Cited as:
Fehr v. Canadian Pacific Railway Co.

IN THE MATTER OF a Complaint of Alleged Unjust Dismissal - Adjudication under Division XIV - Part III of the Canada Labour Code
Between
Gerald Fehr, Employee, and
Canadian Pacific Railway Company (Winnipeg, Manitoba), Employer
Human Resources Development Canada File No. YM2797-4837

[2000] C.L.A.D. No. 47

Canada
Labour Arbitration

B.P. Schwartz, Adjudicator

Heard: December 13-15 and 29, 1999, and January 10, 2000 (teleconference).
Decision: February 7, 2000.

(150 paras.)

[Quicklaw note: Supplementary decision was released July 30, 2001. See [2001] C.L.A.D. No. 358.]

Appearances:

Ian Blomeley, Counsel, for the Employee.
Karen L. Fleming, Counsel, for the Employer.

AWARD

The Issues

1 Gerald Fehr was a long-serving employee of Canadian Pacific Railway. The company dismissed him at the end of 1998. The company sent him a letter of dismissal dated December 14, 1998. It stated that Fehr had "engaged in a course of sexual harassment and abuse of authority". The

core of the company's concerns, according to the letter, was that Mr. Fehr had engaged in a course of sexual harassment and abuse of authority".

2 The course of events that led to Mr. Fehr's dismissal began in 1994. Mr. Fehr was given, for a season, the position of supervisor of a railway maintenance gang. One of its members was Mr. Alan Weber. In 1998, Mr. Weber, through his union, complained to the company that he had been subjected to abusive language and gestures by Mr. Fehr. The company conducted an investigation in the last part of 1998, concluded that Mr. Weber's complaints were well founded, and dismissed Mr. Fehr.

3 Under Part III of the Canada Labour Code Mr. Fehr has the right to submit to an adjudicator a claim that he has been unjustly dismissed.

4 Mr. Fehr's appeal is based on the following claims:

-- The alleged verbal abuse did not happen;

-- The object of the alleged abuse, Mr. Weber, waited unduly long -- four years -- to initiate a complaint to the employer and so has waived his right to do so, or is estopped from doing so. Furthermore, once informed of the allegations the employer unduly compounded the delay between alleged incidents and discipline.

-- The delays by Mr. Weber and the company, taken individually or together, made it fundamentally unfair for the employer to subject Mr. Fehr to disciplinary penalties;

-- The investigation was not conducted fairly. The company's investigator did not:

-- Give Mr. Fehr fair notice of the allegations against him and a fair opportunity to refresh his memory and prepare a defence;

-- Did not conduct an impartial search for the truth, but rather a selective attempt to substantiate a conclusion prematurely reached;

-- Did not allow Mr. Fehr an opportunity to address the issue of an ap-

propriate penalty;

-- Even if the allegations are true, dismissal was not warranted and a lesser penalty should be substituted.

5 The company responded that:

-- The core allegations are substantiated by an independent and impartial witness, Mr. Jim Hart;

-- Victims of verbal abuse, including sexual harassment, may be reluctant to come forward for fear of retaliation. Furthermore, when the abuse is of a serious character, passage of time does not terminate the right of the employer to impose discipline. There is no fixed time limit for discipline under a statute or contract applicable to Mr. Fehr;

-- The investigation was not biased. If there was an unfairness, such as inadequate notice or opportunity to respond, it did not detract from the fact that a justified result was reached -- dismissal. Mr. Fehr had a full and fair opportunity to make his case at the adjudication and the evidence justifies the company's findings and discipline based on them.

6 Over a total of four and a half days in all, a hearing was conducted in which both the CPR and Mr. Fehr presented witnesses and legal argument.

7 I have concluded that the company has proved that on a number of occasions in 1994, Mr. Fehr did cast abusive language and insulting gestures at Mr. Weber. These incidents involved words and actions that were willfully insulting. They involved references to sexual and scatological matter. Mr. Fehr's motivation in making these comments was not to initiate any sexual relationship with Mr. Weber, they were intended to insult and demean Mr. Weber. Mr. Fehr was extremely dissatisfied with Mr. Weber's job performance and expressed his anger in an offensive and hurtful manner that warrants a substantial penalty.

8 The interaction between Mr. Fehr and Mr. Weber was a central concern of the company during its investigation. It was also the focus of the company's case at the hearing. Its witnesses and argument were directed primarily or exclusively towards the way in which Mr. Fehr treated Mr. Weber. The report of the company's investigator, however, included a wider finding: that Mr. Fehr had also verbally abused other employees under his authority. The company made little or no effort at the hearing, however, to substantiate these allegations. They were certainly not proven by the evidence of any witnesses.

9 In determining whether dismissal was warranted, I have considered a variety of aggravating and mitigating factors.

10 The conduct was contrary to company policy and hurtful to a vulnerable employee. The company has a legal duty and sincere commitment to protecting all employees from harassment, sexual and otherwise.

11 On the other hand, Mr. Fehr was a long-serving employee with a disciplinary record that was otherwise essentially clean. He was not ever disciplined for verbal abuse of any other employee apart from the Weber episode. It has not been proven that he lied to his employer about the 1994 incidents when he was interviewed over four years later, as opposed to being unable to remember what happened. The company's own investigator agreed at the hearing that the theory that Mr. Fehr forgot some of the incidents, at a distance of over four years "could hold water". Mr. Fehr was placed in circumstances that were objectively difficult: he was a new supervisor and he had sincere and non-unreasonable concerns about the performance of a new employee. His reaction was unacceptable, but the evidence before me established misconduct in a special set of circumstances and not a larger pattern of malice or abuse.

12 I have carefully considered the official policies and corporate culture of CPR. Its policy on sexual and racial harassment says, sensibly, that discipline in each case must be based on the individual circumstances. A senior manager at CPR suggested at the hearing that an appropriate penalty for a supervisor who makes a series of abusive comments about an employee's intelligence or ethnic background would be a warning for a first offence, an economic penalty for a repeat offender, and a demotion for a three-time offender. Perhaps that senior manager's testimony underestimated how stern the company would or at least ought to be in some circumstances. The testimony did suggest to me, however, that the corporate culture of CPR is consistent with its official policies: that discipline for abusive language and gestures is carried out in accordance with the usual principles that discipline should be progressive and that the penalty should depend on all the circumstances of the case. These principles are also consistent with what arbitral jurisprudence generally expects of an employer.

13 I am left with very serious concerns about the extent of the delay here and about the extent to which Mr. Fehr had an inadequate opportunity during the company's investigation to respond to and collect himself, consult his memory and respond to the case against him.

14 In some cases, extended delay is a legitimate ground for an adjudicator to hold that the complainant should be reinstated without any penalty at all. The delay in this case was so extensive that I have seriously considered finding that Mr. Fehr should be reinstated without penalty. For a variety of factors, including the fact that the employer was not responsible for most of the delay, I have decided not to do so. I have attempted to mitigate the prejudice to Mr. Fehr caused by the delay in various ways. These included recognizing that memories, including that of Mr. Fehr's, fade over time. I have also taken into account the fact that most of the delay was not the fault of the employer, but rather attributable to Mr. Weber's delay in making any complaint. But this case is at the extreme edge of the tolerable in terms of the distance between the offence and the penalty, even when the employer is not at fault.

15 While there was some procedural unfairness to Mr. Fehr, I have found it was not the product of bad faith and at the end of the day I have chosen to fix a penalty independently of my concerns in this regard.

The Facts

Background

16 Mr. Fehr has a grade ten education. He worked for CPR from 1974 until his dismissal in 1998. He worked on rail repair gangs. In 1986, he was first appointed as a foreman for a crew. In that long course of employment there is no evidence that he was disciplined with one possible exception that, in my view, does not significantly detract from his clean record.[1]

17 The year of the alleged harassment, 1994, was the first year in which he worked as a temporary supervisor of a gang. He received several weeks of training first.

18 Canadian Pacific has taken seriously its legal and ethical duties to prevent sexual harassment in the workplace. It is well aware that it has an express duty under the Canada Labour Code to prevent sexual harassment. It is concerned about its liability as employer under the Canadian Human Rights if its supervisors harass employees. It believes, and no one would dispute, that harassment of employees can damage morale, productivity and even operational safety. The company widely distributed its policies and procedures with respect to sexual harassment and an instructional video.

19 At the hearing, it was not established whether Mr. Fehr actually read the anti-harassment policy statement or saw the instructional video. Mr. Fehr did sign a statement of rules and regulations which included a provision that "discriminatory practice and harassment will not be tolerated".

20 It does not much matter for the purposes of my decision whether Mr. Fehr actually studied a particular policy statement or video on sexual harassment. Quite apart from any educational material, a reasonable person with any experience at CPR would know that verbally abusive treatment of an employee, of the specific kind alleged here, is improper and subject to discipline. During closing argument, counsel for the company agreed with me that my evaluation of whether the dismissal was unjust and the substitution of any lesser penalty are not matters that depend on whether the conduct here technically constituted "sexual harassment".[2]

21 The evidence at the hearing established that coarse language is fairly routine on road crews. In various working cultures there may be modes of discourse that are disgusting or shocking to an unfamiliar observer, but which are accepted within the culture. Graveyard humor may be routinely used in some professions that deal with human misery. In other environments it may be common for colleagues to rib each other in coarse terms and it is not expected that anyone will take great offence. A reasonable person who enters one of these cultures may reasonably be expected to make some, albeit not any and all, adaptations in their expectation of how people should speak and what counts as truly offensive. Adjudicators should not approach these cultures with an attitude of superiority, prudishness or sanctimony. Indeed, the arbitral jurisprudence includes the concept of "shop talk". Adjudicators should, in my view, be aware that remarks repeated in a hearing room may seem cruel or gruesome and yet have had a much more benign significance when first heard from a familiar voice that reveals a spirit of irony or humor.

22 All that said, no witness argued that it is accepted on a CPR road crew to engage in the more egregiously insulting behavior allegedly carried out by Mr. Fehr against Mr. Weber. Mr. Fehr himself agreed at the hearing that such conduct was unacceptable and subject to serious discipline. As we shall say, I have found that some comments and gestures that Mr. Fehr is alleged to have made were, in context, so willfully insulting and demeaning as to warrant a substantial penalty.

23 In 1994, Mr. Fehr was for the first time appointed as the temporary supervisor of a rail repair gang. The company appointed Mr. Weber to act as his timekeeper. The position is essentially a bookkeeping job. The timekeeper records hours worked, expenses incurred and the like, and issues regular reports. Mr. Weber acknowledges that he did not receive much initial training and the manuals he was provided with were inadequate. He had to call a regional office in Vancouver for help with discharging his duties early in his tenure. He also required extensive assistance from Mr. Jim Hart, an experienced employee who also worked in Mr. Fehr's gang.

24 Several weeks into his tenure as timekeeper, Mr. Fehr invited Mr. Weber to spend part of his days as a road crew worker and Mr. Weber performed both duties throughout the summer.[3]

25 Mr. Fehr genuinely thought that Mr. Weber performed well on his roadwork. But he found Mr. Weber's performance as a timekeeper to be grossly inadequate. According to Mr. Fehr:

-- Mr. Weber frequently needed considerable help from a fellow employee, Mr. Hart, to do his work;

-- Mr. Weber also had trouble with elementary arithmetic skills, such as adding three small numbers together in his head;

-- Mr. Fehr complained to his own supervisor that his timekeeper was underperforming. Mr. Fehr's supervisor suggested that Mr. Fehr ask whether he was having any family problems. Mr. Fehr did so, and Mr. Weber said that he was not. Mr. Fehr complained two or three more times about Mr. Fehr's performance throughout the course of the summer, but received no guidance or assistance that Mr. Fehr found helpful in any way;

-- Mr. Weber mistakenly advised Mr. Fehr that a particular form, Labour Distribution Form 47A, did not have to be forwarded to higher authorities in the company. The advice was wrong and Mr. Fehr had to deal with embarrassing questions from the company as to why the form was not sent in.

26 Mr. Weber acknowledged that he did not receive much training for the job and that the manuals were inadequate. He thought he was able to perform adequately as a timekeeper as long as he had enough time each day to work on the job. Mr. Hart thought that Mr. Weber could perform adequately if given sufficient time. I cannot determine whether Mr. Weber does or does not lack some basic talent for bookkeeping. I do find, in the context of all the evidence, that:

-- As one would expect from an inexperienced and lightly trained timekeeper who was not provided with adequate manuals, Mr. Weber needed far more help than an average timekeeper, he made more mistakes and took longer to

do his job than average. Mr. Weber also had to contend, like some but not all of the company's timekeepers, with the extra stress and fatigue connected with doing a draining road job during the same days as he was also carrying out timekeeping duties;

-- Mr. Fehr expected solid performance from all his employees;

-- Mr. Fehr was stung by questions or criticisms from his own superiors arising from mistaken advice given to him by Mr. Weber on at least occasion;

-- That Mr. Fehr was frustrated and at times angry about Mr. Weber's performance;

-- Mr. Fehr did complain to his own superiors and for whatever reason did not receive any substantial assistance in resolving the problems;

-- The cause of any improper conduct by Mr. Fehr towards Mr. Weber was not an instinctive personal dislike or a natural tendency towards demeaning others, but upset over what Mr. Fehr perceived to be a grossly inadequate job performance by Mr. Weber as a timekeeper.

27 Mr. Fehr and Mr. Weber would not work again together after the 1994 season. Mr. Fehr worked as a temporary supervisor in other years with no documented events involving improper conduct towards an employee. Mr. Weber worked as a timekeeper in subsequent years, but was eventually not hired on again in that capacity and has a pending grievance over that fact. In 1998 Mr. Weber, through his union, launched a formal complaint about how he was treated. An investigation followed and Mr. Fehr was dismissed.

The allegation that Mr. Fehr was abusive to employees apart from Mr. Weber

28 The company's investigator, Mr. Hallam, concluded in his report that Mr. Fehr had not only been abusive and harassing to Mr. Weber, but that "Mr. Fehr used the power of his position to verbally abuse other employees under his supervision as well as Mr. Weber."

29 Mr. Hallam passed on his report to his superior, Mr. Tumak, who said it was "moving". Mr. Tumak clearly put substantial weight on the report. I expect that Mr. Tumak's own superior, who made the final decision, did so as well. It is well within the realm of possibility that the comments by Mr. Hallam about abuse of other employees had a substantial impact on those who read and acted upon his report.

30 At the hearing, however, the company focussed on the alleged mistreatment of Mr. Weber. It made no attempt to substantiate any allegations concerning any other employees.[4]

31 With respect, I do not believe that even the company's own internal investigation provided an adequate basis to conclude, on a balance of probabilities, that disciplinable misconduct occurred with respect to other employees.

32 When Mr. Hallam interviewed Mr. Fehr, according to Mr. Hallam's own admirably detailed notes, he explained to Mr. Fehr that Mr. Weber had filed a complaint against him. There is no mention in the notes of Mr. Fehr being told that he was under investigation for being abusive to anyone else. At no point in the notes is Mr. Fehr notified of any such complaints or asked to respond to them. One or two of the persons interviewed by Mr. Hallam made references to Mr. Fehr being verbally unpleasant in other contexts, but these persons did not back up their statements with adequate specifics.

33 Prior to Mr. Weber's coming forward with a complaint, the company never once disciplined Mr. Fehr for verbal abuse. Yet Mr. Fehr had worked for the company for two decades and had served for many years as a foreman or as a supervisor.

34 In my view, the company's case must stand or fall with the evidence it presented with respect to specific incidents in the 1994 rail repair season involving Mr. Weber.

The burning clothes incident

35 Mr. Weber told the company investigator that there was an episode where Mr. Weber was out on the tracks operating a grinding machine when Mr. Fehr pulled up in a truck. Mr. Weber continued grinding, but noticed that he was beginning to feel hot. Mr. Fehr was "cracking up laughing". Then Mr. Weber noticed that there was smoke and that Mr. Weber's coverall's were on fire. Mr. Weber complained that Mr. Fehr did not warn him. At the hearing, Mr. Weber stated that Mr. Fehr and one or two welders were about the closest persons to him.

36 But Mr. Hart, who is the main witness in support of Mr. Weber, told a somewhat different story at the hearing. According to Mr. Hart, Mr. Fehr and Mr. Weber were in a truck an eighth of a mile away when Mr. Weber's clothes caught fire.

37 It is understandable that recollections might differ about an event that took place five years before the hearing and during which Mr. Weber in particular was, I would expect, extremely upset. But what precisely happened is too uncertain for me to make a finding that Mr. Fehr acted improperly. When the company investigator, Mr. Hallam, interviewed Mr. Fehr, he did not even ask him about the episode.

38 Mr. Hallam concludes in his report that Mr. Fehr engaged in a pattern of harassment that began shortly after Mr. Weber joined the crew in 1994. I cannot tell whether Mr. Hallam took into account the clothes burning episode in doing so. He could not properly have done so in the absence of putting the matter to Mr. Fehr for response. In any event, based on what I heard at the hearing, there is not an adequate evidentiary basis for holding this alleged episode against Mr. Fehr.

The calculator episode

39 Mr. Weber testified that on one occasion, Mr. Fehr grabbed Mr. Weber's calculator and told him that the calculator was "no fucking good, like you" and threw it away.

40 Mr. Fehr recalled the event, both at the interview with Mr. Hallam and at the hearing before me. Mr. Fehr stated at the hearing that he was reviewing some reports and that Mr. Weber was once

again having great difficulty completing them properly and that Mr. Weber blamed the calculator. Mr. Fehr then said that if the calculator was to blame it should just be thrown out, and did so.

41 Mr. Hart recalls the flying calculator almost hitting a bystanding employee.

42 There is no doubt that Mr. Fehr, frustrated with Mr. Weber's performance, grabbed the calculator and threw it away. The surrounding circumstances including precisely what was said, is unclear. By itself, the episode would warrant a modest measure of discipline such as a warning or formal reprimand. In the context of the other misconduct by Mr. Fehr, it is one factor to be considered in assessing the proper penalty.

The attempt to secure a resignation from Mr. Weber by trickery

43 Mr. Weber told the investigator, and repeated at the hearing, that Mr. Fehr tried to get him to sign a stack of papers, without him having a chance to read them. The stack included a letter of resignation. At his interview with the company investigator, Mr. Fehr allowed that something like that might have happened, but it would have been a joke. Mr. Fehr took a similar line at the hearing. Mr. Fehr stated that such a resignation could not possibly stand up.

44 I find that the episode did occur, although I also find that it was intended as an insulting prank and not as an earnest effort to remove Mr. Weber from his position by trickery. Mr. Hallam stated at the hearing that the resignation episode was not a factor at all in his recommendation to dismiss Mr. Fehr. Counsel at the hearing did not consider it to be one of the focal events that I should consider.

45 If the attempt at securing a resignation had been intended in earnest, as an event that would actually affect Mr. Weber's security of employment, I would consider it an extremely serious offence.

46 As it was, in my view, a prank that was not innocent, but intended to reflect badly on Mr. Weber's intelligence and handling of paperwork, Mr. Fehr's efforts might warrant a reprimand if considered in isolation. Considered as one part of an overall pattern of conduct it can be legitimately taken into account in determining the appropriate level of discipline.

The end of the season party episode

47 Mr. Weber testified that Mr. Fehr strongly implied to him that Mr. Weber should give him a gift of a bottle of liquor at the season-end party. Mr. Weber testified that at the party, Mr. Fehr said that a big bottle meant "job security" whereas a small bottle amounted to just saying hello. Mr. Hart confirmed Mr. Weber's recollection. But both Mr. Fehr and another employer, Mr. John Foord-Kelsey, testified that the job security remark was made by another employee, Mr. Vince Paskowitz. Mr. Foord-Kelsey's testimony on all matters was careful, dispassionate and precise. Mr. Weber testified that he had had only a bit to drink when the job security remark was made. But he admitted that he had three drinks in that evening as a whole. The possibility cannot be discounted that the drinking has distorted Mr. Weber's recollection of that evening. Mr. Foord-Kelsey remembers Mr. Weber leaving the party wearing panties on his head. I am not convinced on a balance of probabilities that Mr. Fehr made the "job security" remark, let alone find that it was meant in earnest rather than as a good-natured joke.

48 As for the allegation that Mr. Fehr pressured Mr. Weber about buying him a bottle of liquor, Mr. Weber did not provide clear and precise recollections. Any conversations in this regard would have taken place over five years ago. Mr. Hallam, the company's investigator, did not even ask Mr.

Weber about the episode in the interview. Perhaps he considered the allegation peripheral to the main case or perhaps he did not consider the evidence sufficient to proceed further with it.

49 By the end of the season I have no doubt that Mr. Weber resented many of Mr. Fehr's actions and even an innocent remark by Mr. Fehr -- for example, about what kind of brand he would enjoy imbibing at the end of season party -- might be viewed as improper pressure.

50 In view of all the evidence I cannot conclude, on a balance of probabilities, that Mr. Fehr put any improper pressure on Mr. Weber to provide him with a bottle of alcohol or that Mr. Fehr made the "job security" remarks.

The scatological episode

51 Mr. Weber testified that one occasion Mr. Fehr stated that he had "made a timekeeper". After making that cryptic opening statement, Mr. Fehr elaborated that he had gone to the bathroom and after having relieved himself, he looked below and saw a timekeeper. Mr. Fehr did not recall such a remark at the interview with Mr. Hallam. Mr. Hart told Mr. Hallam that some such remark had been made in Mr. Hart's presence.

52 I find, on a balance of probabilities that a remark along these lines was indeed made. It would not surprise me at all if Mr. Fehr genuinely forgets this remark. It was not part of a series of similar jokes and the remark would have been made over five years ago.

53 I do think it probable that it was wholly or partly directed at Mr. Weber personally, rather than being directed at the whole class of timekeepers. (That is, there are anti-lawyer jokes and anti-doctor jokes and so on, but I do not believe that Mr. Weber was engaged in such a category, as opposed to a strictly personal insult). Considered on its own, such a remark would warrant a formal reprimand. Viewed in its overall context the remark is not of central importance, but it is a factor that I as an arbitrator can and have taken into account in assessing the appropriate penalty.

The morning meeting insults

54 Mr. Weber complained that Mr. Fehr often made him the object of jokes at morning meetings. He did not recite the content of any particular joke to the investigator or at the hearing. In speaking to the investigator, Mr. Hart, who in many ways corroborated Mr. Weber's testimony, said that he could not remember if Mr. Fehr made jokes about him at the morning meetings, but that it was possible. Mr. Dumont, a worker on the gang at the time, recalled that Mr. Fehr would put down Mr. Weber as a timekeeper in front of other employees, but could not recall specifics. Two witnesses, Mr. Ron Traxell and Mr. Foord-Kelsey, who were gang members at the time, could not recall any instances of Mr. Fehr's ridiculing Mr. Weber in front of the other men at morning meetings or otherwise.

55 Given the vague recollections of Mr. Weber, I conclude that I do not have an adequate evidentiary basis on which to conclude that Mr. Fehr insulted Mr. Weber at morning meetings in any way that rises to the level of a disciplinary offence. Some events might have occurred, but the civil standard of proof has not been met.

The hotel room episodes

56 Mr. Weber testified that he used his hotel room as an office for completing end-of-the-day bookkeeping tasks and that Mr. Fehr allegedly walked into Mr. Weber's room on many occasions to

find out how the reports were progressing and that Mr. Hart was often in the room helping Mr. Weber when Mr. Fehr walked in.

57 The following episodes occurred, according to Mr. Weber:

-- In the first episode, at Portage La Prairie, Mr. Fehr said that when Mr. Weber was finished doing his reports he could "suck on this". Mr. Fehr began pulling on his zipper. Mr. Weber looked away, but could hear the sound of the zipper being unzipped;

-- The following week, Mr. Fehr made a similar remark. Mr. Weber says that Mr. Fehr started pulling at his belt, but does no recall if there was any zipper pulling;

-- A similar episode occurred the following week;

-- Some time later, in Weburn, Mr. Fehr said that he had some "daddy's milk" for Mr. Weber that would be "nutritious". Mr. Weber looked away, but saw Mr. Fehr's underwear first.

58 Mr. Weber said that such episodes happened "quite a bit" and "almost on a daily basis".

59 In a deposition taken on July 8, 1998, by Mr. Randy Heinrichs, a union official, Mr. Weber is quoted as saying that in a hotel-room confrontation in Weyburn, Saskatchewan, Mr. Fehr "pulled out his penis". At the hearing, Mr. Weber says he turned away during crotch grabbing episodes and did not know whether Mr. Fehr actually exposed himself on any occasion.

60 Mr. Hart testified at the hearing that Mr. Fehr would, at the frequent hotel-room meetings at the end of the day, yell at Mr. Weber about his work. Mr. Hart agreed that quite often there was crotch grabbing and invitations "more or less implying", in Mr. Hart's words, that Mr. Weber could "suck his dick". Mr. Hart recalls the phrase "daddy's milk". Like Mr. Weber, Mr. Hart turned his head away during some of the crotch grabbing episodes and he never actually saw Mr. Fehr expose himself. There is clearly no adequate basis on which to conclude that Mr. Fehr actually did pull out his anatomy during any of the incidents.

61 Mr. Fehr denied at the interview with Mr. Hallam that any crotch grabbing took place. His denials were most vehement and categorical -- these episodes simply did not happen -- but he occasionally said that he did not remember any such episodes. At the hearing he repeated his denials that these episodes happened.

62 I have two very difficult questions to contend with here.

63 First, were the remarks made? Second, did Mr. Fehr remember making them and lie to the investigator and at the hearing about them? Or, with the passage of five years, did he forget them.

64 If it were not for Mr. Hart's testimony, I would have to find that the allegations have not been proven even on the civil standard. If I only had Mr. Weber's testimony, I would have to take into account the following facts:

-- Mr. Weber clearly resented Mr. Fehr's criticism of him quite apart from any scatological or sexual insults. If there were no other witnesses, a finder of fact might have to consider the possibility that Mr. Weber was trumping up or exaggerating allegations in order to exact retribution;

-- Mr. Weber did not complain about his alleged ill-treatment until 1998, even though he was not under the supervision of Mr. Fehr after the 1994 season. He even declined to pursue his complaint in 1997, when asked by a union representative whether he wished to do so;

-- Mr. Weber might have an ulterior motive for finally pursuing his complaint of harassment by Mr. Fehr. Counsel for Mr. Fehr suggested that Mr. Weber might have hit upon the idea that a discrimination complaint is a useful lever in trying to reclaim his position as timekeeper, a matter on which he has a pending formal grievance. The grievance was filed in 1996. Mr. Weber was not rehired as a timekeeper that year. The company itself has plainly stated its view that Mr. Weber's not being given the timekeeper assignment had nothing at all to do with Mr. Fehr;

-- Mr. Weber's recollections concern matters that were four years old at the time he complained and over five years old at the time he testified. Memory fades with time;

-- Mr. Weber's recollections or understanding of several specific events at the trial were not accurate. He stated that he understood that Mr. Foord-Kelsey had complained about the way Mr. Weber was being treated to a superior. Mr. Foord-Kelsey clearly and credibly testified that he had not done so. Mr. Weber's recollection of the sequence of events connected with the clothes-burning episode are, in my view, not as accurate as Mr. Hart's, who was able to observe events in a calmer and more detached state. Based on the testimony of Mr. Foord-Kelsey, I am agnostic about whether Mr. Weber accurately recalled the events at the season-ending party.

65 If this were simply a case of Mr. Weber's testimony versus that of Mr. Fehr's, I would not be able to find that any of the hotel-room events occurred -- or that they did not occur. Even on the civil standard, the allegations would remain unproved. I would have two conflicting stories told under oath. Mr. Weber and Mr. Fehr would each have reasons to exaggerate. Each would have had ample time to forget facts or to develop memories that are distorted by self-interest.

66 The decisive factor for me is that Mr. Hart corroborated key elements of Mr. Weber's story. Mr. Hart who appeared at the hearing, appeared to be an honest and unpretentious person. He seems to have been on reasonably good terms with Mr. Fehr while they were working together.

67 I conclude that on at least three occasions Mr. Fehr grabbed at his belt, zipper or crotch and suggested to Mr. Weber that he perform oral sex, and that on at least one other occasion he at least made an insulting reference to oral sex. Mr. Hart and Mr. Weber say that the crotch grabbing and jokes occurred often, but without specifics, and with the passage of four or five years since the event there is not an adequate evidentiary basis for attributing more episodes than that to Mr. Fehr. It is well possible that there were more than three such incidents, but a great deal of time has passed since the events occurred and memory is such that people sometimes over generalize from a few vivid and well-remembered anecdotes. Several striking episodes sometimes cause people to characterize a person or institution in a particular way and then suppose that such occurrences are routine, or at least far more common than they actually are.

68 Mr. Hart believed that Mr. Fehr's behavior amounted to sick jokes and not an earnest attempt to obtain sexual gratification. Mr. Weber initially thought much the same, although by the end of the season, he testified he was beginning to wonder about Mr. Fehr's sexuality. The facts are that:

-- Mr. Fehr is a married man with three children. There was no evidence adduced that he had any interest in, or track record of, sexual infidelities with anyone of any nature;

-- Neither Mr. Hart or Mr. Weber could testify that Mr. Fehr ever actually exposed his anatomy;

-- Mr. Fehr found Mr. Weber an ongoing source of irritation, rather than being in any way attractive as a personality. The notion that Mr. Fehr had any interest in engaging in any kind of affectionate liaison with Mr. Weber is preposterous.

69 I understand that in some situations, an abusive individual might be genuinely interested in having an individual service him sexually in order to humiliate that person. Based on all the evidence, however, I think it is also extremely far-fetched to infer that Mr. Fehr had any real interest in having a physical interaction with Mr. Weber.

70 My view, after carefully reviewing all the testimony, is that Mr. Fehr made the sexually loaded comments to Mr. Weber as a means of insulting him. The references to oral sex and nutrition were basically intended to convey Mr. Fehr's view that Mr. Weber was ineffective and bumbling, and therefore not manly. I am, of course, explaining my sense of how Mr. Fehr viewed Mr. Weber and not in any way condoning Mr. Fehr's worldview or its application to Mr. Weber.

71 Mr. Fehr had no actual interest in having any kind of sexual interaction with Mr. Weber; this is not even remotely a quid-pro-quo case where a superior uses threats or promises of reward to obtain sexual gratification from a subordinate.

Other verbal abuse of Mr. Weber

72 Mr. Hallam, the company investigator, concludes in his report that in addition to the verbal abuse of a sexual or scatological nature, Mr. Fehr made belittling comments concerning Mr. Weber's ability to do his job.

73 At the hearing Mr. Weber's testimony focussed on the specific episodes reviewed above. Mr. Weber mentioned that at morning meetings Mr. Fehr might have called him a few names, referring to his intelligence, but stated that he could not remember all that Mr. Fehr said in this regard. Apart from the calculator flinging episode, I cannot identify any episodes where I am left with any specific sense of time, place, a clear idea of what Mr. Fehr actually said and did, and a reliable impression of the surrounding context.

74 Mr. Hart testified at the hearing that Mr. Fehr would be always yelling at Mr. Weber about his inadequate filling in of the timesheets and saying things like "you're a dummy, you don't know what you're doing".

75 Mr. Fehr denied at the hearing yelling at Mr. Weber and denied that he insulted him in front of other people.

76 Several witnesses who were in the gang that season, Mr. Traxwell and Mr. Foord-Kelsey, stated that that they could not recall Mr. Fehr insulting or yelling at Mr. Weber over the course of the season.

77 Without more specifics -- a clearly recalled quote from a specific occasion, perhaps a date or place, and an account of the context -- I do not know how I can responsibly determine what was actually said on any specific occasion and what the context was that might provide justification or mitigation. The sum of uncertainties about the specifics is that I am left with no reliable basis for arriving at a general conclusion. I suspect that on a number of occasions Mr. Fehr did go beyond the realm of legitimate criticism of Mr. Weber's performance and into that of personal abuse. I have considered seriously Mr. Hart's testimony, but Mr. Hart was recalling events that were over five years old by the time of the hearing and his account fails short with respect to specifics. After reviewing the record, and much reflection on this issue, I do not see how I can say that the case has been proved in this respect even on a civil standard.

CPR's approach to verbal abuse in other contexts

78 At the hearing counsel for the employer agreed that the core of its case was the sexual language in the hotel rooms, not verbal abuse of a non-sexual character.

79 I asked Mr. Tumak, the superior to whom the company investigator sent his report, what the appropriate penalty is for a supervisor who throughout the course of a season calls an employee an

idiot in front of his colleagues and repeats those comments in the employee's hotel room which is serving as the employee's office. Mr. Tumak said that such a season's worth of verbal abuse warranted a reprimand. What if the conduct is repeated after the reprimand, I then asked. Mr. Tumak indicated said that the loss of an annual bonus or incentive payment would be the next step. A third offender might be demoted.

80 Mr. Tumak gave virtually the same answer when I put to him a hypothetical comparable case, only one in which the abuse consists of racial slurs directed at a First Nations' citizen. Mr. Tumak gave virtually the same answer. A first offender who inflicts ethnic slurs over a season would get a reprimand, a second time offender would receive an economic penalty, a third time offender would be demoted.

81 As I said during closing argument, I found Mr. Tumak's estimate of what ought to happen to someone who hurls racist insults to be surprisingly and in fact unreasonably low. It may well be that Mr. Tumak's response does not accurately reflect what the employer would actually do in a real case after it had been fully deliberated.

82 But to return to the matter immediately at hand, Mr. Tumak's estimate of what should properly be done with a non-sexual, non-racial abuse does not seem unrealistic or unreasonably lax. An employer might take a sterner line in some cases depending on all the circumstances. The notion of a formal reprimand for a first offender does not seem unreasonable, at least in many contexts.

83 At the end of the day I believe that the incidents with adequate specifics that have been established here -- the crotch grabbing and insulting invitations to oral sex, the calculator throwing, the resignation trick -- themselves warrant a substantial penalty short of dismissal. If Mr. Fehr did, on a number of occasions, yell at Mr. Weber or insult his intelligence -- facts which have not been adequately proved -- the penalty I would fix would not be substantially different.

84 To repeat, however, I do not see how I can conscientiously allow the vague allegations of verbal abuse to be a substantial factor in my decision in the specific circumstances of the case -- which include that I have no clear sense of what specific incidents were involved and where each properly lies on the scale of impropriety. As with so many other aspects of this case, had a complaint been made in a timely way by Mr. Weber, it is well possible that details could have been properly documented and I could have taken such details fully into account in determining the penalty.

Mr. Fehr's alleged failure to acknowledge various misconduct and exhibit remorse

85 Lying to an employer about past misconduct can be as serious, or more serious, than the misconduct itself. Lying to a tribunal under oath is a criminal offence. On the other hand, candid acknowledgement about misconduct and exhibiting sincere remorse can mitigate the penalty.

86 When Mr. Fehr was first confronted by the company with allegations about misconduct towards Mr. Weber, it was under circumstances that were unfavorable to his being able to recall the incidents, let alone exhibit proper remorse for any misconduct.

87 The company did not receive a complaint from Mr. Weber, forwarded by the union, until August 7, 1998, four years after the alleged misconduct occurred. The first interviews did not take place until October 14, 1998. Mr. Fehr was not interviewed until November 5, 1998.

88 As Mr. Hallam interviewed many witnesses prior to meeting with Mr. Fehr, Mr. Fehr apparently got wind that something was going on and asked some of his colleagues about it. He recalls being told he was going to be asked a "few questions" by Mr. Hallam.

89 There is no evidence at all that Mr. Fehr was notified by the company, prior to his interview, of what the focus of the investigation was and what he would be interviewed about. Mr. Hallam did not send him any such notice. No notice appears on the record anywhere. Mr. Hallam's notes of the interview begin with a statement that Mr. Weber had filed a complaint alleging that he subjected Mr. Weber to humiliating and degrading behavior by verbally abusing him and sexually harassing him. Then, apparently, Mr. Hallam made some reference to the need for confidentiality and the nature of the harassment policy.

90 One can understand that a company might wish to confidentially investigate an event, without informing the subject of the complaint, to determine whether there is any substance to the dispute before upsetting the subject. The company might also wish to proceed discretely at the initial stages in order to avoid any possibility of collusion between the subject of the investigation and potential witnesses. But at some stage in the investigation the witness should be given fair notice of the allegations, a reasonable opportunity to compose himself, to consult his memory, to review any relevant records and to obtain the advice of legal counsel. I note that complainants in sexual harassment cases, under the company policy, are expressly told by the policy that they may bring an adviser with them.

91 Mr. Fehr, by contrast, was suddenly asked at the interview about events that were over four years old. He was not provided with witness statements or summaries of any allegations before, during or after the interview, instead, he was confronted with the specific allegations selected from the record by Mr. Hallam. He was interviewed once, and once only, even though some of those making allegations were re-interviewed. He was not asked at the end of the interview whether he had anything to add, even though other witnesses were. He was not invited to make further admissions after he had a chance to think about the facts and issues and to consult counsel. He was not invited to address the issue of penalty. I will return to many of the issues in the context of examining the distinct issue of whether the investigation met minimal standards of fairness and whether Mr. Fehr was prejudiced in any way as a result.

92 Mr. Hallam, in his report, noted that at times Mr. Fehr absolutely denied allegations, but at other times said that he did not recall whether the alleged event occurred. I would think that anyone confronted with such serious allegations might be flustered, might have difficulty remembering, and might not be articulate about distinguishing between what he recalls as not happening and what he simply does not recall. Mr. Fehr has a limited education -- grade ten -- and from my observation, is not a particularly skilled person when it comes to making fine conceptual and verbal distinctions.

93 When cross-examined, Mr. Hallam was expressly asked whether it was plausible that Mr. Fehr did not recall the events in question as opposed to lying about them. Mr. Hallam agreed that the explanation that Mr. Fehr did not remember "could hold water". It did not matter to Mr. Hallam, he testified, because in his view Mr. Fehr's misconduct was so serious that it warranted dismissal regardless of whether Mr. Fehr could not recall past events or were actually lying about them. When asked about whether remorse would have made any difference, Mr. Hallam said it would not.

94 From the record of his interview with Mr. Hallam, it is clear that Mr. Fehr uses profanity on occasions. There is much evidence that workers on the gangs use rude language often and rib each

other from time to time. In my observation, persons who cross the line into verbal abuse are not always adequately mindful of what they are doing or the impact it is having on others.

95 They can be genuinely forgetful of what they have said and done. If they were more self-aware and more sensitive about others they would generally not be abusive in the first place.

96 To repeat, when asked at the hearing about whether Mr. Fehr lied about key allegations or forgot them at a distance of more than four years, Mr. Hallam testified that either possibility "could hold water". I am not prepared, any more than Mr. Hallam himself, to say that Mr. Fehr lied at the interview to Mr. Hallam. Having observed Mr. Fehr, and listened to his cross-examination, I am not prepared to conclude that he lied under oath.

97 I am well aware, of course, of the possibility that Mr. Fehr knowingly misstated the extent of his recollections at the interview with Mr. Hallam and afterwards. Mr. Fehr did recall some events, like the calculator flinging. He might have been too embarrassed, or too frightened of the job consequences, to admit what happened to Mr. Hallam. He might have felt boxed in by his original denials at the later hearing. But I cannot draw adverse conclusions based on mere possibilities and suspicions. Allegations against Mr. Fehr must be proved on a balanced of probabilities.

The Appropriate Penalty

98 Counsel for both sides agreed that my jurisdiction here is to determine whether dismissal was just and I can find the dismissal to be unjust if termination is excessive and a lesser penalty more appropriate.

99 Counsel for both sides agreed that this proceeding is not the equivalent of a judicial review of what the employer did; I do not have to go so far as to find that the employer's decision was unreasonable as opposed to simply being, in my considered and respectful view, unjust.

100 Counsel for the employer noted that while I am not obliged in law to defer to the employer's judgment merely because it is not unreasonable, I should as a practical matter be respectful of the employer's opinions. I would agree that in any such case an adjudicator should attempt to understand the employer's point of view about the particular case and how that case fits into the policies and corporate culture of the company. The adjudicator should also be mindful of the lessons that company officials have drawn from their extensive real world experience. At the same time, Parliament has seen fit to provide a statutory right of appeal of dismissals under the Canada Labour Code, and adjudicators cannot abdicate their responsibility to make an independent assessment of whether a dismissal is just. That includes substituting a lesser penalty where dismissal is excessive.

101 In any event, I have respectfully arrived at a somewhat different view of the facts than those contained in the report of Mr. Hallam. In particular, I have found that it has not been proved that Mr. Fehr abused other employees, apart from Mr. Weber, and that Mr. Fehr was never even given proper notice that treatment of other employees was at issue. I have also identified a specific series of episodes in which misconduct has been proved. Mr. Hallam, by contrast, made recommendations on a general finding of a "pattern" of verbal abuse and sexual harassment which might in the mind of Mr. Hallam and of those reading in his report, probably extend to some conduct which has not been adequately proved at this hearing.

102 In Re Galco Food Products Ltd. and Amalgamated Meat Cutters & Butchers Workmen of North America, Local P-1105 (1974), 7 L.A.C. (2d) 350 at page 356, Professor Beatty states:

> "It is we think now generally accepted that the prevailing themes of modern punishment are rehabilitation, correction and individualization. It is said therefore that for punishment to serve its ends, it must induce persons to observe the accepted norms of society and it must do so at a cost to the individual which is not excessive."

103 The employer characterizes the conduct here as including sexual harassment. Its policy on sexual harassment, as it stood in 1984, provided that:

> "It is not possible to detail appropriate discipline for a defined set of circumstances involving sexual harassment since each case should be determined individually and judgment must be exercised."
>
> "Discipline could range from verbal warning to dismissal, but disciplinary action should only be taken after all of the information has been properly presented and it is accurately recorded. In the case of unionized employees, assessment of discipline should be consistent with the requirements imposed by the appropriate collective agreement."

104 Factors that weigh in favour of a strong penalty here include the following:

-- Mr. Fehr was verbally abusive to a new and inexperienced employee, one who tended to lack the self-confidence to challenge him or to be emotionally wounded by it;

-- Mr. Weber had to absorb the abuse while he was dealing with all the stress of doing roadwork (which is physically draining and sometimes dangerous) as well as learning the bookkeeper's job;

-- The language and gestures chosen by Mr. Fehr were ones that Mr. Weber found revolting as well as hurtful and insulting. Mr. Hart, who was not the direct object of the sexual language and gestures, also found it sick. Mr. Weber's sense of disgust as well as hurt was reasonable and not prudish or overly sensitive;

-- The company has a strong ethical, material and legal interest in protecting all of its employees from verbal abuse whether or not it is technically characterized as sexual. Verbal abuse of employees jeopardizes morale, productivity and even safety. The employer has legal responsibilities under the Canada Labour Code to prevent discrimination and sexual harassment, and it can reasonably take the view that it should take a firm line against verbal abuse that includes sexual references even when it is only arguable, as opposed to absolutely clear, that the abuse technically constitutes sexual har-

assment under various statutes;

-- A number of incidents took place, rather than one or two isolated episodes;

105 Mitigating factors include the following:

-- Mr. Fehr has a disciplinary record that is essentially clean both before and after the 1994 season;

-- Mr. Fehr was an inexperienced supervisor dealing with a difficult situation. He had a novice timekeeper who had very limited training and inadequate manuals, who was struggling to do the job properly, who often made many mistakes that required recalculation. Mr. Fehr's inappropriate reaction to Mr. Weber was an unjustified and excessive response to frustrations Mr. Fehr had with respect to seeing work done improperly, it was not the product of gratuitous malice;

-- Mr. Fehr sought assistance from his own superiors in dealing with what he viewed as inadequate performance from Mr. Weber, and did not receive much guidance or support;

-- Mr. Fehr worked as a supervisor for a number of years after the 1994 season. He has shown in practice, and not merely as a hypothetical matter, that after 1994 he could carry out the job in an acceptable manner;

-- Mr. Fehr has devoted almost two decades of his life to the service of CPR;

-- Whatever penalty is fixed here, Mr. Fehr has endured the stress and humiliation of being investigated, fired, of having to go through a year of separation from CPR, of being engaged in this legal struggle, of having many employees well aware of the fact of his dismissal and the reasons CPR provided for it. His letter in response to being dismissed refers to his life as having been shattered. It is implausible that he would not be chastened from this experience, regardless of what penalty is imposed at the end of the day.

106 Counsel for both sides have referred me to a variety of cases involving sexual or ethnic harassment. The circumstances of those cases vary widely.

107 One case of particular interest is Canadian Pacific Ltd. and B.M.W.E. (Parker), 57 L.A.C. (4th) 89. In that case the grievor engaged in a campaign against a superior and fellow employee, falsely (and to some employees, convincingly) insisting that there were engaged in a homosexual relationship. Arbitrator Picher stated:

> "Quite apart from the unfortunate homophobia inherent in Mr. Parker's attitude, the record discloses, beyond dispute, that his actions had a devastating effect on the persons he targeted. Moreover, to the extent that the morality of the shop is relevant, it should be noted that rarely, in this Arbitrator's experience, have so many bargaining unit employees so willingly given evidence against a fellow employee and union officer in a discharge case."

108 The Arbitrator noted that there was no workable alternative to dismissal:

> "Because of the seniority structure of the bargaining unit, the Arbitrator cannot direct that the grievor be reinstated to work in some other location. The grievor cannot, in other words, be separated from those he has so profoundly offended, including at least one employee who has indicated that he would quit his job rather than work again with Mr. Parker. Unfortunately, Mr. Parker, who is not a long-term employee, has so poisoned the atmosphere of his own workplace as to make his reinstatement impossible."

109 In a judicial review of the decision by Arbitrator Picher, in Brotherhood of Maintenance of Way Employees v. Canadian Pacific Ltd. [1997] Q.J. No. 466, Justice Duval Hessler disagreed with Arbitrator Picher about whether the conduct technically constituted sexual harassment, because there was no "sexual attraction and/or sexual gratification involved". She agreed, however, that the behavior was profoundly unacceptable. She also agreed that in light of the practical impossibility of reinstatement, dismissal was the only solution. Justice Duval Hessler did note, however, that the union in that case had a duty as well as the employer to be aware of the harassment campaign that the employee had been conducting. She noted:

> "...the Court would be happier had Mr. Parker been confronted with his behavior and given a chance to reform before being dismissed."

110 In contrast to Mr. Parker, Mr. Fehr was a very long-serving employee. It is not merely speculative that he could continue to act as a supervisor in environments not involving Mr. Weber as he did so for a number of years after the 1994 season. I have no doubt that Mr. Weber would not want to work around Mr. Fehr, there is no evidence that separating the two has been, or would be, difficult for this employer.

111 Looking at the other cases submitted to me about racial or sexual harassment, I would note that:

-- In a number of cases where there was unwanted intimate physical contact of a sexual nature, dismissals have been upheld under contract law (Teller v Bank of Montreal, [1987] OJ, Gonsalves v. Catholic Church Extension Society of Canada 164 D.L.R. (4th) 339, Bannister v General Motors of Can-

ada Limited, 40 O.R. (3rd) 557. In Re Government of the Province of Alberta and Alberta Union of Provincial Employees, 5 L.A.C. (3d) 268, however, a grievance appeal board substituted a six month suspension without pay, for a dismissal that was proceeded by an incident in which the grievor, while drunk and under stress, made unwanted sexual contact with a fellow employee;

-- In a number of cases where there were abusive remarks of a sexual or ethnic nature, arbitrators have substituted reprimands or suspensions for dismissals: Manitoba (Workers Compensation Board) and CUPE, Local 1063. [1994] MGAD No. 43, 36 CLAS 269 (reprimand appropriate for abusive language on one occasion); University of Manitoba (Grievance of Jacques Collins), [1993] MGAD No. 124 (University Professor makes a number of remarks with sexist and racist overtones, six months suspension without pay). In Dorrian and Canadian Airlines International Ltd., [1997] CLAD No. 607, however, an adjudicator under part III of the Canada Labour Code upheld a dismissal where the complainant had made offensive sexual comments about many employees over a number of years and displayed offensive materials.[5]

112 An important issue in many cases is whether a person facing discipline has acknowledged the misconduct and exhibited remorse and a desire to avoid repetitions. Mr. Hallam thought that remorse was irrelevant, the facts, as he viewed them, were so serious that no contrition would obviate the need to dismiss Mr. Fehr. Mr. Tumak, the superior to whom Mr. Hallam sent his report, however stated that absence of remorse was a factor he considered. Mr. Jansens, a senior CPR manager whose testimony was consistently thoughtful and articulate, testified that it was a difficult question in his mind whether given the facts as reported by Mr. Hallam that remorse might result in a lesser penalty than dismissal. Mr. Jansens did not rule out the possibility.

113 The most senior managers who testified in this case allowed that remorse could be a factor, and that the absence of remorse was a factor in this case. On the facts that have been proved in front of me, I have no doubt that a genuine expression of remorse would have been an important mitigating factor. Here, however, I come to some very serious difficulties concerning delay, the manner in which the investigation was conducted, and the accompanying prejudice.

114 As already discussed, the union did not bring forward Mr. Weber's complaint until four years after the events in question. Mr. Fehr was first interviewed three months after that. As mentioned, he had no adequate notice to study the statements of witnesses before or during the hearing, no invitation to reflect on events and make further submissions afterwards. He was suddenly confronted with serious allegations. I would not be surprised if some individuals capable of actually remembering the events of four years earlier would have been too upset and surprised to remember them during the interview. The company's manner of dealing with Mr. Fehr did not recognize, either procedurally or in substance, the real difficulties anyone would have when dealing with events that had taken place four years earlier.

115 I am not convinced that Mr. Fehr actually had during the interview with Mr. Hallam and at the hearing, any recollection at all of the four specific episodes which, in my view, have been proved to have occurred. As already mentioned, Mr. Hallam, the company's investigator who interviewed Mr. Fehr, stated that he did not know whether Mr. Fehr was lying or simply forgot the incidents. Either explanation, Mr. Hallam testified, "could hold water". I have little doubt that Mr. Fehr's recollections are at least foggy and that even if he has some recollection (which has not been proved) his ability to acknowledge them, provide any mitigating context and exhibit contribution, have all been seriously impaired by the passage of time and the absence of prior complaint.

116 Even an employee who does not remember an event may mitigate the penalty by honestly saying something like "if this did happen, I am sorry, that would have been inappropriate, I would never do something like that in the future". In the circumstances of the interview with Mr. Hallam, Mr. Fehr in my view had no fair opportunity to consider and articulate such a position. Having never been invited at any stage leading up to his dismissal to speak to the issue of penalty, Mr. Fehr had no real opportunity or incentive to advance such a position. When asked at the hearing, Mr. Fehr did agree on cross-examination that if the sort of behavior he is alleged to have committed did take place, it would be unacceptable and warrant serious discipline.

117 I discussed earlier the testimony of Mr. Tumak concerning appropriate penalties for verbal abuse which is focussed on competence or ethnicity, rather than sex. To recall, Mr. Tumak thought that a season marked by abusive conduct based on competence or race would result first in a reprimand; then if repeated, a denial of a bonus; then if further repeated, a demotion. I will give Mr. Tumak and the company the benefit of the doubt in several respects. I will allow that the company might take a sterner line, as it should, in at least some cases of ethnic abuse. I will also assume, without deciding, that the company needs not hand out an unduly low penalty in one case merely because it has been unduly lenient in another. All that granted, I think Mr. Tumak's testimony suggests that dismissal in all the circumstances found here is excessive even in the context of CPR's own corporate culture.

118 Mr. Jansens testified that the company automatically dismissed employees who are found to be intoxicated. But during the grievance process, if remorse and rehabilitation is shown, the employee might be reinstated. An employee who is intoxicated on the job creates a risk to life and limb and CPR takes safety extremely seriously. Yet in practice it does not always follow through on dismissals in intoxication cases. That is further evidence that CPR's corporate culture is not extraordinarily stern and unrelenting in matters of discipline.[6]

119 Counsel for CPR argued that anything short of dismissal would have a "chilling effect" on other employees who might want to bring forward complaints of harassment. They would be afraid of retaliation if the employee is reinstated, even if penalized in some other form.

120 The Parker case shows that reinstating an employee can be unworkable in some circumstances on account of the response by other employees. It has not been shown that it is by any means unworkable in this case. Mr. Fehr can and has worked as a supervisor separately and apart from Mr. Weber. It has not been shown that CPR would experience any difficulty in keeping them apart in the future.

121 Looking at the CPR policy, I note that it by no means promises dismissal in any and every case where a justified complaint is made. It promises instead a penalty that is appropriate in the individual circumstances. No policy could reasonably guarantee that if a complaint is upheld, the

wrongdoer will be dismissed, regardless of whether the penalty is fit in all the circumstances. The CPR policy does promise complainants that they will be treated with sensitivity, that due regard will be had with respect to confidentiality, and that they will be protected from retaliation. The Parker case shows that reinstatement may reasonably be avoided where the impact on innocent employees would be unacceptable. Given these various assurances and precedents there does not seem to be reasonable grounds to adopt a rigid and draconian line with respect to penalties.

122 Indeed, an unduly harsh line on penalties can be counterproductive. Some employees will not come forward with complaints because they do not want a colleague's dismissal on their conscience when they believe a lesser penalty is warranted. Those accused of wrongdoing are more likely to react with acknowledgment and contrition if they know the company is interested in solving problems as much as inflicting penalties and that where some discipline is warranted it will be proportionate to the offence.

123 I have some difficulty in arriving at a fair penalty because I do think that the delay here has prejudiced Mr. Fehr's ability to recall the factual circumstances surrounding the offence, to fully provide any explanations, excuses or mitigating circumstances, and to exhibit contrition. I am troubled by the prospect of visiting a penalty on an individual for words and gestures which he may recall vaguely, or not at all. After much hesitation, I have concluded that in all the circumstances of this particular case, Mr. Fehr's failure to acknowledge certain episodes and apologize for them should be viewed as neither an aggravating nor mitigating factor. The penalty should be determined on the basis of the other factors I have identified.

124 I would conclude that on the facts as I have found them that outright dismissal is excessive. Taking into account all the aggravating and mitigating factors, I would hold that a five months suspension, without pay, is the appropriate penalty.

Does the delay here make discipline of any sort unjust?

125 Counsel for the complainant brought to my attention several cases that address the consequences of delay.

126 In the Martin case, Martin and Bank of Montreal (Unreported) June 25, 1992, which was also under Part III of the Canada Labour Code, Arbitrator Cromwell found that the complainant had made some offensive comments of a sexual and racial nature. He found, however, that dismissal was unduly harsh. But he did not substitute a penalty. He instead concluded that the complainant should be fully reinstated, with costs.

127 According to Arbitrator Cromwell the imposition of the discipline was not timely. The bulk of the allegations took place from 1980 to 1984. The bank had notice of the basic allegations in 1983, but the complainant was not warned, counseled or disciplined until 1991. The delay was itself unjust. Furthermore, it caused actual prejudice to the complainant. The employer said that the complainant had not "come clean". But according to Arbitrator Cromwell:

> "Mr. Martin has had to deal with old allegations. I am persuaded he attempted to do so as best he could. That his perception and memory were not always fully accurate is hardly surprising and should not count against him the way the Bank suggests".

128 Arbitrator Cromwell accepted as a fact the complainant's fading memory, made allowances for it, and managed to reach findings of fact on all points, some of which were adverse to the complainant. All that done, Arbitrator Cromwell still found the delay and the prejudice caused by it to be grounds for upholding the complaint against dismissal in its entirely.

129 In Seneca College of Applied Arts and Technology and OPSEU, 57 L.A.C. (4th) 343, a Board heard the grievance of an employee who was dismissed in 1993 for racially and sexually harassing remarks. The Board, hearing the case in 1996, refused to give any weight to evidence concerning an incident that occurred in 1990. The employer was aware of the incident at the time it happened. The Board said that:

> "It was evident in listening to the witnesses that the delay in not bringing the matter to the attention of the grievor has seriously prejudiced his ability to deal with the allegations against him. This decision of the Board should not be construed as a find that the incident did or did not take place, but simply that the lapse of time precludes the Board from properly giving any weight to the evidence with respect to the matter".

130 The Board considered another delay issue. The employer was aware in late 1991 of some allegations, but did not send a letter to the grievor until September 1992. The Board agreed that:

> "As was pointed out by Counsel for the Union, in most situations where there is an untoward delay, the law is that all allegations are simply dismissed."

131 The Board decided, however, to proceed with the hearing in light of the "reprehensive" conduct of the grievor and the concern of the College that "very high standards" be maintained with respect to the position exercised by the employee.

132 The delay issue has concerned me enough to initiate my own research, in addition to reviewing the several cases provided by counsel. Arbitrator Herlich points out in the case of Re AFG Industries Ltd. and Aluminum Brick Glass Workers Union 75 L.A.C. (4th) 336 provides this useful analysis of the case law.

> "The cases cited demonstrate a multiplicity of analytical envelopes for the similar sets of concerns about the need to impose discipline in an expeditious fashion. Theories have included concepts of condemnation, acquiescence, procedural fairness as well as notions of some inherent general arbitral principle (see for example the discussion in the University of Ottawa case at page 308 et seq.). While the precise theoretical and analytic underpinnings may be differently described, there is no doubt that arbitrators have long expressed (and the labour relations community has long understood) concern about the need for the timely imposition of discipline. The failure of an employer to act expeditiously may render the discipline void, or at least voidable. One general description relying on the recognized labour arbitration texts, was provided in the Miracle Food Mart case at page 46:

> "...there is no doubt in my mind that an arbitrator in an appropriate case may be called upon to decide whether a requirement of procedural fairness has been met."

133 In Brown and Beatty [Canadian Labour Arbitration, 2nd ed. (1984) para. 7:2100, at p. 335, the authors simply enunciate as a matter of general principle the following:

> "Regardless of the source of an employer's power to discipline, it is generally recognized that a variety of procedural requirements may circumscribe its legitimate application. Some of these constraints derive from [the] laws of general application. Others, such as the requirement that the employer must sanction an individual for behavior it regards as inappropriate in a reasonable expeditious fashion, are matters of general arbitral principle."
>
> [at page 341]
>
> "Whether viewed as the product of some "free-floating" general arbitral principle or as a requirement of procedural fairness which can be subsumed under the more general heading of just cause, it is well accepted that employers are under an obligation to act reasonably expeditiously in imposing discipline. Indeed, while disagreeing about the application of that principle to the facts of this case, the parties before me did not dispute its validity."

134 The cases generally suggest that arbitrators, in looking at delay, should consider the length of the delay, the reasons for it and whether any prejudice resulted therefrom.

135 The initial reason for the delay was that Mr. Weber did not bring forward his complaint, via his union, until August of 1998, four years after the episodes occurred. Mr. Weber was in a unionized environment and had telephone calls with middle managers away from the work site, so arguably he should have brought forward any complaints in the 1994 season while still on site. But I am prepared to make allowances for the fact that he was an inexperienced employee and might have feared retaliation from Mr. Fehr. But he was out of Mr. Fehr's presence and control after the summer of 1994. In 1997, Mr. Weber discussed the alleged incidents with Mr. Randy Heinrichs, a union official, who told Mr. Weber he could lodge a formal complaint. Mr. Weber declined to do so, according to Mr. Heinrichs he was afraid that doing so might hurt his job situation. In 1998, however, Mr. Weber finally decided to proceed with a formal complaint. Mr. Heinrichs took a deposition from him which he forwarded to management.

136 In my view, whatever Mr. Weber's subjective concerns, there is no evidence that he had anything to fear by way of retaliation from the company or anyone else if he lodged a formal complaint. He had an active union to back him, and a company with a well-publicized commitment to preventing harassment. It would be understandable if Mr. Weber was not anxious to revisit traumatic events by getting involved in a formal complaint. But if he was going to do so the appropriate course was to do so with reasonable promptness. I do not think Mr. Weber can reasonably complain if the case against Mr. Fehr were dismissed, or the penalty altered, in light of prejudice resulting to Mr. Fehr from the very substantial delays caused by Mr. Weber's coming forward only after four years had elapsed.

137 The letter was sent to the employer, according to Mr. Hallam's report, on August 7, 1998. The first interview in the investigation, with Mr. Weber, was on October 14, 1998. Mr. Fehr was confronted on November 5, 1998 and was formerly dismissed about a month later.

138 Some weight must be given to the fact that the employer has its own interests in proceeding with a harassment complaint and should not suffer on account of delays occasioned by a dilatory complainant. But the focus of the analysis cannot be exclusively on fairness to the employer, there must be fairness as well to the individual who stands accused.

139 In this particular case, I must respectfully find that the employer did not take any measures to anticipate and counteract any prejudice occasioned by the delay. The manner of the investigation did not respond to the difficulties that Mr. Fehr might have in remembering events and preparing a defence. It is not reasonable to suddenly confront an individual with a welter of accusations going back over four years and to not provide opportunity before, during or after to review the case against him in order for him to prepare a defence or to address fundamental issues such as penalty.

140 The employer brought to my attention the decision of the Alberta Court of Appeal in Higginson v Rocky Credit Union Ltd. [1995] A.J. No 384. It suggests that unfair procedures do not necessarily vitiate the substantive fact that a dismissal was justified. Furthermore, the court suggests, "a fair hearing is not required before dismissal for just cause." I would caution that Higginson is a case under the common law of contract; Part III adjudications for unjust dismissal, by contrast, proceed on the basis of what Arbitrator Cromwell, in the Martin case, calls "the modified arbitral standard" -- that used under arbitral jurisprudence [taking into account any special considerations arising from the fact that the work environment may be white collar, rather than industrial].

141 Discipline delayed is discipline that can be reduced or even entirely set aside by an adjudicator. The remedy for the injustice depends on all the circumstances. Adjudicators under Part III of the Canada Labour Code have broad discretion in this regard. In some cases, an adjudicator might refrain from ordering any remedy. In other cases, like Martin, the adjudicator might entirely decline to order any discipline.

142 I have reviewed both the arbitral case law and the case law on whether the Canadian Human Rights Commission acts appropriately when it waived the limit of one year from the time an event happens to bring a complaint about it. The fact that the statute has a prima facie rule which calls for prompt complaints indicates that arbitrators dealing with comparable situations under the Canada Labour Code should not view delay lightly.

143 I have found it very difficult to determine whether I should outright reinstate Mr. Fehr, without penalty, in light of:

-- The long delay here;

-- The fact that the manner of the investigation did not take into account the difficulties that ensured for Mr. Fehr in the course of its investigation;

-- The fact that the delay has made it more difficult for Mr. Fehr to remember events, to put them in proper context and to express any acknowledgement or remorse that might be a mitigating factor;

-- The inherent unfairness of penalizing someone for events which he might not remember, or recall only hazily.

144 Not without some serious qualms, I have decided in the end that I should go ahead and impose some penalty here despite the delays and notwithstanding that the company did not give Mr. Fehr an adequate opportunity to respond in the context of that delay. Factors that have influenced me include these:

-- Most of the delay was before the investigation even began. Mr. Fehr did not, for most of the delay period, find himself under a cloud of accusation with the accompanying stigma and stress;

-- The employer did not cause the greater part of the delay. The delay was attributable instead to Mr. Weber not coming forward;

-- I am not quite convinced that the three months it took to interview witnesses before confronting Mr. Fehr was unreasonable in all the circumstances, including the fact that the employer had to contract employees in various part of Canada;

-- I have been able to take into account, in assessing the facts and fashioning a remedy, some of the prejudice that might have resulted from the delay;

-- The employer has a substantial interest in sending the message that it takes various forms of harassment seriously;

-- I do not believe that Mr. Hallam, the company's investigator, acted in bad faith in any respect. I have respectfully disagreed with some aspects of the way in which the investigation was conducted, particularly the absence of fair warning to Mr. Fehr of the case against him and a fair opportunity to address it and to speak to the issue of penalty. But Mr. Hallam's notes bespeak an earnest effort to accurately determine the facts and record them regardless of whether they were inculpatory or exculpatory. At the hearing,

Mr. Hallam appeared to me to be trying at all times to answer questions with precision and honesty;

-- The employer has not, according to the evidence, previously dealt with many cases of verbal abuse with sexual content, which may explain some of its procedural mistakes in handling this matter.

Defects in the process used to consider the complaint against Mr. Fehr

145 As already mentioned, Mr. Fehr was not given, in all the circumstances, a fair opportunity to know the case against him and to respond to it. The company viewed this matter as coming under its discrimination and harassment policy that "casual and unfair handling of a complaint or investigation will not be accepted. Both the complainant and alleged offender will be treated with sensitivity, fairness and objectivity at all times". The manner in which Mr. Fehr was suddenly confronted with four-year old allegations against him was not, in my respectful view, fair or sensitive.

146 Discipline cannot be set aside merely because it is does not conform to the letter of a company's own internal policies. Discipline can be set aside, or at least mitigated, in light of serious procedural unfairness.[7] In some cases, in my view, procedural unfairness may be so shocking that it warrants complete reinstatement without penalty, even though the dismissal would be warranted if it had been handled properly.

147 For reasons already indicated in connection with the delay, I have decided in this case that the procedural injustice does not alter the disposition of this case. Quite apart from delay and the procedural defects, the penalty of dismissal was excessive, in my respectful opinion, and a five-month suspension without pay should be substituted.

Conclusion

148 I find that Mr. Fehr:

-- Was unjustly dismissed and that he should be reinstated with no loss of seniority;

-- Should instead have been suspended, without pay, for five months;

-- Should now be reinstated with no loss of seniority;

-- Should be compensated for economic losses flowing from a dismissal rather than a five month suspension.[8]

149 I retain jurisdiction to interpret or elaborate the conclusions just stated, to make any form of orders required and to otherwise assist the parties in implementing the conclusions reached,

150 I wish to thank counsel in writing, as I did at the hearing, for their capable and courteous conduct of this matter at all stages.

qp/s/qldoh/qlclr

1 In 1997, Mr. Fehr received a letter warning him about a violation of safety rules on one occasion. CPR quite properly insists on strict compliance with all rules concerning safety. Mr. Fehr sent a response, which suggests that he was acting pursuant to superior orders. Mr. Fehr testified that he believed the issue was taken care of -- apparently meaning that he thought that the company accepted his explanation. There is no evidence that the safety violation, whether real or dispelled, was a factor even known to the company managers who deliberated on the dismissal of Mr. Fehr. Having reviewed the correspondence, I would find that whether or not the warning should have been given, and whether or not it was in effect removed from Mr. Fehr's record, the warning does not substantially detract from the fact that Mr. Fehr had a clean disciplinary record over almost two decades of employment.

2 There is currently some disagreement in the case law about whether sexual harassment exists when sexually explicit language or suggestions are made in the absence of any sexual desire or attempt at sexual gratification. In Parker, as discussed later in these reasons, a Quebec Superior Court Judge disagreed with an arbitrator over whether it was sexual harassment for an employer to allege, falsely, that two fellow employees were engaged in a homosexual relationship. In various cases much might depend on the precise definition of harassment under a particular statute or company policy and the verbal culture of a workplace. A more encompassing definition or interpretation of sexual harassment may have the virtue of simplicity and clarity. On the other hand, attaching the label of "sexual harasser," to an offender might in some circumstances create in some minds a misunderstanding of the actual nature of the misconduct, with the result that the offender is subjected to disproportionate stigma and embarrassment. The mere fact that sexual insults language are made, I would think, does not necessarily mean that "sexual harassment" has occurred. Epithets and coarse words in our language generally refer to sexual, scatological or religious matters, but in many cases are not taken literally. Counsel for the employer agreed with me during closing argument that it is not necessary for me to resolve that Mr. Fehr's conduct should be technically labeled "sexual harassment" in order to resolve this case and I have refrained from doing so. I have identified a number of episodes in which Mr. Fehr verbally abused Mr. Weber; regardless of what label is attached to the set of such episodes in this case, the conduct would be equally unacceptable and worthy of the same substantial measure of discipline.

3 Mr. Weber says that he routinely did a lot of his work in the evenings in his hotel room, after a long day of road work and mentioned at the hearing that Mr. Fehr refused to pay him overtime. Mr. Fehr says that he gave Mr. Weber time to do his bookkeeping during the regu-

lar workday. The dispute over overtime was not any part of the reason for the company's dismissal of Mr. Fehr. In any event, having reviewed all the testimony, I find that there is not adequate evidence for me to conclude, on a balance of probabilities, that Mr. Fehr acted in any way improperly with respect to the overtime issue.

4 Mr. Hallam, according to his notes, had a brief phone conversation with a Mr. Fowlie who was a peer of Mr. Fehr, rather than a subordinate. Mr. Fowlie characterized Mr. Fehr as a "mean individual who pushed and screamed and yelled at his employees". But the only example provided by Mr. Fowlie was that he witnessed Mr. Fehr screaming and yelling at his employees on one occasion in Whitewood, Manitoba. The investigative record provides no indication of what Mr. Fehr allegedly yelled or why. A supervisor might yell at employees for a number of reasons: he might, for example, be angry about a repeated violation of a safety rule. Without any details, Mr. Fowlie's reference to a Whitewood episode proves little or nothing. Similarly, vague and stale recollections by another of Mr. Fehr's colleagues, Mr. Yarish, did not provide a sufficiently specific and credible basis for concluding, on a balance of probabilities, that Mr. Fehr engaged in disciplinable misconduct in other circumstances.

The nonspecific recollections of Mr. Fehr's general approach were not all negative, incidentally. Mr. Hallam reports having interviewed a Mr. Traxell, who had worked under Mr. Fehr, and found him to be good to work for and good for the company.

5 In Dorrian, there was also evidence that the dismissed supervisor had struck an employee on the backside with a magazine or newspaper, so the case might be viewed as not being confined to merely verbal or gestural harassment. In any event, as the cases show, there is no rigid rule that physical contact of any nature always warrants dismissal or that misconduct failing short of physical contact always warrants a lesser penalty.

6 Mr. Jansens testified that company practice is to dismiss, regardless of contrition, in theft cases. I am not sure that all such dismissals would stand up, regardless of the circumstances, if challenged at arbitrations or appeals. In any event, theft raises concerns that are different from verbal abuse. Perhaps CPR thinks a particularly stern line is needed because a criminal offence is involved, because dishonesty is involved or because the difficulty of detecting theft requires a very tough response when it is uncovered.

7 In Bell Canada v Halle, 99 N.R. 149 (F.C.A.), Pratte J.A. stated that: To begin with I would say that the respondent's dismissal, assuming it to be otherwise justified, cannot be regarded as unjust solely because the applicant did not follow the dismissal procedure described in its internal directives to the letter. So far as I am aware, this procedure is not a condition of the employment contracts of Bell Canada employees. The applicant can therefore depart from it without giving rise to any objection, unless the departure causes an injustice. Contrary to what the adjudicator thought, therefore, it does not matter that the applicant did not follow the procedure described in its directives before dismissing the respondent. The question presented to him was whether the respondent had been unjustly dismissed. In order to answer this, he first had to consider the nature, sufficiency and merits of the reasons for dismissal. Accordingly, in the case at bar the adjudicator should have considered whether the applicant had any basis for complaint about the respondent's performance and whether this provided grounds for dismissal. If the adjudicator had answered these questions in the affirmative, he should then

have considered whether the procedure leading to dismissal of the employee was fair. However, his duty was then to make a judgment on whether the dismissal procedure used by the employer, taken by itself, was fair or unfair regardless of the procedure described in the directives; and if the adjudicator concluded that the procedure used in the case at bar was unfair in itself, and that because of this the dismissal had been unfair, he should then in determining the compensation to which the respondent was entitled as a consequence of the dismissal have taken into account the fact that, though premature, the dismissal was not entirely groundless.

8 A special complication arises in this case from the fact that Mr. Fehr's status with the Company was an oscillating one; sometimes he served as a temporary supervisor and sometimes, when no work was available in that managerial capacity, he served as a bargaining unit employee. Counsel for the employer agreed that if I ordered Mr. Fehr reinstated as a temporary supervisor, the Company would take this view: that any misconduct on Mr. Fehr's part concerning Mr. Weber was strictly in Mr. Fehr's capacity as a temporary supervisor; that the misconduct would not taint Mr. Fehr's record as a bargaining unit employee; and that Mr. Fehr would have his usual rights in the latter capacity whenever he was not serving as a temporary supervisor. Counsel for the parties further agreed that if I concluded that I should substitute some period of suspension for the dismissal that I should fix the period of time that would be appropriate if Mr. Fehr had a stable ongoing position as a supervisor and leave it to the parties to attempt to work out any adjustments that are appropriate in light of the fact that Mr. Fehr instead had an oscillating position. The parties would return to me for a final resolution on this point if they could not reach agreement. It is to that agreement by counsel that I have stipulated the figure of five months.