COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Brazeau v. International Brotherhood of Electrical Workers,* 2004 BCCA 645

Date: 20041216

Docket: CA031704

Between:

Wayne Brazeau

Respondent
(Plaintiff)

And

International Brotherhood of Electrical Workers

Appellant
(Defendant)

Before: The Honourable Mr. Justice Lambert
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Lowry

A.E. Black Q.C. and N.J. Hain	Counsel for the Appellant
A. Thiele and C. Martin	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia 18 & 19 October 2004
Place and Date of Judgment:	Vancouver, British Columbia 16 December 2004

Written Reasons by:
The Honourable Mr. Justice Lambert

Concurred in by:
The Honourable Mr. Justice Lowry

Dissenting Reasons by:
The Honourable Madam Justice Saunders (p. 18, paragraph 28)

Reasons for Judgment of the Honourable Mr. Justice Lambert:

I.

[1] Mr. Brazeau's claim is for wrongful dismissal from his employment as an International Representative in Canada of the International Brotherhood of Electrical Workers. He had held that position for more than 25 years.

[2] The letter of termination sent to Mr. Brazeau by Mr. Barrie, the International President of the Brotherhood, is in these terms:

> Dear Brother Brazeau:
>
> As you are well aware, International Representative Christine Pynaker has made serious allegations concerning sexual harassment and discrimination by you against her in her role as IBEW International Representative. I was made aware of those allegations last spring and, in order to assist me in evaluating them, appointed an Independent Referee to serve as a fact-finder and report back to me.
>
> As you also know, the Independent Referee met with you and the other Representatives on the First District Staff, as well as with the International Vice President and other individuals who were said to have pertinent information. I have now received and reviewed his report. In it, he found that you pursued Representative Pynaker with a romantic intent for a period of approximately two years; that following an ultimatum to you to cease and desist such efforts, you then began disparaging and denigrating Representative Pynaker with her peers and other IBEW Representatives; and that your change in attitude and actions toward her was governed in least in part by having been rebuffed by her. The Independent Referee concluded that Representative Pynaker and her work as an International Representative were adversely affected by your actions, and that this conduct constitutes a form of sexual harassment under Canadian law.
>
> Based on the Independent Referee's report and findings, and the IBEW's policy that gender discrimination in the workplace, and particularly as if affects its own employees, is unacceptable, I must conclude that it is no longer appropriate for you to continue serving as an International Representative of the IBEW. You were contacted by International Vice President Donald Lounds and provided with the opportunity to apply for retirement as an International Representative. You declined that opportunity. Therefore, in order to fulfill my obligations as International President of the IBEW, I have no choice but to advise you that you are terminated from employment by the IBEW, effective February 1, 2001.

[3] Mr. Brazeau's action was tried by Madam Justice Nielson who heard 12 days of evidence, reserved judgment, and gave very full reasons setting out her findings of fact and of credibility and stating her reasons for concluding that Mr. Brazeau had committed acts which fell in the middle of the spectrum of sexual harassment but that the Brotherhood had failed to establish that those acts justified summary dismissal. Madam Justice Nielson decided that Mr. Brazeau was entitled to compensatory damages measured by a 24 month notice period, with no reduction for an alleged failure to mitigate, but that he was not entitled to ***Wallace*** damages (see ***Wallace v. United Grain Growers Ltd.***, [1997] 3 S.C.R. 701) or to aggravated or

punitive damages.

[4] The Brotherhood has appealed from that judgment to this Court. There is no cross appeal.

II.

[5] Madam Justice Nielson's reasons for judgment are reported at 2004 BCSC 251 and may be found on QuickLaw at [2004] B.C.J. No. 343. They give a very full recital of the evidence; some of it conflicting. I do not propose to attempt to summarize those reasons except as may be necessary to address the Brotherhood's grounds of appeal.

III.

[6] In 1992, the Brotherhood promulgated an anti-harassment policy in these terms:

> Harassment consists of unwelcome conduct, whether verbal or physical, that is based upon a person's protected status; such as sex … or other protected group status. The IBEW will not tolerate harassing conduct that affects tangible job benefits, that interferes unreasonably with an individual's work performance, or that creates an intimidating, hostile, or offensive working environment.
>
> Sexual harassment deserves special mention. Unwelcome express sexual advances and/or requests for sexual favours, constitute sexual harassment when (1) submission to the conduct is an explicit or implicit term or condition of employment, (2) submission to or rejection of the conduct is used as the basis for an employment decision, or (3) the conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.
>
> All IBEW Employees are responsible to help assure that we avoid harassment. If you feel that you have experienced or witnessed harassment, you are to notify immediately the Director of Personnel Department; or in his absence, the International Secretary or his Executive Assistant over Personnel. The IBEW forbids retaliation against anyone for reporting sexual harassment, assisting in making a sexual harassment complaint, or cooperating in a sexual harassment investigation.
>
> The IBEW's policy is to investigate all such complaints thoroughly and promptly. To the fullest extent practicable, the IBEW will keep complaints and the terms of their resolution confidential. If an investigation confirms that harassment has occurred, the IBEW will take corrective action, including such discipline, up to and including immediate termination of employment, as is appropriate.

IV.

[7] Mr. Brazeau's marriage ended in May 1993. He was then 61 years old. He lived and worked in Calgary. Ms. Pynaker also lived in Calgary. She was a member of the Brotherhood and had indicated an interest in furthering its work. She was then 35 years old. Mr. Brazeau encouraged her and gave her advice about applying to become an International Representative. In 1994 Ms. Pynaker was appointed an International Representative of the Brotherhood, located in Calgary. Mr. Brazeau

moved to Vancouver.

[8] Between July 1993 and December 1996 Mr. Brazeau expressed a romantic interest in Ms. Pynaker. He sent her many cards and other messages and he gave her flowers and presents. He invited her to dinner. He complimented her on her appearance. Mr. Brazeau's romantic interest was not reciprocated. Indeed, though some gifts were accepted, others were returned. Mr. Brazeau can be said to have pressed his attentions on Ms. Pynaker in circumstances where she had tried to make it plain that his attentions were unwelcome. Eventually, in December 1996 Ms. Pynaker told Mr. Brazeau in unmistakable terms that he was old, that there was no chance of a personal relationship between them, and that his behaviour towards her amounted to sexual harassment. She also arranged for a male friend of hers to convey the same message to Mr. Brazeau. Until that time, Mr. Brazeau may not have properly understood the firmness of Ms. Pynaker's rejection of his advances. Their working relationship was effective throughout this period, and Ms. Pynaker kept some of his gifts and continued to have an occasional dinner with Mr. Brazeau at least until December 1996. She kept all his cards and messages. Throughout this three and one half year period Mr. Brazeau only touched Ms. Pynaker twice. Once when they were crossing a street he held her elbow and once on an airplane he held her hand during turbulence.

[9] The trial judge found that Mr. Brazeau's course of conduct amounted to sexual harassment by Mr. Brazeau of Ms. Pynaker.

[10] From December 1996 to April 1998, Mr. Brazeau and Ms. Pynaker worked together without any incident recorded in the evidence but in April 1998, at a conference in Kelowna, it was found by the trial judge that Mr. Brazeau directed Ms. Pynaker to lead a workshop but did not provide her with materials that he provided to the other leaders. Ms. Pynaker concluded that this amounted to retaliation for her 1996 repudiation of Mr. Brazeau's romantic advances.

[11] Starting in 1999, when the Alberta and British Columbia telephone companies amalgamated, the Brotherhood began an organizing drive of all of the communications workers in the new Telus Corporation. Ms. Pynaker directed the Alberta part of the drive and Mr. Brazeau the British Columbia part. Mr. Brazeau had the overall direction. Ms Pynaker said that she suffered from a lack of response and of direction from Mr. Brazeau and from a failure to supply her with necessary materials.

[12] In May 1999 both Mr. Brazeau and Ms. Pynaker attended a meeting in Georgia. Mr. Brazeau accused another participant at the meeting of flirting with Ms. Pynaker and did so in Ms. Pynaker's presence.

[13] In October 1999, the Brotherhood hired Mr. Buss, an experienced union organizer, to help in the Telus campaign. The trial judge accepted Mr. Buss's evidence that in the course of the campaign Mr. Brazeau made derogatory remarks to him about Ms. Pynaker, including disparaging comments about her personal sexual life.

[14] The trial judge found that these incidents from April 1998 to October 1999 came about as a result of Ms. Pynaker's total rejection of Mr. Brazeau's romantic advances in December 1996 and that accordingly they each constituted acts of sexual harassment of Ms. Pynaker by Mr. Brazeau.

[15] In making her findings in relation to sexual harassment, Madam Justice Nielson said this:

> [226] Having considered all of the facts, I do not place the plaintiff's conduct at the most serious end of the continuum of sexual

> harassment. I find that its persistence and duration, however, as well as the negative effect it had on Ms. Pynaker, preclude placing it in the least serious range. I conclude it falls in the middle of the spectrum.

V.

[16] Having made those findings of sexual harassment, Madam Justice Nielson had to consider whether the Brotherhood had established that the conduct of Mr. Brazeau, in all the circumstances and viewed in its full context, constituted just cause for summary dismissal. Madam Justice Nielson said this:

> [241] ...I have found this a difficult case, with the facts in favour of each party closely balanced. Ultimately, however, it rests with the defendant to justify the plaintiff's dismissal. I have concluded it has not done so for the following reasons.
>
> [242] I find that several factors demonstrate that the plaintiff's conduct did not amount to a complete breakdown in the employment relationship. First, his harassment was not at the serious end of the spectrum. Second, while I appreciate that the defendant was obliged to provide a harassment-free environment for its employees, Ms. Pynaker, who was most affected by the events, was not demanding his removal. Third, the plaintiff was a long-term and loyal employee, with an otherwise clean disciplinary record. I accordingly conclude that the plaintiff was entitled to a clear warning from the defendant that, if his harassment continued, it would lead to his dismissal.
>
> [243] I have found that the plaintiff did not receive such a warning from the defendant.
>
> [244] In my view, these circumstances prevent the defendant from establishing clearly that the plaintiff's conduct was inconsistent with continuation of the employment relationship. Had the plaintiff been warned about his harassment, he could have reflected on it and changed it, if he wished to continue his employment. On the other hand, if he persisted in harassing Ms. Pynaker after a warning, the defendant would clearly have been justified in dismissing him. In the absence of an adequate warning, however, I am unable to conclude which of these scenarios was the more likely outcome.
>
> [245] I accordingly find that the defendant has not established that the plaintiff's conduct was fundamentally inconsistent with the continuation of his employment.
>
> [246] In reaching that conclusion, I have considered the list of factors that Mr. Cohen and President Barry considered in deciding to dismiss the plaintiff. They gave significant weight to the duration of the plaintiff's conduct, and to the threat of litigation in Ms. Greckol's original opinion. While those are legitimate concerns, I find that they were given too much emphasis, to the exclusion of other relevant factors, such as the overall nature and degree of the harassment, the question of a warning, the plaintiff's long service and otherwise commendable disciplinary record, and the over-riding question of whether his conduct was incompatible with the continued performance of his duties.

> [247] I conclude that the defendant has failed to justify the summary dismissal of the plaintiff, and that he is entitled to damages for wrongful dismissal.

[17] Madam Justice Nielson set a notice period of 24 months, declined to increase that period as ***Wallace*** damages, rejected the claim for aggravated or punitive damages and, in relation to mitigation, concluded that the Brotherhood had failed to establish that Mr. Brazeau, at the age of 69 and having been dismissed for sexual harassment could have found work in his specialized field had he made a whole-hearted effort to do so.

VI.

[18] The Brotherhood's grounds of appeal are set out in its factum as errors in the trial judgment in this way:

> 44. It is respectfully submitted that the learned Trial Judge made the following errors in finding the Appellant liable for wrongful dismissal of the Respondent:
>
> a. The learned Trial judge erred by ignoring some and placing undue weight on other critical findings of fact inconsistent with her conclusion that the Respondent did not receive a proper warning from the Appellant. The Respondent received verbal warnings from both the Complainant as well as his immediate supervisor to stop his misconduct. The Respondent was also aware of and was bound by the Appellant's written policies expressly prohibiting sexual harassment and which contained a specific warning that such behaviour if confirmed, would result in discipline up to and including immediate termination.
>
> b. The learned Trial Judge erred in concluding that, in the circumstances of this case, the Appellant was obliged to give the Respondent a further warning before being entitled to summarily terminate his employment for just cause.
>
> c. The learned Trial Judge erred in failing to conclude that the Respondent's conduct when viewed contextually, constituted a character revelation incompatible with the maintenance of the employment relationship.
>
> d. The learned Trial Judge erred in concluding that the Respondent met his duty to mitigate his damages.

[19] Before addressing those grounds for appeal it is important to understand that we cannot be asked to retry this case. The appellant must show that the trial judge misapprehended the evidence or misapplied the law in such a way that her conclusions might well have been expected to have been different but for her errors.

[20] The Brotherhood's first point is that the trial judge erred in her conclusion that Mr. Brazeau did not receive a proper warning. Mr. Brazeau was asked to desist from his advances in 1994, 1995 and 1996 by Ms. Pynaker. He was admonished by Mr. Lounds, his only superior officer in Canada, in June 1998, in relation to sending cards and other messages to Ms. Pynaker and was told that he must stop. But, as he then told Mr. Lounds, he had stopped in December 1996. The retaliatory conduct had

apparently been mentioned by Ms. Pynaker to Mr. Lounds but was not mentioned by Mr. Lounds to Mr. Brazeau. It was argued by the Brotherhood that the existence of the written anti-harassment policy also constituted a warning.

[21] Madam Justice Nielson considered all of the evidence and concluded that no warning was given to Mr. Brazeau. What constitutes a warning may vary with the circumstances. But it is more than an admonishment. It should indicate the nature of the impugned conduct and its wrongfulness and it should include a statement that disciplinary consequences may be expected to follow if the impugned conduct continues. It is because of the raising of the potential for disciplinary consequences following any repetition of the impugned conduct that it is a warning and not simply an admonition. In my opinion the trial judge made no error in concluding that Mr. Brazeau had not received a proper warning.

[22] The Brotherhood's second point is that the trial judge erred in considering that Mr. Brazeau's conduct was not so egregious that his summary dismissal was justified even in the absence of a warning. There is no doubt that the trial judge understood that there were cases where sexual harassment might be so intrusive that it destroys working relationships or the whole workplace environment and where a warning is irrelevant and unnecessary. But Madam Justice Nielson decided that this was not such a case. It was also argued on behalf of the Brotherhood that a warning in relation to retaliatory conduct would not have been effective or could not have been supervised. The trial judge did not accept that view and neither do I. In my opinion the trial judge made no error in appreciation of the evidence or in law in reaching her conclusion that this was not a case where summary dismissal was justified without a proper prior warning followed by a repetition of the impugned conduct.

[23] The Brotherhood's third point is that the trial judge failed to consider Mr. Brazeau's behaviour in the full context in which it occurred and that had she done so it would have revealed a character defect on his part that was incompatible with the continuation of his employment relationship with the Brotherhood. In essence, this is an argument that the trial judge did not consider the full context. The importance of doing so was reaffirmed by the Supreme Court of Canada in ***McKinley v. B.C. Tel***, [2001] 2 S.C.R. 161. In my opinion the Brotherhood's point is simply wrong. The trial judge did consider the full context, including every aspect of Mr. Brazeau's relationship with Ms. Pynaker and every aspect of both of their relationships to the Brotherhood. In particular, I am satisfied that after hearing 12 days of trial evidence and both written and oral arguments, the full context, with all its ramifications, must have been at the forefront of the trial judge's mind. As had been fully argued before her, the Brotherhood had to set the highest standards in its own working environment in order to insist on high standards for its members in their working environments. The trial judge did not dwell on this point in her careful and extensive reasons but in my opinion that provides no basis for a conclusion that she did not consider every relevant part of the whole context.

[24] A trial judge will not be considered to have erred simply by failing to discuss in the reasons an argument that was made in the trial. As was said in ***Van Mol v. Ashmore*** (1999), 168 D.L.R. 4th 637 (B.C.C.A.):

> ...an omission [in the reasons] is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence.

This passage has been approved in a unanimous and in a majority judgment of the

Supreme Court of Canada in ***Van de Perre v. Edwards***, [2001] 2 S.C.R. 1014 and ***Housen v. Nikolaisen***, [2002] 2 S.C.R. 235. There is, in my opinion, no basis for such a reasoned belief in this case through the failure of the trial judge to refer to the special standard that must be applied to sexual harassment cases within a trade union's own staff because of its position as representative of vulnerable workers. The point was made fully in argument and could not have escaped the trial judge's consideration.

[25] ***McKinley v. B.C. Tel*** emphasizes that assessing the seriousness of misconduct requires that the facts established at trial be carefully considered and balanced. That is a task for the trier of fact, properly instructed in the law. It was carefully performed by the trial judge in this case. It is not for this Court to do it again in the absence of an established error of fact or law.

[26] The Brotherhood's fourth point is that the trial judge erred in relation to her finding that the Brotherhood had failed to establish that Mr. Brazeau could have mitigated his damages. This point was not pressed in oral argument though the written argument in the appellant's factum was relied on. In my opinion no error has been shown in the trial judge's conclusion on this point.

VII.

[27] I would dismiss this appeal.

"The Honourable Mr. Justice Lambert"

I agree:

"The Honourable Mr. Justice Lowry"

Reasons for Judgment of the Honourable Madam Justice Saunders:

[28] I have had the opportunity to read, in draft, the reasons for judgment of my colleague Mr. Justice Lambert. With respect, I have come to a different conclusion and would allow the appeal.

[29] The general circumstances of the case are described by my colleague. There are, however, additional aspects of the reasons for judgment that I will refer to as bearing upon my conclusion.

[30] The case involves both sides of the coin of sexual harassment. The learned trial judge awarded 24 months salary as damages for wrongful dismissal, producing an order that the International Brotherhood of Electrical Workers ("IBEW") pay Mr. Brazeau $197,471.23 in general damages plus ancillary payments. She did so having found that Mr. Brazeau's behaviour constituted sexual harassment both in his behaviour importuning the complainant and seeking favour of affection or intimate relationship, and in his retaliation for his failure to attract reciprocity. The latter behaviour was found to have occurred after Mr. Brazeau was told by the International Vice-President overseeing the IBEW's Canadian organization to desist from his unwelcome advances. In the context of the behaviour in this case, I consider the subsequent retaliatory conduct is the more serious of the two as it represents "pay back", a consequence that speaks directly to an abuse of power in an imbalanced situation and confirms the pressure implicit in his earlier advances.

[31] That sexual harassment is misconduct in the workplace is now well accepted. Judicial acceptance of that proposition came in the 1980s, after substantial academic commentary and dogged advocacy by those seeking to advance equality of employment opportunities including, significantly for the purposes of this appeal in my view, trade unions. The law as it relates to sexual harassment was developed largely by human rights tribunals across the country. Finally in 1987, in ***Robichaud v. Canada (Treasury Board)***, [1987] 2 S.C.R. 84, the Supreme Court of Canada addressed the issue in holding an employer liable in damages for sexual harassment of an employee committed as a frolic of his own. There Mr. Justice La Forest for the court concluded that an employer is responsible, and liable in damages, under the ***Canadian Human Rights Act***, S.C. 1976-77, c. 33, for sexual harassment committed by a supervisor. The same legal responsibility and liability for damages lies in British Columbia under the ***Human Rights Code***, R.S.B.C. 1996, c. 210.

[32] This heavy responsibility to protect employees from sexual harassment was fully explored in the landmark case, ***Janzen v. Platy Enterprises Ltd.***, [1989] 1 S.C.R. 1252. There Chief Justice Lamer said:

> [55] I am in accord with the following dictum of the United States Court of Appeals for the Eleventh Circuit in *Henson v. Dundee*, quoted with approval in the *Meritor Savings Bank* case:
>
> > Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.
>
> [56] Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally

> affects the work environment or leads to adverse job-related consequences for the victims of the harassment. It is, as Adjudicator Shime observed in *Bell v. Ladas, supra*, and as has been widely accepted by other adjudicators and academic commentators, an abuse of power. When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.

[33] The seriousness of sexual harassment, particularly in the context of trade union representation, is well recognized in arbitral authority setting the framework for resolution of disputes between members of trade unions and employers. It is in that milieu that this employer and this employee were engaged.

[34] In the context of the non-union employee sexual harassment enters into the discussion of cause for dismissal largely on the basis of conduct involving an abuse of power, or of non-compliance with policy. In this case, the harassment fits within both analyses, in my view.

[35] In the case before us, the reasons for judgment of the trial judge are lengthy, following a twelve-day trial. The major portion deals with the question of whether the events occurred as alleged by the complainant, or did not occur as averred by Mr. Brazeau.

[36] At trial Mr. Brazeau initially took the position, as he had with his employer, that many of the events complained of did not occur and if they did occur, did not bear the harassing quality of which the complainant spoke. There was, therefore, a stark credibility issue. Ultimately the trial judge did not believe Mr. Brazeau's testimony, saying:

> [175] I therefore propose to conduct my analysis by addressing two main issues. First, has sexual harassment been established on a balance of probabilities? Second, did the nature and degree of the harassment justify dismissal? Before addressing those issues, however, I wish to make some general comments about credibility and the Burkett investigation.
>
> [176] Throughout the events I have related, and in his evidence at trial, the plaintiff consistently denied the facts unfavourable to his case, unless and until he was confronted with clear evidence to the contrary. I do not propose setting out his disclaimers in detail, and will mention only the most remarkable. This was his continuing denial to Mr. Lounds, Mr. Burkett, and even in an affidavit sworn in this action, that he ever had a romantic interest in Ms. Pynaker, despite the volume of cards he sent her expressing precisely that sentiment. In my view, this shows either a significant lack of insight, or a conscious decision not to be forthright in addressing the matter.
>
> [177] As well, I found the plaintiff overly inclined to blame or criticize Ms. Pynaker, and others, rather than take responsibility for his actions. For example, he suggested that she led him on, that she was not capable in her job, and that her emotional condition was suspect. None of those allegations was supported by the evidence.

> [178] I find that these factors reflect poorly on the plaintiff's credibility, and I am disinclined to accept his evidence when it conflicts with other testimony.

[37] The trial judge found that many of the behaviours complained of had occurred, notwithstanding Mr. Brazeau's denials to the contrary, and that he had sexually harassed the complainant through his pursuit of her from 1993 through 1996, and in three incidents of retaliatory conduct from 1997 to 1999. Summarizing events prior to 1996 the trial judge found:

> [193] I find his behaviour was unwelcome, and that Ms. Pynaker clearly advised him of this in April 1994. I accept that, when his unwanted attention continued, she felt increasingly threatened, and even stalked. I accept that his behaviour detrimentally affected her work environment. She altered some of her work habits to try to avoid his attentions, but felt she had to tolerate him, as reporting him to their supervisors might lead to adverse job-related consequences.

[38] As to events after 1996, the trial judge found in connection with a conference in which the complainant was an instructor:

> [199] The second incident occurred at a conference in April 1998. I find that the plaintiff was responsible for that course, and that he failed to provide Ms. Pynaker with the support that other instructors received. I find that she suffered adverse job-related consequences as a result....

[39] As to events during an important union organizing campaign of TELUS employees in Alberta, a campaign that ultimately failed, she found:

> [205] ... I find it difficult to accept the plaintiff's evidence that he had legitimate tactical reasons to withhold information from [Ms. Pynaker and another union representative], given the necessity of coordinating the campaign in B.C. and Alberta. ... Instead, he either failed to respond at all, or, when he did respond, was dismissive, sarcastic, and defensive.
>
> [206] I agree that this represented a significant contrast to the assistance the plaintiff characteristically provided to Ms. Pynaker before 1997....
>
> [207] There is also Mr. Buss' evidence that the plaintiff's criticism of Ms. Pynaker had a different tone than the hostilities that generally characterized the campaign. It was obsessive, personal and sexual. While the plaintiff denied making the comments attributed to him by Mr. Buss, I prefer the evidence of Mr. Buss.

[40] The trial judge found that the behaviour cumulatively fell into the middle of the spectrum of sexual harassment. Even while recognizing that the IBEW had an "anti-harassment policy" known to Mr. Brazeau (he had attended training about sexual harassment and participated as a trainer in such courses), she found the case was one "with the facts in favour of each party closely balanced" and that cause for dismissal was not proved. She did so on this reasoning:

> [242] I find that several factors demonstrate that the plaintiff's conduct did not amount to a complete breakdown in the employment relationship. First, his harassment was not at the serious end of the spectrum. Second, while I appreciate that the defendant was obliged to provide a harassment-free environment for its employees, Ms. Pynaker, who was most affected by the events, was not demanding his removal. Third, the plaintiff was a long-term and loyal employee, with an otherwise clean disciplinary record. I accordingly conclude that the plaintiff was entitled to a clear warning from the defendant that, if his harassment continued, it would lead to his dismissal.
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> [243] I have found that the plaintiff did not receive such a warning from the defendant.
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> [244] In my view, these circumstances prevent the defendant from establishing clearly that the plaintiff's conduct was inconsistent with continuation of the employment relationship. Had the plaintiff been warned about his harassment, he could have reflected on it and changed it, if he wished to continue his employment. On the other hand, if he persisted in harassing Ms. Pynaker after a warning, the defendant would clearly have been justified in dismissing him. In the absence of an adequate warning, however, I am unable to conclude which of these scenarios was the more likely outcome.
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> [245] I accordingly find that the defendant has not established that the plaintiff's conduct was fundamentally inconsistent with the continuation of his employment.
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> [246] In reaching that conclusion, I have considered the list of factors that Mr. Cohen and President Barry considered in deciding to dismiss the plaintiff. They gave significant weight to the duration of the plaintiff's conduct, and to the threat of litigation in Ms. Greckol's original opinion. While those are legitimate concerns, I find that they were given too much emphasis, to the exclusion of other relevant factors, such as the overall nature and degree of the harassment, the question of a warning, the plaintiff's long service and otherwise commendable disciplinary record, and the over-riding question of whether his conduct was incompatible with the continued performance of his duties.
>
> [247] I conclude that the defendant has failed to justify the summary dismissal of the plaintiff, and that he is entitled to damages for wrongful dismissal.

[41] The question for this Court is whether the trial judge demonstrated error in her reasons. In my view she did by failing to address one of the most important aspects of the context of the dismissal, what I would term the starting point for any analysis of cause, the nature of the employment itself.

[42] In ***McKinley v. B.C. Tel***, [2001] 2 S.C.R. 161, 2001 SCC 38, at para. 49, Mr. Justice Iacabucci confirmed that the question of whether established misconduct warrants dismissal is a factual question. Determination of that question requires a contextual analysis, that is, it is to be determined on its own facts and circumstances. Thus there is no rule, taking the example in ***McKinley***, that every instance of dishonesty is grounds for summary dismissal. So, too, every instance of sexual harassment, as serious as that misconduct is said in jurisprudence to be, is not cause for summary dismissal.

[43] Although the determination of the issue, considering all the circumstances, is factual, the question whether the view taken encompassed everything that should be considered (as compared to the weight to be given to certain matters) engages a question of law. In ***Housen v. Nikolaisen***, [2002] 2 S.C.R. 235, 2002 SCC 33, at para. 27 this was described by Iacobucci and Major JJ.:

> [27] Once it has been determined that a matter being reviewed involves the application of a legal standard to a set of facts, and is thus a question of mixed fact and law, then the appropriate standard of review must be determined and applied. Given the different standards of review applicable to questions of law and questions of fact, it is often difficult to determine what the applicable standard of review is. In Southam, supra, at para. 39, this Court illustrated how an error on a question of mixed fact and law can amount to a pure error of law subject to the correctness standard:
>
> > ... if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the [page258] decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.
>
> Therefore, what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law.

[44] Two examples in the area of dismissal for sexual harassment are illustrative. In ***Bannister v. General Motors of Canada Ltd.*** (1998), 40 O.R. (3d) 577 (Ont. C.A.), in which the defendant alleged that the plaintiff' sexual harassment was cause for dismissal, judgment for the plaintiff was set aside, in part because the trial judge overlooked the supervisory nature of the plaintiff's position. And in ***Simpson v. Consumers' Association of Canada*** (2001), 57 O.R. (3d) 351 (Ont. C.A.), post-dating ***McKinley***, a judgment in favour of the plaintiff for damages for sexual harassment was set aside, in part because the trial judge failed to consider the senior position of the plaintiff and the context of the work environment.

[45] Although dismissal for misconduct may be seen as the ultimate discipline in the workplace, the question is not whether there is just and reasonable cause, the standard discussed in ***Wm. Scott & Company Ltd. and Canadian Food and Allied Workers Union, Local P-162***, [1977] 1 Can. L.R.B.R. 1, in the context of a ***Labour Code*** importing that criteria. Rather, the question is the extent to which the employment relationship has been impaired by the misconduct, considering all the circumstances that illuminate the question as discussed in ***McKinley***.

[46] The circumstances relevant to cause start, in my view with the nature of the enterprise in which the employee works and the nature and status of the employment within that enterprise.

[47] In ***Blackburn v. Victory Credit Union Ltd.*** (1998), 36 C.C.E.L. (2d) 94 (N.S.C.A.) referred to in ***McKinley***, the court at para. 42, adopted this passage from H.A. Levitt's ***The law of dismissal in Canada*** (2nd ed. 1992), at p. 124:

> What constitutes just cause in a specific situation is particularly difficult to enumerate because it depends not only on the category and possible consequences of the misconduct, but also on both

> the nature of the employment and the status of the employee ....
> [Emphasis added.]

[48] This starting point of the nature of the employment is the basis of the observation in ***Harris on Wrongful Dismissal*** (1990 ed., revised and consolidated) at §3.12(d) that "the objectives of an employer may, in some employment contexts, impose a higher duty of both obedience and honesty on employees than in others".

[49] In logical progression, although there is no mantra to it, one would move from this consideration to conditions pertaining to the employment that give the workplace its structure, being the policies and procedures in place, to features of the employment that are personal to the employee such as length of service and disciplinary record, and to such other considerations as may bear on an assessment of the behaviour, for example, issues of condonation.

[50] I do not read the reasons, in the reflection on the issue of cause, as addressing at all the nature of the IBEW or the nature of Mr. Brazeau's employment. While they refer to some of the relevant considerations such as Mr. Brazeau's long service, they appear to me to omit the starting point for assessment of the conduct and any mitigating or aggravating circumstances, which is the nature of Mr. Brazeau's employment. I consider that the reasons for judgment of the trial judge failed to seat the discussion of cause in its setting of the nature of the work which was the subject of the contract of employment. Thus missing is any consideration of the significance of Mr. Brazeau's position as a senior trade union official and his duty to advance the representation and protection of employees, including both from the pernicious effects of sexual harassment and from unjust complaints of sexual harassment. The reasons fail to recognize the significance of the reputation of the IBEW on this equal opportunity issue and its interrelationship with the authority to represent others given to it by labour legislation.

[51] I recognize that a general description of the IBEW is found in the introduction of the reasons for judgment, as well as a brief description of the positions held by Mr. Brazeau and the complainant. However, in assessing the degree to which the employment relationship was impaired by Mr. Brazeau's conduct, the reasons for judgment do not advert to the "trade union" nature of the employer or the position of Mr. Brazeau, both of which have an aspect of modelling and require moral authority to represent others. This modelling aspect is not unknown in employment situations and there are many fields of employment in which behaviours that may be tolerated in another work environment are unacceptable and cause for dismissal.

[52] It is a natural conclusion, in my view, that not only was the behaviour wrong and would be wrong in any employment setting, but that it had enhanced significance to this employer.

[53] Nor would I put weight, as did the trial judge, upon the views of the complainant on dismissal of Mr. Brazeau. The issue was the relationship between Mr. Brazeau and the union corporate, not Mr. Brazeau and the complainant. Whether a complainant is of a forgiving nature is not the issue.

[54] Without adverting to the "business" of the IBEW or Mr. Brazeau's senior position, the trial judge considered this was a close case. Setting the behaviour in its full context easily pushes the balance, in my view, in favour of the IBEW, as does any consideration (not found in the reasons for judgment) of the liability of the IBEW to pay damages under human rights legislation, both federal and provincial, arising from Mr. Brazeau's behaviour.

[55] There is, further, the matter of the warning not given. While the scope of an employer's ability to discipline is debatable, any discussion must be framed by the substance of the employment contract as well as the practices and policies in the workplace. In the least, the tools available to discipline are limited. In British Columbia, for example, an employer is not allowed to dock earnings (***Employment Standards Act***, R.S.B.C. 1996, c. 113, s. 21(1)). Suspensions with or without pay may constitute constructive dismissal, as may demotion, depending upon the terms of the employment contract. A warning, oral or in writing, while in one sense disciplinary in that it may remain on an employee's file and be relied upon in the future, is effectively notice of expectations.

[56] If the judgment relied only on the fact of the absent warning, I would conclude that a reversible error of fact had been made, in these circumstances. Mr. Brazeau not only knew of the sexual harassment policy, he trained others in its substance. His problem was not that he did not know the standard, it was that he did not comply with it. When confronted in an investigation into his behaviour, he denied his behaviour, challenged its characterization and impugned the mental stability of the complainant. I consider that the trial record does not support the conclusion, implied in the finding that a warning was required, that a warning would have produced a different result and saved him from himself. With respect, it is difficult to conceive of the need to tell a senior trade union representative that he may not retaliate for his spurned advances, whatever may be the words used in such a communication.

[57] It follows I would allow the appeal, set aside the judgment and dismiss the action.

"The Honourable Madam Justice Saunders"

Correction: 16 December 2004
On page 5, para. 7, the name of Mr. Pynaker has been changed to reflect the correct name of Ms. Pynaker.