IN THE MATTER OF AN ARBITRATION PURSUANT TO
THE *LABOUR RELATIONS CODE,* R.S.B.C. 1996 c. 244

BETWEEN:

METRO VANCOUVER REGIONAL DISTRICT

(the "Employer")

AND:

GREATER VANCOUVER REGIONAL DISTRICT EMPLOYEES' UNION

(the "Union")

David Kappeli Grievance

AWARD

ARBITRATOR: Randall J Noonan

APPEARANCES: Michael Kilgallin, for the Employer
Allison Tremblay and Nyusha Samiei, for the Union

HEARING DATES: April 5 and 6, 2023

DATE OF AWARD: April 30, 2023

it took five years to hire new staff. The Grievor denied that he mentioned Mani Deo in his comment.

9. Whatever the exact words, there was no difference between Mr. Lenardon's and the Grievor's recollection that the words were spoken in a sarcastic manner and were intended to reflect the Grievor's unhappiness with the staffing situation in the FM department.

10. The Grievor admitted that the Employer had hired four new employees into the FM department between September 2020 and May 2021, but said that two of those had moved to other departments. The Grievor remained frustrated at what he saw to be the Employer's slowness to post or fill positions in the FM department.

11. Mr. Lenardon did not think that the Grievor's sarcastic comment was appropriate. He consulted his superintendent, Casandra Kurenov, whose office was next to his. She advised that he reach out to HR. He then spoke to Briana Pellegrino in the HR office. She advised him to have an informal conversation with the Grievor to remind him to bring concerns forward in a constructive manner.

12. As a result, later in the afternoon of May 17, Mr. Lenardon went to the FM shop where he found the Grievor at his desk. There were no other FM employees there, so Mr. Lenardon closed the door and told the Grievor that he wanted to talk with him about his earlier comments. Mr. Lenardon and Briana Pellegrino were both clear that they had no intention of disciplining the Grievor for the comments that had been made and that the meeting was to coach the Grievor regarding the appropriateness of the comments.

13. Mr. Lenardon told the Grievor that he found the comments about the hiring of managers to be inappropriate and disrespectful. He told the Grievor that he had an open-door policy and that the Grievor could bring concerns to him in a constructive manner.

14. For reasons that are not entirely clear, the Grievor then began to talk about a concern he had in relation to another staff member of the department who he thought lived with and carpooled with someone from another department who may have been exposed to COVID 19. Mr. Lenardon did not know anything about the incident that the Grievor brought up. The Grievor apparently thought that management had not properly enforced a contact tracing policy and had not required the staff member to take a COVID test. Mr. Lenardon testified that the Grievor said, "Management is incompetent," to which Mr. Lenardon replied, "I'm a member of the management team," to which the Grievor further replied, "Management is incompetent."

15. The Grievor does not deny that the conversation took place. However, at hearing his version of events is that he said, "Management is incompetent in relation to the COVID policy."

16. According to Mr. Lenardon, he then told the Grievor that he was disappointed in the Grievor's comments and referenced their long-standing relationship. The Grievor responded saying, "I like you, but I don't respect you."

17. At hearing, the Grievor recalled the discussion in the shop somewhat differently. He testified that:

21. Mr. Lenardon then advised both Ms. Kurenov and Ms. Pellegrino of what had transpired and sent an email to the Grievor advising him of the time and location of the June 2 meeting and to "please feel free to invite a steward."

The prior relationship between Mr. Lenardon and the Grievor

- Mr. Lenardon testified about his relationship with the Grievor prior to the May 17 conversation and subsequent meetings. He said that he (Lenardon) had started with the Employer in 2015 (in a non-management role) and that he worked with the Grievor on a number of occasions. He had always considered their relationship to be professional and positive. He said that the Grievor had suffered a workplace injury in January 2020 and was away from work for nine months as a result. He said that during those months significant changes were made to the department with an increased focus on efficiency. Changes were made to scheduling from a team-based to an individual-based model. New staff were hired.

- Mr. Lenardon testified that near the end of 2020 or early in 2021, the Grievor applied for a promotion to Flow Monitoring Technician I. Mr. Lenardon advised him that he did not meet the educational requirements and that he would not be considered for the position. He said that he noted the Grievor's frustration with him regarding that decision. Mr. Lenardon said that he advised the Grievor of a couple of paths by which he could obtain the requirements through internal training and part time courses and that he authorized the Grievor to attend those.

24. The Grievor testified that before the May 17 meeting, his relationship with Mr. Lenardon was "totally normal," and that he had never had a problem, and that they interacted casually. However, he did not like Mr. Lenardon as a manager. He said, "He was inexperienced as a manager. His style was a little bit different from what some of the older workers were used to. I found him to be overenthusiastic – hand clapping and 'hey team!'" He said that the older managers had just let them [the FM employees] do their work, whereas Mr. Lenardon "tended to be more involved and was cheerleading."

The Investigation Meetings

25. Mr. Lenardon and Ms. Pellegrino met with the Grievor and his union representative on three occasions before making the decision to discipline the Grievor: June 2, June 24, and August 11, 2021. Shop Steward and Vice-president of the Union, Brian Northam, represented the Grievor in the June 2 meeting, and Union President Bill Eastwood represented him in the other two meetings. In each of those meetings, Ms. Pellegrino started with what was termed "housekeeping matters" such as advising of the need for confidentiality, that no recordings of the meeting were to be made, there was to be no retaliation to anyone else as a result of the meeting, and of the requirement for the Grievor to be direct, honest, and forthright. She said, "It will be important that you share the fulsome details of your perspective on what occurred."

26. For each of the meetings, Ms. Pellegrino and Mr. Lenardon wrote on paper a number of questions to be put to the Grievor and left spaces to record the answers given. Ms. Pellegrino acted as the primary note taker although Mr. Lenardon took less-complete notes in a secondary role. Mr. Lenardon led the questioning of the Grievor. At the hearing, each of the witnesses,

including the Grievor, testified that Ms. Pellegrino's notes were an accurate recording of what happened and was said at the meeting.

27. At the June 2 meeting, after the housekeeping matters were looked after, Mr. Lenardon took the lead. He said that the purpose of the meeting was to discuss the conversation that took place on the afternoon of May 17. He then asked the Grievor if he was familiar with the Respectful Workplace Policy, and he read the section of the policy that defined personal harassment and bullying: *Any behaviour that demeans, embarrasses, humiliates, alarms or verbally abuses a person and that is known or would reasonably be expected to be known as unwelcome.*

28. Mr. Lenardon said, "In that conversation there was comments that are of concern to me. Specifically, you stated, on several occasions, 'Management is incompetent.' I reminded you that I am a Supervisor and part of the management team. You reiterated 'Management is incompetent.' What is your rationale for this statement?" Mr. Lenardon also said, "The second statement that is concerning from my perspective is when you said 'I like you but I do not respect you.' Do you feel statements like that are appropriate in the workplace?"

29. The Grievor responded saying, "No, I didn't say that." Mr. Lenardon asked, "What did you say?" To which the Grievor responded, "Nothing." Ms. Pellegrino reminded him of the expectation that he be forthright, to which the Grievor responded, "Absolutely."

30. After several more proddings, the Grievor continued to deny that he made the statements attributed to him by Mr. Lenardon and continued to refuse to elaborate when asked several times what he had said. At one point Ms. Pellegrino asked him, "Did you say anything when you were in the room with Vince?" His response was, "I listened." She pressed on, "You said nothing when you were in the room with Vince?" He again replied, "I listened." In cross-examination, the Grievor admitted that his statements that he said "nothing" and that he "listened" were dishonest.

31. Mr. Lenardon went on, "Then I said I had an open door policy," to which the Grievor replied, "I don't recall what was said." Mr. Lenardon moved on to the comments of May 31, "On May 31, I advised you I wanted to meet. [You said] 'You're a manager and you need thicker skin." The Grievor replied, "I didn't say that." When pressed further about what he had said on May 31, the Grievor said, "Sounds good, see you on Wednesday," referring to the pending June 2 investigation meeting. Both in direct and cross-examination, the Grievor admitted that he did say that Mr. Lenardon had to "grow a thicker skin."

32. Before the meeting ended, Mr. Lenardon continued to press, "So you emphatically deny making these comments?" To which the Grievor replied, "I didn't make these comments, Vince."

33. Mr. Lenardon and Ms. Pellegrino met with the Grievor again on June 24, 2021. Bill Eastwood was the Union representative. In that meeting, the Grievor continued to deny he made the statements attributed to him. Mr. Eastwood suggested that it was an "it's his word against yours" situation.

34. The same people met again on August 11, 2021, with Mr. Lenardon explaining, "I'd like to offer a further opportunity for you to provide your perspective as there is a considerable difference between your description of the dialogue and my stated recollection." The Grievor

continued to deny he had made the statements. Mr. Eastwood, on the Grievor's behalf, said that the Grievor had made his position clear that he did not say what was attributed to him and that should be the end of it.

35. In his testimony at the hearing, the Grievor admitted that he said words to the effect that management was incompetent and that Mr. Lenardon should grow thicker skin. He admitted that his answers in the investigation meeting were not truthful. He admitted in cross-examination that he had a choice to make during the investigation meetings between being honest and forthright or to just deny that he made the statements and refuse to provide any details. He agreed that he chose the latter. He defended that choice by saying that the words Mr. Lenardon put to him were not exact quotes of what he said, so he could deny saying them. In relation to not providing answers to questions about what exact words he did use, he said he did not want to provide the Employer with ammunition to use against him.

36. The Employer issued its letter of suspension on June 13, 2021, that included these words:

> I have concluded you were both insolent and insubordinate. Your comments on the dates of May 17, 2021 and May 31, 2021 went far beyond a reasonable expression of concern toward actions taken by the Corporation. Under no circumstances would it be acceptable to direct the comments you made toward a Supervisor. Further, you were not forthcoming or forthright during the course of the investigation. It's important you understand that this type of behaviour is serious and will not be tolerated by Metro Vancouver.

Employer's Argument

37. The Employer argues that the Grievor's comments on three separate occasions were inappropriate and insolent. The first was the sarcastic comment made in front of other staff on the morning of May 17 regarding the hiring of managers. The Employer admits that it did not intend to discipline the Grievor for those comments as it had decided the matter should be dealt with through a coaching meeting. Next were the comments made in the afternoon of May 17 to the effect that "management is incompetent" and "I like you, but I don't respect you." The final comments were those alleged to have been made on May 31, 2021, "You're a manager now and better grow thicker skin." The Employer similarly argues that that comment was insolent and inappropriate.

38. The Employer submits that a one-day suspension was reasonable given a number of factors including: the severity of the comments; that the Grievor provided no mitigating circumstances for the Employer to consider; that the Grievor did not demonstrate any contrition or remorse; and that the Grievor was not forthcoming and forthright during the investigation meetings.

39. In relation to the assessment of credibility, the Employer referred to the well-known principles set out in *Faryna v. Chorny,* [1952] 2 DLR 354 (BCCA), and in *F.H. v. McDougall,* 2008 SCC 53.

40. The Employer submits that insubordination is one of the most serious offences in the workplace because it represents an improper challenge to an employer's legitimate managerial authority to control and direct its operations and workforce.

41. The Employer submits that insubordination can take many forms and includes insolence and the demonstration of a defiant attitude towards management (*Highland Valley Copper – and – United Steel and Auto Workers of America, Local 7619 (Marcus Grievance)* (1999), 82 L.A.C. (4th) 210 (Greyell); *Canada Post Corp. v. Canadian Union of Postal Workers (Torpy Grievance, CUPW 850-07-00596),* [2012] C.L.A.D. No. 380 (Gordon); and *Palmer & Snyder, Collective Agreement Arbitration in Canada,* Fourth Edition, at pages 506-507).

42. The Employer submits that it is difficult to find insubordination cases in which the penalty imposed was a one-day suspension, but it cites *Fortis BC Inc. v. International Brotherhood of Electrical Workers, Local 213 (Robinson Grievance),* [2008] B.C.C.A.A.A. No. 9 (Fuller), as a case that may be of assistance.

43. The Employer argues that dishonesty exacerbates the gravity of an employee's misconduct and that the Grievor's conduct in the investigation meetings was neither honest nor forthcoming or forthright. The Employer was clear that it was not citing the Grievor's lack of honesty in the investigation meetings as a separate ground of misconduct, only that it continued the pattern of insolence the Grievor had demonstrated to that point (*Kamloops (City) v. Canadian Union of Public Employees, Local 900 (Mrs. X Grievance),* [2014] B.C.C.A.A.A. No. 32 (Nichols)).

44. The Employer submits that an employee has a duty of good faith and fidelity during an employer's investigation (*Sobeys West Inc. v. United Food and Commercial Workers, Local 1518 (Sidhu Grievance),* [2015] B.C.C.A.A.A. No. 148 (Pelz); and *Teck Coal Ltd. (Fording River Operations) v. United Steelworkers, Local 7884 (Halldorson Grievance),* [2014] B.C.C.A.A.A. No. 124 (McPhillips)).

Union's Argument

45. The Union submits that the Grievor's sarcastic comment on the morning of May 17 was understandable and forgivable given the frustrations that the Grievor felt about the staffing situation in the FM Department. It said that sarcasm is a common and acceptable way to make a point. The Union stresses that the Employer initially determined that those comments were not worthy of discipline.

46. In relation to the comments made in the afternoon of May 17, that is, words to the effect that management is incompetent and that the Grievor did not respect Mr. Lenardon, the Union argues that those comments should not be considered to be misconduct as they were made in response to Mr. Lenardon telling the Grievor that he could bring concerns forward and that he, Mr. Lenardon, had an "open door" policy. It argues that in those circumstances, the Employer was asking for an "open and honest" conversation and that the Grievor was just expressing his open and honest feelings. It likens the situation to entrapment insofar as the Employer encouraged the Grievor to be open and honest and then punished him for being so.

47. In relation to the Grievor's "I don't respect you" comment, the Union argues that it referred to the Grievor's views of Mr. Lenardon as a person and not as a supervisor. It claims that the Grievor acknowledged the need to respect Mr. Lenardon's position. Furthermore, the Union argues that saying "I do not respect you" is not disrespectful. It argues that personal respect is something that has to be earned and not just expected.

48. The Union also argued that in the May 17 meeting, it was most likely that both the Grievor and Mr. Lenardon had raised voices and that Mr. Lenardon was probably downplaying his role in the conflict. The Union submits that it would be inappropriate to condone Mr. Lenardon's behaviour in the meeting.

49. In respect of the May 17 "grow thicker skin" comment, the Union argues that Mr. Lenardon blew the situation out of proportion and that there should not have been a follow-up formal meeting. It argues that the Grievor was justified in making the "thicker skin" comment to Mr. Lenardon. The Union submitted that, "it is a fact of the workplace that managers need to have some ability to not take workplace matters personally – that industrial disagreements are a reality and that one cannot take every criticism to heart."

50. Regarding the Grievor's denials in the investigation meetings, the Union argues that an employee has the right to remain silent in investigation meetings and does not have to give statements to the Employer except in limited circumstances that do not apply in this case. It cites *Tober Enterprises Ltd. v. U.F.C.W., Local 1518,* [1990] B.C.L.R.B.D. No. 51 (Bruce) in support of that proposition. The Union argues that the Grievor is not guilty of dishonesty, only omission.

51. The Union relies on *Western Forest Products Inc. and USW, Local 1-1937 (Simpson)* (2020), 315 L.A.C. (4th) 291 (Bell), for the proposition that even obscenities spoken in the presence of a supervisor ("fucking production before safety" and "fucking bullshit") are not always found to constitute insubordination.

52. In relation to its alternative argument that the discipline imposed was excessive in all the circumstances, the Union cites *St. Mary's Hospital (New Westminster) v. H.E.U.,* [1997] B.C.C.A.A.A. No. 504 (Jackson). In that case, the employee had been suspended for two days for telling his supervisor to "shut up" and "stuff your snarky comments." While Arbitrator Jackson found that the comments were directed at the supervisor, questioned his authority, and constituted insubordination, she found that the two-day suspension was excessive and reduced it to a one-day suspension. The Union argues that the grievor's comments in that case were worse than those of the Grievor in this case and thus the penalty here should be less than a one-day suspension.

53. The Union further argues that should I find that the Grievor's conduct constituted insubordination, the penalty imposed should be reduced because the conduct was provoked by management, particularly Mr. Lenardon's telling the Grievor that he had an open-door policy and that the Grievor could come to him with his concerns. The Union argues that that invitation encouraged the Grievor to be open and honest and was a provocation that led the Grievor to say what he said. The Union adds, however, that it is not claiming that Mr. Lenardon caused an outburst by the Grievor. The Union cites *Newmont Mines Ltd. v. C.A.I.M.A.W., Local 22,* [1982] B.C.C.A.A.A. No. 103 (R. Brown), as a case in which the employer's provocation resulted in a reduced penalty.

54. The Union also relies on *Fleetwood Industries Ltd. v. I.A.M.A.W., Lodge 171,* 2001 CarswellOnt 5298 (Solomatenko), where the discipline imposed for insubordinate comments was reduced to the remainder of the shift the grievor had been working, plus two other shifts. That reduction in

discipline resulted partly from the arbitrator's determination that the actions of the supervisor to whom the offending words were directed had inappropriately provoked the grievor. The Union makes that point that the reduced penalty in that case took into account that the grievor had a disciplinary record. It submits that in this case, as the Grievor had no disciplinary record, the penalty should be lesser.

55. There were a number of other authorities submitted by both parties. I have reviewed all of them, although I have only cited those that I found to be most applicable to the issues in this case.

Analysis and Decision

56. There were differences in recollections between Mr. Lenardon and the Grievor as to exactly what was said in relation to each of the comments the Employer found to be offensive. I note here that to the extent that there are differences in the evidence of Mr. Lenardon and the Grievor in any of their relevant discussions, I prefer the evidence of Mr. Lenardon. He made notes of the comments and conversations shortly after they took place; he put his version of the events to the Grievor on May 31 (as soon as the Grievor returned from holiday) and during the subsequent investigation meetings; aside from generally denying that he had said what was attributed to him, the Grievor did not offer any explanations or put forward any alternate recollections of what was said until the arbitration hearing. Having said that, I find that while there were minor differences in the recollections of these two witnesses, the result would be the same even if the Grievor's version were accepted.

57. The first issue is whether the comments made by the Grievor to Mr. Lenardon constituted insubordinate behaviour. I will deal with them in order.

58. Although the Grievor was not disciplined for the sarcastic comment he made on the morning of May 17, 2021, I have no hesitation in finding that the comment related to the hiring of management personnel was inappropriate. The Grievor no doubt had concerns about the Employer's staffing of the FM Department. Whether those concerns were valid or not, however, is quite beside the point. The sarcastic comment was made loudly when Mr. Lenardon came into the FM shop and could only have been interpreted as a criticism of him and/or management generally. It was made while the Grievor was talking to other employees who were also under Mr. Lenardon's supervision. I do not have to decide whether or not the comment warranted discipline, as the Employer determined that the matter should be handled in a non-disciplinary manner. I do find, however, that the comment was certainly serious enough to warrant the subsequent private meeting in which Mr. Lenardon advised the Grievor that he found the comment to be disrespectful and to let the Grievor know that there was a channel to raise concerns in a constructive manner.

59. On the afternoon of May 17, Mr. Lenardon spoke to the Grievor to relay his concerns. It was during that conversation that the Grievor told Mr. Lenardon that management was incompetent and that he did not respect Mr. Lenardon. Those comments were apparently made in respect of the Grievor's concern about another employee's possible COVID exposure and his view that management had mishandled it. I find that the Grievor's comments were indeed insubordinate, insolent, and intended to demean Mr. Lenardon. Again, the legitimacy of the Grievor's COVID concerns is not the issue. Mr. Lenardon advised the Grievor that the purpose of the meeting was

to discuss the Grievor's comments made that morning. Rather than addressing those comments – either explaining them or apologizing – the Grievor took the opportunity to raise another issue and further to personally verbally attack Mr. Lenardon and "management."

60. The Union argued that the words, "I don't respect you" are not disrespectful. I cannot agree with that submission. Disrespect can be expressed in many ways. For example, one can turn one's back on a speaker or put ear buds in one's ears when the other is speaking. Either of those actions would effectively communicate lack of respect through body language alone. The Grievor took a much more direct route to make the same point – he said aloud, "I don't respect you." I do not accept the Union's argument that saying the words "I don't respect you" is not a sign of disrespect. It seems to me that this was a pellucid declaration of disrespect.

61. The next concerning comment was made by the Grievor on May 31 when, as he was being advised that there would be a formal meeting involving HR, he said, "You're a manager, you should grow a thicker skin." Again, that was a highly disrespectful statement that conveyed disdain.

62. The Union submits that I should find that the comment was a justifiable statement because, in its view, there should have been no follow-up to the May 17 meeting. The Union also argued that "managers need to have some ability to not take workplace matters personally." I disagree with that submission for two reasons. First, as I have found above, the comments made on May 17 were serious and there was nothing improper in setting up a more formal meeting at which the Grievor would have the opportunity to explain his comments, apologize, or correct what he considered to be Mr. Lenardon's mistaken recollection of events. More to the point, however, is that even if the Grievor thought Mr. Lenardon should not have advanced the matter, he should not have made a personally derogatory statement about Mr. Lenardon's character. Such a comment is highly unprofessional and amounted to insubordination and insolence in the circumstances. It is not surprising that Mr. Lenardon would "take personally" the comment, "You need to grow thicker skin." It was not a general workplace complaint – it was a slight on Mr. Lenardon's character and his managerial style.

63. Turning to issues arising from the investigation meetings, I find that the Grievor's conduct in those meetings constituted further insolence. It is also clear, based on the Grievor's testimony at the hearing, that the Grievor provided dishonest responses to the key questions put to him in the investigation meetings. He knew that the substance of the comments attributed to him were accurate. The fact that they may not have been exact quotes did not mean that his denials were truthful. Any reasonable person hearing or reading the Grievor's responses would conclude that the Grievor was denying the substance of what was being said. His denials were non-cooperative and misleading. Being technically correct is not the same as being honest. If he thought the wording of what he had actually said was slightly different from what Mr. Lenardon claimed, an honest answer would have been to admit that the substance was correct but then to put forward his alternate version of the exact words spoken. Further, when asked directly to state what he did say, he indicated that he had said nothing, only listened. He admitted that was not an honest response.

64. In *Kamloops (City), supra*, Arbitrator Nichols wrote:

> 73. Further, when confronted with her conduct in the March 26 meeting, Ms. X was dishonest about the altercation. While she did not say "I did not do it", her response that she had no idea how the letter was changed was not true or forthright. She failed to admit her wrongdoing, even though she understood what the meeting was about and was given an opportunity to explain. Arbitrator Folely commented on the impact of a denial of dishonest conduct in *Saliken, supra* as follows:
>
> > The arbitral authorities support the principle that the degree to which there is an admission of guilt and expression of remorse, and the content and timing of any such admission of guilt and expression of remorse, are key factors in determining whether an employment relationship can be restored.
> >
> > For example, arbitrator Hamilton stated as follows in *Maple Leaf Meats and UFBW Local 832,* [2003] M.C.A.D. No. 31:
> >
> > > "On the question of 'rehabilitative potential', one of the primary benchmarks is a grievor's candour and admission of wrong doing not only at the time of the hearing, but also at the earliest opportunity when the matter is being investigated."
> >
> > Also, as stated by arbitrator Kelleher in *Cominco Metals and United Steelworkers of America,* Award No. A-22/88, January 15, 1988:
> >
> > > "...arbitrators are unanimous in holding that the denial of dishonest conduct when confronted by management is a factor which exacerbates the misconduct."

65. The Employer cites several other cases in which dishonesty during an investigation resulted in terminations being upheld or in which it was found that such dishonesty constitutes a separate ground for the imposition of discipline. Given that the discipline imposed in this case was a one-day suspension and that the Employer did not seek to add a separate ground for a more severe disciplinary response, I need not address those cases.

66. As set out earlier, the Union argues that the Grievor had a right to "remain silent" during the investigation meetings and cites *Tober Enterprises Ltd., supra* for that proposition. I find that that case does not assist the Union here. On the facts of *Tober*, the grievor was facing a criminal charge at the time of the employer's investigation into his conduct. On the advice of his lawyer, the grievor made no comments in response to the employer's investigatory questions. In reviewing the decision of the arbitrator, the British Columbia Industrial Relations Council (as it then was) found that the grievor had effectively been disciplined for failure to offer a timely explanation to the employer. In page 6 of its decision, the Council said:

> Turning to the final issue, did the Arbitration Board err by concluding a failure to explain alleged misconduct constitutes just and reasonable cause for

> discipline? After thoroughly reviewing the submissions of the parties, the Panel is satisfied a failure to explain misconduct, particularly where the employee also faces criminal or quasi-criminal charges, cannot amount to an independent cause for discipline. In my view, the obligation to explain only gives rise to evidentiary consequences and must, therefore, be described as an "opportunity" to explain behaviour. While the consequences of remaining silent may ultimately lead to dismissal, the failure to explain, standing alone, does not constitute just and reasonable cause for discipline. The failure to explain cannot be regarded as an offence which jeopardizes the employment relationship. It is the substantive misconduct alleged by an employer which must be proven on the balance of probabilities, with or without an explanation from the employee. Further, it is the proven substantive misconduct, and not the failure to explain, which constitutes just and reasonable cause for discipline or discharge. The failure to explain, without more, simply cannot be regarded as culpable behaviour.

67. If the Union were correct in its assertion that the Grievor's only issue in relation to the interviews was omission as opposed to dishonesty, that finding in *Tober* may be of assistance. However, on the facts before me, the Grievor did not "remain silent" and instead provided wrong or misleading answers to questions posed to him. In these circumstances, the paragraph immediately following the above quote in *Tober* is apt:

> On the other hand, where an employee deliberately attempts to deceive his employer by a false or misleading explanation, the employee's conduct is clearly blameworthy and threatens the basis of the employment relationship.

68. In summary, I find that the Grievor's comments on the afternoon of May 17, 2021, and on May 31, 2021, as well as his conduct during the investigation meetings, all constitute misconduct. As a result, I find that the first question set out in *Wm. Scott & Co.,* [1976] B.C.L.R.B.D. No. 98*,* that is, whether the employee given just and reasonable cause for some form of discipline by the employer, to be answered in the affirmative.

69. The second question in the *Wm. Scott* analysis, as it applies to this case, is whether the Employer's decision to suspend the Grievor for one day was an excessive response in all of the circumstances of the case.

70. The Union argues that where an employer provokes an employee's misconduct, that is a mitigating factor that should result in a reduction of the disciplinary penalty invoked. It argues that Mr. Lenardon provoked or encouraged the Grievor to make the comments that he did by telling the Grievor that he, Mr. Lenardon, had an open-door policy and that the Grievor could bring any concerns he had to him in a constructive manner. I do not accept that argument. It is not reasonable for any employee to conclude that an invitation to bring forward employment-related concerns in a constructive manner, or even in an open and honest manner, provides license to make offensive statements without consequence, even if those statements reflect the employee's personal feelings. As was suggested to the Grievor during cross-examination, there is a significant difference between one's "inner voice" and what one says to others in an "outer voice." Regardless of the Grievor's personal feelings about Mr. Lenardon or management in general, treating others with disrespect in the workplace may result in disciplinary consequences.

71. In relation to the provocation argument, the facts of this case are significantly different from those in *Newmont Mines, supra,* cited by the Union. In that case, the arbitrator found that the conduct of the supervisor was inappropriate and constituted a provocation. In this case, I do not find that Mr. Lenardon's conduct was inappropriate or that it somehow provoked the Grievor to say what he did.

72. This case is also distinguishable on its facts from *St. Mary's Hospital, supra,* in which a two-day suspension was reduced to one day. In that case, the arbitrator found that the offensive comments made by the employee to his supervisor was a one-time "momentary blip" in an otherwise good relationship in which both the supervisor and the grievor demonstrated a lack of rancor about the incident. That is quite different from what happened in this case in which the Grievor made several statements on different occasions, all reflecting an ill will towards Mr. Lenardon.

73. Similarly, I find that the facts in the instant case distinguish it from other authorities cited by the Union. In *Western Forest Products, supra,* it was found that offensive comments made by the grievor were not directed at the supervisor personally. In *Slocan Forest Products, supra,* both delay in administering discipline and a finding that the grievor's insubordination resulted from medical factors beyond his control, led to allowing the grievance. The comments in this case were directed at the supervisor personally and there were no medical factors involved. No other authorities cited by the Union have assisted its argument that the discipline imposed was excessive in all the circumstances of the case.

74. Also in relation to the Union's submission that the penalty was excessive, I note that the Grievor did not either admit misconduct, issue an apology, or demonstrate any remorse for his actions either at the meetings with the Employer or at the hearing. That is an aggravating factor.

75. In conclusion, I find that the Grievor's comments and conduct in the investigation meetings constituted misconduct and the imposition of a one-day suspension was not an excessive response in all the circumstances. Therefore, the Union's grievance is dismissed.

76. In reaching this conclusion, I would like to make clear that this finding is not a reflection on the Grievor's character as a whole. He is a long-term employee of the Employer and has provided years of discipline-free good service. I do not doubt that the concerns he felt in relation to either staffing or COVID were honestly held. However, he undoubtedly let some underlying issues cloud his judgment and that resulted in what seems to be an uncharacteristic series of events.

DATED and effective at North Saanich, British Columbia on April 30, 2023.

RANDALL J. NOONAN
Arbitrator