

LABOUR RELATIONS CODE  
(Section 84 Appointment)  
ARBITRATION AWARD

GREATER VANCOUVER REGIONAL DISTRICT EMPLOYEES' UNION  
UNION

GREATER VANCOUVER REGIONAL DISTRICT  
EMPLOYER

(Re: Franklin Dove - Psychiatric Evaluation)

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Arbitration Board:	James E. Dorsey, Q.C.
Representing the Union:	Marjorie Brown
Representing the Employer:	Gabrielle M. Scorer
Dates of Hearing:	October 10 - 11, 13; November 28 - 30; December 7, 18 - 19, 2006
Date of Decision:	January 19, 2007

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### **1. Grievance and Jurisdiction**

The risk of violence against a worker is a workplace health and safety hazard. An employer must investigate, assess and, if necessary, taken corrective action. Improper activity or behaviour by a worker towards another worker, including any threatening statement or behaviour which gives another worker reasonable cause to believe he or she is at risk of injury, must be reported and investigated.

On February 9, 2006, the employer placed Franklin Dove on indeterminate leave of absence with full pay and benefits pending completion of a workplace risk of violence assessment that included having Mr. Dove evaluated by a qualified mental health professional with respect to his fitness for work and risk for workplace violence. The employer engaged conflict management consultants after its investigation in January. Its decision directing Mr. Dove to undergo an evaluation was made on the recommendation of the consultant organization.

Mr. Dove refused to undergo the evaluation. In the following weeks, the union was not persuaded by the employer that there were reasonable and probable grounds for the employer's decision and grieved on March 15, 2006. The employer suspended payment of Mr. Dove's wages commencing May 13<sup>th</sup>.

The union and employer agree I am properly constituted as an arbitrator under their collective agreement and the *Labour Relations Code* to finally decide the merits of the grievance. There was a pre-hearing case management conference, rulings on the disclosure and admissibility of various documents, an order for exclusion of witnesses and summons issued to several of Mr. Dove's co-workers who testified.

Mr. Dove's employment with the employer, which commenced in 1986, was interrupted in 1987 and resumed in 1992. It has continued uninterrupted since then. Mr. Dove has no disciplinary record or adverse evaluation. Before 2006, no supervisor told him that his negative talk at work about the treatment he received from his employer and supervisors created an unsafe workplace.

Placing the employer's investigation and decision in their full context requires a review of events over the twenty years since Mr. Dove was hired.

## **2. Hire, Lay-off, Human Rights Complaint, Reinstatement (1986-92)**

Mr. Dove was born in London to Gahanna parents. He grew up in Sierra Leone and Ghana before returning to England at age fourteen. He came to Canada in 1974. He has had a twenty year relationship with the mother of their fourteen year old son.

By 1985, among other qualifications, Mr. Dove had obtained power plant instrumentation and electrical certifications at Vancouver Community College and Pacific Vocational Institute. In May 1986, he was hired by the employer to work as a Utility Helper at the Iona Sewer Treatment Plant. While working there, Mr. Dove learned he had a physical sensitivity to sewage that he characterizes as a disability called "acute sensitivity to sewage exposure." Because he needed the work and wages, Mr. Dove continued to work until he was laid off after five months.

In December 1986, the employer recalled him as a temporary

Maintenance Mechanic IV in the Water Mechanical Division to work at the Beach Yard property in North Vancouver. An initial term of one month was extended until he was laid off on October 30, 1987.

Mr. Dove testified he had problems with his supervisor during this period of employment. On December 17, 1987 he complained to the British Columbia Council of Human Rights that he had been discriminated against because of his race, colour and/or ancestry. His complaint was not resolved for four and one-half years. During that time, he worked for other employers and obtained additional qualifications at the British Columbia Institute of Technology and a millwright Trade Qualification certificate.

On June 29, 1992, Mr. Dove and the employer agreed to a consent order by the Council of Human Rights under which the employer admitted Mr. Dove was discriminated against and, commencing July 13, 1992, employed him in the Water Mechanical Division as a full time regular Maintenance Mechanic III, with seniority to be determined. Mr. Dove testified that only two employees, Amzad Ali and Neil Walsh, had been employed when he had previously worked in the Water Mechanical Division.

The union was not a party to the human rights complaint. It took the position it should be a party to the consent order and in January 1993 petitioned for judicial review. That proceeding was settled with a second consent order by the Council in December 1993 to which the union was an interested party. Mr. Dove continued to work in the Water Mechanical Division, which was separate from the Sewer Mechanical Division.

Clearly, and understandably, from the testimony of Mr. Dove and co-workers the conflict and proceedings from 1987 to 1993 have indelibly marked Mr. Dove; shaped his perspective of the employer; and heightened his alertness to the treatment he received at work.

### **3. Mr. Dove's Harassment Complaint against Mr. Hengen (1998)**

In July 1995, Mr. Dove posted into his current position as a Maintenance Mechanic IV (MM4). Since approximately 1992, Fred Oliver has been Mr. Dove's foreman. At the time, Mr. Oliver reported to Amzad Ali, who was supervisor and

general foreman in the Water Mechanical Division.

Tom Hengen began employment with the employer in 1988 as a MM4 in Beach Yard. Through reorganizations, he was working out of the mechanical shop at Lake City in Burnaby when Mr. Dove returned to employment with the employer. In 1998, the Water Mechanical Division had two geographic areas - M1 and M2. Both Mr. Hengen and Mr. Dove were working in M2.

On June 19, 1998, Mr. Dove complained to Chief Administrative Officer Johnny Carline that Mr. Hengen had harassed him on several occasions over the preceding five years, which he had reported to Foreman Fred Oliver, Superintendent Dan Donnelly or Supervisor Amzad Ali. The most recent was an incident at Lake City of "screaming, shouting and pointing his finger in my face" in the presence of Vince Launder, another MM4, and allegedly overheard by Mr. Ali. Mr. Dove testified Mr. Hengen also addressed him, during the same incident, with a racial slur ("Black Bastard"), which Mr. Dove did not record in his written complaint and which Mr. Hengen denies having said. Copies of the complaint were sent to Human Resources Services Division Manager Johnstone J. Hardie, Messrs Donnelly, Ali, Oliver and Union President Bill Eastwood.

Mr. Launder has a long family history with the employer. Both his grandfather and father were employed by the employer. His father was Superintendent of the Water Division. He thinks his father hired Mr. Hengen in 1988, but had retired when Mr. Dove returned in 1992. Mr. Launder was not asked during his testimony about the 1998 incident. Messrs Oliver and Ali did not testify. Mr. Hengen acknowledged in testimony that he and Mr. Dove "have had our differences."

Mr. Dove testified the complaint was investigated by Mr. Hardie and the outcome was a letter stating he and Mr. Hengen had to get along together.

Mr. Dove testified he continued to have interpersonal problems with Mr. Hengen and that he has generally disregarded Mr. Launder who he believes does not care for him.

#### **4. Injured Eye and Spontaneous Angry Response (2001)**

In 2001, Mr. Dove was part of a crew changing valves in a pump. Mr.

Fitzpatrick was in front of Mr. Dove removing a sling. When it was removed, he turned to pass it to another employee. As he did, the sling hit Mr. Dove in the eye and caused permanent damage. Mr. Dove was hurt and angry and screamed at Mr. Fitzpatrick.

The significance of this event is the characterization in 2006 of Mr. Dove's behaviour in response to being struck in the eye.

Mr. Dove testified he did not charge, touch or threaten Mr. Fitzpatrick, as Mr. Launders says, and apologized to Mr. Fitzpatrick the next day. Mr. Fitzpatrick was not asked about this event in his testimony. It arose in the testimony Mr. Launder, who testified after Mr. Fitzpatrick.

Later, Mr. Oliver spoke to Messrs Dove and Fitzpatrick about the need to continue to work together. They listened; shook hands; and, Mr. Dove testified, have not had a problem since.

## **5. Water and Sewer Merged and Mr. Dove Accommodated (2002)**

Maintenance mechanics in water and sewer continued to work out of Lake City after maintenance computerization created four geographic areas - A1 to A4. Then, in 2001, the Operations & Maintenance Department combined the Water and Sewer Divisions with a view to all mechanics working both water and sewer.

In December 2001, Mr. Hengen became supervisor of the combined divisions and Mr. Ali became superintendent. Mr. Oliver remained foreman, reporting to Mr. Hengen.

Six months after Mr. Hengen became supervisor, Mr. Dove was assigned to work on sewage. He grieved he was being discriminated against. Mr. Hardie testified that when the grievance was filed the employer confirmed the existence and extent of Mr. Dove's sensitivity to exposure to sewage. In December 2002, he wrote Union President Bill Eastwood that the employer had reviewed the situation and Mr. Dove's medical information. In part, the letter states:

With the support of the information provided, we have concluded that Mr. Dove should be granted approval for restricted responsibilities related to the area in which he fulfills his normal duties. More specifically, the employer confirms that assigned tasks not be related to wastewater collections systems and wastewater treatment plants.

Mr. Hardie testified these restrictions were communicated to the supervisors. He did not know if the supervisors communicated the restrictions and the reason for the restrictions to the maintenance employees.

There was no evidence that Mr. Hengen or any other supervisor informed Mr. Dove's fellow employees. Mr. Dove did tell several of them he was not assigned to sewage work because he had a letter or consent order.

Since January 2003, Mr. Hengen has maintained a separate computer file about Mr. Dove. Notes from this file, which Mr. Hengen reviewed before testifying, were entered into evidence, but they were not referred to during his testimony.

In January 2003, a conflict developed between Messrs Dove and Smith about which Mr. Dove testified and Mr. Smith did not. The conflict was reported to Mr. Hengen and he involved shop steward Ron Long. All four met and the meeting ended with a handshake. Mr. Dove testified he and Mr. Smith got along together after that, although Mr. Smith is rude and taunts him. Later in his testimony, he included Mr. Smith with Messrs Hengen and Launder as fellow employees who did not like him. He testified he avoided Mr. Smith. He got along "O.K." with the other employees.

In 2003, the employer gave its employees training in conflict resolution. Division Manager, Organization Development Donna Brown, co-lead the training. She testified it was part of the employer's ongoing training program and not specifically responsive or directed to conflict within this work unit.

The merging of the two divisions and Mr. Dove's restriction to work in water had scheduling and other consequences for all the employees. Mr. Dove was no longer included in the standby rotation schedule. The union grieved this and Mr. Dove's limited access to planned overtime. On June 7, 2004, after receiving legal advice, Mr. Eastwood wrote Mr. Dove, in part, as follows:

It appears that the Employer has accommodated your disability appropriately and further accommodation would be construed as placing an undue hardship on the GVRD. I am sorry to inform you that the Union will not be pressing the matter of you being placed on the Standby roster to arbitration. In his third stage grievance response Mr. Johnny Carline reiterated that it continues to be his view that you will be entitled to a fair

share of the planned overtime, we ask that you will let us know if that commitment is being honoured.

The union raised the issue again when it believed circumstances had changed, but the employer disagreed they had and confirmed its position in a letter in December 2004.

Dan Lenning, a MM4, testified about an interchange with Mr. Dove in the shop in March 2005 during which Mr. Lenning recalls Mr. Dove called him Mr. Hengen's "puppet." Mr. Dove denies this. He recalls telling Mr. Lenning to watch out because someone will fink on you as had happened to him with a Coquitlam Centre incident in November 2005. He says Mr. Lenning must have misunderstood.

In March 2005, the union wrote the employer about Mr. Dove not having been included in planned overtime at the Capilano Dame in December 2004 and February 2005. Mr. Dove believes he was excluded from planned overtime on April 4, 2005. From Saturday, April 9 to Monday, April 25, 2005, Mr. Dove was on vacation leave. He complains he was excluded from planned overtime April 25<sup>th</sup> and May 2<sup>nd</sup>.

The following are descriptions of notations from Mr. Hengen's file on Mr. Dove from April to September 2005 that are not related to work performance or training subjects:

- May 16 - Ron Long (union Vice-president) and Jesse Medeiros (shop steward) inform Mr. Hengen that Mr. Dove is documenting everything;
- May 19 - Ray Fitzpatrick asks to drive to Beach yard on his own rather than with Mr. Dove because the day before when driving to a first aid course Mr. Dove continuously talked about past events and how people are out to get him;
- June 20 - "Franklin's demeanour at work is not very good, does not participate in any discussions involving the group, and seems to be very distant";
- June 21 - told by Mr. Ali that Mr. Dove sent letter to union alleging

Mr. Hengen is “profiling” Mr. Dove;

- June 24 - in work group discussion, Mr. Dove seemed “cold towards everyone” and did not participate;
- September - Dennis Smith cautions Mr. Hengen to be careful “because Franklin was conspiring something against me”

After the summer of 2005, it was learned that Mr. Oliver, one of the two working tradesperson foremen, would be seconded for two years to the Capilano filtration plant under construction. Messrs Hengen and Ali decided to assign the other working tradesperson foreman, George Nicholls, to replace Mr. Oliver. Rather than recruit a single replacement for Mr. Nicholls, it was decided to select four MM4 employees to rotate through the vacant foreman position on three month terms.

Mr. Hengen testified he and Mr. Ali decide to exclude Mr. Dove from the selection process because of his disability. They wanted persons who could respond to situations in both water and sewer and Mr. Dove’s disability restricted him from exposure to sewage.

Mr. Hengen testified he spoke “very briefly” to Mr. Dove to alert him that he would not be included in the selection, but did not explain to him the reason he was excluded. Mr. Dove “had no response whatsoever.”

## **6. Human Rights Compliant (October 12, 2005)**

In fact, Mr. Dove’s response was dramatic. He testified he had had enough. The ongoing situation had not been resolved through the employer’s internal complaint processes in 1998 and with subsequent complaints he made. The various agreements and understandings about his accommodation and planned overtime were not being respected by the employer.

He retained counsel and filed a complaint with the Human Rights Tribunal on Wednesday, October 12, 2005. The respondents named in the complaint are the employer and Messrs Hengen, Ali and Oliver.

Among other things, the complaint asserts that approximately a month previous to the date of the complaint he had learned he would be excluded from

selection for rotation into Mr. Oliver's vacant foreman position. He and the helpers had been excluded from the meeting at which it was discussed with the other maintenance mechanics.

Mr. Hengen received a copy of the complaint on a Monday morning, spoke to Mr. Ali and Human Resources. Mr. Oliver was out of town at a convention.

On or about Monday, October 31, 2005, Mr. Dove telephoned Mr. Y, a Maintenance Mechanic II (MM2) or "helper", to tell him that he had made a human rights complaint. Mr. Y recalls that Mr. Dove said the employer had opted for an early settlement. Mr. Y testified that he had worked well with Mr. Dove over the years, but Mr. Dove was progressively more fixed on what was happening and getting back at the employer. Mr. Y recalls the first person he spoke to about Mr. Dove's complaint was another helper, Ray Fitzpatrick.

On Friday, November 4<sup>th</sup>, Mr. Hengen informed the employees at a crew meeting that the persons selected to rotate through the temporarily vacant foreman position would be Messrs Launder, Smith, Dale Bindley and Dan Lenning. Mr. Bindley was assigned the first rotation.

On Friday, November 4, 2005, Mr. Fitzpatrick and Mr. Launder were working on a job at the Sasamat Pump Station near UBC which Mr. Hengen visited. Mr. Launder asked Mr. Hengen if it was true that there was a complaint against the employer and Messrs Hengen, Ali and Oliver. Mr. Hengen notes in Mr. Dove's file: "[Mr. Y] and Vince asked if we could have a meeting to discuss the workings of the crew. [Mr. Y] would like to have everyone interviewed to give their views on issues with Franklin."

Mr. Hengen telephoned Mr. Oliver and Ms Brown to tell them the crew knew about the complaint. Mr. Oliver's secondment had not begun and he was still the foreman.

Mr. Eastwood was informed of the complaint by Mr. Dove who sent a copy of it or other correspondence about it to him. Mr. Eastwood was aware Mr. Oliver, a union member, was a named respondent. He spoke to Mr. Oliver to tell him the union was available for him if he wished. Mr. Eastwood testified Mr. Oliver was distraught about being named.

About this time, Mr. Y, telephoned and left a message for Mr. Eastwood, who responded to hear from Mr. Y that he was concerned about being dragged into this thing with Mr. Dove and concerned about speaking against a co-worker. Mr. Eastwood testified he told Mr. Y to be honest and forthright.

## **7. Heightened Workplace Tensions (November - mid-January 2006)**

It is conclusively evident from the testimony and events that, after the human rights complaint became common knowledge, Mr. Dove's actions and all interactions with Mr. Dove were scrutinized and discussed. The frequency and length of Mr. Hengen's file notes about Mr. Dove increase significantly after November 4<sup>th</sup>.

- **November 2005 – Smith Reports Dove Early at Coquitlam Centre**

On Monday, November 7<sup>th</sup>, Mr. Oliver expressed discomfort dealing with Mr. Dove in the face of the complaint. Mr. Hengen said he would speak to Mr. Hardie and Ms Brown. Mr. Hengen testified that the complaint definitely placed a strain on his relationship with Mr. Dove. He characterized his behaviour as "cautious", not cold, unfriendly or distant and agreed "cautious" may be one way to characterize Mr. Dove's behaviour after the complaint. Mr. Hengen testified he did not meet alone with Mr. Dove after the complaint, place himself in a position where what was said or done could possibly be twisted against him by Mr. Dove or directly address concerns with Mr. Dove's performance or behaviour.

The same day, Mr. Launder expressed concern about working with Mr. Dove. Mr. Hengen testified that Mr. Launder did not say and he did not ask why. From the testimony, the last time Messrs Launder and Dove had worked together was for two eleven hour shifts in the summer of 2005 when six of the crew responded to an emergency replacement of leaky valves in a pumping station in Central Park

Mr. Hardie and Ms Brown received telephone calls from Messrs Hengen and Ali in November about Mr. Dove and concerns expressed about Mr. Dove by other employees.

The work unit consists of 13 employees, including Mr. Dove. There are seven MM4s, who infrequently work together. There are five MM2s, who work as

helpers with the MM4s. There is one full time temporary Utility Trade Helper, who backfills for the MM2s. There are two bargaining unit foremen.

In November 2005, Mr. Dove and Ray Fitzpatrick were working together, as they had frequently in the past. Mr. Fitzpatrick testified he knew about the consent agreement between Mr. Dove and the employer and that Mr. Dove had talked daily and incessantly about his complaints with the employer. Mr. Fitzpatrick would ask him to stop and he would for a time, but always return to the subject. Mr. Fitzpatrick found this both depressing and stressful. He found he was taking the conversation home and talking about it at the dinner table. He explained to Mr. Dove that Mr. Dove's problems were becoming his so much so that he was even thinking about them when he was fishing.

In mid-November, Mr. Hengen spoke to Messrs Dove and Fitzpatrick about late reporting at a work site; coming to Lake City rather than reporting directly to the work site; and both going to pick up a seal. Mr. Hengen's description of Mr. Dove's attitude and demeanour was distant and indifferent. The day after calling Mr. Dove in about the seal incident, November 24<sup>th</sup>, he recalls Mr. Dove was unresponsive to the usual morning greetings.

MM4 Dennis Smith, who seldom worked with Mr. Dove, testified that at this time in late 2005 Mr. Dove was more unresponsive, cold and distant than he had been in the past.

At the weekly Friday morning crew meeting on November 25<sup>th</sup>, Mr. Dove was distant and participated to the extent necessary. While Mr. Hengen was talking about the need to respect start and quit times and the procedure for picking up and dropping of helpers, Mr. Dove went to the photocopier to copy documents. This reinforced the common belief that Mr. Dove was keeping records of work events, as he had advised others to so.

At the end of the meeting, Mr. Oliver asked Mr. Dove to take filters with him in his vehicle for the job he was to do that day. Mr. Dove said there was not enough room. Mr. Oliver said they would fit in his smaller vehicle. Mr. Hengen asked Mr. Dove to remain after the meeting and spoke to him about a job he was to do on Monday with Mr. Fitzpatrick.

Mr. Launder testified that on Monday, November 28<sup>th</sup>, he had been working in Coquitlam and had gone to the shopping center to eat on his way to night school. He saw Mr. Dove's van there at 3:25 p.m. He had previously assessed that Mr. Dove was one of the few and greatest abusers of personal use of the employer's vehicle and failing to telephone when leaving a work site, about which they had been spoken to many times.

First thing the next morning, Mr. Launder telephoned Mr. Hengen - "You will not believe who I saw at 3:25 p.m. in the Coquitlam Centre parking lot." Mr. Hengen immediately left for North Vancouver to find Messrs Dove and Fitzpatrick at the Beach Yard where he arrived just after 7:00 a.m. They were not there. He called them. No answer. He called Mr. Oliver who told him they were at Lake City in Burnaby picking up supplies. Mr. Hengen spoke to Mr. Dove who explained he was getting supplies; readily said he had left the site at 3:00 p.m. the day before; and acknowledged he was at the Coquitlam Centre at 3:20 p.m. where he saw Mr. Launder's vehicle. Mr. Hengen followed up with Mr. Fitzpatrick who blamed Mr. Dove for the early quit.

The next day, Mr. Hengen called Messrs Dove and Fitzpatrick to his office and reprimanded them for the early quit and failing to respect the repeated directives regarding start and finish times. Mr. Dove said he was sorry; it would not happen again; and he had screwed up. When doing so, he banged his fist into his open hand.

- **December 2005 – Mr. Y Reassigned to Accommodate Simon**

In December 2005, there were incidents when Mr. Dove was aloof, distant and unresponsive in morning greetings and exchanges with others.

In early December 2005, Mr. Lenning recalls an incident when he went to Mr. Nicholls' office. He encountered Mr. Dove and had what he characterized as an odd exchange when Mr. Dove rubbed foam up and down Mr. Lenning's sleeve. Planner Fred Beatty was present. Mr. Lenning acknowledges he might have missed something and did not understand. Perhaps it was a joke. Mr. Dove denies it happened.

At the time Mr. Lenning was paired with John Marcanato, who had not yet

received his certification, and, although he had always gotten along well with Mr. Dove and considered him to be a friend, at this time, he was avoiding interaction with him. If he greeted Mr. Dove in the morning there was no reply. If he did not greet Mr. Dove then Mr. Dove would ask why he had not and what was wrong. Mr. Dove says sometimes he would simply nod and denies asking what was wrong.

Mr. Lenning recalls that since sometime in December, Mr. Dove did not go to Lake City Tuesdays to Thursdays. In another incident, he asked Mr. Dove to pass him the time sheets. Mr. Dove simply glared and Mr. Lenning reached for them himself. Mr. Dove does not recall this incident.

In mid-December, the Utility Trade Helper, Sylvio Simon was working with Mr. Dove. Mr. Simon has been employed by the employer for two and one-half years and wants to become a full time employee with security of employment. His father who had been employed by the employer for 39 years had just retired in 2005.

Mr. Simon had seldom worked with Mr. Dove in the previous year. He observed, as others testified, that some days Mr. Dove was open, greeting and pleasant. Other days he would not acknowledge a greeting.

Mr. Simon testified that, except for the constant negative talk, Mr. Dove was a pleasure to work with and he had no problem working with him. Mr. Dove's talk made him question wanting to work for the employer. At home, his father would inquire what was on his mind and he would ask his father if what Mr. Dove was saying was true. At the end of the day in the work yard Mr. Simon was noticeably distracted. One day Dan Lenning noticed him pacing, upset and almost in tears. He inquired if something was wrong and Mr. Simon said he was thinking about quitting.

Mr. Lenning, who did not work with Mr. Dove, was concerned about Mr. Simon and that it might be unsafe for him to work with Mr. Dove because he would be distracted and make a mistake. Mr. Bindley, in the first rotation as acting foreman, reported to Mr. Hengen that Mr. Simon did not want to work with Mr. Dove.

Mr. Bindley, who worked in the sewer division before the amalgamation, testified he had not work frequently with Mr. Dove in the past. Mr. Dove recalls they had never worked together. During the fall of 2005, Mr. Dove informed him and others about his Human Rights complaint and Mr. Bindley heard other complaints about Mr. Dove's constant talk about his situation and relationship with the employer. Mr. Bindley recalls that Mr. Dove cautioned him to be careful in his relationships with management, not trust anyone and record everything that happened. Mr. Bindley's experience with Mr. Dove was similar to others. Some days, Mr. Dove would respond to a greeting. Others he would not.

Mr. Bindley testified Mr. Dove did not join the banter at crew meetings and never joked as others did. Some Fridays, the crew would go to breakfast together after the early morning meeting. Mr. Dove was always invited to come, but he seldom did. Mr. Bindley learned about the Human Rights complaint from Mr. Dove, who told him he had a meeting at which the employer was going to offer him money to settle the complaint.

Mr. Bindley testified that on occasion Mr. Dove would brush against him as he walked past and on one occasion on a Friday morning in 2005 he greeted Mr. Dove, who then bumped into him harder than usual without apologizing or saying anything. He was "surprised how hard he pushed against me." It was unusual, but did not cause concern. Mr. Bindley does not believe the push was accidental, but did not report it to the employer at the time. He did not take it up with Mr. Dove, who he does not find approachable. It did not happen again.

Mr. Dove does not recall, but accepts he might have bumped into Mr. Bindley. He did not do so deliberately and thinks he would have apologized if he had accidentally.

The next day, Friday, December 16<sup>th</sup>, Mr. Hengen called Mr. Simon into his office to speak to him. Mr. Hengen reassigned Mr. Simon and assigned Mr. Y to work two days the following week to do two tasks with Mr. Dove. Mr. Hengen did not speak to Mr. Dove. He did not determine if there was another perspective on what Mr. Simon was saying. He did not explain to Mr. Dove why there was a change in his helper. He testified he believes this was done by someone in

Human Resources.

Mr. Launder testified that he was told by Mr. Nicholls, who did not testify, to inform Mr. Y about the reassignment. He understood that the helpers had been upset with Mr. Dove's "hate mongering" and it was putting Mr. Y into a "bad depression" so serious that some mornings he could not get out of his chair. He carried the message to Mr. Y and "spent the day consoling [Mr. Y]."

Later Mr. Launder testified he told Mr. Y he simply had to "suck it up" because it was part of being a helper. Mr. Launder had worked with Mr. Dove as a helper before 1997, but Mr. Y's depression and talk about quitting started him thinking about quitting. He testified he did not think it fair that he had to learn about sewer after the amalgamation while Mr. Dove did not when they are paid the same wages. He had heard rumours Mr. Dove had a letter, but recently learned the employer had made an accommodation under its duty to accommodate. He always thought Messrs Dove and Walsh got special treatment.

Mr. Launder was unrestrained and not believable in his extreme account of the frequency and impact of Mr. Dove's talk about his concerns with the employer and specific foremen and supervisors.

Mr. Y takes medication for depression and is sometimes affected by Mr. Dove's constant negative discussion about the employer during drives to and from jobs and while working. He did not tell this to Mr. Dove, who he did ask to change the subject. At times, he and Mr. Dove worked through lunch. This made the day pass faster.

When Mr. Y was told he was to switch with Mr. Simon he was upset. He was full-time and Mr. Simon was not. He was being reassigned from a watershed job he likes to do to a less desirable assignment to accommodate Mr. Simon who he thought had had a misunderstanding with Mr. Dove. That evening he drank too much and caused some physical damage at home. He attributes this behaviour to the reassignment. Mr. Y discussed the reason for his outburst and behaviour with his wife.

On Monday he spoke to Mr. Hengen and reported that the reassignment had ruined his weekend and why was he always assigned whenever Mr. Dove

needed a helper.

There were difference a between Messrs Dove and Hengen about when he was to report directly at the work site or come to the Lake City. They revolved around the requisite supplies for a job. On December 20<sup>th</sup>, Mr. Dove was at Lake City to pick up supplies when Mr. Hengen thought he should be at a work site. Mr. Hengen testified that during their discussion Mr. Dove inched toward him and leaned forward inches from his face “menacingly.” Before Mr. Dove left he said Mr. Hengen was “picking on him.” Mr. Hengen did not take any action, report or tell anyone.

In his testimony, Mr. Dove first denied he said this. He then said that he might have but he always tried to be non-confrontational. Later he denied saying this. He testified he always maintained his composure and simply got out of the way as an act of preventive maintenance. He avoided creating any opportunity for Mr. Hengen to discipline him after having been called in on the incident with Mr. Smith in 2003. Mr. Dove testified he simply left the room and looked at Mr. Hengen in an “amazed” way. He did not “glare.” He explained he was amazed because he was disappointed that the mistreatment was continuing.

Later in December, Mr. Fitzpatrick, who had been working with Mr. Dove, told Mr. Hengen that his wife was concerned with the stress he was experiencing working with Mr. Dove. One day when assigned to work with Mr. Dove, he asked if it was necessary for him to continue. Mr. Hengen said it was. Mr. Fitzpatrick asked if he could back to Lake City after the task and be assigned other work for the remainder of the shift. Mr. Fitzpatrick testified he wanted to avoid Mr. Dove’s talk about the employer and that Mr. Hengen and others knew he found it stressful working with Mr. Dove.

- **January 2006 – Crew Meeting and Mr. Y Letter**

In early January, Mr. Dove mannerisms and relationships did not change. Mr. Lenning recalls that after a Friday morning crew meeting in early January as Mr. Dove was walking to the garbage he passed Mr. Lenning and said “They’re watching you.” Mr. Lenning does not know what this meant. Mr. Dove denies he said this.

Mr. Hengen again reassigned Mr. Simon and replaced him with Mr. Y who protested to Mr. Hengen on Monday, January 16, 2006.

Since November, Mr. Hengen had been speaking to Mr. Ali and Human Resources about the situation with Mr. Dove, tensions among the crew members and Mr. Oliver not wanting to work with Mr. Dove. Mr. Hardie testified he and Ms Brown had been receiving telephone calls from Messrs Hengen and Ali throughout November, December and January. Mr. Hardie told Mr. Hengen that because he was accommodating Mr. Dove's behaviour by reassigning the helpers they were not coming forward to anyone else with their complaints and concerns.

Mr. Hardie encouraged Mr. Hengen to speak more openly with the employees and to encourage them to speak to him or Ms Brown. Mr. Hengen recalls Mr. Hardie advised him that the employer needed the employees to come forward stating their unwillingness to work with Mr. Dove and any allegations against Mr. Dove.

Mr. Hardie testified that the existence of the Human Rights complaint made it difficult for the employer to speak directly to Mr. Dove without the risk of being accused of harassing him. On some matters, the employer communicated with Mr. Dove through their lawyers. Messrs Hengen and Ali were told to be cautious communicating with Mr. Dove.

Mr. Hengen decided to convey this in a crew meeting Monday, January 16<sup>th</sup> after Mr. Dove left. The remaining members, except perhaps for Mr. Nicholls who left, met with Mr. Hengen, who testified the purpose of the meeting was for the employees to go on the record with their allegations and concerns. Mr. Hengen testified it was an emotional event during which he said it was a travesty that Mr. Dove had made the Human Rights complaint that was known to everyone. He agrees he asked for anyone who was willing to work with Mr. Dove to raise their hand. No one did. He was not asked if he said for the rest of your days or lives. He recalls Mr. Y suggested someone from Human Resources should interview the members of the crew.

Mr. Hengen does not recall saying at this meeting "If we stick together we

will get rid of Mr. Dove.” He declined the opportunity to say he did not say it. Mr. Smith testified Mr. Hengen, who was “cracking up” because of the complaint, did not say anything derogatory about Mr. Dove. Mr. Y did not recall Mr. Hengen saying this. He did recall Mr. Hengen asking if anyone would work with Mr. Dove and that MM2 Franco Cimino raised his hand to volunteer. Mr. Launder testified he was not at that meeting.

MM4 Neil Walsh was at the meeting and recalls Mr. Hengen saying this. He felt sick because it is not their place to gang up to get rid of someone. There is a union and management to deal with these things. He recalls Mr. Hengen said “Anyone who wants to work the rest of your days with Franklin Dove put up your hand.” He recalls it was “rest of your days” or “life”, not the “year.” It was a couple of weeks before Mr. Walsh reported what had been said.

Mr. Dove testified that when he was working with Mr. Y on Monday, January 16<sup>th</sup>, Mr. Y spoke about the Human Rights complaint, but Mr. Dove said he did not want to discuss it.

The next day, Tuesday, January 17, 2006, Mr. Y presented a draft letter to Mr. Hengen that he and his wife had written the evening before. The letter was about what was happening at work and how it was affecting him and new employees and something should be done. Mr. Hengen said he would take Mr. Y’s concerns to Human Resources. He reviewed the letter with Mr. Y and then destroyed it to prevent Mr. Y from being accused of racism or discriminating against Mr. Dove.

This was the second day of his reassignment with Mr. Dove in place of Mr. Simon. During the day, Mr. Y asked Mr. Dove if he would accept \$50,000 to settle the complaint. Mr. Dove recalls asking where that came from.

Over the years, Mr. Y had not had a close relationship with Mr. Dove. He had followed Mr. Dove’s lead when he was helper with Mr. Dove, but did not appreciate the negative comments and talk about the employer. He testified he was concerned Mr. Dove might put his safety in jeopardy. Once when he complained to Mr. Dove about his driving, perhaps in January 2006, Mr. Dove asked him if he wanted to drive. Another time, Mr. Dove reacted angrily when he

was cut off on the highway. A couple of time he greeted Mr. Dove "Hello Franklin" and Mr. Dove curtly replied "That's my name." He was guarded what he said around Mr. Dove. He recalled that at some time Mr. Hengen had advised he be careful what he said around Mr. Dove and keep dated notes about events. Mr. Y testified there had been ongoing disputes between employees and supervisors, verbal arguments and favouritism.

### **8. Human Resources Interviews Employees - January 18 - 26, 2006**

Mr. Hardie testified he received a telephone call from Messrs Hengen and Ali conveying that the employees were more open to discussion their concerns with Mr. Dove. Mr. Hengen had spoken to the employees and the themes were: incessant commentaries about the employer; complaints about being ill treated; and liberty from worker in sewer. One employee spoke about this creating a dangerous environment because it affected the ability to concentrate. He spoke to Ms Brown.

Mr. Hardie and Ms Brown decide to interview the employees and prepared an outline for the interviews that I have abbreviated as follows: purpose of meeting; first hand descriptions with Mr. Dove; impact of interactions on individuals and work environment; their actions in response; personal safety concerns; and what will happen next will be determined after interviews.

The following table of interviews is created from the testimony and documents entered into evidence. The persons with asterisk by their name testified in this arbitration.

<b>Date</b>	<b>Time</b>	<b>Employee</b>	<b>Job</b>	<b>Interviewer (s)</b>
18-Jan	13:52 - 14:00	Ron McFarlane	MM2	Donna Brown and Johnstone Hardie
18-Jan	14:03 - 14:16	Franco Cimino*	MM4	Donna Brown and Johnstone Hardie
19-Jan	12:30 - 13:03	Ray Fitzpatrick*	MM2	Donna Brown and Johnstone Hardie
19-Jan	13:05 - 13:30	Mr. Y*	MM2	Donna Brown and Johnstone Hardie
20-Jan	??:?? - 13:50	John Marcanato	MM4	Donna Brown and Johnstone Hardie
24-Jan		Dale Bindley*	MM4	Donna Brown
24-Jan		Dan Lenning*	MM4	Donna Brown
24-Jan	13:50 - 14:15	Dennis Smith*	MM4	Donna Brown and Johnstone Hardie
25-Jan	13:05 - ??:??	Vince Launder*	MM4	Donna Brown and Johnstone Hardie
25-Jan	14:20 - 14:45	Sylvio Simon*	Utility	Johnstone Hardie
25-Jan		George Nicholls	Foreman	Johnstone Hardie
27-Jan		Neil Walsh*	MM4	Donna Brown

27-Jan Fred Beatty Planner Donna Brown

Mr. Dove was not informed that the interviews were taking place and he was not scheduled to be interviewed at this time.

The results of the two interviews totalling twenty-five minutes on January 18<sup>th</sup> were unremarkable. Mr. MacFarlane had not worked with Mr. Dove for the past year; Mr. Dove was a good worker; he knew about Mr. Dove's accommodation; Mr. Dove always spoke about things that were causing stress and annoying others; thought it unfair one person caused so much stress and disruption; and speculated it must be difficult for Mr. Dove to live with and he should move on or get help. Mr. Cimino reported Mr. Dove was a good worker with whom issues went away quickly. He and Mr. Dove respected each other. Mr. Dove was reluctant to say "good morning."

Mr. Cimino testified that everyone has some problem at work and the work unit had "the good, the bad and the ugly." Mr. Dove is a little above the middle with a temper and personal characteristics. All the MM4's with whom he works have their distinct personalities. He likes to rotate so he can have pressure one week and relief the next. The world would be a better place if everyone washed their laundry at home. People should not play games, respect one another and mind their own business. Mr. Dove treated him like a gentleman.

The two interviews on Thursday, January 19<sup>th</sup> were preceded by an event that was reported during the interviews. That morning Mr. Y was warned by an unnamed person that Mr. Dove was looking for him. In later testimony, he said it was Mr. Fitzpatrick who told him, but it was after January 19<sup>th</sup>.

Later in the day on Thursday, January 19<sup>th</sup>, Messrs Y and Fitzpatrick were sitting in a vehicle Mr. Y was driving. They were filling time sheets. Mr. Fitzpatrick said Mr. Dove was coming toward them. Mr. Y looked up and acknowledged Mr. Dove, who placed his fist up to the window and then placed his hands at the sides of his face to peer in. Mr. Dove then turned and walked away. Mr. Y did not know what it meant. He agreed that if Mr. Dove did not know about the interviews it was probably just a silly gesture.

Mr. Dove says he had worked with Mr. Y on Monday and Tuesday and he

saw Messrs Y and Fitzpatrick leaving work early. He did not know why they were leaving and did not know the employer was conducting an investigation.

He approached the vehicle knocked on the window and made a goofy face in jest. He soon knew it was a mistake because he received a telephone call from his Human Rights lawyer about a suggestion he was threatening people at work. The evidence does not establish when the call was made. Nor was it established if this was the same incident Mr. Hardie testified about asking, through the employer's lawyer and Mr. Dove's lawyer, that Mr. Dove not talk about his Human Rights complaint at work.

At his interview, Mr. Fitzpatrick spoke of Mr. Dove's incessant talk about his situation that had persisted, but not increased in recent months. He did not mention the incident earlier that day while in the vehicle with Mr. Y.

At his interview, Mr. Y said Mr. Dove's constant negativism and talk about the employer had gotten worst in recent months; there was the fist incident that morning; and other events recounted elsewhere in this decision. Although Mr. Hardie described Mr. Y as very intimidated by the event, the employer did not go back to Mr. Fitzpatrick to ask him about the incident earlier that day. Mr. Y reported that Mr. Dove had said he had received a monetary offer to settle his complaint. Form some source not identified in the evidence this figure grew to \$200,000.

Foreman Fred Oliver was not interviewed. The last interview Mr. Hardie conducted was with Foreman George Nicholls, who had not worked with Mr. Dove until the amalgamation of water and sewer. He reported that because Mr. Dove was paranoid and thought the employer was constantly watching, Mr. Dove would ask for more specific direction and task related decisions than others. The end result was that, although Mr. Dove had to sign off on a job, Mr. Nicholls had made so many decisions during the course of the job that Mr. Dove could not be held responsible if there was a subsequent problem. On those types of jobs, helpers did not want to work with him. This behaviour required more time and attention from Mr. Nicholls, but did not create a problem in their relationship. Because of Mr. Dove's accommodation, it was more difficult to assign him work.

Mr. Nicholls told Mr. Hardie that he had no particular problems with Mr. Dove, who like other employees had to be schooled at times. However, the rest of the department wanted to get rid of him.

The interviews that made the greatest impression on Mr. Hardie were with Messrs Smith, Launder and Simon. Mr. Smith there had been instances in the past when Mr. Dove brushed past him in a hallway, making contact, but not apologizing. Mr. Launder reported Mr. Dove had called him "shorty" and "baldy" on one occasion four or five years previous. At the time, Mr. Launder told Mr. Dove not to call him names and treat him with respect.

Mr. Walsh was the last maintenance mechanic to be interviewed. He has been employed for twenty three years and testified that he was aware when Mr. Dove returned in 1992 that he was not working in the sewer division. He understood there was a letter authorizing this. He seldom works with Mr. Dove and did not notice a difference in his behaviour in late 2005 and early 2006.

At the interview with Ms Brown on January 27<sup>th</sup>, he said Mr. Dove was not the easiest person to work with. He was moody, stubborn and holds a grudge. He also reported there was different treatment of the employees and favouritism in the assignment of overtime. Mr. Walsh reported the crew meeting at which Mr. Dove as excluded by having Mr. Nicholls take him out. Ms Brown's notes of what Mr. Walsh reported Mr. Hengen had said at the crew meeting are - "Stick together and I want Franklin fired" and "Anyone want to work with Franklin for the rest of their days." He told her this was a Monday morning crew meeting after Mr. Hengen had a meeting with Mr. Carline on a Friday that caused Mr. Hengen to be upset.

In September 2005, in anticipation of hearing dates scheduled to commence October 10, 2005, the employer produced redacted copies of Ms Brown's interview notes. The redacted copy of Ms Brown's notes of her interview with Mr. Walsh expunged his name, the comments about overtime and different treatment and the statements attributed to Mr. Hengen. Ms Brown was unaware her notes had been redacted because, at the time, Mr. Hardie had conduct of the grievance and arbitration proceedings. She was subsequently assigned to be the

responsible person when Mr. Hardie took sick leave.

At the conclusion of the interviews, Mr. Hardie, Ms Brown and other management met and identified there was a common theme of a strained workplace with tense relationships with Mr. Dove. They did not review the results of each interview or review for each other the interviews at which only one management person was present.

Ms Brown was struck by the level of emotion displayed by several of the employees and their expression of concern for safety and the working with Mr. Dove. The concerns about safety were that the distraction and internal consternation caused by Mr. Dove's constant negative comments and singular focus on his mistreatment and Human Rights complaint could cause an error in lockout or other procedure that could lead to an injury or fatality.

Mr. Hardie testified he was conscious that not all the employees liked Mr. Dove. He was not impressed with Mr. Y's emotional interview. He listened carefully to learn about actions and behaviours by Mr. Dove. Among those he interviewed, he did not treat Mr. Nicholls to be an employee with views persuasive in forming his opinion because of his opinion of Mr. Nicholls and the fact Mr. Nicholls delegates work to Mr. Dove and does not work with him.

Mr. Smith wrote the following letter dated January 29<sup>th</sup> to Ms Brown with copies to Messrs Hardie and Hengen:

This letter is written to express my thanks for last week's meeting and to also document my concerns over the sad happenings in the matter of Franklin Dove. And to show my disappointment with human resources for not dealing with Franklin earlier, and possibly avoiding the present unfortunate events.

Donna, at a forum at head office which you oversaw a year and a half ago I requested in the presence of other work mates, training with individuals with mood disorders. In singular Franklin Dove. I received none. In December of last year I phoned Linda Shore requesting the same. And Linda responded with the platitude of all bureaucratic platitudes, "See your supervisor." The long and short of it is, if you cannot ask Human Resources for help in such matters who can you ask? Anyhow you did apologize and once again I thank you for your apology and hope in the future when an employee asks for help for mental health training he or she receives it. When you consider 30% of the population suffers from some sort of mood disorder, my request is not unreasonable.

Donna, understand not all mood disorders are as profound as paranoid schizophrenia or severe bi-polar. Some just suffer from the common cold of mood disorders, depression. Having said this I believe Franklin is a sufferer of some sort of mood disorder. Regardless if he has not got an actual physiological problem with the brain, he certainly has an emotional problem. You guys in Human Resources cannot deny my logic in this matter.

Now pay attention big time here. Consequences of heavy duty mood disorders and or emotional problems can have similar symptoms. These include mood swings, paranoia, deep depression, delusions of being superman and suicide. I see all of the first four symptoms with Franklin. No matter how much of a dislike I have towards Franklin, I do not want to see the fifth symptom. So please handle Franklin with the benevolence that I see all the time from the management of the G. V. R.D. towards its employees. I do not want to see him commit suicide. Such an outcome will have an effect on me that I should not have to endure. I also want to caution you guys that a person with a mood disorder can also go the other way and feel the paranoia is so real that desperation leads to desperate measures of protecting one's self. Someone or another individual may get hurt, my self included. I also mention that passing Franklin on to another department, thus subjecting others to the harsh hardships of working with Franklin is not fair.

This missive is just that. A formal documentation of what I believe are very real possibilities of the consequences mentioned above. I believe that the only real pragmatic solution so as to avoid a possible violent outcome is to somehow make Franklin a winner and at the same time not admitting the G. V. R.D. is guilty of any human rights issues. Simply buy him out and swallow our pride.

Wishing for a safe solution and many thanks for listening,

The employer decided that there was a risk to the organization and they needed help. Because of the Human Rights complaint, it was decided to engage an outside expert. Ms Brown contacted ProActive Resolutions Conflict Management, whose services the employer had used before. She informed Mr. Eastwood, who knew about ProActive from an earlier incident that led to a risk of violence assessment. He understood there was safety issue to be addressed and it seemed reasonable for the employer to investigate any complaint it received.

Mr. Eastwood testified he was aware there had been an ongoing resentment between Messrs Hengen and Dove and had been involved at times. The union sympathized with the employer's predicament, but did not take any official action to intervene.

## **9. Supervisors Meet with Mr. Dove - February 2, 2006**

Two events that happened on Wednesday, February 1, 2006 were discussed with Mr. Dove the next day.

As background to the first incident, the MM4 employees have assigned vehicles they take home and use to drive to their work sites throughout the region. On Friday, January 27<sup>th</sup> at the crew meeting, Mr. Hengen had again underscored with the crew that they was no need to use time and fuel to come to Lake City unless there was a purpose for reporting there before or after their assigned tasks on Tuesday, Wednesdays and Thursdays. The employees went to Lake City on Monday mornings to collect work orders and on Fridays for the weekly crew meetings. Mr. Bindley testified Mr. Hengen was continuing to the time he testified to tell the employees not to hang around Lake City.

Mr. Dove was working at the Vancouver Heights Pumping Station where he needed a new battery for a generator set. Mr. Bindley was acting foreman, or as he joked in his testimony, it was his crack at the whip. Mr. Nicholls called him to pick up a battery at a retailer and deliver to the site in the early afternoon. Employees at the retailer helped him load the battery into his vehicle. When he arrived at the pumping station, Mr. Dove was having lunch with two of the operations crew in the water group. It was after lunch time and over an hour since Mr. Dove reported he needed a battery. He was surprised Mr. Dove acted as if everything was routine. He asked Mr. Dove to help him unload the battery and then drove his vehicle to the back of the building. Mr. Dove did not come promptly to help.

Mr. Bindley unloaded the battery and took it down stairs; switched it with the old battery; started the generator set; and took the old battery to an exterior door. One of the operations crew helped him carry the battery outside. He asked Mr. Dove to take and drop it off at Lake City. Mr. Dove said he was not allowed to go to Lake City. Mr. Bindley told him he was allowed to go there to drop off the battery. Mr. Dove said he was told he was not allowed to go to Lake City. Mr. Bindley did not press. He took the battery; dropped it at Lake City; and reported the incident to Mr. Hengen, who testified he gave not direction to Mr. Dove that was different than what applied to all the employees.

It appears from the testimony that Mr. Dove was suspicious that something was going on from which he was excluded. Although employee interviews happened on the Fridays of January 20<sup>th</sup> and 27<sup>th</sup>, the others were on Tuesday to Thursday. He suspected he was being kept away from Lake City on those days of the week.

Later that day, February 1<sup>st</sup>, after scheduled working and school hours Mr. Smith was driving Mr. Y to his home in Burnaby. As they proceeded into a residential area, Mr. Smith saw Mr. Dove driving on Noel Drive. Mr. Y knew Mr. Dove knew where he lived because on occasion Mr. Dove had picked him up for work and driven him home after work. Mr. Y became nervous and thought it was not coincidental because the employees had been interviewed about Mr. Dove. He testified he was concerned about his children because Mr. Dove was driving in a direction away from the school. Mr. Smith testified he was not frightened, but curious, while Mr. Y was “crawling out of his skin.” This was typical of the hyperbole that characterized Mr. Smith’s testimony, much of which has deliberately not been recounted.

Mr. Y telephoned Ms Brown to report this sighting, who had told him during his interview that he should call her directly if he heard or saw anything that she should know. Ms Brown did this with Mr. Y because of the level of emotion he presented during the interview, which he testified heightened his concern about Mr. Dove.

Ms Brown testified Mr. Y was distraught because he did not know why Mr. Dove was in his neighbourhood. She acted immediately by calling the employer’s lawyer, who telephoned Mr. Dove’s Human Rights lawyer.

At approximately 5:30 p.m. to 6:00 p.m., Ms Brown reported the incident to Mr. Hengen, who immediately telephoned his wife and instructed her not to go home because he was concerned for the safety of his family. Later, because of these events and what transpired in the Human Rights complaint proceedings, Mr. Hengen installed a monitored alarm system at his home; stopped coaching hockey; stopped travelling out of town to watch his son play hockey; and guarded personal information to protect his family from a possible threat by Mr. Dove.

The employer's lawyer reported to Ms Brown that she had learned from Mr. Dove's lawyer that Mr. Dove was in that neighbourhood driving a friend home. Ms Brown telephoned Mr. Y with this information. Mr. Y recalls she telephoned to inform him Mr. Dove had a friend at an address in the neighbourhood. He testified, as far as he was concerned, that was the end of the matter.

But it was not the end of what some referred to as "stalking." Mr. Smith testified that on February 2<sup>nd</sup>, Mr. Y was "right out of it at work." He testified Mrs. Y called Mr. Ali to complain about the happenings at work. This was not corroborated by any other evidence and might be part of what Mr. Dove characterized as the "flyby hearsay" at the workplace when referring to statements Mr. Smith made in his testimony about events that were suppose to have happened at Iona Sewer Treatment Plant in 1986.

Mr. Launder testified he was so concerned that he showed a picture of Mr. Dove to his wife and instructed her that if he ever came to the door not to open it and to call him.

Ms Brown informed Mr. Hardie, who was concerned about personal use of an employer vehicle.

The next morning, February 2<sup>nd</sup>, Mr. Dove was called to a meeting with his shop steward, Jesse Medeiros, and Messrs Hardie, Hengen and Ali. The meeting began at 7:35 a.m. and ended at 8:10 a.m., when others were waiting to use the room. Mr. Hardie testified he was aware, at the time of his testimony, that prior to the meeting, Mr. Dove had been asked if had been stalking Mr. Y.

The first issue was Mr. Dove's behaviour and comments to Mr. Bindley the previous day at the Vancouver Heights Pumping Station. The second was Mr. Dove being in Mr. Y's neighbourhood. Mr. Hardie believes he had been informed the evening before about what had been learned through the employer's lawyer, but he was interested in the Mr. Dove's personal use of the employer's vehicle.

Mr. Hardie describes it as a courteous meeting in which Mr. Dove responded appropriately and did not raise his voice. His experience is that Mr. Dove has been courteous in all their interactions.

Mr. Dove explained his route home from work the day before; that he saw a friend walking who he offered a drive; and this was why he was in Mr. Y's neighbourhood on Noel and Beaverbrook Drives and Aries Place. Mr. Dove testified he explained he had been telephoned by his Human Rights lawyer who had been contacted by the employer's lawyer. He had given his lawyer the name and telephone number of the person he drove home and he understood his lawyer did telephone that person. Mr. Hardie's notes taken during the meeting record that Mr. Dove was thanked for his full candour.

Mr. Dove testified it all seemed very weird to him that he was being accused of stalking Mr. Y and being insubordinate. At the end of the meeting, Mr. Dove told the participants that he believed his telephone was being bugged and he was inquiring about it. Mr. Hardie records his comments as: "my telephone is bugged, you know that don't you?" "and I've made inquiries about that." Mr. Hardie inferred Mr. Dove had already told this to Messrs Hengen and Ali and was asking him if he knew. Mr. Dove testified he did not intend to say the employer had bugged his telephone.

There was no evidence that Mr. Dove was disciplined for any of his actions on February 1<sup>st</sup>.

Mr. Dove worked Friday, February 3<sup>rd</sup>, but took vacation Monday to Wednesday, February 6<sup>th</sup> to 8<sup>th</sup>. At the end of day on Friday, Mr. Cimino drove Mr. Dove home in Mr. Dove's vehicle and drove it back to Lake City.

Mr. Dove took time off because a settlement meeting to attempt to resolve the Human Rights complaint was scheduled for Tuesday, February 7<sup>th</sup>.

#### **10. Mr. Richard Hart Interviews Co-workers - February 3 - 6, 2006**

ProActive provides management service in prevention of workplace conflict, responding to conflict and managing conflict situations that arise. Its principals and founders are Richard D. Hart, a lawyer and Dr. Steven D. Hart, Professor of Psychology. ProActive markets as specialists in "managing the risks associated with group conflict and violence" ([www.proactive-resolutions.com](http://www.proactive-resolutions.com)).

Ms Brown contacted Mr. Richard Hart and explained that there were high levels of tension and emotion among the employees in the work unit. Mr. Hart

recommended ProActive interview each employee, including Mr. Dove.

After Ms Brown contacted Mr. Hart, she telephoned Mr. Eastwood to give the union notice that the employer had engaged ProActive and there would be more proceedings. Mr. Eastwood has been union president for twelve years and knew Mr. Dove from the accommodation proceedings in 2002 and the standby and overtime issue in 2005. He thanked her, but did not seek to intervene.

Mr. Hart interviewed employees on Friday, February 3<sup>rd</sup> and Monday, February 6<sup>th</sup>. He did not interview Mr. Dove. Ms Brown sat in on some of the interviews. Mr. Hart did not testify. His interview notes were not identified or entered into evidence.

Ms. Brown testified Mr. Hart gave management an overview of his thoughts after the interviews - there was high tension in the workplace; a cooling off period was appropriate; and Mr. Dove should be placed on temporary paid leave.

The decision was taken to interview Mr. Dove on Wednesday, February 9<sup>th</sup>, when he returned to work. The Human Rights complaint was not resolved February 7<sup>th</sup>. Early on February 8<sup>th</sup> at the request of Mr. Hardie, Mr. Hengen left a voice message for Mr. Dove that he was to report to the employer's Head Office on Wednesday, February 9<sup>th</sup>.

Mr. Hardie spoke to Mr. Eastwood to inform him that Mr. Dove was being brought in for an interview and Mr. Eastwood was invited to attend. Mr. Eastwood asked if it was disciplinary meeting and Mr. Hardie replied he was not certain. Mr. Eastwood decided it likely was to be disciplinary. He arranged to attend with the union's lawyer.

#### **11. Dr. Stephen Hart Interviews Mr. Dove - February 9, 2006**

Mr. Dove did not have an employer vehicle during the days he was on vacation. His spouse drove him to the employer's Head Office where he went to the 18<sup>th</sup> floor.

Dr. Hart was called to testify and qualified as an expert in violence risk assessment and clinical risk assessment, not diagnosis of mental disorders. Dr.

Hart is not a licensed physician or psychologist and does not diagnose mental disorders. He teaches. He described a risk of violence assessment as an evaluation of individuals to determine potential to engage in acts that affect psychological wellbeing by causing fear of physical harm or causing physical harm.

The assessment process is to gather information and attempt to reconstruct what had happened; identify any risk factors like substance abuse, a history of disorder and past behaviour; and speculate about the future and identify what will prevent problems. Most violence is unrelated to mental disorder, but sometimes it will interfere with conflict resolution or push people to violence if it is an acute or chronic disorder.

Mr. Hart arranged to have Dr. Hart conduct this interview in his place because he had a scheduling conflict and, as Dr. Hart testified, the employer was unable to delay the investigation because Mr. Dove was coming back to work. For the employer, there was some urgency, but Dr. Hart does not know why. His task was to interview Mr. Dove and give the employer immediate feedback on interim management pending completion of the risk assessment. What to do in the short term.

In preparation for the substitution, Mr. Hart briefed Dr. Hart on what he had heard in the employee interviews. He did not give Dr. Hart his interview notes. From both Mr. Hart and the employer, Dr. Hart learned about Mr. Y's high emotional state and the event of Mr. Dove being in Mr. Y's neighbourhood. He was not told the explanation for Mr. Dove being there at that time.

Dr. Hart testified that the purpose of the interview was to get Mr. Dove version of events and account for the allegations of possible misbehaviour and decide what the employer should do in the short term to deal with the situation. Before the interview, he spoke to Ms Brown for ten or fifteen minutes about his plan and approach and that she could sit in.

On the day of the interview, Mr. Dove was met by Mr. Hardie, brought into the interview room and introduced to Dr. Hart by Ms Brown, both of whom were meeting him for the first time. Ms Brown stayed for the interview. Mr. Dove was

unaware Mr. Eastwood was in the building. Mr. Eastwood and the union lawyer were waiting in the lobby for Mr. Dove to appear when they were informed by Mr. Hardie that Mr. Dove was being interviewed.

Dr. Hart began by explaining who he was and the purpose of the interview was to address allegations that caused employees to feel potentially unsafe. Dr. Hart testified that Mr. Dove, who was civil, restrained, polite and business like, said that the previous Thursday, February 2<sup>nd</sup>, Mr. Hardie had told him that his colleagues did not want to work with him, were scared of him and intimidated by him.

Mr. Dove testified he was shocked that he had not been informed by management about the purpose of the meeting or offered union representation. This was how he “officially” learned the employer was conducting an investigation about him. Dr. Hart confirmed that Mr. Dove did not know the reason for the interview before it started.

What impressed Ms Brown was that Mr. Dove reported Mr. Hardie had said he did not know why he was at the meeting on February 2<sup>nd</sup>. She did not believe Mr. Hardie would have said that in that type of meeting. Later she asked Mr. Hardie and he said he had not said that and would not in that type of meeting. Mr. Hardie was asked during his testimony if he had made that statement on the previous Thursday. He replied he had not, but he did not know precisely why he was there with Messrs Hengen and Ali. There was no explanation in the evidence when Mr. Hardie did or could have told Mr. Dove about the views of Mr. Dove’s colleagues. In his testimony, Mr. Dove denied having said this during the interview.

Mr. Dove said he had been falsely accused of lots of things, like raising his fist when he simply did something childish and being in Mr. Y’s neighbourhood when he was simply dropping off a friend. Both seem to have been told to him by his lawyer. He said the problem stemmed from the sewer and water reorganization and his actions to defend and maintain what he had obtained in the Human Rights consent order. The union had not represented him and he was defending himself and maintaining a daily record of events. He had worked

with Mr. Y on January 16<sup>th</sup> and 17<sup>th</sup>. Mr. Y was not afraid of him and spoke to him about a buy out by the employer. He suspected that Mr. Y was put up to it by the supervisor. He said there was favouritism in job assignments to Mr. Launder and that he believed Mr. Smith was looking for favours for repeating the stalking allegation.

Mr. Dove spoke about losing callout pay in the past two years and he was not going to be victimized. He spoke about the Vancouver Heights Pump Station battery incident that had been a subject of the meeting the previous Thursday.

Dr. Hart asked how he dealt with stress and he replied he rose early, worked out and devoted his energy to completing assigned tasks.

Mr. Dove complained that Mr. Hengen had no people skills; was victimizing him; gave others preferential treatment; was coaching Mr. Y; and wanted to have Mr. Dove leave. There were no grounds for Mr. Y to feel afraid. He believed the only explanation was that employer representatives were making serious and false accusations because they wanted to get rid of him. He had retained a lawyer and was leaving things to the lawyer.

Mr. Dove mentioned about the clicking noise on his telephone that was coincidental with these events that he had reported to Telus. Dr. Hart found his view of an employer conspiracy extending to possibly bugging his telephone dramatic and absurd. He pressed to confirm what Mr. Dove believed. Mr. Dove did not back away. He said he had an incident reference number from Telus for the troubleshooting request. Mr. Dove testified the clicking noise was later diagnosed as a problem with an analog modem.

At this point, because of Mr. Dove's belief there was a conspiracy against him that possibly included bugging his telephone, Dr. Hart was convinced there was a possibility Mr. Dove suffered from a mental disorder. Only one in thousands believes his telephone is bugged. The only other explanations were dramatic overstatement or it was true. To assure himself it was not dramatic overstatement and to allow Mr. Dove an opportunity to recant, Dr. Hart stated the proposition twice - the employer organized a conspiracy against him by coaching fellow employees and tapped his telephone. Mr. Dove agreed this is what

happened, not that he was suspicious and believed the employer was capable of this. Mr. Dove denies he used the word “conspiracy” or directly said the employer had bugged his telephone.

Mr. Dove spoke of some pain he experienced following a motor vehicle accident in November 2005. Then Dr. Hart inquired about Mr. Dove’s family history and if he had any history of emotional or psychological problems. Mr. Dove recalls Dr. Hart, who he knew only as “Stephen” at that point, asked about his family history and if there were any incidents of aggressive behaviour. As the one hour or so interview progressed, Dr. Hart assessed that Mr. Dove was becoming more tense, perhaps uncomfortable, and more guarded and defensive.

Mr. Dove was asked about why he was in Mr. Y’s neighbourhood at the end of the day on February 1<sup>st</sup> and why Mr. Y would feel intimidated. Mr. Dove explained giving the name of the friend he drove to a specified address on Aries Place. Dr. Hart testified Mr. Dove demanded in a raised voice with a pointed finger if he thought Mr. Dove was intimidating. It was unusual and ironic to Dr. Hart that Mr. Dove became intimidating by rising out of his seat, making direct eye contact, pointing his finger and demanding an answer. Mr. Dove acknowledges he might have raised his voice, but it is not his style and he did not lean forward or point his finger.

Ms Brown testified she seemed to recall Mr. Dove raised his voice, but he was not yelling. Except for leaning toward Dr. Hart and asking “are you intimidated by me?” Mr. Dove was polite throughout the interview.

Mr. Dove was asked and explained the 2002 incident that caused eye injury and that he had yelled at, but not touched, Mr. Fitzpatrick.

At the conclusion of the interview, Dr. Hart had concluded it was necessary to verify if Mr. Dove suffered from a mental disorder before proceeding further with the risk assessment. For him, it was necessary to determine if Mr. Dove was lying or affected by a mental disorder.

## **12. Employer Accepts Dr. Hart’s Oral Recommendation - February 9, 2006**

At the end of the interview, Dr. Hart told Mr. Dove he was going to recommend to the employer that it place him on paid leave until he undergo an

independent mental health evaluation. Mr. Dove became upset that this person's decision would affect him and his family and repeatedly asked to be given his business card. Dr. Hart did not have one readily available to give to Mr. Dove. Dr. Hart testified Mr. Dove was repeating himself in continuing to ask and it was not until some time later during the exchange that he found a card to give him. Mr. Dove characterizes Dr. Hart's role as part of the lynching.

Ms Brown left the interview room to consult Mr. Hardie and returned to have Dr. Hart join her and others. At some point, Mr. Dove left for the washroom and telephoned his Human Rights lawyer. The next event was that Ms Brown told him Mr. Eastwood was in the lobby. Mr. Dove spoke to Mr. Eastwood.

In the meantime, Dr. Hart communicated and explained his recommendation to Mr. Hardie, Ms Shore, Ms Brown, Doug Humphris, Division Manger, Maintenance and Howard Heath. Mr. Hardie recalls Dr. Hart told them his concerns and recommended sending Mr. Dove for an assessment by a mental health professional experienced in violence in the workplace. After a twenty to twenty-five minute meeting it was decided to accept Dr. Hart's recommendation.

Mr. Hardie testified the employer was comfortable accepting Dr. Hart's recommendation because of his expertise in violence in the workplace. It was the safest course to take.

The next event was a meeting to communicate the decision to Mr. Dove and the union. The union lawyer, Messrs Dove and Eastwood, Ms Brown and Messrs Hardie and Humphris met. The union took no position pending receipt of more information and assessment. Mr. Eastwood was pleased the employer was not imposing discipline on Mr. Dove and would not consider grieving until he learned more. The employer said it would identify a list of mental health practitioners with the requisite qualifications.

Dr. Hart testified he made his recommendation based solely on what he had heard and seen during the interview. The strong denial of any misbehaviour by Mr. Dove was striking. Mr. Dove took a strong moral position and denied any aggressive behaviour except when he reacted after being injured. His allegation

of conspiracy and telephone being bugged was unusual.

In Dr. Hart's opinion and experience, only someone lying or suffering a mental disorder would present in this manner. Only an assessment would determine if there was a mental disorder. This was a possibility that it was reasonable for the employer to look into. Dr. Hart did not investigate to determine if the allegations against or made by Mr. Dove were true. That might be relevant to the issue of workplace violence, but, in his opinion, was irrelevant to whether a mental disorder might exist because of Mr. Dove's unusual presentation during the interview. Even if everything Mr. Dove said was true and his telephone was bugged, there still might be a mental disorder.

Dr. Hart told the employer the other employees' allegations were so serious the threat assessment had to continue, but no conclusion could be reached until Mr. Dove underwent an independent medical evaluation to determine whether he did or did not suffer from a mental disorder.

On cross-examination, Dr. Hart acknowledged that if someone was subjected to a lengthy period of mistreatment and did not react in some manner he would be surprised and professionally curious.

Conflict is not getting along well together and encompasses a failure to cooperate, rudeness, name calling as well as discriminatory, tortuous or criminal behaviour. ProActive uses a ladder of reported conflict behaviour in its training that has 27 rungs from the lowest (disregarding behaviour that involves actions and remarks that do not have malicious intent, but are said or done without considering another's feeling) to the highest (murderous contact – attempts to kill). Dr. Hart made not finding what level Mr. Dove's behaviour reached but in the interview he saw behaviour to the 14<sup>th</sup> rung (Invasion of personal space – standing too close) just below covert uninvited touching.

### **13. Dr. Hart Confirms Recommendation in Letter - February 23, 2006**

Dr. Hart testified he composed and wrote the following letter dated February 23, 2006 to Mr. Hardie confirming his recommendation:

1. As part of the Threat Assessment process we have undertaken with respect to Franklin DOVE, we have now completed the interviews of relevant employees; including Franklin DOVE.
2. Franklin DOVE is currently on a forced, indeterminate leave of absence from his employment with GVRD. He was placed on leave on February 9, 2006.
3. On February 8, 2006 [sic], we verbally provided recommendations, for the interim management of this case. Specifically, we recommended that the GVRD remove Franklin DOVE from the Lake City Operations Centre pending completion of the Threat Assessment process, as a result of our having reviewed the information available to date, and having arrived at the following preliminary conclusions:
  - (a) The Lake City Operations Centre is in a state of conflict related crisis, in that the level of anger, fear, distrust and suspicion within the work group is extremely high and is, according to reports, interfering with employees' abilities to carry out their work duties safely and proficiently.
  - (b) The conflict active within the Lake City Operations Centre is currently centered primarily around Franklin DOVE, his presence in the workplace, and his propensity to engage in conflict-associated behaviours.
  - (c) In the current circumstances of the Lake City Operations Centre, Franklin DOVE is at a high risk of continuing to engage in conflict-associated behaviour in the workplace, to the extent of causing other employees distress, concern and even fear of physical violence (independent of the actual risk of such violence).
  - (d) In the current circumstances of the Lake City Operations Centre; - Franklin DOVE is potentially at an elevated risk of engaging in workplace violence, including making threats of violence or engaging in threatening behaviour.
  - (e) There are indications that Franklin DOVE may suffer from a mental disorder, which in turn may affect both his risk of engaging in conflict-associated behaviour in the workplace and his risk of engaging in workplace violence.
  - (f) Prior to the Threat Assessment process being completed, the GVRD should ensure that an evaluation of Franklin DOVE is conducted, by a qualified mental health professional with respect to both his fitness for duty and his risk for workplace violence, and that a report arising from that evaluation is made available to the GVRD.
  - (g) The GVRD should not permit Franklin DOVE to return to the workplace, at least until after the Threat Assessment process has been completed.

We attach a draft letter of instruction to the examining mental health professional, for your review and consideration.

The enclosed draft letter to a mental health professional was prepared by Mr. Hart, not Dr. Hart. The letter states:

- 1) The GVRD is your client in this matter.
- 2) You will conduct an assessment of Franklin DOVE with respect to risk of workplace violence and conflict associated behaviour. In particular, we require your professional opinion in answer to the following questions:

- a) Does Franklin DOVE pose a risk of violence against any person associated with the GVRD's workplace? This includes but is not limited to risk for:
- i) Physical assault;
  - ii) Damage to the property of The GVRD or its employees;
  - iii) Verbal threats of physical violence;
  - iv) Threatening physical behaviour;
  - v) Bullying or harassing behaviours that may reasonably be expected to cause others to fear for their physical safety or well-being; and,
  - vi) Extreme expressions of anger or distress that may reasonably be expected to cause others to fear for their physical safety or well-being.
- b) If the answer to question 2(a) is yes:
- i) What are the primary risks posed by Franklin DOVE?
  - ii) What are the factors, conditions, or circumstances that are causally relate to the risks posed by Franklin DOVE?
  - iii) Who are the likely targets of any act of workplace violence Franklin DOVE might perpetrate?
  - iv) What steps, if any, might be taken to effectively eliminate, reduce, or otherwise manage the risks for workplace violence posed by Franklin DOVE?
- 3) You will conduct a fitness for duty assessment of Franklin DOVE. In particular, we require your professional opinion in answer to the following questions:
- a) Is Franklin DOVE fit to fulfill his duties for his employment as a Maintenance Mechanic with the GVRD? In answering this question, please specifically consider the following duties:
- i) Work cooperatively with co-workers;
  - ii) Take instruction and direction from his current supervisors and superiors;
  - iii) Accept constructive feedback, correction, suggestions and criticism from co-workers and superiors;
  - iv) Prioritize and complete multiple, complex tasks;
  - v) Oversee management of complex projects;
  - vi) Supervise and direct Mechanics Helpers;
  - vii) Learn new tasks skills relating to his job; and
  - viii) Adjust to ongoing changes in processes, procedures, systems and workplace configuration.
- b) Does Franklin DOVE suffer from any mental disorder that may significantly affect his ability to fulfill his duties for his employment as a Maintenance Mechanic with the GVRD? In answering this question, please specifically consider the duties referred to in 3 (a), above.
- c) If the answer to question 3 (b) is yes:
- i) What are the primary symptoms, features, or characteristics of mental disorder that might affect Franklin DOVE's ability to perform his duties?
  - ii) How, in what way, or to what degree might the mental disorder affect Franklin DOVE's ability to perform his duties?

- iii) What is Franklin DOVE's prognosis for recovery or improvement?
  - iv) What are the steps that you would recommend be undertaken to treat or manage the mental disorder?
- 4) Your assessment will be based on your examination of or interview with Franklin DOVE, and information to be provided by the GVRD concerning past issues and incidents pertaining to Franklin DOVE's employment, as well as any further inquiries, interviews or information you may deem necessary.
  - 5) You will provide a written report outlining your findings to the GVRD.
  - 6) You will not provide a copy of your report to anyone other than the GVRD, except at the specific direction of the GVRD or as may be required by law.

The employer accepted the scope, content and process in the draft letter.

#### **14. Union Seeks Particulars – February 28, 2006**

On February 27, 2006, Mr. Hardie couriered a letter to Mr. Dove and sent a copy to Mr. Eastwood. He wrote that the employer had received an oral recommendation on February 9<sup>th</sup> from Dr. Hart “advising you be excused from normal workplace attendance and duties, in order to insure the safety of all employees within the mechanical work group.”

Mr. Hardie informed Mr. Dove that the employer had received a “further recommendation from Dr. Hart that an assessment process be conducted to assess your fitness for work.” He enclosed a list of four doctors and asked that Mr. Dove select one before March 7<sup>th</sup>.

Mr. Eastwood testified he was surprised the employer had leapt to this request without conducting any further investigation. The union wanted verification of the allegations and Mr. Eastwood felt it was incumbent on the union to ask for particulars. He was not prepared to accept the opinion Mr. Dove “may suffer from a mental disorder.” He wrote Mr. Hardie on February 28<sup>th</sup> confirming an earlier request for a copy of Dr. Hart’s recommendations and that it was necessary to have access to it to determine the merit of the employer’s request that Mr. Dove undergo an assessment.

Mr. Hardie replied on March 2<sup>nd</sup> to Mr. Dove enclosing copies of Dr. Hart’s letter. Mr. Dove gave one to Mr. Eastwood, who was surprised by its lack of specifics. The investigation was to be ongoing. There was no identification of the specific allegations or who made them. There was no employment record or history of discipline of aggressive behaviour. His experience with Mr. Dove was

that he was quiet and easy going.

For Mr. Eastwood, it did not add up. He did not see the potential of an elevated risk for violence and nothing leapt out suggesting Mr. Dove may suffer from a mental disorder. The enclosed letter to a mental health practitioner was invasive, not specifically authorized under the collective agreement and he assessed the questions as “right over the top.” The fitness for duty questions appeared to be a fishing expedition. The union would not agree or counsel Mr. Dove to consent. The more he considered it, the more he became riled up. He sought legal advice and left on a scheduled vacation.

#### **15. Neil Walsh’s Report to Doug Humphris Recorded– March 2, 2006**

Mr. Walsh had spoken to Ms Brown about the January 16<sup>th</sup> crew meeting at the January 27<sup>th</sup> interview. She attended his interview with Mr. Hart on February 6<sup>th</sup>. She did not recall Mr. Walsh telling Mr. Hart that Messrs Hengen and Launderers were out to get Mr. Dove.

Mr. Walsh’s report to her on January 27<sup>th</sup> and whatever he told her on February 6<sup>th</sup> was not pursued before Mr. Dove was interviewed by Dr. Hart and held out of service.

On the morning of Thursday, February 16<sup>th</sup>, Mr. Walsh telephoned Mr. Humphris. The discussion was recorded by Mr. Humphris in a memorandum dated Thursday, March 2<sup>nd</sup> that includes quotations from the conversation that had been written during the call.

Mr. Walsh said it had taken him a couple of days to get the courage to call and that what was happening to Mr. Dove “just wasn’t right.” On the Wednesday morning following the Human Rights settlement meeting, which was February 8<sup>th</sup>, Mr. Dove’s van was cleaned out and given to someone else.

If he had to, Mr. Walsh would side with Mr. Dove, even though he was a difficult person to get along with and did not speak a lot. Mr. Hengen “antagonizes people, he plays games.” At a Monday morning crew meeting after Mr. Hengen had met with Mr. Carline the previous Friday, Mr. Hengen spoke of the boys needing “to stick together on this one” and he wanted Mr. Dove “out of here.” He asked for a show of hands who would like to work with Mr. Dove.

Mr. Walsh reported there had been a history of differences between Mr. Hengen and Mr. Dove back to when Mr. Hengen was the planner for the area in which Mr. Dove worked. Mr. Hengen was part of group, including Mr. Ali, that were tough to get along with and played games.

Mr. Walsh said he wanted to get this off his chest and tell Mr. Humphris, who was new to his position, because what was happening to Mr. Dove was not fair. Although Mr. Dove was not easy to get along with, he did not deserve what was happening.

Mr. Humphris did not testify. A copy of the memorandum of the conversation was given to Mr. Hardie on Monday, March 6<sup>th</sup>. A copy was not given to Ms Brown, who testified nothing in Mr. Humphris' memorandum caused the employer to change its decision.

Ms Brown testified Mr. Hengen was asked about Mr. Walsh's comments in a meeting attended by her and Messrs Hardie and Humphris after the decisions about Mr. Dove had been taken. Mr. Hengen denied saying what Mr. Walsh reported to her. No one else made a report similar to Mr. Walsh and no further steps were taken. No weight was given to the similar report from Mr. Nicholls to Mr. Hardie in his interview.

The allegation that Mr. Dove's van was cleaned out before he met Dr. Hart and the information in Mr. Humphris' memorandum did not cause the employer to reconsider.

#### **16. Employer Discloses Particulars - April 6, 2006**

The union was not aware of Mr. Humphris memorandum or what had been reported to the employer by the employees. The employer had set a deadline of March 7<sup>th</sup> in its letter of February 27<sup>th</sup>.

While Mr. Eastwood was on vacation, union Secretary Bob Bowman informed Mr. Hardie that the union and Mr. Dove were waiting for legal advice before responding to the employer's letter of February 27<sup>th</sup>. Mr. Hardie moved the deadline to noon on March 10<sup>th</sup>. On March 8<sup>th</sup>, Mr. Beaumont wrote Mr. Hardie, in part:

Based on the conclusion in Dr. Hart's report, on a *without prejudice* basis,

the Union and Mr. Dove may be prepared to agree that he will participate in a risk assessment. However, before doing so, the Union requires production of the particulars relied on by Dr. Hart in preparing his report. That is, what are the facts alleged which Dr. Hart uses to come to his conclusion that Mr. Dove should undergo a risk assessment?

Mr. Eastwood testified the union wanted to be told the substance of the complaints.

The employer replied promptly on March 9<sup>th</sup> to Mr. Dove forwarding a letter from Dr. Hart dated March 9<sup>th</sup> in which he summarized the basis of the opinion he had given to the employer on February 9<sup>th</sup> after interviewing Mr. Dove. He wrote:

At your request, I am writing this letter to summarize the oral report I delivered to you last night. In that conversation, I outlined for the information that formed the basis for our opinion that there are reasonable grounds to believe that Mr. Dove poses a substantial risk for workplace violence and that it is possible he suffers from a mental disorder.

Briefly, the information on which our opinions were based included interviews with GVRD employees who provided information regarding the complaints of harassing or intimidating behavior by Mr. Dove and an interview with Mr. Dove, conducted with Ms. Donna Brown present.

The specific details that raised concerns regarding Mr. Dove's risk for workplace violence included the nature of the complaints of antagonistic, harassing, and intimidating behavior by him. These involved a rather lengthy and serious history of Mr. Dove's conflictual behavior that has caused others in the workplace to experience considerable distress and concern for their safety. Also, Mr. Dove's behavior during the interview reflected an antagonistic and conflictual interpersonal style. For example, Mr. Dove frequently blamed and demeaned various co-workers and supervisors, and on several occasions challenged or even attempted to intimidate me.

The specific details that raised concerns Mr. Dove may suffer from mental disorder included his extreme suspiciousness as reflected in his responses during the interview. For example, Mr. Dove states emphatically that the explanation for the current complaints was that GVRD was engaged in a "conspiracy" to fire him and was "coaching" other employees to lie about him; he even went so far as to accuse the GVRD of "bugging" his residential telephone line, and said he had reported his suspicions to Telus.

The foregoing raises for us real concerns regarding potential risks to the safety and well-being of workers in the GVRD's Lake City workplace, including Mr. Dove himself, risks that that we do not feel can be adequately understood or managed without Mr. Dove undergoing an evaluation by a qualified mental health professional, addressing the questions that we have previously outlined for you.

Dr. Hart had had not further involvement with Mr. Dove or other employees, except Mr. Y. The employer had asked and he had met with Mr. Y

later in the day on February 9<sup>th</sup> to try to identify steps to manage his mental health concerns.

Dr. Hart testified he carefully drafted this letter citing only relevant facts and information that formed the basis for his opinion. The ten factors and details were: the lengthy history; Mr. Dove's conflictual behaviour; the concern it caused others; Mr. Dove's behaviour during the interview; the fact Mr. Dove blamed and demeaned co-workers; his attempt to intimidate Dr. Hart; his extreme suspiciousness; his description of a conspiracy to fire him; his assertion that the employer coached others; and saying the employer bugged his telephone.

Dr. Hart testified it was not his opinion that Mr. Dove did, in fact, constitute a substantial threat of workplace violence. That was a premature conclusion. He had no specific or direct knowledge of the employees' complaints. What he referred to in the third paragraph - the specific details - came from Mr. Hart. Whether it was true or accurate was irrelevant. He had no finding of facts from either the investigation by Mr. Hardie and Ms Brown or by Mr. Hart.

For Dr. Hart, there was sufficient basis for the possibility Mr. Dove posed a substantial threat of workplace violence and it was reasonable for the employer to look into it. If it was investigated and there was no threat, then it became a routine human resources matter. If the risk assessment was completed, then Mr. Hart could provide conflict resolution services for the workplace such as workplace training in awareness, threat assessment and management, respectful workplaces, workplace violence and other conflict avoidance skills and conduct workplace dialogues and workplace conferencing developed by Transformative Australia Justice with which ProActive had merged.

Dr. Hart testified that, before the interview on February 9<sup>th</sup> or giving his initial opinion on February 9<sup>th</sup> or expressing his opinion in the Letter of February 23<sup>rd</sup> or in his restatement on March 9<sup>th</sup>, he did not review any documentation about the history of conflict, as he usually would do before rendering an opinion. He did not review the 1987 Human Rights complaint or 1992 and 1993 consent orders acknowledging the employer discriminated against Mr. Dove or the recent complaint. He was not given any additional information after February 9<sup>th</sup>, except

what he heard from Mr. Y. To date no risk assessment has been concluded because of the delay in having Mr. Dove evaluated.

Mr. Dove gave a copy of Dr. Hart's March 9<sup>th</sup> letter to the union. Mr. Eastwood was not comforted by what he describes as a generalized, non-specific opinion not supported by either an ongoing investigation or proper investigation in the past. It did not provide him with a basis on which he could engage Mr. Dove in a discussion to undergo the requested mental health evaluation, which was to be Mr. Dove's choice and decision.

The union took a new tact and asked the employer for details of what precipitated the employer to engage ProActive; who was interviewed and who complained; and what was said in the interviews or complaints. Mr. Eastwood testified the union was trying to understand why the employer had engaged the services of a doctor who did no investigation other than interview Mr. Dove and decided to send him for a psychiatric examination.

Mr. Hardie was trying to move the union toward supporting the need for an assessment and replied on March 14<sup>th</sup> that it engaged ProActive after a "number of employees were raising concerns about Mr. Dove's workplace behaviour" and thirteen employees were interviewed by "Dr. Hart, including Mr. Dove." This was an error in confusing Mr. and Dr. Hart that was repeated by others. Mr. Hardie felt limited in what he could disclose because of the privacy rights of employees, although he testified they were told the interviews were not to be treated as confidential; may be repeated and were for the record; and the employees had consented to be interviewed on that basis

Mr. Hardie wrote: "Should Mr. Dove not participate in the upcoming assessment, the GVRD would not be able to support the continuation of paid leave, nor would we presently be able to permit Mr. Dove's return to work. Please update us not later than Wednesday, March 15<sup>th</sup> at 3:00 p.m."

Mr. Eastwood testified this response did not come close to disclosing the information the union wanted or needed. It just said trust us. On March 15<sup>th</sup> the union grieved to try to get more information and bring some closure.

The Union grieves the Employer's imposition of non-culpable discipline on Franklin Dove. Specifically, the Union disputes the Employer's position, per Mr. Johnstone Hardie's letter of March 14, 2006, that Mr. Dove will be taken off paid leave and will not be allowed to return to work, unless Mr. Dove submits to a psychiatric examination/risk assessment, with one of four psychiatrists selected by the Employer.

The Union does not agree that the Employer has reasonable and probable grounds to require Mr. Dove to submit to a psychiatric examination/risk assessment. Under the circumstances, any examination would breach Mr. Dove's privacy rights.

In the alternative, if the Employer does have reasonable and probable grounds to require an examination, the Union takes the position that:

- a) any examination to establish that Mr. Dove is fit to return to work must not elicit more information than is reasonable necessary in the circumstances;
- b) in being advised of Mr. Dove's fitness to return to work, the Employer, or its agents, must not be provided with more personal information about Mr. Dove than is reasonable necessary under the circumstances;
- c) Mr. Dove may select the psychiatrist to conduct the examination to determine his fitness to return to work.

The Union is prepared to deal with this grievance as quickly as possible and, should the Employer not allow the grievance, suggests that the Employer limit any damages Mr. Dove would be entitled to should the grievance succeed by continuing his paid leave.

We are available to meet at your convenience.

The employer replied March 30<sup>th</sup> that the assessment of Mr. Dove was a "necessary step to complete our overall risk assessment and insure the safety of the workplace." The employer enclosed the letter addressed to a qualified psychiatric physician for Mr. Dove to take to the person selected in a "mutually agreeable way" and reiterated that wage continuity and return to the workplace were dependent on having the assessment done. The employer was moving to discuss the process of evaluation, not the merits.

To attempt to breach the impasse in the face of a loss of wages by Mr. Dove, it was arranged for Mr. Eastwood to meet with Ms Brown, Ms Shore and Mr. Hart, who Mr. Eastwood thought was the doctor not the lawyer. The purpose was to give him an off-the-record briefing on what the employer's investigation had disclosed. This was to meet Mr. Eastwood's inability without more information to either advise Mr. Dove or press him to undergo the assessment. Ms Brown created a summary of the information in notes she prepared in

anticipation of the meeting. Mr. Eastwood was given employee names on the understanding he would keep them confidential

After the meeting, Mr. Eastwood composed a letter to Ms Shore dated April 3, 2006 stating what he recalled and understood from the meeting. Ms Shore replied April 6<sup>th</sup> correcting Mr. Eastwood that he met Mr. Hart, not Dr. Hart, and stating: "The following points represent information which contributes to our belief that a further assessment of Mr. Dove is required." For easier reference, the points are numbered in this reproduction.

1. That Dr. Stephen Hart, in his interview with Mr. Dove, observed Mr. Dove to comport himself in such a manner as to raise for Dr. Hart concerns that Mr. Dove may represent a risk for workplace violence, and as well as concerns that Mr. Dove may suffer from mental disorder.
2. That Mr. Dove has displayed what other employees consider to be both physical and threatening behaviour towards some of his colleagues that has left them in some cases fearing for their own safety and in some other cases for the safety of management representatives.
3. That on one occasion in the past, Mr. Dove aggressively charged at a coworker, and had to be restrained by others out of concern that Mr. Dove would strike the coworker.
4. That Mr. Dove has persisted in discussing personal issues related to his human rights complaint and his general dissatisfaction with the workplace, notwithstanding repeated requests by certain employees that he stop, to such an extent that coworkers are left concerned regarding his mental stability and his ability to manage his own distressing emotions and behaviour.
5. That Mr. Dove has displayed erratic behaviour before a number of his colleagues that has led them to be unsure if they are considered friends or enemies. Some suggested that his morning greetings were both hot and cold and that these shifts in demeanor did not appear to be linked to any action on their part.
6. That on one occasion a coworker had identified Mr. Dove driving a GVRD vehicle in close proximity to the coworker's home when there was no apparent reason for him being there. Even though Mr. Dove offered a credible excuse for the incident, the coworker reported that he still feels fearful for his own safety and that of his family.
7. That Mr. Dove has expressed on multiple occasions, to a number of colleagues, that certain management representatives are out to get him. He has advised others to be on their guard and that they should be keeping notes and records for their own protection in the way that he himself does. Mr. Dove talks to coworkers of his keeping a journal in which he writes everything that happens at work, leaving coworkers concerned that he may be collecting evidence against them for some unknown reason. Coworkers have observed Mr. Dove regularly and frequently expending large amounts of time copying documents such as time sheets, which they understand to be part of his attempt to collect proof of what goes on in the workplace. Coworkers report that

his behaviour on these occasions has seemed sufficiently bizarre as to again cause the coworkers concern regarding Mr. Dove's mental stability and his ability to manage his emotions and behaviour.

8. That Mr. Dove's behaviour has led to certain individuals seeking medical help to cope with working in close proximity to him.
9. That in at least one case a coworker has vowed that the pressure of working with Mr. Dove will likely lead to him leaving the department.
10. That at one time Mr. Dove approached the side window of a GVRD truck occupied by two of his coworkers, pounded on the glass and made a strange and, what they considered to be threatening, face close to the glass.
11. That Mr. Dove veered in what a coworker considered to be a threatening way towards him in a hallway at Lake City Operations Center as they walked towards each other.
12. That Mr. Dove has been overheard by several colleagues using pet or demeaning names such as "shorty", "baldy", "puppets of management", and "yes men" when talking about coworkers and has called coworkers such names in speaking to them directly.
13. That Mr. Dove has difficulty in taking direction from supervisors and suggestions from coworkers, and does not take criticism well. Sometimes he reacts aggressively or argumentatively.
14. That Mr. Dove has displayed contempt for his supervisors and others in GVRD management.
15. That Mr. Dove has expressed to a coworker a firm conviction that he will be successful in the proceedings related to his human rights complaint, and that the award in his favour will be in the range of \$200,000; he has made these assertions to such an extent and in such a manner that coworkers have expressed concern that he may react unpredictably and possibly violently if his expectations are not met.
16. A number of Mr. Dove's coworkers suggest that he could be a time bomb just waiting to go off given the correct set of circumstances.
17. That Mr. Dove's coworkers have questioned his mental stability and his ability to manage his own distressing emotions and behaviour, as a result of his having so continuously talked about his exemption from working in the wastewater division of the O&M department, while ignoring the extreme distress this behaviour has causes them.
18. That some coworkers feel that Mr. Dove has been single-handedly responsible for a serious decline in the morale of his coworkers to the degree that many feel that a workplace accident could occur as a result of the distraction his behaviour is causing.

Mr. Eastwood discussed these with Mr. Dove, who, he concluded, had a "credible" explanation for each, many of which were outdated. He concluded the employer had not conducted a through investigation and Mr. Dove was adamant he would not undergo the evaluation. He communicated this to the employer in a letter on April 10<sup>th</sup>.

Efforts to resolve the grievance and impasse, including a meeting attended by Messrs Eastwood, Dove, Hardie and Humphris, Ms Brown and Ms Shore on April 27<sup>th</sup> were unsuccessful. Ms Brown testified that during that meeting, Mr. Dove asserted that a proper investigation into his workplace complaints was never done and certain documents related to the eye injury incident had been falsified by his supervisor and the Workers' Compensation Board. Mr. Dove was prepared to participate in what he assessed as a proper continuation of the employer's risk of violence assessment, but not undergo the directed evaluation that he said was too invasive. Mr. Hardie testified he had been involved in some of Mr. Dove's past complaints and the employer always found ways to resolve them. No further action was required on his historical complaints of harassment.

By letter on May 1<sup>st</sup> the employer offered to allow Mr. Dove to select the examining psychiatrist provided that person is knowledgeable in risk of violence assessment and to limit the information it received from the psychiatrist to confirmation Mr. Dove is capable of returning to work safely and stating any condition to accompany a safe return to work. If Mr. Dove did not agree by May 12<sup>th</sup> he would be placed on unpaid leave with certain benefits to continue.

#### **17. Mr. Dove Replies in Amended Human Rights Complaint - May 1, 2006**

On May 1<sup>st</sup>, Mr. Dove filed an amendment to his Human Rights complaint of October 2005 expanding it to include events since the early settlement meeting on February 7<sup>th</sup> and alleging continuing discrimination and retaliation. He recited comments on each of the points in Ms Shore's letter of April 6<sup>th</sup>.

I am not a violent person. I have no history of mental illness or violence.

My comments on each subparagraph in the Alleged Behaviour are set out below:

1. Alleged Comportment - This is very subjective. Dr. Hart does not set out what comportment shows a risk for workplace violence. I was calm and collected in the interview. At one point Dr. Hart asked me "why aren't you angry? If I were you I would be angry". I said that I was disappointed by his assessment. Dr. Hart does not state that I suffer from a mental disorder only that I may suffer from a mental disorder. This allegation is very derogatory and defamatory;

2. Other Employees fears for their safety - I have never threatened anyone. Dr. Hart does not state what physical or threatening behaviour I made to other colleagues;
3. Aggressively charging a co-worker - This relates to an event on August 21, 2001, which I mentioned in paragraph 60. At that time I was working with Ray Fritzpatrick, a co-worker and a sling hit me in the face when the Ray did not properly restrain the sling. I was shocked and distressed. I was hurt. I did not aggressively charge the co-worker. I yelled at Ray because I got hurt and the sling hit me near my eye. I realized that it was an accident and I apologized to him for yelling at him. That happened about five years ago. I subsequently had eye surgery to my right eye as a result of this incident. I have permanent vision loss in my eye as a result of this incident. Attached as Exhibit "U" to this Amended Complaint are copies of correspondence on that eye injury, being:
  - (i) an August 21, 2001 fax from the GVRD to the WCB;
  - (ii) an August 24, 2001 letter to me from the WCB;
  - (iii) a September 19, 2001 letter from me to the WCB;
  - (iv) a WCB Claim Form dated September 19, 2001.
4. Discussing personal issues relating to my complaint - I have not persisted in discussing my personal issues related to my complaint. I have kept to myself. I do not know what is being referred to;
5. Erratic Behaviour - I do not know what is being referred to. Whether my greetings were hot or cold is not an element of erratic behaviour;
6. The GVRD vehicle - To the best of my knowledge, the GVRD has never contacted Belford [friend driven home] about this incident. They have never contacted me directly about it. Beasley [Mr. Dove's lawyer] questioned me about it but the GVRD management has never questioned me. I have never threatened any co-worker;
7. Out to get him - I do not know what is being referred to. I have not said that management was out to get me. I used to keep a journal of all my daily activities but I stopped doing that when the GVRD's work schedule became computerized in or about 1994. Since then, I have only kept sporadic records;
8. Co-workers seeking medical help - I do not know what behaviour of mine allegedly caused them to seek medical help. This alleged behaviour is not identified;
9. Co-worker threatening to quit the department - I do not know what is being referred to. There is no factual basis set out for this allegation;
10. Approaching GVRD truck side window - On or about February 19, 2006, I saw [Mr. Y] and Ray Fritzpatrick in a GVRD truck as I was leaving the GVRD's Lake City operation centre to go to my work site for the day. I made a funny face at the side window of their truck. It was an attempt at humour. It was a funny face. I did not pound on the glass. It was not a threatening behaviour;

11. Veering into a co-worker's path - I do not know what incident is being referred to. I do not recall veering into a co-worker's path;
12. Pet names - I do not know what is being referred to. Many people use names at work for others. I have never used names, for others, that were demeaning names. No one at work has ever challenged be about any names that I may have used for others;
13. Difficulty with supervision - I have worked for the GVRD since 1986. After the GVRD's 1987 termination of my employment was rescinded as a result of the 1993 Consent Order between the Council of Human Rights for British Columbia, the GVRD, the GVRDEU and myself, I have:
  - (i) never been disciplined,
  - (ii) never been told by management that I did not take direction, supervision or criticism well,
  - (iii) never been told that I have acted aggressively or argumentatively;
14. Contempt for supervisors - I have filed a human rights complaint with the Tribunal against three of my supervisors. I have never threatened them.  
I have never displayed any violence against them. I am not a violent person;
15. Assertions about monetary award - I have never made the alleged or any similar statement about what I would do if I was successful in a Human Rights Award. I have never made those assertions, nor have I acted in a manner for which others would feel I was possibly violent.
16. Time bomb - This is ridiculous. It is without factual foundation. I have not threatened anyone. I have not displayed any inappropriate or irrational behaviour which would cause the Respondents to require an IME before I could return to work;
17. Irritating other co-workers - I have not constantly displayed or announced that I do not have to work in the wastewater division ("Sewers"). That is common knowledge;
18. Decline in morale - I am not to blame for a decline in the workplace morale.

On cross-examination, Mr. Dove denied persistently discussing issues related to his Human Rights complaint. He testified it was mutually discussed among the employees. He respected Mr. Fitzpatrick's request not to discuss it. He did tease others with pet names and called Mr. Cimino "shorty", who sometimes calls him "African" or "Abyssinian" in their friendly banter. Mr. Cimino, who testified after Mr. Dove, was not questioned about this. Mr. Dove testified he did not call Mr. Launder short or bald and he is neither.

Mr. Dove's wage continuity and some benefits stopped May 13<sup>th</sup>. The

union pressed the grievance forward by letter to Mr. Carline on May 15<sup>th</sup>. He denied the grievance by letter dated June 27, 2006.

Mr. Dove's application to have Dr. Hart joined as a respondent to his Human Rights complaint was denied September 15, 2006 (*Dove v. GVRD and others* (No. 4), 2006 BCHRT 448) and is the subject of a petition for judicial review filed November 10, 2006.

### **18. Summary of Employer Submissions**

The employer submits it must take remedial action when confronted with conduct detrimentally affecting the well-being of a workplace. The personality and attitudes of employees are a legitimate employer concern when they affect team-work, co-operation and productivity (*Brewers Warehousing Co. Ltd.* (1982), 6 LAC (4<sup>th</sup>) 297 (Egan)).

Lack of honesty, threats and disruptive behaviour are serious employment offences and matters an employer must take seriously. In *Insurance Corporation of British Columbia* [1997] B.C.C.A.A.A. No. 75 (Hall), an employee's incessant talk about her harassment complaint against a supervisor adversely affected fellow employees. The employee, like Mr. Dove, denied discussing the complaint with others. The employer submits that employee's constant negativity had similar effects on fellow employees, as did Mr. Dove's, and detrimentally affected productivity. While there was a death threat in that case, the principle enunciated was that an employer has a responsibility to protect its employees from abuse by a fellow employee and to ensure efficient operations.

The employer submits it was seeking to remedy the disruption in the workplace and address safety concerns raised by several employees. The employer submits the clear evidence is that:

- Mr. Dove's talk about his issues with the employer affected the helpers. Four of them - Messrs Launder (before he became a MM4), Fitzpatrick, Y and Simon - did not want to work with, or around, him. Mr. Hengen had to rearrange work assignments to accommodate them. For Mr. Y, the effect was a change in mood, increased medication for depression, disruption in his home life and direct involvement by his wife. Mr.

Fitzpatrick took it to his home, dinner table and recreation activities. He sought to shorten the time during a day he worked with Mr. Dove.

- Mr. Dove engaged in provocative and intimidating behaviour toward co-workers. He intentionally bumped Messrs Smith and Bindley. He did not say “good morning” or otherwise recognize fellow employees when greeted in the morning or was abrupt. He made provocative remarks to Mr. Lenning and told him that he was being watched. He glared at fellow employees. He tried to intimidate Mr. Hengen by saying he was picking on him. He threatened Mr. Y when he was in his vehicle before going for an interview on January 19<sup>th</sup>. His presence in Mr. Y’s neighbourhood shook Mr. Y up. He called others names and went after Mr. Fitzpatrick when the sling hit his eye. Mr. Hengen was so fearful he installed an alarm system at his home.
- Fellow employees expressed safety concerns. Mr. Simon was so distraught Mr. Lenning spoke to Mr. Hengen. Messrs Lenning and Smith saw the effect on Mr. Y. Mr. Smith was so concerned he wrote his letter of January 29<sup>th</sup>.
- On cross-examination, with few exceptions, Mr. Dove contradicted the testimony of others and said their testimony was untrue. (A complete list is set out in the employer’s written argument). The testimony of the other employees is to be preferred. It was consistent with what they had previously reported.

The employer submits it listened to the employees’ experiences and concerns in the January interviews conducted by Mr. Hardie and Ms Brown and saw the affect Mr. Dove’s behaviour was having on them. The employer was obliged and correctly decided it must act immediately to remedy the situation. It had both a common law and statutory duty to provide a safe work environment (*Pirelli Cables Inc.* [199] B.C.C.A.A.A. No. 473 (McPhillips), ¶ 47; *Workers Compensation Act* RSBC 1996, c. 492, s. 115; *Occupational Health and Safety Regulation* B.C. Reg. 296/97, ss. 2.1, 3.10, 4.19, 4.24 - 4.28).

There was a workplace health and safety risk that had to be investigated

and assessed. The employer engaged ProActive, an expert in the field of workplace conflict assessment and management to investigate and make recommendations. The first step ProActive undertook was the least intrusive. It interviewed all the employees, including Mr. Dove.

The employer submits Dr. Hart reached the careful conclusion during his interview of Mr. Dove that it was possible Mr. Dove suffered from a mental disorder. If he did, continuing with the assessment process was not feasible because there was no way to know if what Mr. Dove was saying was truthful and the employer might wrongly conclude he was deliberately lying or being deceitful. Dr. Hart identified this as the primary issue to be resolved before proceeding further. The employer submits:

106. It is important to underscore that Dr. Hart did not reach any conclusions regarding the state of the Grievor's mental health. Rather, Dr. Hart determined that a psychiatric assessment was necessary for the Employer to understand the status of the Grievor's mental health. This information had to be obtained before ProActive could complete its Threat Assessment process and make recommendations to the Employer regarding the appropriate manner in which to address employee concerns regarding workplace safety and the appropriate manner in which to address the Grievor's conduct.
107. Based on ProActive Resolutions' recommendation, the Employer placed the Grievor on leave with full pay and benefits pending confirmation of his mental fitness via a psychiatric assessment. The Employer respectfully submits that in so doing, it was acting in accordance with its common law and statutory obligations to investigate risk of workplace harm and provide a safe working environment.
108. To date, the Employer has not made any final determination with respect to what, if any corrective action needs to be taken in this case. Rather, the Employer considers the investigation into the alleged unsafe working conditions to be ongoing as it awaits receipt of a report summarizing the results of the Grievor's psychiatric assessment. Only then, will ProActive Resolutions be in a position to complete its evaluation and make appropriate recommendations regarding Employer action.

The employer submits it had reasonable and probable grounds to require Mr. Dove "to confirm his mental fitness via a psychiatric assessment." It can do this if it believes an employee may pose a threat of danger to himself or herself or co-workers (Brown & Beatty, *Canadian Labour Arbitration*, 4<sup>th</sup> ed. (Aurora, Ont.: Canada Law Book), ¶ 7:6142; *Via Rail Canada* (2002), 106 LAC (4<sup>th</sup>) 110

(Hope)). This is particularly so when the work is done in a safety sensitive environment such as mechanical maintenance (*Extendicare Health Services Inc. (Fairview Villa)* (1994), 43 LAC (4<sup>th</sup>) 201 (Merrick); *Elk Valley Coal Corp.* [2005] B.C.C.A.A.A. No. 50 (McPhillips)).

The employer submits relying on a professional expert's recommendation constitutes reasonable and probable grounds. In *Consumer Glass* (1998), 70 LAC (4<sup>th</sup>) 40 (Albertyn), a psychiatrist who had interviewed the grievor and conclude he was psychiatrically fit to return to work, revised his opinion when informed of subsequent behaviour and recommended examination by a psychiatrist specializing in delusional disorders. The grievor was required to do this to maintain his employment status and before the arbitrator made a final decision.

The employer submits Dr. Hart's recommendation and the totality of the evidence of Mr. Dove's behaviour provides reasonable and probable grounds to have Mr. Dove "confirm his fitness for work because it has established reasonable and probable grounds to believe the Grievor may be the cause of risk or danger to safety in the workplace, to his co-workers or to himself."

The employer submits it arrived at the least intrusive means to confirm Mr. Dove's mental fitness and securing the information it needed by allowing Mr. Dove to select a qualified psychiatrist and by respecting his privacy. A psychiatric assessment is the only appropriate course of action. When Mr. Dove refused, holding him out of service without pay was reasonable (*New Brunswick (Department of Education)* [2006] N.B. L.A.A. No. 10 (Bruce); *Esso Petroleum Canada IOCO Refinery* (1994), 56 LAC (4<sup>th</sup>) 440 (McAlpine); *Via Rail Canada* (2002), 106 LAC (4<sup>th</sup>) 110 (Hope)). His attendance at a psychiatric assessment could be ordered as the disposition of this arbitration (*U.S.N.R. Kockums Cancar* (1998), 71 LAC (4<sup>th</sup>) 217 (McPhillip)).

130. In closing, the Employer submits that the evidence has established that in early 2006, the Employer was faced with reports indicating that the Grievor was allegedly engaging in conduct that was significantly disrupting the work of the maintenance mechanics group at Lake City Operations Centre. The Employer was faced with reports that the Grievor's alleged conduct was negatively impacting on morale and productivity in the workplace. In addition,

some of the Grievor's co-workers reported being distraught as a result of the Grievor's conduct. Some co-workers no longer wanted to report for work, others reported being intimidated or afraid of the Grievor. Still others reported suffering physical symptoms and admitted to taking medication as a result of the stress the Grievor's conduct was causing.

131. The evidence has established that in addition to the above, the Employer became aware there was a concern by some members of the work group that the Grievor's alleged conduct was causing his co-workers to become so distracted they were unable to focus on their work, in safety sensitive work conditions. Several of the Grievor's co-workers reported being concerned that the Grievor's ongoing disruption of their workplace would result in injury. One co-worker reported a specific concern regarding his belief that the Grievor may be a suicide risk.
132. The Employer submits that once it received the above noted reports from its employees, it had to take some action to address the situation. In addition, once the Employer began receiving reports that some employees were concerned about workplace safety, this triggered the Employer's common law and statutory obligations to provide a safe working environment. Specifically, the *Act* and *Regulation* required the Employer to investigate this situation in order to determine what corrective action, if any, was required to ensure workplace safety.
133. Given the complexity surrounding the Grievor's outstanding human rights complaint against the GVRD, two of his supervisors and one foreman, as well as the specific nature of his co-workers' complaints, the Employer decided that this situation should be investigated by an independent, third party. As a result, ProActive Resolutions, an expert in the field of workplace conflict risk assessment and management was engaged to evaluate the situation and make recommendations regarding what would constitute an appropriate Employer response.
134. The evidence has established that part way through ProActive's investigation into this situation, Dr. Hart, a psychologist recognized as an expert in the field Threat Assessment, interviewed the Grievor. That interview left Dr. Hart with the impression that the Grievor might be suffering from a mental disorder. Dr. Hart recommended the Grievor be removed from the workplace pending confirmation of his mental fitness via a psychiatric assessment with a qualified expert in the field of risk of violence. The Employer submits that its reliance on Dr. Hart's expert opinion in this regard constitutes reasonable and probable grounds for requiring the psychiatric assessment. Further, when Dr. Hart's recommendation is considered against the factual back drop of the co-workers' collective experience, the case for establishing reasonable and probable grounds is only strengthened.
135. The Employer submits that once it advised the Grievor that he would be required to confirm his fitness via a psychiatric assessment, it attempted to facilitate that process using the least intrusive means possible. In that regard, the Employer was open to addressing all of the Grievor's concerns as it tried to balance his right to privacy

against its need to ensure workplace safety. The Employer submits that in the end, it had narrowed its request for information as much as reasonably possible, given the circumstances of this case.

136. The Employer submits that once the Grievor decided not to attend the required psychiatric assessment, it acted appropriately in holding the Grievor out of service without pay. The Employer further submits that this was the Employer's only recourse given the situation.
137. The Employer submits that it has acted reasonably, responsibly and in accordance with the law throughout in responding to this complex situation. As a final point, it is the Employer's view that the appropriate outcome of this arbitration should be an award directing the Employer to return the Grievor to active duty without back pay only upon receipt by the Employer of confirmation of the Grievor's mental fitness via a psychiatric assessment by a practitioner experienced in risk of violence assessment. The Employer further submits that if the Grievor continues to refuse to attend the required psychiatric assessment, he does so at his own peril.

## **19. Summary of Union Submissions**

The union acknowledges there is a need to balance an employee's privacy rights with an employer's obligation to provide a safe workplace, but the employer did not have reasonable and probable grounds to find Mr. Dove was sufficient risk of danger to property, himself or others to take the action it did. The employer did not take the least intrusive approach, which is to begin with the family physician.

Instead, the employer demanded the incredibly intrusive approach ProActive recommended. Only after union pressure, did the employer back away to the position it arrived at by the time of the arbitration hearing.

The issue is not what was acceptable after the grievance, but what was required before, all of which happened on February 9<sup>th</sup>, while Mr. Dove's union representatives were left sitting in the lobby.

The weight of Dr. Hart's opinion rests on the unproven assumption that the allegations of facts made by other employees are true. It was not until Mr. Eastwood met with Mr. Hart and Ms Shore in late March or early April that these were particularized and disclosed in the letter of April 6, 2006. Most of these matters are dated; were not investigated or properly assessed; and were credibly explained by Mr. Dove.

The union submits Dr. Hart was allowed to proceed on an erroneous

assumption that Mr. Y continued to feel intimidated, when he testified that once the reason for Mr. Dove's presence in his neighbourhood was explained the matter was closed for him. Dr. Hart agreed it would be normal to be upset when falsely accused, as Dr. Hart did when he raised a matter previously examined by Mr. Dove and the employer's lawyers the evening of the event and explained by Mr. Dove the day after the event. Ms Brown was present and knew Mr. Dove was telling the truth.

The union submits Dr. Hart had no facts and reviewed no documents before he interviewed Mr. Dove. Dr. Hart reached no conclusions and gave no opinion in his area of expertise - violence risk assessment and clinical risk assessment. He gave a recommendation on how to proceed without knowing the history of the longstanding dispute; the responsibility the employer had assumed after Mr. Dove was held away from work for years; the good reasons for Mr. Dove to feel there was a conspiracy against him and to be withdrawn; or that Mr. Dove had reason to investigate the unusual noises on his telephone for which he later obtained an explanation.

The union submits the employer cannot rely on Dr. Hart's opinion as one of expertise in the absence of having done the investigation it should have done. In light of the testimony in this hearing, most incidents reported to the employer are either stale dated or fall away. The extreme positions taken by Messrs Launders and Smith must be discounted, at least, as simple exaggeration. Even if true, bumping into someone does not warrant a psychiatric examination. The employer should investigate and discipline, if necessary, and allow Mr. Dove to grieve.

The union submits the 2001 eye injury incident is fully explained, irrelevant history that does not appear in either Mr. Hardie or Ms Brown's notes of their interview with Mr. Launder, who must have dredged it up for Mr. Hart. It was not investigated before it appeared as the third point in Ms Shore's letter of April 6<sup>th</sup>.

The union submits Mr. Fitzpatrick did not describe the window tap and goofy face incident as threatening and Mr. Y agrees that if Mr. Dove did not know why they were leaving work early, it could be interpreted as a silly joke that was

not threatening. Why are these characterized as “pounding” on the window and a “threatening face”?

The union submits all the other events or items have no specific time or place. Mr. Bindley testified to a bump. Except for a brush past that he did not raise at the time, Mr. Smith reported no other incident. Mr. Y had concerns about the effect of Mr. Dove’s talk on his attention to safety procedures.

The union acknowledges Mr. Dove engaged in persistent inappropriate discussion about his ongoing relationship with the employer and supervisors, as testified to by Mr. Fitzpatrick. Only Messrs Smith and Launder linked this to Mr. Dove’s mental state. The employer did not speak to Mr. Dove about this.

The union acknowledges Mr. Dove did not join in the group’s camaraderie and was withdrawn on some days. This does not warrant a psychiatric evaluation or suggest he is a threat or risk of violence.

The union submits Mr. Dove’s expression of concern that management persons are out to get him was well founded and corroborated by Mr. Nicholls and Mr. Walsh, who took extra steps to inform the employer. Mr. Hengen did not deny what it is alleged he said and agrees he described Mr. Dove’s Human Rights complaint as a travesty. This was never investigated beyond asking Mr. Hengen, when many other employees were present at the crew meeting.

Mr. Dove did keep time sheets and, perhaps, other records. He told others they should. Mr. Hengen kept a file. This is not threatening behaviour. There is no evidence Mr. Dove spent “large amounts of time” doing this.

Mr. Lenning testified about Mr. Dove saying he was a puppet. Mr. Dove denied this. Mr. Launder testified he was called “baldy” and “shorty.” Mr. Dove says they do not suit Mr. Launder and he did not. Mr. Dove agrees he called Mr. Cimino familiar names and Mr. Cimino agrees he called Mr. Dove names. They respected one another.

The union submits there is no record of discipline that Mr. Dove did not take direction. Only Messrs Launder and Smith described Mr. Dove in this manner. Messrs Oliver and Nicholls did not testify. Messrs Dove and Hengen obviously had a conflicted relationship. No one described Mr. Dove’s attitude as

one of “contempt” - not even Messrs Smith, Launder and Y.

Only Mr. Y spoke of Mr. Dove saying he was going to get a monetary award in his Human Rights complaint and only Mr. Smith questioned Mr. Dove’s mental stability. Messrs Cimino and Walsh did not share the view there was a problem. No one said he was a “time bomb just waiting to go off.” These allegations or statements are simply too conflated to withstand scrutiny.

The union submits most co-workers coped with Mr. Dove’s talk, mood and behaviour. Most did not have to work with him. Some did not enjoy working with him and others adapted. Messrs Y and Simon had problems. The employer did not address the situation.

The union submits no safety concerns arising from Mr. Dove’s talk and negativity were reported to the Workers Compensation Board, the health and safety committee or anyone else over the years.

The union submits the reasons offered by the employer for its decision as reasonable and probable grounds for a psychiatric evaluation do not withstand the scrutiny and investigation they should have received at the time the employer formulated them. There were alternative options available to the employer and within the service offered by ProActive. Instead, it leapt to the most intrusive for Mr. Dove.

The union submits there is no contractual basis for the decision the employer took and the authority for it only arises, apart from a contractual or statutory power, when there is a safety issue (*Monarch Fine Foods Co. Ltd.* (1978), 20 LAC (2d) 419 (Picher); *Brewer’s Warehousing Co Ltd.* (1982), 4 LAC (3d) 257 (Knopf)).

When requiring a medical examination, the employer must begin with the least intrusive step (*Dartmouth General Hospital* (1992), 30 LAC (4<sup>th</sup>) 115 (North); *Brinks Canada Ltd.* (1994), 41 LAC (4<sup>th</sup>) 422 (Stewart); *Public Service Employee Relations Commission* [1998] B.C.C.A.A.A. No. 435 (Jackson) appeal dismissed [199] B.C. L.R.B.D. No. 472; *ONA v. St Joseph’s Hospital*, July 6, 2005 (Sup Ct J. - Ont. Div Ct.)).

The union submits if the employer is concerned with the honesty of an

employee, it should deal with it as a culpability matter warranting discipline not a medical issue (*Surrey Memorial Hospital* (1995), 50 Lac (4<sup>th</sup>) 333 (Kinzie) appeal dismissed [1996] B.C.L.R.B.D. No. 55). It was the employer's responsibility thorough Mr. Hengen to inform Mr. Dove about any shortcomings in his performance if it had been going on for years, but the credible evidence is that it had not (*BC Rail Ltd.* (1984), 17 LAC (3d) 402 (Hope)). Because the employer did not, it lulled Mr. Dove into a false sense of security that limits the employer's right to act now (*Frito-Lay Canada Ltd.* (1975), 10 LAC (2d) 234 (Beatty); *City of Vancouver* (1983), 11 LAC (3d) 121 (Hope)). This is particularly applicable to any allegation of misconduct by Mr. Dove in response to the 2001 eye injury incident.

The union submits that any conflicts in accounts of events must be resolved by preferring the sworn testimony in this arbitration over the unsworn accounts in Dr. Hart's reports (*Ridge Meadows Hospital* (2003), 120 LAC (4<sup>th</sup>) 205 (Hope)). And the reasons on which the employer relies cannot be enlarged beyond April 6<sup>th</sup> to include matters raised in testimony that were not previously reported or relied on by the employer (*Newton Ready Mix Ltd.* (1984), 17 LAC (3d) 333 (Dorsey)).

The union submits the employer must meet a high standard of proof to establish the serious allegation on which it relies to impose a most invasive free roaming examination of Mr. Dove's mind and a serious condition of continued employment on him (*Board of School Trustees of School District No. 33 (Chilliwack)* (1990), 16 LAC (4<sup>th</sup>) 94 (Hope)). Care must be taken that circumstantial evidence admits of only one rational conclusion when deciding guilty behaviour (*Alcan Smelters* (2001), 98 LAC (4<sup>th</sup>) 410 (Hope)).

The context is that it all began with racial discrimination, acknowledged by the employer, and Mr. Dove's ongoing fight for his right not be discriminated against because of his race, colour, ancestry, place of origin and physical disability. The employer must be held to a standard of good faith and fair dealing when requiring this invasive examination (*Health Employers association of British Columbia on behalf of The Salvation Army (Sunset Lodge)*, unreported, July 4, 2003 (Hope)).

The union submits that, at its core, this is a case about someone talking too much and bothering others. The facts upon which Dr. Hart based his opinion about the appropriate next step in the risk assessment process were mistaken in some instances and dependent upon ordinary human powers of perception and understanding, which if mistaken can be contradicted (*Hennessey v. Rothman* [1988] B.C.J. No. 350 (BCSC)).

The union submits that Dr. Hart's opinion evidence was based on no facts or erroneous facts. He brought no more knowledge to the process than what a thorough investigation by the employer would have achieved. The arbitrator's realm of expertise is to determine whether the employer had reasonable and probable grounds. Dr. Hart's expertise and opinion are not helpful. His expertise does not provide information outside the experience and knowledge of the arbitrator. It does not enable appreciation of the matters in dispute because of their technical nature. Dr. Hart cannot usurp the arbitrator's function to determine whether there were reasonable and probable grounds. (*R v. Mohan* [1994] SCR 9; *R v. D.D.* [2000] SCR 275)

## **20. Analysis and Decision**

This is not a case in which there are disputes about the legal principles or applicable law. It is a dispute about facts, their import and whether they provide reasonable and probable grounds for the employer's decision.

There were numerous conflicts in the testimony between statements by Mr. Dove and other employees. Many related to incidents that happened at unidentified times or years ago.

There were differing perspectives in the presentation of evidence on whether it was necessary to make fact findings on each reported incident or episode in order to resolve the issue presented by the grievance, namely, whether the employer had reasonable and probable grounds to require Mr. Dove to undergo a mental health evaluation.

The outstanding Human Rights complaint scheduled for hearing early in 2006 was a further influence on the pursuit of fact finding. The purpose of the arbitration was not to address the allegations of discrimination. Neither the union

nor Mr. Dove asked me to make findings about his allegations of discrimination, even when they overlapped incidents employees recounted and the employer relied on.

In so far as it is necessary to make findings of fact for this proceeding, the recitation of facts above is not based on an unequivocal distinction between the testimony of Mr. Dove and other employees. There were weaknesses in the testimony of several witnesses.

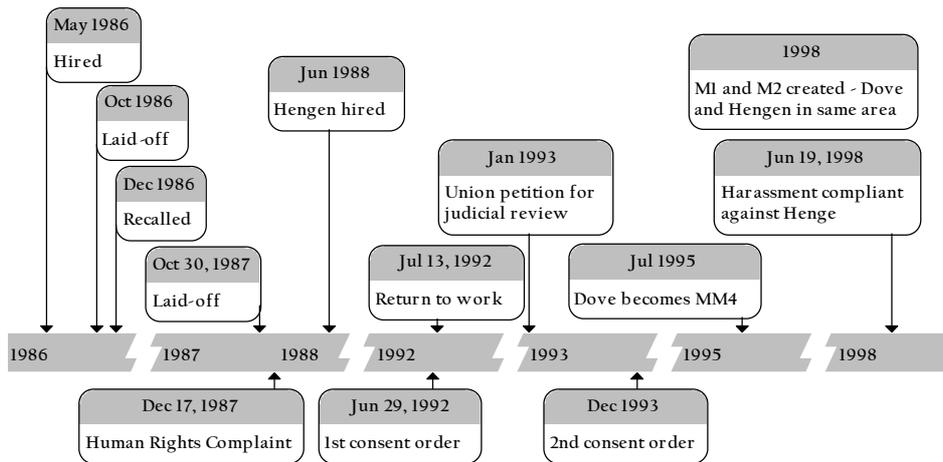
Among the list of contradictory statements and denials by Mr. Dove, there were several instances when he struggled reconciling his recollection with a favourable reconstruction. When pressed to the logical response that someone else must have been untruthful he said they were. Throughout the hearing and his testimony, he was quiet, courteous, responsive and not argumentative.

I find that Mr. Dove did speak repeatedly throughout the years of his employment to others about his perceived mistreatment by his employer and this intensified in the first half of 2005.

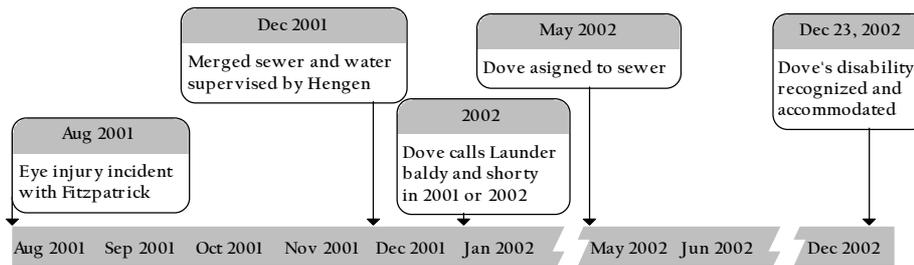
For detailed reasons given at the time, I upheld the employer's object to the introduction of work schedules by the union after the employer had closed its case; the union had begun the presentation of its case; and there had been an adjournment for a week.

Consequently, I am cautious in finding the extent to which he spoke about these things after he filed his Human Rights complaint on October 12, 2006, which precipitated the events that led to this arbitration.

The stage for Mr. Dove's discontent in 2005, that led him to seeking redress through a Human Rights complaint that included Mr. Hengen as a respondent, rather through an internal employer complaint procedure or a grievance, was set in the 1980's and 1990's.

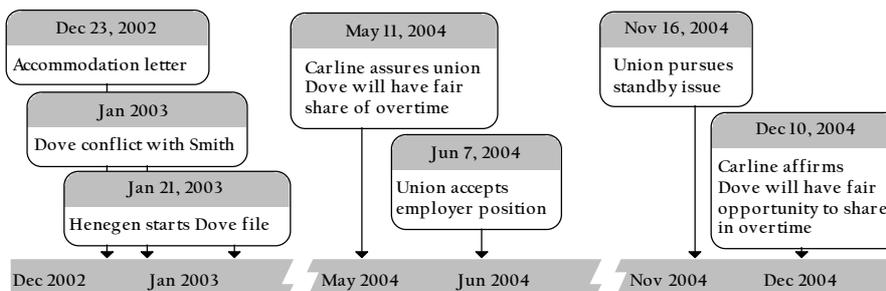


Although the 1998 harassment complaint, which alleged some of the same behaviour by Mr. Hengen that Mr. Dove is later accused, was resolved, obviously, their relationship did not improve. Nonetheless, the evidence does not address any issues or incidents from mid-1998 to mid-2001 and few in 2002.

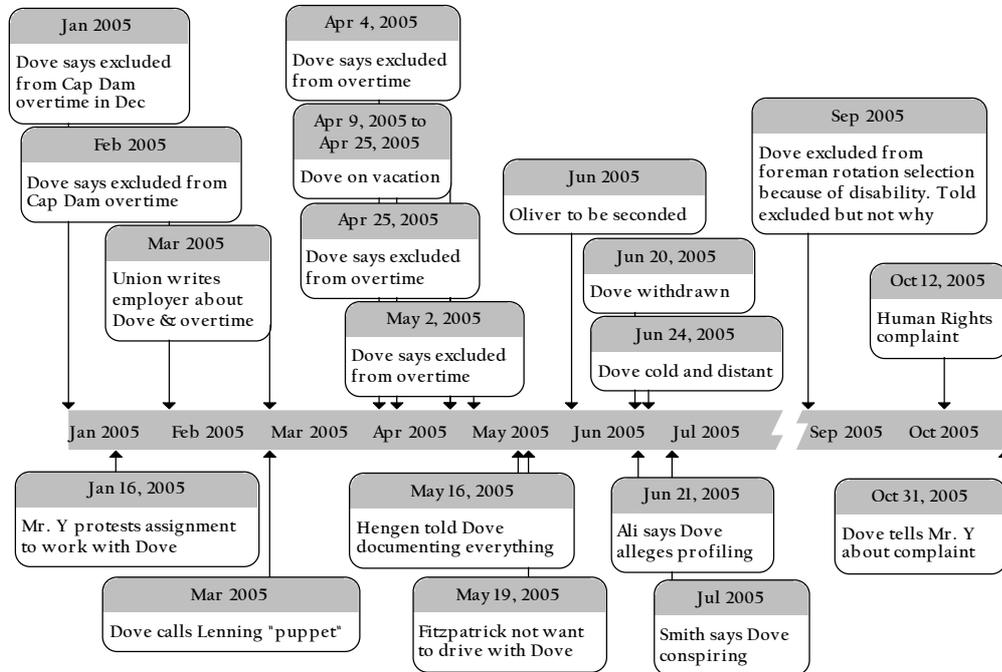


The precipitating events that ultimately led to Mr. Dove's Human Rights complaint in October 2005 were the accommodation letter in December 2002 and disputes about its application in 2004, which Mr. Dove pursued through the union.

At about the same time as the accommodation letter, Mr. Hengen started documenting incidents involving Mr. Dove. The first was a conflict between Messrs Smith and Dove in January 2003.

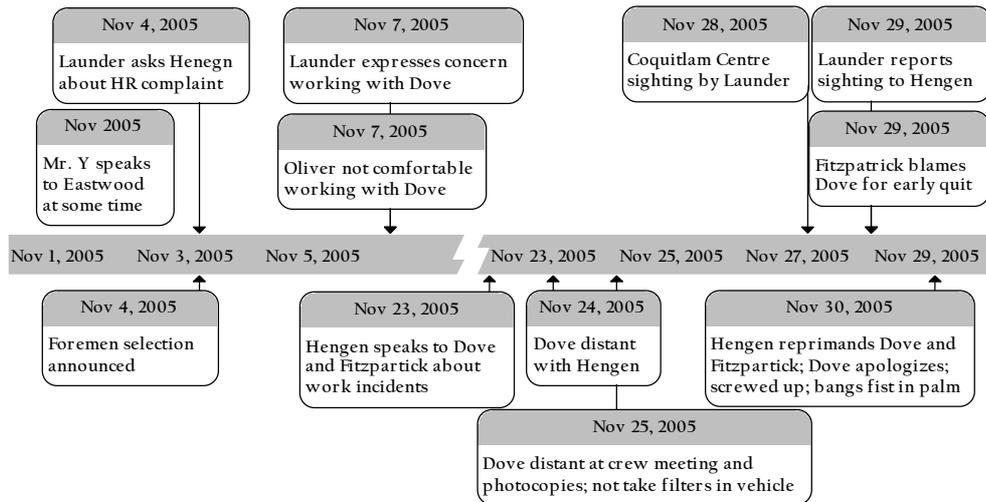


The differences over the employer's commitment to give Mr. Dove a fair share of overtime, the rise in tensions and co-worker complaints about Mr. Dove begin in earnest in early 2005.

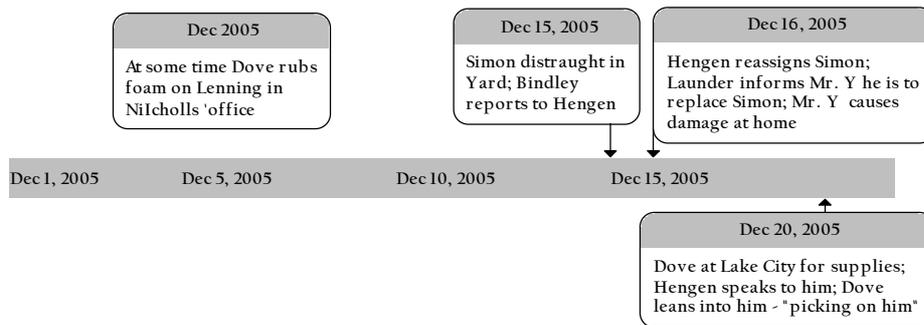


After the Human Rights complaint became common knowledge, workplace tensions increased. Talk among the employees about Mr. Dove and his talk, moods and behaviour increased. Division lines between factions or cliques within the work unit became clearer. Individuals took sides for or against Mr. Dove or tried to stay out of it. Old scars were opened and past stories retold. Mr. Dove was isolated, tense and withdrawn.

Despite this, there were no real incidents in November 2005 and Mr. Hengen continued to speak to Mr. Dove about work and performance issues as they arose.



Tensions rose in December 2005 because of the reactions Messrs Simon and Y had to working with Mr. Dove.



Although Mr. Hengen's requests for help in dealing with the situation were unanswered because both Mr. Ali and the employer were respondents in the complaint, he continued to perform his supervisory responsibilities and exercise his supervisory authority. No disciplinary action was taken. There were no incidents identified in the evidence between December 20<sup>th</sup> and January 16<sup>th</sup>.

The protestation by Mr. Y about being reassigned again to work with Mr. Dove on January 16<sup>th</sup> led to the ultimate management solution of promoting Mr. Dove's co-workers to complain and create a context in which the employer could act, rather than deal directly with Mr. Dove about his negative talk and its effect on Messrs Y and Simon.

The crew meeting on January 16<sup>th</sup>, from which Mr. Dove was excluded, led to Mr. Y's letter of January 17<sup>th</sup> and the interviews from January 18<sup>th</sup> to 29<sup>th</sup>,

which provided the context for the January 19<sup>th</sup> complaint by Mr. Y about Mr. Dove's knock on the window of his vehicle and face. The February 1<sup>st</sup> complaint about Mr. Dove being in Y's neighbourhood was the only other non-work performance event before he was held out of service.

The tensions following the Human Rights complaint upset the harmony among the mechanical maintenance crew and caused emotional pins and needles. In the employee interviews, incidents were exaggerated. The intense emotional reactions of some became Mr. Dove's fault.

When the facts were known and accepted, as happened with the "stalking" incident on February 1<sup>st</sup>, the record was not set straight and it was not forgotten or forgiven.

In the interviews, those who spoke loudest and most often were in the circle sympathetic to Mr. Hengen and they were heard. The statements of those who spoke up for Mr. Dove were generally ignored.

This happened against a backdrop of no evidence of any official communication to the employees about the accommodation Mr. Dove required and the employer had properly gave him; exclusion of Mr. Dove from the selection process for foreman rotation because of his disability; no evidence of any effort to accommodate Mr. Dove to participate in the selection process for foreman rotation; no meaningful conversation with him about why he was excluded from the selection; the natural diversity of personalities within a work group; and diverse perceptions whether speaking out against Mr. Dove or Mr. Hengen would curry favour or invite retaliation.

Moving beyond January 2006, there were conflicts in the testimony of Mr. Dove and Dr. Hart. A balanced recollection was provided by Ms Brown who witnessed, but did not participate in, their exchange. I find her recollection of Mr. Dove's behaviour and mannerisms to be most reliable.

Dr. Hart attended the interview unprepared. He did not know about the history of Human Rights complaints, their outcome, Mr. Dove's disability, the accommodation or the differences over overtime and standby that were ongoing. He had only a cursory briefing from Mr. Hart, who had already recommended

holding Mr. Dove out of service on paid leave for a cooling off period sometime after completing his employee interviews on Monday, February 6<sup>th</sup>.

Dr. Hart knew that Mr. Dove did not know why he was being interviewed, but did not know that already on the morning of Wednesday, February 8<sup>th</sup>, the day after the Human Rights settlement meeting, Mr. Dove's vehicle had been cleared and that it was only that day that he was told he was to report to head office the next day.

There was no explanation why the employer did not tell Mr. Dove the purpose of the meeting. There was no explanation why the union was invited to attend if the employer had not already decided to accept and implement Mr. Hart's recommendation. There was no explanation why it was so urgent to proceed that the interview with Mr. Dove could not await Mr. Hart who had all the information acquired by ProActive.

There was no clear explanation why Mr. Dove was asked in the interview about being in Mr. Y's neighbourhood when his lawyer had provided an explanation the employer had accepted and reviewed with Mr. Dove on February 2<sup>nd</sup>, but did not communicate to the employees when it knew, prior to the February 2<sup>nd</sup> meeting, that the event had been characterized as stalking by employees. Nonetheless, the even was put to Mr. Dove by Dr. Hart and he was understandably upset the issue would not go away. On Dr. Hart's testimony, being upset about being falsely accused of wrongdoing is a normal reaction.

Apparently the statement Mr. Dove made at the meeting on February 2<sup>nd</sup> to Mr. Hardie and others about his telephone being tapped was relayed to Dr. Hart. It had nothing to do with anything any other employee had told the employer. Why raise it with Mr. Dove? I have concluded that Dr. Hart was straying into clinical psychology and beyond risk assessment. He was bypassing the workplace facts to venture into Mr. Dove's condition. It led him to a place no one had anticipated and for which the employer had not contingency. Then, the force of his credentials drove the events that followed.

If Mr. Hart, not Dr. Hart, had conducted the interview it is probable, if not certain, Mr. Dove would have been simply held out of service for a period to allow

emotions among the mechanical maintenance employees to cool off, as was the plan. Mr. Hart would not have recommended a mental health evaluation.

Instead, Dr. Hart substituted for him at the last minute and conducted the interview through the lens of his training and, without regard to other approaches, the planned course of action or further investigation. He simply followed the logic that the possibility of a mental disorder should be addressed and eliminated or confirmed. If it was eliminated, then the fact finding could begin.

Dr. Hart did not find and did not testify that, when he formulated his opinion on February 9<sup>th</sup>, Mr. Dove posed any threat to himself or others. His sole concern was whether Mr. Dove's statements were to be evaluated as the statements of someone with a mental disorder or not.

Dr. Hart did not testify he had grounds to question Mr. Dove's fitness to safely perform his duties at work. However, on February 23<sup>rd</sup>, he wrote that one preliminary conclusion was that: "The Lake City Operations Centre is in a state of conflict related crisis, in that the level of anger, fear, distrust and suspicion within the work group is extremely high and is, according to reports, interfering with employees' abilities to carry out their work duties safely and proficiently." He did not identify the "reports" and had none except, perhaps, what Mr. Y told him after his recommendation or Mr. Hart's summary briefing when he asked Dr. Hart to substitute for him.

What was happening was that the information gather by Mr. Hart and Dr. Hart for ProActive were collapsing into an amalgamated factual foundation for an expanding opinion being regarded as that of an expert. Similarly, from February 9, 2006 to the last day of hearing, the nature and basis on which the employer justified its decision evolved.

At its heart, Dr. Hart's recommendation by was one of process. Mr. Hart recommended one approach - a period of cooling off with Mr. Dove out of the workplace while the factual investigation continued - which the employer appears to have accepted and was intending to implement. It called Mr. Dove to an interview that it would not postpone because Mr. Hart was not available. It

cleared out Mr. Dove's vehicle. It notified the union and asked it to be present when it was to tell Mr. Dove he was being placed on leave with pay.

That plan was derailed when Dr. Hart prematurely made his recommendation. I have concluded it was premature because it was based on a mistaken premise, namely that the employer could not get to the truth of most questions without further investigation and in the absence of a psychiatric evaluation of Mr. Dove. A simple timeline of the reported events and some care in separating rumour, stale dated events and feelings from what was factual relevant would have substantially advanced the inquiry. This is what would have happened if the original plan had been followed. There were workplace alternatives to return Mr. Dove to work after a short time, even if Messrs Y, Simon and Fitzpatrick were not to be assigned to work with Mr. Dove.

The employer's persistent adherence to, and defence of, Dr. Hart's recommendation forestalled further investigation and assessment. Staying the course in the face of contrary information was only ameliorated almost three months later by the employer's willingness to retreat from the path laid out by ProActive to a less intrusive one respectful of Mr. Dove's privacy.

There was no factual basis on which it could be concluded Mr. Dove had been or was a physical threat to any fellow employee in the relevant months prior to February 2006. No one in management spoke to Mr. Dove before or during the February 9<sup>th</sup> interview about the effect his constant, negative talk was having on the helpers assigned to work with him. The helpers were left to fend for themselves - suck it up - and when they reached their limit were reassigned. The cooling off period was to be the first step to engage in discussion about that issue and to achieve a solution that improved the environment and did not impact productivity.

There was evidence that morale was adversely impacted after the Human Rights complaint, but none that productivity was adversely impacted.

Mr. Dove did not make verbal or physical threats to his fellow employees. The 2001 eye injury incident cannot be characterized as such and Mr. Fitzpatrick and he worked many shifts together after that incident. There were instances

when Mr. Dove was distant, withdrawn and perhaps rude. There were instances when he was inattentive to others and brushed past them. There were times when he was unfriendly, aloof and glared, but not physically aggressive. There was no history of violence or aggression towards others.

Apart from his constant talk, Mr. Dove channelled his desire for redress into the complaint, grievance and human rights procedures and processes.

The employer must take action to address conduct detrimentally affecting the well-being of a workplace. It is clear the employer was required to act to address the morale, tension and emotional issues within the work group in the fall of 2005. It had to ensure the employees were focused on safe work practices and productivity. It had to investigate, perhaps without waiting for the employees to be rallied to lead the charge.

Following investigation, the employer could use counselling, or other assistance for individuals, as it did for Mr. Y, training, dialogue and other options to maintain a respectful, healthy and safe workplace while the Human Rights complaint took its course.

Following the least intrusive course on which ProActive had embarked by commencing with interviews, the employer chose the route of a cooling off period, presumably to do further investigation, engage in dialogue and take further action during the cooling off period with the union, the mechanical maintenance employees and Mr. Dove.

The decision the employer took to require Mr. Dove to undergo a psychiatric evaluation simply to eliminate the *possibility* that he, and not others, was not being truthful was neither reasonable nor required. Dr. Hart's opinion, without being fully informed of the background, context and facts, based on the impression he formulated in a single interview with Mr. Dove, who was not previously told the purpose of the interview, who was interviewing him or the possible consequences, is not reasonable and probable grounds to have Mr. Dove undergo a psychiatric assessment. An unsound recommendation from management consultants, even if experts, is not reasonable and probable grounds to compel Mr. Dove to undergo a psychiatric assessment.

The speculative possibility Mr. Dove might be suffering from a mental disorder as opposed to lying, reporting truths or a combination of these does not provide reasonable and probable grounds to require a psychiatric assessment, regardless how improbable Dr. Hart thought it was that representatives of the employer had conspired against Mr. Dove or tapped his telephone. Mr. Dove's irritation and forceful response to being questioned again about a false allegation he had definitively answered and being told he was to undergo a psychiatric examination was restrained and understandable in the circumstance. It is not reasonable and probable grounds to require a psychiatric examination.

I find the employer did not have reasonable and probable grounds to require Mr. Dove to undergo a psychiatric assessment, whether as initially directed in February or later in May, 2006. The grievance is allowed. The employer is to reinstate Mr. Dove's wages and all his benefits immediately and compensate him for lost wages and benefits.

I retain and reserve jurisdiction to deal with all matters related to the implementation and interpretation of this decision. I retain jurisdiction over the amount of compensation Mr. Dove is to be paid by the employer for lost wages, benefits or other damages.

I am expressly not directing a date by which Mr. Dove is to be reinstated. I am doing this to enable the union and employer to discuss this issue and to allow the employer to determine the next steps it wishes to take to conclude its interrupted investigation or to prepare Mr. Dove, the mechanical maintenance employees and supervisors for Mr. Dove's return to work. I retain jurisdiction to decide all matters related to Mr. Dove's return to work.

JANUARY 19, 2007, NORTH VANCOUVER, BRITISH COLUMBIA.

*James E. Dorsey*

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