Date: 20210624

File: 566-02-10993

Citation: 2021 FPSLREB 75

Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

SHELLEY WEPRUK

Grievor

and

DEPUTY HEAD
(Department of Health)

Respondent

Indexed as
Wepruk v. Deputy Head (Department of Health)

In the matter of an individual grievance referred to adjudication

Before: Steven B. Katkin, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Patricia A. Deol and Kirby Smith, counsel

For the Respondent: Richard E. Fader and Shawna Noseworthy, counsel

Heard at Vancouver, British Columbia,
July 26 to 29, 2016, March 7 to 9, September 11 to 14,
and October 16 to 19, 2017, and April 9, 2018.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Shelley Wepruk ("the grievor") was a regional regulatory compliance and enforcement specialist in the Inspectorate Program of the Department of Health ("the employer") located in Burnaby, British Columbia, when her termination of employment occurred, effective July 3, 2014. To support the termination, the employer relied on a threat that she had made against her manager, which was in an email that she sent to her union representative.

[2] At the hearing, and despite her initial denial, the grievor admitted to having sent the email in question. In her defence, she relied on the presence of a number of mitigating factors but rested largely on her allegations of a toxic work environment and a lengthy pattern of harassment that she had suffered at the hands of management, which resulted in her making the threat toward her manager.

[3] The grievor was suspended without pay during an investigation. The letter terminating her employment was issued on October 9, 2014, and the termination was backdated to the date of the suspension.

[4] The grievor grieved her termination of employment on October 28, 2014, and the grievance was referred to adjudication on April 2, 2015. She was represented by her union, the Professional Institute of the Public Service of Canada ("the union"). The termination grievance, as well as other grievances relating to harassment allegations, a letter of reprimand, and several relating to denials of leave (8 in total) were referred to the Public Service Labour Relations Board.

[5] On November 1, 2014, the Public Service Labour Relations and Employment Board was created, and these proceedings were continued under the *Public Service Labour Relations Act*, as amended (see the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365), and the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40, ss. 365 to 470)).

[6] On June 19, 2017, the name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act* and the *Public Service Labour Relations Act* changed to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the

Board"; note that in this decision, "the Board" refers to the current Board and all its predecessors), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act* (see *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9)).

II. Preliminary issues

[7] The employer raised issues about my jurisdiction over five of the eight grievances, not including the termination grievance. I issued an interim decision on the jurisdictional objections; see *Wepruk v. Treasury Board (Department of Health)*, 2016 PSLREB 55.

[8] In that decision, I determined that a grievance contesting the employer's statement that it would seek access to the grievor's university records was not adjudicable (Board File No. 566-02-10986). Accordingly, the grievance was dismissed. I also determined that the grievance against the suspension without pay pending the investigation (Board File No. 566-02-10990) was moot, given that the termination had been backdated to the first day of the suspension. Accordingly, this grievance was also dismissed.

[9] The grievor withdrew the following grievances on July 12, 2016, and February 21, 2017: Board File Nos. 566-02-10987, 10991, 10988, 10989, and 10992.

[10] The only remaining grievance at adjudication of which I am seized is the termination grievance.

[11] The grievor raised an objection to the introduction of a transcript of her testimony before the Social Security Tribunal (SST) and the SST's decision on her eligibility for Employment Insurance (EI) benefits. I issued an interim decision on the admissibility of this evidence on February 17, 2017; see *Wepruk v. Treasury Board (Department of Health)*, 2017 PSLREB 19. I dismissed the objection to admissibility, with the following exception:

> …
>
> *[27] The objection to the admissibility of the Social Security Tribunal's decision concerning the grievor's eligibility for employment insurance benefits is allowed only with regard to any information that may be contained therein that was obtained by*

> *the Minister of Employment and Social Development, the Minister of Labour, or the Canada Employment Insurance Commission under a program for which they are responsible. I order the respondents to prepare copies of the Social Security Tribunal's decision redacting the said information.*
>
> …

[12] I issued a production order on December 7, 2015, requiring the Royal Canadian Mounted Police (RCMP) to produce copies of all documentation and information related to the grievor's file to her and the employer's counsel.

A. Anonymization request

[13] The grievor also requested that the decision in this grievance be anonymized. The employer took no position on this request.

[14] The grievor expressed concern that some of the relevant evidence is very personal. She was concerned that the use of her name could be professionally embarrassing in the future and could undermine her ability to find employment. She was also concerned that her conduct in sending the email could have a detrimental effect on third parties such as her family and, most importantly, upon her young daughter and that it may impact her reputation at school and among the parents of other children.

[15] Counsel for the grievor submitted that anonymizing the decision would not prejudice the administration of justice and that the noted circumstances are exceptions to the open court principle.

[16] Counsel relied on the "*Dagenais/Mentuck*" test for determining an exception to the open court principle, as set out in *N.J. v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 129 at para. 49:

> *[49] The Dagenais/Mentuck test, as reformulated in* Sierra Club of Canada*, is a two-pronged test. First, I need to decide whether an order limiting the open court principle is necessary, in the context of the litigation such as adjudication, to prevent a risk to an important interest. Second, I also have to decide whether the salutary effects of the order would outweigh its deleterious effects on the public's right to open and accessible adjudication proceedings.*

[17] Counsel submitted that the health and well-being of the grievor's daughter was put at risk by way of stigma or bullying as a result of the grievor's actions. Counsel submitted that the daughter's health and well-being should be protected and that they constituted an exception to the open court principle. In addition, counsel submitted that the grievor's ability to secure future employment may be negatively impacted. Counsel noted that this would impact both the grievor and her daughter and that it meets the first part of the *Dagenais/Mentuck* test. Counsel submitted that the salutary effects of the order would outweigh any deleterious effects on the public's right to open and accessible adjudication proceedings. Counsel stated that this grievance was not a case of "high public interest" and that the publication of the grievor's name was not essential to a transparent understanding of the Board's decision.

[18] Counsel referred me to *Chamberlain v. Treasury Board (Department of Human Resources and Skills Development)*, 2015 PSLREB 29 (the sealing of medical reports); and *Gangasingh v. Deputy Head (Canadian Dairy Commission)*, 2012 PSLRB 113 (anonymization for commercial interests).

[19] The Board operates on the open court principle and does not usually anonymize the name of a party or third party in its decisions. The Board has issued a *Policy on Openness and Privacy*, which is posted on its website. The policy notes that the open court principle is significant in our legal system and that in accordance with this constitutionally protected principle, the Board conducts its hearings in public, save for exceptional circumstances. The policy expands on those exceptional circumstances as follows:

> …
>
> *In exceptional circumstances, the Board departs from its open justice principles, and in doing so, the Board may grant requests to maintain the confidentiality of specific evidence and tailor its decisions to accommodate the protection of an individual's privacy (including holding a hearing in private, sealing exhibits containing sensitive medical or personal information or protecting the identities of witnesses or third parties). The Board may grant such requests when they accord with applicable recognized legal principles.*
>
> …

[20] The anonymization of names and identifying information is a restriction placed on the open court principle that requires an evaluation against the *Dagenais/Mentuck* test, established by the Supreme Court of Canada.

[21] The decision in *Basic v. Canadian Association of Professional Employees*, 2012 PSLRB 120 at para. 11, summarizes the *Dagenais/Mentuck* test as follows:

> *[11] The* Dagenais/Mentuck *test was developed in the context of requests for publication bans in criminal proceedings. In* Sierra Club of Canada*, the Supreme Court of Canada refined the test in response to a request for a confidentiality order in the context of a civil proceeding. As adapted, the test is as follows:*
>
> …
>
> *(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and*
>
> *(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.*
>
> …

[22] In this case, the serious risks identified by the grievor include her personal reputation, job prospects, and the health and well-being of her daughter. The impact of a decision on a personal reputation or on job prospects is not a significant risk that would justify anonymization. All grievors are aware that Board hearings and decisions respect the open court principle and that their names will be made public. In this case, the salutary effects of a confidentiality order do not outweigh the deleterious effects of such an order.

[23] I now turn to the health and well-being of the grievor's daughter. The protection of children is a well-recognized reason for confidentiality orders. In the *Protocol for the Use of Personal Information in Judgments*, issued by the Canadian Judicial Council, the factors to consider when minor children are involved are discussed this way:

> …
>
> *[31] Absent a legislative or common law publication ban, there may be exceptional cases where the presence of egregious or sensational facts justifies the omission of certain identifying information from reasons for judgment. However, such protection should only be resorted to where there may be harm to minor children or innocent third parties, or where the ends of justice may be subverted by disclosure or the information might be used for an improper purpose. In such a situation it may be necessary to avoid*

> *the use of information which identifies the parties in order to protect an innocent third party.*
>
> *[32] Protection of the innocent from unnecessary harm is a valid and important policy consideration (see* A.G. of Nova Scotia v. MacIntyre, *[1982] 1 S.C.R. 175). In these cases, the judge must balance this consideration with the open court principle by asking how much information must be included in the judgment to ensure that the public will understand the decision that has been made. It should be noted that where there is no publication ban in place, the identity of persons sought to be protected by editing reasons for judgment may still be ascertainable by examining the actual court file. Thus, full access to the record is maintained for those who have sufficient reason to take the extra step of attending at the registry or doing an online search for court records. However, by not disseminating the information to easily accessible court websites, some level of protection is maintained.*
>
> *[33] Cases in which it may be appropriate to exercise a discretion to remove personal identifying information may include those involving allegations of sexual assault or exploitation or the sexual, physical or mental abuse of children or adults. In such cases, consideration should be given to whether the identity of the victims should be included in reasons for judgment. The abuse of children may be severe enough to warrant name protection if the children were subjected to serious physical or psychological harm. The protection might also be extended in situations where the child welfare authorities have been contacted concerning abuse or lack of care, or if there is any mention of child protection proceedings, foster care, guardianship or wardship. In divorce or custody proceedings where allegations of sexual abuse are made, consideration could be given to protecting the identity of all family members, even where the allegation is unfounded. In proceedings where a paternity issue is raised, it may also be appropriate to protect the identity of the children involved.*
>
> *…*

[24] In this case, I do not find that case fits the category of "… exceptional cases where the presence of egregious or sensational facts justifies the omission of certain identifying information from reasons for judgment." The facts may be embarrassing, but they do not rise to the level of egregious or sensational. Although protecting the innocent from unnecessary harm is a valid and important policy consideration, it must be balanced against the open court principle. The unnecessary harm to an innocent party in this case is speculative and does not rise to a level that would justify overriding the open court principle.

[25] Therefore, I reject the grievor's request for anonymization.

III. Summary of the evidence

A. The witnesses

[26] In total, 11 witnesses were called. The grievor testified on her own behalf and called Mandy Deol. Ms. Deol had been a co-worker of the grievor's, and although she also experienced issues at work that she felt were harassment, she did not socialize with the grievor either inside or outside work and was not a friend of the grievor's. She testified for the grievor under subpoena.

[27] Nine witnesses testified for the employer. First were the grievor's managers, Dennis Shelley and Kim Seeling, both of whom were the focus of her harassment allegations against management. Mr. Shelley, Regional Manager of the Inspectorate Program for Health Canada's B.C. region, acknowledged that there was a degree of tension in his working relationship with the grievor, such as he did not engage in small talk with her. They did not have a positive relationship. Mr. Shelley admitted that the spring of 2014, just before the event at issue, his relationship with her was on the low end compared to his relationships with other employees.

[28] Ms. Seeling was the grievor's supervisor on an acting basis for the relevant periods. Ms. Seeling stated that perhaps employees had negative sentiments toward her because her position on an acting basis had been extended without a staffing process. Assignments on an acting basis were a sore point in the office, as I will refer to later in this decision. Ms. Seeling also admitted that her relationship with the grievor was tense, but she blamed the grievor for being aggressive and disrespectful.

[29] Brian Mori also testified for the employer and was the regional director of compliance and enforcement in Health Canada's B.C. region. In 2013 and 2014, he reported to Bruce Cuddihey, the regional director general of that region, whose office was in the Sinclair Centre in Vancouver, B.C. Mr. Shelley was one of six managers reporting to him.

[30] At the relevant time, Mr. Cuddihey was the regional director general for Health Canada's B.C. region, reporting to Peter Brander, the senior director general.

[31] Mr. Brander also testified. At the relevant time, he was the senior director general on an acting basis for regions and programs and was located in Ottawa,

Ontario. He was responsible for 23 programs and services and approximately 1100 staff across the country.

[32] A further member of management who testified was Jeannette Bourgeault. At the relevant time, she was the senior conflict management practitioner with the Ombudsman Integrity Resolution Office. Her area of responsibility was the four western provinces; she visited one region once per quarter. She issued an email that she would be in Vancouver in April 2014. She met with the grievor there on April 14, 2014, for about one hour, to discuss her harassment allegations.

[33] Elaine Wass was Health Canada's regional director of human resources for its B.C. region during the events at issue. Mr. Cuddihey asked her to carry out an administrative investigation into the matter.

[34] RCMP Constable Chantelle Foote also testified. She arrested the grievor and interviewed her.

[35] Lastly, Damian Kakwaya, a co-worker of the grievor's, testified on behalf of the employer. While he harboured some of the grievor's workplace concerns, he was not a friend of hers. Unlike her, he testified that he did not want to engage in negative anti-management talk at work and therefore had requested not to be seated near her in the office. It also appears that he and she had tension as a result of two work interactions. In the first, she had called him an "S.O.B." during a disagreement. In the second, when he was selected for a supervisor position on an acting basis in June 2014, she had called him "the next Joe Boy", which had offended him.

B. The grievor's work history from 2002 to 2011

[36] The grievor started working for Health Canada in 2002 in Ottawa. She relocated to Vancouver in 2005 and was appointed to the position of Regional Regulatory Compliance and Enforcement Specialist in the Inspectorate Program in Burnaby, B.C., classified SG-SRE-05. Following a period of sick leave and a fitness-to-work evaluation, she returned to work in August 2006. In September 2006, she went on maternity leave and was scheduled to return to work in September 2007. She had wanted to return part-time, but Mr. Shelley refused on the basis that only SG-4s could work part-time. She then went on care-and-nurturing leave until September 2008, following which she went on sick leave indefinitely until her return to the workplace in 2011.

[37] Mr. Shelley testified that he had requested the fitness-to-work evaluation after a meeting with the grievor in his office in November 2005 during which she grabbed a chair and began thumping it, attracting attention from other employees. Further to the evaluation, the medical recommendation was that she be placed out of his line of sight.

[38] In the evaluation, dated July 19, 2006, the grievor was found fit for her usual duties, with no formal accommodation, but it contained the following recommendations:

> …
>
> *It is advised that Ms. Wepruk's workspace be moved out of sight of the immediate supervisor to whom she's currently reporting. Although we do not recommend limitations for labour relations matters, the specialist recommends that minimising unnecessary contact would be prudent to avoid future medicalisation of these issues.*
>
> *Apart from separating the workspaces, the specialist's opinion is that there is no medical evidence to restrict or limit her involvement with her immediate supervisor in her usual, workday activities. There is no medical evidence to suggest she should report to another supervisor.*
>
> *If further difficulties persist between the employee and her supervisor, mediation would be recommended.*
>
> *If there is further medical leave because of these matters, a rapid reassessment is recommended.*
>
> …

C. The Tsou incident and the medical certificates

[39] In the fall of 2013, a work colleague, Albert Tsou, reported to Ms. Seeling that he had seen the grievor at Simon Fraser University (SFU) during the time that she told Ms. Seeling that she was off work and taking care of a sick child. When she investigated, Ms. Seeling reviewed the grievor's absences from work and noted that for five consecutive weeks, the absences included a Thursday.

[40] Ms. Seeling met with the grievor about the absences on October 8, 2013. The grievor told her that she felt that she was being targeted. The grievor told her that she had not been at SFU. Ms. Seeling testified that she had accepted the grievor's word and said that the matter was closed with respect to any leave already taken. However, she

advised the grievor that she would have to provide medical certificates for subsequent absences.

[41] The grievor confronted Mr. Tsou about his allegations to management. He reported his interaction to management, but he never made a harassment complaint against the grievor.

[42] On February 4, 2014, the grievor received an email from Mr. Shelley, advising her that management would conduct a fact-finding meeting on February 12, 2014. The meeting was held at Mr. Shelley's request, as he had concerns about her leave. She was represented by her union representative, Jennifer George.

[43] One of the concerns that prompted the meeting was that further to Mr. Tsou's report, the grievor might have been attending university courses during work hours. At the fact-finding meeting, Mr. Shelley stated that the employer would contact SFU, to access her student records. In a letter to her, Mr. Cuddihey later acknowledged that some errors were made in the fact-finding session and that Mr. Shelley should not have threatened to go to SFU. However, Mr. Cuddihey testified that he did not view that threat as harassment or bias but as an error. In the end, the employer did not contact the university.

[44] The grievor filed a grievance against the request for student records on February 21, 2014. The final-level reply from the employer on February 25, 2015, considered the grievance moot, as the employer did not contact SFU. This is the grievance I held as non-adjudicable in my interim decision.

[45] When it was put to Mr. Shelley that the matter had been resolved by Ms. Seeling in her October meeting with the grievor, he said that he was not aware that it had been closed.

[46] The grievor obtained a medical certificate from her family doctor on February 23, 2014, stating that she was under "acute psychological distress". The doctor noted that the grievor wished for the following accommodation at work: "having a different supervisor". The certificate stated that the doctor agreed with that accommodation. However, the evidence disclosed that the grievor never submitted the certificate to the employer, on the advice of her union. She received a letter of

reprimand on June 20, 2014, relating to failing to provide a medical certificate for a two-day absence in April of 2014, signed by Mr. Shelley, which reads as follows:

…

> *Written instructions were provided to you on October 15, 2013 that you were to provide a medical certificate to support your requests for sick leave. On April 8 and 9, 2014, you were absent and did not provide a medical certificate. At our meeting on May 20, 2014, I gave you an opportunity to explain why you failed to adhere to my instructions. You were not able to provide a satisfactory explanation. Consequently, I have concluded that this is insubordination.*
>
> *This letter of reprimand will remain on your personnel file for a period of two years provided no further disciplinary action is taken during that time. In addition, the two days in question are deemed unauthorized absence without pay.*
>
> *I am reaffirming the direction to you; for all instances of absences due to illness you are to provide a medical certificate upon your return to work. It is my expectation that you will forward the medical certificate with your leave request on your first day at work following such an absence. Failure on your part to comply with these directions will result in the absence being considered as unauthorized without pay, and may result in more severe disciplinary action up to and including termination of your employment.*

…

[47] Mr. Shelley testified that at the disciplinary meeting of June 20, 2014, the grievor turned her chair away from him and sat with her back toward him. He testified that after he read aloud the letter of reprimand, she left “in a huff”.

[48] The grievor grieved the letter of reprimand. The grievance was denied on February 25, 2015, and as stated earlier in this decision, it was withdrawn (Board File No. 566-02-10991).

D. Other grievances filed by the grievor

[49] The grievor received a second letter of reprimand on June 25, 2014, relating to her interaction with Mr. Tsou.

[50] The letter of reprimand, signed by Mr. Mori, the regional director, compliance and enforcement, reads as follows:

…

> *The purpose of this letter is to provide you with my decision regarding an allegation that you behaved inappropriately towards another employee. In reviewing the available information it has been determined your behaviour towards Mr. Tsou was inappropriate, in particular your decision to approach him a second time on November 22, 2013 and your accusation that he was bullying you. This type of behaviour will not be tolerated.*
>
> *You are reminded of the Statement of Values and Expected Behaviours entrenched in the Values and Ethics Code for the Public Service, specifically those relating to Respect for People which address the requirement to treat all people with respect. It is imperative you align your behaviours with the Code in the future.*
>
> *The allegation of misuse of leave has been deemed inconclusive.*
>
> *Consequently, I have decided that it is necessary to render discipline in the form of a written reprimand. In making my decision, I have considered your length of service with Health Canada. In accordance with the terms of your Collective Agreement, a copy of this letter shall be placed in your personnel file for a period of two years provided no further disciplinary action is taken during that time. This letter of reprimand serves as notification that more serious disciplinary action will be taken if there is a repetition of this type of misconduct, up to and including the termination of your employment for cause. In addition, you are required to attend a training course, which will be scheduled for you, in the subject area of addressing conflict constructively.*
>
> …

[51] The grievor grieved the letter of reprimand. The grievance was denied on February 25, 2015.

[52] The grievor filed a harassment grievance, which she also ultimately withdrew, against Mr. Shelley and others on June 26, 2014. In it, she referred to ongoing harassment and bullying. It was also denied on February 25, 2015. The final-level reply included the following:

> …
>
> *It is my understanding that you asked to meet with management on January 9, 2014, to discuss a few items including the topic of bullying and harassment. At this meeting, it is my understanding that you raised observations of perceived factions in the workplace ("in group and an out group") and concerns that you were perceived to be in a "bad" faction. You further indicated you felt this way because you had presented grievances. In response, management assured you that you would not experience retribution for presenting grievances, since this is within your rights, and should you have any specific indication of retribution to*

> *let management know. Moreover, your concerns regarding workplace factions and how you were perceived were not supported by concrete examples that meet the definition of harassment, as set out by the Treasury Board Secretariat of Canada. In addition, you had a second opportunity to present such examples at your grievance hearing, however none of the issues raised met the definition either.*
>
> …

[53] On June 16, 2014, the grievor requested family related leave related to a teachers' strike. The request was denied. She filed a grievance that ultimately was withdrawn.

[54] The grievor wrote an email to her lawyer on June 24, 2014, which included the following:

> …
>
> *Unfortunately, as is par for the course in these types of situations, HC is upping the level of violence in my workplace. I am now being disciplined by having pay docked. I am having [sic] steady barrage of discipline for the most trivial matters. I have another disciplinary action meeting scheduled for June 26. It is getting quite ludicrous. However, did get a good yearly performance review. That bodes well for fighting the inexorable progression these matters have.*
>
> …

E. The email of June 30, 2014, and the RCMP's investigation

[55] I now turn to the events that led to the termination. As of the event in question, Mr. Kakwaya had become the supervisor on an acting basis as of July 2, 2014, as Ms. Seeling's similar appointment had ended on June 30, 2014. Ms. Seeling's last day in the office before going on vacation was June 27, 2014.

[56] Mr. Shelley emailed the grievor on June 30, 2014, advising her that he would be responsible for approving her leave as of that date. Mr. Kakwaya testified that Mr. Shelley had advised him that since he was acting only for four months and would then return to being a colleague, it would be best if he were not involved in the grievor's leave reporting. Mr. Shelley said that Mr. Kakwaya agreed to that condition.

[57] The grievor was not pleased with the leave approval process as she had filed her harassment grievance against Mr. Shelley only a few days earlier. She forwarded Mr. Shelley's email to her union representative, Ms. George, the same day. After 3:15

p.m. on June 30, the grievor received an email from Mr. Shelley stating that her leave request for the unforeseeable school closure was denied. She considered it psychological violence.

[58] The grievor then sent the email that led to her termination to her union representative on June 30, 2014, from her Health Canada email account. It read as follows:

> *Hi Jennifer, Dennis has denied my family leave request for June 16, 2014 for unforeseeable school day care closure. As I understand it, according to section 17.12 d. ii) of the current collective agreement I'm entitled to 7.5 hours to provide for my child in the case of an unforeseeable closure of the school or day care facility. I had not used this leave for the current fiscal period.*
>
> *There was no school on Monday, June 16 due to the unplanned teachers' "study day" prior to the beginning of the full strike on June 17 and I could not obtain daycare.*
>
> *We need to have Dennis Shelley removed as my supervisor/leave approver as soon as possible. He is not conducive to my occupational health nor safety. I'm tired of the constant workplace violence. One day soon I will snap, bring one of my guns in to work, and shoot the bastard.*
>
> *Today he went to lunch with some of the favourites: Leslie Beaton SG-5, 24 years service, Eric Yim SG-4, 2 years service, and the student. As usual, I was not invited.*
>
> …

[59] After sending it, the grievor tried to call Ms. George, but her call went to voicemail. She tried to call friends, but there were no answers. She then left for the day and testified that she then forgot that she had sent it.

[60] The grievor testified that she thought that she had sent the email in confidence to Ms. George, who was a lawyer working for the union as an employee relations officer. She did not intend that Mr. Shelley would see it; nor did she intend to threaten or hurt him. She stated that she was begging for help. She testified that she did not intend the email as a threat but that she now sees how it could be perceived that way. At the time, she did not understand the legal meaning of "threat".

[61] The evidence disclosed that it was not the grievor's first reference, at work, to workplace violence and to how she might be led to it. Mr. Kakwaya testified that she showed him an article about a forestry employee on Vancouver Island who had shot

some of his colleagues and told him, "This is what happens when people don't get listened to." Mr. Kakwaya testified that he was concerned but not alarmed enough to bring it up to management at the time, although he did admit to eyeing exits in the event that he needed to extricate himself from the situation. The grievor had said that she was under tremendous stress. She said that she did not recollect showing Mr. Kakwaya that particular article but stated that if he recollected it, then she probably did show it to him. She said that Mr. Kakwaya was trustworthy and honest.

[62] The grievor's union read the email after the Canada Day long weekend and alerted the RCMP to its existence. The RCMP went to the grievor's workplace on July 2, 2014, and placed her under arrest.

[63] Constable Foote interviewed the grievor (Exhibit E-4, tab 2), told her about the email, and stated that it referenced Mr. Shelley. During the interview, she admitted to sending the email but stated, "I never ever threatened Dennis Shelley." She stated that she was feeling frustrated with his behaviour and that she had been bullied and harassed at work for nine years. She continued with this:

> *And so the day I sent the e-mail, there had been several other instances of workplace violence caused by Dennis Shelley.*
>
> *…*
>
> *And so I sent the e-mail to the union representative. Saying I needed to file another grievance.*
>
> *…*
>
> *… So I was feeling very frustrated that day and I just, there had been several instances.*
>
> *…*
>
> *And so I was just feeling frustrated so I did not threaten Dennis Shelley at all. I said to my union you know someday I'm gonna snap.*
>
> *…*
>
> *Am I really gonna do it? (inaudible) if I was really gonna hurt Dennis Shelley I woulda done it a long time ago.*
>
> *…*
>
> *Am I gonna do something to Dennis Shelley no.*

[64] She told Constable Foote that she had some antique firearms and a shotgun but that she did not have ammunition for them.

[65] Constable Foote then explained to her why the police took seriously both the email and the perception it created. She replied with this:

> *Right and so that obviously is a very, bad error in judgment on my part. And I for sure would never do something like that again.*
>
> …
>
> *And I didn't, for me, I didn't realize it was even considered a threat and so. [I] didn't say I am going to do it.*
>
> …
>
> *I just said you know some day.*
>
> …
>
> *… I guess what I was trying to imply to the union with it is that you know I, I can't (inaudible) and I wish they would do something. And I guess maybe that was what I was hoping for.*
>
> …
>
> *Cuz I mean I didn't mean any harm or anything.*

[66] The grievor told Constable Foote that she sent the email on June 30, "right at the end of the day".

[67] When asked what information the RCMP provided to Health Canada before the Board's production order, Constable Foote replied that as a police officer, she had been instructed not to share information with third parties unless there is a public safety issue. Officers are told to request information through official means.

[68] After her conversation with the grievor and discussion with her supervisor, Constable Foote determined that the grievor could be released on two conditions, which would satisfy public safety concerns. They were that she have no contact with Mr. Shelley and that she not enter her workplace. The grievor signed an undertaking to a peace officer to comply with those conditions. It was attached to the grievor's promise to appear in court, which was in force until October 24, 2014, after which it was to lapse. On that date, Constable Foote was still communicating with the Crown concerning a charge proposal.

[69] On the morning of October 24, Constable Foote left a voicemail for the grievor not to appear in court. A court summons would be issued later. On October 24, 2014, the grievor was not told that the charges would be dropped, which would not have been communicated to her by Constable Foote, the Crown, or anyone else involved.

Constable Foote said that the decision not to proceed with charges was made in January 2015; the six-month limitation on summary conviction offences had elapsed, and the Crown was not interested in proceeding with an indictable offence. Constable Foote believed that the Crown office would have communicated that to the grievor.

[70] On January 21, 2015, the RCMP advised the employer that the conditions in the undertaking were no longer in place and that to date, Crown counsel had pursued no charges.

[71] The grievor's firearms were seized on July 2, 2014, and the report of the inventory (Exhibit E-4, page 37) was made the next day. Constable Foote had no reason to disbelieve the grievor's testimony that she never tried to retrieve her seized guns. Constable Foote acknowledged that the grievor had said that she had a valid firearms licence and that she had never purchased ammunition. Constable Foote did not recall whether the grievor's guns were antique as she did not see them. The only information that the officers who seized them provided her was that they were long guns.

[72] When asked to respond to the suggestion that the grievor's consent to be interviewed was not bona fide because she had to get home to her child, Constable Foote said that she did not require consent because a person can be held for investigative purposes for up to 24 hours. Whether or not the grievor gave a statement would not have influenced whether she was held for a longer or shorter period.

[73] Constable Foote testified that the grievor was cooperative when she was arrested. She had no historical record of inappropriate behaviour, which was a factor in deciding on her conditional release. When asked whether she had advised Mr. Shelley of the conditions of the grievor's release, Constable Foote said that typically, she informs the complainant of the release conditions of the arrested party, for their personal safety, but she could not recall the timeline of the conversation with him.

[74] Constable Foote agreed that Mr. Shelley had said that he did not feel threatened (Exhibit E-4, tab 2, page 28). He confirmed in his testimony that he would have preferred that Labour Relations handle the matter internally. He was not fearful on that day. Mr. Shelley agreed that the grievor was never physically violent at work. He believed that Constable Foote told him to leave work and that Human Resources called him and encouraged him to leave, which he did. He did not see the text of the email

until the hearing. Constable Foote had mentioned the word, "shoot". He stated that in retrospect, he probably should have been afraid. While he was at home, he received a call from Constable Foote, who told him that the matter would be treated as a police issue.

[75] In his statement to Constable Foote, Mr. Shelley said that he believed that the grievor was emotionally unstable. He said that that was based on the entirety of their working relationship. When asked if his observation included the grievor crying at her desk, Mr. Shelley denied having witnessed it. He never went near her workstation uninvited, for fear of being accused of wrongdoing.

[76] Mr. Brander was informed of the grievor's email on July 2, 2014, when Mr. Cuddihey phoned him and filled him in. Mr. Brander wanted to ensure that Labour Relations was involved; he was concerned for the staff's safety and asked what measures had been taken with Health Canada security. He ensured that regional management had access to the resources required for an investigation and that process and policies were followed.

[77] The grievor was suspended without pay on July 3, 2014. The letter of suspension read, in part, as follows:

> …
>
> *On July 2, 2014 we were informed by the RCMP that you wrote an email to the Professional Institute of the Public Service of Canada (PIPSC) concerning issues involving your immediate manager. In the email, we were advised you made reference to violence to resolve your situation. This letter is to advise you that an administrative investigation will be conducted immediately.*
>
> *Given the circumstances of the above noted allegations, management has determined that your continued presence in the workplace presents a reasonably serious and immediate risk to the legitimate concerns of the Department and as such, you are hereby administratively suspended without pay pending the outcome of the investigation as of July 3rd, 2014.*
>
> *During the investigation and prior to management rendering a final decision, you will be afforded an opportunity to present any clarifications or extenuating circumstances that you feel have not been addressed in the course of the investigation. You are encouraged to cooperate fully in the investigation. It is management's intention that the investigation be exhaustive and swift. Please refer to your collective agreement as to your right of representation.*

> *Should it be determined that the allegations against you are founded, administrative and/or disciplinary measures may be taken. If it is determined that the allegations against you are unfounded, you will be reintegrated into the workplace and you will be compensated accordingly for the period that you were suspended.*
>
> …

F. The administrative investigation

[78] On July 23, 2014, the grievor was advised that an administrative investigation had begun and that Ms. Wass, the regional director of human resources, would conduct it.

[79] Ms. Wass testified about the investigation process. In conducting the investigation, she followed federal government and Health Canada procedures. She collected information from management, determined whom she had to interview, conducted interviews, took statements, and provided interviewees with copies of their statements to sign or amend. Some interviewees, including Ms. Deol, made amendments or adjustments to their statements. Ms. Wass reviewed all the information, prepared a first draft of the report, and provided a copy to management.

[80] Ms. Wass interviewed Mr. Shelley, Ms. Seeling, Mr. Kakwaya, Ms. Deol, and the grievor. When asked why the interviewees' statements were not appended to her report, she replied that they gave her full statements and that she decided to summarize them; it was the investigation method at the time.

[81] The grievor was advised of a mandatory meeting on July 28, 2014. She was advised that at the meeting, she would be "… afforded an opportunity to present any information that [she felt] should be considered by management in their decision-making process". She was advised of her right to be accompanied by a union representative or a person of her choice. She was also advised that "… any information that is not presented directly by [her] will not be considered for the purpose of the investigation". She was also advised that disciplinary measures could arise if misconduct had occurred.

[82] Ms. Wass interviewed the grievor. At that meeting, the grievor's representative said that the grievor would not and could not answer any questions because of the ongoing RCMP investigation. From Ms. Wass's perspective, the grievor declined to

participate in the investigation. As to the suggestion that the employer should have waited to conduct the investigation until the RCMP had concluded its investigation, Ms. Wass replied that an administrative investigation by the employer is conducted separately and in parallel to any other investigations. The employer was required to carry on with its investigation, as it had in hand an allegation of potential misconduct and had the responsibility to investigate whether misconduct had occurred.

[83] In her investigation, Ms. Wass obtained little information from the RCMP. She had only the information that it had given to Mr. Shelley about the grievor's arrest and the conditions imposed. The information technology department tried to obtain information but received little. The RCMP did not provide a time frame to management about developments in the criminal proceedings.

[84] A preliminary investigation report was issued on August 22, 2014. It notes that although the grievor attended an interview, her counsel (representing the union) stated that her criminal defence lawyer had advised her to not respond to any questions. Based on the interviews with Mr. Shelley, Ms. Seeling, and Ms. Deol, the investigator reported that all three stated that they were now concerned about their personal safety at work.

[85] The grievor was provided with the preliminary investigation report on or about August 28, 2014, via a letter from Mr. Cuddihey (Exhibit E-2, tab 7). She was invited to provide clarifications or extenuating circumstances that she felt had not been addressed in the course of the investigation. Her counsel replied on September 4, 2014, and noted the following:

> *Ms. Wepruk has reviewed the Report and accompanying documents. However, she has no access to her work computer or any office files and therefore is unable to check the accuracy of the allegations as set out in the Report. She has advised us that there are many inaccuracies in the Report, but without access to her computer or any of the materials that were left behind at work, she is unable to comment further.*
>
> *The Report may be leading to a conclusion that Ms. Wepruk committed a workplace offence for which she may be disciplined. For the record, Ms. Wepruk strenuously denies that she is guilty of any misconduct.*

[86] The grievor was offered access to her office personal and electronic files on either September 12 or 15, 2014. Her documents were to be brought to another work

location, and she was to have read and print only access to her computer files. A departmental representative would be in the room with her and would review all documentation before copies were made. Her counsel replied that the conditions under which access was to be granted were "not acceptable".

[87] Counsel also stated this:

> *… In any event, as we previously stated at the fact finding meeting held on August 7, 2014, Ms. Wepruk has been advised by her counsel not to reply substantively to the allegations at this time. While Ms. Wepruk would like to reply at a later date, she is unable to do so while charges are pending.*
>
> *Accordingly, Ms. Wepruk is not in a position to provide a written response to the draft Administrative Investigation Report by the September 19, 2014 deadline.*

[88] Mr. Cuddihey, as was Ms. Wass, was aware that the grievor took issue with inaccuracies in the report. He testified that with respect to the disciplinary hearing, and despite the grievor's misgivings otherwise, the result was not predetermined and that management viewed it as an opportunity for additional information or comments from the grievor or her counsel, but none was provided.

[89] Ms. Wass disagreed with the union's suggestion that her report was under-representative of the grievor's allegations of bullying and harassment in the workplace; she stated that the investigation was directed by her mandate, which involved an allegation of misconduct. Neither the grievor nor her counsel provided any information that would have led her to pursue such allegations.

[90] Ms. Wass said that she was aware of the grievor's allegations in her grievances and included references to the grievances in her report as background surrounding the misconduct that occurred. Her mandate did not include investigating the grievances. She did not look into what was going on in the grievances process, as it is a separate process.

[91] When asked whether it would have been relevant to look into the harassment allegations, Ms. Wass said that she identified that they were in the grievance redress system and that they were being dealt with. Ms. Wass said that had the grievor and her counsel raised that issue in her meeting with them or in comments to the preliminary

investigation report, in her mind, she would have had to research it. They did not provide any such information.

[92] When asked if she agreed that if there was harassment, it would have been a mitigating factor in management's decision, Ms. Wass replied that she did agree, with certain parameters. The information that harassment allegations had been made and were being dealt with was relevant, and she put it in her report. The allegation under investigation involved misconduct. What management does with the information is up to it. As the investigator, she did not know what was put before management.

[93] When it was put to her that Ms. Deol told her about harassment by Ms. Seeling, she did not recall if Ms. Deol spoke to her directly about it.

[94] Ms. Wass was aware that in a letter (Exhibit E-2, tab 8), the grievor had said that there were inaccuracies in the preliminary investigation report and that she denied committing misconduct. She was also aware that the grievor stated that she would answer questions when the criminal investigation was concluded (Exhibit G-2, tab 10). When asked why she did not wait until the criminal proceedings had concluded, Ms. Wass said that she had a mandate to proceed and that management could have instructed her to wait. Once her investigation was completed, it was up to management to decide how to proceed.

[95] When asked whether anyone she interviewed stated that the grievor was under duress during the period covering the email, Ms. Wass replied that it was so, if they included it in their statements and indicated the periods. When referred to Mr. Kakwaya's testimony that he saw the grievor crying, Ms. Wass agreed that crying is a sign that a person is under duress but stated that she was not qualified to say it is a sign of crisis. Had the grievor or her counsel told Ms. Wass that the grievor had been under duress when she sent the email, she would have looked deeper.

[96] Ms. Wass had no knowledge of the grievor's disciplinary record and did not consider it relevant to her investigation into whether the grievor had authored the email. Ms. Wass did not raise directly with her interviewees the allegations of bullying and harassment set out in the grievances; she asked generally about the situation in the workplace.

[97] When asked if she was aware of dysfunction in the Burnaby office in 2005 with issues such as inclusiveness, Ms. Wass said that she was aware of such issues there and in other Health Canada workplaces. When asked about the same issues that arose in the office staff's responses to the 2012 Public Service Employee Survey, Ms. Wass said that when she returned to work on July 2, 2014, she had no knowledge of dysfunction in the inspectorate or a toxic workplace, and that no one raised it with her. When told that three witnesses testified to a toxic work environment, Ms. Wass said that she would be surprised but accepted it as fact and added that it was not raised during her investigation.

G. The disciplinary hearing and the termination of employment

[98] The disciplinary hearing was scheduled for September 19, 2014. In the invitation letter dated September 15, 2014, the grievor was advised that she could present any clarifications or extenuating circumstances that she felt had not been addressed in the course of the investigation before a final decision was made.

[99] The grievor attended the disciplinary hearing on September 19, 2014, along with her representative. At the hearing, her counsel stated that she would not provide any comments until the criminal proceedings were resolved.

[100] Although the grievor's grievances mentioned harassment, Mr. Cuddihey admitted that they were not considered in the decision to terminate her. He did not direct Human Resources to obtain the RCMP's file and was unaware as to whether Human Resources had sent such a letter. He did not consider a freedom-of-information request to the RCMP to learn when the criminal matters would be concluded. He said that whether the Crown pursued charges was not within his mandate; his focus was on the administrative investigation, not the criminal matter.

[101] Mr. Brander attended the disciplinary hearing on September 19, 2014, and testified as to his rationale for deciding in favour of termination. He stated that he had not come to a decision at that point. As the ultimate authority for making the decision, he thought it important to attend the meeting. As the senior Health Canada officer in the region, Mr. Cuddihey managed the process, but the ultimate decision rested with Mr. Brander. He also testified categorically that the grievor's harassment allegations played no role in the decision to terminate her employment.

[102] Mr. Brander was aware at a high level that the grievor had several grievances working through the system. He would have known the subject matter, but not the details, as they were not at the third level of the grievance procedure, where he would have heard them. The grievances did not influence his decision, the basis of which was the specific threat of violence against the manager.

[103] As for Mr. Cuddihey's role in the termination, Mr. Brander asked for his comments. He told Mr. Brander that his concern was workplace safety and that he would support a termination.

[104] With respect to whether he should have waited until the criminal proceedings were resolved, Mr. Brander said that management reached out to the RCMP for information several times, but the RCMP's information was "spotty". He had no indication as to how long the criminal investigation would last. He was faced with an email with very specific threats directed at a specific individual; he had to make a decision for the health and safety of all the employees for whom he was responsible. The grievor had numerous opportunities to present even the slightest circumstances as an explanation.

[105] Mr. Brander's rationale for deciding on termination was the specific nature of the threat, what would happen, and to whom it would happen. The grievor made no attempt to recall her email and expressed no remorse during the investigation or at the disciplinary hearing. He referred to general knowledge from media reports as to how similar threats that are not treated seriously can cause irreparable damage in the workplace. Mr. Brander referred to the *Value and Ethics Code for the Public Sector* (Exhibit E-2, tab 19), at page 4, and to the section entitled, "Respect for People and Integrity". He also referred to the Health Canada *Values and Ethics Code* (Exhibit E-2, tab 20) and to the avenues for resolution on page 5 and the expected behaviours, which are respect for people and integrity.

[106] When referred to the grievor's grievance that raised mental health issues (Exhibit G-2, tab 15), Mr. Brander said that it was not raised during the investigation or at the disciplinary hearing. It was first brought to his attention in the grievance hearing on January 29, 2015. Similarly, the grievor's allegations of harassment and a toxic workplace that led her to send the email were not raised during the investigation or at the disciplinary hearing. He first learned of them at the grievance hearing.

[107] When he decided to terminate the grievor, Mr. Brander had seen an excerpt of the email in the investigation report, which he read (the excerpt as set out at page 68 of the investigation report, Exhibit E-2, tab 11; the full text of the email is at Exhibit E-2, tab 11-E). To the best of his recollection, he was not provided with the full text of it. He reviewed the draft investigation report, which contained the email. He was aware that the grievor was given the draft report as part of the standard procedure in investigations.

[108] Mr. Brander was not aware that the grievor had outstanding allegations of harassment and intimidation. When asked if he denied being aware of the grievor's harassment allegations, Mr. Brander replied that if an employee files a harassment claim, there is a specific process to follow. The grievor filed a grievance, but that was not the appropriate forum for a harassment claim. He would not have had the text of the grievance. As of the termination, he did not know that she had an outstanding grievance alleging harassment, as it had not reached the third level.

[109] Mr. Brander was not aware that the union alleged that the February fact-finding meeting was biased. He was also not aware that the grievor advised Ms. Seeling that she felt targeted and harassed by her until the third-level grievance hearing on January 29, 2015. Mr. Brander said that he was unaware of a mutually antagonistic relationship between the grievor and Mr. Shelley, but he was aware of her grievances. His involvement was at the third level, and it is inappropriate for him to intervene early in the process. The first and second levels work with Labour Relations, which would be aware as to whether harassment alleged in a grievance should be treated as a complaint and investigated as such.

[110] The factors Mr. Brander considered when deciding to terminate the grievor were the email's content, the grievor being provided with the opportunity to present extenuating circumstances, the *Value and Ethics Code for the Public Sector*, the Health Canada *Value and Ethics Code*, and whether the employer-employee relationship was broken as a result of the threat.

[111] Concerning the information that the employer had about the grievor's court appearance, Mr. Brander said that he had a discussion with the departmental security officer (DSO) to determine the status, but it was not productive, as information from the RCMP was sparse. He believed that the DSO attempted to find the information

before the termination. Mr. Brander said that the termination was separate from the criminal proceedings and that the employer followed its internal processes. The grievor was given many opportunities to comment, and he proceeded on the facts before him.

[112] Mr. Brander was aware that the grievor had filed two grievances after her suspension since he had advised her of her right to file them.

[113] Although he was aware that the grievor had criminal proceedings pending, Mr. Brander did not mention it in the termination letter dated October 9, 2014, because he was dealing with misconduct in the workplace, which is a separate and distinct process from criminal proceedings. He did not know that the grievor appeared in court on October 24, 2014. Mr. Brander said that he did not see any official communication after the termination that indicated that the Crown was not pursuing the grievor's matter; nor did he take further steps to find out.

[114] When asked whether he took into account that the grievor did not send the email directly to Mr. Shelley, Mr. Brander replied that regardless of where it was sent, it was a specific threat to a specific individual. He disagreed that it was a private email sent to the union because emails sent from Health Canada computers are not private, as the computers are work tools. Employees receive a quarterly email about email policy, which includes a link that must be clicked to indicate acceptance. Furthermore, the grievor showed no remorse and no attempt to recall her email. Nothing indicated to the employer that it was done on the spur of the moment.

[115] Concerning whether he looked into the harassment allegations set out in several grievances, Mr. Brander said that he consulted Labour Relations to learn whether they met the definition of "harassment". Labour Relations said that they did not and that they were grievances. He reviewed the grievances and determined that they did not meet the definition of harassment.

[116] The letter terminating the grievor's employment, signed on October 9, 2014, by Mr. Brander, stated as follows:

…

> *After having reviewed all the relevant information, including the findings of the administrative investigation report, and taking into consideration your position during the disciplinary hearing, I find*

> *that the threat of violence against an identified Health Canada manager made by you on June 30, 2014, in an e-mail sent from your Health Canada e-mail account to a third party, constitutes serious and severe misconduct.*
>
> *Your conduct is in violation of the* Values and Ethics Code for the Public Sector *and* Health Canada's Values and Ethics Code, *both of which require you to behave in a manner which demonstrates respect for people, integrity and trustworthiness. Consequently, I have determined that disciplinary action is necessary.*
>
> *In coming to a decision, I have given all due consideration to your service record and consideration was placed on the fact that you did not acknowledge sending the email or express remorse.*
>
> *Given the nature and the gravity of the misconduct, I conclude that the fundamental element of trust essential to the employment relationship, has been irreparably broken. Of significance, you behaved in a manner irreconcilable with the nature of your position, as Border Integrity Officer of Health Canada.*
>
> *Accordingly, pursuant to section 12(1)(c) of the* Financial Administration Act, *I hereby terminate your employment for cause, effective July 3, 2014.*
>
> *…*

[117] The termination was backdated to July 3, 2014, the date of the grievor's suspension without pay.

H. The termination grievance

[118] The grievor filed the grievance against her termination of employment on October 28, 2014. In it, she stated that she should have been placed on sick leave rather than suspended, "… given that [she] had mental health issues." She also stated that her employment should not have been terminated, "… given the outstanding harassment issues affecting [her] in [her] workplace." She alleged that there was no just cause to impose any discipline. In the alternative, she stated that the disciplinary penalty was "… grossly disproportionate to any alleged misconduct."

[119] As stated earlier in this decision, on January 21, 2015, the RCMP advised the employer that the conditions in the undertaking were no longer in place and that no charges had been pursued by Crown counsel to date.

[120] At the grievance hearing of January 29, 2015, the grievor's counsel made submissions on the termination grievance and on other grievances. Counsel submitted at that hearing that harassment and bullying issues drove the grievor to send the email

containing the threat. It was also submitted that the employer should consider the fact that the email was not sent directly to Mr. Shelley and that it was private correspondence to the union. He also stated that the employer should have considered the grievor's mental state.

[121] In the grievance response dated February 25, 2015, Mr. Brander wrote this:

> …
>
> *In response to Mr. Bobert's argument that the other grievances represent examples of harassment and bullying on the part of the Employer, I am satisfied that management has acted appropriately and in good faith when making decisions, which you ultimately grieved. I am also satisfied that management has acted in accordance with the applicable laws, regulations, policies and your collective agreement.*
>
> *In addition, throughout the investigation and disciplinary process you were provided the opportunity to present information and/or explanation regarding your misconduct. No information and/or explanation was brought to management's attention and no indication or information regarding your mental state was brought forward as concerns [sic] for consideration.*
>
> *In addition, regardless of who the threat was sent to, the email that you sent to your union representative contained a very specific threat against a specific named employee who was also your manager. This conduct is in violation of the* Values and Ethics Code for the Public Sector *and* Health Canada's Values and Ethics Code*, both of which require you to behave in a manner which demonstrates respect for people, integrity and trustworthiness.*
>
> …

I. The SST application for benefits

[122] After her termination, the grievor applied for EI benefits and was denied entitlement to them on December 12, 2014, on the basis that her employment had been terminated for misconduct. She appealed the denial to the SST and had a hearing on December 7, 2015. A transcript was made of her sworn testimony to the adjudicator (Exhibit E-6).

[123] At the SST hearing, the grievor testified that she had never acknowledged sending the threatening email. Her position before the SST was that the employer had not proven that she had sent the email, since there were no witnesses, and the email was timestamped outside office hours. She also testified that her union representative

had breached confidentiality by sharing the email and that she lost her employment not because of her actions but because of those of others.

[124] The adjudicator dismissed the appeal in a decision dated December 9, 2015.

[125] At the hearing before me, the grievor admitted that she had been untruthful before the SST and that she was ashamed of her testimony. She stated that at the time, she had no money and was in danger of losing her house.

J. Harassment allegations

[126] As outlined earlier in this decision, the grievor's primary evidentiary focus in this case lay in her allegations of harassment and a toxic work environment that she alleged she had suffered for years. The employer, for its part, either downplayed or denied the existence of such an environment or its knowledge that one existed and alleged that she caused many of the difficulties. It also submitted that it had acted twice to try to solve such issues, pointing to a team-building exercise that had been held.

[127] Mr. Brander's testimony was that he was unaware of any such issues. As the senior director general, he chaired an advisory committee composed of employees at all levels from across the country that gave them opportunities to raise issues. It was a mechanism to hear directly about issues in the workplace. Two or three members were from Burnaby. Issues were never raised about the Burnaby office. Nobody raised the issue of a systemic problem or toxic workplace in Burnaby with him. He also stated that the grievor did not provide concrete examples that met the definition of "harassment" in the Treasury Board Secretariat's policy, and she did not give examples at the disciplinary hearing.

[128] In the next section of this decision, I outline some of the evidence presented on behalf of the grievor that addressed her allegations of a toxic work environment and harassment. However, I note that the only grievance before me relates to her termination of employment and that she withdrew the harassment grievance. Therefore, I am limited to considering the termination grievance, and in that context, the harassment issue becomes a mitigation issue. She argued that the treatment she suffered rendered her mental state to a point that her behaviour was mitigated.

[129] The grievor alleged that she had endured a toxic work environment in which harassment against her was permitted to continue, despite management's knowledge. Both Ms. Deol and Mr. Kakwaya testified to their firm beliefs that the work environment was indeed toxic.

[130] Mr. Kakwaya said that the toxic work atmosphere existed in the spring of 2014. He said that when Ms. Seeling joined the unit, he observed that Mr. Shelley's management style changed; everything fell apart. Mr. Shelley walked with his head in the sand. Maybe he could not see Ms. Seeling's unprofessional conduct. Mr. Kakwaya told Mr. Shelley that it was not good optics for the unit that he brought coffee for Ms. Seeling every morning and afternoon, as doing so created favouritism rumours. Mr. Shelley responded that doing so was his prerogative. Mr. Shelley testified that he and Ms. Seeling shared a Tim Hortons coffee card.

[131] Mr. Kakwaya believed that Mr. Shelley was aware of the discord in the office, as there was considerable evidence of it. The problems were not with the staff but with local management. According to Mr. Kakwaya, Mr. Mori, the regional director, did nothing except side with local management.

[132] Both Ms. Deol and Mr. Kakwaya testified about the existence of office favourites and those that were not favourites, and they testified to fearing repercussions for raising issues of unfairness or unprofessionalism. Ms. Deol stated that she was aware of another employee who had pursued grievances and whose career had been negatively impacted as a result. Ms. Deol stated that both she and the grievor were hurt by being excluded from office social activities; more will be said about this issue later in this decision.

[133] In Mr. Kakwaya's experience and words, if an employee does not "suck up" to Ms. Seeling, his or her "career is toast". He stated that Ms. Seeling would investigate or ask staff to investigate employees' private lives. He stated that he did not know why. New employees learned that it was advantageous to become a favourite — temporary employees to become indeterminate, and co-op students to gain continuous service when they joined the public service. For her part, Ms. Seeling denied the existence of any favourites.

[134] The grievor testified that Ms. Seeling turned people in the office against her as they wanted to stay on Ms. Seeling's good side. Employees did not want to associate

with the grievor or sit next to her in meetings. Ms. Seeling would invite other employees and students to lunch in front of the grievor but would not invite her. She had some friends with whom she sometimes went for walks, but they did not want to be seen with her. They would meet in the underground parking lot by going through the back door, which had no windows. She alleged that for similar reasons, employees also did not wish to be seated near Mr. Kakwaya.

[135] According to the grievor, Mr. Kakwaya's participation in a 2006 group grievance led to his ostracism. Both Ms. Deol and Mr. Kakwaya testified that in 2006, a group of employees in the Burnaby office filed a group grievance against Mr. Shelley concerning a lack of transparency about people being awarded non-advertised positions on an acting basis. While Ms. Deol did not participate in the grievance, Mr. Kakwaya did. Mr. Shelley then approached the ombudsman's office, and a team-building session was held. With respect to his allegation of repercussions by management, Mr. Kakwaya alleged that he did not receive assignments on an acting basis or have success in staffing processes for a long time after participating in that grievance.

[136] The grievor testified about those who were favourites and those who were not in the office. Ms. Seeling co-opted students by making it known that she could have their contracts extended or have them hired full-time. She told the students who was liked and not liked in the office. Ms. Seeling denied it. The grievor saw a student painting Ms. Seeling's nails. Other employees in the office observed it too. Ms. Seeling said it occurred while on a break and that nothing was untoward about it.

[137] The grievor said that the favourites received training away from the office, which Mr. Shelley denied to the others. She was denied that training and was told that it was not in the budget. She spoke of the time a new machine was being tested in Toronto, Ontario, to detect counterfeit pills crossing the border, which was part of her job. British Columbia was to receive the same machine. Instead of sending her, the border specialist, for training on the machine, an SG-4 was sent. Ms. Seeling said that working with the machine did not require a border integrity specialist and that she had spoken with a manager in Health Canada's Quebec region who had said that his management would send an SG-4 for the training.

[138] Mr. Kakwaya confirmed that the grievor was not a favourite. Concerning how Ms. Seeling treated her, he said that in June 2014, before he became the supervisor on

an acting basis, he observed that the grievor did not say anything in a border integrity meeting, although she was the border integrity specialist. When he asked Ms. Seeling why the grievor did not participate, she replied that the grievor did not have ideas to contribute.

[139] The grievor cited the weekly cross-Canada Border Integrity Committee teleconference meetings as a source of harassment against her. She claimed that Ms. Seeling would take over her role in the meetings, causing her to feel embarrassed with respect to her co-workers across the country.

[140] Before the meetings, the grievor and Ms. Seeling would meet, and Ms. Seeling would ask her for an update. During the meeting, Ms. Seeling would repeat everything the grievor had told her, present it as her own, and then ask if the grievor had anything to add, to which she had to say that she did not. The colleagues from other regions would then call Ms. Seeling instead of the grievor.

[141] Ms. Seeling said that she did not recall this. She agreed that she took information from the grievor and that as they were from the same region, she presented the region's viewpoint. Ms. Seeling denied undermining the grievor on those calls.

[142] The grievor also testified that the harassment extended to the type of work that she was assigned. As an example, she cited a monthly roster for phone duty that was done by SG-4s. Supervisors other than Ms. Seeling did not assign SG-5s that duty. Ms. Seeling decided that the grievor had to perform phone duty, although no other SG-5s had to. In cross-examination, Mr. Shelley confirmed that SG-4s handle the phone duty unless it is assigned to students. He said that as far as he knew, SG-5s did not perform phone duty, except for a specific reason.

[143] The grievor was the only person in the office who sat on a regional emergency preparedness committee chaired by Mr. Cuddihey, as that was 20% of her job. The committee met quarterly in downtown Vancouver, but Mr. Shelley told her to attend by teleconference. When she asked Mr. Shelley why, he replied that he was the boss. She said that it was more efficient to attend in person, so she would arrange to have a border-related reason to be downtown and would attend in person.

[144] The grievor described Ms. Seeling's management style as controlling. She assigned menial tasks to the grievor, such as proofreading documents. Ms. Seeling denied it and stated that the most routine task was desk duty, which the grievor did about twice a month, and that 20 inspectors took turns on desk duty. She also worked twice per month at the mail centre. The grievor asked Ms. Seeling if she could avoid the desk duty and mail centre but never asked to work on complex files in border integrity.

[145] The grievor also alleged that the harassment extended to the assignment of her office space on her return from leave in 2011. The office had one row of seats next to windows and one row of inside seats. When she returned to work, she was given an inside seat, although all SG-5s had window seats. Mr. Shelley testified that SG-5s never had preferential rights to windowed workstations. Some SG-4s have window seats, and some SG-5s do not. The employer alleged that at the time, the grievor said that she did not care. In 2014, two window seats became available, a lottery was held, and the grievor was able to choose her seat.

[146] The grievor testified that much of the bullying and harassment was subtle but hurtful. Mr. Shelley would pass her in the hallway and not look at her. If he was in the lunchroom when she walked in, he would not acknowledge her and would walk out. He was questioned about this allegation and said that he needed the proper context to respond, but he alleged that the grievor also ignored him. Furthermore, not every encounter in a hallway or the lunchroom needs a conversation. According to the grievor, if she passed favourites talking with Mr. Shelley in the hallway, they would turn their backs to her. When Ms. Seeling did talk to her, she always said something disparaging about other employees.

[147] The grievor said that she overheard conversations in cubicles that Ms. Seeling was asking SG-4s and students to report on what the grievor was doing. Mr. Kakwaya confirmed this allegation in his testimony in that he was aware that Ms. Seeling had students investigate other employees.

[148] The grievor testified that she did not want to be in that office anymore and that her thoughts were becoming more extreme.

[149] Both Ms. Deol and Mr. Kakwaya testified that Ms. Seeling engaged in gossip about the employees in the office. Concerning the grievor in particular, Ms. Deol

testified that Ms. Seeling commented on her frequent taking of leave and her disputes with Mr. Shelley. Mr. Kakwaya testified that he heard Ms. Seeling gossip about employees and their absences, unrelated to a legitimate work purpose. Ms. Seeling denied gossiping about the grievor or anyone else in the office.

[150] When Ms. Deol acted for the grievor in the border integrity position during the grievor's leave from 2005 to 2008, she was stressed and alleged that she was under a microscope. Mr. Shelly considered that position important, so Ms. Seeling made it important to her. When Ms. Deol left on maternity leave, she never wanted to return to that position. She heard from colleagues across the country that Ms. Seeling criticized her during her time in that position. Ms. Deol testified that Ms. Seeling had voiced negative comments about the grievor's suitability for her position and alleged that Ms. Seeling had stated that she wanted the grievor fired. Ms. Seeling testified that she did not recall saying that she wanted the grievor fired. She said that in fact, the grievor's performance was satisfactory and that she did what was asked of her; it did not ring true that Ms. Seeling had said that the grievor was not a good worker.

[151] In 2014, Ms. Deol observed that the grievor was emotional and stressed. Mr. Kakwaya also confirmed in his testimony that he had seen the grievor crying at work and had advised her of the availability of the Employee Assistance Program. The grievor had told him that she was burdened as she had many grievances and considerable paperwork. Ms. Wass interviewed Ms. Deol and asked her about the events leading to the email incident and for her opinion as to why it happened. Ms. Deol told her that she was not surprised it happened under Ms. Seeling's watch. It was a toxic and unprofessional workplace, which many people brought up many times.

[152] In her testimony, Ms. Deol said that team-building exercises were held in the Burnaby office in 2006 and again in 2011 and 2012 because of office tensions. When the Public Service Employee Survey garnered negative results with respect to the Burnaby office, Mr. Mori issued a communication admitting that it had obvious problems that had be addressed, and a second team-building exercise was held.

[153] Mr. Shelley admitted that in 2006, tension at the inspectorate led to a team-building exercise dealing with issues such as respect in the workplace and inclusiveness. Matters improved and were good for about two years but then reverted as people became complacent. In 2012, the inclusiveness issue returned to some

degree. He stated that the organization in 2006 was different from the current one and that many of the staff there in 2006 had left.

[154] Some witnesses expressed harassment concerns stemming from staffing issues. They were referred to earlier in this decision. These concerns pertained to how students were treated and hired, the nail-polish incident in particular being mentioned, as well to as the allocation of assignments on an acting basis.

[155] Concerning the supervisor position on an acting basis, Mr. Shelley said that about seven or eight people had expressed interest in it and that of those, Ms. Seeling and Mr. Kakwaya were given the opportunity. The grievor said that never receiving the opportunity to act was an indication of harassment. Mr. Shelley agreed that if an SG-6 was absent, the most likely replacement to act was an SG-5.

[156] He said that a staffing process to staff the supervisory position on an indeterminate basis was opened. The grievor's application was reviewed, and Mr. Shelley passed her through the screening process. Others did not pass the screening process. The choice was between someone who had no previous management experience versus those who had acting experience. Mr. Shelley also said that it was difficult to see how a first-level manager could work with a middle-level manager in a trusting relationship in view of the grievor's many grievances against him. That comment was not in relation to her overall abilities.

[157] The grievor testified that she was not allowed to sit on staffing panels hiring co-op students, even though they did mainly border work, and she helped train them. She had also taken the staffing panels course. It was put to Mr. Shelley in cross-examination that the grievor was not on a staffing panel in 2012, 2013, or 2014. He did not know if she had asked to be on one and had been denied. He agreed that at that point, she had the job experience to be on a panel.

[158] In March 2014, employees in the office went to a training session at the British Columbia Institute of Technology. Colleagues from Ottawa and Toronto made presentations. According to Ms. Deol, during the lunch period, Ms. Seeling brought an iPad for lunch orders; five or six employees, including Ms. Deol and the grievor, were not asked for their orders.

[159] On their way back to the office, they talked about it, and a couple of them cried because they had been hurt. Ms. Deol said that she emailed Mr. Shelley about it the same day. She also testified that she spoke to Mr. Shelley about it and that he said that he would talk to Ms. Seeling. Ms. Deol did not know if that took place, as Mr. Shelley did not follow up with her. In his testimony, Mr. Shelley admitted that he had not done it.

[160] Ms. Deol also testified that she had told Mr. Mori about the incident, alleged that Ms. Seeling had been unprofessional, but requested that he not speak to Ms. Seeling about it as Ms. Deol would be punished. Although one witness testified that the lunch order had been taken on a sheet of paper rather than an iPad, the grievor, Ms. Deol, and Ms. Seeling all referred to an iPad being used to place the order. In any event, nothing turns on the item used to place the order.

[161] Concerning this incident, Ms. Seeling testified that the iPad was passed to people who were interested in ordering noodles. It was at her table first as the iPad owner was seated there, and Ms. Seeling took it to another table after placing her order. She did not control the iPad. Ms. Seeling had no intention to exclude people as four other tables had been unable to participate. She denied that Mr. Shelley had spoken to her about this incident but admitted that one person, Klara Richard, came to her and said that she expected that as the supervisor, Ms. Seeling should make sure that everyone could participate. Ms. Seeling said that she did not feel that because she was the supervisor, she should have been responsible for organizing the order from the noodle supplier. She passed the iPad to another table, which could have passed it to another table. Fifty people were at the course, seated at 8 or 10 tables. Ms. Seeling said that she was not aware that several people had cried while walking back to the office.

[162] Both the grievor and Ms. Deol alleged that management had issues with parents trying to juggle both home and work lives. In Ms. Deol's case, while she was the supervisor on an acting basis for Ms. Seeling in the summer of 2013, she arranged with Mr. Shelley to telework for four hours on Thursdays. Ms. Deol informed Ms. Seeling of it on her return and observed that Ms. Seeling was not happy to learn it.

[163] Ms. Seeling went to see Mr. Shelley, and Ms. Deol testified that she overheard their conversation and Mr. Shelley stating that Ms. Deol's mother role was more

important to her than her inspector role. Ms. Seeling recalled Mr. Shelley saying as much but could not be certain of when he said it. Mr. Shelley testified that Ms. Deol did not want a work-life balance and in fact that she wanted that balance to be weighted to her home life.

[164] Ms. Seeling testified that in September, Ms. Deol had arranged with her to take a course on Thursdays for three hours and for eight consecutive weeks. She wanted to do it from home and to carry out administrative work for the rest of the workday. Following that, she wanted to continue working from home. Ms. Seeling told her that it was not an appropriate request for her to recommend to the regional manager but that Ms. Deol could request it.

[165] On November 15, 2013, during Ms. Deol's performance review, Ms. Seeling told her that she could not telework. Ms. Seeling said that during that meeting, Ms. Deol became angry and told her that she felt that she was being punished because Ms. Seeling and Mr. Shelley had no children and did not have lives. Ms. Seeling said that she was so hurt that she ended the meeting and cried all the way home. Her relationship with Ms. Deol changed as a result of it.

[166] Ms. Deol went to Mr. Shelley and told him that Ms. Seeling was harassing her. She alleged that he asked her if she knew the definition of "harassment" and that she had best be confident about it because it was a very strong allegation. When Ms. Deol replied that the fact that she felt harassed was enough, Mr. Shelley said that a third party would probably say that Ms. Seeling was not in the wrong. He said that a harassment allegation is not appropriate unless it can be backed up.

[167] Mr. Shelley told her that a formal process was in place to deal with allegations of bullying and harassment, which she could have exercised. He did not tell her to make a complaint and did not refer her to anyone else about harassment. In his testimony, Mr. Shelley admitted that he did not go to his superiors about the allegation against him of family status discrimination and said that given another opportunity, he would have addressed the allegations more aggressively.

[168] Ms. Deol alleged that those who were part of the "in" group were given preferential treatment, notably with respect to telework. To support this allegation of preferential treatment, she referred to a co-worker, whom she described as one of Mr. Shelley's favourites, being allowed to work from home 37.5 hours per week after

she moved to Alberta with her husband. (At the time, Alberta was part of Health Canada's B.C. region.) In his testimony, Mr. Shelley said that the situation was not comparable as at the time, the co-worker was dealing with a health issue and lived in Olds, Alberta, which was a long commute to the office in Calgary, Alberta. Mr. Shelley testified that from 2011 to 2014, other than Ms. Deol and that co-worker, no employee had a teleworking arrangement.

[169] Ms. Deol requested Mr. Shelley's final decision on the refusal of her teleworking request, which she considered an attack on her family status. She told him that she had overheard his conversation that her mother role was more important than her inspector role; Mr. Shelley apologized to Ms. Deol but terminated her teleworking arrangement, stating that he was no longer comfortable with it. He said that his preference was for employees to be on site, given the nature of the work and the operational requirements.

[170] Ms. Deol acted for Ms. Seeling in the summer of 2013 and testified that in a meeting before that assignment began, Ms. Seeling told her to be aware of mothers who abused sick leave. Ms. Seeling denied it and said that she might have told Ms. Deol to exercise diligence about the grievor's leave requests. Ms. Deol also testified that Ms. Seeling warned her that the grievor would probably be her biggest problem, that Ms. Deol would have to attend the teleconferences as the grievor did not do her work, and that significant hand-holding would be necessary. Ms. Deol stated that Ms. Seeling did not give that direction about anyone else.

[171] When Ms. Seeling returned to work after her leave, the first thing she asked about was the grievor. Ms. Deol told her that she had had no problems with her and that she had treated her respectfully and professionally. Ms. Seeling acknowledged that she could have said the grievor would be Ms. Deol's biggest problem, and while she did not recall the comment about hand-holding, she said that it was possible that she had made it.

[172] Ms. Seeling said that she did not recall telling Ms. Deol how she looked for trending reports on persons who might be abusing sick leave but acknowledged that it was possible. She denied ever making a comment of trending leave for mothers.

[173] The grievor alleged that the harassment she suffered extended to the treatment of her leave requests. In support of her allegation, she referred to her meeting with

Ms. Seeling on October 8, 2013, about what Ms. Seeling had referred to as a pattern of absences on Thursdays in September 2013, which was a reference to management's suspicion that she attended SFU while on leave. The grievor pointed out errors and noted that all her leaves were supported and had been entered in the leave tracking system.

[174] The grievor also testified that she learned that Ms. Seeling had carried out an Internet search and that she had tracked the grievor's attendance at a scientific conference in Ottawa during her vacation. A couple of days later, Ms. Seeling emailed the grievor and asked her to produce a medical certificate for any further medical absence, which she had not said in the meeting.

[175] In the fall of 2013, Ms. Seeling told the grievor that she had noticed that the grievor had used the full five-day family responsibility leave every year. The grievor told her that it was an entitlement under the collective agreement and that she would not use vacation leave for that purpose.

[176] The grievor also referred to the written reprimand (Exhibit G-2, tab 40) that she received because of absences on April 8 and 9, 2014, for which she had not submitted a medical certificate. Ms. Seeling reminded her of her obligation further to their meeting in October 2013, and according to Ms. Seeling, the grievor told her that she did not have one and ended the conversation by turning her back. Mr. Shelley then wrote to the grievor on May 2, 2014 (Exhibit G-2, tab 28), to ask for a certificate, and she provided one to Ms. Seeling dated May 7, 2014, on May 12.

[177] In his testimony, Mr. Shelley agreed that the grievor properly took April 8 and 9 as sick days and that she should be paid for them. However, he met with her on May 20, 2014, as he felt that the presentation of a certificate well after the absence constituted insubordination, and he decided to reprimand her. She filed a grievance that was ultimately withdrawn and that is not before me.

[178] In October 2013, the grievor felt that she was being bullied and harassed about leave. At that point, people in the office were viewing her as *persona non grata*; no one wanted to associate with her. She cried at work. She showed some employees information from the Canadian Centre for Occupational Health and Safety about bullying and told them what she was experiencing. Ms. Seeling denied ever having observed the grievor crying at work except for twice over personal matters and did not

see the grievor cry at her desk. She was not aware that the grievor was stressed in spring 2014.

[179] In early January 2014, the grievor decided to contact Mr. Mori by email about the harassment issue and bereavement leave. She said that in December 2013, Roy Thaller, Supervisor, Product Safety, told her that Ms. Seeling was talking about her and was going after her and suggested that she go to Mr. Mori. As Mr. Mori was busy for the remainder of the day, he told her to deal with Mr. Thaller if there were immediate harassment and bullying issues. She replied that she had already approached him. Mr. Mori and the grievor met on January 9, 2014, in his office. He took notes of the meeting (Exhibit E-7).

[180] Mr. Mori anticipated that the grievor would present him with a complaint of harassment and bullying, but her conversation centred on the existence of an "in" group and an "out" group in the inspectorate. She said that she was in the "out" group because she had filed grievances. Mr. Mori asked her for examples of retribution because of her grievance, but she did not provide any. Her only mention of bullying and harassment was that Ms. Seeling had bullied a student by making her paint Ms. Seeling's nails and that bridging students' service violated human resources policies. She said that she was denied training opportunities and attendance at a trade day in Seattle, Washington, and that Ms. Seeling disparaged other employees. The grievor said that she was on the bad list.

[181] Mr. Mori testified that he asked about bereavement leave as the grievor had not raised it. She wanted a special authorization from the deputy minister, as provided in the collective agreement, to be granted bereavement leave on the death of her uncle. He asked her to make a request, with supporting documents.

[182] According to the grievor, she had approached Mr. Thaller twice on the harassment issue. The first time she approached him, he was an SG-6. The second time, he was acting for Mr. Shelley and attended management meetings. Mr. Thaller told her that Mr. Mori knew about the office atmosphere and that he did not want to deal with anything.

[183] From the meeting, Mr. Mori took that having an "in" group and an "out" group could lead to bullying, harassment, and stress in the workplace. There was no suggestion of a follow-up because the grievor had brought the two groups to his

attention. She did not ask him to investigate the matter and did not make a formal harassment complaint. She did not say anything about harassment by Ms. Seeling or harassment and bullying by Mr. Shelley. Mr. Mori understood that she brought to his attention a situation that could lead to bullying and harassment. The only guidance he gave her about the two groups was to take advantage of the internal conflict management system.

[184] The grievor testified about her recollection of her meeting with Mr. Mori. She told him what she had been experiencing in the workplace. She brought the Treasury Board harassment policy and the Health Canada complaint form. She pointed out a section in the policy related to what Mr. Shelley and Ms. Seeling were doing to her. She gave him specific examples of what was going on, such as social exclusion, her leave issues, Ms. Seeling's gossiping and the student painting Ms. Seeling's nails. The grievor told Mr. Mori that if he did not do anything, she was prepared to submit the complaint form to Health Canada headquarters in Ottawa. Mr. Mori said that her complaint would go nowhere because of the federal government hierarchy; he supported Mr. Shelley, Mr. Cuddihey supported him, and Mr. Cuddihey was supported by his boss in Ottawa.

[185] Mr. Mori testified that that was not his recollection of the meeting and that he would never have said that her complaint would go nowhere. The grievor testified that she then told him that it was a formal complaint, that things could not go on as they had been, and that she expected things to change. She said that she never withdrew her harassment complaint. She never heard from Mr. Mori and did not follow up with him as it was clear that he would not do anything.

[186] The grievor testified that in mid-April 2014, she met with Ms. Bourgeault from the informal conflict resolution office. The grievor told her everything that had occurred. Ms. Bourgeault said that she would look into it and get back to her in two weeks. When Ms. Bourgeault did not get back to her, she did not follow up. She saw no point as she was worn down; she focused on her job and tried to find a new job, to get away from Mr. Shelley.

[187] Ms. Bourgeault's recollection of the meeting was that the grievor had formal documentation that she had submitted to management and that there were letters supporting what she spoke of. They discussed her grievances and her concerns. Ms. Bourgeault was more concerned with the grievor's physical and mental well-being

as a person and asked whether with her qualifications, she could explore other possibilities if things did not work out. She told the grievor to take care of herself and stated that she would visit Burnaby the next day and that she would follow up with the manager.

[188] Ms. Bourgeault said that her office works informally. If a harassment complaint has been made or a grievance filed, it would have to be put in abeyance for her office to provide help. If the circumstances are such that the issue cannot be handled informally, she does not become involved. In the grievor's case, Ms. Bourgeault felt that more was needed than an informal conversation.

[189] The next day, in Burnaby, Ms. Bourgeault met with a manager, whose name she could not recall but who was aware of her meeting with the grievor. The manager advised her that management was working on issues but not at the speed the grievor desired. Ms. Bourgeault asked how management was communicating that to the grievor and was told that a meeting would be held the following week. Ms. Bourgeault did not pursue the conversation after that. They discussed other issues in the Burnaby office. She left it with management to have a conversation with the grievor.

[190] When Ms. Bourgeault planned to return to Vancouver, she contacted the manager to learn about developments and was told that the grievor was no longer an employee. Ms. Bourgeault admitted that she took no further steps with respect to the file. She has no authority to contact someone who is not a Health Canada employee or who is on leave. She did not follow up to see if the meeting with the grievor the following week had taken place, but she knew that it had to do with the grievor's concern about a toxic workplace.

[191] The grievor said that she did not withdraw her statement on January 9, 2014, to Mr. Mori that she was making a formal harassment complaint. On June 25, 2014, she filed a grievance alleging ongoing harassment and bullying. Between January and June 2014, she contacted the union about these matters almost daily, by phone or email.

[192] The grievor testified that the employer was aware that she felt that she was being harassed. In September 2013, she told Ms. Seeling that she felt that Ms. Seeling was behaving unprofessionally toward her and that she perceived it as harassment. Ms. Seeling said that at their meeting of October 8, 2013, the grievor did not use the

word “harassment”, but she testified that the grievor stated that she felt that she had been targeted ever since she had arrived in the office.

[193] The grievor testified that in October and November 2013, she reported harassment to Mr. Shelley when her leave issues began. In December 2013, she reported the harassment to Mr. Thaller. He agreed that the employer had large amounts of favouritism. In January 2014, she reported it to Mr. Mori. She reported it to Mr. Brander at her meeting with him in January 2015.

[194] As mentioned earlier in this decision, the grievor said that between January and June 2014, she contacted the union about these matters almost daily by phone or email. She agreed that she never made a written harassment complaint. Had management told her to make one, she would have done so.

[195] As outlined earlier, the evidence disclosed that there was some confusion as to whether the grievor made a harassment complaint and whether she had withdrawn it. This confusion was cleared up in an email exchange between Ms. George and Crystal Johnston, a senior human resources advisor. In Ms. George’s email of March 28, 2014, to Ms. Johnston, she referred to a misunderstanding and referenced Mr. Cuddihey’s letter of March 27, 2014, as being in error. In that letter, Mr. Cuddihey stated that Human Resources had advised him that the grievor had withdrawn her statement that she had made a formal harassment complaint to Mr. Mori during their discussion of January 9, 2014. Ms. George wrote that according to the grievor, her intent in speaking to Mr. Mori was to make a formal harassment complaint against Mr. Shelley and that Ms. Seeling and had not done anything to withdraw that complaint. Ms. George then wrote, “Perhaps there would be some wisdom in Ms. Wepruk confirming that complaint in writing.”

[196] Ms. Johnston replied to Ms. George by email on April 1, 2014, attaching the Health Canada *Policy on the Prevention and Resolution of Harassment in the Workplace*. She understood from Ms. George that the grievor had not yet made a written harassment complaint. Ms. Johnston said that Mr. Mori’s understanding was that the matter was closed. She stated that if the grievor believed that her concerns had not been properly understood or addressed, “… a formal written complaint will be required, and the formal harassment complaint process will be undertaken.”

[197] The grievor said that she did not see the emails before the hearing. She did not recall Ms. George ever telling her to make a written harassment complaint. She thought that the recourse was by grievance.

[198] According to Ms. Seeling, the only time Mr. Mori spoke to her about her conduct was at the end of June 2014. The issue he raised concerned the grievor's treatment of Mr. Tsou and Ms. Seeling's allegation to the grievor in November 2013 that she had bullied and harassed Mr. Tsou. Mr. Mori told her to be careful about stating her opinion if she thought someone was bullying or harassing people. He told her to just gather information and not make concluding statements as she did on November 22, 2013. Mr. Mori wanted Ms. Seeling to take a course on preventing harassment in the workplace. She took an online course about respect in the workplace that focused on a supervisor's role in harassment. Ms. Seeling said that she was devastated when Mr. Mori told her about her behaviour and took responsibility for making that statement.

[199] The employer entered evidence through Mr. Kakwaya to demonstrate that the grievor's threat was not her first reference to workplace violence. Mr. Kakwaya testified that she showed him an online article about a recent workplace shooting in Nanaimo B.C. at the end of April or early May 2014. He stated that she told him, "This is what happens when people don't get listened to," and "When people have grievances that don't get listened to, this is what happens." He stated that the issue was not discussed again.

[200] On June 23, 2014, the grievor's colleague, Mr. Kakwaya, was appointed as the supervisor on an acting basis, effective July 2, 2014. He testified that she asked him if he would harass her "like Dennis and Kim" did.

IV. Summary of the arguments

A. For the employer

[201] For the employer, this case is about a threat. The threat in question was well thought out and not made on the spur of the moment. The grievor had four days in which to recall her message to Ms. George, but she did not. Further, she could not bring herself to apologize to Mr. Shelley either as of the events or at any time after them. An expression of remorse must be timely.

[202] Even if the grievor thought her union representative was her lawyer, death threats are not covered by privilege.

[203] The employer denied that it knew about the harassment that the grievor alleged she had suffered and stated that she had not provided such information during the investigation. While she alleged that the investigation process was flawed, she had chosen not to speak. While she alleged that among other things, Ms. Wass was circumscribed by her mandate, Ms. Wass testified that had the grievor's counsel raised the harassment allegations during the investigation, she would have looked into them.

[204] The decision in *British Columbia Ferry and Marine Workers' Union v. British Columbia Ferry Services Inc.*, 2008 BCSC 1464 ("*B.C. Ferry*"), cited by the grievor, does not stand for the proposition that an employee has the "right to silence" until the end of a criminal proceeding. If an employee is charged with an offence, the employee cannot be disciplined for not speaking.

[205] The grievor's mitigating circumstances were not provided to management when Mr. Brander made the decision to terminate her. The employer submitted authorities to support its argument that they must be timely and submitted that the Board must look at what Mr. Brander had before him.

[206] Counsel submitted that the grievor's failure to explain her conduct or to acknowledge wrongdoing was not a right in the labour relations context. Counsel submitted that whether an employee has been candid with the employer, acknowledged the inappropriateness of the conduct in question, apologized, and demonstrated remorse and a willingness to correct the behaviour are primary considerations in addressing the issue of the mitigation of discipline; see *Naidu v. Canada Customs and Revenue Agency*, 2001 PSSRB 124, and *Ayangma v. Treasury Board of Canada (Department of Health)*, 2006 PSLRB 64.

[207] Counsel submitted that the advice of the grievor's criminal lawyer not to make any submissions did not remove her obligation to cooperate fully during the investigation; see *Hughes v. Parks Canada Agency*, 2015 PSLREB 75; and *Francis v. Treasury Board (Solicitor General - Correctional Service Canada)*, PSSRB File No. 166-02-24111 (19931007), [1993] C.P.S.S.R.B. No. 169 (QL).

[208] Counsel also referred me to *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62, for the proposition that employees are obligated to be forthright in a misconduct investigation.

[209] On the issue of harassment as mitigation, the employer referred to the authorities it submitted.

[210] The finding of a poisoned workplace by the adjudicator in the *Wepruk* staffing decision (*Wepruk v. Deputy Minister of Health*, 2018 FPSLREB 14) was *obiter* (comments not central to a decision and not binding). Mr. Shelley and Ms. Seeling were not called to testify in that case. The union did not argue issue estoppel.

[211] The employer submitted that an employer has obligations under the *Canada Labour Code* (R.S.C., 1985, c. L-2), to prevent and protect against violence in the workplace (at s. 125(1)(z.16). The *Canada Occupational Health and Safety Regulations* (SOR/86-304) define workplace violence as "… any action, conduct, threat or gesture of a person towards an employee in their work place that can reasonably be expected to cause harm, injury or illness to that employee" (at s. 20.2).

[212] Counsel for the employer referred me to *Robillard v. Treasury Board (Department of Finance)*, 2007 PSLRB 41, in which the adjudicator noted the importance of the employer protecting the health and safety of employees. In that case, the adjudicator upheld the discharge. In addition, counsel referred me to *Ricard v. Deputy Head (Canada Border Services Agency)*, 2014 PSLRB 72.

[213] The employer submitted that the testimonies of both the grievor and her witness, Ms. Deol, had issues. It took issue with the grievor's overall credibility and pointed out that she had given a solemn affirmation to the SST yet had denied sending the email. As for Ms. Deol's testimony, it submitted that much of it was based on speculation and inference.

[214] Any reference to the grievor's medical condition cannot be considered because no medical defence was offered. Counsel for the employer submitted that her bitterness and anger did not give rise to an obligation on the employer to accommodate her needs; see *Kingston (City) v. C.U.P.E., Local 109* (2011), 210 L.A.C. (4th) 205.

[215] The employer submitted that the termination jurisprudence submitted by the union was out of touch with current jurisprudence — society has moved on from those decisions. The employer noted that in *Guelph (City) v. Canadian Union of Public Employees, Local 241*, [2000] O.L.A.A. No. 143 (QL), the employment of the grievor in that case was terminated because he stated that he could see that a shooting could happen at his workplace. The arbitrator noted that arbitrators have recognized that threats of workplace violence are very serious and will result in serious disciplinary responses.

[216] The arbitrator also noted that in the case before her, unlike some circumstances in which arbitrators had determined that discharge was an excessive penalty, there was no immediate provocation. She also noted that there was no real expression of remorse or apology. She dismissed the grievance.

[217] Counsel also referred me to *Livingston Distribution v. Industrial, Wood and Allied Workers of Canada, Local 700*, (2001), 94 L.A.C. (4th) 129, on the importance of an acknowledgement of wrongdoing when assessing an appropriate disciplinary response.

[218] With respect to the union's argument that the employer never asked the RCMP for information, the employer said that it had done so, as Mr. Brander testified. Constable Foote said that the RCMP did not share information.

[219] If the grievance is allowed, the employer requested bifurcation to deal with the remedy.

[220] Lastly, the employer referred me to the following jurisprudence: *Ontario Store Fixtures v. United Steelworkers of America, Local 5338*, [2001] O.L.A.A. No. 237 (QL); *McCain Foods (Canada) v. United Food and Commercial Workers International Union, Local 114P3* (2002), 107 L.A.C. (4th) 193; *Vancouver (City) v. Canadian Union of Public Employees, Local 1004*, [2003] B.C.C.A.A.A. No. 285 (QL); *Toronto Transit Commission v. Amalgamated Transit Union, Local 113*, (2005), 145 L.A.C. (4th) 139; *Greater Vancouver Regional District v. Greater Vancouver Regional District Employees' Union*, (2006), 147 L.A.C. (4th) 319; *Johnson Controls L.P. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 222*, (2006), 150 L.A.C. (4th) 303; *Société des Casinos du Québec inc. v. Syndicat canadien de la fonction publique, section locale 3939*, 2007 CanLII 80093 (QC SAT); *Casey v. Treasury Board (Public Works and Government Services Canada)*, 2005 PSLRB 46; *Way*

v. Canada Revenue Agency, 2008 PSLRB 39; *Mangatal v. Deputy Head (Department of Natural Resources)*, 2016 PSLREB 43; *Peterson v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 29; *Briar v. Treasury Board (Solicitor General Canada - Correction Service)*, 2003 PSSRB 3; and *Joss v. Treasury Board (Agriculture and Agri-Food Canada)*, 2001 PSSRB 27.

B. For the grievor

[221] In her testimony, the grievor accepted that her conduct of sending the email was a serious lapse of judgment that justified a disciplinary response. Her counsel also accepted that a disciplinable offence occurred. However, her counsel submitted that the termination of her employment in the circumstances of this case and on the totality of the evidence was excessive, in light of several significant mitigating factors. Therefore, the grievor conceded the first "*William Scott*" question; i.e., did a disciplinable offence occur?

[222] I point out that the grievor's reference was to the test in disciplinary matters set out as follows in *Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 CLRBR 1: Was there misconduct by the employee? If so, was the discipline imposed by the employer an excessive penalty in the circumstances? If it was excessive, what alternate penalty should be substituted that is just and equitable in the circumstances?

[223] While the employer took the position that it is important to heed such threats and to not overlook them, the grievor cited the Federal Court of Appeal's decision in *Canada (Attorney General) v. Public Service Alliance of Canada*, 2015 FCA 273, for the proposition that likewise, psychological harassment is no longer tolerated. She submitted that the employer ignored the toxic workplace that existed in 2014, before the termination.

[224] Counsel for the grievor submitted that threats made in the workplace must be considered in context and in light of all the relevant circumstances. A decision maker must consider all the mitigating factors. I was referred to the following decisions: *Mohamed v. Treasury Board (Revenue Canada, Taxation)*, PSSRB File No. 166-02-16134 (19880520), [1988] C.P.S.S.R.B. No. 139 (QL); *Ottawa-Carleton (Regional Municipality) v. C.U.P.E. Loc. 503*, [1994] O.L.A.A. No. 133 (QL); *Public General Hospital Society of Chatham v. S.E.I.U., Loc. 210*, [1996] O.L.A.A. No. 67 (QL); *Commemorative Services of*

Ontario v. S.E.I.U., Loc. 204, [1997] O.L.A.A. No. 1109 (QL); *Canadian Pacific Railway Co. v. National Automobile, Aerospace, Transportation and General Workers Union, Local 101 (CAW-Canada)*, 209 L.A.C. (4th) 399; and *National Steel Car Ltd. v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 7135*, [2011] O.L.A.A. No. 574 (QL).

[225] The grievor had no history of violence, no criminal record, and no use of her firearms. While the union would not defend her statements, her email must be viewed in its entirety.

[226] As for the newspaper article that she showed Mr. Kakwaya, the harassment had taken its toll on her, and she was not at her best. Mr. Kakwaya did not act on the article shown to him; obviously, he did not take it seriously.

[227] While the employer referred to the OC Transpo shooting incident in Ottawa, and Mr. Brander testified that before that incident, there were comments "like this" from the grievor, such testimony should be disregarded as vague and sensational. If the Board is inclined to give weight to that testimony, the report in that case found that there had been numerous opportunities for the employer to intervene and that it did not. In any event, the evidence is not specific enough to give it any weight.

[228] The grievor's counsel identified the presence of the following mitigating factors:

- the grievor's long service (12 years);
- her previous good record and lack of a disciplinary record;
- the toxic and dysfunctional workplace and management's failure to address the issues;
- the harassment and bullying of her;
- the observable distress she was in by June 2014;
- the lack of premeditation in sending the email, which demonstrates a momentary lapse of judgment;
- the threat was not intended to be seen by Mr. Shelley and was sent in confidence;
- the lack of intent to threaten or harm anyone;
- the expression of remorse;
- the investigation into misconduct was flawed; and
- the significant impact of the termination on her.

[229] On the issue of the grievor's service, her counsel submitted that she had 12 years of it. She rejected the employer's contention that her periods of leave should be subtracted when calculating her years of service, which would leave her with only

approximately 9 years of service with Health Canada. Not counting her leave as service would be discriminatory. The employer did not consider that her longest leave was for medical reasons. Sher argued that treating her as a 9-year employee would be contrary to the collective agreement.

[230] Of the 11 mitigating circumstances present in this case, the grievor argued that the most significant are the toxic and dysfunctional environment, the harassment, and the employer's failure to address her harassment allegations. But for the toxic workplace, the harassment campaign, and the employer's lack of intervention, the email would not have been sent.

[231] The grievor argued that the employer has a substantive duty to provide a harassment-free workplace and to maintain the health and safety of employees in it. There is an obligation to maintain a psychologically healthy workplace. The employer cannot hide from facts it knows. There is no obligation under policy that a written complaint be made; it is one option. As for the harassment by Mr. Shelley, the grievor submitted that if the Board finds that he did not harass her, he at least failed his obligations under statute and treated her unfairly.

[232] In cross-examination, Mr. Mori agreed that favouritism can constitute harassment. The grievor might not have been an easy employee to work with or even well liked by peers and managers, but she was still entitled to the protection of the law with respect to harassment in the workplace.

[233] While the grievor made no harassment complaint in writing, her allegations were made through grievances.

[234] The grievor's counsel submitted that the workplace was highly dysfunctional and toxic, which provided an important context in which to assess the termination of her employment. Counsel submitted that Ms. Seeling singled the grievor out for harsh and arbitrary treatment and that she intended to terminate the grievor's employment. The grievor's situation was compounded by the employer's inaction in addressing her harassment and other allegations. Counsel submitted that the Board's decision in the *Wepruk* staffing complaint supported a finding that the workplace was toxic when the adjudicator determined that there was favouritism and a toxic work environment. The grievor acknowledged that while Mr. Shelley and Ms. Seeling had not been present during the period in question in that decision, Mr. Mori had been present.

[235] Counsel submitted that Ms. Seeling's testimony that she did not want to fire the grievor is not credible. Ms. Deol testified that Ms. Seeling said that she wanted the grievor fired and that the grievor was not suitable for her position. Ms. Seeling took the unreasonable position that the grievor was angry and disrespectful but refused to acknowledge that the grievor was under emotional distress.

[236] Counsel submitted that the evidence of harassment in the workplace before the grievor returned to work in 2011 was highly relevant to assessing the appropriate disciplinary penalty and ought to be accorded considerable weight. Employer conduct, including inaction, is relevant to determining the reasonableness of a disciplinary penalty; see Brown and Beatty, *Canadian Labour Arbitration*, 4th ed, at paragraph 7:4410.

[237] Counsel submitted that by June 2014, the grievor was in a frustrated, distraught state; she cried at her desk almost daily. Counsel stated that at that time, the grievor sent the hasty and misguided email, venting (in confidence) to her union representative. Her counsel noted that she believed that the email was privileged. She testified that she recognized that sending it was wrong but suggested that it must be read in context. Her frustration with a variety of workplace issues had mounted and was reflected in the email. Counsel submitted that an adjudicator can recognize that a grievor may experience stress due to a toxic workplace or harassment; see *Proulx v. Treasury Board (Solicitor General of Canada - Correctional Service)*, 2002 PSSRB 45.

[238] Counsel addressed the fact that the grievor did not offer a medical defence by submitting that she was under stress, that Mr. Shelley said that he noticed it, and that the employer had an obligation to help her. The Board should take notice of her stress as a mitigating factor.

[239] The grievor also submitted that while the threat was made, she made it on the spur of the moment and had not seen it as a threat. She had even forgotten that she had sent it. There was no technical evidence about the employer's suggestion that she could have recalled the email. She testified that she had forgotten about it, thus confirming that she did not intend it as a threat.

[240] Counsel submitted that the employer failed to conduct a fair investigation of the misconduct, primarily by not investigating or evaluating the grievor's outstanding harassment allegations. Ms. Wass's assertion that her mandate did not include

investigating such allegations was a misstatement that is contradicted by the mandate letter. The written harassment complaints outstanding at the time should have been included, despite the grievor not saying anything during the investigation.

[241] Counsel noted that the grievor was facing possible criminal charges, which meant that she was not in a position to participate in the administrative investigation, including answering the investigator's questions.

[242] In *B.C. Ferry*, the Supreme Court of British Columbia confirmed that although the arbitral jurisprudence establishes that silence per se is not misconduct giving rise to just cause for discipline, the right to silence is not absolute. In that case, the Court determined that the employer's interests in ascertaining and publicly disclosing the cause of the incident at issue far outweighed the employee's interest in refusing to talk. Counsel referred me to the discussion of *B.C. Ferry* in *Gill v. Treasury Board (Department of Human Resources and Skills Development)*, 2009 PSLRB 19 at para. 148. The criminal charges against the grievor were dropped on January 15, 2015, and she could then speak. As soon as she was able to state her defence, she did.

[243] The employer relied on *Naidu* for the proposition that the right to silence is not enshrined in the collective bargaining regime and that employees are obligated to cooperate in legitimate employer investigations. However, *Naidu* explicitly references the need for both sides to nurture the employer-employee trust relationship. In this case, the lines of communication and the relationship of trust were already damaged before the investigative process, due to the employer's inaction. The employer's failure to foster a trusting relationship, the union alleged, distinguishes this case from the facts underlying *Naidu*.

[244] Counsel submitted that unlike in *B.C. Ferry*, there are no extraordinary circumstances in this case that override an employee's interest in refusing to talk. The employer had taken the steps it deemed necessary to ensure that the workplace was safe. There was no public interest in disclosing the details surrounding the email.

[245] While the grievor did not verbally apologize during the hearing, counsel stated that she did express remorse. One had to keep in mind that she was being asked to apologize to someone who was a harasser and who had in her words "tortured" her for years. She submitted that this case cannot turn on that lack of apology. There is sufficient evidence to establish a toxic workplace and harassment, with Ms. Seeling

being the principal perpetrator. Ms. Seeling never said that she could have made different choices, such as not tracking the grievor or talking to Ms. Deol.

[246] The grievor stated that it was reasonable for her to feel that the disciplinary hearing was a waste of her time and that it seemed pointless since multiple layers of management had ignored her repeatedly, for months.

[247] In its written submissions, the employer referred to Mr. Brander's testimony that the grievor offered no defence and that she made no allegation of harassment or bullying before her termination. She submitted that that was wrong and pointed out that she had filed several grievances alleging harassment or bad faith.

[248] Counsel submitted that the grievor participated in the investigation in January 2015 by providing an explanation. The employer was not deprived of an explanation, and one was provided before it was required to make its final determination on discipline. The grievor's decision to exercise her right to silence and to rely on her legal counsel was justified. Her decision should not be used against her when assessing the appropriate penalty. She took her first opportunity to provide the employer with an explanation.

[249] Counsel provided extensive argument on the employer's obligation to prevent bullying and harassment. I do not need to summarize that argument, as it is common ground that the employer has obligations under the relevant collective agreement, statute, regulations, and policies to prevent harassment in the workplace.

[250] Counsel noted that there were considerable differences in the testimonies of the witnesses at the hearing. It was submitted that the credibility test found in *Faryna v. Chorny*, [1951] B.C.J. No. 152 (QL) at paras. 11 and 12, should be applied. In particular, counsel submitted that the real test of truth was the harmony of the evidence with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[251] On the issue of credibility, the grievor submitted that Ms. Deol testified under subpoena and that she was a reluctant witness to testify about Mr. Shelley and Ms. Seeling. Further, she had first-hand experience about the harassment, to which she testified. With respect to Mr. Kakwaya's testimony, the grievor said that he was the employer's witness and that he provided clear examples of harassment.

[252] With respect to the grievor's testimony before the SST, counsel submitted that she appeared before it without counsel but that she showed remorse and acknowledged her wrongdoing before this Board. Counsel submitted that this isolated incident of untruthfulness, made under very difficult financial circumstances and under the threat of losing her house, did not detract from the grievor's forthright evidence presented in this proceeding. She was denied EI benefits and asked that she not be penalized twice for her mistake. Counsel did not state that what she did was right, but her evidence before the Board should not be entirely discounted because of it.

[253] Counsel submitted that the grievor's harassment grievance was highly relevant to assessing the appropriate disciplinary penalty and that it ought to be accorded considerable weight.

[254] Taking into account the entire context and the significant mitigating factors in this case, as well as the case law in similar matters, counsel submitted that the termination of employment should be set aside, that a period of suspension be substituted as the appropriate disciplinary sanction, and that the grievor be reinstated to an equivalent position in a different section of Health Canada.

[255] Counsel also submitted that I should make appropriate findings established by the evidence and appropriate related orders and declarations concerning the employer's failure to address the toxic workplace and to address complaints about it and those about harassment. Counsel requested that I issue a declaration that the employer breached the collective agreement, the applicable harassment policies, and Part XX of the *Canada Occupational Health and Safety Regulations* under Part II of the *Canada Labour Code*. Counsel also requested that I order the employer to conduct an independent investigation into the allegations of harassment and bullying and make any recommendations or remedial orders to address any harassment incidents over which I determine have merit.

[256] The grievor was suspended in early July 2014 and was terminated that October. The employer did not make a freedom-of-information request to the RCMP until after she was terminated. She was not in the workplace and did not present a threat. The employer's offer to her to access her office and electronic files showed that it did not perceive her as a threat. There was no need to rush a decision to terminate her. The

employer had the information it needed to investigate, as harassment allegations were outstanding at that time.

[257] On the issue of the grievances that I have already held are not before me and that were withdrawn pursuant to a memorandum of agreement, counsel stated that as they were withdrawn without prejudice, the employer's position is incorrect that the final-level grievance reply stands.

[258] Concerning the employer's position that harassment allegations that predate grievances cannot be litigated, counsel submitted that evidence of the harassment that the grievor endured before her 2011 return to work is highly relevant to assessing the appropriate disciplinary penalty. The employer's conduct, including inaction, is relevant to determining the reasonableness of a disciplinary penalty.

[259] The grievor took issue with the failure of the employer's cases on termination to also address the harassment issue as mitigation. Its cases begin in 2000, and not many are from recent years.

[260] Counsel also requested the payment of unspecified damages to the grievor for the employer's failure to investigate complaints and for its violations of harassment policies.

[261] In her closing remarks, the grievor submitted that the employer has the obligation to provide a healthy workplace, which includes one free of harassment. On the totality of the evidence, Ms. Seeling in particular has to be found responsible for perpetrating a toxic workplace.

[262] On the issue of bifurcation requested by the employer, should the grievance be allowed, the grievor stated that it would be a reasonable approach, and she deferred to the Board.

V. Analysis

[263] Adjudicators and arbitrators have considered threats of workplace violence as serious misconduct that can justify terminating employment in some circumstances, as in *Guelph (City)*. I accept the employer's argument that such threats are serious and that they engage the employer's responsibility under the *Canada Labour Code*. However, the jurisprudence does not establish that each case in which a threat is made

justifies automatic termination. Each case must be assessed on its own facts, along with an assessment of the aggravating and mitigating factors.

A. Was there misconduct?

[264] The grievor conceded that the email constituted misconduct warranting a disciplinary response from the employer. I agree that the email of June 30, 2014, constitutes misconduct. The threat was explicit and credible.

B. The mitigating and aggravating factors

[265] In determining whether the termination of employment was an excessive disciplinary response for the employer, I must consider both the mitigating and the aggravating factors. The grievor has the burden of establishing mitigating factors; see *Wilson v. Treasury Board (Solicitor General Canada - Correctional Service)*, PSSRB File No. 166-02-25841 (19950301), [1995] C.P.S.S.R.B. No. 23 (QL). I now turn to considering the mitigating factors that she advanced, although I have changed the order in which I dealt with them.

C. Flawed investigation

[266] The grievor argued that the employer's flawed investigation, particularly with respect to the scope of the issues covered in the investigation and its failure to investigate the harassment allegations, constituted an aggravating factor. The Board's jurisprudence has often confirmed that any failures that occur during a disciplinary investigation process are corrected by the *de novo* hearing (a hearing that deals with a matter anew) before it; see *Pelchat v. Deputy Head (Statistics Canada)*, 2019 FPSLREB 105; *Tudor Price v. Deputy Head (Department of Agriculture and Agri-Food)*, 2013 PSLRB 57; and *Patanguli v. Canada (Citizenship and Immigration)*, 2015 FCA 291, among others.

[267] The grievor's argument as to what she viewed as the employer's failure to request more information from the RCMP also falls into this category, and any failure on the employer's part was cured as a result of the hearing before me.

[268] The same applies to any failure by the employer to consider the harassment issue during the disciplinary process or any alleged rush to terminate the grievor before it had all the facts. All the facts and mitigating factors have now been identified

and argued by the grievor, thus curing any prior defect that might have existed in the employer's failure to consider all relevant circumstances.

D. Length of service

[269] The grievor argued that she had 12 years of service, which is a long period and a mitigating factor. The employer, on the other hand, argued that she was a relatively short-service employee when one considers the periods of leave she took over the course of her employment.

[270] I agree with the grievor's argument that factoring out certain periods of leave, such as maternity and care-and-nurturing or sick leave, could be considered discriminatory. There was no question that she was entitled to the periods of leave she took and that they were entitlements under the relevant collective agreement, and I see no reason to discount them from her years of service. I find that she was a medium-term employee, which is a mitigating factor.

E. Disciplinary record

[271] The grievor had some discipline on her record in the form of two written reprimands before the misconduct in this grievance. The union argued that this record should not be taken into account as it was the result of harassment. The grievances contesting these measures are not at issue before me. This is a minor aggravating factor.

F. The nature of the misconduct

[272] The grievor argued that sending the email was a momentary lapse of judgment, that she had no intent to harm anyone, and that the threat had been made in confidence. While her argument itemized each of those points as separate mitigating factors, I find that they form a kind of whole, and therefore considered them together.

[273] I do not accept that the threat of violence was a momentary lapse. While the email might not have taken long to write and might have resulted from the intense pressure that she felt, the grievor had been angry and resentful toward the employer for some time. She had referenced that anger when she had suggested to a work colleague in the days before her email that a shooting at the workplace was a possibility, referring to a shooting in Nanaimo. She also referenced it during the hearing when she acknowledged that her thoughts at the time had become "more

extreme"; yet, she also acknowledged that she had not sought help for her issues. She also did not attempt to recall her email or to follow up with a retraction or apology. While she argued that she had shown remorse, she accepted that she had not apologized. I will address remorse later, but an immediate expression of regret can be an indication of a momentary lapse of judgment.

[274] I accept that the grievor likely had no intent to harm Mr. Shelley. However, it was not possible for the employer (or the police) to assess her intent at the time of the threat. Intent may be a consideration in the criminal law context but is not a significant factor in the workplace context.

[275] A threat is a threat, and whether it was felt to have been made in confidence is immaterial. There is no expectation of confidentiality when making a credible threat of violence; see *Smith v. Jones*, [1999] 1 S.C.R. 455. In that decision, the Supreme Court of Canada addressed a claim of solicitor-client privilege but noted that since that privilege is the highest privilege in litigation, the analysis was equally applicable to all other claims of privilege.

[276] I do not accept that the grievor's communication with her union representative constitutes solicitor-client privilege. I do not need to determine what class of privilege might apply to such communications. However, I do note that in general, there is an expectation of confidentiality when an employee speaks to a union representative. The Supreme Court's analysis is relevant because it discusses when it is appropriate to breach a privilege and reveal threats to the police, as the union did in this case. As I understand the grievor's argument, she did not claim privilege for this email but rather relied on the confidential nature of the communication itself as a mitigating factor.

[277] The Supreme Court held that these three factors must be considered when assessing whether public safety outweighs a privilege (see *Smith*, at para. 77):

- Is there a clear risk to an identifiable person or group of persons?
- Is there a risk of serious bodily harm or death?
- Is the danger imminent?

[278] In this case, there was an expressed threat to kill a manager, which is both a clear risk to an identifiable person and a risk of serious bodily harm. In hindsight, it might not appear that the danger was imminent. However, an assessment of danger is

better left to law-enforcement officials, who are trained to assess risks of violence. In my view, less weight should be given to this third factor.

[279] Therefore, I conclude that the grievor should not have expected confidentiality when she made the threat of violence against her manager in the email to her union.

[280] In conclusion, I find that the nature of the misconduct was serious. It was not a momentary lapse of judgement, and there should have been no expectation of confidentiality in uttering the threat.

G. Acknowledgement of wrongdoing and expression of remorse

[281] The disciplinary penalty imposed was based, in part, on the grievor's position during the administrative investigation and disciplinary hearing. On the advice of counsel, she did not respond to the allegations, since criminal charges were pending.

[282] In the *B.C. Ferry* case cited by the grievor's counsel, the British Columbia Supreme Court confirmed that although the arbitral jurisprudence establishes that silence by itself is not misconduct giving rise to just cause for discipline, the right to silence is not absolute. In the extraordinary circumstances of that case (the disappearance of two passengers aboard a ship), the employer's interests in ascertaining and publicly disclosing the cause of the incident far outweighed the employee's interest in refusing to talk.

[283] In this case, employer counsel made no compelling argument that this is an extraordinary case. In light of the evidence gathered during the investigation, the grievor's participation was not necessary for the employer to reach a conclusion on the misconduct. Therefore, I find that there was no misconduct on her part in maintaining her right to silence with respect to the email leading to her arrest and the ongoing prospect of criminal charges at the times of the administrative investigation and her disciplinary interview. Therefore, this is not an aggravating factor and should not have been a consideration in the employer's determination of the appropriate discipline.

[284] One of the key mitigating factors in discipline cases is whether an employee expressed understanding and remorse when the concerns about behaviour were first brought to his or her attention; for example, see *Brazeau*, in which the adjudicator accepted the general statement of the principle set out as follows in *Oliver v. Canada*

Customs and Revenue Agency, 2003 PSSRB 43 (judicial review application dismissed in 2004 FC 1462):

> …
>
> The recognition of culpability or some responsibility for his or her actions is a critical factor in assessing the appropriateness of the discipline. This is because the rehabilitative potential of the grievor is built on a foundation of trust, and trust starts with the truth. If a grievor has misled his employer, failed to cooperate with the legitimate investigation of allegations on conflict of interest, and refuses to admit any responsibility in the face of evidence showing wrongdoing, then re-establishing the trust necessary for an employment relationship is impossible.
>
> …

[285] I have already accepted that it was understandable that the grievor would not acknowledge wrongdoing while criminal charges might be pending. However, her ongoing failure to acknowledge wrongdoing after the prospect of criminal charges had evaporated (by January 2015) must be addressed. It was not until the hearing of this grievance that she acknowledged her significant lapse in judgment.

[286] In December 2015, nearly a year after the prospect of criminal charges had evaporated, and in sworn testimony before an SST adjudicator, the grievor said that she had never acknowledged sending the threatening email. In fact, the notes of her interview with Constable Foote confirm that she did acknowledge sending it. Before the SST, the grievor's position was that the employer had not proven that she had sent the email. She also failed to acknowledge that her actions had contributed to her loss of employment. She acknowledged before me that she had lied under oath before the SST and testified that she did so because she had been in financial distress. In my view, it is not a sufficient excuse for lying under oath.

[287] The grievor's failure to acknowledge her wrongdoing at the earliest opportunity — in this case, at the SST hearing — is an aggravating factor. I also consider her clearly untruthful testimony at the SST hearing an aggravating factor.

H. The toxic work environment, the harassment of the grievor, and her state of mind in June 2014

[288] The grievor relied heavily on her harassment allegations to partly explain her threat of violence. In argument, her counsel stated that the toxic and dysfunctional

work environment, the harassment of the grievor, and the employer's failure to address it were the most important mitigating factors. This argument is similar to an argument of provocation.

[289] Provocation can be a mitigating factor when assessing the reasonableness of discipline for threats of violence, but as noted in *Guelph (City)*, the provocation must be immediate. As stated earlier in this decision, on the day the grievor sent the email in question, she was advised that her request for family leave was denied. However, in my view, this does not rise to the level of provocation that could be considered a mitigating factor. And furthermore, the grievor's argument focused on the long-term nature of the harassment building to a point at which she reacted by sending the threatening email.

[290] As suggested in *Guelph (City)*, there was an avenue for the grievor to address her workplace concerns. She filed a harassment grievance that directly grieved her allegations of ongoing harassment and bullying in the workplace only a few days before the threat was made (on June 26, 2014). While she had expressed concerns about issues that the employer should have identified as possible harassment, she had not availed herself of the formal mechanisms in place to address them. The grievance and complaint processes were available to her to address her concerns, but she did not take advantage of them. I find that there was no immediate provocation such as to justify it as a mitigating factor in this case.

[291] The grievor led considerable evidence on her perception of long-term harassment on a number of fronts, but as I stated, the grievance before me contests her termination of employment. I am not seized of any grievance that asserts harassment or a violation of a collective agreement or legislation and as such do not have the jurisdiction to make findings of violations of a collective agreement or legislation. My jurisdiction extends to assessing the credibility of her harassment allegations and how much weight to give her assertion that the employer's actions provide a mitigating circumstance.

[292] I find that at the very least, the grievor has proven that she fully believed that she was the unjust victim of harassment. The employer seemed to accept this fact as it attacked the substance of her harassment allegations and not her belief that she was harassed.

[293] Both Ms. Deol and Mr. Kakwaya testified credibly as to the perception of the existence of a toxic work environment in which those in the "out" group perceived that management engaged in inappropriate activities and favouritism. The section had twice engaged in team-building exercises and had been the subject of an earlier Board decision on staffing in which many of the same harassment allegations were raised. Management witnesses acknowledged that they were aware of the negative work environment, and the grievor proved that she had raised issues of what she considered inappropriate management behaviour several times with Ms. Seeling, Mr. Shelley, Mr. Mori, and Mr. Thaller.

[294] Although the employer denied that it was aware that the harassment issue proper was being raised, I find this position disingenuous. While the grievor might not have specifically used the word "harassment" in her many discussions with the employer, her complaints were clearly of that nature and could have left no doubt in the employer's mind about her perception of events. Mr. Mori agreed in testimony that favouritism could be harassment, and the evidence disclosed that management had been made aware of favouritism allegations, such as the iPad lunch, among other incidents. The employer was aware of what was at the very least unease on the part of some employees with respect to staffing, the hiring and retention of summer students and the favours asked of them (such as fingernail painting), social snubbing, and management practices that employees termed spying. There was also a perception that reprisals would happen if objections were made to objectionable practices. Management was aware of allegations that those trying to balance work and family life were viewed unfavourably, and one employer witness admitted that he had not taken the issue seriously enough and had discounted a conversation about it without taking any action.

[295] I find that the employer was aware of a certain level of discord and unhappiness within the section with respect to a number of management practices and perceived attitudes and that it took only the minimal action it felt necessary to deal with the situation. However, the mere fact that the grievor found herself in a stressful and toxic work environment does not, of itself, absolve her of all responsibility for her conduct. Furthermore, the fact that she believed that she was the specific victim of harassment is not, in and of itself, sufficient to absolve her of her misconduct.

[296] Despite the employer's argument that the Board's earlier *Wepruk* staffing decision should be discounted, because the finding of a toxic work environment was *obiter*, I disagree. However, I have not placed much weight on that decision and have based my findings of fact on the evidence placed before me.

[297] I should note that I reject the grievor's allegation that management was engaged in an effort to terminate her employment. While there is ample evidence to support an allegation that management viewed her as a difficult employee, I find that on the balance of probabilities, she did not prove that management sought to terminate her employment. While Ms. Deol testified that Ms. Seeling had expressed that desire to her, the evidence did not disclose that she engaged in a campaign to terminate the grievor's employment. Despite her feelings toward the grievor on a personal level, nonetheless, Ms. Seeling gave her a positive performance evaluation and testified candidly that the grievor was good at her work and occupied a key position. Ms. Seeling's testimony did not disclose the type of animus that indicated an intention to terminate; nor did that of the other employer witnesses. The evidence of management's discipline of the grievor, the substance of which must be accepted, does not support that a campaign to terminate her employment took place.

[298] As I am not seized of any harassment grievance and am charged only with evaluating the harassment issue as a mitigating factor, I am not bound to make any finding on whether harassment, as defined in the Treasury Board's policy or the legislation, was present. My jurisdiction in this case extends to determining whether the grievor perceived herself as harassed and whether this perception ultimately led to her sending the threatening email, and if it did, how much of a mitigating factor it plays in determining the penalty. If I find that her perception of harassment was honestly held and reasonable, my role is then to assess the weight to give this factor.

[299] I have found that on the balance of probabilities, the grievor established that the work environment as of the events in question was indeed tense and stressful and that she showed obvious signs of increasing stress in the workplace, as demonstrated by her being observed crying at her desk and her reference to other workplace shootings. I find her evidence of her belief that she was being harassed credible and on the balance of probabilities reasonable. By this, I do not find that she was in fact harassed, only that she believed that she was. I also find that she sent the email as a result of increasing anger and stress on her part. Therefore, I must determine how much weight

to give to her state of mind at the time of the events in question. Based on my reasoning outlined below, I am only prepared to place minimum weight on the grievor's state of mind as a mitigating factor.

[300] While the grievor's false testimony before the SST is of concern to her credibility, I am not prepared to discount all her evidence on that basis alone. I find that her evidence on the harassment issue and on her state of mind as of the events in question was supported by that of Mr. Kakwaya and Ms. Deol, and that evidence made up the greater part of her testimony.

[301] I accept the employer's argument that without medical evidence on the grievor's state of mind further to her perception of harassment, I can only go so far. I accept that she proved that she was unhappy and angry as of the events at issue, but I have no medical evidence of her culpability for sending the email and accordingly have no basis on which to find that she had diminished mental responsibility for her act.

I. Observable distress

[302] The grievor relied on her state of mind when she made the threat as a mitigating factor. In *Rahmani v. Deputy Head (Department of Transport)*, 2016 PSLREB 10, a grievance involving workplace violence, the Board considered as a factor the state of health of the grievor in that case when it reduced the disciplinary penalty. However, in that case, the Board accepted extensive evidence from the grievor's treating physician as a partial explanation for his behaviour. In this case, there is no such evidence.

[303] I accept that the grievor was frustrated and felt harassed. However, without more, her state of mind was not a justification for a threat of violence; nor did it mitigate the seriousness of the misconduct sufficiently to warrant overturning the employer's decision.

J. The impact of the discharge on the grievor

[304] While the grievor raised the impact of the discharge on her as a mitigating factor, I have no evidence before me that it was any more onerous on her than it normally is. Terminations are always serious and threaten the livelihoods of the terminated, but to be a mitigating factor, more must be proven.

VI. Conclusion

[305] The grievor has not met her burden of establishing sufficient mitigating factors that would lead me to find that the discipline imposed by the employer was an excessive penalty in all of the circumstances presented at this hearing. I find that the grievor is guilty of misconduct and that she made a credible and serious threat toward her employer. While not every such threat supports a decision to terminate, I find that in this case, I have an insufficient basis on which to set aside the employer's decision.

[306] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

VII. Order

[307] I reject the grievor's request for the anonymization of this decision.

[308] The grievance is dismissed.

June 24, 2021.

Steven B. Katkin,
a panel of the Federal Public Sector
Labour Relations and Employment Board