present at the start of the shift which, according to the Grievor, made her and other staff "pretty tense". Sometime later in the shift, a large Halloween-type skeleton appeared in the Midtown lunch room. The skeleton was hung from the ceiling with a wire around its neck and was holding a hand lettered sign which said "How is Your Pace" (Exhibit 12). The Grievor testified that she and Employee P had purchased the skeleton the previous morning for Halloween and it was a harmless lunchroom decoration. Neither managers were amused by the skeleton, both believing that it showed the staff was treating productivity as a joke. Supervisor M saw the skeleton as neither playful or joking. Superintendent D said the skeleton was frightening and threatening. She made an announcement that it should be removed, but no one came forward to remove it. The skeleton remained hanging until the Grievor and Employee K left the depot.

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

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

Supervisor M and Superintendent D stated that the Grievor had at least twice refused a direct order to return to work (Exhibits 12 & 37).

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

III. October 15th Interview

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

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

IV. November 3rd Presentation by Human Resources

26 Following the events of the October 13/14 shift, Ms. Ray discussed the situation in Midtown with Ms. Swabb, Mr. Andrichuk, and another senior manager. They agreed that an intervention at Midtown, jointly supported by the union and corporation, would be useful. Human Resources

subsequently arranged a meeting of City Finals employees and supervisors for the stated purpose of resolving conflicts in the depot. The session took place on November 3rd in the Midtown Depot lunchroom. Chairs were set up in a semi-circle and the meeting was conducted by two human resources facilitators. According to Ms. Ray, Superintendent D and Supervisor M initially stayed in the back of the room, but at her request joined the semi-circle (Superintendent D said there were insufficient chairs at the outset). The facilitator reviewed the harassment provisions of the collective agreement and presented power points on workplace values and mutual expectations, harassment, and various forms of bullying (Exhibits 16 & 17). Ms. Ray testified that Superintendent D explained that monitoring productivity is not harassment and bargaining unit employees began expressing their views. Employee K and Superintendent D began arguing and the discussion escalated until the facilitators intervened. Superintendent D, for her part, did not recall the exchange described by Ms. Ray.

27 In Ms. Ray's opinion, there was a great deal of tension during the meeting and, based on her interpretation of body language, she suggested that Superintendent D had been a reluctant participant. Employee K felt that the meeting "did nothing to help us", stating that Superintendent D was a bully and the source of problems in Midtown Depot. The Grievor expressed similar views about the value of the meeting, testifying that "it changed nothing". She said that workers in Midtown were watched at all times, told repeatedly they were doing a poor job, and constantly threatened with having the depot moved to main plant. At the November 3rd meeting, the Grievor asked if the plant wide bid could be moved up so that she could transfer out of Midtown. She denied suggestions that she had acted improperly during the meeting or failed to pay attention. In a Facebook posting, the Grievor described the meeting as the superintendent's "pity party".

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

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

Facebook Postings

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

with Employee K, but her Facebook account had privacy settings that did not permit him access. He then searched the Grievor's name and was able to access her Facebook page, her privacy settings allowing complete public access.

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

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

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

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

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

33 Following the discovery and reporting of these initial postings on November 19th, Supervisor M returned to the Grievor's Facebook site "about a week later", although he was not certain of the

exact date. He was still able to gain public access, as there were no privacy restrictions. He sent the new postings to management (Exhibit 19). Three postings by the Grievor are relevant to the current proceedings (in order of posting):

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

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

Suspension and Interview

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

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

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

35 Superintendent D testified that "I was virtually hysterical from the moment I saw the entries" and "was stunned at their venom". She read the postings repeatedly and admitted being "obsessed by them". She stated that "I realized I didn't know the Grievor at all -- she disdained me, hated me, hated the clothes I was wearing". Describing herself as an emotional wreck, Superintendent D, who

had a record of 22 years of perfect attendance, remained off work for six weeks under doctor's care, in counselling, and on medication. When she eventually returned to work, she transferred to special projects rather than direct supervision.

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

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

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

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

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

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

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

is taken away my ability to act in my own defence.

I respectfully wait for your response.

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

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

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

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

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

You chose to make a conscientious decision to demonstrate inappropriate, threatening, harassing, and bullying behaviour. I find the rationale for your

actions to be inexcusable. I strongly believe that the intent of your postings were not only to serve as a threat to your team leaders but also, to promote hatred and defiance towards them. I am extremely disturbed by the fact that this behaviour exists within our work environment.

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

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

Grievor's Evidence

43 The Grievor testified at length about the content of the Facebook postings and her reasons for the postings. The Grievor started a Facebook account in 2009 (she believed during the summer but was not certain) and said she had become addicted to it by October. She had 52 Facebook friends, four of whom were current or former co-workers (including Employee K and Employee B). At the time of the arbitration hearing, the Grievor continued to use Facebook, estimating that she had 80 friends, but stated that she did not post while drinking and refrained from making offensive comments about others. She could not say how many of her current friends were employees of Canada Post.

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

45 In direct examination, the Grievor reiterated the difficult working conditions in Midtown Depot, which she attributed to under staffing, unrealistic expectations of managers, and the belligerent management style of Superintendent D. The Grievor described in detail a number of

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

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

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

- * October 10 @ 1:08 AM: posting includes DIE BITCH DIE and "run her over". The Grievor explained that she was referring to a voodoo doll she had made of Superintendent D, "it was the start of my nervous breakdown", that she had been trying in vain to get a doctor's appointment for three weeks, and she was drinking at the time.
- * October 13 @ 9:02 AM: "Surprised Evil D" "WRONG AGAIN BITCH" "You gon b missing PERMANENTLY". The Grievor explained that the superintendent did not expect her and several other employees to report to work and had brought in additional staff. They surprised the superintendent by showing up for work.
- * October 14 @ 11:45 AM: "Harassment Update". This was a reference to 24 hour notices of interview and emergency suspensions given to the Grievor and other employees following the events of the October 8/9 and October 13/14 shifts.
- * October 16 @ 4:58 AM: "Lovin ... suspension". The Grievor was off work due to a suspension and stated "I was drinking" and "at home, free from harassment".

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

She responded that "whenever Superintendent D was around, there was more fighting than work".

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

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

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

50 With respect to Supervisor M, the Grievor testified that she wished he "stood up for us once in a while" since "we had trained him and then he turned on us". She acknowledged that the supervisor had a job to do and agreed that she and Employee K had interrupted him a number of times during the meeting. She was referred to the notes Supervisor M made after the meeting (Exhibit 7) but could remember little of the specifics contained in them. She said "I just remember how bad it was ... and being really really really upset and angry". She was not certain whether or not she had said "fuck you" to Supervisor M later in the shift and acknowledged that she might have sworn during the meeting. She characterized his notes to that effect (Exhibit 7) "as a complete fabrication".

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

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

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

bitch" and you will be "the one missing permanently".

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

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

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

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

58 The Grievor could not initially recall if she was drinking after her Facebook site was disclosed

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

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

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

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

false rumours, she repeated that she was exhausted from doing the work of two people and that it was "hard to respect somebody who beats you down all day".

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

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

64 The Grievor was questioned about whether she thought referring to Superintendent D as a "hag" and commenting that her coat was "ugly" were demeaning and hurtful. She responded that she did not expect the superintendent to see these postings and "well I wasn't trying to make her look worse". After some further probing, the Grievor reluctantly admitted that various postings might have demeaning -- "I guess". She explained that she was "drinking and venting". When the Grievor was queried about whether she thought it funny that Employee K had called the police she denied that the incident was humorous even though, in describing it, she wrote "lololol" on her Facebook posting about the incident. She explained "I was just venting" and disagreed that it was an example of "mean girls having fun" (a reference to the Grievor's October 22nd posting). According to the Grievor. "We were victimized on a daily basis". She denied that comments like "DIE BITCH DIE" and "missing PERMANENTLY" were intended to intimidate Superintendent D or might have been interpreted that way by the superintendent.

65 In a follow-up question by the arbitrator, the Grievor contended that she was angry and frustrated and meant what she wrote, but did not intend for Supervisor M or Superintendent D to actually see the postings. She compared the situation to swearing at another driver while driving -- "you don't expect the other driver to hear you". When the Employer pointed out that she had invited

others to give her ideas about how to torment Supervisor M in a posting on October 10th, the Grievor answered "clearly I was drinking, I wouldn't have wrote that if I wasn't".

Psychologist Report

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

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

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

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

Dr. Pugh also rated the Grievor in the "non-problematic range" on an aggression scale, but noted

moderately problematic scores on "verbal aggression" and "hostility. He wrote that "these scores indicate that she carries feelings of hostility that, when stressed, will possibly be released".

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

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

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

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

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

COLLECTIVE AGREEMENT

ARTICLE 10 DISCIPLINE, SUSPENSION AND DISCHARGE

10.01 Just Cause and Burden of Proof

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

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

EMPLOYER ARGUMENT

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

75 With respect to content, the Employer characterized the postings as insubordinate, contemptuous of management, and a form of psychological violence. The Grievor's Facebook friends included co-workers. The postings were defiant about expectations regarding work pace, staffing decisions, use of cell phones, and the attempt of Human Resources to assist. The Grievor had described the November 3, 2010 intervention, jointly supported by the Union and Employer, as a "pity party". The Grievor's postings had mocked her supervisors' age, intelligence, and way of

dressing, often ending her insults with "lol", shorthand for "laugh out loud". She referred to them in demeaning and insulting terms such as "devil", "hag", "bitch", "G man", and "c_nt". She had invited retribution and had used capital letters to emphasize, threaten, and intimidate ("BITCH", "PERMANENTLY"). In the Employer's submission, the supervisors had become targets of hate for nothing more than doing their jobs. The postings were the mean-spirited entertainment of a bully.

76 The Employer argued that the evidence established that the postings had significantly harmed the supervisors at whom they were directed. After the postings were discovered, Supervisor M took two weeks of stress leave during which he questioned his career at Canada Post. His anxiety was heightened because his car had recently been vandalized at work. He feared for the safety of his dog, which had been expressly mentioned in one posting, and he filed a police report in case anything happened to him or his property. Upon his return to work, he was re-assigned to a different depot, which he viewed as a form of punishment.

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

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

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

80 The Employer contended that the Grievor's postings on Facebook harmed Canada Post. Management had been forced to arrange coverage for the absences of Supervisor M and Superintendent D and eventually had to find replacements for them in Midtown. The Facebook postings were publicly available for at least six weeks and would have been easily accessible if

anyone had searched "postal", "mail" or "depot". In the Employer's view, the postings created a risk to the Corporation's reputation by calling into question management's treatment of employees (e.g. "gone postal") and by demeaning supervisory staff. The Employer drew attention to the Grievor's postings after her Facebook site was discovered, but before her privacy setting had been enabled. She had threatened to go to the media and had expressly mentioned Canada Post by name, increasing the Corporation's risk. The Employer took the position that the potential for harm to reputation, rather than evidence of actual harm, is sufficient to attract disciplinary sanctions (*EV Logistics v. Retail Wholesale Union, Local 580* (2008) BCCAAA No. 22 (Laing)).

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

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

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

84 The Employer acknowledged that some of the postings referenced drinking, but argued that even if the Grievor had been drinking while she was posting there was no evidence of diminished

capacity or that she was so drunk that she did not know what she was doing. On the contrary, the Employer suggested that the level of punctuation, good spelling, correct grammar, use of capital and small letters, and underscoring in the word "c_nt" all connoted a certain degree of coherence and sobriety. The Employer submitted that the appropriate inference was not that the Facebook postings revealed the personality of a drunk Grievor, but the postings were consistent with the defiant personality the Grievor displayed at work and consistent with her dislike of her supervisors. The evidence fell far short of establishing on balance that the Grievor's misconduct could be attributed to alcohol in the Employer's submission. It provided several authorities regarding the use of alcohol as a defence for misconduct: *Brown & Beatty, Canadian Labour Arbitration (4th) 7:6150*; *Public General Hospital Society of Chatham and Service Employees' Union, Local 210 (1991) 23 LAC (4th) 35 (Hinnegan)*; *Grober Inc. and United Food and Commercial Workers, Local 175 (2002) 109 LAC (4th) 53 (Williamson)*; and *Livingston Distribution Centres Inc. and Teamsters Union, Local 419 (1996) 58 LAC (4th) 129 (MacDowell)*.

85 Provocation also could not be used to shield the Grievor from the consequences of her misconduct according to the Employer. The Employer argued that there was neither an objective nor a subjective basis for concluding that the Grievor had faced circumstances that justified her Facebook response: *Brown & Beatty, 7:4412*; *Halifax Regional Municipality and Nova Scotia Union of Public and Private Employees, Local 13 (2004) 131 LAC (4th) 1 (Veniot)*. In its view, the evidence did not support a conclusion that the Grievor had been provoked nor did the evidence demonstrate a link between the Grievor's actions and the alleged provocation. By the Grievor's own admission, the Employer argued, there had almost no direct interactions between herself and Superintendent D from 2007 to October 2009 when the impugned Facebook postings began. The superintendent had not attended the October 8/9 productivity meeting that loomed so large in the Grievor's mind. Many of the incidents purported to have provoked the Grievor had involved other employees and the Grievor had not even been present in some cases. It characterized much of this evidence as collateral and unreliable (*Gorsky et al. Evidence and Procedure in Canadian Labour Arbitration (Thomson - Carswell)*; *Fraser Health Authority and Hospital Employees' Union (2004) 129 LAC (4th) 302 (Dorsey)*). Moreover, the Employer asserted, specifics of various alleged provocations were vague, such as Superintendent D "yelled" or "attacked us", exaggerated, or misrepresented facts. As an example, the Employer noted that the Grievor had conceded that Supervisor M had not raised his voice during the October 8/9 productivity meeting and that Superintendent D had never shouted at employees about productivity on October 8/9, contrary to what she had written her insurer (Exhibit 32).

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

the arbitrator concluded that there was some basis for a provocation defence, the proportionality of the response was relevant. The Employer argued that the Grievor's response through Facebook was greatly disproportionate to any provocation.

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

88 Lastly, the Employer turned to the evidence of Dr. Pugh. It was argued that Dr. Pugh's written report and oral testimony failed to establish any link between the Grievor's offensive Facebook postings and a psychological condition or illness. Thus, in the Employer's submission, there was no medical or psychological evidence that could provide a defence for the Grievor's misconduct. With respect to Dr. Pugh recommendation that the Grievor should be reinstated, the Employer took the position that this recommendation was not based on factors within his area of expertise but built on self-serving information provided by the Grievor. The Employer urged the rejection of any of Dr. Pugh's opinion evidence that strayed outside psychology. In support of this position, the Employer cited: *Bullmoose Operating Corporation and Communications, Energy, and Paperworkers Union, Local 443* (2000) 88 LAC (4th) 317 (Larson) and *Detra Berberi and Canadian Human Rights Commission and Attorney General of Canada* (2009) CHRT 21.

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

UNION ARGUMENT

90 The Union acknowledged that the Grievor's inappropriate Facebook postings justified discipline but argued that discharge was excessive in the circumstances. The Employer's social

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

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

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

93 The Union emphasized that a poisoned work environment was a critical factor in assessing the Grievor's conduct. According to the Union, the evidence established that Supervisor M and Superintendent D imposed new rules on City Final employees, such as banning cell phones, based on productivity statistics derived from the entire depot and over which City Final employees had little control. Naturally, employees became angry and lost confidence in their managers when unrealistic expectations were imposed. It was the Union's position that Superintendent D was hardly as innocent as she claimed and responsibility for what occurred must be shared (*Canada Post Corporation and Canadian Union of Postal Workers* (1999) CLB 12464 (M. Picher)). Contrary to her own evidence, the Union argued that employees had consistently testified that the superintendent yelled and swore at them and wagged her fingers in their faces. She kept boxing gloves in her office -- a sign of her belligerence. Even Ms. Swabb, the Union suggested, had not

disavowed Superintendent D's tendency to demean and frighten employees, although she had used euphemisms such as "strong communicator" and "tone may increase". It was no wonder that the Grievor and other employees had stated a strong desire to transfer out of Midtown as soon as possible, a sentiment publicly expressed at the November 3rd intervention meeting. In the Union's view, the superintendent's conduct met the definition of bullying and the Grievor's conduct ought to be considered in that context.

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

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

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

EMPLOYER REPLY

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

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

(2006) Unreported (Norman).

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

DECISION

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

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

102 In addition to the abusive and intimidating language, the postings are mocking to the point of bullying with many of the more offensive comments accompanied by "lol" which stands for "laugh out loud". The postings invite others to join in and indeed others do offer their own mocking

comments from time to time. A set of postings on October 21 & 22 contained a photo of the Halloween skeleton hung in the Midtown lunchroom with comments like "she's lost some weight" and "go back to hell, they miss you", that unquestionably referred to the superintendent. In a later posting about the skeleton, the Grievor wrote, with what can only be described as glee ("lol"), that "if she thinks it looks like her, I am not going to disagree". A non-employee chipped into the general ganging up on the superintendent by calling her "the hag" and "wicked witch". After human resources and the union arranged a meeting to address employee - management friction in Midtown, the Grievor referred to these efforts as Superintendent D's "pity party". Another posting belittled the fact that Superintendent D wore a coat at work and then mocked the coat itself. Other postings boast how the Grievor and co-workers had tricked Superintendent D into calling in extra staff after they had misled her about whether they would be reporting to work (October 13). A second posting jokes (with multiple "lolol") that the superintendent must be afraid of staff since Employee K "phoned the police on her".

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

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

105 I recognize that the job of manager oftentimes requires a thick skin and it would be unrealistic for those who manage people to expect unbridled affection from the employees they supervise. Managers must understand that some, even perhaps all, employees may not like them. I also recognize that Midtown Depot was an unhappy place for a number of workers. However, no manager should have to endure the kind of cruel personal attacks directed at Superintendent D and, to a lesser extent, at Supervisor M. The Grievor's Facebook postings went far beyond the boundaries of acceptable workplace criticism. The postings were shared with other Midtown workers who were the Grievor's Facebook friends, undermining managerial authority and further

poisoning an already challenging work environment. In addition, the Grievor was largely unapologetic. I will address the issue of the Grievor's acknowledgement of wrongdoing in more detail when I discuss the Union's provocation defence. For now it is sufficient to say that while I accept that the Grievor issued a verbal apology at her formal interview on November 24, 2009, the evidence as a whole suggests that the Grievor was remarkably unrepentant for the damage she had caused her managers.

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

107 The first defence offered by the Union was that the Grievor had not intended that her postings would be seen by management, Superintendent D, or Supervisor M. I accept the Grievor's evidence, corroborated by Ms. Ray, that she believed that only her Facebook friends would be able to view her postings. I accept that the Grievor's had not understood that her postings were available to the general public, not just her Facebook friends, and could be easily accessed by simply typing her name into an internet search engine or logging into Facebook. Having reviewed the Agreed Statement of Facts, and listened to the testimony of the Grievor, Supervisor M, and other witnesses familiar with Facebook, I am satisfied that such mistakes are easy to make. Facebook's recommended default privacy settings allowed universal access in 2009. Unless a user specifically restricted privacy, there would be open access. Not bothering to carefully review the privacy steps is akin to not reading carefully, if at all, the policy pages that accompany most common on-line programs nowadays (such as iTunes, Skype, or "Dropbox"). Many computer users just skip this step or tick the appropriate box without reading the rules of use. The Grievor was not much different in that regard.

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

109 The Grievor's defence is similar to that of someone in an extra-marital affair who tells a few

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

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

111 The evidence suggests that limited reliability should be attached to the Grievor's assertions about the impact of alcohol. On two dates, October 10 and 22, the postings expressly mention drinking. At first the Grievor said that she had been drinking when all her postings were made, but then when confronted with postings made while she was at work, the Grievor backed away from this assertion and conceded that she had been drinking for some, but not all, the postings. Second, a number of the postings were made shortly after the end of the work day or while she was preparing to report to work making it less likely that she would have been drinking heavily (for example at 9:02 AM on October 13; 5:40 PM on October 25; and 8:53 AM on November 4). Third, the postings, while offensive, are generally articulate and grammatically well constructed, and demonstrate control of capitalization and underscoring, suggesting that if the Grievor had been drinking when the postings were made, her impairment was not severe. Fourth, there is little change in tone and theme between the emails she wrote while drinking (October 10; 1:21 AM) and those postings at work (November 5; 2:00 AM), and those made at times where heavy drinking was unlikely (October 13 at 9:02 AM). Virtually all emails attack her supervisors, whether the Grievor is sober or not. I conclude there is weak evidence to support the claim that the Grievor's heavy drinking should diminish her accountability for many of the offensive postings.

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

113 A third element of the Union's defence rested on Dr. Pugh's psychological assessment of the

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

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

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

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

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

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

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

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

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

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

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

54 The objective analysis ensures that a person relying on provocation is held to a threshold standard of reasonableness on the sufficiency of the alleged provocation itself. This is tied in significant ways to the employer's right to run its operation without disruption. The employer cannot be held to purely subjective, self-justifying reactions of any employee who wishes to act out and then allege provocation. The need for an arm's-length analysis of the allegedly provocative activity, focused on the objective, often-used "ordinary person" paradigm, seems self-evident to me. A provocation defence of any sort which cannot pass this test would fail at this point.

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

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

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

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

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

119 I now turn to the evidence. There is little doubt that Midtown Depot was an unhappy place for a number of employees, the Grievor included. Employees who testified believed that productivity expectations imposed by management were unfair and unrealistic, placing staff under unwelcome pressure. There was conflicting evidence about how the management style of Supervisor M and Superintendent D contributed to the pressure. Supervisor M was young and

relatively inexperienced and divided his time among three depots. He essentially carried out instructions from his superiors and was viewed that way by Midtown staff. He was consistently described as soft spoken and relatively mild mannered. No one accused him of shouting, swearing, or acting aggressively towards employees. There is no basis in any of the evidence about Supervisor M that supports a conclusion that his personal management style could be seen in any way as provocative.

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

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

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

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

124 On October 15th, the Grievor was interviewed about the incident and accused the superintendent of harassing employees by shouting and enforcing unrealistic productivity requirements. She received a three day suspension which was grieved (it had not been heard as of the date of the current arbitration). The Grievor did not work from October 15 to October 22, posting twelve messages in that time period including ones where she referred to the superintendent as the "devil", "crazy bitch" and "c_nt".

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

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

127 Even if one were to conclude that the Grievor had been legitimately provoked by the events taking place in Midtown, the disproportionate response further undermines the provocation defence. Even if I accept that Superintendent D had an aggressive management style that angered some employees, the degree of character assassination visited on her by the Grievor is all out proportion

to the purported level of offence. The superintendent was not physically aggressive, she did not scream (there is a difference between talking loudly and even shouting versus screaming) and habitually use foul language, she did not use racial epithets, she did not act target specific individuals for vilification in front of others, and she was not even present during most of the City Finals' shift. Many of the actions she took, such as emphasizing productivity, setting work standards, and issuing operational directives were a normal part of her role as a manager. The allegations of bullying, let alone the picture painted of a tyrannical reign of terror, do not stand up to scrutiny. Rather, the picture that emerges is that of the Grievor and a small group of colleagues taking an active dislike to the superintendent for doing her job in a way in which they disapproved. The Grievor then operationalized this dislike through her Facebook postings. This was not a legitimate response to a provocation -- this was mean and nasty bullying of a manager who was attempting to carry out her job.

128 The failed provocation defence combined with other factors makes it difficult to accept the sincerity of any apologies offered by the Grievor. It is true that the Grievor formally apologized at the disciplinary interview conducted after her Facebook postings were discovered, but the genuineness of that apology is belied by a great deal of evidence that suggests that the Grievor shows little remorse for the harm she caused Supervisor M and Superintendent D. Though not stated in so many words, an important part of the Grievor's explanation for what she posted was that Superintendent D got what she deserved because of her mistreatment of Midtown staff; indeed, at one point in cross-examination that Grievor stated that the superintendent and supervisor were to blame (along with alcohol) for the contents of her Facebook site. On numerous occasions during questioning, the Grievor would refer to an incident or event at Midtown to justify what she wrote, distancing herself from responsibility or add that she must have been drunk.

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

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

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

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

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

AWARD

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

Dated March 21, 2012 in Calgary Alberta.

Allen Ponak

qp/e/qlspi/qlhbb/qlhcs

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

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