IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT, 1995*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

NESTLÉ CANADA INC.

- The Employer

-and-

MILK AND BREAD DRIVERS, DAIRY EMPLOYEES,
CATERERS AND ALLIED EMPLOYEES,
LOCAL UNION NO. 647

- The Union

AND IN THE MATTER OF a grievance of Karry Brooks

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Paula M. Rusak	- Counsel
Maureen Tymburski	- Director of Human Resources
J. C. Rhéaume	- Plant Manager
Richard Hulse	- Human Resources Manager

On behalf of the Union:

Michael McCreary	- Counsel
Pat Powers	- Business Representative
Sue Larson	- Steward
Karry Brooks	- Grievor

Hearings held July 17, July 18, October 23 and October 24, 1997 in London, Ontario.

AWARD

I. INTRODUCTION

On June 2, 1997, after an extended absence from work, Karry Brooks (the grievor) was dismissed from her employment at Nestlé Canada for "failure to provide satisfactory medical proof . . . for . . . continued absence from work." The grievor alleges that her discharge was contrary to the collective agreement.

II. THE EVIDENCE

In 1986 the grievor began work on a part-time basis at the Ault Foods ice cream plant in London. She became a full time employee in 1989. At the time of her discharge in 1997 she worked in the production area as an operator III. The plant which had been owned by Ault Foods was sold to Nestlé Canada Inc. effective January 1997.

For some time the grievor had been having interpersonal difficulties with Mike Fair, a fellow employee. On November 8, 1996 incidents involving Mr. Fair led to the grievor becoming very upset. She testified that she had a "breakdown." The grievor met with J. C. (Charlie) Rhéaume, the plant manager, and she left work early.

The grievor did not return to work during the next several weeks, although for some of this time the plant was not in operation. During this period she consulted her physician whom she advised about her workplace problems, noting that these did not involve sexual harassment. She sought both weekly indemnity and Workers' Compensation benefits.

On November 12 the grievor wrote Mr. Rhéaume, the plant manager, outlining five specific complaints she had with Mr. Fair. The Employer accepted the grievor's allegations in the

letter regarding the November 8 incident, contained in the first large paragraph, as fact. The allegations are not easily summarised and I thus include the text of the letter precisely as it was written:

> Dear Charlie;
>
> This letter is written to inform you of my formal complaints against Mike Farr. These are some of the incidents that have led up to my complaints.
>
> On November 8, 1996. We were doing Cookies & Cream on Drumstick. Mike was operator, Scott Erwin, Jim Jobsie, Barb Addis, Ziggy and myself were generals. We all knew the jobs so I asked "if we were going to rotate jobs". Barb Addis said "No". So that left me on crunch all day. Doing crunch is a very boring job. Dena Cornelius was doing weights & volumes. Later they changed Dena And Peter Ham because they needed Dena on the 600. I asked Peter "if he had done weights volumes before?, he said "No". I asked him "if he would change every hour or so?", he said "Yes". I showed him how to do the crunch and unplug the fruit feeder if necessary. I went and told Mike that this is what were doing, he said "No'. I told him that Peter and I were on Classification Layoff and that I was senior to Peter, and that this is what we were doing. I asked Mike "Why he wanted me on crunch all day?". Mike replied "I don't want Peter getting hurt on the fruit feeder. Like look at you, you hurt your arm on the agitator". I had told Mike "I had set up take off the agitator and there was nothing Peter could hurt himself on!". I told Mike that and also told him that Peter has experience as a operator and using a fruit feeder. Then Doug Gray came to let me go for break. When I came back from break. Mike came to me and said "Bob Lawson wanted me back on crunch!". I said "WHY!". He told me "to talk to Bob Lawson". I went to find Bob Lawson and he was in a meeting, so I asked Mark Vanderlaan, he said "as long as we both agree there was no problem". I went back to the machine, doing weights & volumes. Bob Lawson came to me and said "when Peter Ham gets back, I want you to go back to crunch". I asked him "WHY!". He told me "that it was important that I be on crunch, because it was a crucial job. I looked at him and said "that's CRAP!, I am an operator on this machine, and I know that the company has put people on crunch who have never done it before, ECT. Peter Reid". I went back to crunch. The bottom of the fruit feeder was leeking Ice cream. I told Mike and he told Bob Lawson and they did nothing. I ended up standing in Ice cream, and could have slipped and hurt myself. The machine went down and Bryan Carter wanted to show Mike that someone had dumped chocolate into a garbage bin, and it had hardened. Bryan just wanted to show Mike how hard it was to get out. Mike was yelling at Bryan "that he was an operator, and that he did'nt care!". Mike was laughing at Bryan, making him feel and look bad in front of fellow employees. Bryan went to the front office and told Mark about what had happened. I was walking by to go make an appointment with Charlie, and seen how upset Bryan was. I said to Mark "that Mike shouldn't be able to do this to people. I went back to the machine, and it was down again. Mike was sitting against the wall talking

to Peter Ham. I went up and asked Mike "WHY, he wanted me on crunch all day?". Mike said "because he does". I said "you don't want me doing weights & volumes because I might catch you doing your job improper". I have caught Mike not writting down his weights & volumes properly and not writting down what he gets, but what would look good on paper". I have reported it to my supervisors. Mike told me "that it wasn't that!". I asked him "maybe it was because of what happened between Sue Larson and Mike". Sue and I are good friends, and I told him "it had nothing to do with me". I said this because this has been going on for years!. Mike said "No, it wasn't that!". And in his opinion "I was not capable of running a machine in the place!". So that leads me to believe that Mike Farr did not train me properly. Especially when he tells me "if I get less than 140ml. per bar to write down 140ml. I got very angry and went to walk around the machine and Barb Addis was laughing and I said "Funny AH, Barb!". I said to Mike "You may know Drumstick better than me, but I can run Pronco with all the weights & volume are with in specifications!". I also said "if you could run Pronco as will as you say you can, than why was everything you made on Friday November 1, 1996 put on hold because the bars were so heavy they were not kicking a 11 packs?, we were doing dozens!". Then I couldn't take him belittling me in front of fellow employees, and I became very upset!. [*The copy of this letter in the Union book of documents then includes the following handwritten insertion, which was consistent with the evidence but does not appear in the Employer book of documents* - I was yelling crying shaking short of Breath. I had memory loss. I just Didn't know what I was Doing.] Mark asked "what was wrong?". I replied "what do you care!?, because I have complained about Mike many times in the past, to Bob, Linda, Ed Vendebeek, Sue Larson and yourself and nothing was ever done". Mark said " I didn't think it was that bad". I replied "WHAT! it has to get this bad before anyone will do anything!". Mark went and got Dena to let me off the floor. I went and talked to Charlie, he said "for me to leave it with him, and he would get back to me!". When I went back to the floor I was told by Ziggy, that Mike had written a letter asking people to sign it on the grounds "that I had verbally harassed him!". "Mike has harassed me many times before!".

Complaint #2

One time I was having a problem with the sandwich machine and he yelled "YOUR KILLING US!!". I told him "TO MIND HE'S OWN MACHINE! and I would watch mine!". Mike said "They are all my machines, because I'm TOP DOG!". So I told him to run them all than!". Barb Addis complained and we were both called into the office by Linda. And she said "I will Speak to him". Later he came back and came on to me about going to the supervisor!". I told him "it wasn't me".

Complaint #3

The Boxer on Push-ups, was acting up. Mike yelled across the room "You better get a real operator!". When Karen Eichler and I looked at him he shot me a KISS!.

Complaint #4

Mike always runs Drumstick. When he found out Terri Rhame was going on vacation. He bumped me off sandwiches. Which left me running Cookies & Cream on Drumstick, knowing I've only run Drumstick a few times!. Cookies & Cream is a very hard product to run!. I told Mark Vanderlaan, "that Mike was trying to make me look bad!". Mark said "That's Okay!, I will give you the best generals, I can to help you run the machine!". I ran the machine the best I could, but everything was put on hold because the weights & volumes were not right!. I was taken in the office and verbally reprimanded and a letter was written up!. A week later Mike ran the same product, and I have a copy of weights & volumes done by Ray Smith and they don't meet specifications.

Complaint #5

Mike and Kevin Simmers were on sandwiches. My chocolate valve was stuck open, and "I knew nothing about it!". My chocolate tank, was going to over flow. Mike told Kevin "to watch my chocolate over flow". I think Mike should have said something to me, instead of making me look incapable of running the machine!.

I've tried to get along with Mike for along time. There was one time Mike was training Ed Vanderbeek. Mike went out to the garbage dock, for a quick smoke. The front end of Drumstick jammed. I was on sandwiches, I ran around to help Ed. When I got the Machine all stopped, Mike came back. I could have just let it go, like he did with my chocolate. But "I think I'm better than that!". I'm finding it very hard to come into work, and put up with him on a day to day bases!.

I hope you take this into consideration, as I have lodge numerious complaints in the past. I have recieved no improvements with the said employee. I hope you realize that this is done with alot of thought and soul searching. I have been along standing employee with your company, and have never lodged a complaint against another employee. I trust you give this matter prompt and courteous attention.

Thanks for your consideration.

The grievor then amplified her concerns about the events of November 8 in a second letter dated January 8, 1997. The Employer also accepted the allegations in this letter as fact. This second letter was hand written and, as with the first, I reproduce the text of the letter as it was written:

To All Concerned:

Now that there is to going to be an investigation, all the facts must be known.

> On Nov 5/96 Mike Fair went out for drinks with a gentleman from N.D.S. Wen I went out to dinner with the same man to Great West Beef Company. Thursday Nov 7/96 Mike Fair asked the gentleman how supper went. The man replied that he had spare ribs, baked potatoe & salad and thought it was very good. Mike then made a comment with what about after dinner, I said Mike angrily and he replied with well I have never gone to dinner with you. I was very angry and walked away. He made me feel very cheep and humiliated. I have had to deal with people from outside the plant before and when I do I feel I have to deal with these people on a business bases, with utmost respect. I feel that I am a person representing the Ault and the company trusts me to conduct myself accordingly. I feel that if I don't, that it not only reflects on me, but also reflects on the company. When a visitor leaves the plant, he or she may have a conversation with someone, and that person doesn't say just Mike or Karry, they will most likely say a man or lady from Ault. So not only does the problem look bad on me, it also makes the company look bad. Each and everyone of us are her to make this company, from management right down to people like me. I feel that not only did Mike not have any respect for me, he showed disrespect for the man from N.D.S.
>
> P. S. I would also like to apologize for the way I behaved at our last meeting.

As noted, the Employer accepted the grievor's complaints about the events of November 8 as true and the Employer acted upon her complaints. Mr. Fair, a twenty year employee, was disciplined and the grievor was advised in a letter from Mr. Rhéaume dated January 16 as follows:

> In a meeting with myself, Pat Powers, Richard Hulse and Mike Fair, it was clearly laid out to Mike that expectations regarding standards of behaviour in the workplace must be adhered to. These standards are laid out clearly in the Ault Foods Code of Conduct and in the Nestlé policy on personal harassment. Both point quite clearly to the right of every employee to work in an environment free of personal and sexual harassment. We understand the Nestlé policy to be the same as that required by Ault Foods at the time of the incidents reported. The Ault Foods code of conduct points in particular to the requirement to "treat all other employees - with respect and dignity, respecting the rights, opinions and freedom of expression of others."
>
> It was made clear to and understood by Mike that these expectations of behaviour are to be met in the future and that failing to do so would lead to severe disciplinary action and possible termination.

At some point in November or December the Employer suggested to the grievor that she consider taking another position on the day shift which would allow her to work away from

the area in which Mr. Fair worked. The grievor did not pursue this suggestion; she felt Mr. Fair should be removed from his position.

The plant was closed during the Christmas holidays. It reopened on January 14 and the grievor returned to work. During the week of January 14-18, 1997 the grievor worked at the opposite end of the plant at a considerable distance from Mr. Fair and encountered no difficulties. At the end of that week she learned that she was scheduled to work near Mr. Fair during the following week. The grievor did not return to work the following week or at any other time after January 18.

Mr. Rhéaume, the plant manager, wrote to the grievor on January 27, 1997. In his letter Mr. Rhéaume noted the grievor's continued absence from work. He noted as well that both her claim for Workers' Compensation benefits and weekly indemnity benefits had been denied because there were no medical grounds to support her absence from work. The letter indicated that the only medical documentation the Employer had regarding the grievor's absence was the December weekly indemnity application form. Mr. Rhéaume stated that Nestlé would ask London Life, the insurer for the weekly indemnity (WI), to review the claim for WI if the grievor provided further documentation to support her claim. The grievor was then advised that she was scheduled for work, that the company expected her to report for work Tuesday, January 28 at 4:15 p.m., and that: "If you are unable to attend work because of illness you must provide the Company with documentation to support such absence."

The grievor promptly visited her physician and supplied the Employer with two documents dated January 27. The first was a "Standard Return to Work/School Form" and simply indicated that the grievor was unable to attend work due to illness for the period from November 8, 1996 until further notice. The form included the following comment: "Being

followed in this office & seeing counsellor." In addition, the grievor supplied the Employer with an attending physician's statement on a WI form which indicated that the primary diagnosis was "tension headaches/insomnia [secondary to] anxiety/stress". The form indicated the grievor was unable to work in proximity to the stressful situation but that the grievor could return to work on a part-time or modified basis "with appropriate precautions." In the remarks section the grievor's physician wrote as follows: "Patient is subject to workplace harassment which is affecting her physically as described above." The stressful situation and workplace harassment referred to by the physician involved her contact with Mr. Fair.

Mr. Rhéaume wrote to the grievor again on February 10. In that letter he indicated that the company had asked the insurer to review the WI claim and that the claim had been denied as "there is no medical reason to support your absence." The letter continued "As you have no medical grounds to support your absence ... you are required to report for your scheduled shift on Tuesday, February 11th, 1997" beginning at 4:15 p.m.

I note that Mr. Fair worked the day shift. While the grievor had previously worked on the day shift with Mr. Fair, the Employer had directed the grievor to return to work on the afternoon shift so that it was unlikely she would have had contact with Mr. Fair.

Representatives of the Union met with the Employer on February 12 to discuss this situation. Following the February 12 meeting, Mr. Rhéaume wrote to the grievor again. In his February 18 letter Mr. Rhéaume indicated that Mr. Fair could not "be removed from his bid job as a result of disciplinary action." However, Mr. Rhéaume indicated that the company had acted on the grievor's complaints regarding Mr. Fair by giving Mr. Fair a written warning to refrain from harassing the grievor and that Mr. Fair had "been informed of the consequences should such an action occur in the future." Mr. Rhéaume advised that the

Employer was not able to compensate the grievor for her lost wages for the period following November 8, 1996 because there was no medical proof to support the necessity of the grievor being absent from work. Mr. Rhéaume went on to indicate that there was work for the grievor in her former job. As Mr. Fair had been warned, Mr. Rhéaume indicated there should be no reason for the grievor to expect further unacceptable conduct from Mr. Fair. Thus Mr. Rhéaume indicated that the grievor should return to work immediately and no later than Friday, February 21 on the afternoon shift. He stated: "This is your last chance." Mr. Rhéaume concluded his letter with the following comments:

> If you are still not satisfied with Management's refusal to move Mike Fair or with the denial of your claim to back pay it is still open to you to pursue the matter through the grievance procedure. However your continued refusal to report for work will not be tolerated.
>
> I am providing a copy of this letter to your Steward, Sue Larson and to Pat Powers, Business agent, and requesting that if you or either one of them can recommend an alternative resolution of this dispute, please do so. For example, are there other work assignments for either you or Mike which will be acceptable to the person affected without infringing upon the seniority rights of other employees. We will pursue any such suggestions immediately, but this must not delay your return to work.

Following receipt of the February 18 letter the grievor secured two additional forms from her physician. One was another Return to Work Form indicating that the grievor was unable to work due to illness or injury from November 19, [sic] 1996 until the date of the form - February 20. In addition, the grievor's physician provided a typewritten letter addressed "To Whom It May Concern" indicating that the grievor had been off work since November 9 "due to anxiety and stress related to her work environment". The letter concluded with the following: "Please feel free to call us at [phone number] if you need any further information." These two documents were provided to the Employer; however, they appear not to have been fully considered by the Employer as they were not in the file at the time the grievor's employment was terminated.

In addition to securing the two documents from her physician, the grievor had been in

contact with her own lawyer, and her lawyer wrote to the Employer on February 19. The grievor's lawyer indicated that the conduct of some of the grievor's fellow workers constituted "extreme forms of sexual harassment." Her lawyer also indicated that there were instances of "sexual harassment and assault" and alleged that "the work environment . . . has been poisoned . . ."

As a result of the intervention of the grievor's lawyer, the Employer postponed implementation of the grievor's dismissal. Instead, the Employer conducted an investigation into the allegations raised by the grievor's lawyer.

The Employer's investigation was conducted by Maureen Tymburski, Nestlé's Director of Human Resources, and extended over several months. Ms Tymburski interviewed 29 employees, some of whom she interviewed more than once. She testified about her investigation and I received copies of the notes she made of many of the interviews. Some of the notes were signed by the interviewees who indicated that Ms Tymburski's notes accurately reflected the comments which they had made to her. At the end of the investigation Ms Tymburski concluded that there had been numerous violations of the Nestlé policy on personal harassment but she did not find evidence of sexual harassment or assault alleged in the letter from the grievor's lawyer. Ms Tymburski concluded there had not been a poisoned work environment. The Employer thus continued with the grievor's termination as communicated in the letter dated February 18. The grievor's employment was terminated on June 2.

During the period from February 18 until June 2, no representative of the Employer contacted the grievor's physician as they were invited to do in the note which the grievor had provided to them shortly after her receipt of the February 18 letter. In addition, I note that the Employer did not challenge the medical diagnosis at the time of dismissal.

I heard additional evidence from several sources as to the work relationships in the plant. I will not repeat that evidence, except to note that both men and women, including the grievor but excluding Mr. Fair, have engaged in coarse language - "fuck, shit, hell" etc. - and some employees (both male and female) engaged in lewd gestures such as grabbing their genitals and gyrating, or grabbing other employees' buttocks.

In addition, I received a copy of a 1988 sexual harassment complaint filed with the Human Rights Commission by Sue Larson, the Union steward in this grievance, against Mr. Fair and a copy of the settlement which was made without prejudice. The allegations made against Mr. Fair in 1988 included rubbing or grabbing women in the genital area, repeated questioning of females as to their sex lives and offering to participate in improving their sex lives, and a variety of clearly sexual "jokes" and comments. Those 1988 allegations were thus quite different from the allegations made by this grievor.

Following the grievor's dismissal, a grievance was filed. Apart from the grievance, there were other activities underway in an apparent attempt to assist the grievor. A demonstration and picket line occurred outside the plant in July. This picket received publicity on CFPL, a local radio station, and in the London Free Press. In addition, in July a large banner was hung on the fence outside the plant, the text of which read as follows:

Ault Avoids Harassment
Nestlé's Terminates The
Innocent

Although the banner indicated that it was posted by the Union, the parties agreed that the Union had nothing to do with the banner.

Following the picket a CFPL reporter interviewed Marilyn Knox, the senior vice-president of corporate affairs for Nestlé Canada. Ms Knox manages the Employer's media relations

and was contacted for the Employer's response to the picket. In the subsequent news report the reporter said that "Knox says the woman was fired after a Workers' Compensation Board ruled she was medically fit to return to work and then didn't."

Finally, I note that the Union advised me at the beginning of the hearing that, because of the allegations that were being made about Mr. Fair, the Union had advised Mr. Fair about the hearing and his right to attend. Mr. Fair did not attend the hearing.

III. THE COLLECTIVE AGREEMENT

The collective agreement provides in part as follows:

> 6.01 The Company shall have the right to discharge or dismiss any employee for good cause, . . .

IV. POSITION OF THE EMPLOYER

The Employer submitted that it had grounds to discharge the grievor. The grievor had not attended work and did not have medical justification for this. The grievor's physician indicated that the grievor could return to work if she did not have contact with her harasser. The Employer had made several proposals for the grievor to return to work on a shift which did not involve contact with Mr. Fair. However, it appeared that the grievor was unwilling to return to work unless Mr. Fair's employment was terminated. The Employer did not and would not do that.

The Employer had acted reasonably throughout this situation. Mr. Fair was disciplined and he was clearly advised that his conduct had to change and advised of the consequences if his conduct continued.

Until the London Status of Women's Action Group and the grievor's lawyer became involved, the matter had been dealt with as a dispute between two employees, not as a matter of sexual harassment. In November and December the grievor made no mention of sexual harassment. In particular, when she first contacted her physician in November, 1996, she had specifically indicated to her physician that her complaints did not involve sexual harassment.

The Employer had written to the grievor on three occasions indicating that she should return to work. In the third letter she was given what was described as her last chance to return to work. She was advised that she should come back to work and, if there were continuing problems, she could pursue them through the grievance procedure. The "work now, grieve later" rule is appropriate in this instance. While the workplace might not have been a nice place, it was not nearly as bad as suggested by the grievor and her lawyer, and did not justify the grievor's continued absence from work. Thus the Employer said that it had just cause for dismissal, especially as it had on three occasions asked the grievor to return to work and to deal with any other workplace issues through the grievance procedure.

The Employer relied upon the following authorities: *Bailey v. Anmore* (1992), 19 C.H.R.R. D/369; *Aragona v. Elegant Lamp Co. et. al.* (1982), 3 C.H.R.R. D/1109; *Rack v. C & J Enterprises Ltd. et. al.* (1985), 5 C.H.R.R. D/2857; *Bell & Korczak v. Ladas et. al.* (1980), 1 C.H.R.R. D/155; and *Re Government of Province of British Columbia and British Columbia Government Employees' Union* (1995), 49 L.A.C. (4th) 193 (Laing).

In reply to the Union's submissions, the Employer submitted that if I concluded there was not cause for termination I should find that there was no longer a viable employment relationship and decline to order reinstatement. The Employer based this position on the conduct of the grievor following termination, especially the picketing and the banner placed

on the plant fence.

V. POSITION OF THE UNION

The grievor had been dismissed for failure to provide medical proof to support her continued absence. In the Union view the grievor had provided satisfactory medical proof and thus the dismissal was improper and should be set aside in its entirety. In the alternative, the Union submitted that there were several mitigating factors such that dismissal was not an appropriate disciplinary response.

The Union noted that the grievor's physician had provided six different documents regarding the grievor's condition. The first was a Workers' Compensation form and the Union acknowledged that the Employer did not have a copy of the actual form at the time of termination. However, the Employer knew a request for Workers' Compensation benefits had been made and denied. The second form from the physician had been the WI form and that document had been provided to the Employer and was in the file at the time of dismissal. The physician had provided both a second WI form and a return to work form on January 27. The Employer had those documents in the file when the Employer implemented the termination. In addition the grievor's physician had completed two forms dated February 20, 1997. They had been provided to the Employer but had not been reviewed by the Employer's decision-makers in June when the grievor was discharged. Finally the Employer made no efforts to contact the physician, although he had invited them to do so. Had the Employer reviewed the last two forms, the Employer may well have contacted the physician for further information. Had the Employer used the information on these forms the decision may have been different. On this basis the Union submitted that I should allow the grievance, reinstate the grievor, and remain seised as to compensation.

As for its alternative submission, the Union said that if the grievor had failed to provide appropriate medical proof to substantiate her absence then there were mitigating factors that led to the conclusion that termination was not the appropriate disciplinary penalty. In particular the Union cited five factors, as follows:

1. The grievor was suffering from anxiety and stress and in the circumstances it would be understandable if she had not provided precisely the information or documentation that the Employer wished. The fact that she was ill should excuse some of her conduct.

2. Throughout the process the Employer failed to articulate what it wanted by way of medical evidence. At no point did the Employer indicate why the medical reports provided by the grievor were unsatisfactory. At no point did the Employer follow up with her physician. It was unfair to the grievor to simply indicate that the evidence was unsatisfactory, invite the grievor to provide further information, find the new documentation deficient without indicating why, and finally to dismiss the grievor on this basis.

3. The cause of the grievor's anxiety and illness was partly the fault of the Employer. While the Employer made some suggestions under which the grievor might return to work, those involved the grievor moving off her shift or away from her job. This is an instance of blaming the victim. The Employer should have taken more steps to accommodate the grievor. In light of this, the termination was too extreme.

4. The Union submitted that I should conclude on the evidence that there was a poisoned work environment. Ms Tymburski testified that if she had found the grievor had been the victim of sexual harassment, the dismissal would not have been implemented. Thus if I were to conclude that there was sexual harassment I should not uphold the dismissal.

5. The Employer provided alternative reasons for the dismissal through the vice-president, Ms Knox, who indicated that the termination was related to the denial of the Workers' Compensation claim. The Union submitted that Ms Knox made the comment as alleged, that the comment was true and thus that the Employer was being inconsistent and not forthright with the tribunal as to the real reasons for termination.

On the basis of the above five factors, the Union asked that the grievance be upheld and the

grievor reinstated, and that I remain seised with respect to other remedies.

The Union relied upon the following authorities: *Re City of North York and Canadian Union of Public Employees, Local 94* (1990), 16 L.A.C. (4th) 287 (Burkett); two extracts from Aggarwal, *Sexual Harassment in the Workplace* (2nd ed.) Butterworths ("Gestures and Other Non-Verbal Behaviour", at p. 12 and "Complainant's Past Conduct" at p. 65); and *Does a Sexually Permissive Workplace Justify Harasser's Conduct?* Charter Cases/Human Rights Reporter, Lancaster Labour Law Reports, June 1995, p. 4.

VI. CONCLUSIONS

In my view it is helpful in discharge cases to address three distinct questions as follows:

1. *Did the grievor engage in conduct which merits some form of discipline?*
2. *If the conduct merits discipline, is discharge the appropriate form of discipline?*
3. *If discharge is not appropriate, what is the appropriate form of discipline?*

I examine this grievance using the above framework.

1. *Did the grievor engage in conduct which merits some form of discipline?*

I begin with the basic idea that the employment relationship involves the employee attending work on a regular basis, unless the employee has a legitimate reason for absence. As the grievor did not attend regularly, did she have a legitimate reason for her absence?

The grievor had worked at the plant for some ten years. Conditions in the plant involved considerable banter and horseplay and the behaviour of the employees was not what one

would expect in many other workplaces. As well the grievor had herself engaged in some of this conduct prior to November 8. Nevertheless, on November 8 the grievor found the workplace situation very stressful and she had a "breakdown." Her absence from work on that day and for a few days thereafter was understandable. It was her subsequent absence which was of concern.

While there was considerable dispute about the medical documentation, in my view the evidence on the central issue was clear. The grievor's physician concluded that she was suffering from anxiety and stress, but throughout the relevant period he accepted that she could return to work in a situation which did not involve contact with Mr. Fair. I accept his conclusion, as did the Employer. At no time did the grievor's physician suggest that the grievor was unable to return to work at all. He may have been incorrect as to the details of the grievor's contact with Mr. Fair, but his position throughout was that the grievor could return to work provided that the cause of her stress - her dealings with Mr. Fair - was addressed.

The Employer addressed the cause of the grievor's stress. The Employer dealt with Mr. Fair; Mr. Fair was disciplined. In a meeting which was attended by the Union's business representative and Mr. Fair, the Employer laid out to Mr. Fair the Employer's expectations regarding standards of behaviour in the workplace. In his letter of January 16, the relevant portion of which was reproduced earlier in this award, Mr. Rhéaume advised the grievor of these developments, advised her that Mr. Fair had been informed of the expectations regarding standards of behaviour in the workplace and the requirement to treat all employees with dignity and respect, and advised her that Mr. Fair had been warned that his failure to live up to these expectations would result in further severe discipline and possible termination. The grievor was also advised that her Union business representative had participated in the meeting. If she had any questions she could have raised them with either

the Employer or the Union; it appears she did not do so.

The Employer made suggestions to the grievor and to the Union as to how her physician's recommendations could be accommodated. She was invited to apply for different employment within the plant. When she did not apply the Employer took steps to have her return to work on the afternoon shift, a shift other than that on which Mr. Fair worked. She was advised in writing on three occasions, and in a meeting held with her Union representative, that she should return to work. If she had continuing concerns she was advised that she should pursue her workplace problems through the grievance procedure following her return to work. The Employer's February 18 letter, portions of which were quoted earlier, invited the grievor or her Union representatives to provide an alternative resolution to the dispute. While the Employer indicated a willingness to pursue any such suggestions, the Employer was clear that the grievor should return to work.

Following the February 18 letter, the Employer did not implement any disciplinary action against the grievor for some months. As noted earlier this was due to the intervention of the grievor's lawyer and the allegations regarding sexual harassment and assault. The Employer, quite reasonably, investigated these allegations at length. When the Employer rejected these allegations, the Employer implemented the termination as it advised in the February 18 letter.

The reason the Employer gave for termination was the failure to provide satisfactory medical proof for continued absence. There is nothing in the physician's statements or letters which support a complete refusal to return to work. The physician's statement prepared for Workers' Compensation dated November 19, 1996, a statement which was not provided to the Employer, indicated that the grievor would be available for other duty if contact with Mr. Fair did not occur. The physician's December 9 and January 27 WI forms both indicated that the grievor could return to work with appropriate precautions if her work was not in

proximity to Mr. Fair. Nothing in the two statements dated February 20 suggested any alteration in that view. In addition, when the grievor's physician testified, he reiterated this view. In particular, he indicated that throughout this process he felt the grievor would be able to return to work provided she worked apart from Mr. Fair.

I repeat that the basic nature of an employment relationship involves the employee attending work on a regular basis, unless the employee has some legitimate reason for absence. The medical diagnosis and forms provided by the grievor's physician do not support the grievor's complete refusal to attend work. Although the grievor felt she was a victim of harassment, as a victim of harassment she does not have immunity from the normal expectation that she will continue to work especially in a situation in which her Employer has taken clear steps to deal with her harasser and in which her medical situation does not require absence from work.

I note that the Employer took precisely the steps I would expect an Employer to take in dealing with her allegations of harassment, whether the allegations were of sexual harassment or otherwise. The Employer dealt with the cause of her concerns in an appropriate manner through investigation. The Employer also acted against Mr. Fair, the harasser, through the imposition of discipline and provided a clear statement of the Employer's expectations as to future conduct and the consequences of Mr. Fair's failure to meet those expectations. These actions were taken in order to ensure that the grievor could return to work in an environment free from harassment.

I note as well that the grievor did work the week of January 14-18 at some distance from Mr. Fair. There was no indication that the grievor's work during that week was particularly stressful or caused her any real difficulty. It was not seriously suggested that if the grievor were to work on a shift other than with Mr. Fair, such as the afternoon shift which Mr.

Rhéaume had suggested in his letters, it would be excessively stressful for her.

In all these circumstances I find the grievor's continued refusal to attend work provided the Employer with cause for some form of discipline.

2. *Is discharge the appropriate form of discipline?*

Having found cause for some form of discipline, I now consider whether discharge is the appropriate form of discipline. In this case, as in many discharge cases, it is this second question which is the most difficult. The nature of a just cause for discharge provision in a collective agreement requires a careful examination of all of the facts in order to determine whether or not discharge is the appropriate solution.

I accept that an employee's refusal to work is serious and in some instances it can be cause for discharge. The question before me is whether in this instance it provided cause for discharge.

The Union relied upon the five factors outlined above as reasons for mitigating the discharge. Two of those factors do not assist the Union and I deal with them before addressing the other three.

First, while I accept that Ms Knox indicated to CFPL radio that the grievor was fired after Workers' Compensation concluded she was fit to work, in my view this does not assist the Union. First, it is factually correct that the termination occurred "after" the Workers' Compensation decision. While the news report implies that the Workers' Compensation decision was the *reason* for the discharge it does not state it, and I am unwilling to read into the news broadcast a statement from Ms Knox which was not there. Secondly, Ms Knox was

not involved in the dismissal. There was no evidence that she had consulted any of the decision-makers before she made her comments and it was not clear who had briefed her for her radio interview.

The Union submitted that Ms Knox's statements showed bad faith or a change in the grounds for discharge. I am unable to find in the comments attributed to Ms Knox anything which persuades me of bad faith or a change of grounds on the part of the Employer.

Secondly, the Union invited me to conclude that there was sexual harassment and said that if I found sexual harassment then I should set aside the dismissal. Sexual harassment, as contrasted with some other forms of harassment, is a violation of the *Human Rights Code*. Ms Tymburski acknowledged that if the Employer had concluded that the grievor had been a victim of sexual harassment, as contrasted with other harassment, the Employer would not have dismissed the grievor. The Union said that if I reached the conclusion that there had been sexual harassment, I should do as the Employer would have done.

Much of the argument and all the authorities dealt with sexual harassment. Much less of the evidence dealt with the issue of whether the conduct was sexual harassment. A conclusion that Mr. Fair, or others, engaged in sexual harassment involves a consideration of both the conduct and the motive or purpose.

The grievor's complaints have been reproduced above in their entirety. As noted, the Employer took as factual the complaint of the events of November 8. The Employer found violations of its harassment policy and took steps to deal with these violations. I agree with the Employer that the conduct of employees in this workplace was not what one would expect to find in many other workplaces. However, the evidence suggested that Mr. Fair treated both males and females in a similar fashion and that he subjected both males and

females to the type of conduct (labelled by the Employer as harassment) about which the grievor complained. I note as well that Mr. Fair was a co-worker, not the grievor's boss. In addition, the evidence suggested that many employees engage in similar banter or conduct. Finally, in November the grievor advised her physician that Mr. Fair's conduct was not sexual harassment.

Ms Tymburski undertook an extensive and careful investigation. She concluded the evidence did not support a finding of sexual harassment. My review of her notes of the interviews which she conducted with employees suggests that her conclusion was a reasonable one.

However, I did not have the same evidence on this issue which Ms Tymburski had. I have thus considered whether the grievor's complaints, even if they were all true (while the Employer accepted the November 8 allegations, the evidence regarding the other complaints was not extensive) constitute sexual harassment. I find the allegations on their face not to be of sexual harassment. I do not find the grievor's allegations about Mr. Fair's comments or activities to suggest that they were gender-based or sexual in nature, and nothing which I heard in evidence would demonstrate that they were. I am prepared to accept the Employer's conclusion that Mr. Fair engaged in harassing behaviour but, while I view Mr. Fair’s alleged conduct toward the grievor as harassing, disturbing, and bothersome, I do not find that his conduct was sexual harassment. I do not accept that all harassment of a female by a male is sexual harassment.

The allegations in Ms Larson's 1988 sexual harassment complaint were quite different from the grievor's complaints in this case and the evidence regarding Ms Larson's complaint does not assist the Union.

The letter from the grievor's lawyer alleged that persons other than Mr. Fair had engaged in

sexual harassment. The grievor's letters raised only her concerns with Mr. Fair, as did her testimony. I would nevertheless note that I heard no evidence which supports the allegations raised against the other employees.

The Union submitted that if it were sexual harassment the outcome should be different. As I do not find sexual harassment, a consideration of the conclusion which might flow from such a finding does not arise.

Although I do not have to consider whether the outcome would be different if I found sexual harassment, I would note that I know of no legal reason why the Employer would have had to act differently with respect to this grievor. Employers have a duty to keep the workplace free of sexual harassment. However, in this instance this Employer took the position that it was opposed to workplace harassment of any type and this Employer took steps to discipline the harasser and ensure that the grievor could return to work in an environment which was free from harassment and did not cause the grievor undue stress. As the Employer expressed a position of opposition to all workplace harassment and acted to enforce its position, the type of harassment is of no obvious importance in this particular grievance.

The other three mitigating circumstances relied upon by the Union have greater merit. The Union submitted first that it was unchallenged that the grievor was ill, second that the Employer had at no point indicated what the difficulties were with the medical evidence, and finally that the Employer did not take adequate steps to accommodate the grievor.

As for the first of these factors, the grievor was ill. She described herself as having had a "breakdown". Her physician concluded that she was suffering from anxiety/stress and this was not disputed by the Employer. I accept the physician's conclusion.

As for the second factor, while the Employer accepted that the grievor was sick, the Employer advised the grievor a number of times that her medical reports were not satisfactory. The Employer did not explain to the grievor what the difficulties were with her medical reports nor did the Employer explain how the Employer interpreted the reports nor indicate clearly what information was needed from her physician for her to remain off work on medical leave. The communications between the Employer and the grievor throughout this period seemed to have been strained, although it was not clear why this was so. For example, after the grievor supplied the two medical reports dated January 27, Mr. Rhéaume wrote to the grievor on February 10 indicating "You have no medical grounds to support your absence", without any clarification or elaboration. While this statement was technically correct, it was not a successful means of communication with the grievor as the grievor felt that the appropriate response was to secure additional forms similar to those which she had earlier provided to the Employer.

As for the third factor, while the Employer indicated the shift for which the grievor was to report for work, the Employer did not clearly indicate whether Mr. Fair would be working the same shift, or whether this proposal was designed to separate the grievor and Mr. Fair.

In the grievor's situation of anxiety and stress I do not believe that she clearly understood the situation which confronted her. Throughout this period the grievor was receiving advice from a variety of sources. Her lawyer's letter to the Employer dated February 19 indicates that the lawyer felt the grievor had been a victim of sexual harassment and sexual assault and was working in a poisoned environment. Throughout this period the grievor appears to have been in contact with the London Status of Women Action Group. It was this group which later organized the picket at the Employer's plant. The Steward whom the grievor consulted was Ms Larson, the complainant in the 1988 complaint against Mr. Fair. In any event, even with this variety of sources of information and advice, and possibly because of it, I am not

persuaded that the grievor fully understood the situation involving her employment. Her reaction to being told that there was inadequate medical information to support her absence was to provide additional medical notes. She does not seem to have been aware that while the Employer accepted she was under stress, the Employer disputed that she was sufficiently ill to be absent from work entirely. The Employer did not clearly make this point, nor clearly indicate that the suggestion she return to work on the 4:15 p.m. shift was designed to follow her physician's recommendations and allow her to avoid contact with Mr. Fair.

Following the February 18 letter giving the grievor her last chance, the grievor provided two additional notes dated February 20, 1997 from her physician. A lengthy break followed. During that time the Employer completed an investigation of the grievor's complaints and concerns as communicated by her lawyer. Following that investigation the Employer held a meeting on June 2, discharged the grievor and confirmed the discharge with a letter on the same day. Given the grievor's provision of two medical notes regarding medical justification for her leave, given the lengthy period of time between the threat of discharge on February 18 and the actual discharge on June 2, and given the lengthy and serious investigation which the Employer undertook during that period with respect to the concerns raised on the grievor's behalf, I find it surprising that the Employer's ultimate response was simply to implement the decision to terminate the grievor, a decision which it says was taken in the letter of February 18. In my view, given the time which had passed, the awareness of the grievor's medical situation and the stress that she was under, and having accepted that there was some substance to her various concerns, it would have been appropriate in June for the Employer to have first advised the grievor of its conclusions and then to have clearly advised the grievor as to the circumstances under which she could return to work, and finally to have advised her that if she failed to do so her employment would be terminated.

At the time of discharge (and I consider the Employer's submission on post-discharge events

in the next section) there was no indication that the employment relationship had ceased to be viable. Although the grievor was not at work she had been devoting considerable time and energy to workplace issues and the pursuit of her employment relationship.

While an employee's continued refusal to attend work as expected can form the basis for a dismissal, in the circumstances of this case I find discharge too severe a penalty for the grievor. Thus, using the language of this collective agreement, I conclude the Employer did not have "good cause" for discharge.

3. *What is the appropriate form of discipline?*

Having concluded that the Employer had cause for discipline but that discharge was too severe a penalty, I now consider the appropriate penalty.

I begin with the Employer's submission that if I conclude discharge was too severe a penalty - as I have - I should nevertheless refuse reinstatement because of the post-discharge conduct and in particular the picket and the banner.

When an employee covered by a just cause provision in a collective agreement has been discharged without cause, that employee is commonly, ordinarily, even presumptively, entitled to reinstatement. If it were otherwise, the Employer would in effect be able to discharge without cause. However, I also accept that the actual remedy for a grievor who has been discharged without cause has to be carefully addressed and that there will be occasions in which post-discharge events persuade an arbitrator that the remedy of reinstatement is not appropriate.

The evidence on post-discharge conduct was principally the evidence of the picket at the

Employer's plant and the banner which was hung from the fence. I noted earlier that the London Status of Women Action Group organised the picket conducted on the grievor's behalf, although the grievor did participate in it. There was no evidence as to who placed the banner. There was no evidence as to any harm or damage that the picket or the banner did to the Employer's business and in my opinion the harm, if any, was minimal.

While the grievor was responsible for her own involvement in the picket, I do not have any evidence from which I can conclude that she was responsible for the banner or for the organization of the picket. As for her involvement in the picket, I note that picketing is often viewed as the exercise of a right of free speech. I note as well that the purpose of both the picket and the banner appears to have been to secure reinstatement of the grievor in her employment. It would be unusual to deny the grievor reinstatement because she (and her supporters) openly expressed her desire for reinstatement. I thus reject the Employer's submission that the grievor should be denied reinstatement on the basis of the post-discharge activities.

I return to the question of the appropriate remedy. It is common for arbitrators faced with this sort of situation to reinstate the grievor and substitute a suspension without pay.

The grievor had been off work, with the exception of one week, for the period from November 8 to June 2. During that period she received no income from the Employer, other than the one week in January. She had suffered considerable loss of income in addition to suffering from the stress and anxiety for which she was consulting her physician.

On the other hand, while I have been critical of the Employer's actions in this matter, the grievor's actions merited discipline and she also bears some responsibility for both the poor communications and the situation which occurred.

Although the grievor indicated at the hearing that she wished to return to work, it may be that after the time and effort which her Union has spent defending her employment the grievor is unwilling to accept any of the available return to work arrangements. There were suggestions that the primary remedy which the grievor sought was Mr. Fair's discharge, or at least that she felt Mr. Fair, as the harasser, should be required to work elsewhere.

With respect to the possibility of further discipline against Mr. Fair, and with respect to the grievor's view that the Employer should accommodate her wishes by moving Mr. Fair, I would note for the grievor's information that the Employer is not allowed to impose additional discipline for the conduct about which the grievor has complained. Mr. Fair is covered by the same "good cause" provision which protects the grievor. Under such a provision an Employer can only impose discipline once for any particular misconduct. Thus, having disciplined Mr Fair, it is not legally possible for the Employer to again discipline Mr. Fair for the same conduct by imposing a more serious penalty such as a change in his shift, a change in his classification, or his discharge.

The Employer has taken appropriate action both regarding the grievor's complaints and against Mr. Fair. All that remains is a consideration of the remedy for the grievor for her unjust dismissal.

I have concluded that the grievor is to be reinstated in her employment.

Ordinarily, as an arbitrator, I would say nothing about the shift or position to which the grievor is to be reinstated. Collective agreements, such as the one between these parties, routinely deal with matters such as shifts and positions. However, in this case the Employer had indicated prior to the grievor's discharge a willingness to have the grievor return to work on the same shift as Mr. Fair but in another position or, alternatively, its willingness to have

the grievor return to work on a different shift. The Employer had thus indicated flexibility in accommodating the grievor. I heard nothing during the hearing which suggested that there had been a change in the Employer's position on this issue.

I do not intend to prejudge the available return to work options. However it appears that if the grievor only wishes to work the day shift in her current classification then she will have to work near Mr. Fair. If she is unable or unwilling to do that, but she nevertheless wishes to remain on the day shift then it will be incumbent upon her to take another position. Her alternative is to return to work on a different shift as the Employer requested.

I have concluded that the grievor is to be clearly advised of the reinstatement alternatives available to her and to make a decision as to whether or not she wishes to accept one of them. However, as there are collective agreement implications regarding other employees and their exercise of seniority rights and because of the difficulties in the earlier communications with the grievor on these issues, I believe the reinstatement process would be more effective if the Employer and Union were both involved in assessing the available options and in communicating those options to the grievor.

Thus I direct the Employer to discuss with the Union (preferably through the business agent or counsel) the various options available for the grievor’s return to work. The Employer and Union are then to jointly advise the grievor of the reinstatement alternatives which are available to her. The grievor will then have to consider under which of the Employer's reinstatement proposals she wishes to return to work. I direct the grievor to advise the Employer and the Union of her decision within five days of being advised of her reinstatement options. The grievor's failure to accept any of the available return to work options as communicated to her by the Employer and Union within five days of being advised of them shall be treated as a rejection of the reinstatement remedy available to her

in this award and the termination of her employment would, in that instance, remain.

In its reinstatement options the Employer is free to include a reasonable date for the grievor's actual return to work. If the grievor fails to return to work on the date to which she agrees, then that failure is to be regarded as a rejection of the reinstatement remedy available to her in this award and the discharge would remain.

If the grievor accepts reinstatement and returns to work, her reinstatement is to be on the following further terms:

1. The grievor is to be reinstated without any loss of seniority.

2. However, given the grievor's conduct and her refusal to make suggestions regarding her return to work, it would be unfair to the Employer to require the payment of any back wages for the period prior to June 2, 1997. Thus the grievor is entitled to no back pay for the period prior to June 2, 1997.

3. In addition, the grievor's record should reflect some discipline for her refusal to attend work. In place of the discharge, I substitute a one month suspension without pay from June 2 until July 2 because of her refusal to attend work or provide medical justification for her absence.

4. This leaves the issue as to what, if any, relief the grievor is entitled to for the period after July 2, 1997. I heard no evidence that would assist me on this issue. The Union suggested that if I reached this stage I should direct the parties to consider this issue and that I should remain seised. The Employer did not contest this suggestion. In the circumstances, then, I direct the parties to consider this issue of compensation for the

period after July 2, 1997.

Finally, I remain seised to deal with any issues which may arise in the implementation of this award, including the issue of compensation.

Dated at London, Ontario, this 24th day of November, 1997.

Howard Snow, Arbitrator