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Files: 566-02-420, 421, 710 and 1777

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*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

RAYMOND ROBITAILLE

Grievor

and

**DEPUTY HEAD
(Department of Transport)**

Respondent

Indexed as
Robitaille v. Deputy Head (Department of Transport)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: [Michele A. Pineau, adjudicator](#)

For the Grievor: [Fernand Guérette, counsel](#)

For the Respondent: [Adrian Bieniasiewicz, counsel](#)

Heard at Montreal, Quebec,
January 8 to 11, February 26 to 28, March 25 and 26, May 6 to 8, July 2 to 4 and 9 to 11,
August 26 to 29, October 7 to 10 and 28 to 30, and November 3, 2008
and January 7, 8, 20, 21 and 23 and February 16, 2009.
(PSLRB Translation)

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I. Introduction

[1] The grievor, Raymond Robitaille, is Manager, Surface Services, Quebec Region, for the Department of Transport (“Transport Canada” or “the employer,” depending on the context). The grievor has worked for Transport Canada since 1990. His position is classified TI-08 and is excluded from the bargaining unit.

[2] The section managed by the grievor consists of two teams of three railway inspectors. The Railway Operations team consists of Monique Blais, Pierre Pilon and Colette Deslauriers. The Equipment team consists of André Sauvé, Claude Rollet and Alain Richer. Mr. Sauvé is Ms. Deslauriers’ partner.

[3] On April 16, 2004, Ms. Deslauriers filed a harassment complaint against the grievor (“the complaint”). The investigation into the complaint concluded that it was founded. The grievor’s disciplinary penalty was a 15-day suspension without pay and reassignment without his consent to other duties not involving the supervision of employees, in Dorval, although his normal work location is downtown Montreal. Following a grievance, the delegated manager at the final level of the grievance process changed the 15-day suspension to a letter of reprimand, but the assignment to other duties is still in effect. Three other grievances were dismissed. More than two years later, the employer offered the grievor the possibility of returning to his managerial position if he agreed to a “remedial plan.” The grievor refused the employer’s offer for reasons explained later in this decision.

[4] This decision deals with four individual grievances filed by the grievor.

II. Individual grievances referred to adjudication

[5] The first grievance (PSLRB File No. 566-02-421) challenges the final report of the investigation into the allegations set out in the complaint. The grievor alleges a lack of procedural fairness, bias by the investigators, an incomplete report and, consequently, unfounded conclusions. The grievor requests reinstatement in his managerial position, the removal of all references to the complaint from his personnel record, and the reimbursement of all costs, expenses and professional fees incurred for his defence.

[6] The second grievance (PSLRB File No. 566-02-420) disputes the 15-day disciplinary suspension resulting from the investigation report finding that the harassment allegations against the grievor were founded. The grievor requests

reinstatement in his managerial position and the reimbursement of all present and future financial losses.

[7] The third grievance (PSLRB File No. 566-02-710) disputes the conclusions of a letter of reprimand, which replaced the 15-day suspension and that the grievor alleges is a disguised disciplinary action because it reiterates and deals with untimely incidents that were set aside at the final level by another grievance decision (PSLRB File No. 566-02-420). The grievor requests that the relentless and discriminatory tactics against him as a result of the investigation cease, that a statement be made that the investigation and its findings were vitiated, that the written reprimand be withdrawn, that he be reinstated in his managerial position, and that he be reimbursed for all financial losses incurred.

[8] The fourth grievance (PSLRB File No. 566-02-1777) takes issue with the October 3, 2007, remedial plan that the employer wants to impose on the grievor as a condition of possible reinstatement in his managerial position. The grievor alleges that the remedial plan is directly linked to the vitiated findings of the complaint investigation report on the basis of which final disciplinary action was imposed on the grievor 29 months ago. The grievor alleges that the remedial plan constitutes disguised disciplinary action as well as a double penalty that has financial consequences. The grievor requests damages in the amount of \$112 000, the reimbursement of all the sick leave credits that he has taken since April 2004, the reinstatement in his managerial position, a statement that the investigation was vitiated, the removal of all references to the complaint or its consequences from his personnel record, the reimbursement of all costs, expenses and professional fees incurred for his defence, a letter of apology for the harm that he has suffered, and compensatory, exemplary and punitive damages amounting to \$1 895 000.

[9] Since the issues raised by the grievances are interrelated, the grievances were joined for the purpose of the hearing.

III. Objection to adjudicator's jurisdiction

[10] The employer objected to an adjudicator's jurisdiction to hear all the grievances on the ground that they do not meet the criteria set out in paragraph 209(1)(b) of the *Public Service Labour Relations Act (PSLRA)*. The first grievance contests the investigation report, which is not a disciplinary action or a demotion. The second

grievance contests the 15-day disciplinary suspension, which was rescinded at the final level of the grievance process and that was replaced by a letter of reprimand. A letter of reprimand does not result in financial loss within the meaning of the *PSLRA*. The employer argues that it is free to change a disciplinary action at any time, even after the referral of a grievance to adjudication. The grievor was reimbursed his salary for the 15 days in question. The grievance about the 15-day disciplinary suspension is null and void because it no longer exists. The employer stated that, when the decision was made at the final level of the applicable grievance process, its managers were unaware that the second grievance had been referred to adjudication.

[11] The employer adds that, under its right to manage, it may assign an employee to other duties. The grievor still holds his substantive position. The grievor was transferred to other duties because of troubling facts about his management style, as identified in the investigation report. The employer made every effort to assist the grievor with retraining so that he would develop effective management skills, which is the reason for a remedial plan. Since the grievor did not cooperate, the employer considers him unsuited for reinstatement in a managerial position.

[12] Finally, the employer argues that grievance adjudication is a *de novo* proceeding that allows an adjudicator to determine whether the actions imposed were disciplinary, whether the adjudicator has jurisdiction to hear them and, if applicable, whether the disciplinary actions were justified.

[13] In rebuttal, the grievor replies that the determining factor with respect to an adjudicator's jurisdiction is the status of a grievance when it is referred to adjudication. The grievor argues that the employer changed the disciplinary sanction after the grievance was referred to adjudication for the sole purpose of extinguishing his right to refer his grievances to adjudication. The grievor adds that he granted the employer two extensions so that it could render its decision at the final level of the grievance process in the second grievance. He refused a request for a third extension on June 2, 2006.

[14] The grievor argues that the assignment to a lower-classified position without his consent, even though his salary remains unchanged, is effectively a demotion and consequently that it constitutes disguised disciplinary action. The grievor adds that relieving him of all his responsibilities and assigning him to demeaning tasks is as much a suspension as if the employer had sent him home. The demotion has resulted

in major financial repercussions, including the loss of bonuses, the loss of pay for overtime that he regularly worked in his managerial position, the time spent travelling to work daily and the major outlays for transportation to his new work location using his personal vehicle.

[15] I took the employer's objection under advisement pending hearing the evidence.

IV. De novo proceeding

[16] Grievance adjudication is a *de novo* proceeding (see *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (C.A.) (QL)), which means that I need not defer to the conclusions of the decision maker who ruled on the grievance at the final level or the conclusions of the investigators who investigated the harassment complaint. In reaching my decision, I must consider only the evidence before me at the hearing.

[17] The hearing lasted 36 days, excluding occasional hearing days that were used for counsel to prepare for the presentation of certain portions of the evidence. Several thousands of pages of documents were filed in evidence, including the correspondence and hundreds of emails exchanged between the parties, the investigators' report, the grievor's documentation used to justify his position to the investigators, and the transcripts of the statements of individuals interviewed by the investigators. The testimony heard at the hearing was not recorded.

V. Witnesses

[18] Given the complexity of this case, I will describe the roles of the persons involved. The following managers were responsible for decision making and testified at the hearing:

- Linda Brouillette, Director General, Human Resources, Transport Canada, is the delegated manager who decided the grievor's four grievances at the final level and who rescinded the 15-day suspension;
- Nicole Pageot, Director General, Quebec Region, Transport Canada, was the delegated manager for the purpose of the *Policy on Prevention and Resolution of Harassment in the Workplace* ("the policy");
- Carole Paris, Director, Labour Relations, Quebec Region, Transport Canada, is the person who advised Ms. Deslauriers and the employer's representatives about

the case;

- Hélène Gagnon, Regional Director, Surface Transportation, Quebec Region, Transport Canada, is the grievor's line superior and the person who imposed the disciplinary actions on the grievor and developed the proposed remedial plan;
- André Lapointe, Regional Director General, Quebec Region, Transport Canada, is the manager who approved the imposition of a remedial plan on the grievor as a condition of possible reinstatement to his managerial position; and
- Sylvain Giguère, Director General, Prairie and Northern Region, was Director General, Quebec Region, Transport Canada, and the grievor's line superior at the time of Ms. Deslauriers' announcement that she planned to file a complaint.

[19] Ms. Brouillette, Ms. Pageot, Ms. Paris and Ms. Gagnon did not make statements to the investigators but played key roles in the progress of the case. Only Mr. Giguère made a statement to the investigators. Nicole Houle, Head of Labour Relations, Transport Canada, testified at the hearing about the final level of the grievance process, which led to the referral of the grievor's grievances to adjudication. Maryse Montminy, the senior investigator, testified about the investigation process.

[20] In addition to the grievor and Ms. Deslauriers, the following persons interviewed during the investigation testified at the hearing: Ms. Blais, Mr. Pilon, Venance Boucher, Mr. Sauvé and Nathalie Belliveau. Since grievance adjudication is a *de novo* proceeding, I did not consider the statements of the following persons, who were interviewed by the investigators but who did not testify at the hearing: Hervé Hogue, Mr. Rollet, Anna Maria Leyton, Mr. Richer, Luc Bourdon, Martin Boulanger and Olivier Gibault.

[21] Linda Savoie, Director, Access, Privacy and Review, Transport Canada, testified about the grievor's difficulties obtaining documents by means of access to information requests. Since the issue of obtaining uncensored documents was resolved during the hearing, her testimony is not reported.

[22] Martine Quintin, Chief, Administration, Surface Services, Quebec Region, Transport Canada, testified about how the grievor's office was emptied. Since this testimony merely corroborated that of other witnesses, it does not appear in my decision.

VI. Issues

[23] The grievances raise the following issues:

- Did the disciplinary actions, the grievor's assignment to other duties and the imposition of a remedial plan result in a demotion, suspension or financial penalty within the meaning of paragraph 209(1)(b) of the *PSLRA*?
- If applicable, were the disciplinary actions imposed on the grievor justified?
- If applicable, is the grievor entitled to the corrective action sought?

[24] To ensure a better understanding of the evidence for each issue, I will describe in chronological order the events gathered from the evidence that led to the investigation, the disciplinary actions and the so-called administrative measure. Second, I have summarized the relevant portions of the testimonies of the managers who acted on the investigation's findings as well as the testimony of the senior investigator. Third, I have summarized the testimony dealing with Ms. Deslauriers' allegations and each of the incidents that were covered in the investigation report. Finally, I have addressed the evidence about the organizational climate of the section managed by the grievor.

VII. Chronology of events

[25] The grievor was the immediate superior of Ms. Deslauriers, a railway inspector who had worked under his direction since 1995.

[26] In an email dated December 11, 2003, the grievor pointed out to Ms. Deslauriers that a file for which she was responsible had not been handled satisfactorily — the analysis of the file was not sufficiently rigorous, and the recommendation to Transport Canada decision-making authorities had not been communicated to or discussed with the grievor before being emailed. Ms. Blais and Mr. Pilon, members of Ms. Deslauriers' team, received a copy of the email at issue. On December 19, 2003, Ms. Deslauriers complained informally to the grievor's line superior at the time, Mr. Giguère. She was no longer getting along with the grievor. She perceived the December 11, 2003 email as a reprimand, and she planned to file a harassment complaint against the grievor. Ms. Deslauriers told Mr. Giguère that she did not see any way to resolve matters other than by filing a formal complaint. In response to Mr. Giguère's question about what the grievor had done, she told him that it "[translation] amounts to disparagement" and

that the grievor had apparently acted similarly a few years earlier but that this behaviour had subsided over time. According to her, the demeaning conduct had begun again two weeks earlier. She asked Mr. Giguère to intervene because she no longer wanted to work under the grievor.

[27] On December 24, 2003, Ms. Deslauriers asked that the grievor no longer be her line superior. Mr. Giguère acquiesced. After speaking with the grievor, Mr. Giguère informed Ms. Deslauriers that she would temporarily report to him. On January 5, 2004, after speaking with her union representative, Ms. Deslauriers refused mediation proposed by Ms. Paris and informed Mr. Giguère accordingly. At that point, Mr. Giguère discussed with Ms. Pageot a formal complaint by Ms. Deslauriers.

[28] Since Ms. Deslauriers was taking her time filing the complaint, Mr. Giguère asked Mr. Boulanger to supervise her. Some issues occurred in how Ms. Deslauriers was being supervised and in how documents were sent to her, but a protocol was developed to address this situation at the end of February 2004.

[29] On April 16, 2004, Ms. Deslauriers wrote to Tony Valeri, Minister of Transport at the time, describing the reasons for the complaint against the grievor. The complaint contained five allegations of events that took place between June 1995 and December 11, 2003. After acknowledging the receipt of the complaint on June 8, 2004, Ms. Pageot informed the grievor of the complaint on July 6, 2004.

[30] On April 19, 2004, Ms. Belliveau filed a complaint of harassment with Mr. Valeri that was similar to Ms. Deslauriers' complaint, alleging events going back to 1992. The employer dismissed the complaint on the ground that it was untimely. The grievor was not informed of that complaint. Ms. Belliveau became a union representative at the beginning of 2004.

[31] On August 6, 2004, Ms. Paris contacted the harassment investigation office of the Department of National Defence (DND) to launch an investigation of the complaint. The DND has a harassment investigation team at the Saint-Jean base that federal departments may use to conduct their investigations. On August 13, 2004, Ms. Deslauriers and the grievor were informed that Ms. Montminy had been appointed to investigate the complaint. The investigation was to have begun in early September 2004 but was delayed because the complaint was not sufficiently specific. The investigation process began in November 2004. Yvon Brooks was added as a

second investigator. Ms. Paris gave the investigators a dual mandate: to investigate Ms. Deslauriers' complaint and to investigate the organizational climate of the section managed by the grievor. Neither the grievor nor Ms. Deslauriers was informed of the investigation's dual mandate.

[32] In September 2004, Ms. Paris, Ms. Deslauriers and her union representative, Claude Faust, discussed allegations of sexual assault from 1995 that Ms. Deslauriers wanted to include in the complaint. After obtaining written clarifications from Ms. Deslauriers, Ms. Paris informed her that the employer had agreed to investigate all her allegations, including those of sexual assault. A letter of clarification was sent to the investigators on September 30, 2004, in which Ms. Paris informed them that the investigation was to cover allegations dating back to 1995, including allegations of sexual assault. On November 15, 2004, Ms. Paris informed the grievor that two allegations of sexual assault had been included in the complaint.

[33] In November 2004, Ms. Montminy asked Ms. Paris to clarify the complaint. With Ms. Paris' help, Ms. Deslauriers prepared a chronological summary of the events that had occurred since April 3, 1995, including incidents that occurred after the complaint was filed. Ms. Paris provided her with an office and a computer so that she could work on the summary. Ms. Paris sent the document to Ms. Montminy. Following a second request from Ms. Montminy to clarify the harassment allegations, Ms. Paris helped Ms. Deslauriers prepare another document, identifying 16 incidents combined into 6 allegations, which was sent to Ms. Montminy on December 8, 2004. On January 4, 2005, the grievor received that document as well as a notice that an investigation would begin on January 5, 2005. In actual fact, the investigation began on January 10, 2005 and ended on January 25, 2005. Fifteen people were interviewed, including Ms. Deslauriers on January 10, 2005 and the grievor on January 24, 2005.

[34] On February 18, 2005, Ms. Gagnon asked Ms. Deslauriers and the grievor not to report to work but to work from home until the final investigation report was released. The preliminary report, censored and without findings, was sent to Ms. Deslauriers and the grievor on March 7, 2005. Each had two weeks to provide their comments to the investigators.

[35] On March 16, 2005, the grievor went on sick leave for an indefinite period because of stress and burnout.

[36] The same day, Ms. Pageot received the final investigation report, which concluded that the allegations set out in the complaint were founded.

[37] A copy of the final investigation report was sent to the grievor on April 26, 2005, with the comment that Ms. Gagnon, the grievor's line superior, would be taking appropriate corrective action.

[38] On May 5, 2005, the grievor emailed Ms. Paris, asking her about his recourse to contest the investigation report. Ms. Paris told him that she was not the best person to advise him but that she would get back to him. Ms. Paris never followed up on the request.

[39] On May 18, 2005, Ms. Gagnon and Ms. Paris (who had become Director of Human Resources, Quebec Region, Transport Canada) met with the grievor and his counsel to discuss the investigation's findings. The discussion was about disciplinary actions and especially about the decision that had been made not to reinstate the grievor in his managerial position on his return from sick leave. On May 26, 2005, the grievor filed an initial individual grievance (PSLRB File No. 566-02-421) contesting the unfairness of the investigation and the decision not to reinstate him in his managerial position. He also claimed damages.

[40] On June 7, 2005, Ms. Gagnon sent a letter to the grievor informing him of a 15-day disciplinary suspension without pay, to be served when he returned to work. The disciplinary letter would be placed in the grievor's personnel record for a period of two years, or longer if the conduct were repeated. On June 22, 2005, the grievor filed a second individual grievance (PSLRB File No. 566-02-420) contesting the 15-day suspension and the decision not to reinstate him in his managerial position. He also claimed damages.

[41] On August 16, 2005, after the grievor met with Ms. Pageot at the second level of the grievance process for his first two grievances, a second meeting took place with the grievor, Ms. Paris and Mr. Giguère, at which Ms. Paris told the grievor that he could not return to his managerial position because of shortcomings in his management style that had been identified in the investigation report. Ms. Paris asked him to accept a transfer to another position that did not include supervising employees. The grievor refused. At that point, Ms. Paris offered him an assignment to the Special Assignment Pay Plan (SAPP) for a "special project," a position at the TI-06 level that would allow

him to retain his pay level for two years. During that time, the grievor was to find a permanent position elsewhere; otherwise, he was to be laid off at the end of the assignment. The grievor refused to take part in the project. Ms. Paris pointed out to him that the employer had the option of obtaining an exclusion order allowing it to transfer him involuntarily if he did not agree to a voluntary transfer.

[42] The grievor's first two grievances were dismissed at the second level of the grievance process on August 26, 2005. Ms. Pageot informed the grievor that he would not be reinstated in his managerial position.

[43] On August 29, 2005, the grievor informed Ms. Gagnon that he would be able to return to work on September 6, 2005. In an August 31, 2005 email, Ms. Gagnon told him that he would serve his 15-day suspension from September 12 to September 30, 2005 and ordered him to report to the Transport Canada offices in Dorval on September 6, 2005, not to his normal work location in downtown Montreal. If he did not report for work in Dorval, he would be deemed absent without authorization. The grievor was to occupy a position in Security and Emergency Preparedness in the aviation and marine section and eventually in the passenger rail development section. The grievor reported to Dorval on September 6, 2005 as ordered. He was given a negligible, if not non-existent, workload. He worked in an open office, directly opposite a shredder, a printer and a fax machine.

[44] On October 9, 2005, Ms. Paris met with the grievor and again offered him an assignment to the SAPP for a temporary 2-year position at the TI-06 level, which would have led to declaring him surplus after 18 months. At that time, Ms. Paris told him that, if he did not accept a transfer voluntarily, Transport Canada planned to seek an exclusion order from the Public Service Commission (PSC) to transfer him without his consent to a TI-06 position on an indeterminate basis. On October 24, 2005, the grievor refused the offer of the SAPP assignment.

[45] On November 9, 2005, Ms. Pageot asked the Human Resources Branch to obtain an exclusion order from the PSC to transfer the grievor without his consent. On December 8, 2005, the Acting Director General, Human Resources, sent the PSC an official request to that effect. On February 27, 2006, the PSC replied that an exclusion order could not be issued because the involuntary transfer had been decided before the *Public Service Employment Act* had come into force. The PSC spokesperson added that the PSC had never issued such an order but that the threat to do so was most

often used as a tactic to obtain a recalcitrant employee's cooperation. Ms. Paris and Ms. Gagnon again tried to convince the grievor to accept the SAPP assignment under the threat of initiating the exclusion order process. The grievor again refused. Ms. Brouillette, newly appointed Director General, Human Resources, Transport Canada, withdrew the request for an exclusion order because that mechanism was no longer available, since the new *Public Service Employment Act* had come into force.

[46] In December 2005, Ms. Gagnon announced at a national management meeting that she planned to post the grievor's position for the purpose of replacing him. In November 2005, Ms. Gagnon had all personal effects from the grievor's office removed and had them placed in storage. In February 2006, the process to staff the grievor's position was suspended pending the outcome of the grievance process.

[47] On July 4, 2006, the grievor referred his first two grievances to adjudication (PSLRB File Nos. 566-02-420 and 421).

[48] On July 6, 2006, in her decision at the final level of the grievance process, Ms. Brouillette rescinded Ms. Gagnon's decision to impose a 15-day suspension without pay on the grievor as disciplinary action and substituted a letter of reprimand, signed by Ms. Gagnon on July 13, 2006, while maintaining the grievor's reassignment. On July 14, 2006, the employer was informed of the referral of the two grievances to adjudication. On July 24, 2006, Ms. Gagnon met with the grievor to give him the letter of reprimand. On August 24, 2006, the grievor filed a third individual grievance (PSLRB File No. 566-02-710) contesting the letter of reprimand and his reassignment and also claiming damages.

[49] On November 29, 2006, Ms. Gagnon met with the grievor to discuss a possible return to his managerial position if he agreed to correct the conduct identified in the investigation report. The grievor asked Ms. Gagnon to put in writing the conduct that required correction. No action was taken in response to that request. However, on December 10, 2006, Ms. Gagnon informed the grievor that she had chosen a coach for him.

[50] On December 18, 2006, the grievor referred his third grievance to adjudication (PSLRB File No. 566-02-710).

[51] The grievor met with the coach on January 18, 2007 to agree on the coaching

approach. His next meeting with the coach was on May 29, 2007. After several meetings, the coaching ended. As part of the coaching, the coach recommended that the grievor have the opportunity to supervise employees, a recommendation that Ms. Gagnon rejected.

[52] On August 27, 2007, the grievor met with Mr. Lapointe, the new director general. Mr. Lapointe informed him that, since it had been found that the grievor had committed harassment over several years, he would not be reinstated in a managerial position in the near future and that his manager would soon meet with him to provide him with a remedial plan.

[53] On September 13, 2007, the parties were informed that the grievor's first three grievances had been scheduled for an adjudication hearing from January 7 to 10, 2008.

[54] On October 3, 2007, Ms. Gagnon met with the grievor to give him a document entitled "[translation] Remedial Plan for Reinstatement," along with an explanatory letter indicating that the grievor might eventually be reinstated in his managerial position under certain conditions, including that he acknowledge the wrongdoing identified in the investigation report. On October 17, 2007, the grievor rejected the proposed remedial plan, claiming that the employer was trying, by devious means, to prevent him from going forward with the adjudication of his grievances. On October 24, 2007, he filed a fourth individual grievance (PSLRB File No. 566-02-1777), objecting to the imposition of the remedial plan and to his reassignment and also claiming damages.

[55] On January 25, 2008, the grievor referred his fourth grievance to adjudication (PSLRB File No. 566-02-1777).

[56] At the time of the hearing, the grievor still held the position with Security and Emergency Preparedness in Dorval.

VIII. Testimonies of the investigator and managers who acted on the findings of the investigation

A. Ms. Brouillette

[57] In addition to being Transport Canada's director general of human resources, Ms. Brouillette is the deputy minister's delegate to hear grievances at the final level of the grievance process. Ms. Brouillette explained her decision to take the two separate

actions. The letter of reprimand was a disciplinary action arising from the findings of the investigation into the grievor's harassing conduct in the year before the complaint was filed. The transfer to other duties was an administrative measure arising from the grievor's actions in the years before the complaint that raised questions about his competence.

[58] When she decided to reduce the 15-day disciplinary action to a letter of reprimand, Ms. Brouillette took into account that there had been no continuity in the events in the preceding one-year time limit, that the grievor's performance evaluations were rated superior, that the comments about him were positive and that he had an unblemished disciplinary record. However, Ms. Brouillette decided to maintain the reassignment because regional management was free to take administrative action based on the findings of the investigation report and to maintain a healthy and productive workplace.

[59] Ms. Brouillette acknowledged that an involuntary transfer was not a legitimate way to move the grievor. Ms. Brouillette was of the opinion that the serious allegations made in the complaint warranted the investigation. Ms. Brouillette could not cite other examples of an investigation into facts going back several years.

[60] As for the delay in determining the suspension grievance at the final level of the grievance process, Ms. Brouillette stated that she might have known that the deadline for responding was June 2, 2005 but that she had been unable to meet that date. She learned that the grievance of the 15-day suspension had been sent to adjudication after rendering her decision.

B. Ms. Pageot

[61] Ms. Pageot worked with the grievor in 1995. She handled files on work-related conflicts. The section managed by the grievor was stable and had no serious conflicts. Ms. Pageot was not informed of any complaint from Ms. Deslauriers at that time. On March 23, 1995, Ms. Deslauriers accepted a one-year secondment to work in the grievor's section. The agreement contained a termination clause, enabling Ms. Deslauriers to request a return to her substantive position at any time with 30 days' notice. The secondment was part of a program to allow women to try non-traditional jobs.

[62] When the complaint was filed, Ms. Pageot was the delegated manager for

administering harassment complaints under the *policy*. The complaint was forwarded to her from the office of the Minister of Transport because it came from the Quebec Region.

[63] Ms. Pageot recalled receiving a complaint from Ms. Belliveau at around the same time. Ms. Pageot met with Ms. Belliveau to explain why her complaint was dismissed and would not be investigated. Ms. Pageot did not recall comparing Ms. Belliveau's complaint to that of Ms. Deslauriers and did not notice whether they were similar.

[64] In her role as delegated manager, after consulting Ms. Paris and experts, Ms. Pageot felt that the complaint was serious and that there were grounds for proceeding with an investigation of all the incidents. In her opinion, the existence of continuing acts was an aggravating circumstance that justified extending the investigation beyond the one-year period set out in the *policy*.

[65] Over the months, Ms. Deslauriers' complaint evolved because of requests by the investigators for clarifications. Ms. Deslauriers had made it clear that she did not want to file a criminal complaint but that she wanted an administrative investigation of all the incidents. Ms. Pageot stated that she did not focus on the words that Ms. Deslauriers used in her complaint; a sexual assault could just as well have been sexual harassment. Ms. Pageot expected the investigators to provide clarification. During the time leading up to the complaint, Ms. Pageot communicated with Mr. Faust and Richard Côté, another of Ms. Deslauriers' union representatives, after Ms. Deslauriers had stated that she would file a complaint. They asked Ms. Pageot for time to formulate the written complaint.

[66] At the end of the investigation, Ms. Pageot met with the investigators. She accepted the findings of the investigation report as plausible because the investigation had been conducted by experienced investigators. The report's findings convinced her that the grievor's conduct had been inappropriate over a long period and that his management style was unacceptable. She also decided that Ms. Deslauriers and the grievor should work from home until the final investigation report was released, to avoid any possibility of reprisals. After the investigation report was released, Ms. Pageot met with Ms. Deslauriers to reassure her that the grievor would not be reinstated in his position as the manager of Ms. Deslauriers' section.

C. Ms. Paris

[67] Ms. Paris is the manager who administered the complaint investigation process on behalf of Ms. Pageot beginning in May 2004. She proposed mediation to Ms. Deslauriers and the grievor in December 2003 and May 2004, but Ms. Deslauriers rejected that initiative. Ms. Paris had discussions with Mr. Faust before the complaint was filed. Mr. Faust told her that the complaint was very serious and very important. Ms. Paris indicated that she was quite concerned about the delay in filing the written complaint.

[68] Once Ms. Paris received the complaint, she evaluated it as a whole, rather than as a series of individual allegations. She was unaware that the *policy* excluded investigating allegations of sexual assault. According to her, the time limit for the allegations set out in the complaint had not expired because the continuing nature of the incidents meant that it was possible to investigate beyond the one-year time limit set out in the *policy*.

[69] Ms. Paris learned that the DND offered expert services in harassment investigation and that it regularly conducted investigations for other federal departments. On August 5, 2004, Ms. Paris began discussions with the DND about using its services to investigate Ms. Deslauriers' complaint. The DND stated that it was prepared to follow the *policy*.

[70] Following concerns expressed by the DND, Ms. Paris met with Ms. Deslauriers' union representatives to discuss the scope of the investigation. She was persuaded to agree that the sexual assault allegations would be treated as sexual harassment. She then asked the DND to add a male investigator.

[71] Ms. Paris was Ms. Pageot's spokesperson and Ms. Deslauriers' resource person; she helped Ms. Deslauriers prepare a chronology of the facts starting in 1995 and better define her complaint for the investigation. She met with Ms. Deslauriers' union representatives on several occasions in December 2004.

[72] Ms. Paris accepted the investigators proposed by the DND, drew up their mandate and negotiated the service contract. She agreed that the investigators' mandate would cover not only Ms. Deslauriers' allegations but also a review of the organizational climate of the section managed by the grievor, as is normally done during DND investigations. Ms. Paris saw her role as being responsible for moving the

case forward as quickly as possible.

[73] In late March 2005, when the investigators' findings were known, Ms. Paris discussed with Ms. Gagnon the corrective action to take with respect to the grievor. Ms. Gagnon believed that a breach of trust had occurred, preventing the grievor from resuming his supervisory duties.

[74] On May 18, 2005, Ms. Paris met with the grievor, his counsel and Ms. Gagnon. The meeting followed up on the letter from Ms. Pageot and was called to determine the disciplinary action to take in light of the findings of the investigation. At the hearing, Ms. Paris testified as follows about the meeting:

[Translation]

It was quite clear to us that he could not return to his managerial position. We first told him about our concerns [and] that we were not planning to reinstate him in his managerial position. We did not want to force a transfer on him, but he had to leave his position. . . After everything that we had seen and heard, we did not feel comfortable reinstating him in his position. . . With 10 of 16 allegations sustained, there were good reasons to impose further sanctions on him. . . We then spoke to him about an involuntary position, without his consent. . . Mr. Robitaille stated that the report was unfair and a "gang up" and that certain portions were incorrect or had not taken into account certain information. He stated that everything in the report was untrue. I was very disappointed. . . Mr. Robitaille said that he had provided a document to the investigators. . . After the meeting, discussions took place with the investigators, who indicated that they had taken it into account but that it added nothing to the report.

[75] Ms. Paris contacted the PSC to discuss the conditions for issuing an exclusion order. The PSC told her that an employee could not be transferred without being offered an indeterminate position. The only indeterminate position not involving supervising employees that corresponded to the grievor's skills was a TI-06 position, which meant a \$15 000 drop in pay. According to Ms. Paris, if the grievor had agreed to the SAPP assignment, his transfer would have been deemed voluntary, and the employer would have been able to replace him as manager on a permanent basis. Ms. Paris acknowledged that the grievor is currently assigned to duties without his consent.

[76] The grievor asked Ms. Paris about his recourse to contest the investigation

report. Ms. Paris was not sure. She testified that she felt uncomfortable giving him advice on the “best recourse” because the employer might have criticized her for helping the grievor contest a management decision. In any event, the grievor went elsewhere to obtain this information.

D. Ms. Gagnon

[77] In February 2005, Ms. Gagnon received a call from Ms. Pageot asking her to ensure that the grievor and Ms. Deslauriers did not have contact with each other until the outcome of the investigation was known. Ms. Gagnon learned of the complaint when she read the investigation report. She met with the grievor on May 18, 2005, in the presence of Ms. Paris. The purpose of the meeting was to allow the grievor to acknowledge his improper conduct before disciplinary action was imposed, to inform him of the administrative measure under which he would not be reinstated in his managerial position and to tell him that he had to find a position elsewhere.

[78] Ms. Gagnon accepted the findings of the investigation report because she did not think that she needed to redo the work of professional investigators. She decided that the grievor would not be reinstated in his work section and that he had to redirect his career. In response to the acts of harassment, Ms. Gagnon decided on disciplinary action consisting of a 15-day suspension without pay. In response to the grievor’s inappropriate conduct as a manager over a number of years, she decided on an administrative measure that assigned the grievor to other duties not involving supervising employees. She then launched a competition to replace him as the section manager. She announced at a national meeting and to the section’s employees that the grievor would not be reinstated in his managerial position. At Ms. Paris’ request, Ms. Gagnon suspended the staffing action while the grievor’s grievances were being settled.

[79] In late November 2006, Ms. Gagnon met with the grievor to inform him of the unacceptable conduct that prevented him from being reinstated in his managerial position. The grievor asked her to put her points in writing. Ms. Gagnon considered that the request confirmed that the grievor did not want to acknowledge his improper conduct. Therefore, she prepared a two-year remedial plan, in consultation with Ms. Pageot, Mr. Lapointe, Ms. Paris and three labour relations advisors from Transport Canada headquarters, including Ms. Houle. The plan was based on the following conduct by the grievor as reported by the investigators: he isolated employees and

then ignored them; he put people down; he did not adhere to strict working hours; he encouraged socializing outside working hours; he neglected training new employees; and on one occasion he had one employee's evaluation done by another employee.

[80] Other than that conduct, identified in the investigation report, Ms. Gagnon had no other criticisms about the quality of the grievor's work.

E. Mr. Lapointe

[81] When he became Transport Canada's director general for the Quebec Region in 2007, Mr. Lapointe read the investigation report and the correspondence in the file. He found it odd that a three-week suspension had been reduced to a letter of reprimand. He noted that the allegations against the grievor included no ongoing incidents. However, what was documented was very serious, and the grievor's conduct was unacceptable. Mr. Giguère, the outgoing manager, had told him that he had gotten along well with the grievor but that the grievor's situation presented challenges even though he "[translation] had paid his debt." Mr. Lapointe admitted that reinstating the grievor as the manager of Ms. Deslauriers' section had been discussed during at least one employer-union meeting. Mr. Côté had expressed his concerns to him about this matter. Mr. Lapointe told Mr. Côté that, given the grievor's record, he did not think that it would be possible to reinstate him as the section manager.

[82] Mr. Lapointe met with the grievor on August 17, 2007, to assign new duties to him. At that meeting, he told the grievor that reinstatement to his managerial position was not possible. The grievor had first to acknowledge his wrongdoing and demonstrate good faith. Mr. Lapointe testified that his opinion was based on the fact that the investigation report contained numerous findings other than those related to harassment, which he had to take into consideration and on which he had to follow up. In his opinion, in rejecting the remedial plan proposed by Ms. Gagnon, the grievor was not demonstrating good faith.

[83] Mr. Lapointe admitted that, if he had evidence that the allegations against the grievor were untrue, he would correct the situation immediately.

F. Mr. Giguère

[84] Mr. Giguère was Director General, Quebec Region, Transport Canada, from April 2003 until April 2004. When he took over that position, he met with all the employees under his direction. The grievor was one of the first persons with whom he met. The grievor had occupied his position for a number of years. Mr. Giguère found him frank, direct and cordial as well as a manager who knew his subject matter perfectly and with no nonsense. The grievor performed his work effectively and identified issues quickly. Although not perfect, his performance was excellent.

[85] In summer 2003, Mr. Giguère met with the employees of the grievor's team. Ms. Blais was enthusiastic about her work, was happy with her career and got along well with her team members, including the grievor. Mr. Pilon was very competent and hoped to spend his entire career in his position. He liked working with his team and got along well with the grievor, with whom he had had only had one minor disagreement. Ms. Deslauriers was very enthusiastic about the grievor. She appreciated the work team. She said that she was happy in her work and that she got along well with her manager. She exclaimed, "[translation] It's all good!"

[86] On December 19, 2003, Ms. Deslauriers complained that things were not going well. Her manager was not listening to her and did not speak to her. She said that she felt demeaned by the December 11, 2003 email and that she was not being treated like the other employees. She mentioned that she had had previous disagreements with the grievor, without going into further detail. Mr. Giguère discussed the December 11, 2003 email with the grievor and, after understanding the circumstances in which it had been sent, felt that nothing needed to be changed.

[87] When the investigation report was released, Mr. Giguère was no longer the grievor's manager. He was the director of the Transportation Centre, Security and Emergency Preparedness, located in Dorval. Ms. Pageot contacted him to inform him of the outcome of the investigation and to state that she did not intend to reinstate him in his managerial position. Ms. Pageot asked Mr. Giguère if he would agree to supervise the grievor for a period of approximately six months, even if the situation was evolving. Mr. Giguère agreed to meet with the grievor and to supervise him but found it quite odd that the grievor was being offered an assignment under the SAPP. From his experience, that type of assignment was used to facilitate the end of a career as a way to transfer skills to the person designated to replace a retiring employee.

[88] The grievor refused the SAPP assignment but still reported to Dorval in September 2005 as instructed by Ms. Gagnon. Mr. Giguère assigned the grievor to training railway safety employees so that he could keep his skills current.

[89] Mr. Giguère mentioned that in fall 2003 Ms. Deslauriers had worked on a railway file with him. She was very professional, but Mr. Giguère found her overly demanding in terms of her expectations of clients. When she asked for something, she had trouble accepting “no” for an answer.

[90] Mr. Giguère cited the following incident as an example of Ms. Deslauriers’ emotionalism. In January 2004, Mr. Giguère had reorganized the workspaces to make room for a new employee, giving the spaces by the windows to employees who spent the most time in the office. Ms. Deslauriers was assigned a workspace without a window because she was seldom in the office. Ms. Deslauriers was very unhappy with the change because Mr. Giguère had not given her what she had wanted. Mr. Giguère asked Ms. Deslauriers to suggest another solution, but she did not respond. Mr. Giguère also noted a coolness between Ms. Deslauriers, Ms. Blais and Mr. Pilon after the complaint was filed.

G. Ms. Montminy

[91] In early July 2004, a meeting was held between Ms. Montminy, Ms. Paris and Major Richard Lecompte, the head of the DND’s harassment investigation office. In a July 20, 2004, email, Major Lecompte suggested to Ms. Paris that she consider two things before launching an investigation: whether the allegations were specific enough and whether the parties had been informed that certain allegations did not meet the requirements of the *policy*. On September 21, 2004, Ms. Montminy informed Ms. Paris that some of the allegations were outside the time limit and that the grievor needed to be informed of all the allegations against him. Ms. Montminy asked Ms. Paris to provide the investigation mandate to the parties, which Ms. Paris refused because it was an agreement between the DND and Transport Canada.

[92] On September 22, 2004, Ms. Deslauriers informed Ms. Montminy that, following a discussion with Ms. Paris, she wanted the allegations of sexual assault from 1995 included in the investigation. In a subsequent telephone conversation, Ms. Montminy informed Ms. Paris that, if what was involved was indeed assault, the *policy* was very clear: the investigation had to be suspended. Ms. Paris indicated that she was very

surprised that the *policy* referred to this situation. Ms. Montminy explained to her that the *policy* not only stated it clearly but that it was also completely logical. On September 24, 2004, Ms. Paris told Ms. Montminy that Ms. Deslauriers no longer wanted those allegations investigated. On September 26, 2004, Ms. Deslauriers reversed her position and requested that the allegations of sexual assault be included in the investigation. Ms. Paris then terminated the investigation mandate.

[93] On November 8, 2004, Ms. Paris contacted Ms. Montminy to reopen the investigation since she now had a more specific complaint. On December 6, 2004, Ms. Montminy told Ms. Paris that the complaint was still not specific enough and that she would not initiate an investigation. Ms. Montminy asked Ms. Paris to have Ms. Deslauriers clarify her allegations as indicated in the recommendations that Ms. Montminy sent to Ms. Paris by email. On December 7, 2004, Ms. Paris asked Ms. Montminy why the interviews could not begin without all the clarifications, subject to their being provided during the investigation, or why the investigation could not deal only with the allegations that were clear. Ms. Montminy replied that the risk was too great that the investigation would expand or that there would be a perception of bias in favour of Ms. Deslauriers. On December 8, 2004, Ms. Paris informed Ms. Montminy that she had agreed to all the allegations being included in the investigation. Ms. Montminy read the third document prepared by Ms. Deslauriers and informed Ms. Paris that, although the allegations were still vague, she would initiate the investigation.

[94] Ms. Paris eventually confirmed to Ms. Montminy verbally that the investigation should cover all the allegations made by Ms. Deslauriers, even if they went back more than one year, and that criminal allegations should be dealt with administratively. On December 22, 2004, Ms. Montminy asked Ms. Paris to inform the grievor of all the allegations before the interviews started.

[95] Ms. Deslauriers was the first person interviewed by the investigators; the grievor was the 13th. The investigators chose the witnesses based on the content of the complaint and the section organization chart provided by Ms. Paris. However, Ms. Paris asked the investigators to interview Ms. Belliveau even though she had not worked in the section managed by the grievor since 1997. Ms. Deslauriers provided her documentation in support of the complaint on the day she was interviewed.

[96] The interviews were recorded and then transcribed. The persons interviewed

were each given an opportunity to read, correct and sign their statements. The grievor went to the interview with a written response to each alleged incident along with a folder of documentation in support of his responses. The grievor responded to certain questions by reading his written responses. Responses to the investigators' questions were recorded and transcribed, but the tape was turned off when the grievor read a written response or spoke from his notes. As a result, the grievor's prepared response to each incident is not part of the transcript of his statement. The investigators had been instructed to minimize transcription costs and therefore did not record the introductions, warnings and certain comments by the witnesses. However, Ms. Deslauriers' statement was recorded and transcribed in its entirety.

[97] Ms. Montminy testified that, on January 6, 2005, she contacted a Sûreté du Québec officer about Ms. Deslauriers' allegations of a sexual nature. The officer confirmed that those allegations might be considered sexual assault and that Ms. Deslauriers might have both a criminal and a civil recourse against the grievor, even if the employer took disciplinary action. Ms. Montminy gave Ms. Deslauriers that information by telephone the same day.

[98] The statements of the persons interviewed were evaluated on a balance of probabilities, meaning that the evidence had to establish that it was more probable than improbable that a given alleged event occurred. In instances with no direct witness, the investigators accepted evidence of similar incidents in support of an allegation. Circumstantial evidence was deemed to support an allegation. Similar incidents were grouped together to give more weight to an allegation. Ms. Montminy testified in hindsight that she should have dealt with each incident as a separate allegation. Ms. Montminy testified that the investigators did not take into account the business travel photos submitted by the grievor in support of his version of the facts because the photos did not replace a statement. The grievor raised new facts in support of his response to the complaint, but the investigators did not feel that they needed to re-interview the witnesses already interviewed about those facts. Ms. Montminy admitted that the investigators had given more weight to the statement of Ms. Belliveau, who recounted incidents similar to those alleged by Ms. Deslauriers, and to the witnesses who confirmed Ms. Deslauriers' claims.

IX. The allegations in the complaint

[99] The following is the wording of the complaint filed on April 16, 2004:

[Translation]

...

Subject: Harassment complaint

This constitutes a complaint against Mr. Raymond Robitaille, Manager, Operation and Equipment, Surface Services, for abuse of authority and sexual harassment.

I have been employed in the public service since July 1974, and I have worked as an inspector, Railway Operations, since April 3, 1995.

On December 11, 2003, Mr. Robitaille sent me unfounded criticisms in writing, with copies to my colleagues. A few days earlier, he had called me to his office to find out if I was ready for a reverse order of merit competition in our section. After checking with my colleagues and Regional Director Sylvain Giguère, there had never been any question of job cuts within our section and my colleagues had not been informed of the situation.

Those last events were the trigger for me to consult my employer and my union about this manager's conduct toward me.

Those events began in June 1995, during a business trip to Lac Saint-Jean where he assaulted me. Starting at that time, because I did not respond positively to his assault, he has constantly abused his authority over me and belittled me to my colleagues.

Although I am under his direction as an employee, he has refused to speak to me for several months, if not years. After several attempts on my part to re-establish communication, he told me that he did not want to speak to me.

Therefore, I have had to learn over the years to work only with my colleagues, and I suffered harm on a number of occasions during those years, such as never being given any responsibilities other than my duties as an inspector, unlike my colleagues, who have been able to participate in all kinds of meetings, committees, special projects, etc.

At his request, I had to take a secondment to another department for a year (from April 7, 1997, to March 27, 1998).

Now, with nine good career years ahead of me, I can no longer deal with his reprisals, and I can no longer abide Mr. Robitaille's attitude, which is to undermine me, control me, intimidate me and ruin my reputation.

I will no longer be a victim of malicious manipulation, belittled to my colleagues, and a victim of intimidation and abuse of authority, which Mr. Robitaille has exercised toward me. I am asking to be treated fairly and respectfully. I ask that corrective action be taken so that Mr. Robitaille stops all forms of harassment toward me.

Colette Deslauriers

...

[Emphasis added]

[100] The following are the six allegations that were examined in the investigation beginning on January 10, 2005. Each was based on several incidents. The incidents are grouped after each allegation based on the testimony heard at the hearing.

Allegation 1: Ms. Deslauriers felt intimidated by the grievor.

This allegation consists of two incidents.

Incident #1: In August 2001, the grievor informed Ms. Deslauriers of an inspection trip to the Gaspé, with the departure planned for Sunday, September 3, 2001.

Incident #2: On December 8, 2003, during a meeting, the grievor questioned Ms. Deslauriers about how she handled her files and mentioned a “[translation] reverse order of merit competition.” [Note: *Although the expression “reverse order of merit evaluation” is the correct expression, I will use the expression “reverse order of merit competition,” which all the witnesses used.*]

Incident #1

[101] This is Ms. Deslauriers' version of incident #1. In August 2001, Ms. Deslauriers wanted to avoid a week-long inspection trip to the Gaspé because the grievor had planned to leave on a Sunday, while she preferred to travel on Mondays. She felt that the trip was unnecessary and did not want to travel with the grievor because those trips were generally uncomfortable for her. She also did not want to travel with Thomas Picard, another railway inspector, because he was a friend of the grievor.

Approximately 10 days before the trip, Mr. Bourdon, Transport Canada's director general of railway safety, Quebec Region, came to her office. She told him that she was obliged to travel with the grievor. Mr. Bourdon spontaneously suggested the pretext that he needed her for a workplace health and safety meeting during the week of the trip. Therefore, she was able to avoid the trip to the Gaspé. Ms. Deslauriers felt intimidated by the obligation to leave on Sunday.

[102] This is the grievor's version of incident #1. A team (three or more employees) normally carries out inspections of trains in remote areas (Abitibi, Lac Saint-Jean, the North Shore and the Gaspé) over a five-day period, commonly called a "blitz," to avoid having a single employee spend several weeks in a region. The departure for that type of inspection can be on a Sunday with the return on the following Saturday after completing the inspection. The grievor often went on blitzes to keep in touch with the clients being inspected and to help with the inspection if necessary. In August 2001, such a blitz was organized to cover the Lower St. Lawrence and the Gaspé, with stops in Matapédia, Gaspé, Campbellton, New Richmond and Mont-Joli. In short, it was a very long trip. The decision to conduct the inspection was made in advance and was planned jointly with the railway companies. Ms. Deslauriers wanted to make the trip in her personal vehicle, but the grievor told her that it would be better to travel by train and to rent vehicles onsite to increase the productivity ratio of the inspection trip. Ms. Deslauriers was not happy with that scenario and expressed considerable discontent. One week before the scheduled date of the trip, the grievor received an email from Mr. Bourdon asking him if was possible for Ms. Deslauriers to accompany him to a workplace health and safety meeting. Since the request came from a superior, the grievor agreed that Ms. Deslauriers would not be part of the inspection trip. Ms. Deslauriers had not informed the grievor in any other way that she did not want to travel with him.

[103] This is Mr. Sauvé's version of incident #1. Ms. Deslauriers did not want to make the trip to the Gaspé because the grievor had decided that the team had to leave on the Sunday. She preferred not to leave on Sunday. She had spoken to Mr. Bourdon about it. He found a pretext so that she did not have to travel that week.

Incident #2

[104] This is Ms. Deslauriers' version of incident #2. On December 8, 2003, the grievor called her to his office to obtain her comments on a reverse order of merit competition. She was surprised and wanted to know more about it, but the grievor could not answer her questions. She approached Mr. Giguère, who told her that such a competition was not planned; nothing ensued. When the grievor spoke to her about the reverse order of merit competition, Ms. Deslauriers thought that there would be job cuts and that she would have to requalify.

[105] The grievor then asked her if she was very familiar with her files and told her that he expected her to take the lead, i.e., to take charge of her files, particularly a recent request from the Quebec North Shore and Labrador (QNS&L) railway company for an exemption under paragraph 5.1.1(b) of the *Work/Rest Rules for Railway Operating Employees* ("the Rules"). Ms. Deslauriers was surprised at the grievor's attitude because Ms. Blais normally handled exemption requests. Ms. Blais had considerable experience with railway exemptions as a result of a special collaboration with Transport Canada headquarters a few years earlier. Ms. Blais, Ms. Deslauriers and Mr. Pilon had dealt with a similar request in fall 2003. Since Ms. Blais had organized a meeting with the QNS&L and had given her the necessary information, Ms. Deslauriers stated that she was on top of the file. On December 8, 2003, Ms. Deslauriers did not understand what she believed to be a criticism by the grievor of how she managed her files. According to Ms. Deslauriers, Ms. Blais had a habit of taking over files, especially QNS&L files, because she was very familiar with that company. Ms. Deslauriers admitted that she was not afraid of losing her job but that she did feel "threatened" and "insecure" as a result of the grievor's attitude during the conversation.

[106] This is the grievor's version of incident #2. On December 8, 2003, of her own volition, Ms. Deslauriers came to see him in his office to discuss certain files that had been assigned to her. During the meeting, she asked him if there was any news about the withdrawal of the Surface Service unit's involvement in the workplace health and safety program for the railway industry. Under a memorandum between Transport Canada and Human Resources and Skills Development Canada, Transport Canada was responsible for applying Part II of the *Canada Labour Code* to employees working on-board trains. Ms. Deslauriers was the contact person for that file. Several operational restructuring scenarios were being considered but no job cuts. Mr. Pilon had already

raised this issue with Mr. Giguère and had had it confirmed that no personnel cuts were planned for the Surface Services unit. Ms. Deslauriers then informed the grievor that she hoped that it would never come down to a reverse order of merit competition, as had occurred in the engineering section in the late 1980s. As manager of the administration section at that time, Ms. Deslauriers had found the process very difficult for those involved. The grievor told her that a reverse order of merit competition was highly unlikely since a number of people in the unit were eligible for retirement and that an early retirement offer would be the preferred approach, not to mention the fact that the demographic factor of a shortage of skilled persons encouraged the greater retention of experienced employees.

[107] Ms. Deslauriers followed that conversation by complaining that Mr. Pilon did little work and that Ms. Blais took over all files to the point of interfering in Ms. Deslauriers' work. Since it was not the first time that Ms. Deslauriers had complained about that situation, the grievor suggested that she resolve the problem directly with her colleagues. The grievor then mentioned to her that, during a recent trip to Sept-Îles, he had noted her lack of interest in headquarters' initiatives for changes to the *Canadian Rail Operating Rules* and exemption requests and her lack of involvement in discussions with her colleagues. The grievor then returned to the issue of reverse order of merit competitions, pointing out that, although such a competition was not being considered, it was in Ms. Deslauriers' interest to assess her performance against that of others and to keep her knowledge up to date. Ms. Deslauriers responded that matters were not her fault but that of her colleagues, who interfered in her files. The grievor pointed out that he had recently had to intervene on three occasions in disagreements between Ms. Deslauriers and her colleagues, namely, Ms. Blais, Mr. Pilon and Mr. Boucher.

[108] This is Mr. Giguère's version of incident #2. In fall 2003, Mr. Giguère informed the managers of his team about budget cuts. Some employees were worried. Several employees, including Mr. Pilon, came to see him about the possibility of a reverse order of merit competition. Ms. Deslauriers might have been one of those employees, but Mr. Guiguère did not recall whether that was the case. Mr. Giguère, as he did for all employees who came to see him, told Mr. Pilon that there would be no such competition and that there were other ways to look at things, including using attrition, if necessary.

Allegation 2: On several occasions, Ms. Deslauriers felt demeaned, belittled and humiliated.

This allegation consists of five incidents.

Incident #1: While at a training session with colleagues in Moncton, New Brunswick, from September 29 to October 5, 1996, the grievor never spoke to her. During the time in the minivan travelling to and from the training session, the grievor completely ignored her.

Incident #2: In March 2002, during a one-week trip to Gananoque, Ontario, the grievor ignored her while travelling and avoided her during the week of training.

Incident #3: On December 11, 2003, the grievor emailed her, criticizing how she handled a file. Ms. Deslauriers' colleagues were sent copies of the email.

Incident #4: On December 19, 2003, Ms. Deslauriers requested compensatory leave. The grievor replied to her in a very loud and aggressive voice in front of other employees.

Incident #5: On January 26, 2004, the grievor asked Mr. Pilon to introduce Ms. Deslauriers to Pierre Delorme, rather than doing it himself.

Incident #1

[109] This is Ms. Deslauriers' version of incident #1. During a trip to Moncton from September 29 to October 2, 1996, with Ms. Blais, Mr. Pilon, Mr. Sauvé and the grievor, the grievor did not speak to her very often. He made general comments. Ms. Deslauriers was sitting in the van's third row of seats with Mr. Sauvé, and the grievor drove. Ms. Deslauriers added that it was common knowledge in the office that the grievor did not speak to her.

[110] At the hearing, Ms. Deslauriers explained the meaning of her complaint as follows:

[Translation]

I wanted to clarify his attitude toward me compared to the others. He did not speak to me. He spoke to the others. During trips, he did not speak to me. He spoke to my colleagues but not to me. There was nothing friendly between us. It was strictly business. I felt left out.

[Emphasis added]

[111] According to Ms. Deslauriers, the chill between her and the grievor was not apparent to the other travellers. After the trip, she invited the grievor to coffee several times, but he accepted the invitation only once.

[112] This is the grievor's version of incident #1. The grievor stated that he remembered the trip to Moncton well. The purpose was to attend one-time training on the *Canadian Rail Operating Rules*, the Railway Operations team's main work tool. Ms. Blais, Mr. Pilon, Mr. Sauvé and Ms. Deslauriers were also on the trip. Since he was from New Brunswick, the grievor organized evening outings around Moncton, including visits to Moncton's Magnetic Hill, Fort Beauséjour and a lobster tasting. The grievor introduced several pictures in evidence of the employees taken while on the trip, in which everyone seemed to be having a good time.

[113] This is Ms. Blais' version of incident #1. Ms. Blais testified that the trip had been very pleasant and that they had had a lot of fun, as was evident from the pictures that the grievor had taken.

[114] This is Mr. Sauvé's version of incident #1. The trip to New Brunswick was without incident, and Ms. Deslauriers never complained about it.

Incident #2

[115] This is Ms. Deslauriers' version of incident #2. During a trip to Gananoque that included Mr. Pilon, Ms. Blais, Mr. Richer, Mr. Rollet, the grievor and herself, the grievor avoided her, although he spoke to other employees and had lunch and coffee breaks with Ms. Blais and Mr. Pilon. Ms. Deslauriers tried unsuccessfully to speak to him. She felt alone but did not raise this issue with the grievor before filing her complaint. Ms. Deslauriers testified that the grievor did not often speak to her but that he sought the company of Ms. Blais, Mr. Pilon and Mr. Roy, which was very unpleasant for her.

[116] This is the grievor's version of incident #2. The training in Gananoque ran from Monday morning to Friday afternoon. Consequently, employees were required to travel on the Sunday. The grievor explained that he had had a disagreement with Mr. Sauvé before leaving about the mode of travel. Because of a family activity on the Sunday, the evening of departure, Mr. Sauvé wanted to travel in his personal vehicle at a kilometric rate of \$0.42 and to arrive late in the evening, rather than travelling with the group in a

rented minivan. The grievor gave him two options: to take the train the following morning or to travel in his personal vehicle at a kilometric rate of \$0.13, the rate allowed when travel is at the employee's request. Mr. Sauvé told the grievor that he would not attend the training unless he was allowed either to travel at the \$0.42 per kilometre rate or to rent a vehicle. The grievor considered Mr. Sauvé's request unacceptable because the other employees were travelling in a shared vehicle rented for the occasion. It was agreed that Mr. Sauvé could remain at the office and take the training at a later date. At the beginning of the training week, Ms. Deslauriers informed the grievor that her partner planned to file a harassment complaint against the grievor because he had refused his travel request. The grievor was worried about Ms. Deslauriers' comment and decided to stay away from her to avoid any further incidents. The grievor said that he met with Mr. Sauvé afterward. They explained their respective positions, and the situation was resolved.

[117] This is Mr. Pilon's version of incident #2. Mr. Pilon did not notice anything unusual between the grievor and Ms. Deslauriers. The minivan was quite full, to the point of being uncomfortable, but there were no incidents.

[118] Mr. Pilon added that, in 2003, the team travelled to Vancouver, British Columbia, for a conference. Employees had the choice of travelling on the preceding Saturday to reduce travel costs or on the Monday. Ms. Deslauriers, along with everyone else, decided to spend the weekend in Vancouver to take part in visits organized by the grievor. After the visits, the grievor had dinner with friends. The other employees went for a drink and dinner and then to a discotheque. There was considerable drinking during the evening, as the photos that Mr. Pilon took of Ms. Deslauriers attest.

Incident #3

[119] This is Ms. Deslauriers' version of incident #3. On December 11, 2003, the grievor sent her an email criticizing a lack of rigorous analysis of an exemption request from the QNS&L. Ms. Deslauriers was offended by the grievor's criticisms because, according to her, the file had been discussed during a group trip to Sept-Îles in October 2003. Jacques Clavette, Ms. Deslauriers' contact at the QNS&L, had called her in August. The purpose of the trip was to "solve those problems." Once onsite, the team suggested to Mr. Clavette that he request an exemption to solve the problem.

[120] Ms. Deslauriers had consulted Ms. Blais and Mr. Pilon before sending her

response to Mr. Hunter at headquarters by email on December 10, 2003. A similar request from VIA Rail had recently been approved. According to Ms. Deslauriers, the exemption request was fully justified by the QNS&L's detailed submission. Ms. Deslauriers considered the December 11, 2003 email an unwarranted reprimand that humiliated her in front of her colleagues.

[121] On December 19, 2003, Ms. Deslauriers waited for the grievor to arrive to discuss the exchange of emails on December 11, 2003. The previous day, Ms. Deslauriers had met with Mr. Faust and had mentioned to him the situation that she was experiencing with the grievor. On December 19, 2003, she had a conversation with the grievor to ask him for leave on the following Monday. The grievor granted it in a tone that she considered unpleasant, and the matter of the email exchange was not discussed. The grievor returned to his office and shut the door. The grievor then left the office for the Christmas party without speaking to her. In an effort to resolve what she felt was a work-related misunderstanding, Ms. Deslauriers met with Mr. Giguère and walked with him to the restaurant where the Christmas party was being held. She hoped that Mr. Giguère would resolve the situation for her. At the Christmas party, Ms. Deslauriers was on the same bowling team as the grievor. Everything went well, without any mention of the matter of the email.

[122] This is the grievor's version of incident #3. The trip to Sept-Îles in October 2003 was a trip with the entire Railway Operations team (the grievor, Ms. Blais, Mr. Pilon and Ms. Deslauriers). They discussed Rule 82.1, about mandatory meal time, the subject of another exemption request from the QNS&L. Ms. Deslauriers showed little interest in the discussion. On November 12, 2003, Transport Canada received a request for an exemption under paragraph 5.1.1(b) of the *Rules*. The request fell under the jurisdiction of the Quebec Region and therefore was sent to the grievor for review and recommendation. Since the request was associated with Ms. Deslauriers' territory, the grievor assigned it to her. By coincidence, the exemption request came in shortly before there was a rotation of territories between the members of the Railway Operations team. On December 8, 2003, Ms. Deslauriers asked the grievor to assign the QNS&L request to Mr. Pilon, because he was the next person in charge of the territory. The grievor decided that Ms. Deslauriers should complete the review of the file because the request had come in during her rotation.

[123] During the meeting, the conversation shifted to the issue of Ms. Deslauriers'

responsibilities as the workplace health and safety officer (10% of her duties), given an imminent workforce centralization in the area. Ms. Deslauriers was worried that her position would be affected. The grievor reassured her that the change would affect the duties allocated to her but not her position. He told her that it was in her interest to keep her knowledge up to date and to be familiar with her files, adding that he had a duty as her manager to remind her of that. At the end of the meeting, Ms. Deslauriers stated that she was very unhappy about having to complete the exemption request file.

[124] The grievor explained that the normal practice is for persons assigned to a file to consult their colleagues in the section to obtain their comments and to develop a detailed analysis allowing headquarters to carry out a risk assessment on the request. The response must be discussed with the grievor before being sent. On December 8, 2003, rather than following the normal practice, Ms. Deslauriers replied to the exemption request by referring to an exemption granted to another railway company without providing an analysis specific to QNS&L operations. Given the lack of information, the grievor asked Ms. Deslauriers to provide a detailed explanation of her arguments about the file. Ms. Deslauriers' colleagues were copied on the email because of their involvement in the file.

[125] By return email, Ms. Deslauriers complained of a “[translation] change in attitude toward her.” The grievor replied that it was a “[translation] reminder for future action.” In a December 16, 2003, email, Ms. Deslauriers wrote that she did not understand his request for clarification since the justification was set out in the document from the railway company that had already been sent to headquarters. On December 17, 2003, Ms. Deslauriers called the grievor when he was in a meeting in Ottawa to discuss the matter and to complain about a reprimand. The grievor told her that it was not a reprimand and offered to discuss it with her on his return to the office. The grievor returned to the office on December 19, 2003, the day of the Christmas party, and he did not have the time to discuss the issue with her. The grievor and Ms. Deslauriers were members of the same bowling team. Everyone had a good time, and the email was not discussed.

[126] The grievor explained that a request for an exemption to a safety rule can have serious consequences and that it must be analyzed based on the operating requirements of the company making the request. The QNS&L operates a remote regional railway between Sept-Îles and Schefferville, unlike VIA Rail, for which a

request had previously been granted involving a high-speed intercity passenger train. Since the work of each individual inspector affects the uniformity of decisions made regionally and nationally, sharing the analysis of a situation before issuing an opinion makes it possible to harmonize all decisions made by inspectors. Even if Ms. Deslauriers' recommendation had been to grant the exemption request, Ms. Deslauriers was still required to analyze the file in terms of the specific operational requirements of the QNS&L.

[127] This is Ms. Blais' version of incident #3. Ms. Deslauriers sought considerable assistance from Ms. Blais and the grievor in analyzing her files. She systematically asked Ms. Blais to review her letters. Ms. Blais not only had to correct Ms. Deslauriers' spelling and grammar errors but often the letters' contents, to the point where she felt that she was doing Ms. Deslauriers' work. Ms. Deslauriers had complained to the grievor that Ms. Blais was taking over her files and then had denied doing so to Ms. Blais. As for the November 12, 2003 QNS&L exemption request, Ms. Blais expressed her opinion to Ms. Deslauriers, but her involvement stopped there because she was "[translation] fed up" with doing Ms. Deslauriers' work. In her opinion, Ms. Deslauriers' reply to the exemption request "[translation] lacked substance." According to Ms. Blais, it was customary to review any opinion about an exemption request with the manager before sending it to the person responsible for the official response at headquarters.

[128] Ms. Blais testified that the QNS&L's request for an exemption under paragraph 5.1.1(b) of the *Rules* could not have been discussed at the time of the Sept-Îles trip in October because it was received on November 12, 2003. During that trip, QNS&L exemption requests in general, but not that one, were discussed. Ms. Blais gave Ms. Deslauriers an opinion on that file, but it was Ms. Deslauriers' responsibility to prepare the justification based on the company's specific circumstances, even if an exemption was eventually recommended. Ms. Blais was used to the telegraphic style of the grievor's emails, and the one sent to Ms. Deslauriers would not have offended her.

[129] This is Mr. Pilon's version of incident #3. Mr. Pilon testified that he consulted the grievor before issuing an opinion on a request for an exemption from the *Rules*. The practice was for inspectors to consult each other before issuing an opinion. Ms. Deslauriers relied heavily on both of her colleagues to analyze her files and offered them little help in return. He was not surprised by the request that Ms. Deslauriers provide justification for the exemption recommendation because the response did not

include any analysis. A response normally contains detailed reasons for the recommendation and an explanation of how the *Rules* should be applied. Ms. Deslauriers' response explained nothing. In addition, the QNS&L was a closely monitored railway.

[130] Mr. Pilon was not surprised that the grievor asked Ms. Deslauriers to justify her response. He saw the request for justification as recognition of Ms. Deslauriers' shortcomings. When the territories were rotated, Ms. Deslauriers often transferred files that were incomplete or unfinished, unlike Ms. Blais, who always kept impeccable files.

[131] Mr. Pilon stated that in fact he and Ms. Blais worked with Ms. Deslauriers on the response to the QNS&L exemption request, but to a limited extent. Mr. Pilon had held back from being fully involved because on several occasions Ms. Deslauriers had not helped him with his requests. According to Mr. Pilon, Ms. Deslauriers had not generally been very involved with the files and that she had relied on the opinions of the grievor, her colleagues and quite often Mr. Sauvé for technical information, even though this was not Mr. Sauvé's job.

[132] Mr. Pilon testified that, during the trip to Sept-Îles in October 2003, several exemption requests were discussed, in particular a request from the Association des chemins de fer. That request did not come from the QNS&L. It could not have been the request from the QNS&L under paragraph 5.1.1(b) of the *Rules* because that request was not received until November 12, 2003. If Ms. Deslauriers was aware of a request, she did not mention it to anyone. During the trip, Ms. Deslauriers did not participate in discussing the files. She read newspapers.

Incident #4

[133] This is Ms. Deslauriers' version of incident #4. Ms. Deslauriers complained that the grievor had spoken to her in an aggressive tone on December 19, 2003 about a request for leave. The grievor asked her to see if she could get someone to replace her during her absence and then approved the leave without revisiting that point.

[134] This is the grievor's version of incident #4. Following the success of a regional pilot project called "[translation] Mobile Inspector" in the Transportation of Dangerous Goods section, at a management meeting in November 2003 the Regional Director asked managers to test the waters with the employees in each section about running a

similar, but adapted, project. The mobile inspector concept assumes that each inspector has a fax machine, modem and photocopier at home and that each inspector can work from home on certain files. Employees in the grievor's section adopted that work approach. However, the arrival of a new minister created certain challenges, in particular the need to respond quickly to requests for information and to provide assistance from headquarters about ministerial questions. In consultation with the employees, a schedule was arranged so that, on a rotating basis, one employee from each of the unit's two teams would be in the office at all times during normal working hours. The grievor had asked that normal working hours be from 08:00 to 16:00 to respond to requests that arrived late in the afternoon. Most employees had a work schedule between 07:00 and 17:00. However, for some time, Ms. Deslauriers and Mr. Sauvé had worked from 06:00 to 14:00, despite warnings from the grievor to respect the established working hours. After some discussions, a compromise was reached, which allowed employees to begin work at 07:00 but to work late if an urgent request came in.

[135] Ms. Deslauriers expressed her discontent with the working hours because she claimed that they conflicted with her swimming and aerobics classes, which began at 15:30. The grievor felt that that was not a valid reason to change the normal working hours, and he retained a schedule starting at 07:00.

[136] After the new work procedure was introduced, Ms. Deslauriers requested leave. The grievor mentioned to her that she had to let him know about any conflict between her leave and her in-office schedule so that he could cover emergencies in her absence. He had to explain it to Ms. Deslauriers several times before she understood his request. He denied that he raised his voice or that he was impolite to her.

[137] This is Mr. Giguère's version of incident #4. Mr. Giguère testified that the grievor is an imposing man who can speak curtly without actually being angry. Mr. Giguère occupied the office beside the grievor's, not far from that of Ms. Deslauriers. He was in the office on the morning of December 19, 2003. He stated that he did not hear the grievor or Ms. Deslauriers raise their voices. Ms. Deslauriers did not mention this incident when they walked together to the Christmas party.

[138] This is Mr. Sauvé's version of incident #4. He stated that he heard the exchange between the grievor and Ms. Deslauriers about the request for compensatory leave on December 19, 2003. The grievor replied curtly but not aggressively. Ms. Deslauriers

was upset.

[139] This is Mr. Pilon's version of incident #4. Mr. Pilon stated that he did not recall an exchange between the grievor and Ms. Deslauriers about a request for leave.

Incident #5

[140] This is Ms. Deslauriers' version of incident #5. On January 26, 2004, during Mr. Delorme's visit to their unit, the grievor introduced all the other employees, but when he came to Ms. Deslauriers, he asked Mr. Pilon to do it. Ms. Deslauriers considered his behaviour unprofessional and felt left out.

[141] This is the grievor's version of incident #5. On January 26, 2004, Mr. Delorme, the manager assigned to headquarters' workplace health and safety program, was in the section's offices to provide training. As the workplace health and safety lead, Ms. Deslauriers often interacted with him. The grievor met Mr. Delorme at the door and began introducing him to some employees. When Mr. Pilon joined them, the grievor asked him to continue the introductions because he had an emergency to attend to. The grievor stated that at any rate he would have been uncomfortable introducing Ms. Deslauriers because she had informed him a month earlier of her intention of filing a harassment complaint against him. In addition, he was no longer her line superior. The grievor did not recall the nature of the emergency that he had to deal with.

[142] This is Mr. Pilon's version of incident #5. Mr. Pilon stated that he was uncomfortable having to introduce Ms. Deslauriers because they had not spoken since the announcement that she was filing a harassment complaint against the grievor.

Allegation 3: Ms. Deslauriers felt left out by the grievor, and the grievor intentionally undermined her in her work.

This allegation involves five incidents.

Incident #1: Beginning in January 2004, the grievor no longer sent the emails or documents that Ms. Deslauriers needed to carry out her work.

Incident #2: In October 2004, the grievor withheld information, without cause, which Ms. Deslauriers required for a meeting.

Incident #3: Since 1995, the grievor did not offer Ms. Deslauriers opportunities to join committees or attend meetings with clients and has not assigned her any projects.

Incident #4: The grievor did not inform Ms. Deslauriers' colleagues when her mother-in-law died.

Incident #5: The grievor used Ms. Deslauriers' colleagues to send her information rather than speaking to her directly.

Incident #1

[143] This is Ms. Deslauriers' version of incident #1. Ms. Deslauriers alleged that the grievor deliberately removed her name from the Railway Operations email distribution list, which prevented her from carrying out her work properly and from being fully prepared for certain meetings. After the change in supervision, documents that the grievor distributed had to be sent to Ms. Deslauriers' temporary supervisor before being forwarded to her. Her temporary supervisors were Mr. Giguère from January until April 2004, Mr. Boulanger from April to fall 2004 and Ms. Gagnon after fall 2004.

[144] This is the grievor's version of incident #1. From the time that Ms. Deslauriers asked to be supervised by another manager, he systematically sent all relevant information to her supervisor so that that person could coordinate her activities. In March 2004, Mr. Giguère was preparing to leave for another job and asked the grievor to send the information directly to Ms. Deslauriers during the transition period. In April 2004, Mr. Boulanger took over from Mr. Giguère. Mr. Boulanger and the grievor agreed that the grievor would send the information directly to Mr. Boulanger. The agreement reads as follows:

[Translation]

...

TRANSFER OF TERRITORY NUMBER II TO MR. BOULANGER

As of Friday, April 16, 2004, Ms. Colette Deslauriers will report to the manager of security management systems, Martin Boulanger.

This document sets out the management responsibilities of the two managers and ensures uniformity in the application of the regional Railway Operations program.

1.0) Responsibility for Railway Operations territory number II

Mr. Boulanger will be responsible for supervising all aspects of territory number II. . . If Mr. Robitaille receives complaints about the territory handled by Ms. Deslauriers, he will inform Mr. Boulanger, who will take the necessary action to handle the complaint. Mr. Robitaille will be copied on all correspondence about how complaints that Ms. Deslauriers dealt with were handled. If Mr. Boulanger receives complaints related to territory number II, he will copy Mr. Robitaille accordingly.

. . .

4.0 Sharing information related to the Railway Operations section

If requests are received from headquarters for comments on rules to be approved or amended, Mr. Robitaille will provide Mr. Boulanger with the information, who will ensure that Ms. Deslauriers provides the relevant and appropriate information. Mr. Boulanger will then forward the information related to the request to Mr. Robitaille so that Mr. Robitaille is able to ensure appropriate follow-up on the file. Mr. Boulanger will be provided with copies of developments in the file.

. . .

[Emphasis added]

The agreement is still in effect. The responsibilities were transferred to Ms. Gagnon, currently the section's director.

[145] This is Mr. Giguère's version of incident #1. When Mr. Giguère decided that Ms. Deslauriers would report to him, he believed that it would be for a short time and therefore did not involve anyone else. Ms. Deslauriers' supervision was not a formal arrangement at that time. Mr. Giguère asked the grievor to continue to send electronic material directly to Ms. Deslauriers. A short time later, the grievor began sending the material directly to Mr. Giguère for forwarding to Ms. Deslauriers. Mr. Giguère did not recall if he had forgotten to forward certain information to Ms. Deslauriers or if he had not received the material from the grievor.

[146] After a few weeks, realizing that the conflict between Ms. Deslauriers and the grievor was not going to be resolved quickly, Mr. Giguère decided to request the assistance of another manager. He asked Mr. Boulanger to take over supervising

Ms. Deslauriers; Mr. Boulanger agreed. On one or two occasions, Mr. Boulanger mentioned to the grievor that he was not receiving all the material to forward to Ms. Deslauriers; as a result, the agreement was drawn up to resolve the issue. It took some time to agree on a process since Mr. Boulanger and the grievor did not always see eye to eye.

Incident #2

[147] This is Ms. Deslauriers' version of incident #2. The grievor failed to send her a new warning label, which he had allegedly obtained at a meeting that she had not attended.

[148] This is the grievor's version of incident #2. The grievor mentioned that, following a meeting in October 2004, he had received a new label to be used by health and safety officers when declaring a machine unusable, a situation that had not happened in the 15 years he had been working for Transport Canada. After the meeting, he gave the label to Mr. Pilon, asking him to contact Ms. Gagnon since neither she nor Ms. Deslauriers had been at the meeting. When Ms. Gagnon emailed him a few weeks later, asking him where the label was, the grievor replied that he had given it to Mr. Pilon. He explained that the new label was merely a reprint of the old label with minor changes. It did not invalidate the old label. The change had no impact on railway safety or on the work of railway safety inspectors.

[149] This is Mr. Pilon's version of incident #2. The warning label has never been used. It is used if there is a refusal to work, not in the context of Railway Operations inspections, because its purpose is to prevent the use of fixed machines. He stated that he had delayed distributing the label. Mr. Pilon testified that the grievor could be inconsistent in his emails and that, on a few occasions, the grievor forgot to send copies to certain employees, even Mr. Pilon. His colleagues would pass along the information to him without further formality.

Incident #3

[150] This is Ms. Deslauriers' version of incident #3. Ms. Deslauriers complained that she had not been given opportunities to participate in professional activities or projects equal to the section's other employees and that Mr. Pilon and Ms. Blais had had more opportunities than she.

[151] This is the grievor's version of incident #3. The grievor testified that, when required, he consults the lead employee for a sector. In Ms. Deslauriers' case, he consulted her about workplace health and safety. The grievor established that, contrary to her claims, Ms. Deslauriers participated in several activities, including the following, which were part of his statement to the investigators:

[Translation]

...

- a) *In 2003, the complainant participated in testing the new safety management systems of a major railway operator. She was supervised by Martin Boulanger, the office's manager of safety systems inspections. That secondment allowed the complainant to become familiar with and to contribute to a new approach by the Department to monitoring railway safety.*
- b) *In February 2001, the complainant worked full-time developing a legal brief with Mr. André Sauvé in the Equipment section. The project required considerable effort.*
- c) *During the 2000-2001 fiscal year, the complainant carried out a special project, lasting several months, on protecting track work (Rule 40.1 of the Canadian Rail Operating Rules). During that time, she worked with Mr. Venance Boucher from the Engineering Section evaluating the level of safety practices of several railway companies.*
- d) *In February 2000, the complainant was an active member of the national committee developing a computer system linked to applying the rail health and safety program. The head office led that committee.*
- e) *The complainant is the co-chair (union representative) of the local workplace health and safety committee for our office. As co-chair, she is the contact for employees with respect to the employer's responsibility for Part II of the Canada Labour Code. She was also involved in designing a video on workplace health and safety in collaboration with the head office.*
- f) *The complainant acted as the acting manager of the Railway Operations and Equipment sections on at least two occasions.*
- g) *The complainant coordinates the availability of safety officers on weekends. A rotation exists among employees*

who volunteer to provide emergency service outside regular office hours. She is also responsible for preparing quarterly workplace health and safety reports.

- h) The complainant has been an active member of the regional interdepartmental workplace health and safety technical committee of the Human Resources and Skills Development Canada (HRSDC) since May 2000.*
- i) The complainant has been an active member of the HRSDC Investigative Procedures Committee since October 1998. That committee meets semi-annually, and the last meeting was in February 2004.*
- j) The complainant is the regional delegate to the workplace health and safety program redesign committee. That initiative, which began in 2004, is led by our head office and is a joint initiative with delegates from each region.*

... she was invited to and attended all seminars for the Railway Operations section, the most recent having been held in Victoria, British Columbia, in May 2003. She also attended a national conference for inspectors held in Ottawa in June 1999 ... [and] rail safety conferences of Groupe TRAQ (Transports sur rails au Québec) held annually in Ste-Foy.

Incident #4

[152] This is Ms. Deslauriers' version of incident #4. When her mother-in-law died, Ms. Deslauriers informed the grievor, but he did not follow up. As a result, she was deprived of the presence of her colleagues on that occasion and of an offering from the social committee.

[153] This is the grievor's version of incident #4. He has no recollection of the passing of Ms. Deslauriers' mother-in-law or of failing to inform Ms. Deslauriers' colleagues of that passing.

Incident #5

[154] This is Ms. Deslauriers' version of incident #5. She alleged that she tried to re-establish relations with the grievor on several occasions since 1995, but without success. Although other employees of the section were aware of the situation, they did not become involved; they forwarded the information they received from the grievor to her. The grievor avoided speaking to her, except during meetings about annual

performance evaluations, during which the grievor merely asked her to sign the document.

[155] Ms. Deslauriers admitted that she never received a poor performance evaluation from the grievor, that he allowed her to take training, that he authorized overtime and compensatory leave, perhaps even more so than for other employees, and that she replaced him at least once during his absences.

[156] This is the grievor's version of incident #5. He explained that, in the absence of concrete examples, he could not respond to the allegation that he used Ms. Deslauriers' colleagues to provide her with information in order to avoid speaking to her directly. The grievor pointed out that this allegation contradicts Ms. Deslauriers' statement that his change in attitude toward her occurred in December 2003.

[157] The grievor added that the allegation that he did not discuss the content of her annual performance appraisal with Ms. Deslauriers contradicts his usual practice of asking all his employees if they have comments or something to add to the appraisal. Ms. Deslauriers never complained to him about that failing before filing her complaint.

[158] This is Ms. Blais' version of incident #5. Everything was going well on the team until December 2003. However, the fact that Mr. Sauvé quite often expressed his opinion concerning Ms. Deslauriers' files did create some problems on the team.

Allegation 4: The grievor sexually harassed and assaulted Ms. Deslauriers.

This allegation involves two incidents.

Incident #1: On April 4, 1995, in a Grand-Mère hotel, the grievor sexually assaulted Ms. Deslauriers.

Incident #2: On June 12, 1995, on a VIA Rail Canada train, the grievor tried to kiss Ms. Deslauriers three times.

Incident #1

[159] This is Ms. Deslauriers' version of incident #1. Ms. Deslauriers admitted having friendly relations with the grievor until 1995. They often went to lunch together. After the Christmas dinner in 1994, they allegedly went to a "peep show," and they kissed. When she accepted the secondment agreement in 1995 to become a railway inspector,

she knew that she would be reporting to the grievor. At that time, they were good friends, and things were going well. She also knew that she would have to travel with him as part of her new duties.

[160] On April 3, 1995, the grievor suggested a trip to Grand-Mère for the following day just as she was beginning her secondment to his unit. On April 4, 1995, they worked during the day and met for a drink and dinner. Wine was consumed during dinner. After dinner, they played darts. The grievor called Mr. Sauvé during the evening to tell him that they were having a good time. The grievor accompanied Ms. Deslauriers to her room. When she opened the door, he tried to kiss her and fondle her. She pushed him away. He left without further incident. They returned to Montreal the next day by car without speaking much. She hoped that there would be no recurrence of the incident.

[161] This is the grievor's version of incident #1. The grievor testified that he has known Ms. Deslauriers since 1990, when she was the manager of the administration section for the Quebec Region. They were both on the management committee. They had travelled, sometimes alone and sometimes with other people, to training sessions. In 1994, the grievor told her that he was interested in her. He sent her a letter and bought her a gift. Ms. Deslauriers tore up the letter in front of him and told him that she did not share his feelings. The grievor stated that from that point forward he discontinued any further interest and kept his distance.

[162] After Ms. Deslauriers became an inspector in 1995, on a few occasions she and the grievor went for coffee and lunch when they were in the office. One Saturday, the grievor went with his partner to watch Ms. Deslauriers' daughter play ringette because the game was close to his home. Ms. Deslauriers and the grievor attended the office Christmas parties, as did all employees. In 1995 and 1996, they went on social outings with their respective partners. Ms. Deslauriers' change from one partner to another (from her ex-husband to Mr. Sauvé) cooled and then ended the social relations between the grievor and Ms. Deslauriers outside office hours.

[163] The grievor testified that the only person with whom he had shared his initial interest in Ms. Deslauriers was Mr. Sauvé, who was his good friend.

[164] This is Mr. Sauvé's version of incident #1. The grievor called Mr. Sauvé when he was in Grand-Mère, but Mr. Sauvé could not remember the date. The grievor spoke to

him, laughing that Ms. Deslauriers had beaten him at a game of darts. The friendly relationship between Mr. Sauvé and the grievor deteriorated when the grievor learned that Mr. Sauvé was in an intimate relationship with Ms. Deslauriers.

Incident #2

[165] This is Ms. Deslauriers' version of incident #2. During a trip to Lac Saint-Jean with the grievor in 1995 (alleged to have been on June 12, 1995), Ms. Deslauriers and the grievor were travelling in an almost empty VIA Rail Canada car. They were returning from an inspection. She was seated beside the grievor on the aisle side. The grievor tried to kiss her three times. She pushed him away. They continued to work during the remainder of the trip and stayed in the same hotel that week without further incident. Ms. Deslauriers did not mention the incident again.

[166] Ms. Deslauriers testified that she did not file a complaint against what she considered to be sexual assault because she did not want to jeopardize her career. She and her partner at that time went on a social outing with the grievor and his partner. One day, Ms. Deslauriers mentioned that her daughter was going to play ringette one Saturday; the grievor and his partner attended the game. Ms. Deslauriers separated from her partner in September 1995. Ms. Deslauriers did not recall going on social outings with Mr. Sauvé and the grievor and his partner, other than one evening at a campground when Ms. Blais was present.

[167] This is the grievor's version of incident #2. He testified that the April 16, 2004 complaint referred to an assault that allegedly took place in June 1995. Later, on November 15, 2004, Ms. Paris told him of two allegations of sexual assault. He denied assaulting Ms. Deslauriers in any way whatsoever. The grievor questioned the allegations about those incidents. After 10 years, he was unable to verify the dates of the trips in question because the receipts had been destroyed.

[168] The grievor questioned the June 12, 1995 date of the trip with Ms. Deslauriers because he had evidence that he was in the Montreal office that week (emails sent from his workstation) and that Ms. Deslauriers was attending a meeting in Montreal about a workplace accident with fatal injuries (a copy of an investigation report supports his statement). He learned during his interview with the investigators that Ms. Deslauriers was no longer certain of the dates of the alleged assaults and that they were now some date in 1995. He testified that the date of April 4, 1995, was unlikely as a travel date to

Grand-Mère because it was Ms. Deslauriers' second day working in his unit. In any event, he could not respond to such a vague allegation.

[169] At the hearing, during the grievor's cross-examination, the employer confronted him with a travel claim for the period from July 10 to 13, 1995 to Lac Saint-Jean and another travel claim from Ms. Deslauriers for the same period to Lac Saint-Jean. The grievor replied that that was not evidence of assault on a train. The grievor stressed that, at the time of the alleged assaults, Ms. Deslauriers was married to an investigator in the police department. He found it surprising that she did not mention such serious conduct to her husband or complain directly to the police department.

[170] This is Mr. Sauvé's version of incident #2. He and Ms. Deslauriers met with the grievor and his partner at a social activity in July 1995 at a campground. He did not learn the details of any assault until Ms. Deslauriers told him about it after she had filed her complaint.

Allegation 5: The grievor abused his authority over Ms. Deslauriers.

This allegation involves four incidents.

Incident #1: From April 3, 1995, to March 29, 1996, Ms. Deslauriers did not receive the necessary training and support to become a railway inspector.

Incident #2: In March 1997, the grievor informed Ms. Deslauriers without asking her opinion that she was being seconded to another department.

Incident #3: In late August 2001, the grievor informed Ms. Deslauriers that she would be in charge of the 2001 United Way campaign.

Incident #4: In 2003, the grievor restricted Ms. Deslauriers' travel and denied her a trip to Mont-Joli, while approving the trip for Mr. Picard. The grievor told Ms. Deslauriers that the reason for that decision was a limited budget.

Incident #1

[171] This is Ms. Deslauriers' version of incident #1. Ms. Deslauriers testified that it was mainly her colleagues and Mr. Sauvé who provided her with professional training and that she received little advice from the grievor on how to do her job. The grievor answered her technical questions but avoided social conversations. Ms. Deslauriers did

not feel that she was treated the same as the other employees in the section and wanted to be treated the same way.

[172] This is the grievor's version of incident #1. The grievor managed two teams. One team was responsible for Railway Operations, which means inspections related to railway rules and related requests for exemptions. The other team was in charge of monitoring and inspecting rail rolling stock. Ms. Deslauriers was part of the Railway Operations team, along with Ms. Blais and Mr. Pilon, two experienced inspectors.

[173] Ms. Deslauriers joined his section on April 3, 1995, under a secondment agreement that ended on March 29, 1996. She came for professional growth and development in addition to addressing the operational requirements of the grievor's unit. Ms. Deslauriers' substantive position was manager of the Quebec Region's administration section. She obtained a permanent position as a railway safety inspector in the grievor's unit in February 1996, following a competition for an indeterminate railway operations officer.

[174] Part of Ms. Deslauriers' training involved train travel to observe train inspections. It was common for the grievor to travel with his employees. Sometimes he travelled alone and sometimes with a group, depending on the nature of the work. Ms. Deslauriers was not the first person to travel alone with him. In addition, since Ms. Deslauriers had no experience in the field, the grievor assigned her a mentor, Mr. Sauvé. She acquired her knowledge through work experience and specialized training.

[175] The grievor stated that he spoke regularly with Ms. Deslauriers about her field of expertise, workplace health and safety. Moreover, Ms. Deslauriers was a diligent participant, on an ongoing basis, in at least 10 committees, projects and special meetings, the importance and the descriptions of which speak for themselves (see the list cited in paragraph 151 of this decision). As well, Ms. Deslauriers attended all Railway Operations conferences, the most recent in Victoria, British Columbia, in May 2003, as well as the annual railway safety conferences of the rail transportation group in Quebec City.

[176] The grievor testified that, between April 3, 1995, and March 29, 1996, he provided the support required for professional development as set out in the secondment agreement. On that point, Ms. Deslauriers received ongoing support from

Mr. Sauv , who assumed responsibility for her technical development. The grievor believed that he had performed his task well since Ms. Deslauriers qualified through a competition and obtained an indeterminate position as a railway operations inspector in February 1996.

[177] This is Mr. Gigu re's version of incident #1. When Mr. Gigu re became the director of the Surface Services section for the Quebec Region, he met with all the employees, including the grievor and Ms. Deslauriers. Ms. Deslauriers told him that she loved her work, that the grievor had taken her under his wing and trained her, and that she had also received excellent training from her colleagues and manager. She was one of the most enthusiastic employees. She had only seven or eight more years to work, and she wanted to end her career on that team. She felt appreciated by the group and by the clients. She stated: "[translation] It's all good!"

Incident #2

[178] This is Ms. Deslauriers' version of incident #2. In 1997, the grievor told Ms. Deslauriers that she was being seconded to another department without having been consulted. She felt that a one-year absence, when she had been in her job for only a year, was premature. She did not object to the secondment because she thought that the grievor wanted to get rid of her. Ms. Belliveau encouraged her to accept the secondment. Ms. Deslauriers met with Camille Boileau to sign the secondment agreement but did not discuss her concerns with her. When she returned from the secondment, the grievor commented on her relationship with Mr. Sauv , which she felt was a negative comment. The grievor then left for his own secondment, and she did not have any contact with him for a year.

[179] This is the grievor's version of incident #2. In her 1996 performance assessment, Ms. Deslauriers identified workplace health and safety as an area of interest for training. Shortly afterward, the possibility of a secondment to HRDC from April 1, 1997, to March 31, 1998, was announced. The director general at that time, Ms. Boileau, strongly encouraged secondments for advancement purposes. Ms. Deslauriers expressed interest in the secondment and negotiated an agreement directly with Ms. Boileau without the grievor's involvement, except for his signature on the agreement to accept the secondment request. The grievor pointed out that an employee cannot be forced to accept a secondment against his or her will since the employee's consent is mandatory. On her return, Ms. Deslauriers told the grievor that

she had greatly appreciated the experience and that the HRDC had offered her a permanent position. However, she preferred to return to Railway Operations because she was treated better there.

[180] This is Ms. Blais' version of incident #2. With respect to secondments, the grievor first asked people to indicate interest; those who were interested would let him know. On Ms. Deslauriers' return from her secondment in 1997, she told Ms. Blais that she had learned a lot and that the year had been a positive experience.

[181] This is Mr. Sauv e's version of incident #2. Mr. Sauv e never knew that Ms. Deslauriers did not want to take the secondment in 1997; on the contrary, she told him that it was an opportunity for her to learn something new.

Incident #3

[182] This is Ms. Deslauriers' version of incident #3. In late August 2001, the grievor told her that she would be in charge of the United Way campaign for Railway Operations and Equipment. Ms. Deslauriers felt that she had been sufficiently involved in the campaign in the past and that it was someone else's turn because other employees in the section had not yet taken on that responsibility. The grievor allegedly told her that, if she refused to take on this task, he would ask her partner, Mr. Sauv e, to take charge of it, and he would tell him it was because she had refused.

[183] This is the grievor's version of incident #3. He produced a list prepared by the Quebec Region administration section showing the names of those responsible for the United Way campaign since 1990. Ms. Deslauriers' name appears only once, in 2001-2002.

Incident #4

[184] This is Ms. Deslauriers' version of incident #4. Ms. Deslauriers alleged that the grievor restricted her travel in 2003, specifically a trip to Mont-Joli, and that he allegedly sent Mr. Picard instead, claiming that the trip was not necessary and that there was a limited budget. Ms. Deslauriers saw this incident as favouritism because Mr. Picard was a friend of the grievor.

[185] This is the grievor's version of incident #4. The grievor testified that, without specific dates, this allegation is too general to allow for a response. He recalled that the

Railway Operations budget had always allowed inspectors to cover their territory. On a few occasions at the end of a fiscal year, some trips had been postponed until the beginning of the next fiscal year. The allegation that the grievor gave preferential treatment to Mr. Picard's work because of their friendship is unfounded.

Allegation 6: The grievor made disparaging comments about Ms. Deslauriers on several occasions.

This allegation consists of a single incident.

[186] This is Ms. Deslauriers' version of the incident. She alleged that three episodes occurred. (1) In December 1999, the grievor allegedly made comments about the intimate relationship between Ms. Deslauriers and Mr. Sauv  as follows: "[translation] Those two are still together." (2) On another occasion, the grievor allegedly questioned Ms. Deslauriers' interest in Mr. Sauv . (3) While looking at a photo of Shania Twain on a colleague's computer screen, the grievor allegedly made the following comment while looking at Ms. Deslauriers: "[translation] That is a beautiful woman!" Ms. Deslauriers assumed that the grievor found Ms. Twain better looking than her. She was hurt by the comment.

[187] This is the grievor's version of the incident. The grievor accepted a secondment to a special project in Ottawa from May 1998 to December 1999. Except for the month of April 1998, he did not supervise Ms. Deslauriers for 32 months (from May 1, 1997, to December 1999). During his secondment, he was replaced by Ms. Blais for six months, briefly by Mr. Gibault and by Mr. Sauv  for the remainder of that period. During the grievor's absence, Mr. Sauv  allowed Ms. Deslauriers to work only on workplace health and safety files and to neglect her other files. That arrangement enabled Ms. Deslauriers to travel with Mr. Sauv  as part of their work.

[188] On his return as the section manager, the grievor made a point with Ms. Deslauriers about reassigning her to inspection duties. It was then that he decided to divide the Quebec and New Brunswick inspection duties into three territories and to assign inspectors to each territory on an 18-month rotation. Ms. Deslauriers expressed her dissatisfaction with the change because she could no longer travel as freely as she had when Mr. Sauv  was the acting manager. The grievor had also had to intervene with respect to the number of calls between Ms. Deslauriers and Mr. Sauv  (over 900 minutes per month) using the cellphones provided to them by Transport Canada.

When he raised that issue with Ms. Deslauriers, things became tense. The number of calls returned to an acceptable level. In hindsight, the grievor realized that his professional relationship with Ms. Deslauriers began deteriorating at that point.

[189] This is Mr. Giguère's version of the incident. Mr. Giguère knew that Mr. Sauvé and Ms. Deslauriers were partners, but they avoided discussing it. On more than one occasion, the grievor told Mr. Giguère that it was sometimes hard to manage the work of Mr. Sauvé and Ms. Deslauriers because of their relationship and that he no longer had the same friendship with Mr. Sauvé as previously.

X. Organizational climate

[190] The organizational climate review served as an introduction to the investigation report and as evidence of the validity of the allegations. The investigators' comments can be summarized as follows: some employees found that the grievor had mood swings; some employees criticized the grievor for lack of leadership; others said that business trips were not always relevant and that the grievor liked to party after work; some employees had noticed tension between the grievor and some of his employees; the grievor could be intimidating, sometimes even manipulative, and he spoke badly of people in their absence; and the grievor was unfair in his assignment of tasks and showed favouritism toward employees who were part of his "clan." The investigators suggested that employees had left the section because of conflicts with the grievor. The investigators reported that the statements suggested that the grievor might be guilty of harassment toward other employees. The persons interviewed by the investigators testified to the grievor's knowledge, intelligence, quick responses and potential for advancement.

XI. Summary of the parties' arguments

[191] In light of the employer's objection to the adjudicator's jurisdiction to decide grievances referred to adjudication, it was agreed that the grievor's evidence would be adduced first and that the arguments of the parties would follow the same order.

A. For the grievor

[192] The grievor argued that he has lost everything because of an unjustified complaint. Before the complaint was filed, he was a front-line manager with an unblemished record and excellent performance evaluations and had even won an

award of excellence for his work at Transport Canada, an award that is rarely given. Throughout this ordeal, the employer criticized him for defending himself rather than simply submitting to the sanctions being imposed on him. The irregularities that he raised fell on deaf ears.

[193] The Transport Canada managers testified that their main concern was to maintain a healthy, productive workplace, without actually applying that principle to the grievor. In the grievor's opinion, the employer used every means to try to destroy his reputation, his career, his private life, his social life and his motivation. He has been a condemned person for five years. His financial situation is in ruins.

[194] The grievor explained that he identified numerous errors by the employer through his access to information requests. The employer hid behind the legislative framework to prevent him from discovering the truth. Documents were given to him in dribs and drabs and were heavily censored. A production order from the adjudicator was required to allow the grievor access to the uncensored versions essential to pursuing his grievances. Among other things, he learned that the DND had pointed out that the complaint did not comply with the *policy*, that Ms. Paris had worked with Ms. Deslauriers and her bargaining agent to expand the complaint, that clarifications about him had not been provided to him, and that Ms. Belliveau had filed a harassment complaint against him.

[195] The grievor described the negotiations that took place to have the person at the centre of the complaint, Ms. Deslauriers, testify, as wheeling and dealing. To agree to testify, Ms. Deslauriers received significant compensation in a grievance settlement, and her partner, Mr. Sauvé, received a promotion.

[196] Even though a disciplinary action is valid for only two years, after five years, the grievor is still assigned to Dorval. To date, he still does not know what conduct justified his transfer to Dorval, except for the existence of the investigation report. After the final investigation report was released, the employer made a decision to never reinstate him in his managerial position. To that end, he was offered a SAPP assignment under which he would have been laid off after 18 months. When the grievor refused that assignment, the employer applied for an exclusion order to transfer him without his consent, despite the fact that it was illegal. His immediate superior, Ms. Gagnon, launched a competition to replace him permanently, announced his departure at a national meeting and then had his office emptied. A short time later,

she assigned him a coach but refused the coach's recommendation that he be allowed to supervise employees to complete his coaching. More than two years later, Ms. Gagnon asked the grievor to acknowledge his wrongdoing and to agree to submit to a remedial plan under which reinstatement in his managerial position would be at the employer's discretion. In other words, they wore him down in the hope that he would quit.

[197] The grievor claims that the employer did not follow the policies on which its disciplinary power is based, including the following:

- not screening Ms. Deslauriers' complaint when she filed it;
- conducting an unjustified investigation, given the minor nature of the incidents that had occurred in the year before the complaint was filed;
- lacking transparency and neutrality by becoming involved in the investigation process;
- investigating criminal incidents clearly excluded from the *policy*;
- investigating incidents that were untimely under the *policy* or that occurred before it came into force;
- investigating the grievor's management style as a question of "organizational climate" without informing him;
- failing to intervene actively to resolve the complaint amicably before proceeding with the investigation;
- agreeing to changes to the complaint after it was filed;
- delaying communication of the complete allegations until only a few days before the beginning of the investigation;
- failing to communicate essential information during the investigation;
- illegally sub-delegating delegated manager authority to Ms. Paris under the *policy*;
- not conducting the investigation into the complaint within the six months

stipulated in the *policy*;

- deeming the grievor guilty on the basis of inadequate evidence;
- imposing three disciplinary actions on the grievor for the same event;
- imposing a disciplinary action for abuse of authority on the grievor, which is not set out in the *policy*;
- reducing a 15-day disciplinary action to a letter of reprimand as a means of depriving him of his right to adjudication;
- deciding on disciplinary action without holding a disciplinary hearing;
- threatening the grievor with suspension if he did not accept an involuntary assignment; and
- keeping the grievor's disciplinary file active, without justification, beyond the two-year period set out in the disciplinary sanction and in the employer's policies.

[198] The grievor argued that the employer acted in bad faith and that it was not a matter of involuntary omissions on its part but separate actionable wrongs. The fact that the investigators were "experienced" does not excuse either the employer's lack of judgment in evaluating the case or its interference in the investigation process.

[199] The grievor requested that he be restored to where he would have been in December 2003 were it not for the complaint, the investigation, the disciplinary actions and his involuntary assignment. He requests unconditional reinstatement in his managerial position and compensation for all financial losses incurred, plus interest, as a result of the events described in his grievances and his testimony. The grievor requested that I consider the fiscal impact on the amounts that he had to withdraw from his Registered Retirement Savings Plans (RRSPs) to cover his legal fees. The grievor requested that I remain seized of this matter for a period of two years after his return to work to avoid reprisals from the employer once he returns to work.

B. For the employer

[200] The employer argued that it was justified in imposing sanctions on the grievor for his improper actions and in taking administrative action to address the conduct identified during the investigation. The grievor did not establish that the assignment to other duties was a disguised disciplinary measure. The grievor was not demoted since he retained the same level and pay. He still holds his substantive position even though he is no longer a manager. He has not been subject to any financial penalty within the meaning of paragraph 209(1)(b) of the *PSLRA*. The need to travel further to get to work is not a financial penalty. Overtime is not a contractual right, and therefore, its loss cannot constitute a financial penalty.

[201] The grievor was reassigned to Dorval in light of the investigation report. The objectives were to ensure that he was not responsible for supervising employees and to improve the work environment. The 15-day suspension was punitive. The assignment to other duties was an administrative consequence intended to help him regain his status as manager. This point is demonstrated by the fact that the employer made an effort to find him a coach and to provide him with a remedial plan so that he could be reinstated in his position. It is the grievor who did not cooperate. The employer pointed out that its offer of a coach and a remedial plan is still open.

[202] The employer argued that the *de novo* proceeding before an adjudicator provides a mechanism for correcting errors in the departmental investigation. The adjudicator is able to evaluate the testimony, determine whether the alleged conduct is supported on a balance of evidence and determine whether the employer was justified in imposing the measures that it imposed.

[203] The employer argued that Ms. Pageot, Ms. Paris and Ms. Gagnon were of the opinion that there were extenuating circumstances that warranted going back several years, specifically, the continuous nature of the events and the seriousness of the alleged incidents. Ms. Deslauriers alleged in her complaint that the grievor's harassing conduct never stopped. The *policy* does not prohibit an administrative investigation into sexual complaints or into complaints alleging assault. The employer could not ignore such conduct when it was brought to its attention. Ms. Deslauriers had the choice of requesting an investigation into the assaults of which she accused the grievor as part of a criminal or an administrative process.

[204] The employer argued that the complaint lacked detail and that, consequently, the employer had a duty to seek clarifications. The allegations in the complaint filed on April 16, 2004 remained the same, but clarifications were provided in the form of incidents to support each of the allegations.

[205] The employer maintained that the grievor received a copy of the detailed allegations in January 2005 at the beginning of the investigation. He was the 13th person interviewed because he was not available to be interviewed second, which gave him more time to prepare a defence. He had an opportunity to provide a written response in support of his position for each of the allegations. He provided a written response to the investigators' preliminary report along with a large folder of documents. Accordingly, the grievor had an opportunity to present a full and complete defence.

[206] The employer defended Ms. Pageot's involvement in the investigation process by pointing out that Ms. Paris was consulting with Ms. Pageot. Ms. Paris helped Ms. Deslauriers write her complaint by combining the incidents to allow the investigation to begin. She did not influence the content of the allegations.

[207] The employer argued that the grievor was informed on May 18, 2005 of the conduct for which he was criticized, namely, all the conduct revealed in the investigation report. The employer believes that Ms. Paris did not have to advise the grievor concerning his recourse because he was represented by counsel and because he also sought advice elsewhere.

[208] The employer denied that it used the request for an exclusion order as a tactic to obtain the grievor's cooperation in accepting a voluntary assignment. The employer was motivated solely by the findings of the investigation report. The offer of an SAPP assignment was not a penalty because there was no reduction in classification or pay. Ms. Brouillette was very transparent when she withdrew the request for the exclusion order.

[209] The employer claimed that, in deciding the grievance of the 15-day suspension, the points raised by the grievor at the meeting at the final level of the applicable process were discussed with the investigators. The employer was justified in accepting evidence of similar conduct. Thus, Ms. Belliveau's statement was entirely relevant.

[210] The employer argued that the grievor did not provide medical cause-and-effect evidence between the medical certificates adduced in support of the sick leave he took in 2006 and the stress caused by the employer's actions. The employer claimed that the grievor had previously received a diagnosis of a similar medical condition. Thus, the grievor cannot be compensated for that loss.

[211] The employer argued that, to be entitled to damages, the grievor must adduce evidence that the employer committed a separate actionable wrong in the context of a dismissal, which the grievor has not done. The employer stated that it acted diligently, that it checked with the investigators and that it acted in good faith. Lack of good faith is not a separately actionable civil wrong leading to entitlement to damages. The recourse for a procedural flaw is a grievance. The employer claimed that announcing a competition to replace the grievor was not a wrong. No testimony established that the grievor's reputation was impugned. The grievor did not establish that the employer's conduct was extreme.

[212] The employer objected to an adjudicator's jurisdiction to compensate for losses in pay since there were none, to award compensatory, exemplary or punitive damages, or to award the reimbursement of legal costs or interest.

[213] The employer argued that the issue of disguised dismissal is not set out in the wording of the grievances and that the grievor may not change the nature of a grievance after it has been referred to adjudication. The employer maintained that it has a duty to maintain a healthy and productive workplace and that it must be able to count on its managers to that end. The grievor never acknowledged his wrongdoing, which is what prevents the employer from reinstating him in his managerial position. The employer requested that the grievor's grievances be dismissed.

C. Grievor's rebuttal

[214] The grievor responded that the employer is working hard to deny the errors that it made and to blame him for an investigation that was conducted improperly. He argued that the employer's arguments do not reflect the evidence. The grievor claimed that he continues to be punished because he chose to defend himself against uncorroborated accusations. Ms. Deslauriers' version of the facts was contradicted by all the other witnesses and was not credible. Although the employer claimed that it was generous, it used every possible means to prevent him from referring his

grievance to adjudication. The grievor requested that his grievances be allowed.

XII. Reasons

A. Adjudicator's jurisdiction

[215] The employer objected to my jurisdiction as an adjudicator to decide the grievances because none of them involves a financial penalty or demotion. Paragraph 209(1)(b) of the *PSLRA* reads as follows:

209. (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to

...

(b) a disciplinary action resulting in termination, demotion, suspension or financial penalty;

[216] Subsection 209(1) of the *PSLRA* restricts the grievances that may be referred to adjudication. Only severe disciplinary actions, specifically, those resulting in termination, demotion, suspension or financial penalty, fall under an adjudicator's jurisdiction.

[217] I dismiss the employer's argument that rescinding the disciplinary measure that gave rise to a grievance after its referral to adjudication means that the adjudicator loses jurisdiction over the matter. The employer may alter disciplinary action during the applicable grievance process or when the decision is rendered at the final level. However, that decision does not have the effect of removing a grievance from an adjudicator's jurisdiction once it has properly been referred to adjudication under the provisions of the *PSLRA*. I share the opinion expressed in *Puxley v. Treasury Board (Transport Canada)*, PSLRB File No. 166-02-22284 (19940705), by which the employer may not unilaterally extinguish an adjudicator's jurisdiction by purporting to alter the sanction imposed after the grievance has been referred to adjudication. Once the grievance has been referred to adjudication, the appropriate recourse to remove the grievance from an adjudicator's jurisdiction is to resolve it amicably or to withdraw it.

[218] When it was referred to adjudication, the second grievance (PSLRB File No. 566-02-420) involved disciplinary action. Consequently, I have

jurisdiction to decide it.

[219] The common thread in all the grievances is the grievor's reassignment to duties at the TI-06 level. The grievor argued that the reassignment constituted a demotion even though he retained his pay level. He no longer performs the duties associated with his pay level, and he is no longer able to maintain the knowledge associated with his substantive position. He no longer supervises employees.

[220] The employer adduced evidence to establish the seriousness of the grievor's conduct, as identified in the investigation report, to justify its decision to remove him from his managerial position. The employer relied on internal policies describing the profile of managers' competencies, values and ethics to support its position.

[221] Ms. Brouillette and Ms. Gagnon testified that the investigators' findings about the organizational climate warranted the administrative action of reassigning the grievor to other duties against his will.

[222] It is my opinion that the following correspondence excerpts attest to the employer having an entirely different intention:

- Ms. Gagnon assigning the grievor to duties in Dorval on August 31, 2005 by email:

[Translation]

...

You have been informed on several occasions of the decision that you would not return to your substantive position and of the option to offer you a position in Security and Emergency Preparedness. A written offer will be sent to you shortly. Therefore, management expects you to report on September 6 at 09:30 to Mr. Giguère in Dorval; otherwise, you will be deemed absent without authorization.

In addition, the 15-day suspension disciplinary action, of which you were informed by letter dated June 7, 2005, will be served from September 12 to September 30 inclusive. You must not report to work during that time.

...

- Decision dated July 6, 2006, at the final level of the process applicable to the second grievance:

[Translation]

...

Mr. Robitaille:

This letter is further to the grievance that you filed on June 22, 2005, which was presented at the final level of the departmental grievance process on March 2, 2006, under section 225 of the Public Service Labour Relations Act and the agreement signed between the Employer and your representative. In your grievance, you contest the 15-day suspension imposed on you on June 7, 2005 and the fact that you received two disciplinary actions for a single incident.

I have reviewed in detail all the points and arguments raised by you and your representative, Mr. Fernand Guérette, during the March 17 and April 21, 2006 consultation meetings. In addition, I have discussed the facts with regional management in Dorval.

After reviewing the final investigation report and the reference documents in this file, I have decided to consider only the allegations considered founded and dating back one year or less from the date the harassment complaint was filed against you. In addition, I have considered other mitigating factors such as the performance evaluations in your personnel file and the fact that you have not been subject to any previous disciplinary actions. Consequently, I have decided to reduce the disciplinary action of a 15-day suspension without pay to a written reprimand.

*Despite the foregoing, the report shows that on several occasions you acted improperly, demonstrating **abuse of authority** and lack of respect toward the complainant. In your role as manager, you were responsible for promoting respectful labour relations, contributing constructively to the resolution of conflicts and maintaining a harassment-free work environment. I believe that you demonstrated serious deficiencies as a manager and that your actions do not reflect the values of the Department or of the public service.*

Furthermore, during your meetings with management, you did not acknowledge in any way that your conduct was inappropriate or show any willingness to engage in personal reflection about the situation. Your actions have increased management's loss of trust in your aptitudes and abilities to remain in your substantive position as Manager, Railway Operations and Equipment, which resulted from the investigation. For that reason, I agree with management's decision that you will continue to be assigned to duties at your group and level under the direction of Mr. Sylvain Giguère.

Please note that this assignment is not considered a “transfer without your consent” but rather a temporary administrative measure under management’s rights to assign you to other duties because of its concerns about your management skills.

Therefore, I urge you to speak with management so that it can support you by providing tools to enable you to develop the skills required to regain the trust needed to be reinstated in your substantive position. I leave it to regional management to decide when you have met their expectations to return you to your position with the Surface Services group.

In light of the facts, your grievance is allowed with respect to the 15-day suspension. However, the other corrective action listed in your grievance statement is dismissed.

Mr. Robitaille, please accept my best wishes.,

[signed] *Linda Brouillette*

Director General, Human Resources

...

[Emphasis added]

- Ms. Gagnon’s letter of reprimand to the grievor, dated July 13, 2006:

[Translation]

...

I have carefully reviewed the elements of the March 2005 investigation report arising from the harassment complaint filed against you. That report found that your conduct toward the complainant was seriously improper, demonstrating abuse of authority and lack of respect.

For the reasons stated by Ms. Brouillette, it was decided that the corrective action imposed on you would be limited to a written reprimand. However, I wish to reiterate that you have demonstrated serious deficiencies in your role as manager and that your actions do not reflect the values of the Department or of the public service. Nevertheless, I believe that the disciplinary action will enable you to understand that your conduct in recent years was completely inappropriate and intolerable in the workplace.

In the near future, we will meet to discuss with you the expectations of management and to identify the tools that will assist you in developing the skills required of a manager

and in regaining management's trust so that you may be reinstated in your position in the Surface Services group.

...

[Emphasis added]

- The letter of October 3, 2007 from Ms. Gagnon to the grievor about the imposition of a remedial plan:

[Translation]

...

The purpose of this letter is to provide you with the attached remedial plan, which has been developed in the context of your possible reinstatement in your substantive position. The plan's objectives are, first, to support you with the necessary tools to enable you to develop the management skills required of a managerial position, and second, to regain the trust of management, which is crucial to your reinstatement in your substantive position. This plan supports the decisions rendered at the third level of the grievance process; the following are a few excerpts:

Decision on grievance number 1851-05-P-1197G, dated July 6, 2006:

... the report reveals that, on several occasions, you acted improperly, demonstrating abuse of authority and a lack of respect toward the complainant. In your role as manager, you were responsible for promoting respectful labour relations, contributing constructively to conflict resolution and maintaining a harassment-free work environment. I believe that you have demonstrated serious deficiencies as a manager and that your actions do not reflect the values of the Department or of the public service.

Furthermore, during your meetings with management, you did not acknowledge in any way that your conduct was inappropriate or show any willingness to engage in personal reflection on this situation. Your actions have increased management's loss of trust in your aptitudes and abilities to remain in your substantive position as Manager, Railway Operations and Equipment, which resulted from the investigation. For that reason, I agree with management's decision that you will continue to be assigned duties at your group and level under the direction of Mr. Sylvain Giguère.

Therefore, I urge you to speak with management so that it can support you by providing tools to enable you to develop the skills required to regain the trust needed to be reinstated in your substantive position. I leave it to regional

management to decide when you have met their expectations to return you to your position with the Surface Services group.

Decision on grievance no. 1851-06-P-1307G, dated November 28, 2006:

... I also informed you of management's concerns about the inappropriate conduct identified in the findings of the investigation.

I would like to reiterate that you remain the incumbent of the position of Manager, Railway Operations and Equipment, but that you will continue to be assigned to Mr. Sylvain Giguère's group at your TI-08 group and level. As indicated in the response at the third level to grievance 2005-P-1197, management will develop a remedial plan with you for your reinstatement in your substantive position at the appropriate time.

That plan contains several activities related to performance measures. Future reinstatement in your substantive position depends on the successful fulfillment of all aspects of the plan and on your commitment to following it.

Therefore, I ask that you read the plan and inform me by October 17, 2007 of your decision about your expected commitment by completing the following portion.

...

[Emphasis added]

- The first activity listed in the “remedial plan for reinstatement” of October 3, 2007:

[Translation]

...

ACTIVITIES

1-) Identify and communicate to Mr. Robitaille the improper conduct arising from deficiencies in his management skills that was identified during the harassment investigation.

ACTION

- H. Gagnon to review the investigation report.
- Identification of deficiencies set out in that report.

- Communication of those deficiencies to Mr. Robitaille through meetings.
- *First meeting: November 29, 2006*

PERFORMANCE MEASURES

- ...
- Mr. Robitaille to acknowledge certain conduct.
- *Demonstration of his willingness to work and change that conduct.*

...

[Emphasis added]

[223] The points raised in those excerpts indicate that the grievor was removed from his managerial position for conduct that the employer deemed improper. Even though the 15-day suspension was rescinded, the grievor was still assigned to other duties without his consent. The employer argued that the grievor still holds his substantive position and thus that the assignment to other tasks is an administrative measure.

[224] I do not believe that the employer's argument reflects reality. The employer accepted the findings of an investigation report that found the grievor guilty of acts of harassment. The report links the complaint to inappropriate action by the grievor in terms of how he managed employees in his section. Assigning an employee to other duties can reasonably be interpreted as an administrative measure when it is done to meet operational requirements. For example, an employee could be assigned to more junior duties because of a lack of personnel.

[225] In the circumstances before us, the grievor's assignment to other duties was not because of operational requirements but because of the findings of an investigation that criticized the grievor's conduct. The employer characterized its decision as disciplinary in punishing harassing conduct identified in the investigation report and as administrative in justifying the grievor's reassignment to other duties based on the investigators' observations of the work climate.

[226] I agree with the reasoning of the Federal Court in *Canada (Attorney General) v. Frazee*, 2007 FC 1176, which found as follows that how the employer chooses to characterize its decision cannot in itself be a controlling consideration:

...

23. . . . *The concept of disguised discipline is a well known and a necessary controlling consideration which allows an adjudicator to look behind the employer's stated motivation to determine what was actually intended. Thus in Gaw v. Treasury Board (National Parole Service) (1978) 166-2-3292 (PSSRB), the employer's attempt to justify the employee's suspension from work as being necessary to facilitate an investigation was rejected in the face of compelling evidence that the employer's actual motivation was disciplinary: also see Re Canada Post Corp. and Canadian Union of Postal Workers (1992) 28 L.A.C. (4th) 336.*

24. *The problem of disguised discipline can also be addressed by examining the effects of the employer's action on the employee. Where the impact of the employer's decision is significantly disproportionate to the administrative rationale being served, the decision may be viewed as disciplinary. . . .*

25. *Other considerations for defining discipline in the employment context include the impact of the decision upon the employee's career prospects, whether the subject incident or the employer's view of it could be seen to involve culpable or corrigible behaviour by the employee, whether the decision taken was intended to be corrective and whether the employer's action had an immediate adverse effect on the employee*

...

[Emphasis added]

[227] At the hearing, the employer argued that the grievor had seriously failed to comply with the *policy*. However, Mr. Giguère and Mr. Lapointe both testified that, in their views, a letter of reprimand did not reflect the seriousness of the failings. Ms. Brouillette acknowledged that the investigation did not follow the *policy* and reduced the disciplinary action to a letter of reprimand.

[228] The grievor was informed of the firm intention to assign him to other duties at a meeting on May 18, 2005. Ms. Paris and Ms. Gagnon offered him an assignment under the SAPP for two years during which he had to look for a new job, or he would be laid off after 18 months. The grievor was then threatened with an exclusion order that would reassign him permanently if he did not accept a transfer, despite such an order being illegal. Ms. Gagnon reassigned the grievor to Dorval under the threat of being deemed on unauthorized leave if he did not report on the indicated date. Ms. Gagnon

offered him the services of a coach but did not agree to the coach's final recommendations. Ms. Gagnon proposed a remedial plan, based on conduct identified during the investigation, which depended entirely on her goodwill. Given the circumstances, I believe that the assignment to duties in Dorval constituted disciplinary action.

[229] Even though the grievor retained his classification, the punitive nature of his reassignment was evident in that he was no longer supervising employees, was performing none of the duties of his substantive position and was isolated from his normal place of work. The duties assigned to him had little value; he often had nothing to do, and he was relegated to a junior officer's office. Maintaining a classification does not give an employer free reign to reassign an employee to demeaning duties against his or her will. In summary, the grievor's assignment to other duties was a demotion even though his classification level remained unchanged. Consequently, it amounted to a second disguised disciplinary action.

[230] A disciplinary demotion is within an adjudicator's jurisdiction.

B. Standard of proof and rules applicable to assessing the credibility of witnesses

[231] Before analyzing Ms. Deslauriers' allegations and the investigative process, it is appropriate to analyze the standard of proof and the rules applicable to assessing the credibility of witnesses.

[232] In *F.H. v. McDougall*, 2008 SCC 53, the Supreme Court of Canada set the record straight on the standard of proof in civil cases. The Court pointed out that there is only one standard of proof in civil cases, a balance of probabilities. Simply put, did the alleged fact happen? The Court had the following to say on the issue:

...

[46] Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of

probabilities test.

...

[49] In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

...

[233] To assess a witness' credibility, the person hearing the evidence must not rely solely on the impression left by the witness but must base the assessment on an examination of how the testimony given fits into the evidence as a whole, taking into account other testimony, the facts established, a reasonable probability of events and the assessor's experience in human relations. The following excerpt from *Faryna v. Chorny*, [1952] 2 D.L.R. 354, is often cited to support the principles that apply to assessing the credibility of witnesses:

...

11. 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.

...

Adjudication case law has reiterated the principle in *McMaster University v. Service Employees International Union, Local 532* (1972), 24 L.A.C. 265, and in several other

cases.

[234] In *McDougall*, the Supreme Court considered the issue of how to assess the credibility of witnesses in a civil case and concluded as follows:

[57] At para. 5 of her reasons, the trial judge had regard for the judgment of Rowles J.A. in R. v. R.W.B. (1993), 24 B.C.A.C. 1, at paras. 28-29, dealing with the reliability and credibility of witnesses in the case of inconsistencies and an absence of supporting evidence. Although R.W.B. was a criminal case, I, like the trial judge, think the words of Rowles J.A. are apt for the purposes of this case:

In this case there were a number of inconsistencies in the complainant's own evidence and a number of inconsistencies between the complainant's evidence and the testimony of other witnesses. While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness' evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise but at the least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness' evidence is reliable. This is particularly so when there is no supporting evidence on the central issue, which was the case here. [para. 29]

[58] As Rowles J.A. found in the context of the criminal standard of proof, where proof is on a balance of probabilities there is likewise no rule as to when inconsistencies in the evidence of a plaintiff will cause a trial judge to conclude that the plaintiff's evidence is not credible or reliable. The trial judge should not consider the plaintiff's evidence in isolation, but must look at the totality of the evidence to assess the impact of the inconsistencies in that evidence on questions of credibility and reliability pertaining to the core issue in the case.

...

[235] Therefore, in assessing the credibility of the witnesses, I must consider their testimonies and how they fit into the evidence as a whole, taking into account other testimony, the facts established, a reasonable probability of events and my experience.

C. Allegations in the complaint

[236] In this part of my reasons, I will consider all the allegations covered by the investigation into the complaint. Each allegation is supported by one or more incidents. Under the analytical method used by the investigators, all the allegations were deemed founded, even though certain incidents were not deemed harassment under the *policy*. The investigators commented on the grievor's conduct in each incident.

Allegation 1 - Ms. Deslauriers felt intimidated by the grievor.

Incident #1: In August 2001, the grievor informed Ms. Deslauriers of an inspection trip to the Gaspé, with the departure planned for Sunday, September 3, 2001.

[237] Even though this incident was not considered by the investigators to constitute harassment, they question the grievor's judgment by noting that, according to Ms. Deslauriers, "[translation] he had a tendency to leave on Sunday." However, the grievor offered a plausible explanation for the Sunday departure. The investigators state that Sunday departures are used only for urgent situations or blitzes and comment that the grievor did not remember whether the trip in question was related to some emergency, even though that is not part of the allegation. The investigators add that, when travelling, the grievor had a tendency to finish work early and to party, although that information has nothing to do with the incident. Even though the incident was not found to constitute harassment, these gratuitous comments denigrate the grievor. Ms. Deslauriers' version of this incident lacks credibility because it was not confirmed by Mr. Bourdon's testimony and was contradicted by Mr. Sauvé. Moreover, this 2001 incident is untimely, according to the *policy*. The employer did not explain why it considered it appropriate to investigate this allegation, which does not correspond to any element in the definition of harassment set out in the *policy*.

Incident #2: On December 8, 2003, during a meeting, the grievor questioned Ms. Deslauriers about how she handled her files and mentioned a reverse order of merit competition.

[238] The investigators concluded that this incident was founded. Although nobody witnessed this exchange between the grievor and Ms. Deslauriers, the investigators cited the opinions of "witnesses" in support of Ms. Deslauriers' version. For example,

they attribute comments to Mr. Boulanger about the quality of Ms. Deslauriers' work. In support of this allegation, the investigators cite Ms. Deslauriers' performance evaluations, without adding that they were conducted by the grievor, who always gave Ms. Deslauriers a satisfactory performance rating. The investigators also cite one of Ms. Belliveau's performance evaluations, even though it is not current and is unrelated to the alleged incident. The investigators assign malicious intentions to the grievor and accept Ms. Belliveau's statement, which deals with an entirely different matter. The investigators do not explain how having a conversation about Ms. Deslauriers' work is an act of intimidation or harassment within the definition set out in the *policy*. Ms. Deslauriers was not threatened with the loss of her job. Mr. Giguère testified that Ms. Deslauriers' fears were unfounded, and the grievor reassured her that there would not be a reverse order of merit competition. There is no evidence that the grievor was disrespectful toward Ms. Deslauriers. The *policy* states that a work assessment, the subject of this allegation, does not generally constitute harassment.

[239] Furthermore, contrary to the employer's claim, the two incidents related to this allegation are not continuing acts. The first incident occurred in August 2001, while the second took place in December 2003. More than two years elapsed between them. Deeming the second incident credible is unjustified, along with founding the entire allegation of intimidation on that incident.

Allegation 2: On several occasions, Ms. Deslauriers felt demeaned, belittled and humiliated.

Incident #1: While at a training session with colleagues in Moncton, New Brunswick, from September 29 to October 5, 1996, the grievor never spoke to her. During the time in the minivan travelling to and from the training session, the grievor completely ignored her.

Incident #2: In March 2002, during a one-week trip to Gananoque, Ontario, the grievor ignored her while travelling and avoided her during the week of training.

[240] I have chosen to analyze the first two incidents related to this allegation together. Although the two incidents were deemed harassment by the investigators, it is my opinion that they do not constitute harassment. My reasons are as follows. Ms. Blais, Mr. Pilon, Mr. Sauvé, the grievor and Ms. Deslauriers made the trip to Moncton. Consequently, they are the only witnesses to the incident. The investigators

did not question Ms. Blais about this trip. Mr. Pilon did not recall the trip and said that he would have had to consult his notes. The investigators did not follow up to verify the incident. Mr. Sauvé told the investigators that he noticed nothing unusual about the trip. Mr. Pilon's and Mr. Sauvé's statements are not mentioned in the investigators' report.

[241] Mr. Pilon, Ms. Blais, Mr. Richer, Mr. Rollet, the grievor and Ms. Deslauriers travelled to Gananoque. Ms. Blais and Mr. Pilon were not questioned about this incident. Mr. Richer and Mr. Rollet, who were interviewed by the investigators, noticed nothing unusual. However, the investigators report as "evidence" that Mr. Rollet and Ms. Belliveau, who was not present, "corroborate the fact" that the grievor ignored Ms. Deslauriers. Although Mr. Bourdon and Ms. Leyton, an employee who did a six-month internship in 1998, did not go on the trip, the investigators conclude that they also "confirm" that the grievor had a habit of ignoring certain employees, a completely gratuitous remark. An incident reported by Ms. Leyton suggesting improper conduct by the grievor is cited out of context and despite the fact that that incident was not included in the investigation. Ms. Leyton never claimed that the grievor acted improperly toward her. The investigators' comments about Ms. Belliveau's and Ms. Leyton's experience are not only unjustified but misleading.

[242] Questioned at the hearing about the omission of Mr. Sauvé's statement as evidence, Ms. Montminy stated that she was unaware of Mr. Sauvé's comment because investigator Brooks dealt with that part of the investigation. She could not explain why Ms. Blais and Mr. Pilon were not questioned about the trips. She admitted that it was an error in the investigation. I believe that the investigators incorrectly interpreted the evidence, to the grievor's detriment. The statements do not support any act of harassment toward Ms. Deslauriers, except perhaps her perception that the grievor had friendlier relations with other employees. The evidence supports the grievor's version. The explanation given by the grievor is plausible and was not contradicted. Ms. Deslauriers' perceptions do not constitute harassment. Moreover, the two incidents are not only untimely but also not of a continuing nature, contrary to the employer's arguments (Moncton in 1996 and Gananoque in 2002). Finally, these allegations were not part of the complaint filed on April 16, 2004.

Incident #3: On December 11, 2003, the grievor emailed her, criticizing how she handled a file. Ms. Deslauriers' colleagues were sent copies of the email.

[243] The investigators concluded that this incident constituted harassment. It is my view that the facts used to confirm this incident are contrary to the evidence and to the statements made to the investigators. With the exception of Ms. Deslauriers, the witnesses unanimously state that the exemption request from the QNS&L, which was the subject of the grievor's December 11, 2003, email, could not have been discussed on the trip in October 2003 because it is dated November 12, 2003.

[244] The exchange of correspondence between Mr. Clavette and Ms. Deslauriers, and the emails between the grievor and Jean-Pierre Boucher, which span from September 5 to November 3, 2003, refer to subsection 5.1.5 of the *Rules* and not to paragraph 5.1.1(b). Among other things, in a letter dated September 17, 2003, Ms. Deslauriers writes that it "[translation] is the intention of the Railway Association of Canada to submit an amendment to this section. [emphasis added]" This evidence supports the grievor's version of the facts and the versions of Mr. Pilon and Ms. Blais, which is that during the Sept-Îles trip what was discussed was not a request under paragraph 5.1.1(b) of the *Rules*, but rather a request under subsection 5.1.5.

[245] The grievor's explanations of the impact on railway safety of a response to an exemption request, the analysis used to justify the exemption, and the impact of a response on the uniformity of decisions made at the regional and national levels are not only credible but also undeniable. By asking Ms. Deslauriers to justify her response to the exemption request, the grievor was carrying out his responsibilities as a manager. The December 11, 2003 email cannot be interpreted as a reprimand. There was no disciplinary consequence for Ms. Deslauriers. Since all exemption requests affect the work of the Railway Operations team, it was reasonable for Ms. Deslauriers' colleagues to receive a copy of the email. The investigators did not explain why the authority of a manager to ask for clarifications in such circumstances should take second place to Ms. Deslauriers' sensibilities. The *policy* specifically states that requiring performance to job standards does not constitute harassment. Consequently, this incident does not meet the *policy's* definition of harassment, and the alleged incident does not constitute harassment.

Incident #4: On December 19, 2003, Ms. Deslauriers requested compensatory leave. The grievor replied to her in a very loud and aggressive voice in front of other employees.

[246] The investigators conclude that this fourth incident constitutes harassment.

Their conclusion is contrary to the evidence. Ms. Deslauriers is the only person who said that the grievor spoke to her in an aggressive tone. The Larousse dictionary defines “aggressive” as exhibiting aggression; “aggression” is defined as a sudden and brutal unprovoked attack. Mr. Giguère, who occupies an office close to the grievor and Ms. Deslauriers, states that he never heard the grievor or Ms. Deslauriers raise their voices. Mr. Pilon, who has an office beside Ms. Deslauriers, does not recall anything. Mr. Sauvé stated that the grievor’s tone was not friendly. Ms. Deslauriers did not mention this incident when speaking with Mr. Giguère when she met with him at 10:30 that same morning. No evidence confirms the behaviour complained of by Ms. Deslauriers. In their report, the investigators report that some employees observed mood swings by the grievor, which had nothing to do with this incident. These observations serve only to undermine the grievor’s credibility. This incident does not correspond to the *policy’s* definition of harassment and does not constitute harassment.

Incident #5: On January 26, 2004, the grievor asked Mr. Pilon to introduce Ms. Deslauriers to Pierre Delorme, rather than doing it himself.

[247] The investigators concluded that this incident constitutes harassment. The fact that a manager asks another employee to continue introducing a visitor is not offensive behaviour in itself and does not correspond to the definition set out in the *policy*. Mr. Pilon’s unease, because he was no longer speaking to Ms. Deslauriers, reflects his own discomfort and cannot be attributed to the grievor. This incident does not comprise an objectionable act, comment or display that demeans, belittles, or causes personal humiliation or embarrassment. Moreover, the grievor was justified in wanting to minimize his contact with Ms. Deslauriers because she had asked to discontinue the superior-subordinate relationship in anticipation of filing her complaint. This incident cannot be deemed to constitute harassment.

Allegation 3: Ms. Deslauriers felt left out by the grievor, and the grievor intentionally undermined her in her work.

Incident #1: Beginning in January 2004, the grievor no longer sent the emails or documents that Ms. Deslauriers needed to carry out her work.

[248] The investigators considered that this incident constituted harassment. Ms. Deslauriers’ allegation that the grievor intentionally removed her name from the

email distribution list of the Railway Operations section, which would have prevented her from performing her work properly and from being fully prepared for certain meetings, is vague. The only concrete example of an omission of Ms. Deslauriers' name from the distribution list is about two emails, one from Ms. Eburn dated July 29, 2004, and a second from Mr. Hunter dated September 10, 2004, which were adduced in evidence. I am not aware of what work could not be done properly or for which meetings Ms. Deslauriers was unable to be properly prepared because of the failure to send her those two emails. Mr. Giguère explained that Ms. Deslauriers' change in supervision had initially been an informal arrangement and that, as the conflict continued, it was decided to formalize the supervision through an agreement, which took some time to come into effect. Moreover, the agreement limited the pertinent and appropriate information that the grievor had to forward to Mr. Boulanger for reforwarding to Ms. Deslauriers to requests from headquarters for comments on rules to be approved or amended. Ms. Deslauriers did not establish that the grievor failed to forward the information to her or that he deliberately excluded her from any other distribution list.

[249] This incident does not constitute harassment under the definition set out in the *policy*, namely, that the conduct was offensive, demeaning or belittling or that it caused personal humiliation or embarrassment. This incident is not part of Ms. Deslauriers' complaint of April 16, 2004, and, contrary to the employer's argument, is not a "[translation] clarification."

Incident #2: In October 2004, the grievor withheld information, without cause, which Ms. Deslauriers required for a meeting.

[250] This incident was also deemed harassment. The allegation that the grievor withheld information, without cause, which Ms. Deslauriers required for a meeting is based on a single incident. In October 2004, the grievor allegedly did not send Ms. Deslauriers a new warning label. Ms. Deslauriers did not explain how the lack of the new label undermined her work, or even its relevance. The evidence indicates that Ms. Deslauriers was not at the meeting when the label was distributed and that, consequently, the grievor gave it to Mr. Pilon for distribution. Mr. Pilon delayed giving it to Ms. Deslauriers. The change to the label was minor. The statement that the label had never been used previously was not contradicted. I do not see how Mr. Pilon's failure to provide Ms. Deslauriers with the label could constitute an act of harassment

by the grievor.

[251] Mr. Giguère's version of the time that it may have taken to effect the change in supervision for Ms. Deslauriers is a plausible explanation of the delay or the failure to provide her with certain documents. Whatever the case, Ms. Blais and Mr. Pilon testified that they regularly forwarded to Ms. Deslauriers documents relevant to her work. Ms. Deslauriers did not explain why she waited 10 months to raise this point rather than raising it immediately with Mr. Giguère and Mr. Boulanger.

[252] As with the previous incident, this incident does not constitute harassment under the definition set out in the *policy* that the conduct was offensive, demeaning or belittling or that it caused personal humiliation or embarrassment. This incident is not part of Ms. Deslauriers' complaint of April 16, 2004. Contrary to the employer's argument, it is not a "clarification."

Incident #3: Since 1995, the grievor has not offered Ms. Deslauriers opportunities to join committees or attend meetings with clients and has not assigned her any projects.

[253] This incident was not deemed harassment by the investigators since there was a lack of evidence. The employer did not explain why this incident was included in the investigation. The grievor presented a list of at least 11 professional development activities in which Ms. Deslauriers participated between 1999 and 2003. That list is uncontradicted evidence refuting Ms. Deslauriers' allegation. Its accuracy could have been verified by the employer and the investigators had they questioned it. However, in their report, the investigators state that the list of activities provided by the grievor "[translation] could not be officially verified." The investigators mention in their analysis the comments of Mr. Pilon, Ms. Belliveau and several other employees, which have no relevance to this incident. The investigators report negatively on the numerous opportunities that the grievor provided to Ms. Deslauriers and cast doubt on the grievor's competencies.

[254] This allegation was not part of the complaint and does not constitute either a "clarification" or a continuing act.

Incident #4: The grievor did not inform Ms. Deslauriers' colleagues when her mother-in-law died.

[255] The inappropriate or offensive conduct that is the subject of this allegation is

not explained by Ms. Deslauriers, and her statements are not corroborated by anyone. The investigators were right to reject this incident, which does not constitute harassment. This allegation is not part of the complaint, does not constitute a “clarification” and should not have been included in the investigation. It is not a continuing act that can be linked to any other allegation in the complaint.

Incident #5: The grievor used Ms. Deslauriers’ colleagues to send her information rather than speaking to her directly.

[256] This incident, although vague, was accepted by the investigators as harassment. Given how the work was organized in the section, as adduced in evidence, this incident cannot constitute harassment by the grievor. All the inspectors were frequently on the road or working from home. They did not come into the office unless they were on duty or had to complete reports that required their presence at the office. In addition, the three members of each of the two teams worked very closely with each other. Therefore, it would not be surprising if the grievor communicated information to the person in the office and asked that individual to inform the other members of the team to ensure uniformity in the work. In this context, the procedure adopted by the grievor cannot be criticized.

[257] Ms. Deslauriers did not explain how this approach was detrimental to her work. Given the lack of specific information, this allegation cannot be deemed inappropriate or offensive conduct within the meaning of the definition of harassment set out in the *policy*. This allegation was not part of the complaint and does not constitute a “clarification.”

Allegation 4: The grievor sexually harassed and assaulted Ms. Deslauriers.

Incident #1: On April 4, 1995, in a Grand-Mère hotel, the grievor sexually assaulted Ms. Deslauriers.

Incident #2: On June 12, 1995, on a VIA Rail Canada train, the grievor tried to kiss Ms. Deslauriers three times.

[258] At paragraph 176 of their report, the investigators note that there are no witnesses to either of the two incidents alleged by Ms. Deslauriers. Consequently, it is a question of the credibility of Ms. Deslauriers’ testimony as opposed to that of the grievor.

[259] The investigators devote seven lengthy paragraphs to describing Ms. Belliveau's uncorroborated experiences, which date back to September 1991 and that are unrelated to the experience described by Ms. Deslauriers, except for the grievor's alleged interest in her, which the grievor denied at the hearing.

[260] At his interview, the grievor was not informed of the events described by Ms. Belliveau, so he could not respond to them. The investigators accept Ms. Belliveau's stories as true, which corroborate Ms. Deslauriers' statement. It is clear from the transcript of Ms. Belliveau's statement that the investigators even encouraged this gossiping, which they used to support their findings about an unhealthy work environment.

[261] I heard Ms. Belliveau's testimony at the hearing, and I put little faith in it. Among other stories, Ms. Belliveau recounted an alleged incident that apparently took place at the Québec Inn during a happy hour on her birthday in 1991. Ms. Belliveau had consumed a significant amount of alcohol because of the two-for-one drink special at the hotel bar during a two-hour period; each of her six colleagues present offered her a double drink. The circumstances of what allegedly happened afterward, which she describes in her testimony, reflect a perspective and a lack of judgment attributable to being in a state of inebriation. At the hearing, the incident was credibly contradicted by the grievor's testimony.

[262] The investigators considered the statement of Venance Boucher as corroborating the alleged assault on Ms. Deslauriers in Grand-Mère. At the hearing, Mr. Boucher did not recall the dates of that alleged trip. The employer adduced no evidence that the trip actually took place. Consequently, there is no direct evidence that it did. The grievor's telephone call to Mr. Sauvé is not evidence of such a serious allegation. The fondling described by the investigators is not the same as that described by Ms. Deslauriers at the hearing.

[263] I heard Mr. Boucher's testimony. It is clear that he was biased in favour of Ms. Deslauriers. She asked him to testify in support of her complaint because she had supported him when he had filed his own harassment complaint a few years earlier. Contrary to what was reported by the investigators, the grievor testified that he had never confided in Mr. Boucher. He was ordered to supervise Mr. Boucher after Mr. Boucher filed his harassment complaint, and the grievor had no interest in confiding in him.

[264] The investigators attributed undue importance to Ms. Leyton's statement. Ms. Leyton was an intern for six months in 1998, about three years after the incidents. After hearing Ms. Belliveau's and Ms. Deslauriers' stories, she decided that, with the benefit of hindsight, the grievor may have had less than innocent intentions toward her. She never accused the grievor of improper or harassing conduct.

[265] I heard Ms. Deslauriers' testimony about the two incidents. It is my view that her memory of the events has diminished over time. Is it because she had been drinking the evening of the alleged assault in Grand-Mère or because she still holds a grudge against the grievor? I do not know. Given the seriousness of the allegation, I cannot accept purely circumstantial evidence as clear and convincing enough to meet the balance of probabilities test.

[266] As for the incident on the VIA Rail Canada train in 1995, it is even less worthy of consideration than the first. The June 12, 1995 date, which appears in the clarifications provided by Ms. Deslauriers, is incorrect. Ms. Deslauriers had eight months to verify the accuracy of this date before preparing her clarifications; she did not bother. The grievor adduced documentary evidence, which he provided to the investigators, establishing that he did not travel to Lac Saint-Jean on June 12, 1995 and that Ms. Deslauriers was attending a meeting in Montreal that week. Furthermore, the facts described by Ms. Deslauriers are implausible. She was allegedly sitting in the aisle seat in a virtually empty train. Why did she not get up and change seats? Why did she not tell the grievor directly that his actions were improper? Ms. Deslauriers had no answers to those questions.

[267] Although the grievor did travel between July 10 and 13, 1995, the travel claim does not establish that he and Ms. Deslauriers travelled on the same train. The grievor claimed that inspectors often did not travel on the same train or in the same cars because of their inspection work. The assault alleged by Ms. Deslauriers cannot be accepted simply because Ms. Deslauriers and the grievor travelled to the same location on the same dates.

[268] The hearing was the first time that the employer showed the grievor an expense claim for travel to Grand-Mère between July 10 and 13, 1995. I do not believe that this claim constitutes evidence of an assault, and I attribute little weight to this document as corroboration of Ms. Deslauriers' claims.

[269] Despite the paucity of evidence supporting the alleged second assault, the investigators accepted this incident as harassment because “[translation] the incident being of the same nature and clearly demonstrated becomes by extension evidence of the second.” This conclusion is not only unjustified but also amounts to “character evidence,” i.e., if the first incident happened, it can be used as grounds to conclude that the second also happened.

[270] In short, the investigators decided on the truthfulness of serious incidents on the basis of purely circumstantial evidence. Clear, credible and convincing evidence was required to conclude that the grievor had committed such serious acts. Purely circumstantial evidence, without any corroborating evidence, is not clear, credible and convincing evidence that would tip the balance of probabilities in Ms. Deslauriers’ favour. Concluding that a second incident actually took place solely because it is of “the same nature as the first” is an arbitrary approach and contrary to all standards of probability.

Allegation 5: The grievor abused his authority over Ms. Deslauriers.

Incident #1: From April 3, 1995 to March 29, 1996, Ms. Deslauriers did not receive the necessary training and support to become a railway inspector.

[271] This incident was not accepted as founded. However, the investigators attributed considerable importance to Ms. Belliveau’s statement and to those of other employees, who were not involved in this incident, despite the grievor’s credible and verifiable comments. The investigators should have stuck to the facts. This incident was not mentioned in the complaint. It was added as a “clarification.” Regardless, this incident is untimely and is not part of a continuum of incidents. It should not have been included in the investigation.

Incident #2: In March 1997, the grievor informed Ms. Deslauriers without asking her opinion that she was being seconded to another department.

[272] The investigators accepted this incident as harassment. They attribute considerable importance to Ms. Belliveau’s perceptions, to the observations of Ms. Leyton, who was not yet an employee at that time, and to the comments of Mr. Boucher, even though those employees had no knowledge of the facts. Ms. Deslauriers allegedly admitted that she had never shared her feelings about this

incident with anyone. The fact that Ms. Deslauriers had only recently been appointed to the Railway Operations section does not mean that she was forced to accept a secondment.

[273] There is no evidence in support of Ms. Deslauriers' allegation, except that she allegedly would have preferred not to accept the secondment. I found no evidence of coercion with respect to the signing of the secondment agreement. Ms. Deslauriers must assume the consequences of her actions. If she did not want to take the secondment, she could have mentioned it to Ms. Boileau, with whom she was on good terms.

[274] I believe that Ms. Deslauriers saw her secondment as an opportunity to advance her career. She told the grievor at her first performance evaluation that she was interested in workplace health and safety training. Furthermore, the secondment was nothing new to her since she was introduced to the work of an inspector in the grievor's unit in 1995 through a secondment recommended by Ms. Boileau. Finally, this incident is untimely under the *policy*.

Incident #3: In late August 2001, the grievor informed Ms. Deslauriers that she would be in charge of the 2001 United Way campaign.

[275] The grievor's evidence clearly refutes Ms. Deslauriers' allegation, and it could have been verified by the employer without an investigation. Even though the investigators do not state that this incident was harassment, they suggest in a postscript that the grievor showed poor judgment by not asking another employee to assume responsibility for the 2001 United Way campaign. Not only is this incident not part of the complaint, it is also untimely. It is not a continuing act.

Incident #4: In 2003, the grievor restricted Ms. Deslauriers' travel and denied her a trip to Mont-Joli, while approving the trip for Mr. Picard. The grievor told Ms. Deslauriers that the reason for that decision was a limited budget.

[276] The investigators did not consider this incident harassment, and I agree with them. Unfortunately, in the absence of relevant evidence, the investigators recount in detail other "[translation] recollections" of individuals interviewed, which have nothing to do with this incident and that cast doubt on the grievor's competence.

Allegation 6: The grievor made disparaging comments about Ms. Deslauriers on

several occasions.

[277] The investigators found this incident to be harassment. It is my opinion that, if the grievor made disparaging comments about the relationship between Ms. Deslauriers and Mr. Sauv , those comments were inappropriate, and the grievor should have been reprimanded. However, Ms. Deslauriers never told the grievor that his remarks were rude, degrading or offensive. The incidents alleged by Ms. Deslauriers are vague. The statements of the persons interviewed by the investigators are replete with hearsay. As for the grievor's comment about Ms. Twain's beauty, I have difficulty understanding Ms. Deslauriers' sensibilities about such an insignificant incident. It is unfortunate that the investigators felt that such an incident was so important that it constituted harassment. Ms. Deslauriers' allegations, interspersed with the disparaging comments of the grievor's colleagues as reported by the investigators, make it impossible to separate the wheat from the chaff. Degrading remarks are inappropriate regardless of the environment. On this point, the employer is right to want to ensure a respectful workplace. However, in this case I find that Ms. Deslauriers' allegations are too vague to enable the grievor to respond to them. They are also untimely under the *policy*.

D. Assessment of the witnesses' credibility

[278] Of all the case law adduced by the parties, *B dirian v. Treasury Board (Justice Canada)*, 2002 PSSRB 89 ("*B dirian I*"), and *B dirian v. Treasury Board (Department of Justice)*, 2006 PSLRB 4 ("*B dirian II*"), are the most relevant to this analysis. Mr. B dirian contested a decision by the employer, based on the findings of a harassment investigation, to impose a three-day suspension on him, to remove him from his managerial position and to assign him to a position without managerial responsibility for employees. *B dirian I* laid out the following six-part formula for determining whether harassment had occurred: (1) Has the whole of the evidence surrounding the conduct in question been obtained, considered and evaluated? (2) Has the evidence established in a clear, cogent and compelling manner that the acts in question were in fact committed? (3) Did the behaviour consist of persistent and repeated acts or words, or is a serious act referred to? (4) Are the respective versions of the alleged victim and the person who is the subject of the complaint credible in themselves in light of all the facts, and if so, which version is the more credible on a balance of probabilities? (5) Is the version consistent with what a practical and informed person in the same place

and circumstances would immediately recognize? (6) In light of all the facts surrounding the behaviour, would a reasonable person feel that the behaviour was blameworthy, unwelcome and sexual in nature?

[279] The analysis of the above allegations has convinced me that all the questions raised in *Bédirian I* must be answered in the negative and that the evidence has established that the grievor's version is more credible, on a balance of probabilities, than that of Ms. Deslauriers.

[280] With respect to all the incidents that I have just analyzed, the testimonies of Ms. Deslauriers and the grievor are contradictory, and certain incidents took place in private. Therefore, I must determine the evidence that has convinced me.

[281] Ms. Deslauriers testified with a great deal of emotion and appeared convinced of what she was saying. In her complaint, filed on April 16, 2004, she states the following:

[Translation]

...

Those situations began in June 1995, during a business trip to Lac Saint-Jean where he assaulted me. Starting at that time, because I did not respond positively to his assault, he has constantly abused his authority over me and belittled me to my colleagues.

Although I am under his direction as an employee, he has refused to speak to me for several months, if not years. After several attempts on my part to re-establish communication, he told me that he did not want to speak to me.

...

[Emphasis added]

[282] Ms. Deslauriers complained that the harassment by the grievor began in 1995. She alleged that the grievor constantly abused his authority over her. She also said that, "[translation] for several months, if not years," he refused to speak to her. At the hearing, Ms. Deslauriers testified that she had never mentioned to the grievor the incidents described in her complaint or in the clarifications. Moreover, her allegations are contradicted by the facts.

[283] First, Ms. Deslauriers had the opportunity to remove herself from the grievor's supervision on at least three occasions between 1995 and 1998. On March 23, 1995,

she accepted a secondment, on a trial basis, to an inspector position; she could have ended that secondment at any time. After two alleged assaults, on April 4 and June 12, 1995, she applied for a permanent position under the grievor's supervision, which she obtained in February 1996. During her secondment to the HRDC (from April 7, 1997 until March 27, 1998), it offered her a position, which she turned down because she said that she received better treatment in the grievor's section. She returned to work in the grievor's section for six years before filing her complaint.

[284] Under cross-examination, Ms. Deslauriers then admitted that, in late July 1995, Ms. Blais invited her to a party with friends at a campground where Ms. Blais and the grievor and his partner each had a trailer. Ms. Deslauriers was returning from an inspection trip with Mr. Sauv . At the end of an evening involving considerable drinking, Ms. Deslauriers and Mr. Sauv  retired to the grievor's trailer for the night and shared the living-dining room area. Ms. Deslauriers left the next morning for a family holiday with her partner. In his testimony, Mr. Sauv  did not deny those facts.

[285] The photographs, adduced in evidence, taken by the grievor and Mr. Pilon of social activities during business trips and outside office hours do not support Ms. Deslauriers' version of the facts. Without exception, the pictures show Ms. Deslauriers appearing to enjoy herself. For example, they show Ms. Deslauriers on the grievor's motorcycle, in several tourist locations in New Brunswick and British Columbia, in a bar, in a discoth que, etc..

[286] I find it hard to believe that, after alleging an initial assault on April 4 and a second alleged assault on July 12, Ms. Deslauriers would agree two weeks later to attend a social activity at a campground where she was with the grievor and his partner and where she slept in their trailer.

[287] Assessing the credibility of a witness is not an exact science. The complex mix of impressions that comes from observing and listening to witnesses necessarily calls for a reconciliation of the differing versions of the facts. Giving credence to one witness over another is a matter of judgment. This task was especially difficult in the circumstances of this case because of the length of time that has elapsed since the events occurred. In light of the above analysis, I believe that Ms. Deslauriers' testimony does not correspond to that of the other witnesses or to the totality of the evidence adduced before me.

[288] I find that the explanations given by the grievor in response to the alleged incidents were plausible and most often corroborated by the witnesses. Here are a few concrete examples: the inspection trip to the Gaspé (allegation 1, incident #1), the discussion of the reverse order of merit competition (allegation 1, incident #2), the training trip to Gananoque (allegation 2, incident #2), the sending of the December 11, 2003 email (allegation 2, incident #3), the failure to send emails and documents (allegation 3, incidents #1 and #2), the lack of participation on committees, in meetings and in projects (allegation 3, incident #3), the lack of training (allegation 5, incident #2), and the degrading remarks on the grievor's return from his secondment (allegation 6). For that reason, on a balance of probabilities, it is more probable that the incidents happened as described by the grievor.

E. Handling of the complaint

[289] It goes without saying that the employer cannot be held responsible for an employee filing a complaint. However, can it be held responsible for how it handled the complaint and the investigation? Was it justified in imposing disciplinary actions on the grievor in the circumstances of this case?

[290] The purpose of the *policy* is to provide employees with a work environment that is conducive to trust and mutual respect. The *policy* strives to foster the prompt resolution of conflicts to avoid having problems between employees degenerate into more serious conflicts. In essence, the *policy* defines what the employer considers improper conduct. It sets out a specific process for resolving harassment complaints. By following that process, the employer ensures that the rights of each party are respected and that the impartiality required during the investigation of a complaint is maintained. The *policy's* requirements are closely aligned with the applicable case law.

[291] The following is the definition of harassment set out in the *policy*:

Harassment (harcèlement) - is any improper conduct by an individual, that is directed at and offensive to another person or persons in the workplace, and that the individual knew or ought reasonably to have known would cause offence or harm. It comprises any objectionable act, comment or display that demeans, belittles, or causes personal humiliation or embarrassment, and any act of intimidation or threat. It includes harassment within the meaning of the Canadian Human Rights Act.

[Emphasis added]

The *policy* also offers the following examples to clarify what constitutes harassment:

...

Appendix - Guide for determining what constitutes harassment

Some questions that can help assess whether the behaviour (act, comment or display) constitutes harassment:

- *Is the behaviour unwelcome or offensive?*
- *Would a reasonable person view the conduct as unwelcome or offensive?*
- *Did it demean, belittle or cause personal humiliation or embarrassment?*
- *Is it a single incident?*
- *Is it a series of incidents over a period of time?*

...

The following are some examples, but not an exhaustive list, to clarify what is meant by “harassment”.

<i>What generally constitutes harassment</i>	<i>What may constitute harassment</i>	<i>What does not generally constitute harassment</i>
<ul style="list-style-type: none"> ▪ <i>Serious or repeated rude, degrading, or offensive remarks, such as teasing about a person's physical characteristics or appearance, put-downs or insults.</i> ▪ <i>Displaying sexist, racist or other offensive pictures, posters, or sending e-mails related to one of the eleven grounds prohibited</i> 	<ul style="list-style-type: none"> ▪ <i>Criticizing an employee in public.</i> 	<ul style="list-style-type: none"> ▪ <i><u>Allocating work.</u></i> ▪ <i><u>Following-up on work absences.</u></i> ▪ <i><u>Requiring performance to job standards.</u></i> ▪ <i><u>Taking disciplinary measures.</u></i> ▪ <i><u>A single or isolated incident such as an</u></i>

<p><i>under the Canadian Human Rights Act.</i></p>		<p><u><i>inappropriate remark or abrupt manner.</i></u></p>
<ul style="list-style-type: none"> ▪ Repeatedly <i>singling out an employee for meaningless or dirty jobs that are not part of their normal duties.</i> 	<p>...</p>	<ul style="list-style-type: none"> ▪ <i>Exclusion of individuals for a particular job based on specific occupational requirements necessary to accomplish the safe and efficient performance of the job.</i>
<ul style="list-style-type: none"> ▪ <i>Threats, intimidation or retaliation against an employee, including one who has expressed concerns about perceived unethical or illegal workplace behaviours.</i> 	<p>...</p>	<ul style="list-style-type: none"> ▪ <u><i>Measures taken against someone who is careless in his or her work, such as in the handling of secret documents.</i></u>
<ul style="list-style-type: none"> ▪ <i>Unwelcome social invitations, with sexual overtones or flirting, with a subordinate.</i> ▪ <i>Unwelcome sexual advances.</i> 	<p>...</p>	<ul style="list-style-type: none"> ▪ <u><i>A social relationship welcomed by both individuals.</i></u> ▪ <i>Friendly gestures among co-workers such as a pat on the back.</i>

Sexual and physical assault are covered by the Criminal Code.

...

[Emphasis added]

[292] The *policy* stipulates that, among other requirements, “[a] complaint must include the nature of the allegations . . . the date and a description of the incident(s);

and, if applicable, the names of witnesses . . .” and that “[t]he information provided should be as precise and concise as possible.” The *policy* also stipulates a deadline and provides for a second step, as follows:

...

Step 2 - Screening and acknowledgement of complaint

Upon receipt of the complaint, the delegated manager screens and acknowledges receipt of the complaint. The criteria used in the screening are that the complaint:

- *must be filed within one year of the alleged harassment leading to the complaint, unless there are extenuating circumstances; and*
- *must include the information noted in Step 1.*

If these criteria are met, the delegated manager informs the respondent that a complaint has been received and provides him/her with the particulars of the complaint in writing, including the allegations.

If these criteria are not met, the delegated manager informs the complainant in writing that he or she cannot accept the complaint. If appropriate, the delegated manager suggests other means of resolving the issue.

Step 3 - Review of the complaint

Once the complaint has been acknowledged, the delegated manager reviews the complaint and if necessary, seeks additional information to determine if the allegations are related to harassment.

...

[Emphasis added]

[293] The *policy*'s requirements are reiterated in *Dealing with Harassment: A Guide for Delegated Managers* (“the *guide*”), which contains as follows the steps to follow in dealing with a harassment complaint:

...

Role and expectations of the delegated manager

...

Step 2: Screening and acknowledgement of complaint

Your first task will be to determine whether the complaint meets the screening criteria noted in Step 1. If any of the required information is not provided, you should contact the complainant and advise him or her in writing that without this information the complaint cannot be pursued.

If the criteria are met

. . .

[Emphasis added]

[294] The *guide* also describes as follows the important role played by a delegated manager, who acts on behalf of the deputy head:

. . .

Role and expectations of the delegated manager

As any manager you have a responsibility to provide employees with a harassment-free work environment. This means promptly addressing any situation of harassment whether or not a complaint has been made.

As a delegated manager you have the additional responsibility of overseeing the complaint process if and when a harassment complaint has been filed. This consists of six steps: filing/receiving the complaint; screening and acknowledgement of complaint; review of the complaint; mediation; investigation; and decision. (Review of the complaint requires that the delegated manager assess the complaint, determine the appropriate course of action, and ensure that the appropriate measures are implemented to resolve a complaint.)

Harassment complaints are very costly, both to the organization and to the individuals involved. In addition to the emotional toll, the financial implications - in terms of HR resources, employees' decreased productivity, investigation costs and so forth - make it imperative that a quick and appropriate response to the harassment complaint be made.

Legal implications also make it imperative that the response be fair, appropriate and in keeping with Treasury Board policy. As a delegated manager your role is integral to making the complaint process work.

. . .

(3) Keeping the parties informed

Clear, timely communication with all involved parties is

important throughout the process. The expectations for complainants, respondents and witnesses are defined in the Treasury Board policy. As a delegated manager you are to ensure these expectations are met. The involved parties should be kept informed of developments. You should also find out from the complainant and respondent what type of support and assistance they require throughout the process and direct them to appropriate resources. . . .

. . .

The investigation process

The first thing you must do is to select an investigator, define the investigator's mandate and clarify your expectations. The investigator will then be provided all documentation on the complaint including a copy of the allegations and any pertinent information.

. . .

[Emphasis added]

[295] Transport Canada also created an “Addenda” as a complementary document to the *policy*, which sets out ultimate responsibility and authority about its application. Among other responsibilities, delegated managers are expected to do the following:

[Translation]

. . .

- *to be impartial in any complaint process in which they are involved*
- *to apply the established steps in the complaint process*

. . .

- *to assign a mandate to the investigator(s) and ensure that investigator(s) are qualified in accordance with the Competencies Profile. . . that they are impartial . . . and that they are not in a position of conflict of interest*

. . .

- *to ensure that the established procedure is followed so that parties have the opportunity to make their positions known and to respond to the positions of other parties*

. . .

- *to ensure that parties are provided with the information to which they are entitled*

...

[296] Thus, the investigation framework developed by the employer stipulates that, when a conflict arises, a delegated manager must assume a proactive role.

[297] The *policy* states that a complaint must provide the nature of the allegations, the date and a description of the incident(s), and, if applicable, names of witnesses. Other than general allegations, the complaint filed on April 16, 2004 did not contain the elements of a complaint required by the *policy*. Four of the five allegations were untimely. The allegation of sexual assault was specifically excluded from the investigation process by the *policy*'s wording.

[298] Ms. Deslauriers did not present any circumstance, either at the time of filing the complaint or at the hearing, to explain the delay in filing her complaint. The *guide* notes extended sick leave as an example of a circumstance explaining a delay. The employer argued that the existence of continuing acts and the seriousness of the allegations justified the late filing of the complaint. The existence of continuing acts is not a circumstance that prevented Ms. Deslauriers from filing a complaint earlier. Nor is the seriousness of the allegations an extenuating circumstance.

[299] The only timely allegation is about requiring performance to job standards, which is excluded from the definition of harassment.

[300] On December 8, 2004, Ms. Paris allowed 11 new incidents, referred to as "clarifications," to be added to the complaint. The grievor was informed of the new incidents the day before the start of the investigation. None of the incidents added in December 2004 was screened or reviewed, and no offer of mediation was made. Therefore, those incidents were never dealt with in accordance with the *policy*'s established procedure.

[301] On more than one occasion, Ms. Paris influenced the handling of the complaint. She met with Ms. Deslauriers' union representatives to discuss the complaint before it was filed. During the period preceding the investigation, she had several meetings and telephone conversations with Ms. Deslauriers and her union representatives about the investigation's limits. On three occasions, Ms. Paris helped Ms. Deslauriers clarify her allegations, specifically, the allegations of sexual assault on September 30, 2004, the

chronological summary of the incidents related to the complaint on November 29, 2004 and the rewording of the allegations on December 18, 2004 so that they would correspond to the recommendations suggested by Ms. Montminy. Ms. Paris regularly communicated with Ms. Montminy about the handling of the file and the content of the complaint.

[302] In contrast, between early July 2004 and the grievor's interview by the investigators on January 24, 2005, contact between the employer and grievor was limited to the following four written communications: a letter dated July 6, 2004, informing him that a harassment complaint had been filed against him; a letter dated August 13, 2004, informing him of the appointment of Ms. Montminy as the investigator; a letter dated November 15, 2004, informing him of the addition of two allegations of sexual assault dating back to 1995; and a letter dated December 23, 2004, providing him with clarifications about the allegations arising from Ms. Deslauriers' complaint.

[303] Ms. Paris also sought to influence the outcome of the investigation by asking that Ms. Belliveau be involved after the interviewing of witnesses had begun. It is important to remember that Ms. Belliveau was a railway inspector in the grievor's section between 1991 and 1997, except for one year when she was on secondment. On April 19, 2004, about five days after Ms. Deslauriers' complaint was filed, Ms. Belliveau filed a harassment complaint against the grievor alleging events dating back to 1992. The employer dismissed that complaint without an investigation on the ground that it was untimely and did not inform the grievor of its existence. On January 11, 2005, Ms. Paris asked the investigators to interview Ms. Belliveau. The following is the transcript of Ms. Montminy's personal notes at that time about the conversation with Ms. Paris about Ms. Belliveau:

[Translation]

...

[telephone conversation] with Ms. Paris 11-01-05

File 04-008

Asks me if I remember the second person who filed a complaint against M.R. for [sexual harassment] and that management did not accept it because the incidents went back too far and no situation had occurred in the past year:

Ms. Nathalie Béliveau A. yes

Ms. Paris wants to know if [we] will interview her, yes. Management plans to send her a letter mentioning that she will have an opportunity to discuss her experience as part of our investigation. A. I specify that it is important not to open the door too wide so as not to investigate her case in detail because our mandate relates to Ms. D.'s complaint, not to create false expectations: by being interviewed as a witness and through questions about the [harassment investigation], she may be able to recount certain incidents about either of the parties.

Ms. Paris asks me whether we [will investigate] if she asks us to. A.: it would require a new mandate, new reason, etc. Therefore, they will (decision of Ms. Paris after discussion) simply send their letter with warnings.

...

[Emphasis added]

[304] The grievor was not informed of Ms. Belliveau's complaint or that the employer had asked that Ms. Belliveau be interviewed as part of the investigation. Ms. Belliveau did not witness any of the incidents alleged by Ms. Deslauriers and was not mentioned in Ms. Deslauriers' complaint. Nevertheless, Ms. Belliveau's statement carried considerable weight in the investigators' analysis.

[305] A comparison of Ms. Deslauriers' and Ms. Belliveau's complaints leaves no doubt that the two women collaborated in preparing their complaints. Both complaints were sent to Mr. Valeri, although the *policy* states that a complaint is to be filed with the delegated manager. The organization and writing styles of both letters as well as the vocabulary used is too similar to be chance. Those facts lead me to believe that there was collusion between Ms. Deslauriers and Ms. Belliveau for the purpose of harming the grievor. The fact that Ms. Paris suddenly decided to reopen Ms. Belliveau's complaint to link it to that of Ms. Deslauriers, and to do so without communicating this information to the grievor, is not an involuntary act and shows bias by the employer in this matter.

[306] Furthermore, it should be added that Ms. Montminy also showed bias when she made recommendations to Ms. Paris, to Ms. Deslauriers' benefit, about the format of the complaint and when she agreed to proceed with an investigation that she knew did not comply with the *policy*. Ms. Montminy also showed bias during the investigation

when she was persuaded by Ms. Paris to interview Ms. Belliveau, when she communicated with an officer of the Sûreté du Québec and when she informed Ms. Deslauriers directly of what she had found out. The investigators showed bias when they allowed Ms. Deslauriers to change the date of a sexual assault allegation without warning the grievor before meeting with him. Ms. Paris, who communicated regularly with Ms. Montminy, could not ignore those circumstances.

[307] The order of witnesses was prejudicial to the grievor. Ms. Deslauriers was interviewed first, and the grievor 13th, of 15 witnesses. As a result, the investigation was incomplete and biased. Ms. Deslauriers gave her version of the facts first, and the witnesses who followed were questioned only on the basis of that version. In response to certain allegations, the grievor provided an entirely different version of the facts, with documents to support his statements. Witnesses who had already been interviewed were not re-interviewed about the facts put forward by the grievor. The employer did not give the grievor's explanations the serious consideration they were due.

[308] Another element prejudicial to the grievor was the partial transcription of the statements and information provided to the delegated manager. According to Ms. Montminy's testimony, the investigators were instructed to minimize transcription costs. As a result, to avoid excessive costs, certain parts of interviews considered non-essential by the investigators were not recorded. The exception was Ms. Deslauriers' statement, which was recorded in its entirety. Ms. Montminy did not explain why the investigators made that distinction.

[309] The failure to record all the grievor's testimony had a major impact. The grievor had prepared a written rebuttal to all the allegations sent before the start of the investigation. The investigators decided that the document was too long to be reproduced in the transcript and stopped recording each time the grievor referred to his prepared text or read it. That document, which is a crucial part of his statement, was not reproduced as part of his statement. Indeed, it does not appear anywhere, except here and there when the investigators refer to the existence of a written document. The consequence of that omission is that the explanations given by the grievor in his written document are not part of the investigators' analysis. The investigators completely ignored important parts of that written statement. In addition, the transcript of the statements was given to the delegated manager but not

the grievor's document containing his refutation of the allegations. That document surfaced only at the hearing. This means that the people who read the investigation report and the few people who made an effort to read the statements had incomplete information on which to base a decision. Therefore, the employer imposed disciplinary action on the grievor based on incomplete information.

[310] The grievor noted the inequities of the investigation report at the meeting on May 18, 2005 and during the grievance process, but it appears that the employer did not take his concerns seriously.

[311] The investigation of a complaint, even if conducted by a third party, remains the responsibility of the employer who retains the services. The delegated manager may not abdicate his or her responsibilities of review before a decision is made by relying solely on the reputation of the investigators acting on his or her behalf, as was done in this instance. In light of the very serious consequences of the findings of the investigation, it was the delegated manager's responsibility to ensure that the report was a "high quality" report, as mentioned in the *guide*, before recommending that disciplinary action be imposed on the grievor.

[312] I believe that the employer failed in its duty of transparency and that it unduly favoured Ms. Deslauriers' allegations in handling the complaint. I am convinced that, had the employer made an effort to analyze the allegations set out in the complaint, to meet with the parties, to verify the facts from the documentation it already had, to follow the advice of the DND, to accept the strict provisions of the *policy* with respect to timeliness and the limits of an investigation, and to not interfere in the investigators' work, the outcome of this matter would have been quite different. By calling for an investigation without having carried out its responsibilities, the employer launched a witch hunt.

[313] I find it particularly disturbing that the employer allowed 11 allegations to be added to the complaint filed on April 16, 2004, in contravention of the *policy*; that it investigated allegations excluded under the *policy* because they were untimely, fell under a criminal investigation, or occurred before the *policy* came into force; that it defined an investigation mandate on organizational climate without notifying the grievor and that it disciplined him on that aspect of the investigation; and that it encouraged a statement from Ms. Belliveau in support of Ms. Deslauriers' complaint without informing the grievor and despite the fact that the employer had already

dismissed Ms. Belliveau's complaint.

[314] The impression given by this entire matter is that Ms. Pageot, Ms. Paris, Ms. Gagnon and even Ms. Montminy got caught up in the sensational nature of the allegations and forgot to focus on the facts. I will add that, given the disproportionate importance given to the most minor of incidents, I felt as though I were watching a soap opera in which the episodes became increasingly shocking with each witness heard. The fact that the allegations were almost 15 years old at the time of the hearing undoubtedly contributed to that effect.

[315] I now come to the part of the investigation that focused on organizational climate.

[316] Ms. Paris gave the investigators a mandate to report on the organizational climate as the backdrop to Ms. Deslauriers' complaint. According to Ms. Montminy, the examination of organizational climate, which is part of a DND investigation, is used to improve management practices and not to impose disciplinary action.

[317] The organizational climate mandate that Ms. Paris gave to the investigators reads as follows:

[Translation]

...

Analysis

...

c. evaluate the entire situation in the workplace in question and report on it to identify any underlying factors that might have contributed to the complaint and that might have negative repercussions on the work environment.

...

[318] In their general observations at the beginning of the investigation report, the investigators describe the organizational climate as an expression of an abuse of authority by the grievor and suggest that the grievor might be guilty of acts of harassment toward other employees. After reading the statements of the persons interviewed by the investigators, I believe that the investigators' observations are based on gossip, rumours, generalized impressions and, given the evidence at the hearing,

falsehoods. The employees' negative comments were invited by the questions asked by the investigators, especially in the case of Ms. Belliveau's statement. Rather than using a list of set questions, the investigators engaged in informal discussions with the individuals interviewed. If the scope of the investigation put the first nail in the grievor's coffin, then the description of the work environment and working relations made sure that he was buried.

[319] Contrary to what actually occurred, the investigation mandate states as follows that the investigator's final report was only to take into account factors related to the complaint:

[Translation]

...

Final report

(1) Prepare the final report using the interim report and adding the information described in points (e) and (f) below:

- (a) a summary of the harassment complaint;*
- (b) a description of the allegation or allegations;*
- (c) a description of the context and evidence that justifies or does not justify each allegation;*
- (d) an analysis of the evidence for each allegation;*
- (e) a statement of whether each allegation is founded or unfounded;*
- (f) a decision on whether the conduct described in each allegation constitutes harassment.*

[320] A harassment complaint carries with it a stigma that attaches itself to the alleged harasser for years, sometimes for life. Allegations of harassment are not to be treated lightly. The grievor undoubtedly had his faults, but the facts in this case do not justify the treatment that he received. None of the five allegations set out in the complaint against the grievor filed on April 16, 2004 justified giving the investigators a mandate for a broad investigation into the grievor's conduct. The employer has given me no reason that an investigation of the organizational climate was necessary. That type of investigation does not fall under the *policy*.

[321] For all these reasons, I find that any disciplinary or administrative action imposed on the grievor was unjustified.

F. Circumstances surrounding Ms. Deslauriers' testimony

[322] The manner in which Ms. Deslauriers was called to testify at the hearing before me reveals another aspect of the employer's bias with respect to the investigation of the complaint. On the first day of the hearing, the employer requested that the grievor not be present during Ms. Deslauriers' testimony because of her fragility. Ms. Deslauriers was returning from sick leave. I refused the employer's request. After several hearing days, the employer reiterated its request. Ms. Deslauriers had submitted a medical note to the employer indicating that she could not testify. The employer asked me to accept her statements to the investigators as found facts because she was the complainant. I denied its request on the ground that Ms. Deslauriers was the principal witness, and the grievor had the right to cross-examine her. The employer then requested that I hear Ms. Deslauriers by teleconference to avoid the stress of being confronted by the grievor. I denied the request for reasons of procedural fairness in light of the principles established by the Supreme Court in *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471. The hearing was delayed twice because of these requests. Ms. Deslauriers eventually complied with a summons to appear in the circumstances that follow.

[323] Ms. Deslauriers filed an individual grievance on April 25, 2006, contesting the fact that she had taken several months' sick leave for burnout because of the harassment investigation process and thus had used up her sick leave credits. That grievance was dismissed at the second level of the grievance process. While the hearing was under way, the employer chose to settle Ms. Deslauriers' grievance in return for considerable compensation. Ms. Deslauriers signed the settlement offer on July 9, 2008, while the hearing was ongoing. The grievor argued that Ms. Deslauriers' testimony had been "bought" and that I should consider that point in assessing her credibility. The employer argued that the settlement had nothing to do with Ms. Deslauriers agreeing to testify and asked that I not take it into account. Documents about Ms. Deslauriers' grievance were adduced and sealed.

[324] At the hearing, Ms. Deslauriers needed notes as a memory aid, created during the preparation for her testimony with the employer's counsel, to remember certain facts central to her testimony, including the date of the alleged June 12, 1995, assault. Other contradictions in Ms. Deslauriers' testimony are noted in my analysis of the

allegations set out in the complaint.

G. Disciplinary framework

[325] When the employer decides to exercise its disciplinary authority, it must inform the employee of the reasons behind the action and must give the employee the opportunity to respond before making a decision to sanction that person.

[326] In this case, it is clear that the employer had already made its decision to impose disciplinary action on the grievor even before it met with him on May 18, 2005. The purpose of the meeting was to persuade him to find a new job; otherwise, the employer intended to do it for him.

[327] The firm decision not to reinstate the grievor in his managerial position became quite evident when Ms. Gagnon testified about the remedial plan that she had proposed to the grievor on October 3, 2007, more than two years after the end of the investigation. Ms. Gagnon adduced a document in which she had listed the grievor's deficiencies as identified in the investigation report. She acknowledged that she had not yet informed the grievor of the deficiencies of conduct that, in her view, justified the remedial plan. The plan did not contain any objective assessment criteria or a specific date for the manager's return to his managerial duties. Ms. Gagnon's assessment of the grievor's progress toward returning to his previous duties depended entirely on her goodwill.

H. Corrective action

[328] The grievor argued that he was entitled to significant corrective action. He pointed out that the employer had demonstrated bad faith by using every possible means to extinguish his recourse to adjudication, including replacing the suspension with a letter of reprimand and proposing a remedial plan if he acknowledged wrongdoing.

[329] The grievor stated that his demotion significantly delayed his career and that it constituted a financial penalty within the meaning of paragraph 209(1)(b) of the *PSLRA*. The grievor has incurred substantial travel expenses to report to work now that he must report to Dorval. His travel time is more than two hours per day, when it used to be half an hour each way; he has to use his personal vehicle rather than public transit. The grievor alleged that his standard of living has been seriously affected by

the transfer against his will. He is no longer eligible for overtime, which he had performed regularly, and he is no longer reimbursed for expenses related to the numerous trips outside the office that he undertook as a manager.

[330] The employer argued that a financial penalty within the meaning of paragraph 209(1)(b) of the *PSLRA* was not imposed on the grievor. In support of its position, the employer cited *Bobinski v. Canada (Treasury Board)*, [1985] F.C.J. No. 244 (C.A.) (QL), and *St-Onge v. Treasury Board (Agriculture Canada)*, PSSRB File No. 166-02-16481 (19871112).

[331] In *Bobinski*, the Federal Court of Appeal ruled that the expression “financial penalty” included the obligation to pay a sum of money as a punishment for a disciplinary breach and included a fine.

[332] In *St-Onge*, the adjudicator was of the view that a claim for accommodation, kilometrage and other costs related to travel following disciplinary action were expenses and not a financial penalty within the meaning of the *Public Service Staff Relations Act*. Mr. St-Onge had been transferred for a temporary period for disciplinary reasons. During the transfer, he retained his classification, salary and benefits. He also enjoyed the right to claim all related expenses. The transfer became permanent, and the employer offered him all the benefits associated with a transfer. Mr. St-Onge decided not to take advantage of those benefits. By the time of the adjudication of his grievance, he had never claimed the expenses in question. The adjudicator’s opinion was that the expenses incurred by Mr. St-Onge were not a financial penalty related to disciplinary action but rather that they were personal expenses.

[333] I believe that there are ample differences between *St-Onge* and this case. In this case, the employer did not consult the grievor before ordering him to report to Dorval, which was some distance from his usual place of work, did not offer to reimburse him for his travel expenses, and did not offer him any assistance given that his daily travel time had doubled. The grievor had no choice but to use his personal vehicle to report to his new assignment in Dorval and to incur unusual travel costs. The grievor’s situation is not the same as a voluntary transfer, in which the employee elects not to move or to make personal arrangements that do not take his or her work location into account.

[334] The grievor adduced evidence of personal and financial losses caused by the

employer's actions. He claimed that he has suffered emotionally and physically from the stress of the past five years and claims compensatory, punitive and exemplary damages. In fact, the employer did not contest the amount of the grievor's damages but rather their relevance.

[335] As I have already mentioned, the evidence has convinced me that the grievor was the subject of an unjustified demotion. When this decision is rendered, the grievor will have experienced a five-year setback in his career, which is highly significant given his skills as acknowledged by all the witnesses. His lack of advancement during this time has also affected his retirement benefits. The grievor has lost all personal and financial assets as a result of this matter. He has been profoundly humiliated, and no form of compensation will ever erase the difficult times that he has experienced.

[336] Since he was excluded from the bargaining unit, the grievor incurred costs to defend himself. I am convinced that the complexity of this matter warranted the grievor obtaining professional advice and representation by counsel. I consider the employer's slowness in dealing with the complaint and the consequences of the investigation to be aggravating factors. The grievor sold his home (at a loss), his motorcycle and a second car to cover his legal fees and expenses. He also cashed in his RRSP. I believe that the employer's failings justify the grievor being compensated for those losses. In this instance, the employer contributed largely to the lengthiness of the proceedings by its handling of the complaint, the investigation, the grievance process and the adjudication.

[337] The grievor testified that, due to the length of the proceedings and the stress related to the investigation, he became seriously depressed, and he exhausted his bank of sick leave. His partner left him because of the family stress caused by this matter. At the time of the hearing, the grievor was living in a rooming house. He is ruined. Although medical evidence may be useful in establishing a physical or psychological disorder, it is not necessary to establish the serious and detrimental nature of the employer's conduct or the damage to the grievor's dignity. The grievor was entitled to a workplace free of malice and bad faith, in other words, to a healthy and productive environment, as the employer advocates.

[338] In *Baillie c. Technologies Digital Shape inc.*, 2008 QCCRT 549, the Commission des relations du travail du Québec wrote as follows about the right to dignity:

[Translation]

...

[37] *It is true that Marine Baillie was not physically attacked. However, her career was in effect destroyed. As Félix Leclerc wrote: "The best way to kill a man is to pay him to do nothing." The best way to destroy Marine Baillie was not to give her any work.*

[38] *In Breton c. Compagnie d'échantillons National Itée, 2006 QCCRT 601 (CanLII), 2006 QCCRT 0601, the Commission states as follows:*

[155] According to case law and doctrine, dignity refers to a person's respect, self-esteem and self-love. Dignity also refers to a fundamental and intrinsic dimension of human beings. For example, this concept has to do with unfair treatment, marginalization or demeaning conduct. Dignity also involves, as further examples, the right to be treated with decency, discretion, restraint, thoughtfulness, esteem, consideration, respect, deference and in a respectful manner. There need not be definitive consequences for a person's dignity to be harmed.

...

[339] The hearing of this case has convinced me that Mses. Brouillette, Pageot, Paris and Gagnon did not act by omission or ignorance with respect to either the investigation or the sanctions imposed on the grievor. All four testified to having received expert advice, and even advice from the DND, before making their decisions. The deficiencies found in that decision making are inexcusable. The grievor was destroyed personally and professionally because of their actions.

[340] In short, the employer failed in its duty of diligence, prudence and impartiality. The employer's efforts to crack the grievor and provoke his departure are unjustifiable. It is particularly disturbing that such actions were taken by senior managers of the employer. The abusive nature of the action taken by the employer and its lack of impartiality with respect to the investigation are blameworthy and unworthy of the responsibilities entrusted to senior management.

[341] Traditionally, Parliament and the civil courts have taken the position that the objective of labour laws is to promote dialogue and agreement in the workplace and that an adjudicator's jurisdiction is limited to compensating a party for losses and not

to punishing the party at fault. Indeed, the Federal Court of Appeal confirmed that approach in *Bédirian*.

[342] The Supreme Court has ruled on at least two occasions that the whole of a dispute, the essence of which arises from the interpretation, administration or violation of a collective agreement, falls within an adjudicator's jurisdiction (see *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, and *Vaughan v. Canada*, 2005 SCC 11). For that approach to become a reality, adjudicators must also have the power to order relief that reflects their expanded jurisdiction.

[343] Pursuant to subsection 228(2) of the *PSLRA*, an adjudicator renders a decision on a grievance by making the order considered appropriate. That provision reads as follows, that “. . . the adjudicator must render a decision and make the order that he or she considers appropriate in the circumstances.” In my view, that new provision is in keeping with the decisions of the Supreme Court in *Parry Sound* and *Vaughan*.

[344] The concept of punitive damages is well documented in common law. The conduct must be harsh, vindictive, reprehensible and malicious. However, there is no specific test for determining what constitutes malice. In *Honda Canada Inc. v. Keays*, 2008 SCC 39, para 62, the Supreme Court stated that damages are restricted to “. . . advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own.” Thus, punitive damages are awarded in the case of a wrongful act that, on its own, gives recourse to legal action. In *Keays*, the Supreme Court cautioned that the discretion to award such damages should be exercised most cautiously and only in exceptional cases. I am also conscious of the fact that the Federal Court of Appeal refused to award such damages in *Bédirian v. Canada (Attorney General)*, 2007 FCA 221.

[345] It is in that context that I must examine the circumstances of this case. First, it is my opinion that, given the principles set out by the cited case law, the investigation of a harassment complaint that faithfully follows the principles set out in the *policy*, regardless of whether the complaint is founded, is not in itself malicious or unacceptable conduct or conduct likely to warrant punitive damages. The *policy* calls for the equitable and transparent handling of a complaint and for a response to the complaint so that the parties involved may fully exercise their rights. In contrast, in cases where the employer fails to adhere to the principles set out in the *policy*, it

exposes itself to an application for relief from a party that did not have an opportunity to defend itself fully and that had disciplinary action imposed on it that was considered unjustified.

[346] After reviewing the submitted case law, particularly *Bédirian*, I find that the facts in this case establish that the employer's representatives acted deliberately and with malice toward the grievor in the following actions:

- launching an investigation without verifying the facts and without explaining to the grievor why the investigation included incidents that were (a) not part of the original complaint (16 incidents, when the complaint contained 5); (b) excluded from the definition set out in the *policy* (such as abuse of authority); (c) untimely under the *policy* (that is, occurring more than one year before the complaint was filed); (d) clearly excluded from the investigative authority (sexual assault); and (e) occurring before the *policy* came into force (incidents occurring before June 1, 2001);
- not informing the grievor of the key elements of the complaint until just a few days before the start of the investigation and not informing him of Ms. Belliveau's complaint or of the document containing a chronology of events prepared by Ms. Deslauriers in support of her allegations;
- favouring Ms. Deslauriers by meeting with her union representative before she filed a formal complaint; by meeting with Ms. Deslauriers and her union representative in September 2004 to agree to investigate allegations of sexual assault; by meeting with Ms. Deslauriers on three occasions to help her prepare a complaint that met the investigator's expectations; and by asking the investigators to interview Ms. Belliveau on the ground that her statement could support Ms. Deslauriers' allegations, despite the employer dismissing Ms. Belliveau's complaint;
- deciding to conduct an investigation of the entire "organizational climate" of the section managed by the grievor, without informing him accordingly and without allowing him to offer explanations;
- considering the grievor guilty of acts of harassment without fully reviewing the case;

- trying to persuade the grievor to accept a demotion by threatening him with an exclusion order that the employer knew was illegal, and then, when the grievor refused to be intimidated, by removing him from his managerial duties and assigning him to demeaning tasks;
- retaining in the grievor's personnel record an outdated disciplinary action and using it to impose a "remedial plan" on the grievor, the success of which depended entirely on Ms. Gagnon's goodwill, all without explaining to the grievor the deficiencies that he was alleged to have shown;
- reassigning the grievor to a work location more than two hours' travelling time from his home, with the threat of disciplinary action if he did not report to work and without consulting him or attempting to mitigate the effects on his personal life; and
- trying to extinguish the grievor's right to adjudication by replacing a 15-day suspension with a letter of reprimand.

I believe that all these acts were intended to harm the grievor, that they were not simply the consequence of an investigation or discipline, and that they constitute malicious conduct in and of themselves. The employer did not provide me with any reasonable explanation for its actions. The unjustified disciplinary actions, specifically the reassignment to duties not involving managerial responsibilities, unduly harmed the grievor's advancement when, until the complaint was filed, he had had superior performance evaluations, was appreciated by his superiors and had a clean disciplinary record. Therefore, in light of these circumstances, I find that the grievor is entitled to financial relief to compensate him fully for all his losses arising from what I deem malice by the employer.

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

(The Order appears on the next page)

XIII. Order

[348] The grievances are allowed.

[349] With respect to the imposition of unjustified disciplinary action, namely, a demotion, I order the following:

- the grievor is reinstated in his position as Manager, Railway Operations and Equipment, in downtown Montreal, retroactive to September 6, 2005, without any penalty or other consequence;
- all actions that were grieved are rescinded, as though they never existed;
- the deputy head must remove any mention of Ms. Deslauriers' complaint and the investigation from the grievor's personnel record and any other record related to him; and
- the deputy head must compensate the grievor for any loss of overtime since September 6, 2005, by an amount calculated on the basis of average overtime worked for the three years before the grievor's reassignment to Dorval.

[350] With respect to the harm to the grievor's health caused by the stress of an unjustified investigation, I order the deputy head to reinstate the grievor's sick leave credits that he used between March 16 and September 6, 2005.

[351] With respect to the losses incurred for daily travel time and transportation expenses, I order the deputy head to pay the grievor the following:

- the grievor's kilometrage costs between his home and his office in Dorval since September 6, 2005;
- travel time, up to two hours per day, for each day worked in Dorval since September 6, 2005.

[352] With respect to the grievor's career, I order the deputy head, at its expense, to have a human resources expert conduct a financial assessment of the grievor's loss of career advancement opportunities since September 6, 2005, and to reimburse the grievor for any loss of pay and benefits, including pension benefits, which resulted from that loss of advancement.

[353] With respect to the loss of personal property incurred by the grievor to pay fees and expenses to his counsel, I order that an actuarial assessment of the loss incurred be carried out, at the deputy head's expense, and I order the deputy head to reimburse the grievor the actuarial value of that loss.

[354] With respect to the wrongful acts by the deputy head, namely, malicious, reprehensible and harmful conduct toward the grievor, I order the deputy head to pay the grievor the amount of \$50 000 in punitive damages.

[355] I remain seized of this case for 90 days following the rendering of this decision to deal with any disagreement between the parties, including the choice of a human resources expert, an actuary, the actuarial values and the calculation of the amounts ordered.

May 27, 2010.

PSLRB Translation

**Michele A. Pineau,
adjudicator**