7-23-2000

Re ABT Building Products Canada Ltd and CEP, Loc 434 (Shatford)

Innis Christie

Re ABT Building Products Canada Ltd. and Communications, Energy and Paperworkers Union of Canada, Local 434

[Indexed as: ABT Building Products Canada Ltd. and C.E.P., Loc. 434 (Shatford) (Re)]

Nova Scotia
I. Christie

Heard: January 5 and 6, 2000
Decision rendered: July 23, 2000

EMPLOYEE GRIEVANCE concerning discipline and claim for damages for defamation.

R.A. Pink, Q.C., for the union.
D. Clark and *S. Thompson*, for the employer.

AWARD

Employee grievance alleging breach of the Collective Agreement between the parties effective March 9, 1998 — December 15, 2002 in that the Employer breached Article 3 and Appendix "C" of the Collective Agreement by suspending the Grievor for five days without sufficient cause and breached the Collective Agreement by defaming the Grievor. The Grievor seeks reimbursement for the five days of wages and consequent benefits lost, and damages and a written apology for defamation.

At the outset of the hearing in this matter the parties agreed that I am properly seized of it, that I should remain seized after the issue of the award to deal with any matters arising from its application, including the quantification of any damages, and that all time limits, either pre- or post-hearing, are waived.

At the start of the hearing counsel for the Union indicated that he would object to the admission of videotape and other evidence gathered in the course of an investigation of the Grievor's off-work behaviour commissioned by the Employer, and did so when counsel for the Employer sought to introduce such evidence. In a Preliminary Award in this matter dated December 16, 1999, I ruled that the evidence in issue would not be admitted.

As I stated in the Preliminary award in this matter, the Grievor is a thirty-year employee of the Employer and it predecessors, well known and apparently widely respected both at work and in the community, who was suspended for five days for "misrepresenting his

physical condition to get time off work". As of the date of the Grievance he had been the work place Fire Marshall for two and one-half years. He is a former officer of the Union, who is still very active in Union affairs, and a member of the Chester Municipal Council.

The Grievor not only takes issue with the imposition of a five-day disciplinary suspension upon him, he also grieves that the Employer harmed him by defaming him, alleging that at meetings specially convened for the purpose William Fisher, the Steam Plant Superintendent, told other employees that he was dishonest, a liar and engaging in fraudulent activities. The Grievor seeks damages for that injury and a letter of apology from the Steam Plant Superintendent. Counsel for the Employer advised at the outset that in the course of argument he would submit that the allegation of defamation is not arbitrable. That issue is dealt with below, following my consideration of the grievance against the five-day disciplinary suspension. Facts relevant only to the defamation claim are set out at that point, but, of course, many of the facts and conclusions relevant to the grievance against discipline are also relevant to the defamation grievance.

Counsel agreed that the Employer would go first in calling evidence, which in the Employer's submission would discharge the onus upon the Employer to justify the five-day suspension imposed on the Grievor, but that the Union bore the onus of proof with respect to the aspect of the Grievance which charges the Employer with defamation. By agreement, the Employer went first with respect to evidence and argument on both issues.

Discipline

On August 7, 1998, at his home, the Grievor received the following couriered letter signed by W.A. Fisher, Steam Plant Supervisor, his immediate supervisor:

> *Subject: Appendix C — Discipline and Discharge*
>
> Dear Floyd;
>
> On the 13th date of July 1998, we received a request for leave of absence on your behalf to attend a Union Meeting on July 17th. The Company refused this request citing work requirements.
>
> On Wednesday, July 15th, 1998 you called into the plant at 7:00 A.M. and again at 10:30 P.M. indicating you had a sore neck and would not be available for work for the rest of the week.

On July 16th, I offered you light duty to accommodate the condition you claimed to be encountering which was preventing you from working. You refused to perform the light duty and as a result you did not attend work on July 16th and 17th.

On July 16th you were observed participating in physical recreational activity and on Friday, July 17th you were observed attending the Union meeting you had previously asked the leave of absence to attend.

It is the position of the Company that you have made a serious misrepresentation in regard to your physical condition in order to obtain time off work. This type of behaviour is totally unacceptable and is deserving of serious discipline. Effective immediately you are hereby suspended for five (5) working days . . . During the week of August 10th, you are scheduled for one week of vacation, therefore you are to report to work on the 21st of August 1998 . . .

Mrs. Helen Whitehouse, the Employer's Human Relations Manager, acknowledged in cross-examination that the Grievor had never before abused sick leave and that this is the first time the Employer has ever imposed discipline on anyone for abuse of sick leave. Neither has the Employer ever taken any other form of action against an employee for undue absenteeism due to illness. It is to be noted that the Grievor did not receive any pay or benefit for the period in question. The Grievor has had little sick time off, but has a standing arrangement under which he takes unpaid time off to attend meetings of the Chester Municipal Council.

Under date of August 12, 1998 the Grievor filed a Grievance stating the following as the "Nature of Grievance" and "Settlement Desired":

Floyd Shatford grieves that the Employer violated the provisions of the Collective Agreement by suspending him for a period of five (5) days on the 7th of August, 1998 without sufficient cause, contrary to the provisions of Article 3, Appendix "C" and all other relevant provisions of the Collective Agreement. The suspension was imposed by William Fisher and it was done without adequate knowledge of the facts and contrary to the policies of the Employer. The Grievor did attend to events of the Union on that day which did not involve any physical work of any sort and was not in any way restricted from doing so by his medical physician.

Further the Employer has caused harm to the Grievor by defaming him when Mr. Fisher had separate meetings with most, if not all, of the employees in the Maintenance Department and advised them, amongst other things, that Mr. Shatford was dishonest, a liar and was participating in fraudulent activities. These meetings took place on or about the 7th day of August, 1998. The Grievor seeks damages for this wrongdoing by Mr. Fisher and a letter of apology from him.

> By way of remedy the Union seeks to have the discipline removed from his file, wages paid for the lost time and all benefits reimbursed as well as damages of the defamation of Mr. Shatford.

The basic facts set out in this exchange are not challenged by the Union except that it does not agree that the Grievor "made a serious [or any] misrepresentation in regard to [his] physical condition in order to obtain time off work".

The Employer called Mr. Fisher, the author of the discipline letter and the person who allegedly made the defamatory statements, as its first witness. At the time of the hearing William Fisher had been employed by the Employer as Steam Plant Superintendent for 18 months, having previously been Co-ordinator of Physical Plant Service with the Provincial Government. At the time of the Grievance Mr. Fisher had been in his position for about seven months. He supervised 13-14 unionized employees.

Mr. Fisher testified that the Grievor's job as Fire Marshall related to the maintenance and observation of the fire prevention and suppression systems in the Plant, including the portable fire extinguishers and the sprinkler system. Always on day shift, the Grievor worked out of the Fire Marshall's office on the upper floor of the plant. According to Mr. Fisher, his job involved walking, observing and taking readings, ensuring, for instance, that if a portable fire extinguisher had been used it had been replaced or refilled. A list of the Grievor's duties, which he prepared in the Spring of 1998 at Mr. Fisher's request, was put in evidence. It was, Mr. Fisher said, one of the physically lightest jobs in the plant, divided about 50/50 between paper work and other activity, about 50% of that other activity being "observing" and 50% "physical activity". The most demanding physical activity, Mr. Fisher said, would have involved testing and inverting the portable fire extinguishers, which are about 20 pounds to lift.

In cross-examination Mr. Fisher elaborated that at the relevant time there were some fire extinguishers that weighed over 50 pounds, although most were in the 20-30 pound range. At any one time about 12 of the Employer's 200+ extinguishers would have needed to be lifted and weighed, because each had to be examined once a month. The Grievor's evidence was similar, although he added that his work includes climbing ladders, crawling over pipes, occasionally lifting heavy fire extinguishers and, of course, much more strenuous work in an emergency.

In cross-examination the Grievor testified that Mr. Fisher scheduled his work, in terms of when he did paper work and when he inspected fire extinguishers and the like. Before Fisher's arrival he had done his own scheduling, but testified that with Mr. Fisher scheduling his work he had not thought there was "not a lot of flexibility" on the dates in question and that there was not then a lot of paper work to do.

As has already been adverted to, the Grievor is a member of the Chester Municipal Council. The Employer has allowed him to take leaves of absence to attend meetings of the Council and its committees. The practice, at least while Mr. Fisher has been the Grievor's supervisor, has been for the Grievor to provide his supervisor in advance with a monthly calendar of such meetings, leave for which has never been denied. This regime was the context in which Mr. Fisher received a request from the Grievor on Monday July 13, 1998, for leave to attend a special all-day long-term planning Union meeting on Friday July 17, which he was to chair. The evidence is that the Union had also sent a request through the normal channels to the Human Resources Department that the Grievor be granted the Union leave in question. Mr. Fisher did not know of that when he dealt with the Grievor's direct request.

Because the Grievor had been on vacation the preceding week and would be on vacation for the next two, Mr. Fisher denied the request for Union leave on the ground that the demands of the Grievor's work would not permit it. Although the Grievor received the denial with restraint, Fisher perceived him to be very upset by it, although he said nothing other than that Fisher would "have to tell them", meaning the Union executive. In his testimony the Grievor denied that he had been very upset by the refusal of leave, and the Union apparently took no steps, through the Grievance Procedure or otherwise, to get the refusal reversed.

The Grievor worked normally that day and the next, Tuesday, July 14, without saying anything to Fisher to the effect that he had any physical problem or giving any other indication that there was anything else wrong with him.

The Grievor testified that he woke up during the night of Tuesday, July 15 with a sore stiff neck. He told his wife he did not think he could handle fire extinguishers and the next morning, Wednesday, July 15, he called the gatehouse at 7:00 a.m. to report that he had a

sore neck and would not be coming to work. Mr. Fisher testified that the preferred practice for anyone calling in sick is to contact his or her immediate supervisor, but he testified that "some would call the gatehouse and leave a message". That morning the gatehouse informed Mr. Fisher of the Grievor's call.

The Grievor testified that he took muscle relaxants that day and attended a meeting of the Chester Municipal Fire Advisory Committee, but his neck was very sore and he felt "small pains" running down his arm. At 10:20 that night the Grievor's wife called the gatehouse and left a message that he would not be in for the rest of the week because of a sore neck.

With respect to "calling in" the Employer's 1997 "ABSENTEEISM POLICY" states, at the bottom of the first page and the top of the second:

> *Failure to Call In*
>
> For the efficient operation of the plant, it is essential that when and employee is going to be absent for legitimate reasons the employee must call in at the earliest reasonable opportunity. The following are the rules in relation to failure to call in:
>
> 1. WHEN AN EMPLOYEE IS GOING TO BE ABSENT FOR LEGITIMATE REASONS, THE EMPLOYEE HAS AN OBLIGATION TO CALL IN AT THE EARLIEST OPPORTUNITY AND NO LATER THAN ONE HOUR PRIOR TO THE COMMENCEMENT OF SUCH EMPLOYEE'S SHIFT UNLESS THERE ARE EXTENUATING CIRCUMSTANCES.
> 2. WHEN THE EMPLOYEE CALLS IN SUCH EMPLOYEE MUST SPEAK TO THEIR IMMEDIATE SUPERVISOR OR IN THE EVENT THE SUPERVISOR IS NOT AVAILABLE THE SUPERVISOR IN SUCH EMPLOYEE'S DEPARTMENT. IF NO SUPERVISOR IS AVAILABLE, THE EMPLOYEE IS TO CALL THE COMMISSIONAIRE IN THE GATEHOUSE.
> 3. AN EMPLOYEE CALLING IN, UPON REQUEST BY HIS SUPERVISOR OR THE COMMISSIONAIRE IN THE GATEHOUSE, MUST PROVIDE A VALID REASON FOR BEING ABSENT.
> 4. FAILURE TO CALL IN OR PROVIDE A VALID REASON FOR BEING ABSENT WILL RESULT IN PROGRESSIVE DISCIPLINE.

The Grievor complied with these requirements, provided that he was absent for legitimate reasons.

Fred Corkum, Quality Control Supervisor and Fire Chief of the Employer's plant was called as a witness by the Union, under *subpoena.* Until William Fisher came to the plant as Steam Plant Superintendent the Grievor had reported to Mr. Corkum, who had never had any problems with him as an employee. They are and have been work associates and fellow committee members rather than social friends.

Mr. Corkum testified that on Wednesday July 15, 1998, he attended a one and one-half hour meeting of the Chester Municipal Fire Advisory Committee. The Grievor was present and seemed to be in pain, moving his whole body rather than his head to speak. When Mr. Corkum asked the Grievor at the conclusion of the meeting how he was feeling, the Grievor told him he was going to the doctor that night or the next morning because he was in quite a bit of pain.

Mr. Corkum was on vacation from the end of that week to August 10. Shortly after he returned Mr. Fisher told him about the Grievor's suspension and at that point Corkum told Fisher what he had observed at the Wednesday, July 15 meeting, as reflected in this account of his testimony.

The Grievor testified that Thursday, July 16, after lunch he drove to the office of Dr. L.B. Slipp, in whose office his daughter works as a receptionist. The doctor examined him and then prescribed muscle relaxants, told him to take over-the-counter pain killers if required, gave him the "Disability Certificate" which is in evidence and told him not to do anything he did not feel comfortable with. He said he took the muscle relaxants and some pain killers and felt better in half an hour, although he still did not feel he could resume his normal activities.

At 3:30 p.m. that day Mr. Fisher called the Grievor at home and offered him light duties. This was not something Fisher had ever done before with any employee off only two or three days. The Grievor responded that he was off on vacation for the next two weeks and would probably be fine after that. Fisher then asked him if he thought he could manage any light duty work and he responded, "Probably not". The Grievor did not indicate that he was under a doctor's care and Fisher did not ask him if he was. Nor did Fisher request a medical certificate.

Also on Thursday, July 16, after supper with his family, the Grievor drove to the beach with his daughter-in-law and grandson, who suggested that they play "washers", which he did for only ten or fifteen minutes, because his neck was sore. "Tossing washers" is a local game played with two-inch washers, one of which is in evidence. They weigh almost nothing, and are tossed up to 40 feet, into 24' x 24' boxes if the toss is good, in a horseshoe-like game. The rest of the time at the beach the Grievor sat in a deck chair. That

night the Grievor missed bowling, where he is the league president, for the first time, he testified, in two years.

The following day, Friday, July 17, the Grievor attended the special Union meeting from 9:00 a.m. until 4:00 p.m. He testified that his neck was still sore, that he was taking muscle relaxants and pain killers and that he would not have gone to work even if he had not gone to the meeting.

The Grievor testified that by Monday, July 20, or Tuesday, July 21, his neck felt better. He then called Mr. Fisher, saying that he recognized his absence had caused some inconvenience and offered to come in to work if he was required, with an appropriate change in his vacation time. Fisher declined. The Grievor testified that at that time he had no knowledge that he was under suspicion for abuse of sick leave and Fisher agreed in cross-examination that at that time the Grievor would have had no knowledge of any impending discipline.

That September the Grievor again went to see Dr. Ross, who is in a clinic with Dr. Slipp, about his neck, which resulted in periodic brief physiotherapy sessions "for a month or two".

The Grievor returned to work on August 3, following his two weeks of vacation. On August 6, following the disciplinary interview to which I refer below, he volunteered a medical certificate to Mr. Fisher. Although there was no requirement for him to present a medical certificate, since he had made no claim for short-term disability coverage, he "happened to have it in his wallet", as he said under cross-examination. It contained the following information:

> Heading, "DISABILITY CERTIFICATE"
>
> "NAME", "Floyd Shatford" [handwriting]
>
> "ADDRESS", space not filled in
>
> "EMPLOYER", space not filled in
>
> "To Whom It May Concern:
>
> This is to certify that the above patient was under my professional care from *16 July 98* [handwriting] to *20 July 98* [handwriting] inclusive and was totally incapacitated during this time.
>
> This is to further certify that the above patient has now recovered sufficiently to be able to return to [Editor's Note: the following text is struck out [light]] regular work duties on *20 July 98* [handwriting]
>
> "Restrictions:" [space not filled in]
>
> *DR. LB Slipp* [handwriting]

The Employer was suspicious of the reliability of Dr. Slipp's slip. Indeed, according to Mrs. Whitehouse the management group that decided on the discipline "did not believe it". In fact the Employer complained to the Medical Society of Nova Scotia about Dr. Slipp's willingness to give such documents without proper basis. The Employer's letter, which is in evidence, carried as an attachment the report of a private investigator that Dr. Slipp willingly gave a very similar document to the investigator who openly told the doctor that she wanted time off, to which she had told him she was not entitled, to visit her family. According to the report, Dr. Slipp encouraged her in fabricating the story that she had a sore back. These documents were forwarded to Dr. Slipp but no further action was taken either by the Employer or the Medical Society.

I am well aware that many doctors, particularly family physicians, do not readily accept the role of gatekeeper against claims to sick leave and benefits, often preferring to act as advocates for their patients, but that does not, of course, justify them knowingly, that is fraudulently, giving false medical slips or their patients using such documents. However, the private investigator's report here is hearsay, introduced as part of the Employer's letter to the Medical Society in proof of the fact that such a letter was sent. It cannot, in my opinion, seriously diminish the credibility of Grievor's testimony with respect to his sore neck.

Mr. Fisher noted in his testimony that it was on Wednesday, July 15th, that the Grievor had called the gatehouse at 7:00 a.m. to report that he had a sore neck and would not be reporting to work, and it was 10:20 that same night the Grievor's wife called the gatehouse and left a message that he would not be in for the rest of the week because of a sore neck. That is, apparently the Grievor had not seen his doctor at the time he called in. His own testimony was to that same effect. As I have said, the next day, Thursday, July 16th, at about 3:30, Fisher contacted the Grievor and offered him light duty. There is no specific evidence whether this was before or after the Grievor saw Dr. Slipp. This order of events was, apparently, significant to the Employer. I have borne it in mind in reaching my conclusions here.

As Mr. Fisher also testified, there is no doubt that the Employer's light duty program is voluntary. The Employer's "APPROPRIATE AND MODIFIED WORK PROGRAM" document, reaffirmed as part of its

"ABSENTEEISM POLICY" on November 6, 1997, is in evidence. Two of its sections are particularly relevant to this point:

> 2) There must be a tri-partite agreement between the employee, the physician(s) and the Company that the modified work available accommodates the needs of the employee for a successful rehabilitation period. The employee must be able to perform the work safely and without further risk to his/her health and/or safety.
>
> The family physician must approve the assignment and the length of time required to accommodate the needs of the individual.
>
> .....
>
> 8) The employee has the right and final decision to decide if the available work is compatible and in the best interests of his/her disability.

The only other evidence I have with respect to Fisher's offer of light duty is that the Grievor declined light duty, as he has the right to do under this Collective Agreement, saying only that he had a week of vacation coming up and expected to be able to return to work when it was over. The Grievor made no mention, in that or any earlier contact with the Employer, of providing any medical certificate nor, indeed, of being under a doctor's care. Nor is there any evidence that Mr. Fisher or anybody else raised the issue of a medical certificate with him at that time or earlier.

On August 6 Mr. Fisher, accompanied by Murray Gates, another member of management, conducted a disciplinary interview with the Grievor, who was accompanied by Shop Steward Barry Bunch. According to Mr. Fisher's notes, made at the time, the following points were made: The Grievor stated that he had not had to work light duty on July 16th because it is voluntary under the Collective Agreement. He had gone to the doctor and taken muscle relaxants, and did go to the Union meeting on July 17th. He said that he was afraid that if he worked he would have further damaged his neck, and that for that reason he had also missed his regular bowling on Thursday, July 16th, and golf on Friday, July 17th. He had not done anything strenuous although he had "tossed washers". Mr. Fisher testified that this is "like playing horseshoes", although he had never seen the game.

At the conclusion of the interview the Grievor was told to go home, with pay, until he was advised the next day of the outcome.

Following the disciplinary interview, Mr. Fisher, Mr. Ellwood, the Plant Manager, and Mrs. Whitehouse reviewed the situation and made the decision to impose the five-day suspension that is the

subject of this Grievance. Mr. Fisher testified that the factors taken into account were: The fact that on Monday, July 13th, the Grievor was clearly annoyed at being denied Union leave for Friday, July 17th; the fact that the doctor's certificate was dated the day after the Grievor had called in sick, first himself in the morning and then his wife that night; the fact that the doctor's certificate said he was "totally incapacitated", when he obviously was not, and had been tossing washers while off sick; and the fact that he had gone to the Union meeting on Friday, July 17th. It is clear from the evidence of Mrs. Whitehouse that the management group had Dr. Slipp's "Disability Certificate" in their possession when they made this decision.

Mr. Fisher acknowledged in cross-examination that, but for the surveillance, evidence from which has been excluded, he would not have questioned the Grievor about either his participation in recreational activities or his attendance at the Union meeting. This led counsel for the Union to object to any reliance on any evidence of these activities. Counsel for the Employer noted that the Grievance itself acknowledges that the Grievor attended the Union meeting in question and that, as I note on p. 5 of my Preliminary Award in this matter, at the first hearing Union counsel "expressly accepted as correct" Mr. Fisher's evidence up to the point where Employer's counsel attempted to introduce the surveillance evidence. That evidence included the Union's statement of Grievance. Counsel for the Employer also asserted his right to cross-examine the Grievor and other Union witnesses utilizing whatever knowledge the Employer had, including that which could not itself be introduced.

I ruled that, while I would make no general pronouncement about the use of the fruits of the Employer's inadmissible surveillance, given the other ways open to the Employer to learn about the Grievor's attendance at the Union meeting and public participation in recreational activities I was not going to preclude cross-examination about those matters. Certainly, it seems to me that the Union cannot argue that matters of fact accepted in the Grievance itself cannot be taken account of, simply because they might have been elaborated upon by inadmissible surveillance evidence.

Following the management meeting William Fisher prepared the letter of discipline set out at the start of this Award. The next morning, August 7th, 1998, Fisher called the Grievor at home, as he

had said he would. Fisher, Gene Seaboyer, a member of management, and Barry Brunch, a shop steward, were on a speaker phone for the call. Fisher read the letter of discipline to the Grievor and couriered it to him the same morning.

In cross-examination Mr. Fisher acknowledged that subsequent to his suspension the Grievor got time off for physiotherapy, which Fisher said was "presumably for his neck".

There is provision under this Collective Agreement for Weekly Indemnity Benefits but they are only payable on the fourth day of non-occupational illness not requiring hospitalization or where there has been a non-occupational accident (Appendix D, para. 4) and there is no other entitlement to short-term sick leave with pay. Thus, except in the context of agreed light duty, a medical certificate would not have been required as a matter of course.

The fact that the Grievor was not claiming paid sick leave or short-term disability benefits does not mean that he could take sick leave if in fact he was not sick. The Employer has a legitimate expectation that employees will report for work unless there is valid reason for them not to. This goes without saying but is clearly expressed in the Plant Manager's letter of December 3, 1997, to "All East River Employees" "Confirming Absenteeism Policy" and in the "ABSENTEEISM POLICY" attached to it.

At p. 3 of the Employer's "ABSENTEEISM POLICY", under the heading "Abuse of Leave" and after an opening paragraph discussing weekly indemnity benefits, in the second paragraph the Policy states:

> Any abuse of these benefits is considered extremely serious by the Company. The following are the rules of the Company in regard to abuse of leave:
>
> 1. EMPLOYEES, IF REQUESTED BY THE COMPANY, ARE TO PROVIDE A REASONABLE EXCUSE FOR ABSENTEEISM.
> 2. THE COMPANY MAY REQUEST AN EMPLOYEE TO PROVIDE A MEDICAL CERTIFICATE FROM A DOCTOR PROVIDING SUFFICIENT DETAIL TO SUBSTANTIATE AN EMPLOYEE'S ABSENCE. FAILURE TO PROVIDE SUCH A CERTIFICATE WILL RESULT IN PROGRESSIVE DISCIPLINE IF SUCH CERIFICATE IS REQUESTED. IF THE MEDICAL CERTIFICATE DOES NOT PROVIDE SUFFICIENT DETAIL TO SUBSTANTIATE AN EMPLOYEE'S ABSENCE, THE COMPANY MAY REQUEST AN EMPLOYEE'S PHYSICIAN TO PROVIDE MORE DETAILED REASON FOR THE ABSENCE.
> 3. SHOULD AN EMPLOYEE REPRESENT TO THE COMPANY THAT THEY ARE ILL WHEN THIS IS NOT THE CASE SUCH EMPLOYEE WILL BE SUSPENDED OR TERMINATED.

While the paragraphing allows for the possible interpretation that these rules are intended to apply only to abuse of weekly indemnity

benefits, the general heading, "Abuse of Leave", and the literal words of "the rules" make them applicable to all abuses of leave.

Here the Grievor was never asked for a medical certificate and when he provided the "Disability Certificate" from Dr. Slipp the Employer did not request Dr. Slipp to provide more detailed reasons for the absence. Mr. Fisher's offer of light duty on Thursday afternoon was, in my opinion, not a serious attempt to get the Grievor back to work. The offer of light duties was, I think, made simply to have him confirm that he was asserting that he was too ill to work.

The Disciplinary Issue

The first aspect of the Grievance to be considered is the allegation that:

> . . . the Employer violated the provisions of the Collective Agreement by suspending [the Grievor] for a period of five (5) days on the 7th of August, 1998 without sufficient cause, contrary to the provisions of Article 3, Appendix "C" and all other relevant provisions of the Collective Agreement. The suspension was imposed by William Fisher and it was done without adequate knowledge of the facts and contrary to the policies of the Employer.

Article 3 provides:

> MANAGEMENT RIGHTS
>
> 3.01 The Company retains its right to manage the plant in all respects except as specifically limited by this Agreement.
>
> 3.02 The Company retains its right to establish from time to time rules and regulations governing employees covered by this Agreement providing that such rules and regulations are not inconsistent with the provisions of this Agreement.

The only other relevant provisions of the Collective Agreement are in Appendix:

> C1.01 *Discipline of Plant Employees*
>
> When it is necessary to discipline an employee, and when a disciplinary penalty is imposed, said employee will have union representation.
>
> C1.02 *Application of Discipline*
>
> It is the right of the Company to impose discipline up to and including discharge, which right shall also include progressive discipline where appropriate. Discipline, beyond reprimand, shall be subject to the grievance procedure.

It is undisputed in this proceeding that discipline may only be imposed for just cause, and that the Employer bears the onus of establishing that there was just cause for the discipline imposed. The issues therefore are whether, on the evidence, the Employer had just

cause for any discipline, and, if so, whether the five-day suspension imposed on the Grievor was excessive in all the circumstances. If it was, the further question arises: What discipline, if any, should I, as arbitrator, substitute?

The grievance and arbitration provision in this Collective Agreement are:

> 12.01 *Grievance Procedure*
>
> Complaints must be submitted within seven (7) calendar days of the event giving rise to the grievance. A grievance is defined as a dispute over the meaning of [*sic*] application of the express provisions of the Agreement. It is the mutual desire of both parties that the grievances of any employee shall be adjusted quickly, and it is understood and agreed that no grievance exists until the appropriate supervisor to whom the employee is responsible has had the opportunity at the first step to adjust the complaint with the employee, with or without the Shop Steward.
>
> 12.02 *Arbitration Procedure*
>
> a) When the Union requests that a grievance, as defined in Section 12.01 as to the violation of this Agreement be submitted to arbitration, it shall make the request in writing addressed to the Company.
>
> . . . . .
>
> d) (i) The Arbitrator shall not have the authority to alter or change any of the provisions of the Agreement or to substitute new provisions in lieu thereof, nor to give any decision inconsistent with the terms and provisions of this Agreement.
>
> (ii) The Arbitrator's decision shall be final and binding on both parties to this Agreement.

Decision with Respect to Discipline

Having considered all of the evidence properly before me, I have concluded that the Employer has not discharged the onus upon it of proving that there was just cause for any discipline. I therefore need not consider whether the discipline imposed would have been appropriate if the case had been made out for the imposition of some discipline.

I am not suggesting that the Employer did not have reason to be suspicious in the circumstances of the Grievor taking sick leave for three days that included the day for which he had sought leave. Common sense gives rise to such a suspicion. Such circumstances may also appropriately be part of the evidence that satisfies an arbitrator that, on the balance of probabilities, a grievor was not really ill, as in *Re Canada Post Corp. and C.U.P.W. (Harrison)* (1990), 17 L.A.C. (4th) 67 (Blasina), cited by counsel for the Employer.

However, justified suspicion does not prove abuse of sick leave and, as I have already held in the Preliminary Award in this matter, here it does not in itself even justify surveillance of the sort used.

Every employee has an obligation to work if he or she is able to do so and also has an obligation to be truthful about his or her incapacity. In *Re Canada Post Corp. and A.P.O.C. (Gaudet)* (1991), 23 C.L.A.S. 496, cited by counsel for the Employer, I, as arbitrator, imposed a six-month suspension for fraudulent abuse of sick leave. Moreover, there is no doubt that an Employer who suspects abuse of sick leave has a difficult task where there is direct, albeit self-serving, evidence, as there is here, of real illness. That, however, does not alter the fact that, as in any discipline case, the onus is on the Employer to prove its case at least on a balance of probabilities. It may well come down to a matter of credibility, as counsel for the Employer acknowledged, and that means the Employer must advance contrary evidence more credible in the circumstances than the Grievor's claim to have been ill.

Where the facts justify it the Employer will be able to utilize surveillance, but that is not the only means of proving that an employee was not genuinely ill. Other evidence of incompatible activities may be available, as it was to some extent here. A record of past abuse of sick leave will be relevant, but there is no evidence whatever of that sort here; indeed all of the evidence was to precisely the opposite effect. The Employer will also be able to rely on whatever provision has been made for medical evidence, but the Employer did not do so here.

Under this Collective Agreement the Employer had put in place an absenteeism policy quoted above, requiring an employee to call in sick. The Grievor did that, twice, so, as counsel for the Union pointed out, he was not absent without leave, unless his sickness was not real. That policy provides that an employee calling in as the Grievor did on the Wednesday morning "must provide a valid reason for being absent" only, apparently, "upon request by his supervisor or the commissionaire in the gatehouse". It also provides that the employee must provide a medical certificate only if requested by the Employer, and none was requested here.

In the face its own published policy on medical certificates, the reasonable thing for the Employer to have done would have been to ask for, and insist on, a medical certificate, and, in the face of the

unsatisfactory lack of information on Dr. Slipp's "Disability Certificate", the reasonable thing would have been ask the doctor for more detailed reasons, in accordance with the policy.

According to the evidence the Employer was particularly concerned that Dr. Slipp showed the Grievor as "Totally incapacitated" when in fact he was able to drive his car, go to a Municipal Fire Advisory Committee meeting, "toss washers" with his grandchild and attend a union meeting. I do not approve of Dr. Slipp's standard form "Disability Certificate" because it gives far too little information, but it could well be that the intent behind that phase is that the patient is not to do anything that he or she is not comfortable with, including work. I do not, therefore, accept that it was a fraudulent form merely because the Grievor could engage in the activities in evidence.

As for the activities in which the Grievor engaged while off work, after careful consideration I am not satisfied that they were inconsistent with the incapacity he claimed. The testimony of Fred Corkum, which was not challenged in any way, helped satisfy me that the Grievor did indeed have a sore neck, as he claimed.

The Employer was also concerned that the Grievor turned down Mr. Fisher's offer of light work on Thursday, July 16th. However, this Collective Agreement gives an employee who is ill or disabled full power to decide whether light duty is appropriate. That, of course, does not entitle the employee to pretend to be sick or disabled where he or she is not, but it clearly contemplates that an employee who does not think that he or she can perform his or her regular job does not have to do light duties. The Grievor cannot be faulted for taking advantage of what he knew to be his right, whatever the wisdom of the provision.

Conclusion and Order With Respect to Discipline

For these reasons I hereby allow the Grievance against the five-day disciplinary suspension imposed on the Grievor and order that he be fully compensated for all pay and benefits lost as a result of that discipline. I will remain seized of this matter and if the parties are unable to agree on the quantum of that compensation or any other aspect of the implementation of this part of this Award I will reconvene at the request of either of them to decide any issue between them on the basis of evidence and argument.

Defamation

As well as grieving the five-day suspension, the Grievance as set out above also states:

> Further the Employer has caused harm to the Grievor by defaming him when Mr. Fisher had separate meetings with most, if not all, of the employees in the Maintenance Department and advised them, amongst other things, that Mr. Shatford was dishonest, a liar and was partaking in fraudulent activities. These meetings took place on or about the 7th day of August, 1998. The Grievor seeks damages for this wrongdoing by Mr. Fisher and a letter of apology from him.

After Fisher read the letter of discharge to the Grievor on the morning of August 7th and couriered it to him, Fisher held four ten-minute meetings with groups of employees, three with employees in the Maintenance Department and one with employees in the Electrical Shop. These meetings, with some forty of the total of three hundred employees at the plant, were held to explain to them what discipline had been imposed on the Grievor and why. It is clear on the evidence that these were planned meetings, held with the approval of the Plant Manager and mandatory for the employees involved.

William Fisher testified that these meeting were held because the Grievor was seen as a leader in the plant and management feared an illegal work stoppage over his discipline. Several years earlier the Grievor had been disciplined over the wearing of safety glasses and the result had been a "sit-down". The Grievor confirmed in cross-examination that this had happened. He also agreed that in February of 1998 he had received a non-disciplinary letter from Mr. Fisher about the fact that in the course of his inspections as Fire Marshall he was spending an undue amount of time talking to employees, which in management's view interfered with production. The Grievor also acknowledged that in the early 90s there had been a very disruptive wildcat strike when another employee in the Maintenance Department had been disciplined. There was conflicting evidence as to the cause of that strike.

I accept the Employer's evidence as to why it held these meetings and it is clear that even before these meetings were held the disciplining of the Grievor was being widely discussed throughout the plant. It is clear, however, that holding meetings to explain one employee's discipline to others was a novel procedure. The

Employer had never before treated discipline as other than a matter between the Employer, the employee disciplined and the Union.

The Grievor testified that he heard about these meetings right away from a number of employees who had attended them and for some time after he continued to hear about them from employees and members of the Chester community. He testified that he suffered greatly from the damage the meetings did to his reputation, both at work and in the broader community. The Grievor testified that he had heard people joking about his situation at a ball field, saying maybe they should not let him look after the ball teams' funds, as he had done for some time. The following Thursday at bowling a number of people asked him about the situation. He felt it necessary to explain to his fellow municipal counsellors what had happened. He testified that he thought the Employer was "trying to destroy me". He was unable to sleep and talked at length to his father about the distress he felt. The Grievor's father's testimony confirmed this. The Grievor consulted Doctor Ross, a partner of Dr. Slipp who gave him medication "to calm me down".

Counsel for the Employer objected to the Grievor testifying about what others said to him on the ground that it was hearsay. I ruled that I would admit testimony by the Grievor as to what others said to him, in so far as it would tend to show the effect of the meetings on his reputation, but not what others told him was being said by third parties.

It is undisputed that Mr. Fisher, accompanied by Gene Seaboyer, Mechanical Superintendent in the Maintenance Department at the time, for two meetings and Murray Gates or Ed Moore, Electrical Supervisor, at the other two, addressed each meeting in a quite standard way. He started each by saying that this was a hardboard mill, not a rumour mill, and that he wanted to give accurate information. He then stated in each meeting that on Monday, July 13th, the Grievor had asked for time of to attend the Union meeting and had been denied, that the Grievor had left messages on Wednesday to say that he was ill with a sore neck, that he presented a doctor's certificate saying that he was "totally incapacitated" and had turned down light duty on Thursday, but was observed at the beach on Thursday and at the Union hall on Friday. He told the employees in each meeting to "draw your own conclusions", but he also said in each meeting that "Mr. Shatford made a serious misrepresentation of the

facts to the Company." Fisher did not answer questions, including, "How did Floyd misrepresent himself?"

Counsel for the Union called several members of the Maintenance Department to testify about what was said at the meetings. On the basis of that evidence I find that Mr. Fisher also said in at least two of the meetings that in his opinion anyone totally incapacitated should have been home in bed. Fisher did not deny having made that statement, although he could not recall having done so.

According to Mr. Fisher's testimony he said in each meeting that the Company believed that there had been "serious misrepresentation" by the Grievor. He testified that in the four meetings he had never used the phrases in the Grievance "dishonest", "liar" and "partaking of dishonest activity", nor had he called the Grievor "fraudulent".

Phillip Cook, who has been an electrician in the plant for thirteen years, and was involved in writing the Grievance, testified that in the meeting he attended Fisher said that the Grievor "had acted in a fraudulent manner by misrepresenting himself" and that "this type of dishonest behaviour would not be tolerated by the Company". Cook later acknowledged in cross-examination that at the meeting he attended Mr. Fisher never said explicitly "Mr. Shatford is a dishonest person", "Mr. Shatford is a liar" or "Mr. Shatford was partaking of dishonest activity", but later in his cross-examination Cook reverted to saying that he would "stand by" what he had testified to at the outset, that Fisher had said that the Grievor "acted in a fraudulent manner by misrepresenting himself".

Paul Seaboyer, who has been a machinist at the plant for six years, is not a union officer and was not involved in any way with preparing the Grievance, testified that at the meeting he attended on August 7, 1998, which was not the one attended by Phillip Cook, Mr. Fisher did say explicitly that the Grievor had been fraudulent and that he had lied to the Employer and, in effect, to the employees in the plant as well.

Troy Harnish, a welder and a shop steward at the time of the hearing, testified that Fisher stated to the meeting he attended, which was not the meeting attended by either Phillip Cook or Paul Seaboyer, words to the effect of "This type of dishonest behaviour will not be tolerated by the Company." He also testified that Fisher had used the words "totally dishonest".

On the basis of the testimony I find that, although he denied it under cross-examination, in at least two of the four meetings on August 7, 1998, William Fisher did say words to the effect that "This type of dishonest behaviour will not be tolerated by the Company." I accept that those words, which do not appear in the Grievance, were in fact said, and I do so as a matter of assessing the witnesses Cook and Harnish as they gave evidence to that effect. I also find that at at least two of the meetings Fisher used the word "fraudulent" in connection with the Grievor or the activity for which he had been disciplined.

However, bearing in mind that in this aspect of the Grievance the onus is on the Union to establish the facts on the balance of probabilities, I do not find that Mr. Fisher used the word "dishonest" in any other context or that he explicitly called the Grievor a "liar" or said explicitly that he had committed "fraud". It is entirely possible, of course, that Fisher said somewhat different things at each of the meetings but he undoubtedly went to the four meetings with at least a semi-scripted statement of which I would have expected him to have reasonable recall, even after two years, although, somewhat surprisingly, he did not keep notes. The Union witnesses, on the other hand, heard the disputed words only once in the progress of the particular meeting each attended, none of them had notes that had been retained to the date of the hearing and it is quite possible that their memories had been affected by the familiar words of the Grievance.

Phillip Cook testified that his reaction was one of surprise and anger, and that he was left feeling "iffy" about what had taken place, and found himself questioning whether the Grievor had really been off for illness or not. He, Paul Seaboyer and Troy Harnish testified that, both before and after the meetings that they attended, there was a great deal of discussion in the plant and some in the outside community about the matter. Mr. Harnish testified that "some guys were saying that if the Grievor had called in sick and had then gone to the beach he deserved what he got".

The Defamation Issue

This raises the following issues: (1) Do I, as arbitrator under this Collective Agreement and the Nova Scotia *Trade Union Act*, R.S.N.S. 1989, c. 475, have jurisdiction to deal with a claim of defamation? (2) If I do, were the words and deeds of William Fisher,

acting for the Employer, defamatory of the Grievor according to the applicable law? (3) If they were, what is the appropriate remedy?

(1) Jurisdiction to deal with a claim of defamation

This is uncharted territory only insofar as no Nova Scotia award or case was cited to me in which an arbitrator has exercised jurisdiction over a claim in defamation or, for that matter, in tort of any kind. In other Canadian jurisdictions arbitrators have done so with increasing frequency, as indeed they have had to since the Supreme Court of Canada made it clear in its three landmark decisions, *St. Anne-Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219* (1986), 28 D.L.R. (4th) 1 (S.C.C.), *Weber v. Ontario Hydro* (1995), 125 D.L.R. (4th) 583 (S.C.C.), and *New Brunswick v. O'Leary* (1995), 125 D.L.R. (4th) 609 (S.C.C.), that the courts do not have jurisdiction where a tort claim arises from an employment relationship governed by a collective bargaining agreement.

More precisely the Court held in *Weber* that a tort claim is in the exclusive jurisdiction of the arbitrator under the collective agreement where the tort claim "in its essential character, arises from the interpretation, application or violation of the collective agreement", *Weber*, *supra*, at para. 52, making it clear that disputes may arise out of the collective agreement "expressly or inferentially", *Weber*, *supra*, at para. 54; see also *Halifax Regional School Board v. Nova Scotia Union of Public Employees, Local 2*, [1998] N.S.J. No. 434 (QL) (C.A.) at para. 29 [reported 171 D.L.R. (4th) 322].

Numerous cases were cited to me in which courts in other provinces have refused jurisdiction on these principles from *Weber* and several arbitration awards were cited in which arbitrators have taken the necessary reciprocal jurisdiction in such cases. In other cases courts have held the *Weber* principle to be inapplicable, most notably the Ontario Court of Appeal in *Piko v. Hudson's Bay Co.*, [1998] O.J. No. 4714 (QL) [reported 167 D.L.R. (4th) 479], and British Columbia trial courts in *Kovlaske v. I.W.A.-Canada, Local 1-217*, [1998] B.C.J. No. 1135 (QL) (B.C.S.C.) [summarized 79 A.C.W.S. (3d) 746], and *Fording Coal Ltd. v. U.S.W.A., Local 7884*, [1999] Carswell B.C. 125 [reported 169 D.L.R. (4th) 468]. Before dealing in any detail with these authorities I will state the legal issues as I see them, and the conclusion I have reached with respect to my jurisdiction, after giving the authorities my best consideration.

The significant legal issues here are whether the words of this Collective Agreement or of the Nova Scotia *Trade Union Act*, R.S.N.S. 1989, c. 475, s. 42, which "inferentially" broadens the scope of the language of the Collective Agreement, bring the *Weber* principle into application. The wording of the relevant articles of the Collective Agreement under consideration in *Weber* itself was much broader than is the wording of Article 12 here, and counsel for the Employer has submitted that the same is true of the words of the collective agreements in virtually all of the reported cases and awards in which courts have denied themselves jurisdiction or in which arbitrators have taken jurisdiction on the basis of *Weber*. Counsel for the Union has joined issue on this and has also submitted that, particularly when *Weber* is read together with *St. Anne-Nackawic* and *O'Leary*, it is clear that the principle it espouses flows as much from the arbitration provisions of the applicable labour relations legislation as from the words of the collective agreement.

I agree that the *Weber* principle is rooted in the words of the applicable labour relations legislation, but, as counsel for the Employer has also submitted, the relevant provisions of the Nova Scotia *Trade Union Act* are not quite the same as those considered in *St. Anne-Nackawic*, *Weber* and *O'Leary*, or in the other cases and awards cited. Again, counsel for the Union has joined issue in a careful analysis of the relevant provisions.

I have concluded that although the relevant words of this Collective Agreement are narrow, by inference the claim for damages for defamation does arise out of the Collective Agreement, which must be read in the context of the *Trade Union Act*. The words of the Nova Scotia *Trade Union Act* are not essentially different from those in the legislation considered in *St. Anne-Nackawic*, *Weber* and *O'Leary*. Moreover, in those cases the Supreme Court of Canada established a broad principle to which effect must be given unless it is clear that such was not the legislative intent. I have therefore taken jurisdiction over the claim of defamation here.

In *Weber v. Ontario Hydro*, *supra*, although he was covered by a collective agreement, Weber sued his employer in tort for trespass, nuisance, deceit and invasion of privacy for subjecting him to invasive surveillance in connection with a claim for sick benefits. On the question of whether the ordinary courts had jurisdiction McLachlin J. (as she then was) concluded on behalf of the majority

that under the collective agreement which applied to Weber the arbitrator had exclusive jurisdiction. She stated at para. 58:

> To summarize, the exclusive jurisdiction model gives full credit to the language of s. 45(1) of the [Ontario] *Labour Relations Act*. It accords with this court's approach in *St. Anne-Nackawic*. It satisfies the concern that the dispute resolution process which the various labour statutes of this country have established should not be duplicated and undermined by concurrent actions. It conforms to a pattern of growing judicial deference for the arbitration and grievance process and correlative restrictions on the rights of parties to proceed with parallel or overlapping litigation in the courts: see *Ontario (Attorney-General) v. Bowie* (1993), 110 D.L.R. (4th) 444, 1 C.C.E.L. (2d) 190, 16 O.R. (3d) 476 (Div. Ct.), *per* O'Brien J.

In reaching this conclusion Her Ladyship made the following statements particularly relevant here:

> [51] . . . [The] task of the judge or arbitrator determining the appropriate forum for the proceedings centres on whether the dispute or difference between the parties arises out of the collective agreement. Two elements must be considered: the dispute and the ambit of the collective agreement.
>
> [52] In considering the dispute, the decision-maker must attempt to define its "essential character" . . . The fact that the parties are employer and employee may not be determinative. Similarly, the place of the conduct giving rise to the dispute may not be conclusive; matters arising from the collective agreement may occur off the workplace and conversely, not everything that happens on the workplace may arise from the collective agreement . . . In the majority of cases the nature of the dispute will be clear; either it had to do with the collective agreement or it did not. Some cases, however, may be less than obvious. The question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement.
>
> [53] Because the nature of the dispute and the ambit of the collective agreement will vary from case to case, it is impossible to categorize the classes of case that will fall within the exclusive jurisdiction of the arbitrator. However, a review of decisions over the past few years reveals the following claims among those over which the courts have been found to lack jurisdiction: wrongful dismissal; bad faith on the part of the union; conspiracy and constructive dismissal; and *damage to reputation* (*Bartello v. Canada Post Corp.* (1987), 46 D.L.R. (4th) 129, 18 C.C.E.L. 26, 35 C.R.R. 132 (Ont. H.C.J.); *Bourne v. Otis Elevator Co.* (1984), 6 D.L.R. (4th) 560, 4 C.C.E.L. 1, 45 O.R. (2d) 321 (H.C.J.); *Butt v. U.S.W.A., Local 5795* (1993), 106 Nfld. & P.E.I.R. 181, 41 A.C.W.S. (3d) 80 (Nfld. S.C.); *Forster v. Canadian Airlines International Ltd.* (1993), 109 D.L.R. (4th) 731, 3 C.C.E.L. (2d) 272, 44 A.C.W.S. (3d) 278 (B.C.S.C.); *Foisy v. Bell Canada* (1989), 12 C.H.R.R. D/153, 26 C.C.E.L. 234, [1989] R.J.Q. 521 (C.A.); *Ndungidi v. Centre Hospitalier Douglas*, [1993] R.J.Q. 536). [Emphasis added.]

> [54] This approach does not preclude all actions in the courts between employer and employee. Only disputes which expressly or inferentially arise out of the collective agreement are foreclosed to the courts . . .

In light of this, particularly the emphasized words, it is not open to dispute that an arbitrator *may* have jurisdiction to deal with a claim in defamation. I will only cite the following cases from other jurisdictions in which various courts have explicitly ruled that they did not have jurisdiction over defamation claims because such claims were within the jurisdiction of an arbitrator under a collective agreement: *Venneri v. Bascom* (1996), 28 O.R. (3d) 281 (Gen. Div.); *Quinn v. Morrison* (1998), 108 O.A.C. 312 (C.A.); *Dwyer v. Canada Post*, [1997] O.J. No. 1575 (QL) (C.A.) [summarized 70 A.C.W.S. (3d) 816], affirming [1995] O.J. No. 3265 (QL) (Gen. Div.) [summarized 58 A.C.W.S. (3d) 960]; *Ruscetta v. Graham* (1998), 36 C.C.E.L. (2d) 177, [1998] O.J. No. 1198 (QL) (C.A.), leave to appeal to Supreme Court of Canada refused October 15, 1998 [120 O.A.C. 196*n*]; *Oritiz v. Park*, [1998] Carswell Ont. 3717 (Gen. Div.); *Bergman v. C.U.P.E., Local 608*, [1999] Carswell B.C. 1200 (B.C.S.C.) [summarized 88 A.C.W.S. (3d) 802].

As counsel for the Union acknowledged, there are no reciprocal arbitration awards directly on point, in the sense that an arbitrator has awarded damages for defamation after explicitly considering his or her jurisdiction to do so, except that of Arbitrator R.K. MacDonald in *Re Fording Coal Ltd. and U.S.W.A., Loc. 7884 (Elk Valley Miner Article)* (1997), 69 L.A.C. (4th) 430, which was reversed by the B.C. Court of Appeal in *Fording Coal Ltd. v. U.S.W.A., Local 7884*, [1999] Carswell B.C. 125 (B.C.C.A.) [reported 169 D.L.R. (4th) 468]. *Fording Coal*, which is the strongest authority against my taking jurisdiction here, is discussed in some detail at the end of this part of this Award.

What is important at this point is that, as counsel for the Employer acknowledged, the Nova Scotia Court of Appeal held in *Halifax Regional School Board v. Nova Scotia Union of Public Employees, Local 2*, *supra*, that the question of whether a dispute "is one that concerns the interpretation, application or administration of the collective agreement should be left, initially at least, to an arbitrator" (at para. 14). Clearly, I must seriously address the question of my jurisdiction over the claim for damages in defamation.

Counsel for the Employer focussed on the words "Two elements must be considered: the dispute and the ambit of the collective

agreement", in para. 51 of McLachlin J.'s reasons in *Weber* quoted above. The "ambit of the collective agreement" here does not, in his submission, include protection against defamation.

Repeating for convenience what appears earlier in this Award, the grievance and arbitration provisions in this Collective Agreement are narrow:

> 12.01 *Grievance Procedure*
>
> A grievance is defined as a dispute over the meaning of [*sic*] application of the express provisions of the Agreement. It is the mutual desire of both parties that the grievances of any employee shall be adjusted quickly, and it is understood and agreed that no grievance exists until the appropriate supervisor to whom the employee is responsible has had the opportunity at the first step to adjust the complaint with the employee, with or without the Shop Steward.
>
> 12.02 *Arbitration Procedure*
>
> a) When the Union requests that a grievance, as defined in Section 12.01 as to the violation of this Agreement be submitted to arbitration, it shall make the request in writing addressed to the Company.
>
> . . . . .
>
> d) (i) The Arbitrator shall not have the authority to alter or change any of the provisions of the Agreement or to substitute new provisions in lieu thereof, nor to give any decision inconsistent with the terms and provisions of this Agreement.
>
> (ii) The Arbitrator's decision shall be final and binding on both parties to this Agreement.

This is in marked contrast to the breadth of grievance and arbitration provisions in *Weber* itself, and I have not overlooked the words of McLachlin J. at paras. 71*ff.*

> [71] Isolated from the collective agreement, the conduct complained of in this case might well be argued to fall outside the normal scope of employer-employee relations. However, placed in the context of that agreement, the picture changes. The provisions of the agreement are broad, and expressly purport to regulate the conduct at the heart of this dispute.
>
> [72] Article 2.2 of the collective agreement extends the grievance procedure to "[a]ny allegation that an employee has been subjected to unfair treatment or any dispute arising out of the content of this Agreement . . .". The dispute in this case arose out of the content of the agreement. Item 13.0 of Part A of the agreement provides that the "benefits of the Ontario Hydro Sick Leave Plan . . . shall be considered as part of this Agreement". It further provides that the provisions of the plan "are not an automatic right of an employee and the administration of this plan and all decisions regarding the appropriateness or degree of its application shall be vested solely in Ontario Hydro". This language brings the medical plan and Hydro's decisions concerning it expressly

> within the purview of the collective agreement. Under the plan, Hydro had the right to decide what benefits the employee would receive, subject to the employee's right to grieve the decision. In the course of making such a decision, Hydro is alleged to have acted improperly. That allegation would appear to fall within the phrase "unfair treatment or any dispute arising out of the content of [the] Agreement" within art. 2.2.
>
> [73] I conclude that the wide language of art. 2.2 of the agreement, combined with item 13.0, covers the conduct alleged against Hydro. Hydro's alleged actions were directly related to a process which is expressly subject to the grievance procedure. While aspects of the alleged conduct may arguably have extended beyond what the parties contemplated, this does not alter the essential character of the conduct. In short, the difference between the parties relates to the "administration . . . of the agreement" within s. 45(1) of the *Labour Relations Act*.

I agree that the part of the grievance before me here that alleges damage by defamation is not "a dispute over the meaning [or] . . . application of the *express* provisions of the Agreement" (emphasis added). But the test adopted by the Supreme Court of Canada is whether the dispute arises, either expressly or inferentially, from the interpretation, application, administration or violation of the collective agreement. *Weber*, *supra*, at para. 54; *Halifax Regional School Board v. Nova Scotia Union of Public Employees, Local 2*, [1998] N.S.J. 434 (C.A.), at para. 29. In *O'Leary*, *supra*, the companion case to *Weber*, it was part of the ratio of the Supreme Court of Canada's judgment that the arbitrator had exclusive jurisdiction where the dispute arose *inferentially* from the collective agreement:

> [6] The province's principal argument is that the collective agreement does not expressly deal with employee negligence to employer property and its consequences. However, as noted in *Weber*, a dispute will be held to arise out of the collective agreement if it falls under the agreement either expressly or inferentially. Here the agreement does not expressly refer to employee negligence in the course of work. However, such negligence impliedly falls under the collective agreement.

I agree with the submission of counsel for the Union that the Grievance Procedure in this Collective Agreement must, by necessary inference, reach more broadly.

Section 42 of the Nova Scotia *Trade Union Act* provides:

> 42(1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of *all differences* between the parties to or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning or violation. [Emphasis added.]

To the extent that Article 12.01 of the Collective Agreement refers to disputes over the meaning or application of only the *express* provisions of the Agreement, it does not, therefore, meet the requirement in s. 42(1) of the *Trade Union Act*. I agree with the Union's submission that, to the extent that the arbitrability clause in the Collective Agreement does not meet the requirements in s. 42(1) of the *Trade Union Act*, the default provision in s. 42(2) applies. It provides:

> 42(2) Where a collective agreement does not contain a provision as required by this Section, it shall be deemed to contain the following provision:
>
> > Where a difference arises between the parties relating to the interpretation, application or administration of this agreement, including any question as to whether a matter is arbitrable, or where an allegation is made that this agreement has been violated, either of the parties may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference or allegation to arbitration. If the parties fail to agree upon an arbitrator, the appointment shall be made by the Minister of Labour of Nova Scotia upon the request of either party. The arbitrator shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding upon the parties and upon any employee or employer affected by it.

Clearly this does not restrict arbitration only to the differences involving express provisions of the collective agreement.

O'Leary, *supra*, involved an employer grievance, and the Supreme Court of Canada held that the employer had a right to grieve under the collective agreement even though the agreement only referred to employee grievances, because the language of the New Brunswick *Public Service Relations Act* required every collective agreement to provide for final and binding arbitration where a difference arose between the parties relating to the application or administration of the agreement, a phrase which encompassed grievances by either party. In the same vein in *St. Anne-Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, *supra*, Estey J. for the Court states at pp. 5-6, with respect to the *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, and the collective agreement provisions before it:

> The Act further provides, however, and this is what led to the trial judge's reservation of the question of the court's jurisdiction as a preliminary matter, that:
>
> > "55(1) Every collective agreement shall provide for the final and binding settlement by arbitration or otherwise, without stoppage of work, of all

> differences between the parties to, or persons bound by, the agreement or on whose behalf it was entered into, concerning its interpretation, application, administration or an alleged violation of the agreement, including any question as to whether a matter is arbitrable."

Where a collective agreement does not so provide, a very comprehensive arbitration clause is, by s. 55(2), deemed to be a provision of the agreement. The collective agreement between the appellant and respondent in this case did provide for arbitration. Clause 8 provided a procedure to be followed in the "Adjustment of Complaints" which culminated in the appointment of a three-member arbitration board whose decision would be "final and binding upon both parties to the Agreement". The clause further provided:

> "It is understood that the function of the Arbitration Board shall be to interpret and apply the provisions of this Agreement . . ."

To the extent that the clause may not require that *all* differences between the parties concerning the matters mentioned in s. 55(1) of the Act would be subject to binding settlement through arbitration, the provisions of the statute in s. 55(2) would in any case require all such differences to be settled by arbitration without stoppage of work.

Similarly, in summarizing the law in *Weber*, McLachlin J. states as follows at para. 67 (I note that Her Ladyship refers not only to the language of the Ontario *Labour Relations Act* but to labour relations legislation in general):

> I conclude that mandatory arbitration clauses *such as* s.45(1) of the Ontario *Labour Relations Act* generally confer exclusive jurisdiction on labour tribunals to deal with all disputes between the parties arising from the collective agreement. The question in each case is whether the dispute, viewed with an eye to its essential character, arises from the collective agreement. This extends to Charter remedies *provided that the legislation empowers the arbitrator to hear the dispute and grant the remedies claimed.* [Emphasis added.]

That the Supreme Court of Canada in *Weber*, *supra*, did not intend, by the words in paras. 71-3 quoted above, that the reach of the mandatory requirement for arbitration in the relevant labour relations statute should be undercut is also clear from earlier passages in the majority opinion. In rejecting the notion that the jurisdiction of the courts and the arbitrator should be concurrent McLachlin J. stated for the majority, in paras. 40-46:

> There are three difficulties with this view. The first is jurisprudential; the second the wording of the statute; and the third the practical effect of such a rule.
>
> The jurisprudential difficulty arises from this court's decision in *St. Anne-Nackawic Pulp & Paper Co. v. C.P.U., Local 219* (1986), 28 D.L.R. (4th) 1, [1986] 1 S.C.R. 704, 86 C.L.L.C. ¶14,037. As the Court of Appeal below noted, both the holding and the philosophy underlying *St. Anne-Nackawic*

support the proposition that *mandatory arbitration clauses in labour statutes* deprive the courts of concurrent jurisdiction . . . The court, *per* Estey J. . . . conclud[ed] that to allow concurrent actions in the courts would be to *undermine the purpose of the legislation* (at p. 12).

> "The collective agreement establishes the broad parameters of the relationship between the employer and his employees. This relationship is properly regulated through arbitration and it would, in general, *subvert* both the relationship and *the statutory scheme* under which it arises to hold that matters addressed and governed by the collective agreement may nevertheless be the subject of actions in the courts at common law . . . The more modern approach is to consider that *labour relations legislation provides a code governing all aspects of labour relations*, and that it *would offend the legislative scheme to permit the parties to a collective agreement, or the employees on whose behalf it was negotiated, to have recourse to the ordinary courts* which are in the circumstances a duplicative forum to which the legislature has not assigned theses tasks."

(Emphasis added.) Estey J. concluded at pp. 13-14 that subject to a residual discretionary power in courts of inherent jurisdiction over matters such as injunctions, concurrent court proceedings were not available:

> "What is left is an attitude of judicial deference to the arbitration process . . . It is based on the idea that if the courts are available to the parties as an alternative forum, *violence is done to a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting. Arbitration . . . is an integral part of that scheme, and is clearly the forum preferred by the Legislature for resolution of disputes arising under collective agreements.* From the foregoing authorities, it might be said, therefore, that the law has so evolved that it is appropriate to hold that *the grievance and arbitration procedures provided for by the Act and embodied by legislative prescription in the terms of a collective agreement provide the exclusive recourse open to parties to the collective agreement for its enforcement.*
>
> . . . . .

This brings me to the second reason why the concurrency argument cannot succeed — *the wording of the statute. Section 45(1) of the Ontario Labour Relations Act*, like the provision under consideration in *St. Anne-Nackawic*, *refers to "all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement"* (emphasis added). *The Ontario statute makes arbitration the only available remedy for such differences.* The word "differences" denotes the dispute between the parties, not the legal actions which one may be entitled to bring against the other. The object of the provision — and what is thus excluded from the courts — is all proceedings arising from the difference between the parties, however those proceedings may be framed. *Where the dispute falls within the terms of the Act, there is no room for concurrent proceedings.*

The final difficulty with the concurrent actions model is that *it undercuts the purpose of the regime of exclusive arbitration which lies at the heart of all*

> *Canadian labour statutes*. It is important that disputes be resolved quickly and economically, with a minimum of disruption to the parties and the economy. To permit concurrent court actions whenever it can be said that the cause of action stands independent of the collective agreement undermines this goal, as this court noted in *St. Anne Nackawic*. More recently, this court reaffirmed the policy considerations that drove the *St. Anne-Nackawic* decision in *Gendron v. Supply and Services Union, P.S.A.C., Local 50057*, [1990] 1 S.C.R. 1298 at p. 1326, 44 Admin. L.R. 149, 90 C.L.L.C. ¶14,020, *per* L'Heureux-Dubé J. [Emphasis added.]

These references to and quotes from *St. Anne Nackawic* underscore a key point. The Supreme Court is not concerned in *Weber*, any more than it was in *St. Anne-Nackawic* and *O'Leary*, only with the interpretation of particular collective agreements. It is concerned with a major policy consideration; with ensuring that disputes in the collective bargaining regime be resolved quickly and economically, with a minimum of disruption to the parties and the economy. Not only the Collective Agreement but section 42 of the Nova Scotia *Trade Union Act* must be read in this context. As I said at the outset of this part of this Award, the Supreme Court of Canada has established a broad principle to which effect must be given unless it is clear that such was not the legislative intent.

In closing on this issue, I will address the authorities relied on by the Employer as demonstrating that the principle in *Weber* should not have led me to the conclusion that under this Collective Agreement and the Nova Scotia *Trade Union Act* the Grievor's allegation of defamation is within my jurisdiction; specifically *Piko v. Hudson's Bay Co.*, [1998] O.J. No. 4714 (QL) (C.A.), *Kovlaske v. I.W.A.-Canada, Local 1-217*, [1998] B.C.J. No. 1135 (QL) (B.C.S.C.), and, most importantly, *Fording Coal Ltd. v. U.S.W.A., Local 7884*, [1999] Carswell B.C. 125 (B.C.C.A.) [reported 169 D.L.R. (4th) 468].

In *Piko v. Hudson's Bay Co.* the plaintiff was suing her former employer for malicious prosecution and mental distress after the employer had brought a criminal charge of fraud against her. The Ontario Court of Appeal held that the plaintiff's claim did not arise under the collective agreement because,

> [H]er claim that the Bay maliciously prosecuted her in the criminal courts lies outside the scope of the collective agreement. The Bay itself went outside the collective bargaining regime when it resorted to the criminal process. Once it took its dispute with Piko to the criminal courts, the dispute was no longer just a labour relations dispute. Having gone outside the collective bargaining regime, the Bay cannot turn around and take refuge in the collective agreement

when it is sued for maliciously instituting criminal proceedings against Piko. [At para. 17]

In the course of its reasons the Court distinguished the facts before it from two decisions relied on by the Union in this case, *Ruscetta v. Graham* (1998), 36 C.C.E.L. (2d) 177, [1998] O.J. No. 1198 (QL) (C.A.), leave to appeal to Supreme Court of Canada refused October 15, 1998 [120 O.A.C. 196*n*], and *Dwyer v. Canada Post Corp.*, [1997] O.J. No. 1575 (QL) (C.A.), affirming [1995] O.J. No. 3265 (QL) (Gen. Div.):

> The difference between this case and cases such as *Ruscetta* and *Dwyer* is that although the dispute between the Bay and Piko arises out of the employment relationship, it does not arise under the collective agreement. A dispute centered on an employer's instigation of criminal proceedings against an employee, even for a workplace wrong, is not a dispute which in its essential character arises from the interpretation, application, administration or violation of the collective agreement. [At para. 18.]

I accept the submission of counsel for the Union that *Piko* is distinguishable from the cases relied on by the Union which found that claims of defamation were within the exclusive jurisdiction of arbitrators.

In *Kovlaske v. I.W.A.-Canada, Local 1-217*, [1998] B.C.J. No. 1135 (QL) (B.C.S.C.), the Court held that it had jurisdiction over a defamation claim by a manager of a unionized workplace against, among others, some members of the union. The Court in *Kovlaske* found it had jurisdiction over the claim because,

> The damages claimed by the plaintiff are personal to him. He is not seeking damages on behalf of his employer, nor can the plaintiff compel the employer to bring a grievance on his behalf. The plaintiff, not being a party to the collective agreement, is not in a position to seek remedies under the collective agreement. [Para. 23.]

In his submissions to me counsel for the Employer takes the position that the Grievor's claim to damages for defamation here is similarly personal and therefore lies outside the collective agreement and is within the jurisdiction of the courts, not the arbitrator under the Collective Agreement. This, in my opinion, misstates the main point in *Kovlaske*, which is not that the claim for damages was personal, but that the plaintiff manager was not party to the Collective Agreement, and therefore neither he nor the employer on his behalf could bring his claim under it. The position of an employee grievor is entirely different. Section 41 of the Nova Scotia

Trade Union Act makes every collective agreement binding not only on the employer and the bargaining agent but also "on every employee in the unit of employees", and the Act not only entitles the bargaining agent to grieve on behalf of individual employees but imposes a positive duty on the bargaining agent to do so. See *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509. Most grievances and grievance arbitrations in fact deal with the grievances of individual employees, concerning discipline, wages, overtime, vacations, holiday pay, benefits, discrimination and so on.

In *Fording Coal Ltd. v. U.S.W.A., Local 7884*, [1999] Carswell B.C. 125 [reported 169 D.L.R. (4th) 468], as I stated above, the award of an arbitrator under a collective agreement who awarded damages in defamation was reversed in the British Columbia Court of Appeal. The union president had made a statement in a newspaper to the effect that the employer's production practices were unsafe. The employer both sued in the ordinary courts and grieved under the collective agreement. The arbitrator refused to delay pending the decision of the court and held that he had exclusive jurisdiction. On a statutory appeal under s. 100 of the B.C. *Labour Relations Code*, R.S.B.C. 1996, c. 244, after considering *Weber*, *supra*, and related cases, the majority of the Court of Appeal held that "this dispute [fell] well outside the normal scope of employer-employee relations", there being no words in the collective agreement that precluded the union president from making false statements. McEachern C.J.B.C. also stated:

> ... and the context of the Collective Agreement is not broad enough to exclude the Company's right of recourse to the regular courts for this action of defamation. In other words, I do not think the Collective Agreement contemplates adjudicating upon the freedom of speech rights of Mr. Takala which are, of course, subject to the law of defamation. [Para. 27.]

His Lordship continued,

> Having said that, it may be unnecessary to mention the residual jurisdiction of the regular courts, which was specifically excepted from the general rule in both *Weber* and *O'Leary*. It is significant, however, that parties to defamation actions have an absolute right to trial by jury and there are very special pleading and evidentiary requirements for libel actions that cannot conveniently be managed by an arbitrator. If necessary, therefore, I would also hold that this is a case where the residual jurisdiction of the regular courts should be available to the parties. [Para. 28.]

With respect, I cannot see why these concerns would not arise in every defamation action. They must, therefore, be taken to have

been within the contemplation of the Supreme Court of Canada in *Weber* when, as I pointed out above, McLachlin J. referred explicitly in para. 53 to "damage to reputation" as one of the sorts of disputes that could "expressly or inferentially arise out of the collective agreement" and would therefore be "foreclosed to the courts" (para. 54). So too must these concerns have been within the contemplation of the courts, including the Ontario Court of Appeal, which have subsequently denied themselves jurisdiction over defamation claims made in the context of a collective agreement. Those judgments are cited above.

The alleged defamation in *Fording Coal* can be distinguished as having been far less closely connected to the employment situation and the collective bargaining relationship than was the alleged defamation of the Grievor here. However, with respect, I must also state my agreement with Rowles J.A.'s dissent in *Fording*. His Lordship states in paras. 74 and 76:

> The arbitrator found that the essential nature of the dispute was "with respect to the exercise of management's rights in terms of productivity, discipline and safety in the workplace". In my opinion he was correct in concluding that the discipline arose out of the collective agreement.
>
> . . . . .
>
> [the Employer's] argument does not differ in substance from the argument put forward in *Weber* that a court action may be brought if it raises issues which go beyond the traditional boundaries of labour law. As noted earlier, the Supreme Court of Canada rejected the "overlapping spheres" model at 955-56.

In my opinion this, better than the majority opinion in *Fording Coal*, captures the key point that I made above. The Supreme Court is not concerned in *Weber* only with the interpretation of particular collective agreements. It is concerned with a major policy consideration; with ensuring that disputes in the collective bargaining regime be resolved quickly and economically, with a minimum of disruption to the parties and the economy.

I have concluded that the dispute which is encapsulated in this Grievance against the alleged defamation of the Grievor by the Employer arises, if not expressly then certainly inferentially, from the interpretation, application, administration or violation of the Collective Agreement. The allegedly defamatory statements which are the subject of the Grievance were made in the context of the imposition of discipline on the Grievor, discipline claimed by the Employer to have been imposed under and in accordance with

the Collective Agreement, for alleged breaches of the Grievor's employment obligations, all of which either flow from or are subject to consistency with the Collective Agreement. Indeed, it could be argued that any colour of right the Employer had to publicize its suspension of the Grievor notwithstanding any defamatory effect of doing so must be found in the statement of its right to discipline in Appendix C of the Collective Agreement;

> C1.02 *Application of Discipline*
>
> It is the right of the Company to impose discipline up to and including discharge, which right shall also include progressive discipline where appropriate. Discipline, beyond reprimand, shall be subject to the grievance procedure.

I will not digress into the question of whether this limited provision for grievances against discipline meets the requirements for Section 42 of the Nova Scotia *Trade Union Act*. I quote it only to make the point that just as an employee could grieve some other unspecified disciplinary action by the Employer, demotion or suspension for example, so too is the Grievor entitled to grieve the "disciplinary" publication to other employees of his alleged misrepresentation to the Employer, and to have that discipline remedied if he has made out the case that he was defamed.

It must not be forgotten that there are no express words in this Collective Agreement about reinstatement or compensation for time lost, but since the decision of the Supreme Court of Canada in *Polymer Corp. v. Oil, Chemical & Atomic Workers International Union, Loc. 16-14*, [1962] S.C.R. 338, no court has doubted that, inferentially, arbitrators have the power to rectify unjustified discipline by ordering appropriate remedies.

(2) Were the words and deeds of William Fisher, acting for the Employer, defamatory of the Grievor according to the applicable law?

It is not disputed that to make out a case of defamation the Union on behalf of the Grievor must have established a *prima facie* case consisting of the following elements:

1. The words complained of were published of and concerning or related to the Grievor.
2. The words were published to another party by the Employer, and
3. The words were defamatory of the Grievor in that they were false statements about the Grievor to his discredit.

See *Hiltz and Seamone Co. v. Nova Scotia (Attorney General)* (1997), 164 N.S.R. (2d) 161 (S.C., Stewart J.), at para. 14. upheld, except with respect to prejudgment interest (1999), 173 N.S.R. (2d) 341 (C.A.).

Nor is it disputed that elements 1 and 2 have been established. The Employer acknowledges that the words complained of were published about the Grievor to approximately 30 members of the Maintenance Department. The Employer does, however, dispute that the words were defamatory and raises the defences of justification or truth and qualified privilege. The Employer also submits with respect to publication that the evidence does not establish publication beyond the meetings in the plant or, if it does, that the Employer bears any responsibility for it.

I accept the evidence of the Grievor that what the Employer said about him in its meetings with the members of the Maintenance Department and the Electrical Shop was known in the community outside those who worked in the Plant. The Employer in the person of Mr. Fisher must have known that what he said in those meetings would be repeated outside the plant but I do not find on the evidence that the Employer in fact "published" the statements in question beyond those who worked in the plant. I accept as good law the following statement from R.E. Brown, *The Law of Defamation in Canada*, 2nd ed. (Scarborough, Ont.: Carswell, 1999), at p. 7-1;

> Generally speaking the defendant is responsible only for the defamatory comments which he, or someone acting on his behalf, or pursuant to his authority, publishes and not for the subsequent repetition by others . . .

Thus my concern here is whether what William Fisher said about the Grievor in the meetings in the plant was defamatory and whether the defences of justification or truth and qualified privilege are available to the Employer.

For the purposes of this proceeding there is no meaningful distinction between the various definitions of or tests for defamation put forward by counsel for the Union on behalf of the Grievor and that put forward by counsel for the Employer, again from Brown, *The Law of Defamation in Canada*, 2nd ed., at p. 4-3:

> A publication is defamatory if it lowers the reputation of the plaintiff in the estimation of right minded persons in a substantial segment of the community, that is, if it has the tendency to or does injure, prejudice or disparage the plaintiff in the eyes of others, or lowers the good opinion, esteem or regard which

> others have for him, or causes him to be shunned or avoided, or exposes him to hatred, contempt or ridicule.

I have found on the evidence that in at least two of the meetings at which he allegedly defamed the Grievor William Fisher used the phrase, "This type of dishonest behaviour will not be tolerated by the Company" in relation to what the Grievor had done. Clearly this is the same as saying that the Grievor's behaviour was dishonest. The Employer cannot take refuge behind the use of the spurious phrase "draw your own conclusions". I have also found that in at least two of the meetings Fisher used the word "fraudulent" in connection with the Grievor or the activity for which he had been disciplined. However, I have not found that Mr. Fisher used the word "dishonest" in any other context or that he explicitly called the Grievor a "liar" or said that he had committed "fraud".

In effect then Fisher, speaking for the Employer, called the Grievor "dishonest" and said that he or his behaviour was "fraudulent". He said that to the employees in the Maintenance Department and the Electrical shop who attended the four meetings held on August 7th, 1998.

The parties agree that the test of whether statements are defamatory is objective. That is, the question is not whether any person had the reactions set out in the test quoted, but whether, in my judgment as finder of fact, what was said was something that would "lower the reputation of the plaintiff in the estimation of right minded persons in a substantial segment of the community"? Would it have the tendency to, or would it in fact, "injure, prejudice or disparage the [Grievor] in the eyes of others", or lower "the good opinion, esteem or regard which others have for him", or cause him to be shunned or avoided, or expose him to "hatred contempt or ridicule"?

The testimony of Phillip Cook, Paul Seaboyer and Troy Harnish with respect to their own feelings about the Grievor in light of what Fisher said is therefore of no significance. Nor does it matter what "some guys were saying", except to the extent that I am assisted in assessing what the reaction "of right minded persons in a substantial segment of the community" would have been.

My conclusion is that calling someone "dishonest" and saying that he or his behaviour was "fraudulent", in the context of a kind of meeting never before held and nowhere contemplated in the Collective Agreement or any other pre-established part of the employment

relationship, would cause many of the employees who heard it to think that it was probably true, or at least was quite possibly true. Those employees were a substantial segment of the Grievor's employment community, which, given his Union activities and job, was obviously very important to him. It is surely not necessary in today's world to think of "community" as being geographically bounded.

If the "right minded persons" among those employees, and presumably that would include most of them, thought the Grievor was probably, or even quite possibly dishonest or fraudulent that, clearly, would "lower the reputation of the plaintiff" in their estimation. The evidence of his previous high reputation for integrity was undisputed. Therefore, I find that a *prima facie* case of defamation has been made out, subject to consideration of the defences put forward by the Employer.

The defence of truth

The defence of truth has not been made out by the Employer. As stated in the "discipline" part of this Award, I have found that it was not proven that the Grievor presented a fraudulent medical form merely because he could engage in the activities in evidence. The words "totally incapacitated" were Dr. Slipp's, not the Grievor's, and they may well have been intended to mean that the Grievor could not perform his job, not that he could do nothing. Quite apart from the medical certificate, the evidence has not satisfied me that the Grievor's activities while off work were inconsistent with the incapacity he claimed. It has not, therefore, been proven that the Grievor was either "dishonest" or "fraudulent".

Qualified Privilege

Counsel for the Employer has submitted that even if the statements made by William Fisher on behalf of the Employer to the four meetings held on August 7, 1998, were otherwise defamatory they were made on occasions of qualified privilege and therefore give rise to no liability. The Union has responded that: (1) the meetings were not subject to qualified privilege, (2) if there was qualified privilege it was defeated because the statements were made with actual or express malice, or (3) if there was qualified privilege the Employer exceeded the scope of that privilege.

Both counsel have adopted the Supreme Court of Canada's description of the defence of qualified privilege in *Hill v. Church of Scientology of Toronto* (1995), 126 D.L.R. (4th) 129 at para. 143:

Qualified privilege attaches to the occasion on which the communication is made, and not the communication itself. As Lord Atkinson explained in *Adam v. Ward*, [1917] A.C. 309 (H.L.) at page 334:

> ". . . a privileged occasion is . . . an occasion where the person who makes a communication has an interest or duty, legal, social, or moral, to make it to the person to whom it is made and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential."

In *Hill v. Church of Scientology of Toronto* the Supreme Court of Canada also described the legal effect of the defence, *supra*, as follows, at para. 144:

> The legal effect of the defence of qualified privilege is to rebut the inference, which normally arises from the publication of defamatory words, that they were spoken with malice. Where the occasion is shown to be privileged, the *bona fides* of the defendant is presumed and the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff.

The onus is on the Employer to establish that privilege attaches to the occasion:

> If the defence of qualified privilege is to be successful, the burden is on the party asserting it to allege and prove by a preponderance of the evidence "all such facts and circumstances as are necessary to bring the words complained of within the privilege," including the fact that it was "fairly made" or "fairly warranted by some reasonable occasion or exigency" and published in good faith. [Brown, *The Law of Defamation in Canada*, Toronto: Carswell, 1987, at p. 504.]

The factors to be considered in determining whether privilege attaches to a situation have been described as follows:

> The determination of the existence of a privileged occasion admits of no exact or precise rules. Many judges have admitted to being troubled as to where, when and how to draw the line. While it has been suggested that "the circumstances that constitute a privileged occasion can themselves never be catalogued and rendered exact, and that they involve considerations "upon which opinions may widely differ, courts have identified a number of factors which may be considered in determining whether a communication is privileged. These factors include the nature of the alleged defamatory publication, the persons by whom and to whom it is made, and the circumstances under which it was published.
>
> > "In determining whether or not it is so privileged, the Judge will consider the alleged libel, who published it, why, and to whom, and under what circumstances. He will also consider the nature of the duty which the defendant claims to discharge, or the interest which he claims to safeguard, the urgency of the occasion, and whether or not he officiously

> volunteered the information, and determine whether or not what has been published was germane and reasonably appropriate to the occasion."
>
> The fact that the statement was untrue or, for that matter, that the defendant may have honestly believed in the truth of his or her assertions, or was moved by the highest of motives, is totally irrelevant to the issue as to whether the occasion was privileged. However, the circumstances upon which the defendant relies must in fact exist in order to make the occasion one in which a communication is privileged. [Brown, *supra*, at pp. 471-73.]

Brown again refers to the exigency of the situation at p. 473:

> The defendant must establish that the words spoken or written were published on a lawful occasion, that is one "fairly warranted by some reasonable occasion or exigency".

I accept that any employer, and the Employer here, has many legal, social and moral, and, I would add, legitimate business interests, which justify it in communicating with its employees about matters that they have "a corresponding interest or duty to receive". The old English cases relied on by counsel for the Employer, *Hunt v. Great Northern Railway Co.*, [1891] 2 Q.B. 189 (C.A.), and *Sommerville v. Hawkins*, [1851] 10 C.B. 231, provide obvious examples. They involve situations where, if the statements were true, as the Employer thought them to be, the shared interest and the urgency of communicating was obvious. The information in question was not "officiously offered" but was told to the employees in an obvious and effective way.

The only Canadian case cited by counsel for the Employer, *Fisher v. Rankin*, [1972] 4 W.W.R. 705 (B.C.S.C.), is an even better example of how qualified privilege should operate in an employment context, more particularly a unionized one. It involved allegedly otherwise defamatory statements in the report of a joint union-management committee made in the course of grievance proceedings. Berger J. elaborated his reasons for concluding that such proceedings were the subject of qualified privilege at pp. 713-714:

> The provisions of the collective agreement relating to the resolution of grievances are founded on the premise that there will be frank explanation by management of the reasons for the disciplinary action it has taken, and an opportunity for the union to put the case for the employee concerned. To hold that what is said at a meeting of the Joint Standing Committee may subject those present to a suit for defamation would nullify the whole proceeding.
>
> The company and the union had a collective agreement. That collective agreement was required by law to include a provision for the resolution of grievances.
>
> . . . . .

> No system for resolving grievances provided for under s. 22 of the Act would function at all if the reasons for discharge were not put before the union as the representative of the employees. I think that to deny to the company's representatives the defence of qualified privilege would have a chilling effect upon their willingness to state fairly and frankly the reasons for an employee's discharge.
>
> I think that society has an interest in seeing that the machinery established under s. 22 of The Labour Relations Act functions effectively . . . The union's interest is clear. It is the employee's bargaining agent. The union in a sense acts as the advocate for the disciplined member. That duty is, rightly, cast upon it by the judgment in *Fisher v. Pemberton et al.* (1969), 72 W.W.R. 575, 7 D.L.R. (3d) 521 (B.C.). It cannot adequately represent him unless it knows the case it has to meet. The union also has an interest, as the representative of all the employees, in knowing the grounds upon which the company has acted. To offer only one illustration, it has an interest in seeing that an objectionable precedent for disciplinary action is not set. The reasons for allowing qualified privilege to be asserted as a defence seem to me to be compelling.

Not only is this an example of how qualified privilege should operate, it makes it very clear why, in a unionized employment relationship, the Employer's four meetings on August 7th, 1998, should not be considered to have been situations of urgency, but ones in which the Employer "officiously offered" information about the Grievor to employees who at that stage had no legitimate interest in hearing it. There was an issue to be dealt with but no "urgency" or "exigency" that called for what the Employer did.

I find that the Employer here, having by-passed its own arrangements for checking on the validity of the Grievor's medical certificate, compounded its failure to respect established processes by not going through the Union in attempting to deal with what it thought would be a difficult labour relations incident. In communicating its concerns to the Union, statements about the Grievor in the same terms as those made to the meetings clearly would have attracted qualified privilege. So too might have statements to other employees as the situation unfolded, but in my opinion the highly unusual process adopted by the Employer on August 7, 1998, of going straight to the employees as a group about a matter in which the Union was supposed to represent them did not attract qualified privilege.

The Union submissions also focus on whether the Employer really had reason to think there would be a work stoppage when news of the Grievor's suspension spread through the plant, and on

whether the Employer was either intentionally malicious or reckless as to the truth of what it was saying about the Grievor. I do not think Mr. Fisher was malicious in the intentional sense. I am not satisfied that he said what he did about the Grievor with intention to injure him or knowing that it was false. On the evidence I find that he and the other members of management involved believed what he was saying about the Grievor and thought what he was doing was called for to prevent a possible work stoppage.

The concept of recklessness as to the truth amounting to malice is more complex. It has recently been addressed by the Supreme Court of Canada in *Botiuk v. Toronto Free Press Publications Ltd.* (1995), 126 D.L.R. (4th) 609 at p. 630:

> A distinction in law exits between "carelessness" with regard to the truth, which does not amount to actual malice, and "recklessness", which does. In *The Law of Defamation in Canada, supra*, R.E. Brown refers to the distinction in this way (at pp. 16-29 to 16-30):
>
> > ". . . a defendant is not malicious merely because he relies solely on gossip and suspicion, or because he is irrational, impulsive, stupid, hasty, rash, improvident or credulous, foolish, unfair, pig-headed or obstinate, or because he was labouring under some misapprehension or imperfect recollection, although the presence of these factors may be some evidence of malice."
>
> The author then puts forward the reasons of Lord Diplock in *Horrocks v. Lowe*, [1975] A.C. 135 (H.L.), as representative (though not definitively) of the Canadian position. In that case, Lord Diplock wrote at p. 150:
>
> > ". . . what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, "honest belief". If he publishes untrue defamatory matter *recklessly*, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with *carelessness*, impulsiveness or irrationality in arriving at a positive belief that it is true . . . But despite the imperfection of the mental process by which the belief is arrived at it may still be "honest", that is, a positive belief that the conclusions they have reached are true. The law demands no more."

On this basis I find that Fisher was not reckless with respect to the truth of his allegations such that he can be said in law to have acted with malice.

Because the four meetings on August 7th were not occasions of qualified privilege, I make no finding on whether, had they been, that privilege would have been lost or exceeded on any other basis.

(3) Damages and Apology

Counsel agree that the following statement from the decision of Rogers J. in *Kolewaski v. Island Properties Ltd.* (1983), 56 N.S.R. (2d) 475 (N.S.S.C.) at paras. 133-4 correctly states the Nova Scotia law:

> Defamatory statements are either libelous or slanderous. Historically a libel emanated from something written and a slander from something spoken. However, Williams points out at page 49 of the *Law of Defamation in Canada*, supra [(1976)]:
>
> "The distinction between written and spoken defamatory comments is not the only test for determining whether words are libelous or slanderous. It is generally said that libelous comments are those which may be observed and are published in a permanent form. There must be a publication which may be perceived by the sense of sight and which is permanent . . . Slanderous comments are all those which do not amount to libel."
>
> Concerning slander itself, Williams, supra, goes on to say at page 50:
>
> "A slander is generally not actionable without proof of special damage. However, there are types of slander per se without proof of special damage . . .
>
> '(i) An imputation upon a person which adversely reflects upon his business, trade, profession or calling will be actionable per se . . .
>
> . . . . .
>
> '(ii) An imputation of a serious crime is actionable per se. The imputation should be unequivocal and specific before it will amount to the imputation of a serious crime.'"

Clearly what was involved here was slander, not libel. I have already stated that I do not find that Mr. Fisher made his statements at the four August 7th meetings maliciously. Thus even if I were to conclude that Mr. Fisher's statements fall within one of these exceptions and entitled the Grievor to general damages, he would not be entitled to aggravated damages.

The Union, quite appropriately, has not argued exception (i), so general damages can only be ordered if my finding is that there was the "specific and unequivocal" "imputation of a serious crime", which brings exception (ii) into play. My precise finding stated in the discipline part of this Award, it will be recalled, was that at at least two of the meetings Fisher used the word "fraudulent" in connection with the Grievor or the activity for which he had been disciplined, but did not say explicitly that he had committed "fraud", and also that Fisher said in effect that the Grievor had engaged in dishonest activities.

Counsel for the Union submits that a finding that Mr. Fisher accused the Grievor of "fraud" is a finding that he accused him of a crime, because fraud is a specific crime. Fraud is, of course, a crime, and it may be serious, but it may also be minor. On my finding of the facts here I cannot say that Fisher was "specific and unequivocal" in the "imputation of a serious; crime" to the Grievor as those words are quoted by Rogers J. in *Kolewaski, supra.*

In *Siepierski v. F.W. Woolworth Ltd.* (1979), 34 N.S.R. (2d) 551 (S.C.), another Nova Scotia case relied on by the parties, at para. 68 Grant J. quotes from *Gately on Libel and Slander* in terms which, while somewhat archaic, also convey the sense that the allegation of "fraud" here is not the sort of slander for which the courts have traditionally awarded general damages:

> In *Gately on Libel and Slander* (6th Edition), at page 83 under the heading "Words Imputing a Criminal Offence":
>
> > "Words which impute to the plaintiff the commission of a crime for which he can be made to suffer 'corporally' — i.e. physically — 'by way of punishment' are actionable without proof of special damage."
>
> And at page 85 of *Gately* again:
>
> > "The exact offence need not be specified; words involving a general charge of criminality will suffice, provided they impute some offence for which the plaintiff can be made to suffer corporally by way of punishment."

I do not think that the ordinary, reasonable listener to William Fisher's words at the meetings on August 7, 1998, would have thought he was accusing the Grievor of a crime for which he could go to jail or be otherwise punished "corporally". I find that although the word "fraudulent" was used, it would not have been understood as an accusation of a crime of the sort that gives rise to general damages.

No special damages were alleged here.

Conclusion and Order With Respect to Defamation

I have not found that the Grievor's activities while off work were inconsistent with the incapacity he claimed. It has not, therefore, been proven that the Grievor was either "dishonest" or "fraudulent". William Fisher's statements about him at the four meetings on August 7, 1998, were, therefore defamatory in that they amounted to slander. No qualified privilege attached to those occasions because they were outside the course of normal discipline, grievance and industrial relations processes. Mr. Fisher's statements were not, however, shown to have been malicious, they were not such as to

entitle the Grievor to general damages and there was no special damage alleged. I therefore make no order for the payment of any damages to the Grievor.

The Union on the Grievor's behalf has also sought "a letter of apology". While there were no submissions by either party with respect to the letter of apology, the Union clearly maintained its request for that remedy.

I therefore order that William Fisher, or a superior to him, on behalf of the Employer, write and deliver or mail a letter to the Grievor stating unequivocally that: (i) the Employer recognizes that in this arbitration award it has been held that the Employer failed to establish that the Grievor misrepresented his physical condition in order to obtain time off work; (ii) William Fisher should not have told or implied to the Grievor's fellow employees, other than in the normal discipline, grievance and other industrial relations processes, that the Grievor was dishonest or had acted in a fraudulent manner; and (iii) the Employer apologizes for any hardship or unhappiness the statements made at the August 7, 1998, meetings caused the Grievor. This letter is to be included on the Grievor's personal file and any other place in the records of the Employer where any indication of his suspension appears; and, if the Grievor wishes, it is to be published to all employees in the Maintenance Department and the Electrical Shop of the plant.

For convenience I will repeat here my "Conclusion and Order With Respect to Discipline". ". . . I hereby allow the Grievance against the five-day disciplinary suspension imposed on the Grievor and order that he be fully compensated for all pay and benefits lost as a result of that discipline. I will remain seized of this matter and if the parties are unable to agree on the quantum of that compensation or any other aspect of the implementation of this part of this Award I will reconvene at the request of either of them to decide any issue between them on the basis of evidence and argument.

Fees and Expenses of the Arbitrator

Article 12.02 e) of the Collective Agreement provides:

> The fees and expenses of the Arbitrator, and any other hearing costs, shall be paid by the losing party in arbitration after decision by the arbitrator, or by the Local Union when grievances are withdrawn from arbitration before decision by the arbitrator.

In this matter the Union was successful in its objection to the admissibility of the evidence that was the subject of my preliminary

award. It was also successful in the Grievance against the discipline imposed on the Grievor. Over the Employer's objection, the Union correctly claimed that I had jurisdiction to deal with defamation, which, contrary to the Employer's position, I have found to have occurred and for which I have granted a remedy. The Union "lost" only in so far as it claimed that aggravated general damages were available for the defamation that occurred here.

In my opinion, *prima facie*, the Employer was the "losing party" for purposes of Article 12.02 e). However, I have not received any submissions on this point and, should the Employer wish me to, I will do so as part of my retained jurisdiction.