

*Case Name:*  
**Grimm's Fine Foods v. United Food and  
Commercial Workers Union, Local 247  
(Costas Grievance)**

**IN THE MATTER OF an Arbitration  
Between  
Grimm's Fine Foods (the "Employer"), and  
United Food and Commercial Workers  
Union, Local 247 (the "Union")  
Re: M. Costas and M. Solis Termination Grievances**

[2010] B.C.C.A.A.A. No. 146

No. A-109/10

British Columbia  
Collective Agreement Arbitration

**Panel: Mark J. Brown (Arbitrator)**

Heard: September 20, 21, 22 and 27, 2010.

Award: October 12, 2010.

(94 paras.)

**Appearances:**

Lorene A. Novakowski, for the Employer.

Charles Gordon, for the Union and on behalf M. Costas.

Christopher J. Foy, for the Union and on behalf M. Solis.

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**AWARD**

**I. ISSUE**

**1** M. Costas and M. Solis were terminated on May 26, 2010 for an incident that occurred on May 5, 2010. Costas has been employed by the Employer since July of 2002; Solis since April of 2003.

2 Costas' termination letter stated in part:

Based on our investigation, we can confirm the following details:

1. You were working in Production on Stuffer #1 as the operator.
2. You asked [Solis] to empty your bowl.
3. [Solis] said he would empty the bowl when his bowl was full.
4. You and [Solis] argued and you both flicked water droplets in each others face.
5. You both punched each other in the head.
6. Co-worker Balvir was hit in the back by one of you.

Ms. Costas, we have not taken this incident lightly. In fact, we are appalled by your actions. You admit to punching a co-worker in the face; an act of assault. Another co-worker was struck while you and Mark were fighting. You have breached the Company's policy on Horseplay. You have also breached the regulations from WorkSafe BC on workplace conduct. And finally, you have ignored the section in the Collective Agreement relating to Respect and Dignity. This is not acceptable. We have had many conversations about this incident. In making a decision about your fate, the most important question that we asked ourselves was if the Company condoned violence in the workplace. Simply answered, we do not condone violence in the workplace.

With that being said, this letter will serve as your notice of termination, which is effective immediately. You are being terminated for fighting in the workplace, which we consider to be just cause.

3 Solis' termination letter was for the most part identical.

4 Both grievances were referred to me to be heard at the same hearing. Both grievors were represented by Counsel provided by the Union.

5 Union Counsel conceded that the grievors actions should result in some form of discipline, but that termination was excessive. The Employer argued that the terminations were for just and reasonable cause and should be upheld.

6 I am issuing this decision in an expedited fashion as it relates to two terminations.

## II. BACKGROUND

7 The Employer is a well known European meat producer. There are approximately 193 employees at the plant in Richmond; 170 are in the bargaining unit. The Employer is subject to the Canadian Food Inspection Agency guidelines and there is an inspector on site at all times. The Employer views health and safety to be a serious matter at the workplace.

**8** The Employer's Horseplay policy states:

In an effort to maintain a safe working environment, Grimm's Fine Foods does not permit acts of horseplay on company property (inside or out). Horseplay may take the form of spraying other employees with water, throwing objects, writing on smocks, fighting, etc. All acts of horseplay are considered dangerous as the possibility for an accident to occur is increased.

As required by WCB regulations 4.24 & 4.25 & 4.26

Any employee involved in an act of horseplay will be subject to the disciplinary process, which may include dismissal.

**9** When employees are hired they are subject to an orientation. It includes reference to the horseplay policy and health and safety. The employees also take two tests during the orientation session in order to ensure that they have understood topics discussed. There are also periodic training sessions that involve health and safety. Both Costas and Solis took part in the orientation and other training sessions on health and safety.

**10** The Collective Agreement includes the following provision at Article 6.05:

The Company and its' Employees agree that they will at all times operate within the spirit of mutual respect for each other as parties and as individuals. Any inappropriate behaviour such as vulgarity, bullying, cursing, profanity, name calling swearing, yelling or the humiliation of employees will not be tolerated.

**11** The balance of the Article sets out a resolution process if a grievance is filed.

**12** The incident on May 5, 2010 took place in the Production 2 area of the plant on the afternoon shift. The area has five production lines. They are within close proximity of each other; approximately six feet apart. The incident in question occurred on line #1 which is closest to the wall. It is approximately two to three feet away from the wall. Workers on line #1 perform their job in the area between the wall and the line, facing the other lines. Workers on line #2 perform their job facing line #1.

**13** On the shift in question, line #1 was producing wieners. Costas was the stuffer operator, Balvir Dhanda was linking the product, and Solis was hanging the product.

**14** Meat is put in a hopper at the top of the machine. Costas' job involved placing casing on the horn of the machine so that the meat can be extruded into the casing. She would pass the casing to Dhanda who was responsible for linking the casing who would in turn pass the product to Solis who would place the product on a rod and hang the rod on a wagon. The wagons are picked up by other employees and taken to the smokehouse. The work is performed by all three employees on a table that is approximately six to eight feet in length.

**15** When casing breaks, the meat product is placed in one of two stainless steel bowls on the table. When the bowls are full the meat product is placed back in the hopper so that it can be extruded into the casing.

**16** Because of the amount of machinery in the area, the area is noisy. Employees wear helmets and hearing protection. Knives and rods are used in production. Because of the temperature in the

area, employees wear a number of layers of clothing under their smocks. The area is also wet due to the amount of water used to ensure proper hygiene. It is a safety sensitive environment due to these factors.

**17** I will commence a review of the incident from when the Employer became aware of it, moving to the Employer's investigation, and then return to the grievors' testimony at the hearing.

**18** Zlatko Rubinic is the lead hand on the shift. He is a member of the bargaining unit. He was behind line #2 with his back turned to line #1 when he heard screams. He turned and saw Costas and Solis behind Dhanda. Solis' helmet was off and Costas and Solis were yelling at each other in their native language. Rubinic directed them into the aisle and took all three to the office of the Supervisor, John Dragun.

**19** Based on Dragun's testimony and notes taken during the investigation stage, both employees were still agitated when they arrived at his office. Dragun had to step between them and ask them to sit down as he thought they were going to fight again. Costas explained to Dragun that she asked Solis to dump her full bowl into the hopper. Solis stated that it was not his job. Costas asked him again. He refused. Costas flicked water at Solis and he did the same to her. Costas stated that Solis punched her in the face. Dragun noticed some puffiness in the cheek area. Costas punched Solis in the face area knocking his helmet off. She cut her knuckles. She then tried to hide behind Dhanda. Dhanda was punched in the back by one of the two of them. Dragun stated that Solis' version of events was essentially the same except that he asserted that Costas punched him first. Dragun called Roslynn Smith, Human Resources Manager, and was advised by her to send Costas and Solis home pending further investigation.

**20** Dragun had no problem scheduling Costas and Solis to work on the same line as there had not been issues between the two of them in the past.

**21** Costas went to first aid due to the cut on her right hand. Neither Solis or Dhanda required first aid.

**22** Sometime after the day in question, Dragun talked to Philip Hee and Jing Sheng who were working on line #2 at the time of the incident. Both heard yelling and Dhanda's scream but neither saw any punches thrown. Both Hee and Sheng testified as well, but I do not find their testimony helpful in reaching my conclusions. About a week after the incident Dragun also had a meeting with employees and asked them if anyone saw the incident. He could not recall the date of the meeting or who attended. He did state that no one saw the incident.

**23** Smith has been the Employer's Human Resources Manager since 1995. When she arrived at work the next day, Solis was there to see her. Because he was there, Smith decided to interview him about the incident. A Shop Steward, Allison Cox, was present at all interviews.

**24** Based on Smith's testimony and notes taken at the time, Smith was told by Solis that Costas asked him to empty her bowl. He said he would do it when his bowl was full. She asked again. He repeated that he would do it when his was full and that it was her job. Costas came down toward him, arguing and shaking her finger. She asked Solis what he really wanted. She flicked water in his face. He flicked water at her. Costas punched him in the forehead knocking his helmet off. He punched her in the cheek one or two times. Dhanda screamed and everything stopped. Dhanda said she was hit in the back twice. Solis was upset and ashamed.

**25** Smith interviewed Costas on May 7th. Based on Smith's testimony and notes taken at the time, Smith was told by Costas that her bowl was full. She asked Solis to empty it. Solis said he would do it when his bowl was full. Costas put some of her meat from her bowl into Solis' bowl and asked him again. Solis did not empty the bowls. Costas went to Rubinic who was at the machine on line #2. He just shrugged his shoulders. Costas went back to line #1 and emptied both bowls. While she was emptying the bowls she saw Solis laughing at her. She threw the bowl on the table and then went to talk to Solis. She asked Solis why he was laughing and what his problem was. While they were arguing, Solis flicked water in her face. Costas said "fine" and when she moved her hand water sprayed in his face. Solis then punched her in the face. Costas hid behind Dhanda and then struck out with her right hand hitting Solis in the face. Solis punched her two more times. Dhanda was hit in the back. Costas believed it was from Solis. Dhanda screamed and it stopped.

**26** Smith stated that she could not conclude who threw the first punch. Because they were both willing participants in the fight, she did not believe that it was necessary to reconcile who actually threw the first punch.

**27** Smith also testified about previous incidents at the workplace involving physical altercations. In May of 2009, two employees (Frank Jobses and Mark Wang) were involved in an incident. Jobses asserted that he was struck in the chin by Wang and knocked to the floor. When Jobses tried to get up, Wang stomped on Jobses three times and then grabbed his arm and spun him around on the floor. Wang asserted that Jobses punched him in the face. Wang pushed him back a couple of times. Wang grabbed Jobses' arm to take him to the supervisor but a struggle ensued and Jobses fell to the floor. After interviewing the two employees and any possible witnesses, Smith concluded in letters dated May 15, 2009 to the two employees "that there are some similarities in the stories of what happened, but that it is difficult to actually say for sure what happened. It is apparent that you both had a role to play in this altercation". The Employer decided to treat both the same and suspended both employees for three days without pay "for having a physical altercation".

**28** In April of 2010, two other employees (Ronelio Cuestas and Berardo Facundo) were involved in an incident. Facundo asserted that the two of them had an argument and that Cuestas followed him into an area in the plant and punched him on the left shoulder resulting in Facundo falling to the ground. While Facundo was on the floor, he asserted that Cuestas kicked him in the left foot. After being helped up by a co-worker, Facundo stated that Cuestas swung a knife at him causing him to step backwards and hit his head on a door. Cuestas asserted that Facundo approached him after some words were spoken and challenged him to a fight outside. Cuestas stated that co-workers separated them. Cuestas followed Facundo into another room to resolve the matter. Facundo turned around very quickly and Cuestas raised his hand to protect himself. Facundo fell and then got up and left the area.

**29** After investigating the matter, Smith summarized her findings in a letter dated April 28, 2010 to Cuestas:

1. When you came into the clean up room you appeared to be upset.
2. You had a conversation with Bernardo in your own language.
3. Both of you challenged each other to go fight outside.

4. You followed Bernardo into the Schroeder area.
5. Some sort of scuffle occurred resulting in Bernardo falling to the floor.
6. Bernardo got up and left the area and you returned to work in the clean up back room.
7. It was not confirmed that you punched Bernardo, that you kicked Bernardo, or that you swung a knife at Bernardo.

**30** Cuestas was suspended for five days for his "inappropriate behaviour in this incident". Falcundo was terminated because of his dishonesty at several points in the investigation of the incident.

**31** With respect to the incident at hand, Dhanda was working on line #1 with Costas and Solis. She was between them. She testified that Costas' bowl was full. Costas asked Solis to dump it. He said he would when both bowls were full. They were both very loud. Costas dumped both bowls and then came behind Dhanda to talk to Solis. Dhanda felt two punches on her back. She screamed and turned her head to the right. Costas was right behind her. She saw Costas punch Solis and Solis punch her. Rubinic came when he heard Dhanda scream.

**32** Shirley Mogg has worked for the Employer for twenty-one years. She was working on line #2 on the day in question. She testified that she heard Solis say that it was not his job to empty the bowl. She saw Costas empty the bowl and then go to Rubinic to speak to him. She did not hear the conversation between the two of them. Mogg yelled at Rubinic to move Solis off the line to stop the argument. She saw Costas and Solis arguing. Next she heard Dhanda scream. She saw Solis punch Costas and his hat fell off. She saw him punch her a second time. She could not see Costas as she was behind Dhanda. Mogg was not asked by the Employer if she witnessed anything and she never approached management to report what she saw.

**33** Costas was on her third shift after seven weeks' vacation in the Philippines. She has not had any issues with Solis in the past. Costas testified that she asked Solis to empty her bowl. She could not hear his response. Costas said she could not empty the bowl as she had to keep the machine running. She took some of the meat from her bowl and put it in his bowl so that both bowls were now full. Costas went to him and asked what his problem was. Solis said it was not his job. Costas went to Rubinic to explain the situation. According to Costas he just shrugged his shoulders. Rubinic testified that he looked at Solis and gestured in a way implying what is the matter. He was not sure whether Solis saw him or not.

**34** Costas stated that she then returned to line #1. She emptied both bowls. While she was doing that she noticed Solis laughing at her. She washed both bowls and then threw their bowl on the table. It hit the floor. She washed it again and put it on the table. Costas walked behind and past Dhanda and asked Solis what she did wrong or what the problem was. They were arguing. He was flicking water with his hands and said it was not his job. Costas said fine and opened her hand flicking water in Solis' face unintentionally. Solis hit her in the left cheek area. Costas then moved behind Dhanda grabbing her smock and hiding her face. Costas swung her right hand at Solis and hit him but was not sure where. Solis punched her two more times. The fighting stopped when Dhanda screamed.

**35** Costas has no formal discipline record.

**36** Solis testified that Costas asked him to empty the bowl. He said he would when his was full. Costas went to talk to Rubinic. She was swearing to herself in her own language. She returned to the line and walked behind Dhanda asking Solis what he really wanted. Costas flicked water in his face. He asked her what she was doing and he flicked water in her face. Costas punched Solis in the forehead knocking his hard hat to the floor. Solis said he was shocked and tempted and he retaliated. Solis stated that Costas punched fast, two combinations, four punches. Solis said he punched twice and the fighting stopped when Dhanda screamed. Solis testified that he was quiet and that he did not say that it was not his job.

**37** Solis also stated that there was an incident with the bowls thirty minutes before the altercation. Whether he was confused in his testimony or not, I do not need to reconcile his testimony on this point as it does not affect my conclusions.

**38** Solis has a written warning for absenteeism in 2009 and a verbal warning for not calling in to work in 2008.

### III. ARGUMENT

**39** I do not intend to set out argument in detail. All Counsel spent considerable time taking me through the evidence setting out the version of events that they argue I should accept. Apart from that, I will briefly set out the parties arguments.

**40** The Employer argues that the worksite is a safety sensitive and highly regulated area. The policy on horseplay and WorkSafe regulations are made clear to all employees. With respect to the previous incidents with other employees, the Employer argues that I cannot revisit the incidents. The Employer investigated the matter at the time and reached its conclusions about what happened. The Employer's approach to those two incidents and the case at hand do not demonstrate discriminatory conduct as defined by cases set out in *Canadian Labour Arbitration, Brown and Beatty*, March 2009, 7:4414. The Union has the onus to prove discriminatory conduct on behalf of the Employer and has not done so.

**41** The Employer cites several cases to support its position arguing that termination is justified, the employment relationship cannot be restored and the grievances should be dismissed: *BC Ferry Services Inc. and B.C.F.M.W.U.* (2007), 91 C.L.A.S.128; *Capilano Highway Services Co. and B.C.G.E.U.* (1990), 20 C.L.A.S. 22; *EV Logistics and Retail Wholesale Union, Local 580* (2008), 92 C.L.A.S. 247; *Fortis BC Inc. and I.B.E.W. Local 213* (2007), 90 C.L.A.S. 137; *Health Employers Assn. of B.C. and H.E.U.* (2004), 78 C.L.A.S. 303; *Humber Sheet Metal Ltd. and U.S.W.A., Local 13571* (1998), 54 C.L.A.S. 332; *Labatt Breweries of B.C. and Brewery, Winery & Distillery Workers' Union, Local 300* (1989), 16 C.L.A.S. 12; *Le-Ron Plastics Inc. and C.A.W. Canada, Local 114* (2008), 92 C.L.A.S. 277; *Pepsi Bottling Group (Canada) Co. and U.F.C.W., Local 387W* (2007), 91 C.L.A.S. 369; *Pinty's Premium Foods Inc. and U.F.C.W., Local 175* (2004), 77 C.L.A.S. 169; *Ontario Engineered Suspensions Ltd. and C.A.W., Local 127* (2002), 71 C.L.A.S. 169; *Surrey School District No. 35 and C.U.P.E., Local 728* (2002, 109 L.A.C. (4th) 345; and *TNT Logistics and U.S.W.A., Local 9042* (2003), 73 C.L.A.S. 301.

**42** I will combine the argument of both Union Counsel as it is essentially the same with the exception of the evidentiary component. The Union argues that the grievors were terminated for fighting and that the Employer did not care at the time who threw the first punch. The Employer is now trying to expand the reasons for discharge by concentrating on who threw the first punch and

the alleged dishonesty during the testimony before me. The Union argues that the Employer cannot expand the grounds now in order to shore up its case: *Aerocide Dispensers Ltd. and U.S.W.A.*, [1965] O.L.A.A. No. 1; *Waste Management of Canada Corp and U.F.C.W., Local 175*, [2009] O.L.A.A. No. 415.

**43** The Union cites several cases to support its position as to how I should view fighting in the workplace arguing for a suspension rather than termination: *Re Seaspan International Ltd., Victoria Division and Marine Maintenance Union, Local 1*, [1985] B.C.C.A.A.A. No. 336 (Germaine); *Westcoast Energy Inc. v. Communications, Energy and Paperworkers Union, Local 449 (McGrath Grievance)*, [2001] B.C.C.A.A.A. No. 179 (McPhillips); and *Eurocan Pulp & Paper Co. v. Communications, Energy and Paperworkers Union, Local 298*, [2000] B.C.C.A.A.A. No. 369 (Ready).

**44** The Union argues further that the Employer has demonstrated disparate or discriminatory treatment of the grievors compared to the employees in the two previous incidents to support its argument for a suspension: *British Columbia Transit and Independent Canadian Transit Union Local 11 (McMaster Grievance)*, [1996] B.C.C.A.A.A. No. 161 (Munroe); *Alsco Uniform & Linen Services v. Retail Wholesale Union, Local 580 (Oravec Grievance)*, [2003] B.C.C.A.A.A. No. 190 (Germaine); *Maple Leaf Meats*, [1999] M.G.A.D. No 15 (Hamilton).

#### IV. AWARD

**45** First, I will deal with an issue that arose during the hearing. The Employer attempted to introduce evidence about a leave of absence request from Solis in 2009 to attend a respectful relationship seminar; and evidence relating to incidents involving Costas that did not involve discipline. The evidence was to support the Employer's argument that the grievors should not be returned to the workplace due to a propensity for the type of behaviour in question. The Union objected to the evidence.

**46** I agreed with the Union and did not allow the evidence to be entered. The probative value of the evidence did not outweigh the prejudicial effect. In the case of Solis the request was for a leave of absence for a seminar. In the case of Costas the incidents did not result in discipline and do not form part of her disciplinary record. Whether or not the grievors can be returned to the workforce is a matter I must determine based on all the circumstances relating to the incident in question and the relevant case law.

**47** Second, as I noted above, the Union argues that the Employer has expanded the grounds for discharge and that I should not consider the Employer's arguments relating to who threw the first punch and alleged dishonesty at the hearing. At the conclusion of the hearing the Employer requested an opportunity to make further submissions on this point. I advised the parties that if I was going to consider these factors in my deliberations with respect to whether the discharges were justified, I would grant the request.

**48** I conclude that it is not necessary to seek further submissions on this point. For the reasons set out below, I conclude that the terminations were excessive. I conclude below that the grievors were not dishonest before me; and, even if I considered the factor of who threw the first punch, I would still conclude that the discharge was excessive. However, I have considered the latter factor in considering the third *Wm. Scott* question, which is what alternative measure should be substituted.

**49** Turning now to the case at hand, the parties do not dispute that an arbitrator's approach with respect to discipline and discharge cases is set out in *Wm. Scott and Co. Ltd. and Canadian Food & Allied Workers Union, Local P-162*, [1977] 1 Can L.R.B.R. 1 ("*Wm. Scott*"). The arbitrator asks three questions.

1. Has the employee given just and reasonable cause for some form of discipline by the employer?
2. If so, was the discharge an excessive response in all the circumstances of the case?
3. Finally, if the discharge is considered excessive, what alternative measure should be substituted as just and equitable?

**50** In assessing the appropriateness of the penalty, the arbitrator considers several factors:

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 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.

**51** The Union concedes that the first question can be answered in the affirmative. The actions of Costas and Solis are cause for discipline.

**52** I must consider whether discharge is excessive in all of the circumstances of the case.

**53** In *Eurocan Pulp & Paper Co.*, supra, the arbitrator stated at paragraphs 11 and 12:

It has long been recognized that fighting at the workplace is one of the most serious employment infractions. The conduct undermines management's authority to govern the workplace, and maintain productivity and discipline. Fighting jeopardizes the safety of other employees, beyond just the antagonists. Like few other incidents, a fight directly affects the mood of the work environment, and employee morale. See *SRI Homes Inc. and International Woodworkers of America, Local 1- 184* (1996) 58 L.A.C. (4th) 384 (Hood); *Seaspan International Ltd., Victoria Division and Marine Maintenance Union, Local 1* (1985) 18 L.A.C. (3rd) 220 Germaine; *Tahsis Co. Ltd. and International Woodworkers of America, Local 1 - 85* (1984) 14 L.A.C. (3rd) (Bird); and *Ontario Store Fixtures and United Brotherhood of Carpenters & Joiners of America, Local 1072* (1993) 35 L.A.C. (4th) 187 (MacDowell).

The case law also recognizes that fighting does not necessarily warrant automatic termination of involved participants. In *Re Allied & Technical Workers, Dist. 50 and Liquid Carbonic Canada Ltd.* (1972) 24 L.A.C. 309 (P.C. Weiler), the board stated:

The principle appears to be accepted in the more recent cases, by several different arbitrators, that a momentary flare-up of a work dispute into physical violence is not just cause for discharge by itself. This principle is obviously subject to change by a term in the collective agreement and no doubt there can be special cases where the seriousness of a particular fight can result in discharge even for a first offence ... Ordinarily, though, when arbitrators have exercised their contractual and statutory powers to assess the degree of discipline justified by an offence, they have concluded that a substantial suspension is a sufficient response to the seriousness of a fight. (at 314-5)

**54** Arbitrators have also considered employer policies (e.g. does the employer have a zero tolerance policy), whether the altercation involved a supervisor as opposed to two bargaining unit members, was the fight premeditated or spur of the moment, were other employees at risk, the risk involved to employees due to the surroundings, as well as the factors set out in *Wm. Scott*.

**55** I also believe that it is fair to say that employers and employees in all workplaces view violence as being more serious today than what one might have expected several years ago. Given the modern workplace, and society in general, violence in the workplace is not tolerated to the extent that it might have been previously.

**56** The issue of the consistent application of the Employer's policy and consistent treatment of employees is an issue in the case at hand as well. In *Fortis BC Inc.* supra, the arbitrator stated at paragraphs 177 and 178:

Arbitral jurisprudence has always recognized the principle that similar cases should receive similar treatment. *Brown and Beatty* describe it as a "universal precept of fairness and justice", at 7:4414. Arbitrator Joliffe in *Alberta and AUPE* at p. 16 refers to the "time honoured arbitral principle that employees should receive similar, not differential, treatment for workplace offences found to be materially alike in sufficient relevant ways so as to have reasonably invited a similar approach." Consistency instils a sense of fairness. As arbitrator Ready puts it in *B.C. Transit* at p. 57:

...there must be some pattern of consistency on the part of an employer. After all, employees are entitled to know where they stand by way of clearly communicated and consistently applied standards of conduct by an employer and the disciplinary consequences of failing to live up to those standards.

Employees are reasonably entitled to expect from their employer a consistent approach to discipline: see *Noble Custom Cut*, at p. 7. *Wm. Scott* does not, however, require that everyone who commits a particular offence receive the same penalty without regard to the special circumstances of the individual or mitigating factors such as length of service and an unblemished record: see *Brown and Beatty* at 7:4400 for a check list of relevant factors. Although it could not be consistent with the concept of just and reasonable cause to single out an individual for arbitrary and harsh treatment, there is nothing improper in differentiating between employees on the basis of their disciplinary records.

**57** There is obviously conflict in some of the testimony. In order to reconcile this conflict, I must determine the version of events that I accept based on the principles set out in *Faryna v. Chorny*, [1951] 4 W.W.R. (NS) 171, 2 DLR 354 (B.C.C.A.). My task is to piece together a version of events based on the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (page 357). That does not mean that I must accept a person's testimony in its totality in preference to that of another witness. Certain aspects of various witness' testimony may in fact reflect the probable sequence of events.

**58** In my experience the vast majority of witnesses do not lie under oath. Their version of events may differ because of fading memories, miscommunication, different perceptions, cultural issues, or other factors that lead witnesses to different stories based on honestly held beliefs. In a small minority of cases some witnesses do lie under oath.

**59** In the case at hand I do not believe that any witness was dishonest in their testimony. The grievors in particular testified as to their version of the altercation which occurred very quickly and while both were upset. Furthermore, their command of the English language resulted in some confusion at times in answering some questions.

**60** In reviewing all the evidence, I reach the following conclusions with respect to the incident on May 5, 2010.

**61** No one saw the incident coming. Costas and Solis have worked together before without issue. Dragun and Rubinic had no problem scheduling them to work on the same line.

**62** Costas was frustrated with the number of casings that were breaking. The bowl in front of her was full. She asked Solis to empty the bowl. Whether Solis replied that it was not his job, or simply said he would do it when his bowl was full, need not be reconciled. Costas was frustrated with the response. Costas proceeded to move some product from her bowl to the one in front of Solis and asked him again to empty the bowls as both were now full. Such a move would not surprisingly annoy Solis.

**63** Even though Costas stated that she needed Solis to empty her bowl because she was busy, she took the time to seek out Rubinic to complain about Solis. Rubinic responded by shrugging his shoulder. While Rubinic thought such a response was appropriate because he was not aware of the potential dispute and because he was called to another machine, Costas' frustration level increased.

**64** Costas was angry and emptied both bowls. Whether Solis laughed at her or not need not be reconciled. Suffice it to say that Costas thought he did and she was angry. Costas went behind Dhanda. Costas asked what the problem was. I conclude that both were speaking in a loud voice, partly because the area is noisy so people need to speak loudly to be heard, and because they were upset. Both Costas and Solis had wet hands due to the environment. Given the circumstances and because she was the one most frustrated with the events, I conclude that because she was not getting the response from Solis that she expected, Costas said "fine" and opened her hand flicking water on Solis' face. Whether it was intentional or not, it surprised Solis and he responded by doing the same.

**65** Costas responded by punching Solis in the forehead knocking his hard hat to the floor. I conclude that she threw the first punch because she was the one that escalated the incident in the first place. She was the most upset with the circumstances. Solis had no reason to escalate the situation by striking first.

**66** Realizing that Solis was mad, Costas grabbed Dhanda's apron and placed her face in Dhanda's back. I conclude that Dhanda did not feel Costas grab the smock as she testified that she was wearing four layers of clothing under the smock.

**67** While Costas was in this position, Solis punched Costas twice in the side of the face. He is right handed and the blows would have struck Costas on the left cheek which was red and puffy when the employees went to Dragan's office. Because of where her face was (against Dhanda's back), Dhanda felt the blows and assumed she had been punched.

**68** I do not believe that Costas struck out after Solis punched her while she was crouched behind Dhanda. I give her the benefit of the doubt in that I do not believe she was not telling the truth before me. I conclude that things happened so fast that remembering exactly what happened and in what sequence is difficult.

**69** This is the point that Mogg witnessed. I conclude that she saw Solis punching Costas. His hard hat was off because Costas had already punched him. Mogg could not see Costas as Costas was behind Dhanda.

**70** Dhanda felt the blows and screamed. She turned and saw Costas and Solis exchange punches. I conclude that these are the sequence of punches that Solis described as the combinations. These blows were very quick. I reach this conclusion because all the other witnesses testified that when they heard Dhanda scream they immediately looked over in her direction and all they saw was Costas and Solis yelling. No one saw any punches.

**71** Turning to the *Wm. Scott* factors, I will consider all the circumstances of the case to decide whether termination was excessive in either or both cases.

**72** Costas has no disciplinary record and Solis' record relates to attendance issues. The record is only a verbal and written warning and for an unrelated matter.

**73** Both employees are relatively long service employees with good employment records.

**74** I conclude that neither was provoked into the fight. Circumstances lead Costas to be frustrated and she acted out and Solis responded inappropriately; however, the case at hand does not involve provocation.

**75** I conclude that Costas was frustrated with the number of casings that were breaking, frustrated with Rubinic's lack of assistance and frustrated with Solis' response to her request for help. Her reaction was spur of the moment and an emotional response. It was not premeditated. Solis reacted due to an emotional impulse.

**76** The economic hardship has been greater on Solis. When his wife died of cancer and his son was born prematurely, he was unable to care for his son. His son was moved to the Philippines to live with his parents. His plan of sponsoring his parents and son to move to Canada to be with him have been put on hold. He is collecting Employment Insurance and has been unable to find work.

**77** Costas was denied Employment Insurance, although she is appealing that decision. She is currently working.

**78** The next point is the issue of whether the Employer has applied its policy in a consistent manner, and the issue of discriminatory discipline. This is not a case where the Employer has meted out differing discipline for the same incident. Both employees were terminated.

**79** The Employer takes safety seriously. The workplace is a safety sensitive one with risks such as water, and tools involved. The horseplay policy is not a zero tolerance policy. The Employer acknowledged that it looks at the circumstances of any event before reaching a decision on what to do. I conclude that the grievors were aware of the company policies or should have been. After all, no fighting in a workplace is simple common sense.

**80** I agree with the Employer that I cannot revisit the previous incidents. They are technically not before me. However, what I find problematic is the Employer's disciplinary response to the previous incidents compared to the case at hand.

**81** In the Jobes/Wang incident, the Employer could not determine what happened. It concluded that there were some similarities and that a physical altercation occurred. At the very least based on Wang's version, a punch was thrown. On the other end of the spectrum, Jobes' version describes an attack. If you accept the least violent version, a punch was thrown. The employees were suspended for three days. It set up an expectation in the workplace that a physical altercation resulted in a suspension.

**82** In the Cuestas/Facundo incident the five day suspension was the result of employees challenging each other and some sort of scuffle. It also set an expectation that even though the Employer took matters seriously, the discipline imposed did not automatically result in termination.

**83** While I conclude that the Employer has not been discriminatory as that term is used in some of cases cited by Counsel, I conclude that the Employer's response to the case at hand when the employees were honest about what happened is not consistent with past responses.

**84** In the Jobes/Wang incident, at the very least a punch was thrown and the Employer concluded that a physical altercation took place resulting in a three day suspension. In the Cuestas/Facundo incident at the very least a scuffle took place after the employees challenged each other resulting in a five day suspension to Cuestas.

**85** In the case at hand, both employees immediately admitted to punching each other. While I consider the matter to be serious, I conclude that termination is excessive in both cases. The grievors have relatively long service, good work records, no discipline to speak of, the incident was spur of the moment and not premeditated and most importantly the Employer's response on balance is more severe compared to previous incidents.

**86** Turning to the third *Wm. Scott* question, what discipline should be substituted? This is where I consider who started the incident and whether the employees can be placed back in the workplace.

**87** The fact that both said they could work with each other is self-serving at this point. The fact that all other witnesses said they could work with both employees is telling. I conclude that both can be returned to the workplace and that a suspension should have the required remedial affect.

**88** I am not prepared to follow the short suspension as suggested by Counsel for Costas based on the Employer's previous response to other incidents. While I consider the termination to be excessive for all the above reasons, especially due to the Employer's previous reaction to physical altercations, I do not consider a short suspension to be appropriate.

**89** Physical altercations in any workplace today are serious, but even more so in a safety sensitive one where risks are more prevalent.

**90** I will address Solis first. I conclude that he reacted in an inappropriate impulsive way to Costas' first punch. It was a spur of the moment action and not premeditated. He made no effort to remove himself from the situation. He struck a woman. He also put Dhanda at risk. However, Solis was ashamed and remorseful the next day. The termination has had a serious impact on his family situation. He has good employment record and long service.

**91** For all the above reasons I substitute a one month suspension without pay. Solis's personnel file should be amended to reflect the suspension, he should be re-scheduled to work as soon as possible and made whole.

**92** With respect to Costas, I conclude that she threw the first punch. She put Solis and Dhanda at risk and she has shown little remorse. She has a good employment record and is a long service employee. Given that she initiated the incident, I conclude that her suspension should be longer than Solis'. I substitute a two month suspension without pay. Costas' personnel should be amended to reflect the suspension, she should be re-scheduled to work as soon as possible and made whole.

**93** I add the following comments in *obiter*. The Employer has an opportunity to re-emphasize its approach to physical altercations in the workplace. It could put all employees on notice that it will in the future consider all physical altercations as a very serious matter. It could implement a more comprehensive policy possibly with a zero tolerance component to it. Obviously any policy change needs to be considered within the context of the Collective Agreement, and any requisite labour relations guidelines. It must be applied consistently. The Employer may be able to solicit the Union's co-operation in implementing any policy change given the mutual concern and benefit of providing a safe workplace.

**94** I remain seized of any issues arising from the implementation of this Award.

*Mark J. Brown*

Dated this 12th day of October, 2010

qp/e/qlas

