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Citation: 2006 PSLRB 66

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

WAYNE TRENHOLM

Grievor

and

STAFF OF THE NON-PUBLIC FUNDS, CANADIAN FORCES

Employer

Indexed as
Trenholm v. Staff of the Non-Public Funds, Canadian Forces

In the matter of a grievance referred to adjudication pursuant to section 92 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Paul Love, adjudicator

For the Grievor: Jack Gerow for United Food and Commercial Workers Union, Local 1518

For the Employer: Margaret T.A. Shannon and Christopher Smith

Heard at Comox, British Columbia,
January 17, 18, 19 and 20, 2006.

Grievance referred to adjudication

[1] On December 17, 2004, the grievor filed a reference to adjudication with respect to his termination of employment on April 30, 2004, arising out of an assault on Larry Pasaluko, another employee, at an employer-sponsored golf tournament on October 2, 2003.

[2] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, this reference to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (the "former *Act*").

[3] I previously issued a decision extending the time prescribed to file the reference to adjudication, after a contested hearing, to ensure that Mr. Trenholm's grievance was heard on the merits.

Summary of the evidence

[4] At this hearing, the employer called the following persons to give evidence: Larry Pasaluko (irrigation technician), Master Corporal David Paul (military policeman), Len Doyle (Pro Shop worker, now retired), Gordon Murphy (greens keeper), Yvonne Dixon (human resource manager), and Brenda Dagenais (director of labour relations). The bargaining agent called Mr. Trenholm.

[5] The Staff of the Non-Public Funds operates the Glacier Greens Golf Course located at Canadian Forces Base Comox, British Columbia. The golf course operation consists of a maintenance shop with a variable number of staff (up to 12 or 14 people) depending on the season. There is also a pro shop and a social centre. An efficient golf course operation requires a degree of cooperation between the irrigation technician and the greens keepers at the golf course, as the greens keepers are out on the course, and should be passing information and observations on to the irrigation technician, to ensure that the course is in optimal shape for use by golfers.

[6] Mr. Trenholm was employed as a full-time seasonal greens keeper at the golf course. At all material times, he was a member of the United Food and Commercial Workers Union of British Columbia, Local 1518 (the bargaining agent). He commenced

working for the employer in April of 2001. His employment was terminated on April 30, 2004.

[7] Mr. Pasaluko is employed at the golf course as an irrigation technician. He started with the employer at an entry-level position in 1997. It was apparent to Mr. Pasaluko that Mr. Trenholm did not like him, and he took steps to avoid coming into contact with Mr. Trenholm in the workplace. Mr. Pasaluko testified that Mr. Trenholm was often angry when he received workplace instructions that he did not like.

[8] Mr. Pasaluko and Mr. Trenholm were co-workers at the golf course. Neither person had management nor supervisory responsibilities in the workplace. Neither employee had a responsibility to supervise the other.

[9] Mr. Trenholm admitted in cross-examination that he has a strong sense of what is right and wrong, and admits that he will sometimes deal with people that offend that sense of right and wrong. He admits to a previous conviction for assault, and three previous convictions for impaired driving.

[10] Mr. Pasaluko does not appear to have been well-liked at the golf course by some of the employees. Mr. Murphy, for example, did not like the way Mr. Pasaluko treated other people; he avoided contact with him at work and did not socialize with him after working hours. Both Mr. Murphy and Mr. Doyle indicated that Mr. Pasaluko was a person from whom one could never get a straight answer. He appears to have teased others and joked inappropriately. Mr. Murphy indicated that Mr. Pasaluko made him feel uncomfortable. It is apparent that Mr. Pasaluko had a problem with a previous supervisor and that he prepared a petition to the employer which was signed by other employees. His evidence initially in cross-examination was that he signed the petition; however he admitted later in cross-examination that he prepared the petition. He may have expressed frustration with this supervisor by saying the words to the effect that he would like to get the supervisor into a cage match. These words were, however, never spoken to the supervisor. Before the events of October 2, 2003, there is no evidence before me that Mr. Pasaluko threatened or assaulted other employees, or made threatening comments directly to the former supervisor in the work place.

[11] It is apparent from Mr. Trenholm's testimony that he has little respect for Mr. Pasaluko. He did not mince words during his examination in chief. He considered

Mr. Pasaluko to be manipulative; he picked on weaker employees; he was a poor sport at golf; and he could not be trusted. In cross-examination, he was critical of Mr. Pasaluko's work performance and said that he was late every day; that he let the greens die; that he was not performing the duties in his job description; that he attempted to run over day-old fawns and rabbits; that he fished illegally on the golf course property; and Mr. Trenholm believes that he stole gasoline from the employer. Mr. Trenholm believes that Mr. Pasaluko talked about him behind his back. In summary, there appear to be many reasons why Mr. Trenholm disliked Mr. Pasaluko.

[12] I am simply reporting Mr. Trenholm's evidence. I make no findings because none of these allegations were put to Mr. Pasaluko during cross-examination and therefore I put no weight on the allegations. Mr. Trenholm's views may offer some insight into his thinking and the actions that have led to his dismissal. It is clear that Mr. Pasaluko has an unblemished disciplinary record. He was not disciplined in connection with the events leading to Mr. Trenholm's termination of employment.

[13] The employer held a tournament at the golf course on October 2, 2003. Mr. Pasaluko attended the tournament and golfed with a partner against two other employees. Mr. Pasaluko admits to drinking five cans of beer while he was golfing. Mr. Trenholm attended the tournament and golfed with Len Doyle, and did not golf against Mr. Pasaluko and his partner. It appears that Mr. Trenholm drank five to seven beers during the golf game.

[14] After the round of golf finished, Mr. Pasaluko and Mr. Trenholm attended the social centre for dinner, and the wrap up awards ceremony. Mr. Pasaluko and Mr. Trenholm sat at different tables for most of the evening. Both Mr. Pasaluko and Mr. Trenholm consumed alcoholic beverages, primarily beer, during the evening. The beer was free. Mr. Pasaluko admits to drinking two mugs of draft beer. Mr. Trenholm was not paying any attention to the amount that he drank. It appears that he drank a mug to mug and a half of draft beer at the awards dinner.

[15] Later in the evening, Mr. Pasaluko came over to Mr. Trenholm's table, congratulated him on winning the tournament, and bought a round of shooters. Another round of shooters was ordered, which was to be paid for individually. Mr. Trenholm left before the second round of shooters came. However, he apparently went to his locker at the maintenance building to get money to pay for his drink. He, however, gave no notice to anyone that he was going to the maintenance building.

[16] Mr. Pasaluko finished off his second shooter. He went back to the maintenance building to use the computer in the superintendent's office to set the irrigation system for the evening, and also to call his wife for a ride home. He had pre-arranged for his wife to pick him up as he knew he would be drinking alcoholic beverages. After making the changes, Mr. Pasaluko went to the washroom. Both men were unaware of each other's presence in the building.

[17] The following events are the ones at issue. Mr. Trenholm and Mr. Pasaluko testified to different versions of the facts. Mr. Trenholm and Mr. Pasaluko were the only persons present in the building. What is clear, however, is that Mr. Trenholm applied physical force to Mr. Pasaluko. Mr. Pasaluko called the 911 operator, and the military police were dispatched to the golf course. Mr. Pasaluko was found on the ground outside the maintenance building by the military police. He was taken to St. Joseph's Hospital in Comox by ambulance and he was treated for his injuries. Mr. Trenholm was arrested by the military police at the maintenance building and lodged overnight in the cells of the Royal Canadian Mounted Police (RCMP) in Courtenay. Mr. Trenholm was later charged with the offences of assault causing bodily harm to Mr. Pasaluko and two counts of resisting arrest.

[18] The employees who attended the tournament were permitted to leave work early and if they did not attend the tournament they had to work. The tournament occurred on the employer's property. The incident occurred on the employer's property. The incident did not occur during a shift where the employees were maintaining the golf course.

[19] Mr. Pasaluko claims that he was the victim of an unprovoked attack. After he left the washroom, in the hallway of the maintenance building, he was looking down doing up the waist draw string of his pants, and he suddenly saw Mr. Trenholm as he turned the corner. Mr. Pasaluko says that Mr. Trenholm said "you're not my fucking boss," and Mr. Pasaluko said "uhum", and was just raising his head from doing up the draw string when Mr. Trenholm poked him in the eyes with his open fingers. He fell back against the door, and Mr. Trenholm punched him on both sides of his face. As he slid down the door to the floor, Mr. Trenholm continued to punch him on the sides of his face and top of his head. He fell over onto his left elbow and Mr. Trenholm grabbed him by the right arm and said "get up you fucking pussy." Mr. Trenholm kicked him in the mouth, and kicked him again in the arm, which he was holding up to

protect his face. Mr. Pasaluko tried to protect himself by covering up his face, and moving into a foetal position. Mr. Trenholm then stomped on his right shoulder, and then stomped on his lower back. Mr. Pasaluko crawled back to the washroom, washed his face, and testified that he could see that he was in trouble. Mr. Pasaluko made his way back to the superintendent's office and called 911. In the course of the conversation with the 911 operator, Mr. Trenholm came back into the operator's area of the maintenance building and yelled "what the fuck are you doing now." Mr. Pasaluko started slapping at the keys of the computer and said to Mr. Trenholm "I am just setting the irrigation," and said to the operator "I have to go as he is back." He made his way outside the building where he collapsed onto the ground. The next thing he recalls is a military policeman shining a light in his eyes asking him how he was, and he responded "not very well". He recalls the paramedics arriving and transferring him by ambulance to St. Joseph's Hospital in Comox. He stayed in the hospital emergency room for about four hours while his injuries were treated.

[20] Mr. Pasaluko sustained bruises to both sides of his face and lacerations below his lip which required eight stitches. He says that the lacerations were caused by the kick to the face. The hospital admission record (Exhibit E-10) indicates that Mr. Pasaluko had severe low back pain, lower hip pain, facial pain, two facial lacerations requiring suturing in the left lower lip area, as well as bruising and swelling on both sides of his face. He had pain in his eye the next day and had difficulties seeing. He was later seen by Dr. Glen Hoar, an ophthalmologist. Dr. Hoar diagnosed a traumatic corneal abrasion (Exhibit E-13). On October 21, 2003, Mr. Pasaluko was seen at the emergency department at St. Joseph's Hospital for shoulder pain. The attending physician diagnosed an anterior dislocation of the right front sternal clavicle (collar bone) (Exhibit E-11). A clinical note from Dr. Bell indicated that as of October 10, 2003, Mr. Pasaluko was unable to work for 11 days (Exhibit E-12), and he also referred Mr. Pasaluko to a physiotherapist. Mr. Pasaluko was off work for two weeks. The Workers' Compensation Board assessed a 1 % disability as a result of the injuries from the fight. This assessment is under appeal. As a result of the assault Mr. Pasaluko is afraid of Mr. Trenholm. Mr. Pasaluko does not wish to be around Mr. Trenholm and says that he will quit if Mr. Trenholm is reinstated to the workplace.

[21] The employer's counsel attempted to have me view photographs that were in Master Corporal Paul's file, but was not prepared to tender the photographs as exhibits, or obtain laser copies and tender the copies of the photographs as exhibits.

The reasons given for not providing the photographs were privacy concerns and an ongoing criminal trial. The viewing of the photographs was to confirm Mr. Pasaluko's evidence of his injuries. I also note that the grievor's representative was not provided with any notice that the photographs were to be introduced, and was not provided with copies of the photographs in advance of the hearing. I ruled that I was not prepared to see the photographs, without the placement of the photographs on record as exhibits, as the prejudicial value of this action would be substantial, and the impressions that I obtained could not be placed on record, and could not be reviewed properly in the event of a judicial review. In my view, it is simply unfair to the grievor to have the adjudicator view photographs, which are not filed as exhibits.

[22] Mr. Trenholm claims that Mr. Pasaluko hit him first and that he finished the fight. Mr. Trenholm claims that he went to the maintenance building and was just coming out of the washroom when he saw Mr. Pasaluko. Mr. Pasaluko bumped into him, Mr. Trenholm said "watch it" and as he turned around Mr. Pasaluko hit him in the face, and he didn't see it coming. Mr. Trenholm claims that Mr. Pasaluko said that he was a loser just like his mom and dad. Mr. Trenholm claims that Mr. Pasaluko was "coming at him again", and he hit Mr. Pasaluko once on the side of his face, and Mr. Pasaluko hit a stud wall. Mr. Trenholm said that:

> *. . . it happened so fast. He went to the ground and I grabbed him. I didn't know the fight was over. I hit him. I went to hit him again and said get up you fucking coward, and as I went to hit him a second time he was curling up and said that he didn't want to fight so I stopped. . . .*

[23] Mr. Trenholm confirms that he hit Mr. Pasaluko three times, once in the face and twice in the kidneys. He does not admit to any further blows. During cross-examination, when all the injuries from the medical reports were read to Mr. Trenholm, his response was "It is pretty easy to fake injuries with no proof." At a later point when he was asked by counsel about his reference to there being no proof, Mr. Trenholm's explanation was that there was no x-ray and "The doctor writes down what you tell him." When questions were put to him about the doctor's finding of the traumatic corneal abrasion, Mr. Trenholm's response was as follows:

> *Question: Is it your evidence that Larry's version of facts and medical evidence are a fabrication?*
>
> *Answer: Yes maa'm, the medical stuff. They only do what they are told.*

Mr. Trenholm's response in essence was that Mr. Trenholm fabricated the evidence of the injuries by falsely reporting injuries to the doctor.

[24] Mr. Trenholm claims that he was arrested because he had blood on his shirt, which came from the cut above his eye made by Mr. Pasaluko when he hit him first. During the arrest after the MP "twisted his arms behind his head" while putting the cuffs on, Mr. Trenholm said "I asked him if he had a little man complex." He says that he was then assaulted by two MP's and dropped face down in the gravel. He also confirms that he was charged with one count of assault causing bodily harm and two counts of resisting arrest.

[25] Prior to the October 2, 2003, incident, there were earlier incidents between Mr. Trenholm and Mr. Pasaluko. During the first incident, which occurred in August or September of 2003, Mr. Pasaluko tripped over some scrap lumber in the maintenance building, while attempting to retrieve some metal poles to rope off an area on the course. He swore and threw the materials into a dumpster. Mr. Trenholm yelled at Mr. Pasaluko "you're a fucking goof", and then "look at me like that and your time is coming." Mr. Trenholm explained at the hearing that he had just spent a number of hours cleaning up the pile, and that Mr. Pasaluko was having a temper tantrum and was staring at him.

[26] Mr. Doyle saw Mr. Trenholm on men's day at the golf course, after the incident. This may have been the Saturday following the Thursday incident. By that time as Mr. Doyle put it, "the rumour mill had gone wild." Mr. Doyle walked over to where Mr. Trenholm was standing on the green and he had quite a few scratches on his face which Mr. Doyle described as road rash. He asked him "where he got it" and he is pretty sure that Mr. Trenholm said "I guess I resisted arrest." Mr. Doyle was asked by counsel whether this was consistent with road rash from resisting arrest or being punched. Mr. Doyle was an RCMP officer for many years prior to his retirement and has many times arrested suspects who did not wish to be arrested. In his view the marks were consistent with Mr. Trenholm's face being pushed onto gravel. He did not recall seeing any cuts on Mr. Trenholm's face; there may have been. Mr. Doyle does not appear to have noticed any cuts on Mr. Trenholm's face. Mr. Trenholm did not advance his theory that he had cuts on his face from being punched by Mr. Pasaluko. Mr. Doyle was not surprised that there had been a fight between Mr. Trenholm and Mr. Pasaluko; that Mr. Trenholm ended up in jail, and Mr. Pasaluko ended up at the

hospital. He said words to the effect that "us Irish guys were taught to finish a fight." He also said after referring to Wayne:

> *He has a history. If there is a fight, he is not going to back down and quit until it is over. He will tell you himself, "not until it's over, that is how us Irish guys were taught. That is how my dad taught me; if you have to fight don't stop until it is over".*

When Mr. Doyle left the golf course on October 2, 2003, he had no idea that Mr. Pasaluko or Mr. Trenholm would be involved in a physical altercation.

[27] On another occasion, in the summer of 2003, Mr. Pasaluko was driving a core harvester machine, near the number 12 green. Mr. Trenholm approached him and said "he was sick and tired of me saying things about him". Mr. Pasaluko indicated that Mr. Trenholm was "pissed off and he was leaning into me so I couldn't get off the machine, I put my hands up, and he slapped them away and said get your hands out of my face." On this occasion, Mr. Trenholm challenged Mr. Pasaluko to a fight outside the golf course property. Mr. Trenholm later apologized to Mr. Pasaluko for this assault.

[28] The employer did not discipline either employee in relation to these two incidents.

[29] The employer's policy on discipline (Exhibit E- 16) contemplates an investigation of misconduct. The extent and complexity of the investigation will depend on the complexity of the incident. Ms. Dagenais indicated that since the military police had investigated the incident, the employer did not conduct its own separate investigation.

[30] The employer's policy contemplates a disciplinary hearing for all misconduct that could result in the imposition of a disciplinary penalty (Exhibit E- 16, paragraph 22). The employer eventually held a disciplinary hearing on February 19 and 20, 2004. The proceedings were delayed at the request of the bargaining agent's representative to "hold off" on its investigation pending the court case.

[31] Mr. Trenholm filed two written statements in this matter; November 5, 2003 (Exhibit E-23) and February 19, 2004 (Exhibit E-22). The two statements gave different versions of the assault. The first written statement did not contain any allegation that

Mr. Pasaluko insulted Mr. Trenholm's parents. The second statement included an allegation that Mr. Pasaluko insulted Mr. Trenholm's parents.

[32] Mr. R. Curren, a regional manager, conducted the hearing. Mr. Curren heard from Mr. Pasaluko and Mr. Trenholm as well as three co-workers, none of whom was a witness to the assault. Mr. Curren made the following findings in a letter dated March 31, 2004 (Exhibit E-3):

. . .

> *By virtue of your own admission, you assaulted Mr. Pasaluko on the evening of 2 October, 2003 in the workplace, as alleged. While your evidence differs from Mr. Pasaluko's as to which of you initiated the altercation and assaulted the other first, it is clear from uncontradicted evidence given by both of you that you punched Mr. Pasaluko and that you continued to deliver two further kidney punches to his back after he had withdrawn and was in fact curled up on the floor in the fetal position.*
>
> *Whether one accepts your evidence or the evidence of Mr. Pasaluko's regarding how the fight started, I find that in any event you clearly assaulted Mr. Pasaluko and that you used excessive force in the circumstances. Even were I to find that you were provoked as you allege, or that you were acting in self-defence as you further allege, one is legally justified only in using as much physical force as is reasonably necessary to stop another person from assaulting them when defending themselves. It is clear that, in the circumstances and by your own admission, you continued to physically assault Mr. Pasaluko in circumstances where there was clearly no real threat that he would assault or harm you. I find that the force you used in assaulting Mr. Pasaluko was excessive and not reasonably justifiable. . . .*
>
> *Given the potential severity of this matter, and the multiplicity of factors to be considered in assessing the appropriate disciplinary penalty to be imposed in this case, I shall refer the matter back to the Glacier Greens Golf Course and Country Club Manager for a decision concerning the appropriate penalty in this situation.*

. . .

[33] Mr. Trenholm's employment was terminated by Y. Bossé, Lieutenant-Colonel Wing Administration officer for Wing Commander, by letter on April 30, 2004 (Exhibit E-2). The decision regarding the disciplinary penalty states in part as follows:

. . .

The evidence by your own admission, is that you assaulted Mr. Pasaluko and that you continued to assault him after he had withdrawn from the altercation and was curled up on the floor in a fetal position. The hearings (sic) officer, Mr. Curren, found that you continued to physically assault Mr. Pasaluko in circumstances where there was clearly no real threat that he would assault or harm you, and that the force you used was excessive and not justifiable. Despite being provided the full opportunity to provide evidence and explain your actions at the disciplinary hearing, at which you were represented by your Union Representative, you failed to provide the Employer any viable or credible explanation for your actions, or with any firm basis upon which to mitigate the outcome of this matter.

This matter has been remitted to the Personnel Support Program chain of command for a recommendation concerning the appropriate penalty to be imposed in all the circumstances. I have thus reviewed the hearing officer's written decision in detail, along with the evidence given at the disciplinary hearing. I have taken into consideration the fact that you have been employed by the Staff of the Non-Public Funds (NPF) in your current capacity as a full time seasonal employee since 17 April 2001 and that, until the decision in this hearing, you had a clean disciplinary record.

This case involves a serious aggravated assault in the workplace by you against a fellow NPF employee. The assault resulted in bodily harm to the victim, who was hospitalized thereafter. The victim is frightened of you and remains so to date. Even assaults of a lesser nature in the workplace are seen as severe and weighty in the labour and employment context and are generally sufficient in and of themselves to result in termination of the perpetrator's employment for just cause, without payment of notice or severance or the need for progressive discipline.

I understand that your evidence was that you were provoked into assaulting Mr. Pasaluko, which was not specifically accepted or denied by the hearings officer in light of your admission of the facts. Even if the Employer was to believe and accept your proposed defence of provocation in this matter, which it has not on record, such would only potentially be sufficient to mitigate the penalty for your initial assault. There is no evidence in any way (sic) justify or mitigate the fact that, by your own admission, you continued to deliver two "kidney punches" to the victim after he had retreated and was curled up lying on the ground in a fetal position, and that you continued to goad him to "Get up and fight like a man". The force you used was clearly excessive and unjustifiable in the circumstances.

> *The evidence in this matter thus confirms that you are a potential danger to your fellow employees in the workplace. You have proven yourself to be either unwilling or unable to work cooperatively with your co-workers, and demonstrated a complete lack of respect for the safety ad well-being of another employee. Your conduct has clearly brought the GGGC and 19 Wing activities into disrepute.*
>
> *This is of an extremely serious nature and sufficient to justify serious action by the Employer at this time. This situation is untenable. In the circumstances, I have no alternative but to terminate your employment effective immediately for just cause.*
>
> . . .

[34] The employer received a grievance from Mr. Trenholm dated May 31, 2004. It is common ground that the grievance was filed within the time limit for the filing of a grievance under the collective agreement. As it was a termination grievance, Ms. Dixon treated the grievance as a third level grievance and sent it to headquarters. Mr. John F. Geci, President and CEO of CFPSA, replied to the grievance as follows on June 15, 2004:

> . . .
>
> *I have reviewed your grievance and the circumstances surrounding your dismissal. You admitted to the Hearing Officer at your discipline hearing that you assaulted a co-worker at a work related function. I find nothing in the facts that would mitigate or excuse your behaviour. Discipline was warranted.*
>
> *Violence in the workplace is unacceptable behaviour and will not be tolerated by CFPSA. Consequently, your grievance is denied.*

[35] At the time of the assault, Mr. Trenholm was awaiting trial on two separate additional assault charges. In April 2004, he was convicted of an assault on a person on July 6, 2003.

[36] On January 19, 2006, after the close of the employer's case, Mr. Gerow applied for an adjournment of the case to interview, and called a witness, Glen Meers, also an employee at the golf course. After hearing argument, and a brief reserve, I denied the adjournment, and I gave an oral ruling, which I have reduced to writing in this decision. I have also added the case references which I had in mind at the time of giving my ruling. The oral ruling, reduced to writing is as follows:

An adjournment was sought to enable counsel to ascertain the availability of the witness Glenn Meers. This witness has not been interviewed by Mr. Gerow l, and does not appear to be under subpoena. Because counsel has not interviewed the witness counsel cannot say with precision what the evidence will be. The witness appears to have suffered a heart attack.

The bargaining agent wishes to call Mr. Meers for two reasons. The first reason is to testify that there was a bad working relationship between Mr. Pasaluko and Mr. Trenholm. That evidence is already before me from at least two witnesses and there is also evidence that Mr. Pasaluko was not well liked by certain employees at the golf course. There is nothing particularly to be gained by further evidence on this point, and I am not prepared to grant an adjournment for this further evidence. There is more prejudice to the employer than to the employee if I grant the adjournment.

The bargaining agent also wishes to call Mr. Meers for the purpose of establishing theft of gas and that Mr. Pasaluko lied under oath at this hearing. The focus of this hearing is whether Mr. Trenholm assaulted Mr. Pasaluko on Oct 3, 2003. The assault is alleged to have taken place at a golf function, or an employer's function. There is no apparent connection to gasoline or gas pumps, or theft of gasoline, in the assault allegations.

I note that it was never put to Mr. Pasaluko that he had made up the story about the assault because Mr. Trenholm was a whistle blower about gasoline theft. It was never suggested to Mr. Pasaluko that he was lying about the events to get even with Mr. Trenholm or that he fabricated what happened because of the allegations of being a whistle blower. This allegation does not appear to be referenced in the results of the disciplinary hearing set out in E-3 the March 31, 2004 letter. [1]

The gas point appears to be a matter of general credibility of the witness. Overall, in my view, the evidence relating to the gasoline appears to be irrelevant, and collateral, and the theory of the case was not clearly put to Pasaluko in cross examination

Counsel for the employer has suggested that it is irrelevant to the issue of what occurred on Oct 2nd allegation of assault. There is no connection in time or any factual connection between the alleged theft of gasoline and the assault. In my view the allegation of gasoline theft is collateral to the issue

[1] After reviewing my notes it is also clear that Mr. Pasaluko was never confronted about the theft of gasoline in a blunt manner. He said that he heard about this at the criminal court.

of the assault. The collateral facts rule [can be briefly stated as]:

A witness can be asked about any fact. But if denied, it is not necessarily open to call contradictory proof, if the contradictory proof is being called solely for the purpose of general credibility.

I am not strictly bound by rules of evidence but in my view it is a sound principle and is focussed on fairness to the witness and relevancy. I will be reducing my ruling to writing in the decision and will be referencing the appropriate case authority.

Fundamentally the evidence sought to be tendered in my view is relevant only to the issue of credibility and not to any issue on the assault itself, it is caught by the collateral facts rule, and I am not going to permit an adjournment to pursue this evidence, particularly where:

- the witness has not been interviewed

- the evidence is speculative

- there is a real question as to whether this evidence is admissible

- it is not necessary to establish a bad working relationship or dislike between these two employees as this is already in evidence.

In my view there is little or no prejudice to Mr. Trenholm in refusing the adjournment. He is the principal witness for himself in this case. Light on this case can only be shed by Mr. Trenholm and Mr. Pasaluko. This case turns on what happened on October 2nd and any surrounding mitigating factors. The evidence of mitigating factors would come principally from Mr. Trenholm.

Bearing in mind that this is a discharge case with serious potential consequences to Mr. Trenholm, the collateral facts rule is one applied by the criminal courts in circumstances of equal or more seriousness. This rule makes good sense; when dealing with issues of general credibility a party is stuck with the answer a witness gives and is not permitted to call contradictory proof.

I have concerns about the length of time to get this case on for hearing. It is about 2.5 years since the dismissal. There is liability accruing to the employer should I find the dismissal is wrongful or without just cause. It has taken almost seven months to get this case on for hearing following a decision on timeliness. There is no guarantee if the adjournment is

> *granted that this hearing can be concluded in a timely way. I am therefore denying the adjournment.*

[37] At the hearing, I did not have at my fingertips the case citations which I was relying upon for my ruling. The collateral facts rule is set out in *The Attorney-General v. Hitchcock*, [1847] 154 E.R. 38 (Exchequer Court). The "rule" in *Browne v. Dunn* (1894), 6 R. 67 (H.L.) is set out as follows:

> *Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross- examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.*

[38] Mr. Pasaluko was never directly confronted about theft of gasoline from the employer during his cross-examination, and the evidence was that he had first heard about this at court in criminal proceedings involving Mr. Trenholm. I surmise this occurred at the hearing when the Provincial Court Judge struck Mr. Trenholm's guilty plea to the assault involving Mr. Pasaluko, and substituted a plea of not guilty and the Provincial Court Judge ordered the matter to proceed to trial. The evidence was not particularly clear on the point of when Mr. Pasaluko learned of the allegation of gas theft. The tenor of the evidence was this was during the criminal proceedings. The point is that Mr. Pasaluko was not directly confronted with issue of the alleged gasoline theft, or any of the bargaining agent's theory.

Summary of the arguments

For the employer

[39] During a party at the workplace employees have a duty to conduct themselves in a manner that does not adversely affect the interests of the employer: *Séguin v. House of Commons*, 2001 PSSRB 37. Applying the *Millhaven* test, the off duty conduct

of Mr. Trenholm justifies the imposition of discipline: *Casey v. Treasury Board (Public Works and Government Services Canada)*, 2005 PSLRB 46. The evidence demonstrates that Mr. Trenholm used excessive force in the assault, even if the adjudicator accepts the grievor's version of the assault: *R. v. Jobidon*, [1991] 2 S.C.R. 714. In the absence of extenuating circumstances, a physical assault that undermines the employer's authority is worthy of some discipline: Brown and Beatty, *Canadian Labour Arbitration*, Third Edition. While there may have been a problem between these employees, there is no defence of provocation: *Regina v. Squire* (1975), 26 C.C.C. (2d) 219 (Ont. C.A.). There is no immediacy or connection in time between the events claimed to be provocative and the assault: *Verigin v. Regnier*, [1996] B.C.J. No. 2130 (Q.L.). A defendant may be criminally liable for excessive force, where the force applied was unnecessary to prevent any further assault by the victim: *R. v. Assiniboine*, [2005] B.C.J. No. 1550 (Q.L.). The defence of self-defence, however, is not available to combatants engaged in a consensual fist fight: *R. v. Paice*, [2005] 1 S.C.R. 339. There is no evidence of extreme intoxication amounting to automatism that could constitute a defence: *R. v. Daviault*, [1994] 3 S.C.R. 63; *Pocket Criminal Code*, (Thompson Canada Limited, 2002), s. 33.1(1). Voluntarily induced intoxication is not a defence to a general intent crime such as assault: *R. v. Cedeno*, 2005 ONCJ 91, *Black's Law Dictionary*, 7th Edition, (St. Paul, Minn.: West Group, 1999). By analogy, an employee who commits an assault on another employee cannot raise self-defence as a legitimate defence where excessive force is used, or consent where bodily harm is inflicted. Intoxication does not mitigate an assault on a fellow employee. Once an assault is proven, the onus is on the defendant to establish his defence: *Miska v. Sivec*, [1959] O.R. 144 (Ont. C.A.); *Bettel et al. v. Yim* (1978), 20 O.R. (2d) 617 (Dist. Ct). The employer says that it is not possible to reintegrate Mr. Trenholm in this small workplace, as the work of the golf course requires the cooperation of both parties, and Mr. Pasaluko should not have to work with Mr. Trenholm. Having the safety of its employees in mind, as well as its responsibility to maintain a safe work environment, the termination of Mr. Trenholm's employment is justified: *Re Retail, Wholesale, etc., Workers, Local 461 v. Canadian Food Products Sales Ltd.* (1966), 17 L.A.C. 137; Re *Dominion Glass Co. v. United Glass & Ceramic Workers, Local 203* (1975), 11 L.A.C. (2d) 84. There is no true remorse, and no apology and therefore the grievor should not be reinstated: Re *Metropolitan Toronto (Municipality) v. C.U.P.E., Local 43* (1990), 14 L.A.C. (4th) 355.

[40] The employer says that all the factors in the case of Re *Millhaven Fibres Ltd, Millhaven Works, Oil, Chemical and Atomic Workers International Union, Local 9-670* (1967), 1(A) Union-Management Arbitration Cases 328, are present: (1) the conduct of the grievor harms the company's reputation or product; (2) the grievor's behavior renders the employee unable to perform his duties satisfactorily; (3) the grievor's behavior leads to refusal, reluctance or inability of other employees to work with him; (4) the grievor has been guilty of a serious breach of the *Criminal Code* and thus rendering his conduct injurious to the general reputation of the company and its employees; (5) the grievor's behaviour places difficulty in the way of the company properly carrying out its functions of efficiently managing its works and efficiently directing its working forces (the *Millhaven* criteria).

[41] The employer further submits that the base commander determined that Mr. Trenholm cannot be permitted on base property, and as a result it cannot reinstate Mr. Trenholm. In summary, the employer has a legitimate interest to protect employees and clients in the workplace. Mr. Trenholm has shown no remorse and there is no evidence of treatment for anger issues. Mr. Trenholm's method of resolving conflict is to use threats and violence. His criminal record demonstrates a predilection for violence. The employer has no ability to separate Mr. Pasaluko and Mr. Trenholm in the workplace. Mr. Pasaluko has a genuine fear of Mr. Trenholm, and has testified that he will quit if Mr. Trenholm is reinstated. The employer should not be exposed to the possibility of harassment claims, or claims of constructive dismissal if Mr. Trenholm is reinstated and Mr. Pasaluko quits his employment.

[42] The employer submits that should I find that just cause for discharge is not made out, I should sever the employment relationship and award damages.

For the Bargaining Agent

[43] The bargaining agent submits that the employer has alleged serious criminal conduct by the grievor. Given the serious allegation and consequences to the grievor, the adjudicator must scrutinize the evidence carefully to ensure that the balance of probabilities standard is met: *School District No. 33 (Chilliwack) v. Chilliwack Teachers' Association* (1990), 16 L.A.C. (4th) 94 (Hope). As the Board decided in *Séguin*, there must be clear and cogent evidence. Applying the standard in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), in the examination of the evidence, Mr. Trenholm's evidence was credible and I should accept his evidence as to how the fight started, and what

happened during the fight. He didn't start the fight, but he finished the fight. The assault is mitigated by the relationship of dislike between these two employees, developed over time, and the provocative words or insults regarding the grievor's parents spoken by Mr. Pasaluko just before the fight.

[44] The bargaining agent submits that Mr. Pasaluko did not give credible evidence. He was not a person who gave "straight answers" to others. He qualified and shifted many of the answers to the questions asked at the hearing. He lied about a petition that he prepared complaining about a former supervisor and about wanting to get the former supervisor in a "cage match".

[45] Applying the usual analysis in a case involving termination of employment, the bargaining agent concedes that the conduct of Mr. Trenholm merits some discipline: *Brown and Beatty*, para. 7:3430. The disciplinary response of the employer was, however, excessive in the circumstances. Given that Mr. Trenholm has some seniority, and has a clean employment record, the disciplinary sanction should be remedial in nature, and should correct Mr. Trenholm's behaviour rather than punish him. Setting aside the fight, Mr. Trenholm is the type of dedicated employee any employer would want at the workplace. The proper disciplinary sanction is reinstatement, with a one month suspension, and back pay. The bargaining agent asks that I reserve jurisdiction over the implementation of this decision.

[46] The *Millhaven* factors are not present in this case.

[47] There is no evidence in this case of risk of loss of life, and both employees had marks on their faces. There was no potential for serious injury, and Mr. Trenholm did not use a weapon. There is no evidence in this case that the fight undermined the employer's authority, presented any danger to a member of the public, or prejudiced the public image of the employer: *Smith v. Treasury Board (Canadian Penitentiary Service)*, 21 L.A.C. (2d) 411. The fact that criminal charges have been laid is irrelevant to the resolution of this employment issue. An altercation between two employees, who have no supervisory authority over the other is a less serious form of assault. As reported in the extract of *Brown and Beatty*, at paragraph 7:3430 in footnote 13 in over half the reported awards suspension was the appropriate sanction. Several factors mitigate the seriousness of the assault. Mr. Trenholm had the intention of going home; he did not seek out Mr. Pasaluko and did not leave the social centre with the intention of getting into a fight with Mr. Pasaluko. There was provocation as Mr. Pasaluko said

to Mr. Trenholm "you are a loser just like your mom and dad." The employer did not call rebuttal evidence and Mr. Trenholm's evidence therefore ought to be accepted. The initial blow was struck by Mr. Pasaluko who sucker punched Mr. Trenholm. Mr. Trenholm had no intent to maim or injure Mr. Pasaluko; the final blow was struck to see if the fight was over. Mr. Trenholm should not be punished because he won a fight started by Mr. Pasaluko.

[48] The employer did not follow its own disciplinary guidelines and this was prejudicial to Mr. Trenholm. The employer did not follow sound labour relations practice by investigating what happened, and obtaining Mr. Trenholm's side of the story. It was a long time before he was able to give his side of the story.

Reply for the Employer

[49] The employer says that no negative inference can be drawn from the employer's decision not to call rebuttal evidence. The employer relies on the strength of the evidence adduced in its case. This is not a case where Mr. Pasaluko went looking for Mr. Trenholm to fight him, therefore nothing can be drawn from the fact that both parties ended up in the same place where the assault occurred. The grievor has given a number of different versions as to how the fight occurred, and he ought not to be believed. Mr. Pasaluko's testimony withstood cross-examination. No mitigating factors have been shown. A penalty of a one month suspension for a serious assault sends the wrong message to employees in the workforce.

Reasons

[50] Mr. Trenholm is a conscientious employee. Mr. Trenholm also had an unblemished work record. He, however, tends to be a perfectionist. He was unhappy with how Mr. Pasaluko and other employees performed their duties at the golf course. There is no evidence that Mr. Trenholm had interpersonal difficulties with employees other than Mr. Pasaluko. Mr. Trenholm provided the manager with his complaints about Mr. Pasaluko's job performance. Mr. Trenholm did not observe the manager doing anything about his complaints, and that frustrated him.

[51] It is clear from the evidence that Mr. Trenholm's conduct warrants some degree of discipline in the circumstances of this case. The questions in this case are whether discipline was an excessive sanction in the circumstances, and whether an alternative sanction should be substituted if the discipline was excessive. In my view, the

termination of Mr. Trenholm's employment was not an excessive employer response. There was just cause for the employer to terminate Mr. Trenholm's employment and therefore it is unnecessary for me to consider alternative sanctions.

[52] As I have found that there is just cause for dismissal, there is no need for me to consider the employer's argument that Mr. Trenholm's criminal record, possible loss of his security status, and the order of the base commander not to attend on the base are reasons why reinstatement to the position cannot be directed by me.

[53] As of October 2, 2003, Mr. Trenholm was facing two other assault matters involving persons and incidents unconnected with the October 2, 2003, incident. These were not assaults in the workplace. By April 20, 2004, Mr. Trenholm was convicted of one of the assaults. The status of the other assault charge is unclear. In my view, an assault conviction for an offence unrelated to a work place incident does not demonstrate that Mr. Trenholm has a propensity for violence, and that he probably assaulted Mr. Pasaluko. I am not prepared to draw any inference from the fact that he is facing assault charges. In our criminal justice system, unless a person is able to admit to the essential facts of an offence alleged by the Crown, a trial is required, as the Crown is bound to establish the guilt of the accused person to a standard beyond a reasonable doubt. Mr. Trenholm is entitled to his criminal trial with respect to the transaction involving Mr. Pasaluko, and transactions involving other persons. If he had been convicted of the offence at the time of the hearing that would have been some evidence from which I could have inferred that he assaulted Mr. Pasaluko.

[54] There can however be multiple consequences arising from an incident such as the present one including criminal charges, civil action for damages for battery, and a termination of employment. My only jurisdiction is to determine whether the employer has established just cause for dismissal on a balance of probabilities. The fact that Mr. Trenholm is facing criminal charges is irrelevant to my task as adjudicator. He has not yet been convicted or acquitted of those charges. I must, however, make an assessment of the seriousness of the conduct involving Mr. Pasaluko.

[55] Further, the fact that Mr. Trenholm has other criminal convictions for assault, or was awaiting trial for other criminal convictions at the time of the assault of Mr. Pasaluko is not evidence which assists me in determining whether Mr. Trenholm assaulted Mr. Pasaluko on October 2, 2003. The events surrounding the earlier assault

charges appear to be substantially different than the facts alleged in the assault of Mr. Pasaluko.

[56] Finally, the fact that Mr. Trenholm withdrew a plea of guilty and proceeded to trial on the charges involving Mr. Pasaluko is irrelevant to whether the employer has proven cause. A criminal conviction arising from the fight might be evidence that would bear on the *Millhaven* criteria, and proof of the assault. He apparently entered a plea of not guilty initially and was represented by a lawyer. On the trial date, his first lawyer advised him that he had no defence, and consequently he changed his plea to guilty. During the course of his dealings with the probation officer at the time of the preparation of a pre-sentence report, it appears that the probation officer reported that he did not admit to the facts alleged, he obtained advice from another lawyer and he applied to the Provincial Court Judge to strike the guilty plea and set the matter for trial. This application was granted and Mr. Trenholm entered the plea of not guilty and when the hearing took place he was awaiting trial.

[57] This is a case which involves the assessment of credibility as there are two different versions as to how the assault started, and what happened during the assault. I have considered and applied the test in *Faryna v. Chorny* at page 356 on the issue of Mr. Trenholm's and Mr. Pasaluko's credibility:

> *The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.*

> *The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.*

[58] I do not accept Mr. Trenholm's evidence. As I have outlined below, Mr. Trenholm is a person with a short fuse. In his story, Mr. Pasaluko bumped into him in the hallway, and Mr. Trenholm said "watch it", Mr. Pasaluko insulted his parents, hit him in the face, and Mr. Trenholm finished the fight. Mr. Trenholm denies poking Mr. Pasaluko in the eyes, as Mr. Pasaluko alleged. Mr. Trenholm claims that Mr. Pasaluko sustained some of his injuries by hitting a two by four stud wall and not a door as Mr. Pasaluko alleged.

[59] Mr. Trenholm's version of the assault is not probable. There is no past history between these parties which suggests that Mr. Pasaluko was the aggressor in his dealings with Mr. Trenholm. Mr. Trenholm is clearly a man with a short fuse with regards to his temper. Mr. Trenholm does have a history of instigating aggressive dealings with Mr. Pasaluko. The two earlier incidents between Mr. Pasaluko and Mr. Trenholm demonstrated Mr. Trenholm's short fuse. In the maintenance shop after Mr. Pasaluko tripped over some wood scraps, that had been organized by Mr. Trenholm, Mr. Pasaluko swore and threw the wood out of his way. Mr. Trenholm said "you are a fucking goof, and yeah look at me again like that and your time is coming and it will be coming quick." In my view, while this was not a battery it was an assault. It was a threat to cause harm to Mr. Pasaluko. It indicates that Mr. Trenholm is easily irritated by conduct not particularly directed at him and by non-verbal cues such as "looks". In a later incident, on the golf green, Mr. Trenholm confronted Mr. Pasaluko on the number 12 golf green, and leaned into Mr. Pasaluko in a manner that can only be described as intimidating. When Mr. Pasaluko put up his hands to get Mr. Trenholm to back off, Mr. Trenholm hit his hands, and said "get your hands out of my face." It is ironic because it appears that Mr. Trenholm had invaded Mr. Pasaluko's personal space, had him trapped in the vehicle, and then assaulted Mr. Pasaluko. This was a minor assault but nevertheless shows that Mr. Trenholm is easily irritated and when irritated has responded violently to Mr. Pasaluko. Mr. Trenholm also expressed

his interest in a further violent confrontation with Mr. Pasaluko outside the employer's gates. There was an incident in the maintenance shop. There was an incident on the greens, where Mr. Trenholm invited Mr. Pasaluko to step off the employer's property so that they could "settle the dispute like gentlemen." There is no evidence of past bullying of Mr. Trenholm by Mr. Pasaluko.

[60] On the evidence of both parties, it was Mr. Trenholm that was arrested and not Mr. Pasaluko. The mere fact of an arrest is not proof of an assault on Mr. Pasaluko. Separate and apart from the issue of whether Mr. Trenholm resisted arrest, even on his own evidence he was aggressive with the military police who investigated; Mr Pasaluko was not. This seems to fit with my impression of Mr. Trenholm; that he is a person with a short fuse.

[61] I do not accept Mr. Trenholm's evidence that Mr. Pasaluko said to him "you are a loser like your mom and dad." There is no reason as to why Mr. Pasaluko would have said that. There is no evidence that Mr. Pasaluko knew Mr. Trenholm prior to Mr. Trenholm starting work at the golf course. There is no evidence that Mr. Pasaluko knew Mr. Trenholm's parents. The bargaining agent never suggested to Mr. Pasaluko during his cross-examination that he instigated the fight by insulting Mr. Trenholm's parents. These acts of provocation were not raised by Mr. Trenholm in his first written statement to Mr. Vicic, a representative of the bargaining agent on November 5, 2003.

[62] There is clinical verification of all the injuries suffered by Mr. Pasaluko. Mr. Trenholm's story is inconsistent with the injuries confirmed by the oral testimony of Mr. Pasaluko and corroborated by the medical and hospital reports. There was multiple trauma to Mr. Pasaluko's face, and on Mr. Trenholm's testimony, the trauma is not explained by the force that he admits having applied on Mr. Pasaluko. If Mr. Trenholm's story is accepted, it offers no real explanation for Mr. Pasaluko's eye injury, as Mr. Trenholm does not admit to hitting Mr. Pasaluko in the eyes. He only admits to one blow to the side of the face.

[63] On Mr. Trenholm's story there is no explanation for the cut to Mr. Pasaluko's face in the lower lip area which required eight stitches. Thirdly, on Mr. Trenholm's story, there is no real explanation of the mechanism of injury for Mr. Pasaluko's shoulder injury. Mr. Trenholm's only explanation is that the documents and medical evidence is fabricated; the doctors simply wrote down what Mr. Pasaluko told them, or the injuries were self caused. In my view, it is improbable that a person would poke

one's self in the eye to fabricate proof of an injury. In Mr. Trenholm's version, nothing that he did would have caused the eye injury. I do not accept his theory that Mr. Pasaluko poked himself in the eye. This explanation lacks any aura of reality. In summary, Mr. Trenholm's evidence is inconsistent with the evidence of the physical injuries and improbable. The facial abrasions, bruises, cuts and back injury were also noted by the emergency room physician shortly after the assault; there was little opportunity for Mr. Pasaluko to fabricate his injuries.

[64] Mr. Trenholm's story is inconsistent with the injuries suffered by Mr. Trenholm. In his version of the events, he had a cut on his face from Mr. Pasaluko's blow. Mr. Doyle, a retired RCMP officer, employed at the golf course, saw Mr. Trenholm the day after the fight and saw damage consistent with his face being pushed into the gravel on a resisted arrest scenario. In my view, if there was a cut there to be seen Mr. Doyle would have seen it. As a former RCMP officer, he is a trained observer. He was a person who seemed to have no axe to grind. It is also my sense that he found Mr. Trenholm the more likeable of the two employees, and his evidence to Mr. Trenholm was scrupulously fair.

[65] Mr. Trenholm explained how he got the injuries to his face to Mr. Doyle as relating to his arrest by the military police. Mr. Trenholm did not explain to Mr. Doyle that he was hit by Mr. Pasaluko. There was no duty to Mr. Trenholm to explain to Mr. Doyle that he was hit by Mr. Pasaluko. He explained however that his face was injured in the arrest and not in an earlier fight with Mr. Pasaluko and a subsequent arrest by the military police. I put more weight on his earlier explanation. It is more likely to be true because it was advanced earlier in time. The explanation he advanced at the hearing with time for reflection, in my view is less likely to be true.

[66] Mr. Murphy testified that after the fight he observed Mr. Trenholm the next day and he had road rash on his face and a cut over his left eye. This testimony tends to confirm the injury that Mr. Trenholm says was caused by Mr. Pasaluko when he sucker punched him. I do not accept Mr. Murphy's evidence concerning a cut above the eye. He is a long-term friend of Mr. Trenholm, and played hockey with Mr. Trenholm. He was clearly a witness who was partial to Mr. Trenholm. In his own words he said:

> *I obviously dislike Larry. I don't like how he treats people, and as I stated earlier we don't talk at work.*

[67] Mr. Murphy demonstrated his dislike for Mr. Pasaluko in his relating of evidence about Mr. Pasaluko's ill-treatment of animals on the golf course property. This is evidence which tends to inspire contempt for Mr. Pasaluko, but has minimal probative value. Mr. Murphy had no real evidence which bore on the causes to the fight. He was not present at the fight. He was drunk on the night of the golf tournament. He had no inkling that there was a problem between Mr. Trenholm and Mr. Pasaluko that evening.

[68] I do not accept Mr. Trenholm's evidence as to how this assault occurred. In particular, I do not accept that Mr. Pasaluko hit Mr. Trenholm, that Mr. Trenholm was cut above the eye, and that Mr. Pasaluko insulted Mr. Trenholm's parents. I consider this to be recently contrived or fabricated testimony, which does not fit with the preponderance of probabilities.

[69] It is a mystery to me why Mr. Trenholm assaulted Mr. Pasaluko on that day. Clearly there was animosity between these two employees. It is not necessary for me to resolve this point. Both Mr. Trenholm and Mr. Pasaluko had consumed alcohol during the day and were not going to drive home. I conclude that both men were intoxicated to some degree. Both men disliked each other. The encounter in the maintenance shop was unexpected by both.

[70] As outlined earlier, the facts in this case are disputed. The employer bears the burden of proving the disputed facts on a balance of probability standard, and given the seriousness of the allegations there must be clear and cogent evidence. The task is made a little less challenging by the evidence concerning the degree of force applied by Mr. Trenholm to Mr. Pasaluko. I am satisfied as a matter of law, that the employer has, even on the evidence of Mr. Trenholm alone, proven to a balance of probabilities standard that Mr. Trenholm assaulted Mr. Pasaluko. Clearly, excessive force was used by Mr. Trenholm.

[71] Having rejected Mr. Trenholm's version of events during the assault, and particularly the blows struck, I do not accept his version of how the fight started. Mr. Pasaluko's version of the events was internally consistent and not significantly impacted by cross-examination. I find that this assault occurred in the manner alleged by Mr. Pasaluko.

[72] I am satisfied that the employer has proven an unprovoked assault by Mr. Trenholm upon Mr. Pasaluko, on a balance of probabilities. There was clearly a

difficult employment relationship between these two employees, however, I find nothing in the relationship which explains or mitigates Mr. Trenholm's actions on October 2, 2003.

[73] If this were a minor assault, I may have given some consideration to a lengthy period of suspension for Mr. Trenholm. This was a very serious assault which caused Mr. Pasaluko bodily harm; the injuries were neither transient nor trifling. Mr. Pasaluko was off work for two weeks, and still has a residual fear of Mr. Trenholm. The evidence establishes that Mr. Trenholm intentionally caused bodily harm to Mr. Pasaluko. It may not have been a premeditated act, but Mr. Trenholm knew that he was applying force, and the only conclusion that can be drawn is that he applied the force with the intent to cause injury to Mr. Pasaluko.

[74] Mr. Gerow argues that Mr. Trenholm should not be punished for "winning the fight." Clearly, as a matter of criminal law, a person can be held criminally responsible for excessive or unjustified use of force even when acting in self defence. I see no reason why this concept should not be applied in the employment law context. Even on his own story, this was not much of a fight, rather it was a beating that he gave Mr. Pasaluko. Of his own admission, he struck Mr. Pasaluko twice in the kidneys when Mr. Pasaluko was in a foetal position. Mr. Trenholm applied far more force than was necessary in the circumstances. On Mr. Pasaluko's evidence that I accept as it fits more with the injuries he suffered, it was a completely unprovoked and vicious attack. Mr. Pasaluko's evidence at this hearing was consistent with the report of his evidence at the disciplinary hearing.

[75] This assault did not occur during working hours, and it did not take place in a spot viewed by members of the public. There is no evidence concerning the first *Millhaven* factor of impairing the reputation of the golf course. There is no evidence that the fight deterred patrons from using the golf course.

[76] The grievor argued that the incident was unrelated to work. It happened at an employer sponsored function, on the employer's property, and the employer had permitted employees to leave work early to attend. The assault cannot be said to be unconnected with the employer's workplace or operation, as it took place in a building where all golf employees start and end their shifts, and eat their lunch. Further in my view, for the effective operation of a golf course there is a need for co-operation between an irrigation technician and a greens keeper as both individuals are required

to work together to keep the greens in shape for the functioning of a golf course. This is a small workplace and it is inevitable that Mr. Trenholm and Mr. Pasaluko will have contact. In my view the grievor's conduct and particularly his inability to deal with Mr. Pasaluko will impair the proper functioning of this golf course. While these employees were to a certain extent avoiding each other prior to the October 2, 2003, incident, it was a chance encounter on October 2, which resulted in a serious assault. A proper functioning golf course requires the work of the irrigation technician and the grounds keeper. If Mr. Trenholm cannot deal in a civilized manner with Mr. Pasaluko then he cannot effectively pass on information that Mr. Pasaluko needs to irrigate the course, and cannot accept information from Mr. Pasaluko that he needs to effectively maintain the grounds. This satisfies the fifth *Millhaven* criteria.

[77] Mr. Trenholm does not accept responsibility for his actions. Mr. Trenholm's theory is that the event was essentially set up by Mr. Pasaluko because he reported Mr. Pasaluko for misconduct. He thinks that "he was suckered" by Mr. Pasaluko into responding, and will not let himself be put into that situation again. It is clear that he has no empathy for Mr. Pasaluko and the injuries he caused to Mr. Pasaluko. He has sought to cast the blame for the assault on Mr. Pasaluko. I do not accept that there was any provocative conduct by Mr. Pasaluko on the night of the assault. Even if the assault started as Mr. Trenholm claimed, the degree of force that he used was excessive and unreasonable in the circumstances, particularly when Mr. Pasaluko was on the ground and offering no apparent resistance.

[78] In my view, there is no real remorse exhibited here that might mitigate the punishment imposed by the employer. It appears from the viciousness of the assault, particular the kick to the face, and multiple punches, that Mr. Trenholm lacks self-control. The combination of lack of remorse and lack of self-control, together with Mr. Trenholm's clear lack of respect for Mr. Pasaluko, in my view poses a continuing danger to Mr. Pasaluko. While there is no evidence that Mr. Trenholm has threatened other employees, it is apparent that he has an anger management problem, that he acts on that anger in a violent way, and lacks proper control of his temper. There is no indication that he recognizes this as his problem. In fact, the evidence tends to demonstrate that he has a rigid approach to what is right and what is wrong, and that he considers fighting or physical force to be an appropriate response when he has been wronged. The lack of insight into his problem, presents a risk to other employees in the workplace. Given that I am left with no real understanding as to why he

assaulted Mr. Pasaluko and why he continued to apply force after it should have been clear to any reasonably objective bystander that Mr. Pasaluko presented him with no risk of harm, it would be dangerous to Mr. Pasaluko and to other employees to put Mr. Trenholm back in the workplace.

[79] Further it is apparent that while Mr. Trenholm has not had difficulties in getting along with others, his behaviour in this incident causes me significant concern that he is unable to work with others, that he presents a risk to others, and in particular to Mr. Pasaluko. In my view this renders him unable to perform his duties satisfactorily, satisfying the second *Millhaven* criteria. Mr. Pasaluko refuses to work with Mr. Trenholm if he is reinstated. I am satisfied that he is genuinely afraid of Mr. Trenholm, and will probably quit if Mr. Trenholm is brought back to the golf course. This satisfies the third *Millhaven* criteria.

[80] In summary, while the grievor has not yet been acquitted or convicted of a criminal offence, I am satisfied that Mr. Trenholm committed a serious assault that caused bodily harm. His reasons for the assault are unclear, but this was clearly an unprovoked vicious assault involving at least one kick to the head and multiple punches to the face. Mr. Pasaluko was off work for two weeks because of his injuries. Mr. Trenholm was not candid in his evidence concerning the assaults and admits to only one blow to the face and two blows to the kidneys. I am satisfied that the employer has satisfied the second, third, and fifth *Millhaven* criteria, any one of which may justify a termination of Mr. Trenholm's employment. For the reasons expressed above, I am satisfied that the employer has proven just cause to terminate Mr. Trenholm's employment.

[81] The bargaining agent raised the argument of a procedural breach of Mr. Trenholm's rights and a breach of the employer's policy. This argument was not well developed at the hearing. It appears that the employer did not conduct its own investigation separate and apart from the criminal investigation, and proceeded directly to a disciplinary hearing. If this was a breach of the policy, then it is difficult to see how Mr. Trenholm's rights were affected, as he was given an opportunity to present his information at the disciplinary hearing, he was represented by a bargaining agent representative, and has been able in this adjudication process to challenge the employer's termination of employment decision.

[82] In a discharge hearing before a Board adjudicator, the employer bears the burden of establishing just cause, and it is open to the employee to raise defences including procedural defences. A hearing before an adjudicator is a hearing *de novo* which may cure procedural errors at the investigative stage. The adjudicator is not bound by the conclusions reached by the employer during its investigation either with regard to the employee's liability for discipline or the quantum of discipline, as the employer is required to prove its case on a balance of probabilities at a hearing. Having reviewed the investigation, however, it is my view that Mr. Trenholm knew the nature of the allegation, had representation by his bargaining agent, and had the opportunity to provide information to the independent person who determined that an assault had occurred. It was at his request, and in his interest that the investigation was deferred as a result of a police investigation which resulted in criminal charges. I am not bound by the conclusion of the investigator. I give no weight to the conclusion of the investigator. I am, however, not satisfied that there was any procedural error which affected Mr. Trenholm's rights. If there was a procedural error, it has been fully cured by this adjudication hearing, where Mr. Trenholm had the opportunity to cross-examine the employer's witnesses, give evidence, and make argument.

[83] It is unfortunate for Mr. Trenholm that he will not be able to work for this employer, as steady work is apparently difficult to come by in the Comox Valley for a person with Mr. Trenholm's limited training and education. There may well be financial consequences to him from the suspension and ultimate loss of this job. As an employee, he had some seniority with the employer; however, he is not a long term employee. While I am sympathetic to the fact that he appears to have a difficult life, and that there have been financial consequences to him of losing this employment, I see no reason to interfere with the employer's decision.

[84] For all of the above reasons, I make the following order:

(The Order appears on the next page)

Order

[85] I therefore direct that the grievance be dismissed.

June 1, 2006.

Paul Love,
adjudicator