

IN THE MATTER OF AN ARBITRATION

BETWEEN:

KEMESS MINES LTD.

(hereinafter referred to as the "Employer")

AND:

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 115

(hereinafter referred to as the "Union")

(Goudreau Arbitration)

Arbitrator:

H. Allan Hope, Q.C.

Counsel for the Employer:

Peter Gall, Q.C. and Jessica Connell

Counsel for the Union:

John MacTavish

Place of Hearing:

Prince George, B.C.

Date of Hearing:

January 10 and 11, 2006

Date of Award:

February 27, 2006

A W A R D

The Dispute

[1] This dispute involves grievances filed on behalf of the Grievor, Andy Goudreau, on July 25 and July 27, 2005 respectively. The Grievor, who is 67 years old, began his employment on November 5, 1997. The grievances relate to his suspension without pay and subsequent dismissal in response to what the Employer viewed as separate incidents of racial harassment contrary to its Human Rights Policy. The suspension was imposed for reasons outlined in a letter dated July 14, 2005 from Linda Hodgson, the Employer's Human Resources Superintendent at the Kemess Mine. The Mine Site is located approximately 300 miles northwest of Prince George. The events giving rise to the dismissal were recorded in a similar letter from Ms. Hodgson dated July 27, 2005.

[2] The facts that resulted in the suspension and subsequent dismissal occurred at the Mine Site on July 9 and July 13, 2005 respectively. The suspension arose from a complaint filed by Yoshi Hirano, an employee of Eurest Support Services Ltd., the catering company that operates the residential and meal facilities at the Mine Site. The Site is remote. There are no residential or meal facilities available other than those offered by the Employer through its catering contractor. The suspension letter reads as follows:

This letter is to formally outline the reasons for your suspension without pay. On July 12, 2005 a meeting was held with you and the Union representative in attendance

in regards to an allegation of you harassing a member [of the] catering staff. This allegation is a violation of Kemess Mine's Human Rights policy. You denied making the statements as presented at the meeting. However, due to the seriousness of the allegation it was necessary to remove you from the workplace to give the Company an opportunity to fully investigate the issue. On completion of the investigation the Company will contact you to advise you of the outcome. (emphasis added)

[3] The suspension was imposed following the July 12 meeting and management's review of the preliminary facts it had gathered in the wake of Mr. Hirano's complaint. The inference invited by the evidence is that the Employer intended to pursue its investigation of that incident to determine what actually occurred and what disciplinary response, if any, was appropriate. The complaint was set out in a statement written by Mr. Hirano which was dated July 12, 2005 and which was read out in the meeting. In these proceedings the Employer introduced an ex post facto statement in support of the suspension which was dated July 13, 2005. It was written by Cecilia Reeb, Mr. Hirano's immediate supervisor. She was present at this hearing but did not give evidence. Mr. Hirano was the only person the Employer had interviewed who was present in the incident that gave rise to the complaint. He was also present at this hearing and did give evidence.

[4] The Grievor was the only other person at the July 12, 2005 meeting who was present during the incident giving rise to the suspension. There were other employees present during the incident who were not interviewed before or after the incident. That fact is significant in light of differences between the parties

with respect to the exchanges that took place during the meeting. It is reasonable to assume that if the investigation had continued as anticipated in the suspension letter, the disputed facts would have been further developed in terms which would permit a clearer understanding of what occurred.

[5] Subject to those preliminary observations, I turn to the Hirano incident. It occurred during the serving of the evening meal in the dining facilities maintained by the catering contractor. Mr. Hirano, whose racial origin is Japanese, is a senior cook in the facility. He had an exchange with the Grievor that he viewed as involving a comment that he found offensive. From his perspective, the comment was compounded by a previous exchange with the Grievor that occurred approximately six months before the July 9 incident. Mr. Hirano's account of those two events was set out in his July 12, 2005 statement. It reads as follows:

On Saturday July 9th I came on the line to offer assistance to Andy [the Grievor] because he was looking for a food item that he saw but wasn't on the menu that evening. Before I could help him he looked at me and said "I'll go down the road and get some Chinese food". I feel this was a racist comment. [M]y reply to this comment was "I'm not Chinese" and [I] left immediately. Prior to this occurrence I was carving Prime Rib one night, I served him just the same as everyone else and Andy told me I was being "cheap" and said "we were in Canada a meat and potato country, not China". I feel that these comments made to me [are] based on my race and culture, and find what was said to be insulting and demeaning.

[6] In the July 12 meeting called to address Mr. Hirano's complaint, the Employer was represented by Robert Thurston, the Employer's electrical foreman; Ron Movold, the Employer's electrical general foreman; Ms. Hodgson; and Tony Marconato, the production manager. Ms. Hodgson was the only one of that group who attended the hearing and the only management official to give evidence on behalf of the Employer. She was assisted in her evidence with respect to the meeting by reference to notes she had taken while it was in progress and which she later transcribed.

[7] The meeting was conducted by Mr. Marconato. At the time of the hearing he was no longer an employee of the Employer and, as stated, he did not give evidence. Attending the meeting on behalf of the Union was Pat Moth, the Union's representative at the Mine Site, and the Grievor. Mr. Moth, was also assisted by notes he had made during the meeting. He recorded the following comments attributed to the Grievor:

I was looking for chicken to eat. He [Mr. Hirano] asked where I was going to eat. I told him I would go down the road to the Chinese Restaurant. He said that he was not Chinese and left.

[8] Mr. Moth also said that he had recorded Mr. Marconato as having acknowledged that the Grievor had said in the meeting that another kitchen employee present at the time had tried, in effect, to tell Mr. Hirano that the Grievor had not intended to insult him. In his evidence, the Grievor gave a similar account of the July 12 meeting and said that he did not view his exchange with Mr. Hirano

as racist, nor did he intend any racist implication in his reference to a Chinese restaurant. However, the Grievor also said that it was evident to him immediately following the exchange that Mr. Hirano was upset, and that, when he completed his meal, he returned to the serving line with the intentions of speaking to Mr. Hirano to determine if he had offended him.

[9] The Grievor said that he approached one of the cooks who remained on the serving line and asked to speak with Mr. Hirano, but that Mr. Hirano, who was out of view in the kitchen, did not want to speak to him. The Grievor also quoted that cook as having said to him that Mr. Hirano had misunderstood his comment. As stated, Ms. Hodgson was the only witness called by the Employer who was present at the meeting. She did not disagree with the account given by the Grievor and Mr. Moth. However, she did not recall all of the comments put to her in cross-examination, some of which were later recited by them in their evidence. Her recollection of events was reflected in the notes she recorded coincidental with the meeting. They read as follows:

Andy Goudreau – Harassment Allegations

Union: Pat Moth

Company: Robert Thurston, Electrical Foreman; Linda Hodgson, Human Resources Superintendent; Tony Marconato, Production Manager; Ron Movold, Electrical General Foreman

T.M. [Tony Marconato] This is in regards to a conversation with the chef in the kitchen the other night. What was said?

A.G. [The Grievor] They ran out of chicken – said that I was going to Chinese restaurant. Yoshi [Mr. Hirano] said that he was not Chinese.

T.M. Read Yoshi's statement (attached to file note).

A.G. Denied the last part of Yoshi's statement re: the prime rib incident.

T.M. Reviewed the Kemess Mine Human Rights policy with Andy and also reviewed Article 1.02(a) of the Collective Agreement.

A.G. One of the other cooks said that it was a misunderstanding on his (Yoshi's) part.

Andy denied referring to "Chinese".

T.M. advised Andy of the need to address situations such as this.

Tony asked Andy and Pat to leave and give the Company some time to talk about the issue and decide how to proceed.

T.M. We have a pretty strong statement that we are going to react to and investigate. We are going to suspend you and contact you after the investigation.

A.G. I'm married a [Filipino] woman – does that make me racist?

T.M. Don't know – you spoke the words. We need to investigate and will contact you.

[The Grievor] was scheduled to go out on the next flight – Wednesday, July 13th.

[10] It is noteworthy that, as stated, neither Mr. Hirano nor his manager, Ms. Reeb, were present at the July 12 meeting to respond to differences between Mr. Hirano and the Grievor with respect to what occurred in the brief exchange that gave rise to the suspension. Further, the Employer did not have available the statement made by Ms. Reeb, nor did management solicit statements from other employees of the contractor who were present at the time. In that context, Ms. Hodgson had recorded that the Grievor had said in the meeting that, "one of the other cooks said that it was a misunderstanding on his [Yoshi's] part". That "cook" was not further identified and neither his observations nor his conclusion that a misunderstanding had occurred were pursued by the Employer.

[11] Also filed in evidence in this hearing was the statement made by Ms. Reeb. As stated, she is one of the camp managers employed by the catering contractor and was the manager on duty during the incident in question. She attended this hearing but did not give evidence. Her account of events was dated July 13, 2005. It referred to observations she had made at 7:15 p.m. on July 9, 2005, but was dated the day after the meeting. Her account reads as follows:

During my usual walk around of the kitchen I asked Yoshi about his evening. He was very angry and told me about Andy [Goudreau]. There was a situation where we did not have the food item Andy wanted to take for his lunch, which by the way was not on the menu. Yoshi offered Andy pork souvlaki which was our replacement for pork cutlets. Andy's reply was "I'll just have to go to the next Chinese restaurant". Yoshi was very insulted by this and replied, "I'm not Chinese" and walked away. Yoshi apologized to me for being unprofessional and

getting angry but he was sure if Terry Hamilton had been in the situation there would have been no remark about Chinese. Yoshi also told me this was not the first time Andy had been insulting and racist. Yoshi remembers a carving night when Andy said to him "Don't be cheap, your in Canada now. We're a meat and Potato country not China, where they have little meat and lots of vegetables". On Saturday Mike Clark affirmed what Yoshi had said and added that Andy came to him to say that he did not mean anything by that remark. Mike has now said that both Yoshi and Andy lost their tempers and it was probably not a big of an issue as it is being made out as. I know how upset Yoshi was and feel that he was truly offended by these racist remarks from Andy. I know it is my responsibility to protect those who are employed by ESS and to provide them with a safe and harassment free environment to work in. I feel these remarks are a big issue. I am relieved that Kemess is taking this as a serious issue.

[12] That statement was not available prior to the Grievor's suspension. The inference invited by the evidence is that the Employer's investigation of the Hirano incident was abandoned when the second incident occurred that triggered his dismissal. That incident occurred on July 13, 2005 when the Grievor was in the course of boarding a crew bus which was scheduled to transport employees of the Mine and the catering contractor to the Mine's airport. The Grievor was boarding the bus out of his usual rotation because he had been instructed to leave following his suspension.

[13] As noted in Ms. Hodgson's notes of the July 12 meeting, "[The Grievor] was scheduled, [out of turn] to go out on the next flight – Wednesday –

July 13". The bus was full when the Grievor arrived except for two seats at the back. As he was threading his way down the aisle of the bus, the Grievor made a comment to the effect that; "all coloured people to the back". His comment resulted in a complaint by Mederic Poirier, a cook employed at the Mine Site by the caterer, Eurest Support Services, who was also on the bus. The Grievor made that comment as he was passing between Mr. Poirier and an unidentified passenger sitting across the aisle. He did not pause or stop as he passed between the two seats. Mr. Poirier, who is First Nations, was on the bus in preparation for leaving on his regular rotation. He immediately concluded that the Grievor was addressing the "back of the bus" comment to him. He wrote the following report on July 14, 2005:

On Wednesday July 13 I was sitting on the bus waiting for it to leave to the airport. Andy looked at me and said, "colored people sit in the back of the bus" as he was walking past. I replied "colored people!?" He then said "I'm glad you learned how to speak English". I found these comments to be racist towards me. Having these things said as well as people laughing I felt uncomfortable as well as out of place.

[14] In the hearing Mr. Poirier added to that account, saying that when the Grievor made the "back of the bus" comment, he said, "coloured people?!" in the form of an exclamatory question, but that he then added, "fuck you", in a loud tone. He said it was then that the Grievor said, "I'm glad you learned how to speak English". In any event, the complaint was addressed by the Employer in a conference telephone call that involved Ms. Hodgson, Mr. Marconato, the Grievor

and Mr. Moth. Notes made of the telephone conversation by Ms. Hodgson read as follows:

Re: Andy Goudreau

Telephone call to Andy Goudreau

Union: Pat Moth

Company: Tony Marconato, Linda Hodgson

T.M. [Tony Marconato] Andy since your suspension we received another statement.

Tony read the complaint from Wednesday, July 13.

A.G. [The Grievor] I said all colored people to the back meaning me. All I heard is "F_____ you".

T.M. We will be terminating your employment.

A.G. I talked to a lawyer he said there was nothing wrong with what I said.

T.M. We have an obligation to protect the rights of employees and to protect them from harassment. We will send in your stuff to your house.

A.G. I will be talking to my lawyer.

[15] That terse exchange constituted the Employer's entire investigation into the second incident. As noted in the extract, the Employer dismissed the Grievor on the basis of "the complaint from Wednesday, July 13". The Complainant, Mr. Poirier, attended this hearing and gave evidence. He explained

that he left out the, “fuck you”, comment because he did not consider it appropriate to include it in a written statement. In his evidence the Grievor acknowledged having made the “back of the bus” comment that invited Mr. Poirier’s somewhat colourful response. He also acknowledged having made the comment attributed to him by Mr. Poirier to the effect that, “I am glad you learned how to speak English”. However, in admitting the basic facts, the Grievor said that he was not addressing Mr. Poirier when he made the comment about coloured people and did not hear him say, “coloured people!?” He said that all he heard Mr. Poirier say was, “fuck you”. The Grievor said that he was responding to that unexpected comment when he made his “learning to speak English” retort.

[16] I pause to note that the Grievor was less than articulate in his evidence, particularly with respect to his efforts to describe his motivation and intent in the various comments attributed to him. Reading between the lines, my conclusion is that the gist of the Grievor’s responses about the bus incident was that he was self-conscious as he boarded the bus and his “back of the bus comment” was an effort to make light of the circumstances. In any event, the Grievor, as stated, said that the only part of Mr. Poirier’s statement that he heard, was, “fuck you”. The Grievor said he did not hear Mr. Poirier pose the exclamatory question, “coloured people!?”.

[17] Mr. Poirier reached the conclusion that “coloured people” comment was directed to him on what amounted to the Grievor’s body language. He said that as the Grievor was threading his way down the somewhat cramped aisle of the bus, he looked directly at Mr. Poirier as he was making the comment. Mr. Poirier

said the Grievor looked directly at him and he concluded that the remarks in question were addressed to him.

[18] As stated, the Grievor said that he was not speaking to Mr. Poirier and that his reference to coloured people was not directed at anyone on the bus. He said that his comment was self-effacing and was responsive to the fact that the only seating available to him was at the back of the bus. In saying that the comment was not directed at anyone on the bus, he said that, in fact, there was at least one other employee who was not "Caucasian [and] who did not take offense". In short, the Grievor said the comment was not intended as a reference to Mr. Poirier. He said that his reply about learning English was in response to Mr. Poirier's, "fuck you".

[19] On July 27, 2005, one week after the telephone conversation, the Grievor was dismissed. There had been no investigation into the second incident prior to the dismissal. There was no indication that the Employer interviewed any of the passengers on the bus other than Mr. Poirier. On the evidence, the Employer simply concluded that Mr. Poirier's perception on the incident was correct. The decision to dismiss was made entirely on the basis of the July 20, 2005 telephone conversation. The letter of dismissal reads in part as follows:

You were suspended without pay on July 12, 2005 pending a complete investigation of the allegations of harassment. Further to this meeting, on July 13, 2005 there was a further incident of harassment by you on the bus prior to your departure from the mine site. As was discussed with you at the meeting on July 12th this

behaviour is contrary to Kemess Mine's Human Rights Policy. On July 20th you received a telephone call from the Company to discuss with you the second incident of harassment. It was determined that as a result of your actions and blatant disregard for the Human Rights policy that you had left the Company with no choice but to terminate your employment.

[20] In weighing the evidence in terms of the factual issues in dispute, I note that the appropriate test is that described in the oft-quoted decision of the British Columbia Court of Appeal in Faryna v. Chorny, (1952) 2 D.L.R. 354 (B.C.C.A.). On p. 174 O'Halloran J.A., writing for the Court, wrote in part as follows:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his [or her] story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. (emphasis added)

[21] That test is routinely applied by arbitrators to a broad range of credibility issues from the truthfulness of a witness to the reliability of the disputed evidence when analysed in the context of the doctrine of probabilities. It is in that latter sense that the reasoning in Faryna v. Chorny applies to this dispute. In

particular, the question is whether the evidence given on behalf of the Employer offers a version of events which is more probable when weighed in the context of the surrounding facts.

[22] Incorporated in that weighing of the evidence is the question of whether the account given by witnesses called by the Employer can be viewed as more likely in the context of the proven facts than the competing version given by the witnesses called by the Union, including the Grievor. The onus of proof in this case was on the Employer to prove facts upon which it relied to a balance of probabilities and that those facts constituted racial harassment within the meaning of the Employer's harassment policy and within the reasoning in the arbitral authorities having application to offences of workplace harassment. In para. 105 of Laidlaw Transit Ltd. and Teamsters' Local Union No. 31, [1998] B.C.C.A.A.A. No. 181, Award no. A-46/98, Arbitrator Gordon wrote as follows:

105 The onus of proof rests with the Employer. The standard of proof is the balance of probabilities. Serious allegations of misconduct, such as sexual harassment, justify an arbitrator scrutinizing the evidence with greater care: Continental Insurance Co. v. Dalton Cartage Co. (1982), 131 D.L.R. (3d) 559 (SCC).

[23] That same reasoning applies to an allegation of racial harassment which is an equally serious allegation of misconduct and, as this case testifies, carries the same grave implications in terms of employment security. However, as noted by Arbitrator Jordan on p. 443 in Stongs Markets Ltd. and Retail Clerks' Union, Local 1518, (1982) 5 L.A.C. (3d) 438:

An adjudicator who is faced with conflicting versions of an offence must make a decision in favour of one of those versions before he can apply the onus or proof and determine whether it has been satisfied. For a decision maker to accept both versions as plausible and to dismiss an allegation by saying that the onus of proof has not been satisfied is, in the words of the Manitoba Court of Appeal in Cantlie v. City of Winnipeg et al., [1976] 3 W.W.R. 667, a “denial of justice”.

[24] It is advisable in the test of credibility to repeat that the essential issue raised is not one of truthfulness. The Union challenged the accuracy of the evidence given by the witnesses called by the Employer, but not their truthfulness. For its part, the Employer challenged both the accuracy of the evidence given by the Grievor and his truthfulness. However, I was not able to find facts which would support the conclusion that the Grievor was deliberately lying in the aspects of his evidence which were relevant to a resolution of the credibility issue.

[25] The difficulty in weighing the evidence of the first incident is determining which of various accounts are more reliable. My sense is that the notes made by Ms. Reeb of her interview with Mr. Hirano invite the conclusion that the Grievor made the offensive statement with respect to going to a Chinese restaurant when Mr. Hirano approached him to inquire with respect to whether he wanted to accept a substitute for the chicken dish the Grievor was expecting to find. There is no doubt in the evidence that the offensive statement was made by the Grievor and, despite his protests, it was racist in the objective sense that it was clearly, albeit erroneously, a stereotyping of Mr. Hirano’s race in a context which was unflattering.

[26] I pause to note that my preference for the notes made by Ms. Reeb arises from differences with respect to the nature of the exchange that took place between the Grievor and Mr. Hirano on July 9, 2005. In his written statement and in his evidence, the recollection of Mr. Hirano was that as he approached the Grievor to offer assistance, the Grievor said "I'll go down the road and get some Chinese food", being a comment Mr. Hirano viewed as having a racist implication. The Grievor was equally terse in the statement attributed to him by Ms. Hodgson in the notes she prepared of the July 12, 2005 interview. However, the notes of that interview kept by Mr. Moth recorded a statement by the Grievor indicating a more expanded context for the exchange. The Grievor was recorded as having said that he was looking for chicken to eat and that Mr. Hirano asked him where he was going to eat, to which he replied that he would "go down the road to the Chinese Restaurant".

[27] In considering the question of which account was most accurate, the statement taken by Ms. Reeb supported the inference that a more expanded discussion took place. As indicated, Ms. Reeb recorded Mr. Hirano as having said that the exchange took place when the kitchen did not have a food item that the Grievor wanted to take for his lunch, later identified as chicken. She quoted Mr. Hirano as having offered an exchange dish, described as "pork souvlaki", which caused the Grievor to comment, "I'll just have to go to the next Chinese Restaurant". It was apparent on the evidence and the written statement of Ms. Reeb, who was present but who did not give evidence, that there was no unanimity between the various parties with respect to exactly what was said in the incident.

[28] What was clear in the evidence was that the Grievor reacted to the inability of the kitchen staff to meet his request for a chicken dish but that the precise text and context of his comment was not clear. His comment was variously recited in the evidence. Paraphrasing Mr. Hirano, the Grievor said, "I'll go down the road and get some Chinese food". In the statement of Ms. Reeb, he was recorded as having said, "I'll just have to go to the next Chinese Restaurant". In the various notes of the July 12, 2005 meeting he was quoted as having said, "They ran out of chicken, [I] said I was going to [a] Chinese Restaurant", or, as recorded in the notes of Mr. Moth, "He, [Mr. Hirano] asked me [where] I was going to eat. I told him I would go down the road to the Chinese Restaurant".

[29] There was no consensus achieved in the evidence, including the documentary evidence, with respect to what was said by Mr. Hirano, if anything, to lead the Grievor to make the Chinese restaurant comment. However, in his evidence, the Grievor offered what might well be an explanation. When he was being cross-examined with respect to his inexplicable evidence that Mr. Hirano had said, "where are you going to eat", he admitted that his recollection made no sense in the circumstances. That is, he acknowledged that there was no reason why Mr. Hirano would be asking that question. However, when pressed, the Grievor said that Mr. Hirano's question, spoken with his accent, may have been, "What are you going to eat". That question was consistent with the statement filed in evidence from Ms. Reeb who recorded Mr. Hirano as having approached the Grievor to inquire about whether he wanted something to eat in replacement for the chicken. In that context, it would be consistent for Mr. Hirano to have asked the Grievor a question relating to what he wanted to eat by way of substitution.

[30] In the final analysis, the variations recalled by the witnesses did not detract from the fact that the Grievor made a comment which incorporated what may be described as racial innuendo. What is significant is that the comment was not overtly malicious or racist. The Grievor insisted that he did not recall why he had made the statement. He insisted that he did not intend it as an insult and that it was not provoked by a racist attitude on his part. Be that as it may, I agree with the Employer that statements which incorporate words that can be taken as racist are to be read objectively and that a belated assertion that the words were not intended to be racist is no answer.

[31] Furthermore, the statements the Grievor admitted making must be weighed in the context of the earlier incident which Mr. Hirano had elected to ignore. Once again, there was no consensus with respect to precisely what words were used. In context, however, it is convenient to record the words described by Ms. Reeb in her interview of Mr. Hirano. She quoted Mr. Hirano as having said that the Grievor's response when he was given a slice of roast beef that he viewed as niggardly, was, "Don't be cheap, [you are] in Canada now. We are a meat and potato country, not China, where they have a little meat and lots of vegetables".

[32] The Grievor did not deny having made a statement similar to that, but, once again, he denied that it had any racist implication in his eyes. However, applying the objective test favoured by the authorities, I conclude that the comments in both cases invoked stereotyping which carried the mistaken implication that Mr. Hirano was Chinese and, as such, that he was culturally inferior to his Caucasian counterparts. I agree with the Union that no weight can

be given to the first incident because of the failure of Mr. Hirano to report it and the consequential failure of the Employer to address it. That failure is not something to be criticized in the sense that Mr. Hirano demonstrated both a sense of personal dignity and of tolerance in reacting to what was the first instance of a provocative comment. But the purpose the Employer asserted for introducing the evidence was that it demonstrated racist tendencies on the part of the Grievor. The failure of Mr. Hirano to report the incident, admirable as that restraint was, deprived the incident of any disciplinary implications in the context of progressive discipline and the doctrine of the culminating incident.

[33] I pause to note that the Grievor said that during his July 12 interview, Mr. Marconato, who was conducting the interview, accused him on two occasions of being a racist. That account was not refuted by the Employer. Mr. Marconato, who had left the employ of the Employer at the time of the hearing, was not called as a witness. There was no context given with respect to his racist accusation, but it does give perspective to the approach taken by the Employer in its investigation. That is, it supports the conclusion that the Employer had accepted that the Grievor was a racist who had made two racially motivated statements to Mr. Hirano which were breaches of its Human Rights Policy. The Employer relied in particular on a section of the policy that reads in part as follows:

Personal harassment is defined as any comment or conduct that is unwelcome or that ought to be known to be unwelcome and that is related to one or more of the protected categories of the Human Rights Code. Such behaviours may cause a person to feel degraded,

humiliated, or embarrassed. It includes, but is not limited to: - Racist slurs and jokes ...

[34] The evidence was that extracts from the policy deemed relevant by the Employer were read out to the Grievor in a context that implied that the Grievor had made the comments attributed to him and that he simply “didn’t get it” in the sense that he did not agree then or now that his comments were racially motivated or intended to be “racist slurs or jokes”. The inference I drew from the Grievor’s evidence was not that he did not understand that pejorative references to a fellow employee’s race were inherently improper. It was that he did not view his comments in that light.

[35] The Grievor reflected a similar approach to the incident on the bus. He denied that his “back of the bus” comment was directed at anyone on the bus. As stated, his evidence was that he was the last person to board the bus and, as he made his way to the back, he made the comment as an attempt at humour to lighten his self-consciousness as he progressed down the aisle of the loaded bus to find his seat at the back. He said that his comment was received by the bus load of passengers as humorous. He said that his comment was not directed at Mr. Poirier and that his response to him was triggered by the words, “fuck you”, being the only words he heard. He said that his response was not intended to be racist as opposed to a reply in kind to what he took to be a slanging of him by Mr. Poirier.

[36] The Grievor was clumsy and somewhat inarticulate in his explanations, but it was clear that he did not intend his comments to be racist. All in all, it was a naïve and ingenuous reaction. However, nothing in the evidence

supported a finding that he had singled out Mr. Poirier for his “back of the bus” comment. There was nothing in the context recited in the evidence to suggest that he was meaning that Mr. Poirier should move to the back of the bus. When the totality of the evidence is weighed, the facts do not support a conclusion that either of the two incidents were racially motivated as opposed to isolated and ignorant jousting in a closed work environment.

[37] There were significant differences between the parties with respect to the extent to which the Grievor attempted to apologize for his comments. It was clear that no apology was delivered prior to the hearing to Mr. Hirano or Mr. Poirier. In his evidence the Grievor said that he had attempted on two occasions to apologize to Mr. Hirano but that Mr. Hirano would not talk to him and appeared to be avoiding him. The Employer said that the absence of an apology was a significant failure on the Grievor’s part. It cited Carbioo-Chilcotin School District No. 27 v. International Union of Operating Engineers, Local 859, [2004] B.C.C.A.A.A. No. 317 (Hope) at para. 31:

The general principle was addressed in Canadian Labour Arbitration in para. 7:4422 at 7-250 as follows:

Thus, many arbitrators have explicitly examined and ultimately relied upon the rehabilitative potential of persons who, for example, had seriously threatened, or actually physically abused members of management, or engaged in an act of theft, or even sabotage, or were addicted to gambling, as a basis for substituting a period of suspension for the discharge initially

imposed ... [S]ome arbitrators, by implicitly assuming that an employee who immediately admits his wrongdoing and/or tenders an apology following his misconduct thereby recognizes the impropriety of his behaviour and thus would more likely be capable of conforming to the expected norms, have relied on that fact as a basis on which to ameliorate the discipline imposed. This emphasis on the rehabilitative potential of the grievor seems particularly compelling in those instances where the arbitrator is satisfied that the employer's interest in protecting the integrity of its service can be satisfied by some sanction other than the dismissal of the employee in question. Conversely, where arbitrators can imply, from the grievor's refusal ... to acknowledge the wrongfulness of his conduct ... they have relied upon that as a factor in determining not to exercise their discretionary powers to modify the discipline imposed.

[38] In support of its submission that harassment is serious misconduct in the workplace, the Employer cited Clarendon Foundation and O.P.S.E.U., Local 593, (2000) 91 L.A.C. (4th) 105 (Sarra) and Trillium Health Centre and C.U.P.E., Local 4191 (Borgona), (2001) 102 L.A.C. (4th) 48 (Surdykowski). The Union did not seriously argue against that proposition or that the conduct of the Grievor was deserving of some form of discipline. Its position was that dismissal was a response which was disproportionate to the facts.

[39] In that context, the Union relied on Vancouver Native Housing v. United Food and Commercial Workers' Union, Local 1518 (August Grievance), [1999] B.C.C.A.A.A. No. 461, Award no. X-138/99 (Coleman); Manitoba Government Employees' Union v. Manitoba Lotteries Corp., [2003] M.G.A.D. No. 69 (Peltz); Tolko Industries Ltd. and IWA-Canada, Local 1417, [1997] B.C.C.A.A.A. No. 247, Award no. A-115/97 (Lanyon); Woodland Windows v. Industrial Wood and Allied Workers of Canada, Local 1-424, [1994] B.C.C.A.A.A. No. 29, Award no. A-27/94 (Albertini); Lornex Mining Corporation Ltd. and United Steelworkers of America, Local 7619, April 23, 1986, unreported (Chertkow); and Public Service Employee Relations Commission and British Columbia Government and Service Employees' Union (Templeton Grievance), [1998] B.C.C.A.A.A. No. 191, Award no. X-29/98.

[40] The Employer relied on the authorities previously cited to support a submission that it was under a positive obligation to "deal forcefully" with discriminatory practices by employees, even where the employee asserts that there was no intention to discriminate. In its view, the authorities support the proposition that where conduct is seen as discriminatory in an objective evaluation, the conduct cannot be excused on the basis that it was unintentional.

[41] The Employer also relied heavily on the fact that the Grievor had persistently denied that his conduct was racial harassment and that he had failed to either apologize or take any positive steps to apologize. In its view, the evidence supported the conclusion that the Grievor was in denial with respect to his conduct and could not be trusted to avoid similar conduct in the future if he were to be

reinstated. In that context the Employer noted that both of the Complainants had expressed concern about the possibility that the Grievor would be returned to the workplace. The Complainants repeated those concerns in this hearing, including the prospect of having to confront him on a routine basis.

[42] The position of the Union, as stated, was that while the Grievor's conduct in the first incident may be deserving of discipline, it fell far short of constituting just cause for dismissal. Its position with respect to the second incident was that it was simply an unfortunate misunderstanding on the part of the Complainant, Mr. Poirier and, while his, "learning to speak English", comment was of a racial cast, it arose out of the confusion of the event. In its view, the circumstances in both incidents should have been met with a warning or a short suspension.

[43] I agree with the Employer that racial harassment is a serious offence against the discipline that employers are expected to achieve and maintain in the workplace. That requirement is of greater importance in the work environment at issue in this dispute. That is, employees at the Mine Site do not simply work together, they reside together, eat together and, to a significant extent, spend their off work hours together. It would be difficult to conceive of an employment situation in which the potential for racial disruption is more volatile. In that context, I accept that the comments made by the Grievor in the first incident constituted racial harassment.

[44] That reasoning applies despite the Grievor's assurance that the comments were not racially motivated and that he is not a racist. However, the evidence does not support the Employer's characterization of the Grievor's conduct as being spurred by a racist attitude. The onus on the Employer was to prove the facts upon which it relied to a high degree of probability, given the seriousness of the allegation made against the Grievor and the devastating consequences associated with finding those facts to have been proven. Arrayed against the inferences to be drawn from the brief facts is the improbability that an employee with approximately eight years of service in that close work environment could have succeeded in suppressing racist attitudes for all of those years.

[45] To conclude that the Grievor is a racist, to paraphrase O'Halloran J.A. in Faryna v. Chorny, would be out of "harmony with the probabilities which a practical and informed person would readily recognize as reasonable" in the employment setting that exists at the Mine Site. I agree with the submission of the Employer that employees are accountable for actions on their part which, viewed objectively, are racist in appearance. To accept the Grievor's assertion that his reference to a Chinese restaurant was not racist, when viewed objectively, it would be necessary to have him explain the comment in terms that softened the innuendo implicit in the words used. In fact, he was unable to explain the comment in any terms. But the inference invited by the facts is that the Grievor's comments were motivated by ignorance rather than malice. It must be assumed that if in fact he was a racist, expressions of it would have surfaced long since.

[46] I accept the evidence of the Grievor that his comment's were not intended as a racial slur, however naïve and insensitive that assertion appears in retrospect. But whether or not the comments were intended as a racial slur and whether or not they were intended to create offence, the fact is that they did create offence and, viewed objectively, they could be expected to have created offence. Mr. Hirano did not appear in his evidence to be unduly sensitive. He gave his evidence with a significant measure of personal dignity and tolerance and, as stated, he had already overlooked a previous comment by the Grievor which involved racial stereotyping. In short, the fact that Mr. Hirano, with his tolerant nature, did take grievous offence only when his first experience with the Grievor was repeated, speaks to the question of whether the comments were in fact offensive, regardless of the Grievor's intentions.

[47] Turning to the second incident, I accept the Grievor's assertion that he did not address his "back of the bus" comment to anyone on the bus. In particular, I accept his statement that he did not direct that comment at Mr. Poirier. However, the Grievor did not deny that his comment about, "learning to speak English", was directed at Mr. Poirier. On the facts, I conclude that the Grievor may have made the "back of the bus" comment as a reflection of his self-consciousness at boarding a crowded bus to leave the Mine Site at a time when he would not normally be leaving. But, I also accept that Mr. Poirier, though mistaken, believed that the comment was directed at him and, given the circumstances, that his conclusion was understandable.

[48] In any event, the “back of the bus” comment was offensive and racist in its innuendo, even accepting that it was not directed at any one on the bus. In that context, the Grievor, having uttered a racist comment, was accountable for the reaction it triggered in Mr. Poirier. In that same vein, the Grievor was clearly accountable for his, “speaking English”, comment, even accepting that it was a riposte to what the Grievor perceived as a casual slanging of him by Mr. Poirier. In short, I believe the evidence of both witnesses, being the only witnesses called who were present during the incident. That finding is dictated by a weighing of the probabilities inherent in the event. It is not difficult to accept that it is likely that the Grievor, having been ordered to leave the Mine Site out of rotation and on suspension, would be self-conscious about a boarding a bus loaded with other employees who may or may not have known about the circumstances of his leaving.

[49] On the facts, it is more likely that the Grievor’s comment about the “back of the bus” was motivated by his self-consciousness rather than as a racial slur directed for no apparent reason at Mr. Poirier. In that context, the Grievor’s history of employment, as with the first incident, mitigates against a finding that he was a racist. More singularly, there was nothing in the evidence to explain why he would make such a comment to Mr. Poirier. There was no history of any animosity or racial tension between the Grievor and First Nations employees generally or Mr. Poirier specifically.

[50] Having said that, however, I agree with the arbitral authorities relied on by the Employer to the effect that actions that can be viewed objectively as

racially motivated create an accountability in an employee who is responsible for the conduct. Whatever its motivation, in the multi-racial setting found in the Mine Site in general and the crew bus in particular, a reference to, “coloureds to the back of the bus”, risks the incitement of an adverse reaction from one or more of the employees. That is, the comment, at best, was a clumsy attempt at humour that betrayed an insensitivity and ignorance which has long since been viewed as unacceptable, particularly in a workplace. Further, the comment about “speaking English”, which was directed specifically at Mr. Poirier, was an insidious form of racial stereotyping which was equally unacceptable and, in that sense, constituted racial harassment as defined in the Employer’s policy.

[51] Hence, I conclude that the Grievor’s conduct in both incidents was deserving of discipline in the sense contemplated on p. 5 of Wm. Scott and Company Limited and Canadian Food and Allied Workers Union, Local P-162, [1977] 1 C.L.R.B.R. 1 (Weiler), where the Board wrote as follows:

[A]rbitrators should pose three distinct questions in the typical discharge grievance. First, has the employee given just and reasonable cause for some form of discipline by the employer? If so, was the employer’s decision to dismiss the employee an excessive response in all of the circumstances of the case? Finally, if the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?

[52] I conclude that the answer to the first of those “three distinct questions” is that the actions of the Grievor did constitute “just and reasonable

cause for some form of discipline". However, in the context of the second question, I am of the view that dismissal was an excessive response, thus raising the third question of what substitute penalty would be appropriate. Before I address that issue however, I propose to set out the reasoning that led to the conclusion that dismissal was excessive. I begin with the principle which was addressed by Arbitrator Munroe in Simon Fraser University and Association of University & College Employees, Local 2, (1991) 17 L.A.C. (4th) 129. On p. 135 he wrote:

I take it to be well settled that in a discipline case, the onus rests with the employer to show not only that just or proper cause existed for the imposition of a disciplinary sanction, but also for the imposition of the particular penalty selected.

[53] It was in the context of that principle that, having concluded that the facts amounted to just cause for the imposition of some form of discipline, I concluded that dismissal was excessive. In approaching that second question, I obtained further guidance from Arbitrator Munroe in Simon Fraser University where he expressed the expectations in the arbitral jurisprudence that a dismissal for a first offence is contrary to the principles of progressive discipline. On p. 135, citing Palmer, Collective Agreement Arbitration in Canada, he wrote as follows:

However, implicit in the modern just cause standard is the notion that for most offences in most circumstances, an employer will take the path of corrective discipline prior to resorting to the ultimate sanction of a severance of the employment relationship. It follows that in the

usual run of cases, "... if an employer is going to deviate from the accepted approach of progressive discipline he must at the very least come forward with clear and compelling justification for discharge as the only response reasonably available to him" ... (emphasis added)

[54] Guidance with respect to the expectation of the Labour Relations Board with respect to the arbitral review of a dismissal was set out in Wm. Scott & Company on p. 4 as follows:

In evaluating the immediate discharge of an individual employee, the arbitrator would take account of "the employee's length of service and any other factors respecting his employment record with the Company in deciding whether to sustain or interfere with the Company's action". The following is an oft-quoted, but still not exhaustive, canvass of the factors which may legitimately be considered Steel Equipment Co. Ltd. (1964), 14 L.A.C. 356 at pp. 40-41:

1. The previous good record of the grievor.
2. The long service of the grievor.
3. Whether or not the offence was an isolated incident in the employment history of the grievor.
4. Provocation.
5. Whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses; or whether the offence was premeditated.
6. Whether the penalty imposed has created a special economic hardship for the grievor in the light of his particular circumstances.
7. Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly

- enforced, thus constituting a form of discrimination.
8. Circumstances negating intent, e.g. likelihood that the grievor misunderstood the nature or intent of an order given to him, and as a result disobeyed it.
 9. The seriousness of the offence in terms of company policy and company obligations.
 10. Any other circumstances which the board should properly take into consideration, e.g., (a) failure of the grievor to apologize and settle the matter after been given an opportunity to do so; (b) where a grievor was discharged for improper driving of company equipment and the company, for the first time, issued rules governing the conduct of drivers after the discharge, this was held to be a mitigating circumstance; (c) failure of the company to permit the grievor to explain or deny the alleged offence.

The board does not wish it to be understood that the above catalogue of circumstances which it believes the board should take into consideration in determining whether disciplinary action taken by the company should be mitigated and varied, is either exhaustive or conclusive. Every case must be determined on its own merits and every case is different, bringing to light in its evidence differing considerations which a board of arbitration must consider.

[55] In conducting that review in this case, I note that the dismissal of the Grievor was the first application of discipline imposed on him in his eight-year history of employment. The Employer urged that the second incident invited what amounted to an application of the principle of progressive discipline. In effect, the Employer submitted that the incident on the bus should be viewed as a second

offence that justified an application of the doctrine of the culminating incident. I am not able to agree with that reasoning.

[56] Even assuming the two incidents could be viewed separately for purposes of discipline, I accept that the “back of the bus” comment was not proven to have been directed at Mr. Poirier, nor was it proven to be a racial slur in the egregious sense contemplated in the authorities. In short, the second incident was not a repeat of the first. Accepting that the second comment amounted to racial stereotyping, its significance cannot be divorced from the initiative that gave rise to it. I am not able to agree that the two incidents should be weighed separately in terms of whether the Grievor can be relied on to maintain an acceptable standard of conduct in the future. In addressing that latter question, I conclude that the evidence supports the finding that on two occasions the Grievor made inappropriate comments that could be characterized as involving racial slurs, but did not amount to repeat offences, and, while deserving of discipline, do not support the extreme penalty of dismissal, either taken cumulatively or jointly.

[57] Further, there were a number of factors in the evidence that mitigate in favour of a reduced penalty. They include the fact that the Grievor, despite the second incident, had no prior disciplinary record; his eight years of service was, at least in relative terms, long-service. In short, the two incidents were isolated in the Grievor’s history of employment. As stated, I disagree in that context with the submission of the Employer that the two incidents should be addressed as separate disciplinary incidents in terms of the Grievor’s record. In any event, neither incident could be described as premeditated in the sense contemplated by the

Board in Wm. Scott and Company. It can be said on the Grievor's evidence, when weighed in the context of all of the evidence, that he had not formed any intent to insult either of the two Complainants.

[58] A further mitigating fact is that the penalty had special economic implications for the Grievor. It was unlikely on the evidence that he would be able to find alternate employment because of his age, if for no other reason. In fact, he had been unsuccessful in obtaining alternate employment following his dismissal. His dismissal, in the short term, left him without access to employment income for the support of his young family. In the long term, his age and a finding that he was a racist would seriously impair his prospects for future employment.

[59] In terms of apologies, it was not made apparent in the evidence that the Grievor had failed to apologize in any deliberate sense. It is true that he resisted the notion that his conduct was deserving of an apology and he continued to demonstrate a measure of perplexity with respect to what he had done wrong. However, he did express his willingness to apologize in the hearing and that he had come to understand through sensitivity training that avoiding any comments involving racial stereotyping, or what is characterized in the policy as a racial slur, was essential. In addition, the Grievor had made efforts to speak with Mr. Hirano to explain that he did not intend to offend him.

[60] Finally, the facts raise a concern about the extent to which the Employer perceived itself as obligated to conduct an impartial and thorough investigation which included the development of facts which may mitigate the

seriousness of the Grievor's conduct. It is acknowledged in Wm. Scott and Company that employees earn a form of employment security which increases over time and which should be recognized by an employer. On p. 3 the Board wrote:

Employment under a collective agreement is severed only if the employee quits voluntarily, is discharged for cause, or under certain other defined conditions ... As a result, an employee who has served the probation period secures a form of tenure, a legal expectation of continued employment as long as he gives no specific reason for dismissal.

.....
As a result, discharge of an employee under collective bargaining law, especially of one who has worked under it for some time under the agreement, is a qualitatively more serious and more detrimental event than it would be under the common law.

.....
Because the employer is now entitled to escalate progressively its response to employee misconduct, there is a natural inclination to require that these lesser measures be tried out before the employer takes the ultimate step of dismissing the employee, and thus cutting him off from all of the benefits associated with the job and stemming from the collective agreement.
(emphasis added)

[61] In terms of this dispute, the Grievor was entitled to retain his employment unless the facts adduced by the Employer compelled a finding that the relationship was incapable of being restored. Certain of the facts typically adduced in support of such a finding were absent in the abbreviated approach adopted by the Employer in this dispute. In both cases the investigation was perfunctory and,

as stated, the Grievor had a clear discipline and work record. Not only had there been no occasion to discipline him, there was no evidence of any occasion when it was necessary to caution or warn him. In short, there was no basis for concluding that corrective discipline would prove unsuccessful in correcting his first instances of misconduct.

[62] I agree with the Employer that acts perceived as racial harassment are to be measured objectively with no requirement to prove a specific intent on the part of the offending employee. However, the events in question do not support a finding that the employment relationship was incapable of being restored. The best insight into that question is the fact that the Grievor, as stated, lived in close quarters for several years with no prior complaint about his racial attitudes and with no apparent difficulty in meeting and maintaining a proper standard of conduct. The two incidents were not sufficient to defeat the clear implication arising from that employment history.

[63] Both Complainants were opposed to the Grievor returning to his employment. That is certainly a factor to take into account, particularly where the Grievor will be returning to the same close environment he left and a coincidental exposure to the two Complainants on a regular basis. But, the interests of those two employees should not so greatly outweigh the interests of the Grievor to the point that he is to be left late in his working life with little likelihood of obtaining alternate employment income with which to support his young family.

[64] I agree that the conduct of the Grievor was a serious breach, regardless of his intentions, and that a substitute penalty should be sufficient to demonstrate to the bargaining unit that racial intolerance is unacceptable and to ensure that the Grievor will maintain acceptable conduct in the future. On that basis I conclude that the Grievor is entitled to be reinstated and that a suspension of 28 working days, being a significant penalty, be substituted for his dismissal. He is entitled to retain his seniority and to be compensated for his wage loss. I will retain jurisdiction to assist in the implementation of the Award if that becomes necessary. On that basis the grievance is granted in part.

DATED at the City of Prince George, in the Province of British Columbia, this 27th day of February, 2006.

"H. Allan Hope, Q.C."

H. ALLAN HOPE, Q.C. – Arbitrator

