2004 CarswellBC 368, 2004 BCSC 251, 2004 C.L.L.C. 210-032

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2004 CarswellBC 368

Brazeau v. I.B.E.W.

Wayne **Brazeau** (Plaintiff) and International Brotherhood of Electrical Workers (Defendant)

British Columbia Supreme Court

Neilson J.

Heard: May 5-9, 2003; August 25-29, 2003; October 14, 2003; November 7, 2003
Judgment: February 24, 2004
Docket: Vancouver S013087

Counsel: Angela E. Thiele, Christopher Martin for Plaintiff

Allan E. Black, Q.C., Neil J. Hain for Defendant

Subject: Constitutional; Labour and Employment; Public; Evidence; Civil Practice and Procedure

Human rights --- What constitutes discrimination — Sex — Employment — Sexual harassment — What constitutes

Plaintiff employee was employed as International Representative by union employer for over 27 years — Employer had sexual harassment policy — Employee pursued complainant co-worker romantically, sending her cards, faxes, and gifts from 1993 until 1996 when she definitively told him that she had no romantic interest in him — Following complainant's rejection of him, employee's conduct towards her, which had been supportive and mentoring, changed — Complainant accused employee of sexually harassing her — Employer investigated and determined that harassment had occurred — Employee was given option of retiring and when he refused, was dismissed — Employee brought action for wrongful dismissal — Action allowed, on other grounds — Employee was found to have sexually harassed complainant — Employee's behaviour toward complainant from mid-1993 to end of 1996 constituted sexual harassment in that cards, gifts, social invitations, and overly attentive and intrusive behaviour were intended to convey his interest in personal and romantic relationship with her — Employee retaliated against complainant for rejecting his advances — At conference in 1998, employee failed to provide complainant with the support that other instructors received and she suffered adverse job-related consequences as result — At conference in May 1999, employee accused another employee of flirting with complainant; this comment was unwelcome and complainant could reasonably be concerned that it would detrimentally affect her relationships with her co-workers — Some aspects of employee's behaviour during organizing campaign represented retaliation against complainant, rooted in their personal history and he expressed this hostility in personal and sexual terms.

Employment Law --- Termination and dismissal — Termination of employment by employer — What constituting just cause (grounds for dismissal) — Misconduct — Sexual harassment of other employees

Plaintiff employee was employed as International Representative by union employer for over 25 years — Employer had sexual harassment policy — Employee pursued complainant co-worker romantically, sending her cards, faxes, and gifts from 1993 until 1996 when she definitively told him that she had no romantic interest in him — Following complainant's rejection of him, employee's conduct towards her, which had been supportive and mentoring, changed — Complainant accused employee of sexually harassing her — Employer investigated and determined that harassment had occurred — Employee was given option of retiring and when he refused, was dismissed — Employee brought action for wrongful dismissal — Action allowed — Although employee's actions constituted sexual harassment of complainant, it was not harassment of most serious type, rather it was in mid-range of seriousness — Employer had obligation to warn employee prior to summarily dismissing him — Neither complainant or anyone involved in investigation wanted employee to be fired — Employee's superior knew about situation and did not take any steps, rather his own conduct constituted harassment of complainant — When employee's superior spoke to employee about situation he did not raise issue of retaliation, or possible serious consequences of employee's behaviour, nor did he report matter to International Office — Employer's sexual harassment policy was not notice to employee that he might be dismissed; policy referred to gradient of disciplinary action rather than summary dismissal; policy was not routinely enforced — Employee was long-term and loyal employee, with otherwise clean disciplinary record.

Employment Law --- Termination and dismissal — Notice — Considerations affecting length of notice — Gen- eral

Plaintiff employee was employed as International Representative by union employer for over 25 years — Employer had sexual harassment policy — Employee pursued complainant co-worker romantically, sending her cards, faxes, and gifts from 1993 until 1996 when she definitively told him that she had no romantic interest in him — Following complainant's rejection of him, employee's conduct towards her, which had been supportive and mentoring, changed — Complainant accused employee of sexually harassing her — Employer investigated and determined that harassment had occurred — Employee was given option of retiring and when he refused, was dismissed — Employee brought action for wrongful dismissal — Action allowed — Employee was entitled to 24 months' notice — Employee was 69 years old when he was dismissed in 2001 and planned to retire in 2004 when he reached 30 years' service — While some of employee's skills may have been transferable, it was unlikely that he would have secured similar position elsewhere, with comparable remuneration and benefits to those earned through his long tenure with employer — Employee did not fail to mitigate his damages.

Employment Law --- Termination and dismissal — Notice — Considerations affecting length of notice — Mitigation by employee — Onus of proof

Plaintiff employee was employed as International Representative by union employer for over 25 years — Employer had sexual harassment policy — Employee pursued complainant co-worker romantically, sending her cards, faxes, and gifts from 1993 until 1996 when she definitively told him that she had no romantic interest in him — Following complainant's rejection of him, employee's conduct towards her, which had been supportive and mentoring, changed — Complainant accused employee of sexually harassing her — Employer investigated and determined that harassment had occurred — Employee was given option of retiring and when he refused, was dismissed — Employee brought action for wrongful dismissal — Action allowed — Employee was entitled to 24 months' notice — Employee did not fail to mitigate his damages — Onus was on employer to show that

plaintiff did not look for work and if he had done so would likely have found work — While some of employee's skills may have been transferable, it was unlikely that he would have secured similar position elsewhere, with comparable remuneration and benefits to those earned through his long tenure with employer.

Employment Law --- Termination and dismissal — Practice and procedure — Remedies — Damages — Punitive or exemplary damages

Plaintiff employee was employed as International Representative by union employer for over 25 years — Employer had sexual harassment policy — Employee pursued complainant co-worker romantically, sending her cards, faxes, and gifts from 1993 until 1996 when she definitively told him that she had no romantic interest in him — Following complainant's rejection of him, employee's conduct towards her, which had been supportive and mentoring, changed — Complainant accused employee of sexually harassing her — Employer investigated and determined that harassment had occurred — Employee was given option of retiring and when he refused, was dismissed — Employee brought action for wrongful dismissal — Action allowed — Employee was entitled to 24 months' notice — There was no factual basis for any award of increased damages — Employer did not seek to prevent its employees prevented its employees from speaking or cooperating with employee — Employer did not attempt to prevent complainant from testifying at trial — Employer did not fail to provide employee with information related to his pension benefits; employer responded to requests for production and any failure to provide information was due to misunderstanding — Employer's allegations against employee were not unreasonable, false, or made in bad faith — Employer did not delegate authority to deal with this matter to U.S. lawyer; litigation was conducted by British Columbia counsel within parameters for such litigation in British Columbia.

Cases considered by *Neilson J.*:

Alleyne v. Gateway Co-Operative Homes Inc. (2001), 2001 CarswellOnt 3900, 14 C.C.E.L. (3d) 31, 2002 C.L.L.C. 210-017 (Ont. S.C.J.) — followed

Ansari v. British Columbia Hydro & Power Authority (1986), 2 B.C.L.R. (2d) 33, 13 C.C.E.L. 238, [1986] 4 W.W.R. 123, 1986 CarswellBC 86 (B.C. S.C.) — considered

Bardal v. Globe & Mail Ltd. (1960), 1960 CarswellOnt 144, [1960] O.W.N. 253, 24 D.L.R. (2d) 140 (Ont. H.C.) — referred to

Cantelon v. IWA-Canada, Local 1-71 (1999), 1999 CarswellBC 1541 (B.C. S.C.) — referred to

Gonsalves v. Catholic Church Extension Society of Canada (1998), 1998 CarswellOnt 3317, 112 O.A.C. 164, 98 C.L.L.C. 210-032, 164 D.L.R. (4th) 339, 39 C.C.E.L. (2d) 104 (Ont. C.A.) — referred to

Janzen v. Platy Enterprises Ltd. (1989), [1989] 1 S.C.R. 1252, 89 C.L.L.C. 17,011, 95 N.R. 81, 25 C.C.E.L. 1, 47 C.R.R. 274, [1989] 4 W.W.R. 39, 59 D.L.R. (4th) 352, 58 Man. R. (2d) 1, 10 C.H.R.R. D/6205, 1989 CarswellMan 158, 1989 CarswellMan 328 (S.C.C.) — followed

Leach v. Canadian Blood Services (2001), 2001 ABQB 54, 2001 CarswellAlta 173, 7 C.C.E.L. (3d) 205, [2001] 5 W.W.R. 668, 90 Alta. L.R. (3d) 99, 284 A.R. 1 (Alta. Q.B.) — referred to

McIntyre v. Hockin (1889), 16 O.A.R. 498 (Ont. C.A.) — referred to

McKinley v. BC Tel (2001), 2001 SCC 38, 2001 CarswellBC 1335, 2001 CarswellBC 1336, 9 C.C.E.L. (3d) 167, 200 D.L.R. (4th) 385, 2001 C.L.L.C. 210-027, 91 B.C.L.R. (3d) 1, [2001] 8 W.W.R. 199, 271 N.R. 16, 153 B.C.A.C. 161, 251 W.A.C. 161, [2001] 2 S.C.R. 161 (S.C.C.) — followed

Shiels v. Saskatchewan Government Insurance (1988), 20 C.C.E.L. 55, 67 Sask. R. 220, 51 D.L.R. (4th) 28, 1988 CarswellSask 345 (Sask. Q.B.) — referred to

Simpson v. Consumers' Assn. of Canada (1999), 90 O.T.C. 161, 1999 CarswellOnt 692, 41 C.C.E.L. (2d) 179, 99 C.L.L.C. 210-036 (Ont. Gen. Div.) — referred to

Simpson v. Consumers' Assn. of Canada (2001), 2001 CarswellOnt 4448, 13 C.C.E.L. (3d) 234, 152 O.A.C. 373, 57 O.R. (3d) 351, 209 D.L.R. (4th) 214, 2002 C.L.L.C. 210-012 (Ont. C.A.) — referred to

Tse v. Trow Consulting Engineers Ltd. (1995), 14 C.C.E.L. (2d) 132, 1995 CarswellOnt 795 (Ont. Gen. Div.) — referred to

Wallace v. United Grain Growers Ltd. (1997), 152 D.L.R. (4th) 1, 219 N.R. 161, 1997 CarswellMan 455, 1997 CarswellMan 456, 123 Man. R. (2d) 1, 159 W.A.C. 1, 97 C.L.L.C. 210-029, [1997] 3 S.C.R. 701, 36 C.C.E.L. (2d) 1, 3 C.B.R. (4th) 1, [1999] 4 W.W.R. 86, [1997] L.V.I. 2889-1 (S.C.C.) — considered

Whiten v. Pilot Insurance Co. (2002), 2002 SCC 18, 2002 CarswellOnt 537, 2002 CarswellOnt 538, [2002] I.L.R. I-4048, 20 B.L.R. (3d) 165, 209 D.L.R. (4th) 257, 283 N.R. 1, 35 C.C.L.I. (3d) 1, 156 O.A.C. 201, [2002] 1 S.C.R. 595 (S.C.C.) — considered

Wm. Scott & Co. v. Canadian Food & Allied Workers Union, Local P-162 (1976), [1977] 1 C.L.R.B.R. 1, [1976] 2 W.L.A.C. 585 (B.C. L.R.B.) — referred to

Yeomans v. Simon Fraser University (1996), 20 C.C.E.L. (2d) 224, 1996 CarswellBC 1003 (B.C. S.C.) — referred to

Statutes considered:

Subpoena (Interprovincial) Act, R.S.B.C. 1996, c. 442

Generally — referred to

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90

Generally — referred to

ACTION by employee for wrongful dismissal.

Neilson J.:

INTRODUCTION

1 The plaintiff was a long-term employee of the defendant. On February 1, 2001, his employment was ter-

minated summarily following an investigation into allegations that he had sexually harassed a fellow employee, Ms. Christine Pynaker. The plaintiff brings this action for wrongful dismissal.

2 The defendant is an international trade union with headquarters in Washington, D.C. It has approximately 980 locals in North America, with about 760,000 members who work in a variety of industries, including telephone and telecommunications. Its head at the relevant times was International President J.J. Barry.

3 Mr. Laurence Cohen is an experienced labour lawyer who practises in Washington, D.C. He has acted as counsel to the defendant since 1960, and provided advice to President Barry during the events that led to the plaintiff's dismissal.

4 The defendant's operations are divided into geographic Districts, each overseen by an International Vice President who is elected by the District members for a five-year term. Canada forms the First District. Mr. Donald Lounds was the International Vice President involved in these events.

5 The defendant employs International Representatives in each District, whose duties include assisting the Locals with organizing, and negotiating and administering collective agreements. They also conduct training programs and conferences for the Locals and their officers. The International Representatives are not unionized. There are fourteen International Representatives in Canada. Their immediate supervisor is the International Vice President, but the International President alone has the power to hire and dismiss them. They are largely autonomous in their own regions, but also co-ordinate a number of their activities. They thus have the opportunity to observe and assess each other's performance.

6 The plaintiff is presently 71 years old. He joined the defendant in 1967. Between 1968 and 1974 he was consecutively the President, Business Manager, and Financial Secretary of Local 264. On November 1, 1974, he was hired as an International Representative. He was appointed the defendant's Western Canada Organizing Co-ordinator in 1991. He was based in Calgary until 1994, when he moved to Vancouver.

7 Ms. Christine Pynaker is presently 46 years old. She began work as a telephone operator in Alberta in 1975. She became a member of the defendant's Local 348 in 1980, which represented telecommunications workers at Telus. In 1987 she was seconded to the Calgary office of Local 348 where she became a Business Representative in 1988, and an Assistant Business Manager in 1990. She became an International Representative based in Calgary in 1994, and remains in that position today. She is the only female International Representative in Canada.

8 Mr. Mike Semeniuk was the Assistant Business Manager of Local 348 from 1987 to 1994, and became its Business Manager in 1995. He has known both Ms. Pynaker and the plaintiff since 1987.

9 Mr. Kevin Burkett is an experienced mediator and arbitrator who is based in Toronto. He was retained by the defendant to conduct an investigation into Ms. Pynaker's complaints of sexual harassment.

THE FACTS

10 My decision is heavily dependent on my findings of fact. I have therefore found it necessary to set out the factual background in considerable detail.

The Sexual Harassment Policy of the Defendant

11 The defendant published an "Antiharassment" policy in October 1992. This set out a commitment to maintain a work environment free of harassment, and stated:

> 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 favors, 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.

12 In 1998 this policy was revised to reflect recent legal decisions. The main revisions related to the second paragraph, which now read:

> Sexual harassment deserves special mention. Unwelcome sexual advances, requests for sexual favors, or other sexually offensive behavior 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.

13 Both the plaintiff and Mr. Lounds acknowledged that they were aware of this policy. They had also attended training about sexual harassment. The plaintiff had participated as a trainer in such courses as well.

Events from 1993 to 1996

14 The plaintiff and Ms. Pynaker met in the late 1980s in the course of union activities, but had no significant dealings with each other until 1993.

15 In May 1993, the plaintiff's marriage ended.

16 About the same time, the only female Canadian International Representative retired. The defendant wanted a woman to fill the vacancy. The plaintiff encouraged Ms. Pynaker to apply, and she did so. He assisted her with her application. She said she accepted his help because he was a senior representative, and knew how to

do things.

17 The plaintiff testified that he liked Ms. Pynaker, and that they developed a social relationship. In July 1993, he travelled to New York. While there, he sent her several cards. Most provided mundane details of his trip, but they also included personal messages. On one he wrote:

> It was wonderful to hear your voice today. It's the next best thing to a "HUG". ...

18 Another card read:

> I think you know I care about you, but I wonder if you realize how much. ... And I wonder if I can ever find the words to tell you,

The plaintiff then wrote inside this card:

> You are truly a wonderful person and care for you ever so much [sic] ... Please take care, I really do miss you and look forward to hearing your voice on the phone.

19 Another card carried this handwritten message:

> This day may have not been the best, but you are in every way. Have a pleasant weekend and take care!!
>
> With all the love a person has to offer to another, Wayne.

20 The plaintiff typically signed these cards "O and Xs With Love". On some, he drew a heart with a smiling face in it, which he called a "Happy Hart". On several he used postage stamps with "Love" printed on them.

21 The plaintiff testified that when he returned from New York, he did not express affection or romantic interest to Ms. Pynaker directly, because he was "scared of the answer". Nor did Ms. Pynaker speak to him about the cards. She said this was because she did not take them seriously, in part due to the age difference between them.

22 During the fall, the plaintiff began to invite Ms. Pynaker for meals periodically, at his expense. He continued to assist in her application to become an International Representative, and ultimately recommended her for the job. In December 1993, he gave her an airline ticket to Spain to visit her parents, purchased with his points and some cash. It appears he may have written this card to go with it:

> Christine, there are as many beautiful people on earth as there are stars in the sky and you are the most beautiful of them all in every sense of imagination a person may possess.
>
> May you have a restful pleasant vacation, all my thoughts, dreams and wishes will be with you.
>
> Should you be looking for a vacation and lifestyle full of frolic some fun, happiness, romance, kindness, caring and sincerity, you will have to wait until you find within yourself, that I am that person.
>
> A writer-poet, I am not, but a person who is deeply in love with you, I am that.
>
> Christine, lifestyle, happiness and romance has no natural boundaries, only those perceived by people.

23 Ms. Pynaker was appointed an International Representative in February 1994, to be based in Calgary, as was the plaintiff. She testified that she relied heavily on the plaintiff for help in her new role, and that he willingly provided assistance. He frequently arranged for them to teach courses together, and they were in constant communication. She, and others, described him as her mentor.

24 The plaintiff gave Ms. Pynaker a gold necklace and flowers for her birthday in February 1994. He also gave her a Mickey Mouse watch, and an IBEW ring on her appointment as an International Representative.

25 The plaintiff continued to send Ms. Pynaker cards, and later, faxes. Over 60 of these were entered in evidence. Some of them simply acknowledged her birthday, or holidays such as Christmas and Easter. Some offered encouragement to her in her work. A number of them, however, reiterated the plaintiff's romantic and affectionate feelings for her.

26 This last group of cards expressed themes of wishing to be together, thinking of you, and dreaming and planning true love and happiness. There is little purpose in describing all of them, as their message is repetitive. Considerable time was spent at trial trying to determine when some of them were sent, but in most cases the evidence was inconclusive.

27 I will deal specifically with only one card, which was referred to as the "baby card" at trial. It had a photograph of a baby in diapers on the front saying, "I was sitting here thinking of you and I started to feel warm all over". Inside the card read: "Either it's love or I just wet my pants". The plaintiff had written under this, "I didn't wet my pants Take Care With Love Wayne". He described it as just a "fun card" which he felt conveyed the warmth and caring of love. He did not think it was sexually suggestive. Ms. Pynaker, however, interpreted the card as implying that the plaintiff was sexually aroused by her, and said she was disgusted by it.

28 During cross-examination, the plaintiff for the first time acknowledged that, through these cards, he was offering Ms. Pynaker a romantic relationship, and that he had been deeply in love with her. He said, however, that he could not recall discussing his feelings with her directly. Nor did he attempt to approach her physically or affectionately, apart from taking her elbow when they crossed a street, or holding her hand during turbulence on a plane. He agreed that Ms. Pynaker did nothing to suggest she welcomed his overtures, and said that he received no response at all from her, and did not know how she felt about him.

29 Ms. Pynaker testified that she had no romantic interest in the plaintiff, and did nothing to encourage him. She said that initially she was not concerned about the cards he sent, as she receives many cards from friends and colleagues. She simply ignored them. She thought his physical assistance in crossing streets and during turbulence was old fashioned and fatherly at first. She viewed him as part of the same generation as her father, and thought it impossible that he was seriously pursuing her. She did not begin to take his behaviour seriously until February 1994.

30 In February 1994, Local 348 held a farewell party for Ms. Pynaker, at which she became uncomfortable because the plaintiff was overly attentive. She told Mr. Semeniuk, and he and the Assistant Business Manager arranged to sit next to her at dinner. Ms. Pynaker and Mr. Semeniuk testified that the plaintiff was visibly upset by this, and left early.

31 Later in February, Ms. Pynaker, Mr. Semeniuk, the plaintiff, and Mr. Schell, another International Representative, conducted a training course for IBEW members at a Vancouver hotel. Ms. Pynaker again became uncomfortable with the plaintiff's behaviour. He left post-it notes on her binder on which he had written encour-

aging comments, hearts, and a request to spend time with her. Others noticed the notes, and Mr. Schell told her they were unprofessional.

32 Ms. Pynaker testified that the plaintiff seemed obsessed with her whereabouts at the conference. After dinner one night, he followed her to her hotel room, and tried to help her find her room key in her purse. He left once she had the key, but she found this invasive and was upset by it.

33 Later, Ms. Pynaker, Mr. Semeniuk, and Mr. Schell were working in Mr. Schell's hotel room. The phone rang several times, and they did not answer as they believed it to be the plaintiff. Shortly after, someone knocked at the door several times. Mr. Semeniuk looked through the peephole, and saw the plaintiff outside. Ms. Pynaker and Mr. Semeniuk both testified that they discussed the plaintiff's behaviour, and that Mr. Schell and Mr. Semeniuk told her that she had to speak to the plaintiff about his inappropriate behaviour as he "just did not get it".

34 Ms. Pynaker said that, as a result, she met with the plaintiff the next day in the hotel restaurant, and told him as diplomatically as possible that she just wanted a good working relationship with him. He told her this would be no problem, and she was relieved.

35 The plaintiff denied that this conversation took place. He also denied that his post-it notes expressed romantic intent, and said he just intended to encourage Ms. Pynaker, as this was her first teaching experience. He denied being preoccupied with her whereabouts during the conference.

36 Ms. Pynaker said the plaintiff's intrusive behaviour diminished briefly after their discussion, but then recurred. He would say something inappropriate, stare at her, come too close to her, or act jealous. He telephoned her constantly, and continued to send her affectionate cards.

37 Ms. Pynaker testified that, as a result, she changed the way she dressed at work, wearing looser clothing and longer skirts. She was careful not to stretch in front of him, as he would comment on this. She obtained call display so she could choose not to answer his calls, and she tried to avoid situations where he offered her physical assistance.

38 Asked why she did not report the situation to her employer, Ms. Pynaker said that collegiality and coordination with other International Representatives were important. She was the only female International Representative, she was new to the job, and she wanted to fit in. She did not want a reputation as a trouble maker. As well, the plaintiff had recommended her for the job, and he was well connected in the defendant's organization. She felt that reporting his behaviour to their superiors would not be a career-enhancing move.

39 Ms. Pynaker did, however, discuss the situation periodically with her close friend, Derek Wilken. Mr. Wilken testified that he felt the cards were inappropriate from the outset, and told her so. He also told her to return the three gifts the plaintiff gave her in early 1994. Ms. Pynaker did not tell him about the plane ticket to Spain, or that she had gone out for meals with the plaintiff.

40 Mr. Wilken said that Ms. Pynaker did not immediately act on his advice. He believed this was because she was somewhat naïve, and because she was focussed on becoming an International Representative, and did not want to upset the plaintiff.

41 Mr. Wilken said that the cards became obsessive, in his view, and Ms. Pynaker became increasingly dis-

turbed by them. He acknowledged the situation was an awkward one, but he remained firm in his advice to her that she must tell the plaintiff to stop. She nevertheless delayed doing so until April.

42 On April 7, 1994, Ms. Pynaker, with Mr. Wilken's assistance, typed this letter to the plaintiff:

> Wayne,
>
> I am hereby returning the gifts that you have presented to me over the last few months. Although you assured me these gifts were on a business/friendship level, your offensive behaviour has indicated otherwise. On that basis the gifts are unwelcome, inappropriate and I cannot keep them.
>
> Despite our conversation of February 25th in Vancouver in which you expressed the willingness to affect a business relationship, you seem unable to keep our association on a strictly business level.
>
> I find your remarks and comments often condescending and sexist. Your seemingly obsessive preoccupation with my whereabouts and paranoid judgements concerning my friends and associates is causing me a great deal of discomfort.
>
> At no time in the past, present or future has or will a "personal relationship" exist.
>
> I am strongly suggesting that you refrain from continuing this type of destructive behaviour.
>
> Christine Pynaker

43 Ms. Pynaker said that she gave the letter to the plaintiff, along with the three gifts, at the end of a meeting in Toronto.

44 Mr. Wilken agreed that he helped write the letter, although his recollection of the surrounding circumstances was somewhat different. He believed it was instigated by the plaintiff sending Ms. Pynaker red roses. He said she put the letter, the roses, and the other three gifts in a package to send to the plaintiff. He did not see her mail it.

45 The plaintiff agreed that Ms. Pynaker returned the three gifts to him in Toronto. He said they were accompanied by a handwritten note, rather than a typed letter. He could not recall exactly what the note said, but agreed the gist of it was that there was nothing between them, and never would be. He said he was surprised and bothered, as Ms. Pynaker had given no previous indication she was upset by his behaviour. When he got home, there was a large envelope with the roses he had sent Ms. Pynaker. He threw them, the note, and the gifts away.

46 The plaintiff testified that he spoke to Ms. Pynaker shortly after this, and she said she wanted to continue to be friends and work with him. He told her that would be fine. They did not discuss the note. Nor did he apologize for his behaviour, as he did not want to offend her, and "what was done was done".

47 The plaintiff moved to Vancouver in April 1994. He and Ms. Pynaker continued to work together on training sessions, and they were in frequent contact by telephone and fax.

48 The plaintiff initially testified that, after he received her note, he continued to send Ms. Pynaker cards for birthdays, Christmas, and other holidays, but no longer sent her affectionate cards. Later, however, he admitted that he still sent her cards with themes such as needing a hug, missing you, and thinking of you. These were of-

ten signed "With Love", and with the "Happy Hart". He also sent her computer generated Valentine greetings.

49 Ms. Pynaker described a variable relationship with the plaintiff after April 1994. She said they often worked well together. She was able to speak to him if she felt his behaviour was over the line, and he would take the hint and stop it. At other times, however, the plaintiff was overly attentive, and she began to feel more threatened by his apparent obsession with her. She said that he continued to send her affectionate cards.

50 She testified that the plaintiff sent her roses for her birthday in February 1995. Mr. Wilken saw them and told her to return them. She did so. The plaintiff denied sending the roses.

51 After April 1994, the plaintiff still bought gifts for Ms. Pynaker periodically. These were characteristically things she admired when they were passing time together at conferences. They included a sweater, and six or seven art objects, one of which was a figurine worth over $700. He said Ms. Pynaker did not protest when he bought her these gifts. He maintained that they had nothing to do with his personal feelings for her.

52 Ms. Pynaker testified that the plaintiff insisted on buying her these gifts to demonstrate his friendship, and she accepted them in the spirit of trying to maintain a good working relationship with him. If she refused, he would become upset. She felt that gifts of art were less personal than the jewellery she had earlier returned, and said that while she accepted some gifts, she turned down many others.

53 After April 1994, the plaintiff still periodically invited Ms. Pynaker to dinner at his expense. He also took her to two musical shows in Vancouver. Ms. Pynaker believed that she offered to pay her own way, but the plaintiff refused. She said she went on these outings to give him the benefit of the doubt, and because she wanted to maintain a friendly relationship with him. She compared it to the male International Representatives going golfing or fishing together.

54 Ms. Pynaker testified that, at one conference in 1995, she became so upset with the plaintiff's overly-attentive behaviour that she asked Mr. Wilken to meet the flight on which she and the plaintiff returned to Calgary, in the hope the plaintiff would realize that she had other male friends. When Mr. Wilken met them, Ms. Pynaker introduced him to the plaintiff, and the plaintiff immediately walked away.

55 Mr. Wilken said that when the plaintiff's unwelcome behaviour did not stop after April 1994, he told Ms. Pynaker to speak to her supervisor. Mr. Wilken was not aware that Ms. Pynaker continued to accept gifts from the plaintiff, or go out to dinner and the theatre with him at his expense.

56 Ms. Pynaker testified that the plaintiff continued to telephone and fax her constantly, with respect to both work-related and personal matters. The faxes, which are more easily dated than the cards, were sent in 1996. Some offered encouragement or commended her in the performance of her work. Others expressed more personal sentiments, such as, "You make my day when you call, it's too bad you can't call everyday!!" or "Smile you are a beautiful person", or "I am really looking forward to our evening of conversation and dinner".

57 One offered the comment, "I bet you look beautiful when you are sleeping, I hope you are having a good rest!!" Several others wished Ms. Pynaker a beautiful sleep, or inquired about breakfast. Another suggested that she should give the plaintiff a picture of herself, and ended, "There is not another friend in the whole wide world that loves you as much as I do!!" Many of them were signed with terms of love and friendship. Many were written on IBEW letterhead.

58 The plaintiff testified that most of these faxes were related to work. He said that he viewed love and friendship as one and the same, and his salutations just meant that he cared for his co-workers. He agreed, however, that in retrospect some of his faxes were inappropriate, and that he did not send similar faxes to other colleagues.

59 Ms. Pynaker testified that she was "creeped out" by his references to her sleeping, as it sounded as if he was imagining how she looked in bed. She said she found his communications condescending, threatening, and invasive. She felt she was being stalked.

60 She did agree that she also faxed the plaintiff regularly, and that some of her faxes did not relate to work, but included comments of friendly encouragement or jokes. Some also referred to her sleeping pattern and breakfast plans.

61 In late 1996, the plaintiff and Ms. Pynaker were at a training course in Whitehorse. She testified that, as she was collecting her notes, he came close to her, looked into her eyes, and said, "Have I told you how beautiful your eyes are?" She was so unnerved that she was distracted from her teaching duties, and tried to avoid him for the rest of the conference.

62 The plaintiff agreed that he may have made this comment. He said that he and Ms. Pynaker had a falling out at this conference. She complained to him about insomnia, and he told her she should seek professional help. While he did not mean psychiatric help, he said Ms. Pynaker took it that way, and was upset. Later, she told him some IBEW representatives had been at her home, and had admired the figurine he bought her. He asked her what they said when she told them he had given it to her. She told him she had not advised them of this, because she did not want them to know. He asked her if she was ashamed of him, and said if so, she should give the figurine back to him.

63 Ms. Pynaker did not recall this conversation, but said she was upset when she returned to Calgary, and spoke again with Mr. Wilken about the situation. He told her she must "be cruel to be kind", and suggested that she telephone the plaintiff, and tell him that he was "fucking old and fucking ugly," leaving no possibility that he would misinterpret her request to cease his pursuit.

64 Ms. Pynaker did so. She also told the plaintiff that he had to stop sending inappropriate written communications, and following her at the defendant's events. She told him it was sexual harassment. She said he responded that she was paranoid, and needed to see a shrink. She was very upset, as she feared he would tell others that she had psychiatric problems, and because he was not taking responsibility for his actions.

65 She told Mr. Wilken about the call and her concerns. He then called the plaintiff himself. Mr. Wilken testified that he made a point of being calm. He introduced himself, and told the plaintiff why he was calling. He asked him to stop harassing Ms. Pynaker, and explained that she had no romantic interest in him. The plaintiff asked to tell his side of the story, and Mr. Wilken said no. He asked the plaintiff if he understood the possible consequences of harassment, and mentioned jail. He also told the plaintiff that he thought it was foolish that the two of them could not keep their attention on their jobs, and help people in the union.

66 The plaintiff acknowledged that Ms. Pynaker called and berated him, saying that he was a stupid old fool and that he did not know how to teach. He said that she also told him that if he was foolish enough to give her gifts, that was his fault, and she was going to keep the figurine. He denied that she called him, "fucking old and fucking ugly", or that he told her that she needed to see a shrink. He said he was taken aback by the call, but

denied being angry. He attributed it to his comment in Whitehorse about seeking professional help, and their argument over the figurine.

67 He agreed that Mr. Wilken telephoned him shortly afterwards. He said Mr. Wilken was friendly, and he took his call as an attempt to mediate between him and Ms. Pynaker. Mr. Wilken said that the two of them must stop this, because they were working for the same union. The plaintiff asked him if he wanted to hear his side of the story, meaning the argument over the figurine, and Mr. Wilken said no. He denied that Mr. Wilken mentioned harassment or jail, or that anything said in these two phone calls conveyed the message that he was harassing Ms. Pynaker and had to stop.

68 The plaintiff's pursuit of Ms. Pynaker ceased at the end of 1996. She testified that she chose not to report any of the events to the defendant because she did not want to become the topic of rumours in the workplace, and she felt she could handle it on her own. She hoped the issue was closed.

Events from 1997 to 1999

69 Ms. Pynaker confirmed that the personal cards and faxes stopped after these telephone calls. So did the plaintiff's glowing reports and commendations of her work, and she was concerned about the possibility of retaliation. While they still taught some courses together, she said she had little contact with the plaintiff, because he stopped requesting her as a co-instructor.

70 The plaintiff agreed that, after the calls, he gave Ms. Pynaker no more gifts, and said that their relationship with respect to the cards and faxes "automatically changed". He said they just drifted into another phase of their lives, but remained friends. He testified that there was no unpleasantness between them. He said that he continued to assist her, and the volume of faxes and telephone calls between them did not change.

71 There was little documentary evidence about their dealings in 1997. There is only one written communication between them that year, a fax from the plaintiff to Ms. Pynaker in which he thanks her for some assistance with a course, and signs with "Take Care. Wayne".

72 Ms. Pynaker testified that in early 1998 the plaintiff engaged in retaliatory behaviour toward her during two courses. The first was in March 1998. She prepared and coordinated a large shop stewards' course in Edmonton, which was taught by her, the plaintiff, and other International Representatives. Ms. Pynaker testified that, after the course, she heard that the plaintiff was critical of her work. Mr. Semeniuk testified that he saw the plaintiff roll his eyes briefly when Ms. Pynaker was speaking at a meeting. He said, however, that the course evaluations were positive.

73 The plaintiff testified that the instructors of the course had been concerned because there was too much material to cover in the time available. He had therefore suggested that they all remove the same parts of the materials to be consistent. He said he was not being critical of Ms. Pynaker, but just trying to solve the problem. Ms. Pynaker agreed that some of the material had to be taken out due to limited time.

74 Ms. Pynaker's second concern about retaliation arose in connection with a course in Kelowna on April 23, 1998. She testified that the plaintiff was responsible for organizing this course. At the outset of the programme, she was asked to participate in an exercise for which she felt unprepared. Later, she was to direct a workshop, but found no materials available at the designated location. She said the lack of support made her appear unprofessional. She contrasted this experience with courses she had taught with the plaintiff before 1997,

when he had been extremely helpful and attentive to her.

75 The plaintiff testified that a Ms. Laurie, rather than he, was responsible for organizing this course. He said Ms. Pynaker was given the same instructions as the other participants. All of the groups received some of the material late and were upset by this.

76 Mr. Semeniuk was present at the Kelowna conference, and confirmed that the plaintiff had been responsible for organizing it. He attended Ms. Pynaker's workshop, and said that she had no material, and they had to borrow it from other groups. He said that the session was shoddy compared with the usual standard, and Ms. Pynaker appeared disorganized.

77 In June 1998, Ms. Pynaker asked to meet with Mr. Lounds, the head of the First District and her immediate supervisor, because of her concern about retaliation by the plaintiff. She said she showed Mr. Lounds the cards and faxes from the plaintiff. She told him she was concerned that the plaintiff was now retaliating by criticizing her work, because she had rejected him. She said Mr. Lounds was dismissive, and said something to the effect of, "He's just in love with you, give him a little kiss".

78 Mr. Lounds testified that when Ms. Pynaker showed him the cards he was shocked, and told her he would look into it. He said she did not tell him that the plaintiff had stopped sending the cards. Nor did he believe that she told him the plaintiff was now criticizing her. He agreed he may have made the comment about giving the plaintiff a kiss, and said he did so because Ms. Pynaker was upset, and it was his strange sense of humour. He testified that he did not think the comment was inappropriate at the time, but now agreed that it was. He believed the whole matter was blown out of proportion later.

79 Mr. Lounds said that several weeks later he met with the plaintiff, and discussed the cards. He told the plaintiff he was disturbed and it had to stop. The plaintiff assured him it had. Mr. Lounds said the plaintiff also told him that Ms. Pynaker had been leading him on, and that he had proof of this. Mr. Lounds asked him to provide the proof. The plaintiff did not send him anything to substantiate that Ms. Pynaker had led him on.

80 The plaintiff testified that he understood that Ms. Pynaker was complaining about faxes from him, and he and Mr. Lounds discussed these. He told Mr. Lounds that some of them dealt with work, but others were personal, by which he meant jokes. Mr. Lounds asked him to show him faxes back from Ms. Pynaker. The plaintiff testified that Mr. Lounds did not mention any cards.

81 Mr. Lounds met with the plaintiff and Ms. Pynaker separately in Toronto on September 30, 1998. The minutes of these meetings indicate they both told him that there were no problems between them, and they were to participate together at an upcoming conference. Ms. Pynaker testified that quite often things did go well between them, but there were lapses.

82 The plaintiff testified that Mr. Lounds said nothing about inappropriate conduct or sexual harassment during their meetings in June and September. Both he and Mr. Lounds testified that they did not discuss retaliatory conduct at either meeting. Mr. Lounds said that his concern was the cards, and he was satisfied they had stopped. He did not hear of any further animosity between the plaintiff and Ms. Pynaker until 1999, during the Telus campaign.

83 The Telus campaign was a major representation campaign during 1999 and 2000, brought about by the merger of B.C. Tel with Telus in Alberta. Telus had over 6000 employees who were in the bargaining unit of the

defendant's Local 348. B.C. Tel had over 10,000 employees who were in the bargaining unit of the Telecommunication Workers' Union, or the TWU. A determination had to be made about what role each union would play in the future.

84 Ms. Pynaker and Mr. Semeniuk were heavily involved in the campaign. They were concerned about protecting Local 348, and the defendant's membership in Alberta. Mr. Semeniuk believed the best strategy was to approach the Canada Industrial Relations Board to argue for a council of unions, which would give both the defendant and the TWU a continuing role. Local 348 channelled its efforts in this direction initially, but ran short of financial resources to continue the proceedings before the Board. They asked Mr. Lounds for financial support from the International Office, but this was not forthcoming.

85 Local 348 therefore turned its efforts to conducting a representation campaign, culminating in a vote to determine which union would represent the employees in a single bargaining unit covering both provinces. As the plaintiff was the defendant's Western Canada Organizing Co-ordinator, Ms. Pynaker approached him for assistance, and he helped to organize a meeting of Business Managers in February 1999 to obtain support for the campaign.

86 A second meeting about the campaign was held in Calgary in March 1999. Ms. Pynaker and the plaintiff testified that after the meeting, they, Mr. Lounds, Mr. Schell, and officers of Local 348 went out for dinner. Mr. Lounds kept talking about a surprise at a future staff meeting, and when pressed as to what it was said, "Christine is going to fuck a moose". He was referring to having a moose meat barbecue at the future meeting. Ms. Pynaker testified she found the comment offensive.

87 Mr. Lounds did not apologize to her. He denied making the comment during Mr. Burkett's investigation, but admitted to it at this trial, although it was his recollection that it occurred at a gathering at his home in Toronto. He said it had to be taken in context. It was said among friends, and he had had too much to drink. He said it was just humour, it was too bad it happened, and Ms. Pynaker did not tell him she was offended.

88 A relevant incident, unrelated to the Telus campaign, fits here chronologically. In May 1999 the plaintiff, Ms. Pynaker, and other representatives of the defendant attended a meeting in Georgia. Ms. Pynaker and Mr. Semeniuk testified that the plaintiff was overly attentive to her. Later, Ms. Pynaker heard that he had accused an Assistant Business Manager of flirting with her. She said she was concerned that such comments interfered with her working relationship with male colleagues.

89 The plaintiff initially denied making that comment. However, he later agreed that the following version of this event, set out in a letter written by his counsel during Mr. Burkett's investigation, was correct:

> Ms. Pynaker alleges that Mr. Brazeau accused "Merko" of flirting with Christine while at a conference in Savannah in May 1999. Mr. Brazeau advises that Merko was to go out with him and several others. He decided to go out with Ms. Pynaker instead. Mr. Brazeau light-heartedly commented that he would "rather flirt with Christine than go out with the guys". The comment was off-handed and not meant to cause anyone harm, but Mr. Brazeau acknowledges he should not have made such a comment at all. In hindsight, it could be considered offensive to Merko and Ms. Pynaker. As a result, Mr. Brazeau apologizes for this inappropriate comment.

90 Returning to the Telus campaign, it was conducted by two committees, one in Alberta under Ms. Pynaker's direction, and one in B.C. under the plaintiff's direction. The plaintiff, as the Western Canada Organ-

izing Co-ordinator, had overall responsibility for the campaign.

91 Local 348 and the Alberta committee were very concerned about the success of the campaign. They were dependent on the B.C. committee for information about the prospects of winning enough TWU members to carry it. An essential activity in the campaign was to develop a list of TWU members in British Columbia, and prepare a survey of their views, to assess the strength of the defendant's position. Correspondence during the spring of 1999 indicated both committees were aware of the importance of this information.

92 Mr. Semeniuk and Ms. Pynaker testified that discord began to develop between them and the plaintiff, because the plaintiff did not reply to their repeated requests for information from British Columbia. They said that he was unresponsive, and even rude. They both compared his negative attitude to the prompt and diligent responses he had typically given to any request by Ms. Pynaker before 1997. Both expressed the belief that the plaintiff was engaged in retaliatory behaviour, arising from her rejection of him.

93 The situation escalated during the summer. Ms. Pynaker and Mr. Semeniuk copied the International Office with their correspondence to the plaintiff, expressing their frustration over his lack of cooperation.

94 At the same time, Mr. Semeniuk was urgently requesting financial support and resources for the campaign from the International Office, through Mr. Lounds, and encountering a similar lack of response.

95 Around the end of the summer, Ms. Pynaker wrote a lengthy report to Mr. Lounds and to the International Office in Washington, outlining the status of the campaign. In it she highlighted in red print the Alberta committee's complaints about the plaintiff's lack of cooperation. She expressed the view that the plaintiff was feeling pushed out of the campaign by her and by Mr. Semeniuk. She accused him of being untruthful, and finished with this comment:

> The [Alberta] committee members are seriously disappointed with the "International" politics. Wayne's actions have moved beyond uncooperative and veering into being obstructive at a time when we are trying to actively promote the benefits of belonging to an International Union.

96 The plaintiff acknowledged that the campaign was intense, and that differences of opinion arose between the B.C. and Alberta committees. He also agreed that the Alberta committee was concerned about the lack of information they received from British Columbia. He denied being rude, or deliberately withholding information, and said he provided it appropriately, and as quickly as possible.

97 The plaintiff said that there were many obstacles to developing the TWU membership list, and this became a major problem. Mr. Lounds had directed him to develop it in British Columbia, and had approved withholding the names on the list due to a concern that there would be retaliation against these people. As a result, the plaintiff could not comply with Ms. Pynaker's requests to send the list to Alberta. He agreed that at one point he told Ms. Pynaker and Mr. Semeniuk that he worked for Mr. Lounds and did not report to Business Managers.

98 The plaintiff believed Ms. Pynaker's and Mr. Semeniuk's criticism of him was unwarranted. He testified that he was well aware of how important the campaign was for the defendant, and that he gave it his best efforts. He denied that any personal feelings with respect to Ms. Pynaker affected his performance.

99 In August 1999, a number of the defendant's representatives, including Ms. Pynaker, the plaintiff, and Mr. Lounds, went out for dinner after a meeting. Ms. Pynaker and the plaintiff testified that as they walked back

to their hotel, Mr. Lounds said to the group, "Let's go back to the hotel and gang-bang Christine". Ms. Pynaker said she found this extremely embarrassing. She did not respond, as the others had been drinking.

100 Mr. Lounds flatly denied making this comment.

101 In September 1999, Mr. Semeniuk wrote to the International Office in Washington, complaining about both the plaintiff and Mr. Lounds. He referred to the plaintiff's lack of communication and accountability about activities in British Columbia, and claimed that he was deliberately preventing the flow of information from B.C. to him or Ms. Pynaker, and excluding them from meetings. He accused Mr. Lounds of failing to deal with the plaintiff's conduct, and of a lack of commitment to providing the necessary financial assistance from the International Office for the campaign.

102 On October 18, 1999, Ms. Pynaker wrote to Mr. Lounds, reporting on the status of the campaign. She said that the lack of coordination and communication between the B.C. and Alberta committees had resulted in two separate campaigns, creating a major handicap to the success of the campaign. She reiterated the concern that the lack of financial support from the International Office demonstrated that it was not taking the campaign seriously. She concluded with this recommendation:

> If this Campaign is to be successful the '2' committees must become '1' committee. All actions and issues must be thoroughly understood with no hidden agendas, secret meetings, overlap or other surprises . . . This campaign needs a driver that has the ability to bring together the fundamental objectives and direction to actively strategically fight TWU with an all-embracing force that will guard against the splitting up of that attention for the ultimate win. With my past track record in; organizing; a deep understanding of telecommunications; its political makeup and consistent productive working relationship with L.U. 348, I strongly recommend I conclude what we have already started in Alberta and incorporate the plan to include British Columbia.

103 In October 1999, the defendant hired Mr. Les Buss, an experienced union organizer, to assist in winning support for the IBEW in the Telus campaign. Mr. Buss had not met either the plaintiff or Ms. Pynaker before. He was based in B.C. and had regular dealings with the plaintiff.

104 Mr. Buss testified that he immediately became concerned about the fractious nature of the campaign. There was clear hostility between the plaintiff and Ms. Pynaker, but the animosity was not limited to them. Members of the B.C. committee did not like Ms. Pynaker and the Alberta committee, and members of the Alberta committee did not like the plaintiff and the B.C. committee. The reasons for this preceded his arrival, but he was concerned about its effect on the campaign.

105 Mr. Buss testified that, at one point, the plaintiff told him not to share information about preliminary survey results with Ms. Pynaker and Mr. Semeniuk, since it revealed little support for the campaign in British Columbia. Mr. Buss said, however, that he had control over the information flow, and ignored the plaintiff's direction.

106 The plaintiff denied this, but agreed that he did tell Mr. Buss not to share the final survey they obtained with Alberta until Mr. Lounds had seen it.

107 Mr. Buss testified that, during his dealings with the plaintiff, he formed the impression that the plaintiff was obsessed with Ms. Pynaker. He spoke of her constantly, and with antagonism. He told Mr. Buss that she

was untrustworthy, that she was a bitch, that she had slept her way to her job, and that she was having an affair with Mr. Semeniuk. He was also critical of her work.

108 The plaintiff denied saying any of these things to Mr. Buss. He said Mr. Buss knew that he and Ms. Pynaker did not get along. He agreed he told Mr. Buss that Ms. Pynaker and Mr. Semeniuk were close friends.

109 Mr. Buss travelled to Edmonton in early November to meet with Ms. Pynaker and others on the Alberta committee. He testified that, while there, he told Ms. Pynaker everything the plaintiff had said about her, because he was concerned about their hostility, and wanted to learn the basis for it.

110 He said that after their meetings and dinner, he and Ms. Pynaker went to his hotel room. He had some drinks, they shared some marihuana, and they talked about the plaintiff. Ms. Pynaker described the plaintiff as a "dirty old man". She left the room at one point, and returned with some of the cards he had sent her, which she showed Mr. Buss. Mr. Buss said he was shocked, and cut their meeting short, because he did not want to be alone in a room with someone who had saved all of this material. He agreed that he felt Ms. Pynaker played the plaintiff like an old fool or a fish.

111 Mr. Buss said that when he returned to Vancouver, he wrote to Mr. Lounds, asking that both Ms. Pynaker and the plaintiff be reassigned because of the lack of cooperation between them. He said the cards Ms. Pynaker had shown him were a major reason for this letter, but not the only one. His primary goal was to get the campaign going well without interference from them.

112 Mr. Buss testified that, although the plaintiff and Ms. Pynaker were very negative about each other, the plaintiff did not do anything to deliberately harm the campaign. He said he also felt that Ms. Pynaker did a competent job, and said that she could have been valuable on the B.C. end of the campaign, as a woman with telecommunications experience.

113 Mr. Lounds testified that both Ms. Pynaker and the plaintiff called his office to complain about each other's conduct during the campaign. He knew that Ms. Pynaker believed the plaintiff was hostile because she had rejected his romantic overtures. Mr. Lounds said that he did not feel the plaintiff's complaints about Ms. Pynaker were personal, and he did not see a link between them and the plaintiff's rebuff by Ms. Pynaker three years before. He viewed them both as difficult employees, and he was frustrated by their behaviour. He told them both it had to stop. He agreed he did not tell the plaintiff that Ms. Pynaker's complaints were made in a context of sexual harassment and retaliation.

114 Mr. Lounds wrote to the plaintiff and Ms. Pynaker twice in November, directing better communication and exchange of information between the Alberta and B.C. committees.

115 He wrote to them again on December 2, 1999 stating:

> I wish to make it abundantly clear that Representatives working for the IBEW involved in this organizing campaign must strictly adhere to the program dealing with the free flow of information.
>
> Representatives involved in this campaign must adhere to this policy or face the appropriate reprimand.

116 On December 30, 1999, Mr. Lounds wrote to the plaintiff and Ms. Pynaker, restricting each to campaign activities in their own provinces.

117 Mr. Semeniuk testified that in November 1999 Mr. Lounds told him he was thinking of firing both Ms. Pynaker and the plaintiff. Mr. Lounds agreed that he may have told Mr. Semeniuk something had to be done, as he was spending so much time dealing with the problems between Ms. Pynaker and the plaintiff. He did not believe, however, that he told Mr. Semeniuk they would be fired. He did not have the authority to dismiss International Representatives.

118 Toward the end of the campaign, a list of TWU members was compiled, and a survey done of their views. This showed the defendant had very limited support in B.C. Mr. Semeniuk testified that, up to that point, he had believed the campaign could be won. A major problem had been the lack of reliable information from B.C., which prevented a realistic assessment of their chances earlier, before considerable resources were spent.

119 Ultimately, the IBEW lost the vote, and most of its members in Alberta. Local 348 was decimated. Ms. Pynaker's job was significantly affected, as she had no members to service. Mr. Semeniuk described the outcome as "an emotional thing" for him. The plaintiff testified that he was deeply disappointed by the result.

The Investigation

120 In late 1999 or early 2000, Mr. Semeniuk told Ms. Pynaker that Mr. Lounds was thinking of firing her. She was very concerned. They had a long conversation which Mr. Semeniuk described as follows:

> I had had a conversation with Ms. Pynaker, and during the conversation she had gone through a lot of things recently and in the past that had happened to her, and it dawned on me at that point in time that she was being harassed, and it dawned on me that I had known a number of those things and individually, you know, just kind of wrote them off, but when we had that particular conversation and I put it in the big picture, I thought holy mackerel, we as a local and I as a business manager in the local where Christine pays dues have totally disregarded a number of these things that have happened, so I phoned up Ms. Greckol and said Sheila, I need you to talk to this person and see if in your mind there has been sexual harassment, if we as a local have been complacent, is there any liability to us to the international office, just, you know, give me your opinion on this whole deal, so that's what started that.

121 Ms. Sheila Greckol was an Edmonton lawyer. In early 2000, Mr. Semeniuk, in his capacity as Business Manager of Local 348, retained her to provide an opinion on whether Ms. Pynaker had been sexually harassed by the plaintiff or by Mr. Lounds and, if so, what potential liability there was for the defendant.

122 Asked why he finally decided to take action in 2000, Mr. Semeniuk described his conversation with Ms. Pynaker at that time as an "epiphany". He said that when they went through it all, he realized this had gone on for too long, and it was time to do something. He agreed that Mr. Lounds' threat to fire Ms. Pynaker contributed to his decision, but denied that it was the major factor.

123 Ms. Pynaker testified that, for her, the precipitating event in taking action was hearing that Mr. Lounds was threatening to fire her. She said that she did not want the plaintiff fired. She just wanted an acknowledgement that sexual harassment had taken place, an apology, and assurance that there would be no retaliation, from either the plaintiff or Mr. Lounds.

124 Mr. Semeniuk acknowledged that he had known about the plaintiff's unwelcome conduct toward Ms. Pynaker since early 1994, and that he had advised her then that she must do something about it. He also agreed that he had known about Mr. Lounds' inappropriate response to her complaints, and his "moose" and "gang-

bang" comments for some time. He agreed that it was hard to explain why he had taken no action on these matters before 2000, and that it would have been morally correct to confront the plaintiff about his conduct earlier. He said, however, that the plaintiff carried a lot of weight with the defendant, and being on good terms with him was important to Local 348. As a result, Mr. Semeniuk had been "chicken" about accusing him of inappropriate conduct. He said he had hoped that the situation would just go away.

125 Ms. Greckol interviewed several people, including Ms. Pynaker, Mr. Semeniuk, and Mr. Schell. She provided a lengthy opinion on March 13, 2000, in which she recounted events since 1994, and concluded that both the plaintiff and "other members" of the defendant, which I take to be Mr. Lounds, had engaged in sexual harassment and retaliatory behaviour. Ms. Greckol was critical of the defendant for failing to take adequate steps to deal with Ms. Pynaker's complaints. She set out three possible means of redress: a complaint to the federal Human Rights Commission, a civil action against the defendant, or alternative dispute resolution.

126 On March 15, 2000, Mr. Semeniuk forwarded the Greckol report to President Barry, with a covering letter offering the view that alternative dispute resolution would provide the best solution for all involved.

127 President Barry consulted immediately with Mr. Cohen, the defendant's general counsel, and on March 17, 2000 wrote to Mr. Lounds enclosing the Greckol report. He indicated he would be investigating the issues it raised, and asked for Mr. Lounds' comments on the report by March 31, 2000. Neither Mr. Lounds nor the International Office notified the plaintiff of the allegations against him.

128 Mr. Cohen testified that he and President Barry were very upset by the report, and particularly concerned about the potential threat of a lawsuit against the defendant. They discussed their options, and decided to hire an independent investigator, as permitted by the defendant's constitution. Mr. Cohen consulted with labour lawyers he knew in Ontario, and, on their advice, retained Mr. Burkett to conduct the investigation.

129 On March 24, 2000, Mr. Cohen sent Mr. Burkett the Greckol report, and suggested he conduct interviews of the defendant's representatives during a staff meeting in B.C. on April 12 and 13, 2000. In his letter, Mr. Cohen described Mr. Burkett's role as a fact-finder, but also invited him to assist in reaching a mutually satisfactory resolution of the issues if possible. Mr. Cohen said that this letter was copied to Mr. Lounds because the International Vice President must know anything going on in his District, and because Mr. Lounds' office would necessarily be involved in arranging the upcoming interviews.

130 Mr. Lounds testified that, although his office did help to arrange the interviews in April, he had no direct contact with Mr. Burkett before his own interview.

131 On March 27, 2000, President Barry sent a memo to all International Representatives advising them that Ms. Pynaker had made allegations of sexual harassment, that they would be fully investigated by Mr. Burkett, and that Mr. Burkett would be meeting with them individually. His memo provided no particulars of the allegations.

132 Mr. Lounds provided his response to President Barry on March 29, 2000, and Mr. Cohen forwarded this to Mr. Burkett. In it, Mr. Lounds acknowledged that rumours about the plaintiff's attentions to Ms. Pynaker first came to his attention in 1997. He said he did not see the behaviour during the Telus campaign as sexual harassment. He described it instead as a grudge match between the plaintiff and Ms. Pynaker, with bickering on both sides. He said Ms. Pynaker and Mr. Semeniuk wanted one coordinated campaign, with the plaintiff removed from it. The International Office did not agree, and he had advised both Ms. Pynaker and the plaintiff to stop

their bickering and concentrate on the campaign. Mr. Lounds denied making the "moose" and the "gang-bang" comments.

133 Mr. Burkett interviewed the defendant's representatives individually in a New Westminster hotel. He began with Ms. Pynaker, the plaintiff, and Mr. Buss.

134 The plaintiff said he was blind-sided at his interview with Mr. Burkett. While he had received President Barry's memo, and knew Mr. Burkett was inquiring into allegations of sexual harassment, he had no idea they included him. He believed they were directed at Mr. Lounds.

135 The plaintiff testified that Mr. Burkett told him he was inquiring into his relationship with Ms. Pynaker, and set out allegations related to the cards he had sent her several years before. He said that Mr. Burkett gave him the impression from the outset that he believed he was guilty of sexual harassment.

136 The plaintiff said he was in shock. He did not think to ask for counsel or for an adjournment. He could not recall many details of the interview, but agreed that he had denied any romantic interest in Ms. Pynaker. He denied that he was critical of Ms. Pynaker. Other representatives of the defendant confirmed that the plaintiff appeared very upset following the interview.

137 Mr. Burkett testified by deposition. He had made contemporaneous notes of his interview with the plaintiff, which he used to refresh his memory. He flatly denied that he said anything during the interview that suggested the plaintiff was guilty of the allegations, and called the plaintiff's evidence to the contrary a fabrication. He said while the plaintiff appeared surprised that his actions were being construed as harassment, he did not seem upset.

138 Mr. Burkett said he began by telling the plaintiff that Ms. Pynaker had made allegations of sexual harassment against him, and giving him some details related to the cards he had sent. The plaintiff denied any sexual harassment, and said there had been no romantic or sexual relationship between him and Ms. Pynaker. He told Mr. Burkett that she had needed friendship, but he never crossed the line. He then suggested that she had a serious emotional problem. He also mentioned that she had tried to ostracize him.

139 Mr. Lounds described his interview with Mr. Burkett in a letter to President Barry:

> Mr. Burkett indicated to me that he had not dealt with this type of charge before. He went on to say that after talking with Pynaker and Buss that he felt that Wayne Brazeau was guilty. He said he could not understand why I had not fired Brazeau after seeing the cards, letters and paraphernalia connected with Christine's original submission to me just after becoming Vice President.

140 When cross-examined about these comments at trial, Mr. Lounds said most were based on his impression, and not on statements by Mr. Burkett. He conceded Mr. Burkett did not actually say that he should have fired the plaintiff, or that the plaintiff was guilty.

141 Shortly after the initial interviews, Mr. Burkett, on his own initiative, wrote out a proposal for a mediated solution. He suggested that the plaintiff would be removed from his position and have no further work-related contact with Ms. Pynaker, and the defendant would acknowledge that she had been the subject of sexual harassment. Mr. Burkett testified that his reference to removal of the plaintiff referred to retirement, not dismissal for cause. He had not yet made any determination on the merits, but said that since the plaintiff was at an

age when retirement was likely, he felt this was worth exploring as the basis for a negotiated settlement. He said he did not discuss the proposal with the defendant or the plaintiff. He gave it to Ms. Pynaker first, to discuss with Ms. Greckol, as there was no point in proceeding further with the proposal if she would not accept it.

142 Ms. Pynaker did not accept the proposal because it did not address Mr. Lounds' conduct, and it went no further. Some time later, Mr. Burkett raised with Mr. Cohen the prospect of removing Mr. Lounds as part of a mediated settlement. Mr. Cohen said President Barry rejected this out of hand. Mr. Burkett abandoned any further attempt to resolve the complaints through mediation. He and Mr. Cohen both testified that they never discussed a settlement on terms that the plaintiff would be dismissed on the condition that Mr. Lounds would stay.

143 After his interview with Mr. Burkett, the plaintiff retained Mr. Derek Corrigan as his counsel. He also prepared his own account of his dealings with Ms. Pynaker. This was critical of her, and again raised her mental state. It contained no admission of any part of her complaints.

144 Mr. Corrigan wrote to Mr. Burkett on May 11, 2000, asking for a copy of the Greckol report. In this letter, Mr. Corrigan expressed the plaintiff's surprise at the allegations, and reiterated the plaintiff's view that he had done nothing wrong.

145 After receiving a copy of the Greckol report on June 26, 2000, Mr. Corrigan wrote two lengthy letters to Mr. Burkett, outlining more precisely the plaintiff's response to the allegations against him. He complained about the failure to give the plaintiff notice of the allegations prior to his interview. He raised concerns that the root of the complaint lay with the failure of the Telus campaign, and the concern of both Ms. Pynaker and Mr. Semeniuk that this placed their positions in jeopardy. He reviewed the plaintiff's relationship with Ms. Pynaker, portraying him as her mentor, and explaining his attentions as an effort to encourage and support her. He maintained the relationship was a friendly one, and denied any sexual harassment. He depicted the plaintiff's behaviour in these terms:

> Admittedly, he took a special interest in Ms. Pynaker and saw himself as a major figure in her development, but giving gifts and kind words of encouragement has always been part of his nature. In addition, Mr. Brazeau is a gentleman of the "old school" and his attentive approach to women is probably old-fashioned in this day and age. That does not constitute sexual harassment, but may lead someone to think he is sexist or condescending. That is far from the truth. He was very supportive of women taking strong and active positions in the union. His efforts to assist Ms. Pynaker were directed toward Ms. Pynaker becoming a successful and effective International Representative.

146 Mr. Corrigan also advised Mr. Burkett that he had interviewed Mr. Buss, who "emphatically denied" the statements attributed to him about the plaintiff's denigration of Ms. Pynaker.

147 Mr. Buss took issue with this. He acknowledged that he had some casual conversation with Mr. Corrigan about the matter when he met with him about something else, but said he was not formally interviewed about the allegations.

148 In May 2000, Ms. Greckol wrote to Mr. Burkett, expressing concern that his April interviews had not adequately addressed the complaints against Mr. Lounds, and advising of further retaliatory behaviour by him. She also suggested that a mediated resolution was still possible.

149 Mr. Cohen, on behalf of President Barry, agreed to have Mr. Burkett conduct a second series of inter-

views. These took place in conjunction with a meeting of the defendant's representatives in Prince Edward Island at the end of August 2000. The plaintiff testified that while they were waiting to be interviewed, he told Ms. Pynaker that he had not meant her any harm.

150 After those interviews, Ms. Pynaker heard that the plaintiff and others felt there was a conspiracy to get rid of him in order to save Mr. Lounds. As a result, she faxed the plaintiff a copy of the settlement proposal that Mr. Burkett had given her after the first interviews, along with a note advising him that she had refused to agree to the proposal.

151 On November 13, 2000, Mr. Burkett delivered a 19-page report to President Barry. He introduced his findings by saying that, since statements were not taken under oath, and there was no cross-examination, he did not make findings on contentious issues that were not corroborated, or that were based solely on hearsay. He set out his findings with respect to both the plaintiff and Mr. Lounds, and a brief summary of his view of the law of sexual harassment. He then stated his conclusions with respect to the plaintiff:

> *Re: Mr. Wayne Brazeau*
>
> Mr. Brazeau, although 25 years Ms. Pynaker's senior and her mentor, pursued Ms. Pynaker with romantic intent in the period 1994 through 1996. During this period he was caring and supportive of her in her work-related endeavours. He was discouraged in his romantic pursuit and ultimately told to cease and desist. There is no evidence that Mr. Brazeau has in any way persisted in his romantic pursuit of Ms. Pynaker since late 1996. However, there has been a marked change in his attitude towards her work since that time. He has been critical of her training, he has been critical of her at staff meetings and, in conversations with other union officials, he has been critical of her ideas and performance in respect of the Telus campaign. Indeed, there is no evidence that he has at any time in this period been supportive of Ms. Pynaker in her work. While credible reasons have been advanced, and in some measure supported by others, as to why his criticism of Ms. Pynaker was warranted, the fact is that Mr. Brazeau's attitude towards and interaction with Ms. Pynaker in the period since he was told to cease and desist stands in stark contrast to his attitude towards and interaction with Ms. Pynaker in the period before.
>
> I am forced to the conclusion that Mr. Brazeau's change in attitude towards Ms. Pynaker in the period since he was told to cease and desist has been governed, at least in part, by having been rebuffed in his romantic pursuit of her. There is no other credible explanation for such a dramatic change in attitude.
>
> Mr. Brazeau, through his seniority and status within the union and as incumbent in the position of Western Canada organizing coordinator, enjoys a position of influence within the union. In circumstances where he sought a personal relationship with Ms. Pynaker, where he was rebuffed, where, at least in part because he had been rebuffed, he has exhibited a negative attitude towards Ms. Pynaker in respect of her work and where he has called into question her competence, it must be found that Ms. Pynaker has been adversely affected by reason of having rejected the advances of Mr. Brazeau. This is a form of sexual harassment within the meaning of that term as used in the jurisprudence.

152 Mr. Burkett then dealt with Mr. Lounds. He found Mr. Lounds at fault both for his inadequate response to Ms. Pynaker's complaint about the plaintiff, and for failing to treat her even-handedly himself in a number of respects. He criticized Mr. Lounds' failure to respond to her claim that the plaintiff was unfairly critical of her in June 1998. He found that Mr. Lounds should have recognized the plaintiff's inability to make uncompromised and neutral assessments of Ms. Pynaker's work performance, and the harm that could befall Ms. Pynaker's pro-

fessional reputation as a result. Instead, Mr. Lounds simply viewed her as one of two difficult employees.

153 He found Mr. Lounds' comment about the moose inappropriate. He made no finding as to the "gang-bang" comment. He also found Mr. Lounds had detrimentally affected Ms. Pynaker's working conditions in a number of respects in 1999-2000. While Mr. Burkett concluded that Mr. Lounds had treated Ms. Pynaker unfairly, he did not find that Mr. Lounds sexually harassed her.

154 President Barry met with Mr. Cohen and one of his assistants to determine what should be done about Mr. Burkett's findings. Mr. Cohen said that they did not ask Mr. Burkett for an opinion as to an appropriate penalty, since he was not a lawyer, and had been retained only to find the facts.

155 Mr. Cohen testified that he recommended to President Barry that the plaintiff be dismissed, due to the following factors. Mr. Burkett concluded that the plaintiff's conduct constituted sexual harassment. He found this behaviour had extended over years, first characterized by three years of unwanted romantic pursuit, and then by several years of retaliatory behaviour. The communications sent by the plaintiff to Ms. Pynaker were voluminous. There was a significant age difference between them. The defendant's sexual harassment policy, and the law as he understood it, required an employer to act quickly and firmly once sexual harassment was established. Mr. Cohen acknowledged that he was not familiar with the Canadian law of wrongful dismissal and sexual harassment, but said they gave considerable weight to Ms. Greckol's opinion that the defendant might face a lawsuit in Canada if it did not deal appropriately with the finding of sexual harassment.

156 Mr. Cohen considered the plaintiff's long tenure with the defendant as a "plus". He was unaware that he had a clean disciplinary record, but said that would not have overridden the clear finding of sexual harassment against him.

157 Mr. Cohen agreed that neither the defendant's policy nor the law required termination in all cases of sexual harassment. He said that he and President Barry did consider a reprimand or a suspension before making a final decision, but then agreed that the prolonged period of the plaintiff's behaviour, and the threat of a lawsuit, required his dismissal. President Barry, however, directed Mr. Cohen to first offer the plaintiff the opportunity to retire.

158 Mr. Cohen and President Barry also discussed Mr. Burkett's findings with respect to Mr. Lounds. Mr. Cohen testified that he had in mind suspension as an appropriate penalty, but President Barry was reluctant to penalize Mr. Lounds at all, because Mr. Lounds was an elected official, and President Barry felt his misconduct should be dealt with through the ballot process, rather than by disciplinary action from the President. After some discussion, the most President Barry would agree to do was reprimand Mr. Lounds. Mr. Cohen testified, however, that even a reprimand to an International Vice President was unprecedented in his experience.

159 President Barry and Mr. Cohen decided that Mr. Burkett's report would not be circulated beyond them.

160 On January 4, 2001, President Barry wrote to Mr. Lounds advising he had reviewed the matter, including Mr. Burkett's report, and had concluded that the plaintiff's actions were unacceptable, and that he could not continue serving as an International Representative. He directed Mr. Lounds to contact the plaintiff immediately and strongly urge him to seek retirement effective February 1, 2001. If the plaintiff would not agree, President Barry indicated he would prepare a letter of discharge. President Barry also told Mr. Lounds that he had not been sufficiently sensitive to the situation, and this had added to the difficulties faced by Ms. Pynaker. He directed Mr. Lounds to apologize to her.

161 Mr. Lounds communicated President Barry's offer of retirement to the plaintiff, and told him that if he did not accept it, he would have to face the consequences. The plaintiff declined to retire.

162 On January 8, 2001, President Barry wrote to the plaintiff. He set out Mr. Burkett's conclusion that the plaintiff's conduct constituted a form of sexual harassment, and summarized the basis for that conclusion. He then stated that in view of that report, and the defendant's sexual harassment policy, he had no choice but to terminate the plaintiff's employment effective February 1, 2001.

163 The plaintiff testified that he was extremely upset when he received this letter. He felt he had done nothing wrong, and that the matter could have been resolved by simply discussing it. He said that he had believed in the defendant with his heart and soul, but was treated unfairly by it and set aside like an old tool.

164 The defendant later published a positive article about the plaintiff in its newsletter, which characterized his departure as a retirement.

165 On January 10, 2001, President Barry wrote to Ms. Pynaker advising that the plaintiff has been dismissed. He told her that specific conclusions regarding Mr. Lounds' conduct were more difficult, due to different interpretations or versions of events, failures of communication, personality conflicts, differences in the Telus campaign strategy, and internal political overtones. He told her, however, that Mr. Lounds should have been more sensitive and responsive to her concerns, and that she would receive Mr. Lounds' assurance that she would be free from sexual harassment or gender discrimination in the future.

166 On January 15, 2001, Mr. Lounds wrote a letter of apology to Ms. Pynaker, as directed by President Barry, which reads in part:

> ... my review of this entire situation convinces me that there were occasions when I was not sufficiently sensitive or responsive to the difficulties you encountered because of Representative Brazeau's actions, and that my failure to respond more promptly and effectively to the issues you raised made this situation more difficult. If you felt offended by any of my actions in this regard, I want to offer my apology to you.

167 Ms. Pynaker testified that she nevertheless remained unhappy with how her complaint had been handled, particularly with respect to Mr. Lounds. She believed his apology was not broad enough and should have covered what she perceived as his sexual harassment of her. Both she and Mr. Semeniuk took steps on their own initiative to publicize their dissatisfaction with the outcome among the members of the defendant. In June 2001, Ms. Pynaker wrote an open letter to members of the defendant, that included her observation that a hostile working environment remained, due to Mr. Lounds' shortcomings.

168 The plaintiff commenced this litigation in June 2001. On August 28, 2001, he swore an affidavit in which he reiterated that he never had a romantic or sexual interest in Ms. Pynaker, or communicated with her other than in a friendly and affectionate fashion.

169 At the conclusion of his evidence in chief at trial, the plaintiff was asked if he had learned anything in the course of this litigation. He responded in part:

> ... I find that I am very remorseful about the whole problem that happened. It affected me deeply, socially, it affected my family ... and I know it must have affected Christine Pynaker very deeply and emotionally and I want to apologize openly to Christine about the whole situation and I am very regretful that it ever happened

and I am sorry for that.

He agreed that this was the first time he had fully apologized to Ms. Pynaker.

ANALYSIS WITH RESPECT TO LIABILITY

170 The plaintiff concedes during argument that some of his conduct towards Ms. Pynaker between 1993 and 1996 was inappropriate, but stops short of admitting that it was sexual harassment. He argues that it is not objectionable to express an interest in a relationship with another employee. He says he was initially unaware that Ms. Pynaker did not welcome his overtures. After that was made clear to him in April 1994, he treated her as a friend. He did not know that she remained uncomfortable with his conduct until the telephone conversations in late 1996. Thereafter, he left her alone. He says that he did not engage in retaliatory behaviour after 1996.

171 Alternatively, the plaintiff says that if he is found to have sexually harassed Ms. Pynaker, his conduct did not justify his dismissal. His actions were not a serious form of sexual harassment, and the defendant was obliged to give him a clear warning that continued behaviour of that nature might result in dismissal, before it was entitled to discharge him. He also relies on cases from the collective bargaining context to argue that a continuum of progressive disciplinary measures was available to the defendant, and something less than dismissal, such as a warning, a reprimand, or a suspension, was the appropriate response.

172 The defendant replies that progressive discipline is not available in the common law employment context. Dismissal was the only disciplinary option open to it, and was clearly justified by the plaintiff's behaviour. It maintains that the plaintiff engaged in a pattern of serious sexual harassment over more than six years. The harassment was characterized first by his obsessive pursuit of Ms. Pynaker, and then by retaliatory conduct in the workplace when she rebuffed him. It argues that his conduct was so objectionable that no warning was required before dismissing him. In any event, he was warned about his conduct several times.

General Legal Principles in Wrongful Dismissal

173 The defendant bears the burden of proving on a balance of probabilities that it had just cause to dismiss the plaintiff. Since the allegations deal with sexual harassment, the court has a duty to analyze the evidence and proof offered with particular care: *Simpson v. Consumers' Assn. of Canada* (1999), 41 C.C.E.L. (2d) 179 (Ont. Gen. Div.) at para. 348, rev'd on other grounds (2001), 57 O.R. (3d) 351 (Ont. C.A.).

174 In *McKinley v. BC Tel*, [2001] 2 S.C.R. 161 (S.C.C.), the Court advocated a contextual and proportional approach in considering what constitutes just cause for dismissal. Although the facts involved employee dishonesty, I find that approach useful here. At paras. 48, 49 and 53, Iacobucci J. speaking for the Court stated:

> . . . I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.
>
> In accordance with this test, a trial judge must instruct the jury to determine: (1) whether the evidence estab-

> lished the employee's deceitful conduct on a balance of probabilities; and (2) if so, whether the nature and degree of the dishonesty warranted dismissal....
>
> ...
>
> Underlying the approach I propose is the principle of proportionality. An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed. The importance of this balance is better understood by considering the sense of identity and self-worth individuals frequently derive from their employment, a concept that was explored in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, where Dickson C.J. (writing in dissent) stated at p. 368:
>
> > Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

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.

Credibility

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 mat- ter.

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.

179 I found Ms. Pynaker a straightforward witness. Her account of her dealings with the plaintiff and Mr. Lounds was objective, and not exaggerated or coloured by unwarranted hostility. While I question her judgment with respect to some aspects of her dealings with the plaintiff, overall I found her to be a credible witness, in what has clearly been a long and difficult process for her.

180 I did, however, find some aspect of Ms. Pynaker's conduct puzzling. For example, she kept all of the materials she received from the plaintiff, even the post-it notes he left on her binder. She appears to have carried the cards with her when she travelled on business. For example, she had them with her when she discussed the plaintiff with Mr. Buss in Edmonton. As well, I was struck by Mr. Buss' agreement with the comment that Ms. Pynaker "played [the plaintiff] like an old fool".

181 These matters were not developed or explained, but left the impression that there may have been some element of self-interest in the way Ms. Pynaker interacted with the plaintiff. Nevertheless, these aspects of her dealings with him do not detract from my view of her credibility.

Mr. Burkett's Investigation

182 The plaintiff raised a number of complaints about the manner in which the defendant investigated the allegations against him. These are set out in paragraph 6 of the Amended Statement of Claim, and form part of the basis for his claim for increased damages. I will nevertheless deal with them here, as some of my findings differ from those of Mr. Burkett, and I wish to be clear that these differences do not arise from flaws or unfairness in the investigation.

183 The plaintiff claims that the defendant was biased, and that its investigation was "incompetent, incomplete and designed to humiliate [him]". The plaintiff alleges that Mr. Lounds received notice of the allegations in advance and had an opportunity to respond, whereas the plaintiff did not; that the plaintiff was not advised of his right to counsel before his interview with Mr. Burkett; that Mr. Lounds was kept informed as to the progress of the investigation in a manner that the plaintiff was not; that Mr. Cohen helped Mr. Lounds in his defence by providing certain information to Mr. Burkett; and that the defendant told Mr. Burkett that it would not accept a mediated settlement which required the removal of Mr. Lounds, whereas the plaintiff could be removed as part of such a settlement.

184 Mr. Burkett and Mr. Cohen addressed these complaints fully in their evidence. I found both to be credible and straightforward witnesses, and I accept their evidence without reservation. I am satisfied that, with one exception, there is no merit in the plaintiff's complaints about the investigation.

185 That exception relates to the fact that Mr. Lounds did receive advance notice of the allegations, and information about the conduct of the investigation, which the plaintiff did not. Both Mr. Burkett and Mr. Cohen conceded that, in retrospect, this was not appropriate. They explained it was inadvertent, and related simply to Mr. Lounds' position as head of the First District, not to the fact that he was named in the allegations. I accept that explanation. Moreover, I am satisfied that this played no role in Mr. Burkett's findings, or in the defendant's decision to dismiss the plaintiff.

186 I do not accept the plaintiff's allegation that the investigation and the decision to dismiss him were influenced by the defendant's desire to favour Mr. Lounds at the plaintiff's expense. Nor do I find that the plaintiff was treated differently with respect to his right to counsel. No one was advised to obtain counsel prior to the interviews. The plaintiff's counsel, once retained, made extensive submissions to Mr. Burkett on the plaintiff's behalf, all of which were taken into consideration.

187 In short, I am satisfied that, once it received the Greckol report, the defendant acted quickly and appropriately in arranging an independent investigation of the allegations. I find that Mr. Burkett was properly qualified to carry out that investigation, and that he carried out his fact-finding duties independently and without interference from any of the parties involved.

188 The fact that some of my findings differ from Mr. Burkett's is not due to flaws in his investigation. Rather, it is because I have had the advantage of hearing the key participants testify and be cross-examined under oath during a 12-day trial, which took place after full documentary disclosure and extensive examinations for discovery.

189 Even if this were not the case, in a claim for wrongful dismissal concerns about a flawed investigation are effectively removed by a complete and impartial assessment of the facts undertaken at trial: *Leach v. Canadian Blood Services* (2001), 284 A.R. 1 (Alta. Q.B.) at paras. 139-60; and *Yeomans v. Simon Fraser University* (1996), 20 C.C.E.L. (2d) 224 (B.C. S.C.).

Has the defendant established sexual harassment?

190 In *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252 (S.C.C.), Chief Justice Dickson, speaking for the Court, provided this definition of sexual harassment at para. 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.

191 Applying those principles here, I have no difficulty in concluding that the plaintiff's behaviour toward Ms. Pynaker from mid-1993 to the end of 1996 constituted sexual harassment. I find that his cards, gifts, social invitations, and his overly attentive and intrusive behaviour, were intended to convey his interest in a personal and romantic relationship with her.

192 The plaintiff tried to depict his behaviour as merely affectionate, rather than sexual. I do not find that a meaningful distinction. His clear intent was romantic involvement, which necessarily implies physical intimacy.

193 I find that 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. While the plaintiff was not, strictly speaking, Ms. Pynaker's supervisor, he was a senior employee on whom she relied, both to obtain her position, and in performing her job. I find these factors created a power imbalance. I conclude that the plaintiff's actions affected Ms. Pynaker's dignity and self-respect as an employee and as a human being.

194 I accept that the plaintiff's pursuit of Ms. Pynaker ended in 1996. I find the defendant's allegation of sexual harassment in the form of retaliatory behaviour after 1996 more difficult to assess.

195 Mr. Burkett, in his report and in his testimony, described a stark contrast in the plaintiff's behaviour toward Ms. Pynaker before and after 1996. He found that the plaintiff had been entirely supportive of her before she rejected him, and entirely negative towards her thereafter.

196 I find that the evidence before me does not support the same conclusion. Ms. Pynaker did testify that, before the 1996 calls, the plaintiff was uniformly attentive and helpful to her, and never critical. She said that, after the calls, he began to avoid her, be unresponsive to her requests, and criticize her performance. She

provided no specific examples of such conduct, however, until the spring of 1998. As well, she testified that "...quite often things would go quite well" between them, although there were lapses.

197 I accept that after 1996 the plaintiff no longer sought to coordinate his teaching duties with Ms. Pynaker. Given the content of the telephone calls in late 1996, I do not find that surprising. I would expect some distancing between them. There is no evidence, however, that this had a detrimental effect on Ms. Pynaker personally, or in her work. The only communication in evidence between Ms. Pynaker and the plaintiff in 1997 is a fax in friendly terms. I conclude that the defendant has failed to establish any retaliatory behaviour constituting ongoing harassment before March 1998.

198 Ms. Pynaker testified to two incidents of retaliation at conferences in the first half of 1998. I find the evidence about the conference in March 1998 insufficient to support a finding of sexual harassment. The only direct evidence that the plaintiff was critical of Ms. Pynaker was Mr. Semeniuk's report that he saw the plaintiff roll his eyes while she was speaking. Her overall evaluations at the course, however, were good.

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. I am satisfied that the plaintiff's attitude toward her at that conference represented a significant departure from the assistance he characteristically offered her before 1997. In the absence of any other reasonable explanation for this, I find that this represented retaliatory behaviour, rooted in her rejection of him, and that this was sexual harassment.

200 I accept that Ms. Pynaker was concerned enough about the plaintiff's retaliatory conduct that she complained about sexual harassment by the plaintiff to their supervisor, Mr. Lounds, in June 1998. I will deal with the adequacy of Mr. Lounds' response later.

201 I note that at a later meeting in September 1998 between Ms. Pynaker and Mr. Lounds, she reported that things were fine between her and the plaintiff, and that they were going to teach together at an upcoming course. There is no evidence of further retaliation by the plaintiff until 1999.

202 In May 1999, there was the incident at the conference in Georgia, when the plaintiff accused another employee of flirting with Ms. Pynaker. The plaintiff has conceded the comment was inappropriate. I find that Ms. Pynaker was justified in her concern that such a comment might detrimentally affect her relationships with co-workers, and I find that it constituted sexual harassment.

203 A contextual analysis of the other allegations of retaliatory conduct in 1999 requires a close examination of the dynamics of the Telus campaign. I find that there were a number of sources of hostility during the campaign that were unrelated to the personal history between the plaintiff and Ms. Pynaker. For example, it is clear that legitimate tactical disagreements arose between Ms. Pynaker, the plaintiff, and others over how to conduct the campaign. While the campaign was significant to the defendant, it created particularly high stakes for both Ms. Pynaker and Mr. Semeniuk. In their view, other participants, including but not limited to the plaintiff, were not responding adequately to the situation. I find that the plaintiff had some justification for believing that Ms. Pynaker wanted to marginalize his role in the campaign, and take it over herself, and that this created bad feelings between them. I find as well that Mr. Lounds did make the "moose" and "gang-bang" comments, that these comments constituted sexual harassment, and that they compounded the climate of hostility surrounding the campaign.

204 I find that these factors make it difficult to isolate conduct by the plaintiff during the campaign which was clearly related to his rejection by Ms. Pynaker over two years before. I conclude, however, that some aspects of his behaviour represented retaliation against Ms. Pynaker, rooted in their personal history, for the following reasons.

205 It is apparent that the plaintiff was not responsive to requests made by both Ms. Pynaker and Mr. Semeniuk during the campaign. I find it difficult to accept the plaintiff's evidence that he had legitimate tactical reasons to withhold information from them, given the necessity of coordinating the campaign in B.C. and Alberta. Even if such reasons existed, effective operation of the campaign surely required a diplomatic explanation from the plaintiff for his failure to provide the information. 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. I find that the campaign dynamics I have outlined do not adequately account for the plaintiff's obstinate failure to cooperate with Ms. Pynaker. Nor did the plaintiff offer any credible explanation for his behaviour.

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. He was an independent union organizer and had no reason to favour any of the parties in his evidence. While it was suggested to him that he retracted his statements in speaking with the plaintiff's former counsel, Mr. Buss did not recall this, and Mr. Corrigan was not called to prove the statements made to him. I accept Mr. Buss' account as an accurate portrayal of the plaintiff's comments about Ms. Pynaker.

208 In short, I accept that some, but not all, of the plaintiff's hostility toward Ms. Pynaker during the Telus campaign was related to her rejection of him. I also accept that he expressed this hostility to Mr. Buss in personal and sexual terms. I conclude that these aspects of his behaviour constituted sexual harassment.

209 To summarize, with respect to events from 1997 to 1999, I do not find a continuous pattern of retaliatory behaviour by the plaintiff. I do find, however, that the plaintiff's conduct at the conference in April 1998, his comment in Georgia in May 1999, and aspects of his hostility toward Ms. Pynaker during the Telus campaign each constituted sexual harassment. Each represented unwelcome behaviour in the workplace, which I find to be linked to Ms. Pynaker's rejection of his earlier and inappropriate desire to have a romantic relationship with her. I find that each had a detrimental effect on her work, and on her dignity and self-respect.

Did the sexual nature and degree of the harassment justify the summary dismissal of the plaintiff?

210 The onus remains with the defendant to establish that the sexual harassment by the plaintiff was inconsistent with the maintenance of the employment relationship, and thus justified his dismissal: *McKinley , supra.*

211 Before considering that question, it is necessary to review what options were open to the defendant in dealing with the plaintiff. The plaintiff says that a continuum of progressive disciplinary measures was available, similar to those that govern discipline in the collective bargaining context.

212 In *McKinley* , *supra* at paras. 53-54, the Supreme Court of Canada expressed the view that a principle of proportionality underlies the contextual approach to just cause, saying that there must be a balance between

the severity of the misconduct and the sanction imposed. While this seems to imply some support for the application of progressive discipline in an employment contract, the Court did not deal with that specifically. Nor did the plaintiff provide any authority in which a spectrum of progressive discipline was found applicable in the common law employment context.

213 I find that the traditional view that graduated discipline is not typically available in the common law employment relationship still prevails: *Wm. Scott & Co. v. Canadian Food & Allied Workers Union, Local P-162* (1976), [1977] 1 C.L.R.B.R. 1 (B.C. L.R.B.).

214 That view has been more recently confirmed in England, Christie and Christie, *Employment Law in Canada*, 3rd ed., looseleaf (Toronto: Butterworths, 1998) vol. 2 at para. 15.15:

> Unfortunately, in borderline cases involving misconduct the courts are hamstrung into taking an all-or-nothing view of "cause" which severely limits the scope for adjusting the proportionality of the offence and the penalty. This is because the suspension of an employee, for disciplinary or other reasons, traditionally constitutes repudiatory breach by the employer unless it is allowed by the express or implied terms of the contract. Accordingly, the courts lack the flexibility - enjoyed by a collective agreement arbitrator or a statutory adjudicator - to substitute a lesser penalty, such as unpaid suspension...

215 In the absence of a specific or implied term dealing with progressive discipline in the plaintiff's employment contract, I conclude that it is not open to me to substitute some lesser discipline for dismissal. In terms of penalty, I am faced with the stark question of whether the plaintiff's dismissal was justified.

216 There is also, however, the question of the employer's obligation in certain circumstances to warn the offending employee before dismissal is justified. The existence of that obligation depends on the severity of the sexual harassment. Before an employee can be discharged in less serious cases, he must be told that his conduct is inappropriate, and a recurrence could lead to dismissal. In cases of serious harassment which is manifestly inexcusable, a warning is not required: *Tse v. Trow Consulting Engineers Ltd.* (1995), 14 C.C.E.L. (2d) 132 (Ont. Gen. Div.) at para. 43; *Gonsalves v. Catholic Church Extension Society of Canada* (1998), 164 D.L.R. (4th) 339 (Ont. C.A.) at paras. 12-17; and *Leach v. Canadian Blood Services* , *supra* at paras. 118-20.

217 I turn to an analysis of the severity of the plaintiff's misconduct here.

218 In *Alleyne v. Gateway Co-Operative Homes Inc.* (2001), 14 C.C.E.L. (3d) 31 (Ont. S.C.J.) at para. 28, Mr. Justice MacDougall set out a helpful list of factors to be considered in deciding whether sexual harassment amounts to just cause for dismissal, adopted from Echlin and Certosimo, *Just Cause: The Law of Summary Dismissal in Canada*, looseleaf (Aurora, Ont.: Canada Law Books, 2002) at para. 13:310. It includes:

- the degree and nature of the conduct amounting to sexual harassment;

- the nature of the employment relationship between the offending employee and the victim employee(s), and whether the offending employee was in a position of authority over the victim(s), such that the degree and nature of the conduct was, thereby, exacerbated by a particularly offensive abuse of power;

- whether the offending employee was told that the impugned conduct was unwelcome or offensive;

- whether the offending employee continued or repeated the unwelcome or offensive behaviour, after being told that the conduct was unwelcome;

• whether the employer warned the employee that the misconduct was inappropriate and that dismissal was a possible consequence of further similar misconduct;

• whether the employer had a formal, and known, sexual harassment policy, which was enforced by the employer;

• the nature of the employment relationship between the offending employee and the employer, including length of service and position, and whether there were implied or express terms of the employment contract which gave rise to additional obligations on the employer's part, such as with respect to warnings or the opportunity to respond; and

• whether the impugned conduct was condoned by the employer.

I adopt this framework for the purpose of my analysis.

219 With respect to the nature and degree of the behaviour, the cases are clear that, while all sexual harassment must be taken seriously, there is a continuum, and not all instances justify dismissal. Harassment involving aggressive, non-consensual physical contact clearly falls at the most serious end of the continuum. Just one incident of such behaviour may result in summary dismissal. In assessing the severity of more subtle forms of sexual harassment, the cases examine factors such as frequency, duration, persistence, the number of complainants, the tenor of communications, and the presence of coercive, intrusive or aggressive behaviour.

220 Weighing these factors first in the context of the events from 1993 to 1996, I find that the plaintiff did not engage in any overtly sexual conduct with Ms. Pynaker. I find the physical contact he initiated - holding her elbow to cross the street and holding her hand during air turbulence - while unwelcome, was minimal, and did not have sexual overtones.

221 The evidence as to verbal expressions of affection by the plaintiff was inconclusive, except for his comment that she had beautiful eyes. I find he communicated little of his feelings to Ms. Pynaker in person. His romantic overtures were almost entirely in writing. I appreciate, however, that these missives were persistent and voluminous, and continued for over three years. I also accept that the wish for romance he communicated implied a desire for physical intimacy, and that Ms. Pynaker found this disturbing.

222 During her opening, plaintiff's counsel used the phrase "harassment by Hallmark" to describe the plaintiff's conduct. When asked about that characterization, Ms. Pynaker said she did not agree, "because Hallmark is supposed to be warm and fuzzy and kind and thoughtful, and that's not what this was about". Instead, she found the cards threatening, invasive, and condescending. She felt as if she was being stalked.

223 The plaintiff's pursuit of Ms. Pynaker stopped at the end of 1996. Thereafter, in 1998 and 1999, the plaintiff engaged in three discrete incidents of retaliation. I would characterize two of those, at the April 1998 conference, and at the Georgia conference, as minor. His hostility towards Ms. Pynaker during the Telus campaign was more serious, but it is difficult to isolate how much of it was attributable to the personal history between them. The plaintiff's comments about Ms. Pynaker to Mr. Buss were clearly objectionable, but there is nothing to suggest that he made such comments to others in the employment setting.

224 I find that Ms. Pynaker's decision to make a formal complaint, and Mr. Semeniuk's decision to retain Ms. Greckol, were not instigated by any culminating action by the plaintiff. His behaviour was only one factor

in these decisions. I find Mr. Semeniuk disingenuous in professing that he suddenly realized in 2000 that Ms. Pynaker had been sexually harassed. He had been aware of the plaintiff's pursuit of Ms. Pynaker since 1994. In my view, Ms. Pynaker's decision to make a formal complaint of sexual harassment against both the plaintiff and Mr. Lounds was motivated primarily by Mr. Lounds' threat to fire her, and by concerns about Mr. Lounds' behaviour during the Telus campaign. It is by no means clear that Ms. Pynaker would have proceeded with a complaint against the plaintiff alone in the absence of these other factors. I am reinforced in that conclusion by Ms. Pynaker's complaint that Mr. Lounds was not dealt with severely enough by the defendant.

225 I note as well that neither Ms. Pynaker, nor others involved in the investigation, advocated the plaintiff's dismissal. Ms. Greckol and Mr. Semeniuk both recommended a solution through alternative dispute resolution. Mr. Burkett raised the possibility of retirement for the plaintiff as part of a mediated solution, solely due to his age. He did not propose his summary removal. While I recognize these views are not determinative in assessing the severity of the plaintiff's conduct, they nevertheless suggest that those most directly associated with the events did not feel his harassment fell at the most serious end of the spectrum.

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.

227 With respect to the employment relationship between Ms. Pynaker and the plaintiff, there was a significant age difference of 25 years between them. While he was not her supervisor, I find he was appropriately characterized as her mentor. He assisted her in obtaining her position as an International Representative, and she depended heavily on his assistance in her early years in that position. He was a senior and well-connected employee of the defendant, and his assessment of her ability would carry some weight with the defendant. I find that his conduct between 1993 and 1996 placed Ms. Pynaker in the uncomfortable position of having to tolerate his affection because of her reliance on him in the workplace. I accept her view that it would have been a career-limiting move to report his conduct to their superiors.

228 I find, however, that these circumstances changed with time. The plaintiff's approval and assistance became less important to Ms. Pynaker as she became more comfortable in her position, and developed working relationships with other members of the defendant. They became more equally positioned in the workplace. By the time the Telus campaign was underway, Ms. Pynaker was clearly not reticent about criticizing the plaintiff. I find, however, that while the power imbalance between them diminished with time, the plaintiff remained in a position to negatively affect Ms. Pynaker's working environment.

229 Turning to whether Ms. Pynaker told the plaintiff his behaviour was unwelcome, I find she clearly did so in April 1994. While there is some dispute as to whether he received a handwritten note, or a harsher typed letter, both conveyed the clear message that she wished to have a professional relationship only. The plaintiff nevertheless persisted in sending her cards and faxes, asking her to dinner and shows, and buying her expensive gifts. I accept that these gestures were not welcomed by Ms. Pynaker. While one might question her judgment in continuing to accept his invitations and gifts, I accept her explanation that this was necessary to maintain a good working relationship with the plaintiff. Nevertheless, I have some concern that by continuing to accept these overtures, she may have compromised the clarity of the message she delivered to the plaintiff in April 1994.

230 Ms. Pynaker and Mr. Wilken expressed the message more strongly to the plaintiff in late 1996. In as-

sessing the impact of those calls, I prefer the version given by Ms. Pynaker and Mr. Wilken to that of the plaintiff. I found Mr. Wilken a credible witness. Although he is a close friend of Ms. Pynaker, he was straightforward in recounting his involvement in these events, even when his evidence was not favourable to her. I find that he told the plaintiff that his conduct amounted to sexual harassment, that the calls left the plaintiff with no doubt that further attention from him was unwelcome, and that the plaintiff's pursuit of Ms. Pynaker ceased.

231 The next question is whether the plaintiff was warned by the defendant that his conduct was inappropriate, and that dismissal may result if it did not cease.

232 Ms. Pynaker's meeting with Mr. Lounds in mid-1998 was the first time she told someone senior to her and the plaintiff about her concerns. While Mr. Lounds did not have the power to discipline the plaintiff, it lay with him to report any concerns to the International Office, where action could be taken. If handled properly, his meetings with Ms. Pynaker, and then with the plaintiff, should have resulted in a clear warning to the plaintiff that his employment was in jeopardy because of his continuing harassment of Ms. Pynaker. I find that Mr. Lounds' actions did not constitute such a warning.

233 Mr. Lounds did not appear to grasp that he was dealing with a case of sexual harassment. His comment to Ms. Pynaker about just giving the plaintiff a kiss was completely inappropriate. When he spoke to the plaintiff, he did not discuss the matter in terms of sexual harassment. Nor did he refer to the defendant's harassment policy. I find that Ms. Pynaker did tell him about both the plaintiff's pursuit of her, and his retaliatory behaviour. However, when Mr. Lounds spoke to the plaintiff, he mentioned only the cards, which had stopped over a year before. He did not raise the issue of retaliation, or the possible serious consequences of the plaintiff's behaviour. Nor did he report the matter to the International Office.

234 During the Telus campaign, Mr. Lounds knew that Ms. Pynaker believed the plaintiff's lack of cooperation was retaliatory behaviour. He said that he did not think it was sexual harassment, however, but just two difficult employees bickering. He did warn both the plaintiff and Ms. Pynaker that they must communicate more productively, or face a reprimand. He did not, however, frame his admonition to the plaintiff in terms of sexual harassment. Nor did he tell the plaintiff that he could be dismissed if he persisted in his negative behaviour.

235 Mr. Lounds' actions did not constitute a warning to the plaintiff. Instead, his failure to deal with the situation appropriately led to continuing difficulties for Ms. Pynaker, and, at this stage, for the defendant, in justifying the plaintiff's dismissal without a prior warning.

236 The authorities indicate that a properly formulated and implemented sexual harassment policy can provide the necessary warning: *Tse* , *supra* at para. 45 and *Leach* , *supra* at paras. 125-26. Here, I find that the defendant did publish and circulate its harassment policy, and that the plaintiff should have been aware of its contents. He had been involved in courses for the defendant that dealt with sexual harassment.

237 The policy is set out in paragraphs 11 and 12 of these Reasons. There is no question that it covers the conduct which I have found to be sexual harassment. It also states that the defendant will "investigate all such complaints thoroughly and promptly", and that such conduct will be dealt with by "discipline up to and including immediate termination".

238 I have concluded, however, that in the circumstances here the policy did not provide an adequate warning to the plaintiff that, if his conduct continued, he would be dismissed. First, this was the first time the defendant had applied the policy in the context of sexual harassment. There was thus no historical use of the policy to

provide guidance for either party. Second, the policy did not indicate that all incidents of harassment would result in dismissal, but instead suggested there may be a gradient of disciplinary action. Third, Mr. Lounds' approach to the events detracts from any suggestion that the policy was routinely enforced by the defendant. He did not investigate Ms. Pynaker's complaints thoroughly or promptly, he did not make any determination of harassment, and he did not advise the International Office about her concerns so that it could take such steps.

239 With respect to the nature of the relationship between the parties, I accept that the plaintiff was a loyal and long-term employee of the defendant. He had been a member of the defendant for over 30 years, and an International Representative since 1974. He wanted to retire in 2004, after 30 years in that position. He had a clean disciplinary record, and was respected for his experience and knowledge of the defendant's operations. I find that his employment contract contained no express or implied terms relevant to assessing cause for his dismissal.

240 Finally, was the plaintiff's conduct condoned by the defendant? While Mr. Lounds did not deal with the situation adequately, I find that the defendant cannot be said to have condoned the plaintiff's harassment of Ms. Pynaker. The International President, who was the only person with the power to dismiss the plaintiff, was unaware of the harassment until he received Ms. Greckol's report. It is true that Mr. Lounds did not take steps to discipline the plaintiff when he learned about his pursuit of Ms. Pynaker. Nevertheless, if this is construed as condonation, it was subject to an implied condition of future good conduct, which the plaintiff failed to fulfill. When the defendant learned of the whole picture for the first time through Ms. Greckol's report, I find that it was entitled to consider the entirety of the plaintiff's conduct since 1993, in considering whether he should be dismissed: *McIntyre v. Hockin* (1889), 16 O.A.R. 498 (Ont. C.A.), at 501-02.

241 All of these factors must be weighed in deciding if the defendant has met the onus of proof on the fundamental issue of whether the plaintiff's conduct was inconsistent with maintaining the employment relationship. 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.

ANALYSIS WITH RESPECT TO DAMAGES

248 The plaintiff seeks 24 months' income at his annual salary of approximately $95,372, and benefits, as damages for wrongful dismissal. He claims additional compensation through an extension of the notice period, pursuant to *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.), aggravated damages, and punitive damages, based on the defendant's conduct during Mr. Burkett's investigation and this litigation.

249 The defendant replies that the plaintiff's damages are limited by his failure to mitigate his loss by taking advantage of other employment opportunities. It strenuously resists any suggestion that it acted in bad faith, or otherwise in a manner to attract the increased damages sought by the plaintiff.

250 I will deal first with the plaintiff's claim for "*Wallace* " damages, punitive damages, and aggravated damages. While the plaintiff argues he is entitled to all of these, his preference is an award of punitive damages, as this would not attract the same income tax consequences as "*Wallace* " damages.

251 In support of his claim for punitive damages, the plaintiff argues that the Supreme Court of Canada in *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595 (S.C.C.) found that a breach of the duty to act in good faith in the insurance context constituted a separate actionable wrong on which an award for punitive damages could be based. The plaintiff argues that an employment contract also imports an implied duty on the employer to act in good faith, and that, by analogy, I may award punitive damages if I find that the defendant breached that duty here.

252 I have some doubt as to whether an award of punitive damages in the insurance context translates in a meaningful way to an employment contract, given the clear pronouncement in the majority judgment in *Wallace* that a bad faith discharge does not constitute a separate cause of action. I find, however, that it is not necessary to embark on an analysis of this argument, as I have concluded that there is no factual basis for an award of increased damages of any nature.

253 The basis for the plaintiff's claim for increased damages is set out in paragraphs 6 and 13 of the Amended Statement of Claim. Paragraph 6 alleges misconduct by the defendant during the investigation. I have dealt with this at paragraphs 182 to 189 of this decision. For the reasons set out there, I find the plaintiff has failed to justify increased damages arising from the investigation.

254 Paragraph 13 deals with the defendant's conduct during this litigation. The plaintiff claims first that the defendant has used its "superior financial resources" to hinder him in prosecuting his case. He says that the defendant directed its employees not to cooperate with or speak to him or his representatives, that it stood in the

way of facilitating the deposition evidence of Mr. Burkett, and that it attempted to persuade Ms. Pynaker to accept a transfer outside Canada so she could not give evidence at the trial.

255 I find that the evidence fails to substantiate any of these allegations. I am satisfied that neither Mr. Cohen nor any other representative of the defendant prevented its employees from speaking or cooperating with the plaintiff.

256 I find that, when employees of the defendant were approached by the plaintiff, some sought advice from the defendant, and Mr. Cohen obtained and provided appropriate advice to them. Some of these employees did respond to the plaintiff's counsel by asking for travel expenses that were beyond an acceptable amount. I find that this was not on the advice of Mr. Cohen or the defendant. Moreover, if the plaintiff required their presence, the matter could easily have been resolved by simply offering them conduct money in accord with the ***Rules of Court***, and, if necessary, obtaining subpoenas under the ***Subpoena (Interprovincial) Act***, R.S.B.C. 1996, c. 442.

257 In any event, Mr. Lounds testified at trial as an adverse witness at the plaintiff's request and without a subpoena. Mr. Schell provided an affidavit requested by the plaintiff. Mr. Burkett's deposition was done by consent in Toronto. There is no evidence to support a conclusion that the plaintiff wished to have other witnesses present, and they were made unavailable.

258 The allegation that the defendant tried to prevent Ms. Pynaker from attending the trial was based on the plaintiff's account of a conversation with her at a conference in February 2003. I reject the plaintiff's version of that conversation, and accept the evidence of Ms. Pynaker and Mr. Cohen that there was never any intention to prevent her from testifying at the trial, or to use her absence as an excuse to adjourn the trial. I agree with the defendant that such an allegation makes no sense. Ms. Pynaker was clearly a key witness for the defendant, and it would have been unable to present its case without her testimony.

259 Paragraph 13(c) of the Amended Statement of Claim alleges that the defendant failed to provide the plaintiff with material information related to his pension benefits. I accept Mr. Cohen's evidence that the three written requests made by the plaintiff for such information were answered promptly by the defendant. If there was a failure to provide information in the course of an exchange at discoveries, I accept that this was due to a misunderstanding, and not to a deliberate attempt to withhold information by the defendant.

260 Paragraphs 13(d) and (f) of the Amended Statement of Claim set out the basis for the plaintiff's claim for "*Wallace* " damages, alleging that the defendant refused to settle, and maintained allegations of cause when these were unreasonable. I find no merit in these allegations. While I have concluded that the defendant did not have grounds to summarily dismiss the plaintiff, I have also found that he did sexually harass Ms. Pynaker. The plaintiff cannot claim that the defendant's allegations of sexual harassment were unreasonable, false, or made in bad faith. Moreover, when the plaintiff was dismissed, the defendant published a commendatory article about him in its newsletter, referring to his long service, and attributing his departure to retirement, rather than dis-

261 Paragraph (13)(e) of the Amended Statement of Claim alleges that, subsequent to the plaintiff's dismissal, the defendant wrongly delegated its authority to deal with this matter to Mr. Cohen, an American attorney who "was not qualified or competent to practise law in Canada". There is no substance to this allegation. Once litigation commenced, the defendant retained counsel in British Columbia who has conducted this litigation, presumably with instructions from Mr. Cohen, within the usual parameters of litigation in this province, so

far as that could be judged on the evidence at trial.

262 In summary, I find the plaintiff has failed to establish any basis for an increased award by way of "*Wallace* ", punitive, or aggravated damages.

263 I turn to the question of compensation for the defendant's failure to give the plaintiff reasonable notice prior to dismissal. In *Ansari v. British Columbia Hydro & Power Authority* (1986), 2 B.C.L.R. (2d) 33 (B.C. S.C.) McEachern C.J.S.C. (as he then was) approved the guidelines set out in *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.), at 145, with respect to the factors to be considered in determining what is reasonable notice:

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

264 The policy underlying these factors is the provision of an appropriate time within which the plaintiff is likely to obtain new employment.

265 The cases recognize that increased age is generally associated with increased difficulty in finding new employment. The plaintiff was 69 years old when he was dismissed. He planned to retire in 2004, when he reached his thirtieth anniversary as an International Representative.

266 The plaintiff had held his position for over 25 years. While some of his skills may have been transferable, I find it unlikely that he would have secured a similar position elsewhere, with comparable remuneration and benefits to those earned through his long tenure with the defendant.

267 The question of the availability of similar employment introduces the defendant's argument that the plaintiff has failed to mitigate his damages. The defendant says that the plaintiff declined to pursue alternative employment opportunities simply because he wished to have this litigation behind him first. This is based on the following evidence from the plaintiff's examination for discovery on November 28, 2001 which he affirmed at trial:

> 1965 Q. I just have one other area I want to canvass with you. And my understanding is your employment terminated effective the 1st of February, 2001, is that correct?
>
> A. That's correct.
>
> 1966 Q. Okay. Have you had opportunities for employment since that period of time, people expressing interest in your working for them?
>
> A. Yes.
>
> 1967 Q. Can you just identify who you have, please?
>
> A. the local unions, the B.C. Fed, building trades.
>
> 1968 Q. Sorry, local unions, local unions of the IBEW?

A. Yes.

1969 Q. The B.C. Federation of Labour?

A. That's correct.

1970 Q. Building trades?

A. That's correct.

1971 Q. Anyone else?

A. I talked to the Department of Labour.

1972 Q. Right.

A. And there wasn't an opportunity at that time, but they are interested.

1973 Q. Okay. And have you pursued those?

A. Not at this time, I want to get this behind me.

268 The onus to prove failure to mitigate rests with the defendant. To succeed, it must prove both that the plaintiff failed to make reasonable efforts to find work, and that, had he done so, he likely would have found replacement work: England, Christie, and Christie, *supra* at para. 16.71.

269 I find the evidence insufficient to meet that onus here. While the plaintiff's examination for discovery evidence suggests he did not fully explore some potential employment opportunities, it falls short of establishing that suitable positions were available to him, had he done so. The balance of his evidence at trial indicated that he did not want to pursue these opportunities further because he was reluctant to tell prospective employers that he had been dismissed for sexual harassment. A number of authorities support the view that mitigation is made more difficult when dismissal occurs because of sexual harassment: England, Christie, and Christie, *supra* at para. 15.82; *Cantelon v. IWA-Canada, Local 1-71*, [1999] B.C.J. No. 1620 (B.C. S.C.) at para. 42; and *Shiels v. Saskatchewan Government Insurance* (1988), 51 D.L.R. (4th) 28 (Sask. Q.B.).

270 Having considered all of these factors, I conclude that 24 months is an appropriate period of notice. The plaintiff will accordingly recover from the defendant compensation representing 24 months salary, and employment benefits. I leave it to the parties to calculate the precise amount of the award. They may have liberty to apply if they are unable to agree on the appropriate calculation.

271 The matters of pension entitlement and costs remain outstanding. The parties may make arrangements with the registry to appear on those matters, as required.

Action allowed.

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