2010 CarswellBC 3021
British Columbia Labour Relations Board

Lougheed Imports Ltd. v. U.F.C.W., Local 1518

2010 CarswellBC 3021, [2010] B.C.L.R.B.D. No. 190, [2011] B.C.W.L.D. 317, [2011] B.C.W.L.D. 318, [2011] B.C.W.L.D. 323, 186 C.L.R.B.R. (2d) 107, 186 C.L.R.B.R. (2d) 82, 2011 C.L.L.C. 220-003

Lougheed Imports Ltd. operating West Coast Mazda doing business as West Coast Detail & Accessory Centre, (the "Employer") and United Food and Commercial Workers International Union, Local 1518, (the "Union")

Allison Matacheskie V-Chair

Heard: October 15-18, 2010
Judgment: October 22, 2010
Docket: B190/2010

Counsel: Donald L. Richards, for Employer
Jason Mann, for Union

Subject: Labour; Public

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Labour and employment law --- Labour law — Unfair labour practices — Employer practices — Interference with union activities — Termination of employment — Dismissal

Labour and employment law --- Labour law — Discipline and termination — Grounds — Insubordination — Defiant conduct and language — Abusive language or profanity

Labour and employment law --- Labour law — Discipline and termination — Kinds of discipline — Discharge — Just cause

Table of Authorities

Cases considered by *Allison Matacheskie V-Chair*:

Alberta v. A.U.P.E. (2008), 2008 CarswellAlta 796, [2008] L.V.I. 3774-1, (sub nom. *Alberta and A.U.P.E. ("R") (Re)*) 174 L.A.C. (4th) 371 (Alta. Arb. Bd.) — considered

Chatham-Kent (Municipality) v. CAW-Canada, Local 127 (2007), (sub nom. *Chatham-Kent (Municipality) v. C.A.W.-Canada, Loc. 127)* 159 L.A.C. (4th) 321, 2007 CarswellOnt 5078 (Ont. Arb. Bd.) — considered

Faryna v. Chorny (1951), 1951 CarswellBC 133, 4 W.W.R. (N.S.) 171, [1952] 2 D.L.R. 354, [1952] 4 W.W.R. 171 (B.C. C.A.) — considered

White Spot Ltd. v. CAW-Canada, Local 3000 (1993), 21 C.L.R.B.R. (2d) 146 (B.C. L.R.B.) — considered

Statutes considered:

Labour Relations Code, R.S.B.C. 1996, c. 244
Generally — referred to

s. 5 — pursuant to

s. 6 — pursuant to

s. 9 — pursuant to

s. 14(7) — referred to

***Allison Matacheskie V-Chair*:**

I. Nature of Application

1 The Union alleges that the Employer breached Sections 5, 6 and 9 of the *Labour Relations Code* (the "Code") when it terminated the employment of two employees in the bargaining unit. The Employer asserts that it had proper cause to terminate the employment of the employees and therefore did not breach the Code. The Union says that the Employer did not have proper cause and even if it did, the terminations were motivated at least in part by anti-union animus and therefore the Employer committed an unfair labour practice and the terminations should be rescinded by the Board.

2 Due to the embarrassing and offensive nature of some of the comments made about individuals that form part of the evidence in this matter, I have decided to identify all witnesses by initials only.

II. Facts

3 The Employer operates an automotive detailing and accessory shop in Pitt Meadows, BC (West Coast Mazda).

4 On August 26, 2010, the Union applied for certification of a bargaining unit of "employees at and from 19120 Lougheed Highway, Pitt Meadows, BC, except sales, office employees and glass installers". The Board sent the Employer notice of the application on August 27, 2010.

5 The Union was certified on September 8, 2010. The parties are in collective bargaining.

6 On August 31, 2010 and on September 8, 2010, the Union filed two unfair labour practice complaints alleging that the Employer had breached the Code. The complaints were resolved and the Union withdrew the complaints.

7 J.T. was employed as a detailer at West Coast Mazda for approximately four years. J.T. was one of the key inside organizers during the organizing campaign and was a vocal and visible supporter of the Union. The Employer was aware of his support for the Union from at least August 27, 2010.

8 A.P. was employed as an installer at West Coast Mazda for approximately two years. A.P. was a Union supporter and the Employer was aware of his support from at least August 27, 2010.

9 F.Y. is the reconditioning manager at West Coast Mazda. He has been employed in that capacity for the past four and a half years. J.T. reported directly to him. A.P. reported to a different manager but took direction from F.Y. as well.

10 F.Y., J.T. and A.P. were all friends on Facebook. Facebook is a social networking website where members display information about themselves for people who are accepted as their friends on their Facebook account.

11 J.T. has almost 100 friends on Facebook including some present and former employees of the Employer. A.P. had 377 friends including some present and former employees of the Employer. A.P. deleted his account on October 1, 2010.

12 F.Y. checks his Facebook account on a daily basis. He has an application on his phone that enables him to access Facebook directly from his phone. Facebook has a feature where members can state their status as an introduction or title to their Facebook profile. When F.Y. enters the application on his phone, it provides a newsfeed which automatically pops up on his home page screen to show him if any friends on Facebook changed their status.

13 On August 27, 2010, F.Y. went on his Facebook account and the newsfeed showed him that J.T.'s status had the following comment:

> Sometimes ya have good smooth days, when nobodys fucking with your ability to earn a living...and sometimes accidents DO happen, its unfortunate, but thats why there called accidents right?

14 F.Y. brought this to the attention of J.C. who is the Fixed Operations Manager at West Coast Mazda. The main factual dispute in this case is the reason F.Y. brought this to the attention of J.C. The Union asserts that the Employer was aware that J.T. was the key organizer and compiled a file on J.T for the purpose of having evidence to terminate his employment. The Union does not dispute that the Employer first learned of J.T.'s work related postings through F.Y. However it says the Employer's continued monitoring was due to anti-union animus. Concerning this first posting, F.Y. testified he was concerned about what J.T. meant by "accidents happen". He said he was concerned that something might have happened to his property or that J.T. had plotted against him as J.T. had been confrontational with him before.

15 On September 8, 2010, J.T. posted on his Facebook page:

> When a labour relations lawyer calls ya at 7PM and ya fax him 25 task sheets, ya gotta wonder??? Unfair labour practices, coupled with workplace harassment....C'mon Guys??? At least read up on the laws before ya throw the first punch...because that second punch can by a DOOZY....

16 Concerning this posting, F.Y. says he felt a little bit threatened and told J.C. about this posting.

17 On September 17, 2010, J.T. posted as a status update:

> If somebody mentally attacks you, and you stab him in the face 14 or 16 times...that constitutes self defence doesn't it????

18 When F.Y. saw this posting as a newsfeed on his phone, he entered J.T.'s Facebook site and saw a posted conversation between J.T. and a non-work related friend. J.T. said:

> ...Works been a shit-storm lately, our shop is a certified union now, so been stressed rt out (Management needs somebody to blame & Im that guy)...so yeah if you see summa my ANGRY statuses lately, that's why....

19 Further down in the postings, J.T. stated his status as "stress relief anyone" and then posted the top five kills from Dexter, which is a television show concerning a vigilante killer.

20 F.Y. brought these postings to J.C.'s attention. J.C. said he was not sure what to do. The atmosphere or mood around the shop was getting darker and now the postings about stabbing and anger concerned him.

21 On September 17, 2010, a friend of F.Y. told him that he was no longer a Facebook friend with J.T. This means F.Y. no longer had access to J.T.'s Facebook page. The friend also told him that J.T. had posted on his Facebook that it is supposed to be a friend's list, not a goof's list.

22 The friend of F.Y., who told him he was no longer a friend of J.T., was a previous employee of the Employer. J.C. asked this former employee to tell him if he saw anything concerning on J.T.'s Facebook. The former employee let J.C. log onto his Facebook account and then together they looked at J.T.'s postings. J.C. printed anything that concerned him.

23 On September 23, 2010, there was a meeting at the workplace with a representative from WorkSafe BC, J.C., F.Y., the other manager, Marco, A.P. and two employees. The Union disputes part of the Employer's evidence concerning this meeting. J.C. and F.Y. testified that about three minutes into the meeting, J.T. burst into the shop and said "just so you know I'm the one who called you and I should be in this meeting". J.C. told J.T. to get back to work. J.T. came closer to J.C. and was agitated. J.T. said he should be part of the meeting. He then said "I know the games you are playing, I will call the Union". He then said directly to the WorkSafe BC representative, "I am [J.T.] and I will be over there" and left the meeting. J.C. apologized to the WorkSafe BC representative and continued the meeting.

24 J.T. disputes that he "burst" into the meeting. He also disputes that he was agitated or spoke loudly. He also denies making the comment about saying the Employer was playing games and that he was going to call the Union. J.T. was concerned because he says the employees that J.C. chose to attend the meeting both voted no in the representation vote and one had already given his notice and was quitting and the other employee was a glass installer who was rarely in the shop. He says he just interrupted the meeting to let them know he thought he should be at the meeting and let the WorkSafe BC representative know his name and where he could find him if he wanted to speak with him. J.T. also says he later spoke in the parking lot to the WorkSafe BC representative and apologized if he had made him feel uncomfortable. He said the representative told him he would call him later and he did.

25 After the meeting, J.C. told J.T. he would be writing him up. He then issued him a written warning which said:

> We have discussed with [J.T.] about his Disruptive and Confrontational behaviour on September 23, 2010. [J.T.] disrupted all staff, during working hours preventing West Coast Detail from performing their regular business. [J.T.]

was confrontational and interruptive when management was meeting with WorkSafe BC.

Any further disruptive or confrontational behaviour will lead to termination of employment.

26 J.C. says he did not mention anything about his concerns about the Facebook postings in the disciplinary letter as he was not sure what to do about them. He says he was hopeful that the disciplinary letter would generally calm down J.T. He said he was attempting to address J.T.'s volatile behaviour.

27 On September 23, 2010, J.T posted as his status update:

Completely Exploded & SNAPPED on the Fixed Ops/Head Prick at work today ....He sent me Home (With Pay) and wrote me up (Strike 1).... although the FUKN gloves are off now,,,I gotta control my temper. One strike in 4 years aint bad, I guess.

28 On September 24, 2010, J.T. posted:

Hhhmmmm??? According to this reprimand at work, Im confrontational & disruptive to the WHOLE shop ... AND .... My outburst yesterday was threatening and didn't allow The WestCoastAutoGroup to conduct regular business.... well???? All I Gotta say is they pissed off the WRONG GUY ....big time.

29 J.C. viewed the September 23 and 24 posting with the help of the former employee. He says he was concerned because J.T. was now posting about the whole Auto Group and not just the Employer. He was also concerned about J.T. questioning the reprimand and making aggressive statements. He was also offended by the personal insult as he understood, and thought anyone from the workplace reading the posting would understand, that J.T. was referring to him as the "Fixed Ops/Head Prick".

30 J.T. admits he made the postings and says he was a little pissed off as he felt he should be at the meeting as he raised the initial concerns with WorkSafe BC. J.T. felt that his interruption of the meeting did not warrant any discipline.

31 On September 27, 2010, J.T. wrote another posting. He said:

Is wondering if his 2 supervisors at work, go to the bathroom together?? And who holds who's penis while pissing??

32 Concerning this posting, F.Y.'s reaction was disgust. He felt very uncomfortable and offended about these inappropriate comments.

33 J.C. says his concerns escalated as J.T. was now making personal derogatory comments about supervisors and lots of people would see it including other employees.

34 On September 28, 2010, there was a safety meeting to update the shop on the meeting with WorkSafe BC. The meeting went well. At the end of the meeting, J.C. asked J.T. if he had any comments or concerns and J.T. responded "no comment". J.C. asked if he was sure and J.T. responded in a loud voice, "what part don't you understand?". J.T. denies using a loud voice and says that J.C. was repeatedly asking for his comment until he finally said "no, do you not comprehend no". He thought J.C. was picking on him by repeatedly asking for his comment.

35 On the same day as the meeting, J.T. posted on Facebook:

> Was asked for my opinions at a morning safety meeting...I replied "No comment"... Seems my Boss, whos owned the business 25 yrs & is fixed operations director of 2 dealerships as well ... couldnt comprehend my reply?? So its confirmed...HE'S A COMPLETE JACK-ASS... not just Half-a Tard.

36 On September 28, 2010, J.T. also posted the following comment along with a photograph of a boat owned by the owner of West Coast Mazda:

> A sure sign summers done .... Detailing the owners boat for storage.

37 On September 30, 2010, there was a posting on A.P.'s Facebook. It stated:

> west coast detail and accessory is a fuckin joke....dont spend your money there as they are fuckin crooks and are out to hose you... there a bunch of greedy cocksucin low life scumbags... wanna know how I really feel??????

38 A posted Facebook conversation follows which includes J.T. posting:

> I heard that Marco and [F.Y.] were seen fondling each others nut sack in the shop bathroom?? Any truth to that? That shop ripped off a bunch ppl I know.
>
> All in humour,, however,, none of the stereo shit I bought there works, at all...Deck only plays store bought discs and subs are blown and amp is fried, again. The alpine stuff I bought from A&B works awesome tho.

39 In the same Facebook conversation, there was another posting under A.P.'s name that stated:

> I dont think theres enough room on Facebook to type all the bullshit out... gloves are off now....its game time

40 The Facebook conversation continued with a post from A.P.'s girlfriend. She posted:

> Somethings just shouldn't be broadcasted on facebook, especially when you still work there.

41 A.P. appears to have posted back:

> That's the whole point honey

42 A.P. denies making any of these postings on September 30, 2010. This critical evidentiary dispute will be dealt with in more detail below.

43 On September 30, 2010, F.Y. got a phone call from a former employee who asked F.Y. if everything was okay at West Coast as he saw the posting from A.P. F.Y. then checked his Facebook account and saw the posting and the following conversation. He brought it to the attention of J.C.. J.C. says he was concerned about these postings as J.T. was being completely disrespectful to managers and referred to the shop as ripping people off. He was concerned as it criticized the products sold by the Employer and recommended A & B which is a competitor. J.C. brought these postings to the attention of the owners and they were very upset. The owner knew the show Dexter and was very upset.

44 J.C. felt that everyone on the shop floor, including himself, was on edge. Then on October 1, 2010, J.T. posted:

> [J.T.'s] feeling tactical, and vengefull, and retaliatory.

45 J.C. was concerned about the posting. The owner was informed and legal counsel was consulted to see what the appropriate action was. J.C. says he did not speak to J.T. about his postings as he was not sure what to do. The Employer had never encountered a situation involving Facebook postings before.

46 Earlier on the day of the posting on A.P.'s account, A.P. had been sent home early from work. A.P. was paid on a piece basis. A.P. was angry. He told F.Y. it was a conspiracy and F.Y. said no, it is slow and it is slow at all the dealerships. A.P. says he was only sent home early after the certification. F.Y. says the Employer has always sent home employees working on a piece basis when there was no work so they could use their time for their own purposes.

47 Later that day, F.Y. received the phone call from the former employee expressing concern about A.P.'s posting.

48 F.Y. called A.P. in to work the next day. It was A.P.'s day off, but a customer required installer work at the shop and he called to give A.P. the first right of refusal. A.P. came into work and apologized to F.Y. F.Y. and A.P. have different versions of the content of the apology. F.Y. recalls A.P. apologizing and saying he had written things in the heat of the moment and did not mean anything personally against him and the other supervisor. F.Y. says he did not say much in reply and just kept working. A.P. says he did not say he had written things in the heat of the moment. He says he apologized to F.Y. and said he was sorry for what was posted on his website and asked F.Y. not to take it personally. A.P. says F.Y. told him everything was fine.

49 A.P. says he went home for a few minutes after being sent home from work on September 30 but went out to go to the hospital to visit his grandfather. When he was driving he got a phone call from a friend asking him about some pretty harsh stuff on his Facebook. He sent a text message to his girlfriend and asked her to look at his Facebook. However, he says, at the time he sent her the message he had not seen the posting. He says when he arrived home he saw the posting and the following conversation and deleted them. The next day, he deleted his Facebook account and does not have one anymore.

50 A.P. also says he has had problems with his Facebook before when someone else posted things on it in his name. He said he changed his password.

51 On October 6, 2010, the Employer conducted separate investigatory meetings with J.T. and A.P. They were represented by the Union at the meetings. They were provided with copies of the Facebook postings. At the beginning of the meeting, the Employer emphasized the importance of being honest at the meeting.

52 At the meeting, the Employer first asked general questions about whether J.T. or A.P. made inappropriate or critical comments about the Employer's business or disrespectful or derogatory comments about management or owners of West Coast Mazda. Both J.T. and A.P. denies making any such postings. They were then asked specific question with quotes from the various postings. They both denied making the postings. J.T. admitted posting a picture of the owner's boat on his Facebook page. He also admitted posting that he was feeling tactical, vengeful and retaliatory but said it had nothing to do with the shop. He also admitted posting that Dexter was a role model but said it had nothing to do with the shop. In response to questions about the derogatory comments about the supervisors, he said he had left Facebook logged on and anyone could have written that.

53 In the investigatory meeting, A.P. denied making the postings on September 30. He said he did not have Facebook anymore and told the Employer he had problems with people hacking into his Facebook account and he had left it logged on at work.

54 On October 7, 2010, J.T. and A.P. were advised that their employment was terminated and were given letters setting out the reasons. They were terminated for making disrespectful, damaging and derogatory comments on Facebook. The Employer found the comments were inappropriate and insubordinate and created a hostile work environment for co-workers and supervisors. It also said they were likely to damage the reputation and business interests of the Employer. The Employer also relied on the Complainants' denials during the investigation meeting and said that they had compounded their wrongdoing by being dishonest during the interview.

55 At this time, J.T. apologized and said he did not mean to hurt anyone and if anyone took anything out of context, he was sorry if he hurt anyone.

III. Submissions of the Parties

56 The Employer submits that it has proper cause to terminate the employment of both the Complainants. It asserts that it has sufficient grounds to meet the higher test required in the arbitration context by *Wm. Scott & Company Ltd.*, BCLRB No. 46/76, [1977] 1 Can LRBR 1. However, it relies on the proper cause test set out in *White Spot Ltd. v. CAW-Canada, Local*

3000, BCLRB No. B437/93 (Reconsideration of BCLRB No. B120/93), (1993), 21 C.L.R.B.R. (2d) 146 (B.C. L.R.B.). It says a reasonable relationship exists between the misconduct in question and the penalty imposed. There are no persuasive mitigating factors which were not considered and the penalty is not out of proportion to the misconduct. It says the Board's scrutiny is less rigorous than an arbitrator's and grants greater deference to the Employer's decision.

57 The Employer submits that A.P.'s claim that a hacker, or someone else, made the September 30 posting on his Facebook is not credible. It says A.P. was not honest in the investigation meeting and continued to be dishonest when he testified under oath in these proceedings. It says all of the circumstances in this case lead to the conclusion that A.P. made the postings. It says he had the motivation as he was angry at the Employer for being sent home, he had the opportunity as he was home at the time that the posting was made and admits making a posting later that day on the same Facebook account. It also relies on the stream of comments that follow the post and says A.P. was communicating with other friends, including his girlfriend and J.T. who both thought, at the time, that they were communicating with A.P.

58 The Employer says I should not accept his version of the apology made to F.Y. the next day. It says I should accept F.Y.'s version and the apology further establishes that A.P. made the posting.

59 It says the posting is extremely serious as it names the Employer and clearly damages their reputation as it calls them crooks that are out to hose the public and urges people to not spend their money there.

60 The Employer submits that J.T. was dishonest during the investigating meeting and the fact that he admitted the misconduct at the hearing does not negate proper cause. It says his posting were extremely damaging to the Employer's reputation and created a hostile and poisoned work environment.

61 The Employer submits that there does not have to be a workplace rule prohibiting putting inappropriate postings on Facebook. It relies on *Chatham-Kent (Municipality) v. CAW-Canada, Local 127* (2007), 159 L.A.C. (4th) 321 (Ont. Arb. Bd.), paras. 21 and 22 *("Chatham-Kent*") for the principle that there does not have to be a specific rule prohibiting such conduct as insubordination. In particular, at para 7:3660 in Brown and Beatty, Canadian Labour Arbitration (4th ed.), it stated:

> Conduct that is threatening, insolent, or contemptuous of management may be found to be insubordinate, even if there is no explicit refusal to comply with a directive where such behaviour involves a resistance to or defiance of the employer's authority.

62 In *Chatham-Kent*, the arbitrator upheld the termination of an employee for posting comments about work on her personal blog on the internet. The arbitrator found, at para. 25, that the comments put on the internet were insolent, disrespectful and contemptuous of management and were an attempt to undermine the reputation of management and undermine their authority. The arbitrator concluded this was insubordinate behaviour.

63 In *Alberta v. A.U.P.E.* (2008), 174 L.A.C. (4th) 371 (Alta. Arb. Bd.) ("*Alberta*"), the arbitrator upheld the termination of an employee's employment for posting comments on her personal blog site on the internet concerning her co-workers and management. At para. 97, the arbitrator concluded:

> While the Grievor has a right to create personal blogs and is entitled to her opinions about the people with whom she works, publicly displaying those opinions may have consequences within an employment relationship. The Board is satisfied that the Grievor, in expressing contempt for her managers, ridiculing her co-workers, and denigrating administrative processes engaged in serious misconduct that irreparably severed the employment relationship, justifying discharge.

64 The Employer submits that the employment relationship in this case is also irreparably severed by the conduct of the grievors. It relies primarily on the comments concerning F.Y. and the other manager conducting sexual acts in the workplace washroom and how F.Y. testified how personally disgusted and offended he was by these untrue derogatory comments. As well, the head manager was called a "jack-ass" and "half-a-tard" causing him discomfort as well.

65 The Employer says it is an aggravating factor that the comments were made about a supervisor and manager. In *British Columbia Forest Products*, [1988] B.C.C.A.A.A. No. 154 ("*BCFP*"), the arbitrator found:

> The use of foul language, while common in the workplace, is not acceptable when directed at a Supervisor at any time, but particularly so in the presence of other employees. Foul language when used as a verbal weapon to degrade a Supervisor in front of others is unacceptable. It is totally unacceptable when such an attack is made on a Supervisor without provocation
>
> (para. 41, *emphasis in original*).

66 The Employer submits that for J.T. this is not a momentary aberration. It escalated to the point of being unbearable for the Employer to not intervene. It says J.T. was extremely hostile and threatening. Concerning A.P., the Employer says his one posting was extremely egregious and he continues to lie and say he did not post it. It says in these circumstances, the Complainants cannot be returned to the workplace.

67 The Employer relies on *Leduc v. Roman*, 2009 CanLII 6838 (Ont) ("*Leduc v. Roman"*) for general court findings about the nature of Facebook and the ultimate conclusion of the court that the plaintiff in that case "could not have a serious expectation of privacy given that 366 people have been granted access to the private site". In this case, A.P. had 377 friends on Facebook and J.T. had almost 100. Most importantly, both Complainants had fellow co-workers, friends who were previously employees of the Employer and F.Y., a current manager as friends on their Facebook accounts. The Employer says that due to the existence of other employees as Facebook friends, posting comments on their Facebook accounts is the same as making the statements on the shop floor at the worksite.

68 The Employer says it is not a mitigating factor in this case that there may have been inappropriate racial or sexist comments made at the workplace by other employees and management. It says:

> ...this whole "common shop talk" approach that has been adopted in the past for reducing disciplinary penalties is becoming less and less sustainable. One might as well say that bigotry or bullying is a norm in a workplace therefore they should be condoned.
>
> In today's industrial society one of the major overall goals is to create and maintain respectful workplace environments that are free from abuse. (*Northwest Waste System*, at para 317).

69 It also says that the comments made by the Complainants were far worse than any alleged comments made at the workplace such as calling an employee a "spook".

70 The Employer submits that there is no evidence of any anti-union animus in this case. It says the Union's reliance on the fact that the Employer printed out the first posting from J.T.'s Facebook account on the same day that it received the notification from the Board of the certification application does not establish anti-union animus. It acknowledges that it knew at that time that the Complainants were union supporters but maintains that it did not start a search for any grounds upon which it could discipline the Complainants. It says F.Y. and J.C. are credible witnesses and their evidence concerning how the postings came to their attention and why they took the actions they did, when they did, should be accepted.

71 It says any evidence the Union led through its witnesses concerning any anti-union behaviour should not be considered as it was not put to the Employer witnesses when they testified. It acknowledges that two unfair labour practice complaints were filed at the Board during the certification process. However, both complaints were resolved and withdrawn by the Union.

72 The Union submits that under Section 14(7) of the Code, the onus is upon the Employer to establish that its action were not in any way motivated by anti-union animus. It says the Employer has not met this onus and therefore, even if the Board finds there was proper cause for the terminations, it must overturn them if it finds that even one per cent of the Employer's motivation was due to anti-union animus. It says "if union membership can be found to be a proximate cause for the dismissal, even if there existed other proximate causes, the union's complaint will be upheld": *Crown Zellerbach*, BCLRB No. 10/82 at page 4.

73 The Union submits the Board must look at a web of circumstantial evidence to determine if the Employer was motivated by anti-union animus. It relies on *ETL Environmental Technology*, BCLRB No. B195/93 ("*ETL*"), where the Board stated:

> It is trite to say that an employer does not ordinarily admit that its actions are motivated by anti-union sentiments. Consequently, the Board must conduct its analysis by examining a web of circumstantial evidence. In assessing the evidence and considering the Employer's justification for its actions the Board will look at a number of factors:
>
> • The employer's previous attitude towards and treatment of similar conduct
>
> • The employee's previous disciplinary record
>
> • The seriousness of the work offence
>
> • The employee's level of union activity and role in the union
>
> • The employer's knowledge of union activity
>
> • The manner in which the employer investigated and carried out the discipline/discharge
>
> • The existence or absence of reasonable justification for the discipline/discharge. (p. 15)

74 The Union submits that the Employer led little evidence to support any of these factors to establish it did not act upon

anti-union animus.

75 First, the Union says it is very puzzling that the Employer was concerned enough to keep a file on J.T.'s Facebook postings but did not tell him. It says the Employer went to the extent of involving third parties such as former employees to document what J.T. posted on Facebook and was concerned enough to tell the owner of the business, but did not tell J.T. The Union says the Employer tracked J.T. for quite some time and did not even raise it in a disciplinary meeting which occurred during the course of the Employer's monitoring. The Union says the only reasonable explanation is that the Employer was trying to build a file on J.T to terminate his employment rather than attempt to correct his behaviour.

76 The Union says it is very significant that it started to build a file on J.T on the same day that it learned of the certification application. It says that F.Y. had access to J.T.'s Facebook for a long time and J.T. has vented angry feelings on Facebook before and posted similar comments. In these circumstances, the only rational conclusion that makes sense is that the Employer started documenting on August 27, 2010 because that was the day they learned of the certification application.

77 The Union also says it makes no sense for the Employer to have kept J.T.'s postings on union activity if it was truly just monitoring his misconduct. However, the documents disclosed to the Union as part of this proceeding also included postings about union activity such as the filing of the previous unfair labour practice complaints. The Union submits this is evidence of anti-union animus as the Employer was documenting his union activity.

78 The Union submits that it is also evidence of anti-union animus that the Employer sent A.P. home early on several occasions following the certification application being filed. It says, as A.P. was paid on a piece basis, it makes no sense for them to send him home. There is no cost to the Employer to keep him there the full day and there is no way for the Employer to be certain that a customer will not walk in later in the day. It says A.P. expressed his wish to stay the full day, but the Employer still made him go home early.

79 The Union says the Board can also infer anti-union animus from the way that the Employer handled J.T.'s alleged misconduct. It says it is puzzling that the Employer did not immediately take him aside to have a discussion concerning violence in the workplace if it was truly concerned about the Dexter comments or other violent comments on his Facebook. The Union says it is puzzling unless the Board concluded that it is not a concern about violence but really anti-union animus and the building of a file to be able to terminate the inside union organizer.

80 The Union submits the Employer has not established that it did not act upon its anti-union animus. Turning to the factors in *ETL*, the Union submits that the Employer has not acted consistently with its previous attitude towards and treatment of similar conduct. It says that J.T.'s letter of termination referenced homophobic comments on his Facebook. It say the Employer has not treated homophobic comments as warranting discipline except in one instance where an employee was given a written warning for calling another employee a racist comment. The Union also submits that it is common to use racist, sexist, homophobic, and xenophobic comments at the workplace. It also says that F.Y. printed a Facebook photo of J.T. on which he had posted the comment "fucking fag" and displayed it at the workplace and there was no discipline for this. The Employer disputes that F.Y. was involved in this incident but does not dispute that it happened. The Union submits that regardless of who posted it, the Employer has not treated similar conduct in a similar manner.

81 Concerning the *ETL* factor of the employee's previous disciplinary record, the Union submits that both Complainants

had no previous discipline. The Union submits that the written warning issued to J.T on September 24, 2010 is not previous discipline as it is really a part of this continued monitoring of J.T. that is motivated by anti-union animus.

82 Concerning the seriousness of the work offence, the Union acknowledges that the comments were inappropriate but says they are not a serious workplace offence as the Employer's expectations concerning Facebook use were not made clear. It also says that J.T. worked for a significant period of time after the alleged first workplace offence and so if it was serious, the Employer would not have continued to employ him after the first offence.

83 Concerning the Complainant's union activity, the Employer has acknowledged that it knew they were union supporters and in particular, that J.T. was the most vocal and obviously in support of the Union.

84 The Union submits that the manner in which the Employer investigated the conduct is evidence of it acting upon anti-union animus. It says the Employer started the file on the same day of the notification of the certification application and maintained a file until it had enough to terminate J.T.'s employment. It says the Employer could have told J.T. of its expectations concerning the use of Facebook. It could have taken corrective action but chose not to. The Union says it is highly suspicious that the Employer issues a written warning to J.T on September 24, 2010 and does not mention the Facebook postings or even raise the issue with him in the disciplinary meeting. It says the Employer let small infractions build up so they could eliminate the Union's strongest supporter.

85 Concerning A.P., the Union submits if the Board finds anti-union animus motivated the Employer to take the actions it did concerning J.T., this should be taken into account, and lead to the conclusion that anti-union animus also motivated the Employer to take the action it did against A.P.

86 The Union submits that applying the *ETL* factors to the Employer's action in terminating the employment of A.P. also leads to the conclusion that the Employer was motivated by anti-union animus. It relies on the same arguments it did with respect to J.T. and also argues that the Employer did not investigate A.P.'s assertion that he did not write the Facebook posting on his account on September 30, 2010. It says the action the Employer took after its decision to terminate was to prepare for the hearing and does not assist the Employer in arguing it conducted an adequate investigation. The Union says it would have done an adequate investigation before deciding to terminate if it was not motivated by anti-union animus. It says there was a lack of due diligence in investigating A.P.'s version of events. The Union says the Employer also gave no consideration to the fact that A.P. immediately deleted the posting which is consistent with his version of facts that he did not write it. It also did not interview his girlfriend to determine what discussions A.P. had and did not investigate the internet usage at the work site until after the termination. The Union submits that the method of investigation used by the Employer shows it was motivated by anti-union animus.

87 The Union says the Employer has been motivated by anti-union animus and therefore, there is no need for the Board to consider whether there was also proper cause for the terminations. If the Board finds that the decisions were motivated by even one percent anti-union animus, it must find an unfair labour practice has occurred when the Employer terminated the employment of J.T. and A.P., even if it also concludes there was proper cause for the terminations.

88 Turning to the issue of proper cause, the Union submits that there is no proper cause for the termination of A.P.'s employment as he did not write the posting on September 30. It says the Board should accept his evidence that someone else

did it. The Union also submits that even if the Board determined that he did write the posting, the Employer let him continuing working after it saw the posting and therefore the employment relationship is not irreparably severed.

89 Concerning J.T., it says the penalty imposed is out of proportion to the conduct as the employment relationship is not irreparably severed. It says J.T. apologized for his actions and the Employer had no problem with him continuing to work after it saw his first postings. The Union say if the Employer can let him work during that period, there is no problem with him continuing to work now.

90 The Union submits that in all areas of the evidence where F.Y. and J.C.'s evidence contradicts the Complainants' evidence, the Board should prefer the Complainants.

91 In reply, the Employer submits that there was no unreasonable delay in investigating the misconduct. It says it is measured in a matter of days or weeks. It says this limited time of continued working does not establish that the employment relationship has not been irreparably severed. It also says this limited time cannot be seen as condonation of such serious misconduct.

92 The Employer submits that the facts in this case are distinguishable from the facts in *ETL*. It says the fact that the first posting F.Y. brought to J.C.'s attention was the day of the notification of certification is just a coincidence. It says the Union's theory that it was building a case against J.T. does not make sense as the Employer did not know the postings were going to continue and get worse. It argues that there was no similar previous conduct in the workplace as the Employer had never encountered a situation involving the use of Facebook. It says it was unsure what to do and so it monitored the situation and when it became intolerable to the Employer's business interests it sought legal advice and took appropriate action. The Employer says its manner of investigating and taking action is consistent with prudent business conduct and is not evidence of anti-union animus.

IV. Analysis and Decision

93 The Union's primary argument is that the Employer was motivated by anti-union animus when it terminated the employment of the Complainants. The Union attempts to establish a case of anti-union animus by relying on some of the events that led to the previous two unfair labour practice complaints. However, the complaints were withdrawn by the Union and cannot be relied on in this case to establish anti-union animus.

94 The Union argues that sending A.P. home early is evidence of anti-union animus. It says that as there are no cost savings to the Employer when it sends A.P. home as he is paid on a piece basis, the only rational conclusion is that it is sending him home because he is a Union supporter. The Employer's explanation is that as it did not expect any work to come in, it made more sense to let the employee go home and then he could use his time for his own purposes. I find the Employer's explanation is reasonable. The Employer's claim that there was a seasonal downturn in business was not questioned by the Union in cross-examination. As well, I find the Union's theory is directly contradicted by the fact that, after sending A.P. home on September 30, 2010, F.Y. called him the next day and gave him the first right of refusal on work that had come in for that day. I therefore do not find that the Employer's actions in sending A.P. home early are evidence of anti-union animus.

95 The Union also alluded at times to the Complainants being picked on and conversations about decertification around the workplace. However, it was not fully canvassed or put to the Employer witnesses.

96 The Union's main argument concerning anti-union animus is that the circumstances in this case establish that the Employer was motivated by anti-union animus. It relies on the factors set out in *ETL*. I accept that the *ETL* factors of the employee's high level of union activity, the Employer's knowledge of that union activity and no previous disciplinary record for the Complainants are factors which support the Union's argument that there is anti-union animus.

97 Turning to the factor of whether the Employer has treated similar conduct with a similar attitude, I do not agree that the racist, sexist, or otherwise inappropriate comments previously made on the shop floor are similar conduct. The comments made by the Complainants on Facebook were damaging comments about the Employer's business such as don't spend your money at West Coast Mazda as they are crooks out to hose you and the shop ripped off a bunch of people I know. These Facebook comments were made to either almost 100 or 377 people including employees. I find, based on those facts and the analysis in *Leduc v. Roman* that the Complainants could not have a serious expectation of privacy when publishing comments on their Facebook websites and therefore the comments are damaging to the Employer's business.

98 The comments also included very offensive, insulting and disrespectful comments about supervisors or managers. As the Facebook comments were also made to other employees and former employees that were friends with J.T. and A.P. on Facebook, I accept the Employer's assertion that these comments are akin to comments made on the shop floor. The comments about the supervisors amount to insubordination within the meaning of *BCFP* as they are "used as a verbal weapon to degrade a Supervisor in front of others". J.T. also made comments that clearly identified and referenced discipline he had received at work. He also identified the manager and called him derogatory and insulting names. I therefore find the Facebook postings are not similar conduct to the inappropriate comments made on the shop floor on a regular basis.

99 The most important *ETL* factor is the manner in which the Employer investigated and carried out the discipline. The main argument raised by the Union to establish its claim of anti-union animus is that the Employer started to compile a file on J.T.'s Facebook postings on August 27, 2010, the date of the certification application, and continued to monitor his Facebook account until October 6, 2010 without making any attempt at earlier corrective action before terminating his employment.

100 The key credibility issue I must determine in this case is the reason the Employer started a file on J.T's Facebook postings on August 27, 2010. I agree with the Union that it is puzzling or suspicious considering the fact that it is the exact same day that the Employer was notified of the certification application and it knew at that time that J.T. was a strong supporter of the Union.

101 The first posting on August 27 was:

> Sometimes ya have good smooth days, when nobodys fucking with your ability to earn a living... and sometimes accidents DO happen, its unfortunate, but thats why there called accidents right??

102 F.Y. testified that he was concerned about what J.T. meant by "accidents DO happen". He was concerned that something might have happened to his property or that J.T had plotted something against him as J.T. had been

confrontational with him before. The Union challenged F.Y.'s credibility with respect to other specific aspects of his testimony (such as the apology made by A.P. the day after the posting) but did not directly challenge F.Y. on his stated concerns about the August 27 posting. When J.T. testified, he did not dispute the assertion that he had been confrontational with F.Y. previously. J.T also did not put forward any explanation for why he deleted F.Y. as a friend on Facebook shortly after making this posting.

103 The Union asserted that J.T. made similar Facebook postings before August 27, 2010 that F.Y. would have seen and therefore the only reasonable explanation for F.Y. to bring the posting to the attention of J.C is because the Employer was looking for reasons to terminate J.T.'s employment. However, the Union was unable to provide any particulars as to the similarity of other postings. In these circumstances, I accept F.Y.'s assertion that he did not consider other Facebook comments he saw to be work-related and they did not cause him the concern that the August 27 posting did.

104 However, even though I accept that the Facebook postings first came to the Employer's attention through a legitimate personal concern raised by F.Y., it does not answer the question of why the Employer monitored J.T.'s Facebook postings from August 27 until October 6, 2010 without raising them with Turner. I agree with the Union that it is puzzling or suspicious that the Facebook postings were not raised at the time that the Employer issued the September 24 disciplinary letter for disruptive and confrontational behaviour in the workplace.

105 When determining issues of credibility, the leading authority is *Faryna v. Chorny* (1951), 4 W.W.R. (N.S.) 171, [1952] 2 D.L.R. 354 (B.C. C.A.) ("*Faryna*"). Following the principles in that case, I must determine which version of events is more in keeping with the preponderance of probabilities. In other words, did the Employer monitor for the purpose of building a file on his Facebook postings until a case for termination of the Union's key supporters was established or did the Employer monitor the postings as it was concerned but unsure how to proceed and terminated the Complainant's employment when it considered it intolerable?

106 The Facebook postings became more serious than the "accidents DO happen" posting. There is a ring of truth to the Employer's assertion that it did not know that the postings were going to continue or that they were going to get worse. However, the postings continued and they escalated in seriousness.

107 I conclude that if the Employer was purposefully looking to terminate J.T.'s employment, it makes sense that they would have done so after the September 24 posting. To use the terminology in *Faryna*, it fits within the "preponderance of probabilities" that if the Employer was monitoring solely to find grounds to get rid of the inside union organizer, they would have acted on the September 23 and 24 postings. On September 24, 2010, the Employer issued J.T. a disciplinary letter for disruptive and confrontational behaviour in the workplace on September 23, 2010. On September 23 and 24, 2010, J.T. made postings that identified his employer as WestCoastAutoGroup, called the head manager the "FixedOp/Head Prick", directly referenced the discipline he received and said the "FUKN gloves are off" and "they pissed off the WRONG GUY". J.T. is entitled to his opinion. However, displaying his opinion about work related issues may have consequences within the employment relationship: *Alberta* at para. 97.

108 The fact that the Employer continued to monitor and did not take any disciplinary action when there were further insubordinate postings on September 27, 28 and 30, 2010 supports the Employer's assertion that it was uncertain as to how to handle the situation. Thus, I find that the Employer's explanation for its manner of investigation fits within the preponderance of probabilities. I accept J.C.'s explanation of the Employer's conduct; that it did not attempt to correct J.T.'s behaviour because the Employer was uncertain what to do as it had never encountered a situation which involved an employee's use of

Facebook. It continued to monitor until it became intolerable and then it consulted the owner and legal counsel on the appropriate action to take.

109 At that time, they conducted detailed interviews. The Complainants were provided with an opportunity to meet with Union representatives and review copies of the Facebook postings before they were asked about them. At the interviews, the Union representatives were present. Both Complainants denied making the postings. The Employer considered this dishonest and found it compounded the misconduct. The investigation was not over until the interviews were conducted. I find the Employer could have taken action earlier but followed a process which provided the Union with an opportunity to represent the Complainants and provided the Complainants a chance to explain their conduct. I therefore conclude that the Employer was not motivated by anti-union animus in the manner in which it investigated.

110 On a consideration of all the *ETL* factors, I find that the Employer was not motivated by anti-union animus. The fact that the Complainants had no previous discipline and the Employer knew they were key supporters of the Union does not outweigh the fact that the Employer had never encountered similar conduct, and the work offence was serious insubordination and conduct damaging to the Employer's reputation. The manner of the Employer's investigation was the most important factor to determine if there was anti-union animus in this case. However, for the reasons noted above, I find that it does not support a finding that the Employer was motivated by anti-union animus.

111 I turn to the issue of whether there was proper cause for the termination of the employment of the Complainants. The Union argues that there was no proper cause for the termination of the employment of J.T.'s employment because the penalty imposed is out of proportion to the conduct. However, the only basis upon which is argues this point is that it says the employment relationship is not irreparably severed. It says the Employer had no problem with him continuing to work after it saw his first postings and therefore there is no problem with him continuing.

112 I find that the nature of the comments made towards the supervisors were offensive and egregious. J.T. expressed contempt for and ridiculed the manager and supervisors in such a manner that there was proper cause. The fact that the Employer allowed this insubordinate conduct to continue for a matter of weeks does not mitigate against a finding of proper cause. I therefore find the penalty is not out of proportion with the misconduct and there is proper cause for the decision to terminate the employment of J.T.

113 Turning to A.P., the Union argues there is no proper cause, as A.P. did not make the postings on September 30, 2010. I rely again on the test in *Faryna*. A.P was angry with the Employer on September 30 because he was sent home. He was angry because he thought it was a conspiracy and he was sent home because of his support for the Union. He admits he was home for a few minutes around the time that the posting was made. As well, A.P. admits making postings on his Facebook later that day. So there is a small window of opportunity for some unknown hacker to enter his account and express anger about the Employer under his name. His assertion that he left his Facebook page logged on at work does not make sense considering the fact that he had problems in the past where someone had hacked into his Facebook and posted comments under his name on his page.

114 Most significantly, he admits apologizing to F.Y. the next day. This makes sense as there were very offensive comments about F.Y. posted by J.T. in the conversation that flowed from the initial status posting. However, even if I accept A.P.'s version that he apologized for comments "made" on his Facebook page rather than for comments "he made" on his Facebook page, it does not make sense for him to not clearly express that he did not make the postings and someone had hacked into his account. The comments concerned him to the point that he immediately deleted the postings and then closed

his Facebook account the next day. I take from this that he understood how inappropriate and serious the comments were. However, when he apologized to F.Y., he did not expressly say that someone had hacked into his account. This does not fit into the preponderance of probabilities.

115 I found A.P.'s testimony that a friend called him and told him there was harsh stuff on his Facebook to be believable. However, as set out in *Faryna*, the demeanour of a witness is not always a reliable indicator of the truth. When I consider the totality of the evidence, I find that he had the motivation and the opportunity to make the postings. I also find making his apology without saying at that time that someone hacked into his Facebook account leads me to conclude that A.P. made the Facebook posting on September 30, 2010. The comment was very egregious in that it named the Employer and attempted to encourage people not to spend money at the Employer's business. A.P. only made the comments on September 30 and therefore it is an isolated incident. He also apologized to F.Y. who was the person most personally insulted during the ensuing Facebook conversation. A.P. apologized the very next day before he was aware that the Employer knew about the posting. If A.P. had admitted the postings and been honest during the investigation meeting and these proceedings, my conclusion may have been different. However, the Employer found that the dishonesty in the investigation meeting compounded the misconduct and determined that it justified termination. I agree and find that there is proper cause for the termination of A.P.

116 I find the Employer has not breached the Code and dismiss the Union's application.

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