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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

FILIPPO RONCA

Grievor and Complainant

and

PARKS CANADA AGENCY

Employer and Respondent

Indexed as
Ronca v. Parks Canada Agency

In the matter of individual grievances referred to adjudication and of a complaint made under s. 133 of the *Canada Labour Code*

Before: James R. Knopp, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor and Complainant: Leslie Robertson, Public Service Alliance of Canada

For the Employer and Respondent: Calvin Hancock, counsel

Heard by videoconference,
November 14 to 18, 2022, and May 8 to 12 and June 19 and 20, 2023.

REASONS FOR DECISION

I. Prelude: the grievances, the Canada Labour Code complaint, and the historical importance of HMS *Erebus* and HMS *Terror*

[1] Filippo Ronca (the grievor) is an underwater archaeologist whose employment with Parks Canada was terminated following a prolonged disagreement with management over the allocation of resources to projects related to shipwrecks that were part of the Franklin expedition to locate the Northwest Passage. These shipwrecks have been designated as national historic sites and are situated in the Arctic.

[2] The grievor, as the Dive Safety Officer for the Parks Canada Underwater Archaeology Team, took issue with his supervisor's decision to assign him to projects other than the Arctic dive sites. He expressed his disagreement on several occasions and was ultimately found to have committed workplace harassment, which resulted in his suspension and termination.

[3] In addition to grievances pertaining to his suspension and termination, the grievor also filed an occupational health and safety complaint under the *Canada Labour Code* (R.S.C., 1985, c. L-2; "the *CLC*"), alleging that his termination was a reprisal for having raised the health and safety issues.

[4] The Parks Canada Agency's website, a portion of which was tendered in evidence at the hearing, contains links to the historical background to the discovery of the wrecks of HMS *Erebus* and HMS *Terror*. These wreck sites are now national historic sites jointly managed by the Inuit and the Parks Canada Agency ("the employer" or "Parks Canada"). These historic sites play an important role in the grievances and the complaint.

[5] Until the opening of the Panama Canal in 1914, European ships bound for Eastern markets were obliged to sail all the way around the southern tip of South America. Cape Horn was a perilous crossing that claimed many ships and lives. A Northwest Passage through Canadian Arctic waters was the holy grail of commercial and scientific exploration, and throughout the early 1800s, many unsuccessful attempts were made to discover a route to the East. Sir John Franklin was one such unsuccessful explorer, whose near-disastrous Arctic expedition of 1819-1822 earned him the nickname "the man who ate his boots".

[6] Nevertheless, Sir John Franklin was appointed to command another Arctic expedition, and in the spring of 1845, he set sail from England on the *Terror* and *Erebus*, in search of a Northwest Passage. Sailing in tandem, the two ships had already enjoyed considerable success in the Antarctic Ocean, and after an extensive refitting, they were commissioned for work in the Arctic. The refitting included strengthening their hulls to withstand the pressures of the ice sheets that would freeze them solidly in place in the ocean over the winter months. An innovative heating system was installed, transferring heat via square iron conduits from the ship's boiler to the crew's quarters.

[7] Both vessels made their winter camp in 1845-1846 in the ice near Beechey Island, now part of Nunavut. The next summer, they made their way south until they were once again icebound, this time northwest of King William Island, also now part of Nunavut. A note found at Victory Point on that island pinpoints September 12, 1846, as the date on which they became "beset". However, in that year, winter refused to relax its grip, and the ships remained icebound throughout the entire summer of 1847.

[8] In the spring of 1848, Sir John Franklin ordered the crews to abandon their ships. Suffering from starvation and scurvy, they made their way across ice and tundra, in search of safety. Every one of the 129 souls perished in what has been called the greatest polar exploration disaster of all time.

[9] The abandoned *Erebus* eventually drifted and sank in a location northeast of O'Reilly Island, only 11 metres below the surface. The *Terror* also sank, settling further north in much deeper water.

[10] After the vessels disappeared, Great Britain's Royal Navy launched over 30 (largely unsuccessful) searches to find them and their crews. The Inuit provided invaluable assistance to search expeditions by sharing the information they had gathered through their oral histories, which led to recovering some crewmembers' bodies, a few artifacts, and one cairn of notes. Still, many questions remained unanswered.

[11] In 1992, long before the wrecks were located, the *Erebus* and *Terror* were designated national historic sites. In 1997, Canada signed a memorandum of understanding with Great Britain that stated that if and when the wrecks were found, responsibility for them — and their recovery and contents — would fall to Canada.

[12] In 2008, Parks Canada, through its Underwater Archaeology Team (UAT), intensified its search efforts. Inuit oral histories, combined with new information from Inuit sources, as well as modern technology, gradually narrowed the search parameters. In 2010, the UAT discovered the wreck of HMS *Investigator*, which Great Britain had dispatched in 1848 to search for the lost Franklin expedition. On September 2, 2014, Ryan Harris, a UAT member, watched carefully on a sonar screen as an intact ship lying on the ocean floor gradually came into view. Almost 170 years after setting sail, the *Erebus* had finally been found.

[13] The UAT's Arctic efforts were divided between documenting the *Erebus* and continuing the search for her sister ship, the *Terror*. On September 11, 2016, the crew of a private research vessel discovered a three-masted ship on the ocean floor that the UAT soon confirmed was the *Terror*.

[14] Since then, with the continued assistance of Inuit communities near the waters in which the wrecks came to rest, Parks Canada has conducted several hundred dives on the *Investigator*, *Erebus*, and *Terror*. These Arctic sites mark some of the most important archaeological finds in maritime history. They are also of fundamental importance to these grievances.

II. A brief overview of the grievances

[15] The UAT is a very small, highly specialized team of archaeologists who are also among the best divers in the world. At any given time, the team only consists of 8 to 12 members. Before the discoveries of the *Erebus* and *Terror*, Parks Canada conducted many different underwater archaeology projects, but three in particular were of considerable national and international significance, namely, the Gulf Islands project on British Columbia's west coast, the Trent-Severn Waterway (TSW) project in Ontario, and the Red Bay project in Labrador. Each UAT member was assigned to one or more underwater archaeology projects, and each of those three important sites had its team leader. Filippo Ronca ("the grievor") had considerable experience on both the Red Bay and the TSW projects and was the leader of these projects.

[16] The grievor, like all of his colleagues on the UAT, is a highly educated and qualified archaeologist and diver. As of the events that gave rise to his grievances and complaint, he held the dive safety officer (DSO) position, which involved overseeing

safety issues for dives conducted at the UAT's different project sites. As the DSO, he felt that his presence at the Arctic dive sites was necessary.

[17] The UAT's manager, Marc-André Bernier, was tasked with allocating resources between the UAT's different projects. He decided to remove the grievor from the Arctic project because his presence was needed on the TSW project.

[18] The grievor did not take the news well. He considered the absence of the DSO from the Arctic dive sites a serious safety issue. Mr. Bernier disagreed, given the ability of other UAT members to assume responsibility for safety issues at any given dive site.

[19] The grievor challenged Mr. Bernier on his staffing decision, most notably at these times:

- in a telephone call on Tuesday, July 11, 2017, in which Mr. Bernier described the grievor's tone of voice as becoming "angrier and angrier";
- at a meeting on July 31, 2017, at which the grievor reiterated his opinion that as the DSO, he was required to be physically present at the Arctic dive sites. He crossed his arms and told Mr. Bernier this: "If you don't change your mind, I will take this to the next level", which would have been to the office of Director of Archaeology and History Jarred Picher ("the Director"). Mr. Bernier perceived it as a threat;
- at a meeting with the Director in early August of 2017;
- in a telephone call on August 15, 2017, about the security of the Arctic dive sites, in which the grievor expressed dissatisfaction at not having been brought into the dialogue earlier; and
- at a meeting on August 22, 2017, at which the grievor sat at the same table as Mr. Bernier. The grievor raised an issue about the neutrality of Parks Canada's National Office Occupational Health and Safety Committee (OHSC). The grievor turned to face Mr. Bernier squarely, looked him in the eyes, put his hands on the desk in front of him, and said, "What do **you** think about this?"

[20] On the following day, August 23, 2017, Mr. Bernier made a harassment complaint with the Director, who initiated an independent investigation.

[21] On August 23, 2017, the grievor initiated an investigation into workplace safety issues under the *CLC*. He felt that by not complying with the *Directive on Diving Safety* ("the Dive Directive"), the UAT was operating in an unsafe work environment. Occupational Health and Safety personnel launched investigations. Mr. Bernier and Mr. Picher both testified to their concerns about the effect that the investigations had on the UAT and especially their fear that the investigations might jeopardize the UAT's projects.

[22] In September of 2017, Mr. Bernier complained to the Director that managing the grievor was causing him a great deal of anxiety. In October of 2017, Mr. Picher moved Mr. Bernier from Parks Canada's Walkley Road office location in Ottawa, Ontario, to its National Office in Gatineau, Quebec.

[23] An independent investigation team concluded that the harassment allegations were founded and issued its preliminary report early in 2018.

[24] In April 2018, the grievor shared a passage about dive safety with the UAT, part of which contained information from Dr. George Harpur, a barometric specialist associated with the UAT, which Mr. Bernier perceived as a violation of his right to privacy. The employer alleged this was an attempt by the grievor to undermine Mr. Bernier's managerial authority.

[25] The grievor was suspended without pay on May 18, 2018, on the basis of the harassment investigation report. He filed a grievance against his suspension on June 6, 2018, which was assigned Federal Public Sector Labour Relations and Employment Board ("the Board") file no. 566-33-39662.

[26] The grievor's employment was terminated on September 28, 2018. He filed a grievance against his termination on October 15, 2018, which carries Board file no. 566-33-39663 ("the termination grievance").

[27] Board file no. 566-33-39664 is a grievance against the "no discrimination" clause of the collective agreement between the employer and the Public Service Alliance of Canada that expired on August 4, 2018. This grievance was filed alongside the termination grievance. During the hearing, the grievor advised that he was no longer pursuing that aspect of the case. Indeed, no evidence was called on the issue in that grievance, and the Board's related file is ordered closed.

[28] The grievor made a complaint under s. 133 of the *CLC* ("the *CLC* complaint") on December 13, 2018 (Board file no. 560-33-39561), in which he alleged that his termination was a form of retaliation for having initiated *CLC* investigations.

[29] Each of the grievor's separate interactions with Mr. Bernier involved a difference of opinion over a work-related subject, namely, safety issues pertaining to a deployment of resources. I find that, on their own, none of the interactions can be characterized as harassment. However, when all of the interactions are considered

together, the grievor's behaviour amounted to a mild form of insubordination bordering on harassment, so it warranted a disciplinary response.

[30] The grievor simply could not take no for an answer and would not let matters drop. His behaviour passed the point of a normal work-related difference of opinion. The appropriate disciplinary response, given all the mitigating and aggravating factors, would have been a written reprimand, which falls far short of a lengthy period of unpaid suspension and much farther short of dismissal. The grievor is to be reinstated to his former UAT position. The usual remedies apply, which take the form of the repayment of lost wages (including overtime), less the usual deductions, plus the reinstatement of his pension benefits. These amounts are offset by the extent to which the grievor has mitigated his losses by means of other employment. Aggravated damages are not warranted.

[31] The *CLC* investigations launched by the grievor created a climate of animosity and uncertainty in the workplace, and according to Mr. Picher and Mr. Bernier, it threatened the work being done on the UAT's projects. The grievor's adherence to safety issues had their origins in Part II of the *CLC*. He was terminated partly because of the stress and tension that the *CLC* investigations caused in the workplace. His termination was, at least in part, a form of retribution for his having initiated the *CLC* investigations. His complaint to that effect, in Board file no. 560-33-39561, is allowed.

[32] The hearing took place via the Zoom videoconferencing platform from November 14 to 18, 2022, and from May 8 to 12 and June 19 to 20, 2023. The witnesses and participants connected from Ottawa, Ontario, Gatineau, (Quebec, and Masseube, France.

III. The documentary evidence, and the testimonies of witnesses

[33] The grievor began his career with Parks Canada as a volunteer, working on projects in 1995 and 1996.

[34] The grievor is a professional SCUBA (Self-Contained Underwater Breathing Apparatus) diver. He became certified as a divemaster and an instructor through the National Association of Underwater Instructors (NAUI) while he was enrolled in graduate studies in underwater archaeology and maritime studies at East Carolina

University in Greenville, North Carolina, in the United States of America (USA). During his graduate studies program, he was the university's assistant dive officer.

[35] On his graduation, the grievor was hired as an underwater archaeologist for the State of Wisconsin, USA, in 1999 and 2000. From 2000 to 2002, he carried out some contract and term work for Parks Canada in underwater archaeology, and in 2002, he accepted an offer of an indeterminate position as an underwater archaeologist classified at the HR-02 group and level.

[36] When he was hired onto the UAT, the grievor became the assistant dive officer and supported the then-current DSO. He attended safety meetings at Parks Canada and with external stakeholders, including the Canadian Hyperbaric Society and the Canadian Standards Association (for diving-related subjects). He was on the National Dive Committee (which was a jointly staffed safety-and-standards committee involving Environment Canada and Parks Canada).

[37] Throughout the hearing, the witnesses and the documents they produced referred interchangeably to the terms "dive officer", "diving officer", "diving safety officer" and "dive safety officer". For clarity and ease of reference, this decision will refer to this position as that of the dive safety officer, or DSO.

[38] In 2015, Parks Canada, in partnership with the Royal Canadian Navy, conducted ice dives near the wreck sites. It was a military operation, so the grievor was trained in military diving procedures, which he helped teach to Parks Canada divers.

[39] The grievor is trained in the use of nitrox and has completed nitrox gas blending courses. Gas blending commonly refers to air mixtures containing enhanced proportions of oxygen and reduced proportions of nitrogen. Nitrox is commonly used in SCUBA diving and to a lesser extent in surface-supplied diving.

[40] The grievor is trained in many other technically advanced diving techniques, including wreck penetration, ice diving, surface-supplied diving, the use of rebreathers, and diving at depth (that is, deeper than 130 feet).

[41] Although the grievor was hired at the HR-02 group and level, he was promoted to HR-03 in 2008 when he was formally appointed to take over the DSO position from Peter Waddell, who was about to retire from Parks Canada. Mr. Waddell, who did not testify at the hearing, remained with the grievor on the National Diving Committee.

[42] Mr. Bernier testified to valuing the grievor's credentials as a dive safety specialist, and spoke of his own efforts, by means of job classification grievances, to enhance the grievor's set of responsibilities as the DSO. Mr. Bernier testified to the job classification grievance process taking a long time to complete. When the changes became effective in 2011, the grievor received retroactive compensation to 2008.

[43] Generally, testified Mr. Bernier, the DSO organizes and conducts the UAT's annual diving recertification, approves equipment for the UAT's use, and is responsible for health-and-safety issues related to diving and diving-related activities. The grievor, as the DSO, was part of the National Diving Committee, the mandate of which includes reviewing diving-safety issues, including hazardous diving incidents.

[44] The grievor's work description sets out the work profile and the core activities for the DSO position as follows (Exhibit J-1, Tab 3, page 220):

> ***WORK PROFILE***
>
> *As a recognized national expert, provides dive safety and scientific diving expertise; expertise in the conduct of complex underwater archaeological research projects relating to all chronological periods of Canadian history and entailing complex analysis and detailed assessments and, expertise in the field of underwater archaeology to Agency senior management, Service Centre management, divisional management, Field Units and, on an as required basis to, other levels of government and NGOs.*
>
> ***CORE ACTIVITIES***
>
> *Core Activity 1*
>
> *As a member of the national archaeological diving team, design, direct, manage, coordinate and conduct major underwater archaeological research projects (i.e.: multi-sites, multi-year or logistically and technologically challenging projects); recruit and supervise professional and technical staff to meet office and field requirements; manage project contracts and budgets within delegated authority; apply professional underwater archaeological and diving standards, methods and techniques throughout project implementation and, approve the purchase and use of any and all diving equipment.*
>
> *Core Activity 2*
>
> *Extract, excavate, survey, analyze, evaluate and synthesize large amounts of evidence, encompassing diverse subject matter obtained from underwater archaeological sites and/or through laboratory and archival research.*
>
> *Core Activity 3*

As a subject matter expert, formulate and provide recommendations respecting the identification, evaluation, protection and presentation of underwater archaeological resources ensuring consistency with the Cultural Resource Management Policy and, evaluate projects and activities that directly affect underwater archaeological resources.

Core Activity 4

As a national expert, represent the Agency on the Inter-Departmental Diving Committee providing leadership to advances in dive safety and scientific diving and to the ongoing development of the Inter-Departmental Directive for Diving Safety; *provide expert underwater archaeology advice in support of the development and/or modification of strategies, planning documents, policies, regulations, guidelines and technical manuals for the management of underwater archaeological resources.*

Core Activity 5

Provide scientific leadership and contribute to advances in knowledge through establishment of new approaches, methodologies and techniques and through communication, presentation and publication of the results of work of a more complex nature. Review, recommend and evaluate the work and reports of others through a process of peer review at national and international levels.

Core Activity 6

Establish, maintain, enhance and nurture contacts with the diving community both nationally and internationally through association with, and representation on, scientific diving organizations; with commercial and sport diving organizations and groups and heritage preservation groups to maintain currency with trends and activities and, with archaeologists, colleagues and clients to exchange information on, and discuss the discovery, identification, recording, recovery and/or preservation of, underwater archaeological sites, artefacts and cultural materials. Such exchanges may take place at the local, regional, national or international levels.

Core Activity 7

Develop, recommend and direct a comprehensive diving and dive safety program to ensure legal, safe and efficient diving and adherence to a variety of diving regulations and directives (ie. Inter-Departmental Directive for Diving Safety, Part XVIII Canada Labour Code*). As project Dive Supervisor assume on site responsibility for adherence to all dive safety requirements.*

Core Activity 8

Ensure the health and safety of staff and the public in field locations on land, boat and underwater through the application of due diligence in the operation of boats and a variety of specialized diving, surveying and navigational equipment (e.g. underwater

> *communication systems, air compressors, remote sensing equipment, etc.) and through the enforcement of safety standards and safe working practices*
>
> *Core Activity 9*
>
> *Plan, organize and direct the annual re-certification of dive team members and instruction/training in the use of all diving equipment (including oxygen, enriched air (nitrox) open circuit scuba and closed circuit rebreather systems. Develop, adapt, organize and deliver training on underwater archaeology techniques and underwater archaeological resource management to internal and external clients.*
>
> *Core Activity 10*
>
> *Evaluate, develop and direct the risk/hazard analysis and the implementation of all dive rescue plans and safety standards as they apply to diving and other life threatening situations.*
>
> *Core Activity 11*
>
> *Represent the disciplines of dive safety and scientific diving and of underwater archaeology within Parks Canada and within the broader context of the Agency's role as Federal Authority to other federal government departments and agencies and to other scientific diving organizations/institutions.*
>
> [*Sic* throughout]

[45] The grievor testified to being present at over 90% of the UAT's dive projects (before 2017) as part of his DSO duties. The other witnesses did not dispute that percentage, but it was also clear from their testimonies (including the testimony of the grievor) that the grievor, as DSO, was not present at every UAT dive. It was also uncontested that those UAT dives without the DSO on site were conducted safely.

[46] The grievor's performance assessment for fiscal year 2009-2010 contained the following narrative under the heading "Supervisor's Comments" (Exhibit G-1):

> In the past few years, since Filippo has taken the responsibility of Dive Supervisor of the UAS dive team, he has been working in developing his leadership role in this position. The challenges of taking on this responsibility were significant, not only because they are serious and important given the complexity and potential risks of diving in the diversity of conditions under which the UAS operates, but also because of the dynamics of new leadership among the senior archaeologists after the retirement of the previous generation of underwater archaeologists in the UAS. In only a few years in taking the Dive Supervisor position, Filippo was able, in a very noteworthy fashion, to ascertain his leadership among the team. This is a remarkable achievement because it was done by gaining respect of his colleagues and not

> by imposing or forcing this authority. Filippo has matured to be a strong but composed force, bringing competence and confidence to the diving team. This would prove to be a permanent challenge for any dive officer, but Filippo has proven that he has the fibre to take on this role. What is also noteworthy is that he has also taken on more responsibility on the national level through his role with the Departmental Dive Committee. The situation on his reclassification, a necessity for 2010-2011, will bring recognition to his contribution to the UAS and to diving in the Agency. On the archaeological front, Filippo is maturing as well, showing sound judgment in the management of submerged cultural resources, particularly in difficult and sometimes adverse conditions occurring in the TSW …. It is now important that he turns his development efforts to the production of archaeological reports, not only to establish his professional credentials, but also to allow him to progress as a professional archaeologist.
>
> [*Sic* throughout]

[47] The grievor's performance assessment for fiscal year 2010-2011 (Exhibit G-2) referred to two diving fatalities in that period. The grievor and Mr. Bernier both testified to an incident involving a visiting scientist who dove as a guest with Environment Canada on a federal worksite. The guest diver used a new, full-face mask. One of its features was a switch governing the delivery of air from either the main (or "primary") tank or the reserve (or "bailout") tank. The diver descended with his reserve tank activated instead of his main tank. He quickly exhausted his air supply and suffocated.

[48] The second fatality involved a commercial diver who died in only nine feet of water while conducting a surface-supplied dive under hazardous circumstances on the TSW. He was inspecting a dam built of submerged square timbers. Forces of differential pressure trapped the diver against the timbers. After his fatality, Parks Canada temporarily suspended all its diving operations on the TSW.

[49] The grievor testified to the considerable impact on the UAT of these fatalities. At every level, there was a heightened awareness of the importance of safety measures, and he testified to his impression that as the DSO, he was the focal point of the heightened sensitivity. He testified to taking his DSO role very seriously, and Mr. Bernier agreed with that statement. All the UAT witnesses testified to the grievor's tenacity on safety issues. They also agreed that it led to some friction on the UAT.

[50] One such incident occurred in 2013 while the UAT was preparing to dive at a project near Louisbourg, Nova Scotia. Thierry Boyer, a UAT member, had planned to invite his spouse, who was a recognized underwater archaeologist and certified diver working in France, as a guest of the UAT on this particular dive. As the DSO, the grievor was responsible for ensuring guest divers' suitability, and clearing a guest diver to dive with the UAT included a medical clearance. He repeated his testimony about his heightened sensitivity when guest divers were involved, because of the earlier fatalities.

[51] Mr. Bernier and the grievor both testified to a consultation with the UAT's hyperbaric physician, Dr. Harpur, about the necessary medical procedures that had to be conducted. The guest diver did not pass all the procedures, so the grievor did not clear the guest diver to dive. Mr. Bernier and the grievor testified Mr. Boyer did not receive the grievor's decision well. Mr. Boyer did not testify at the hearing. Both Mr. Bernier and the grievor testified to the friction between Mr. Boyer and the grievor as a result of the Louisbourg incident.

[52] The grievor testified to his attempts to adhere as closely as possible to the provisions of the 2002 Dive Directive. Mr. Picher, along with Mr. Bernier and the grievor, all testified to it being the authoritative manual for diving safety at Parks Canada. All of the witnesses generally agreed that some of its aspects were outdated and that it required revision. A 2012 version of it was also entered into evidence ("the 2012 Dive Directive"), but Parks Canada's senior management had not approved the 2012 version.

[53] Mr. Picher, Mr. Bernier, and the grievor all testified to accepting the primacy of the 2002 Dive Directive over the amended 2012 Dive Directive. Some of the amendments had to do with the UAT manager's roles and responsibilities vis-à-vis those of the DSO (at all times relevant to these grievances and complaint, Mr. Bernier was the UAT manager, and the grievor was the DSO).

[54] Turning to the 2002 Dive Directive (Exhibit J-1, Tab 1), its paragraph 3.2.3 articulates, in part, aspects of the scope of the DSO's authority as follows: "This officer also has the authority to restrict or prohibit any diving activity that in their judgement, is unsafe or imprudent, and shall immediately inform the Establishment Diving Officer and/or the Dive Supervisor of any such restrictive actions."

[55] Another example of the differences is at paragraph 3.2.3 (Exhibit J-1, Tab 2, page 164) of the 2012 Dive Directive, which sets out that the DSO is responsible for identifying a dive supervisor for each diving operation. The 2002 Dive Directive does not define "dive supervisor". Mr. Bernier testified to his managerial prerogative to designate a senior member of any given dive team as the person responsible for, among other things, the safety of the diving operation in question.

[56] In their respective testimonies, Mr. Picher, Mr. Bernier, and the grievor all acknowledged Mr. Bernier's prerogative as the manager to allocate UAT resources between the UAT's different projects. This managerial prerogative included identifying a dive supervisor responsible for safety issues for each diving operation.

[57] Mr. Bernier testified to ensuring that each team on any given project had the appropriate personnel in place to deal with logistical and safety issues.

[58] The historical importance of the 2014 discovery of the *Erebus* and the worldwide attention it received placed pressure on the UAT to prioritize its work at the wreck site, at least in the short term. The UAT conducted approximately 250 dives on the *Erebus* between 2014 and 2017.

[59] Mr. Harris, the UAT member leading the *Erebus* project, and Jonathan Moore, the UAT member whom Mr. Bernier designated as the alternate dive officer to support the grievor, both testified to the UAT's general degree of familiarity with the *Erebus*. Hundreds of dives had taken place, all of them safely. The wreck was in only 11 metres of water, and on a clear day with good visibility, it could be seen from the surface. Those factors stood in contrast to the much more challenging dive conditions at the site of the *Terror*, which was in much deeper water.

[60] The UAT had just finished a series of dives on the *Erebus* in September of 2016 when news broke of the discovery by a private partner of a wreck thought to be the *Terror*. Mr. Bernier and the grievor, both of whom were present at the time at the *Erebus* site, testified to the urgency of getting to the new site as quickly as possible, to verify the identity of the newly discovered wreck. Without citing specifics, Mr. Bernier characterized the pressure to establish an immediate Parks Canada presence at the new site as originating from the office of the prime minister.

[61] Mr. Bernier and the grievor, as well as Mr. Harris, also testified to a number of complicating factors, especially the weather. They had to wait five days for a severe storm to pass. Also, their Coast Guard vessel was unable to get near the wreck, which necessitated a series of dives from small inflatable craft called Zodiacs. This carried additional risks and complications. The water at the *Terror* dive site was extremely cold, at minus one degree Celsius, and visibility was very poor. The wreck was deep, well over 100 feet below the surface. To complicate matters further, since the UAT had already concluded its work on the *Erebus*, some of the UAT dive gear had been shipped back to Ottawa, which meant that some UAT members would dive with borrowed gear.

[62] On the third dive of the day on the *Terror*, Mr. Bernier was diving with Mr. Boyer when Mr. Bernier experienced an out-of-air incident. The grievor testified to the practice of "diving in thirds"; one-third of the tank to descend and execute the dive plan, which in this case was to photograph the wreck or otherwise confirm its identity, one-third of the tank to conduct the necessary decompression stops on ascent, and one-third of the tank for when the diver returns in the boat. This, testified the grievor, is a recognized conservative diving practice.

[63] Although it was called an "out-of-air" incident and a "near-miss" on the Hazardous Occurrence Incident Report (HOIR), Mr. Bernier testified that in fact, he had not been completely out of air. He carried a smaller air tank, intended for use in emergencies to return to the surface. Both Mr. Bernier and the grievor testified to drills and practice procedures ritually undertaken by every UAT member to prepare for exactly this type of emergency.

[64] The normal diving protocol, testified Mr. Bernier, calls for at least one decompression stop during ascent, but under the circumstances, Mr. Bernier used the auxiliary tank for a direct ascent to the surface. This involved removing his mask, which Mr. Bernier testified gave him an instant headache in the freezing water and eliminated his ability to see clearly. Still, since he had practised this emergency procedure so often, he executed it safely and properly. He testified to safely resurfacing, closely accompanied by Mr. Boyer. In the Zodiac, the grievor immediately administered the first-aid procedures associated with an emergency ascent of this nature, which included close, continuous, and careful observation, the administration of oxygen, and immediate transportation to a medical facility. In this case, the medical facility was on board the Coast Guard vessel, which was still over 45 minutes away

from where they were. To make matters worse, one of the Zodiacs malfunctioned on the way back. The UAT had succeeded in identifying the *Terror*, but under perilous circumstances, testified Mr. Bernier.

[65] Mr. Bernier testified to the first aid provided by the grievor and to the repeated training he and every UAT member had taken to prepare for exactly such an emergency. He said that this "probably saved [his] life".

[66] The discoveries of the *Erebus* and *Terror* generated interest in the office of Catherine McKenna, Minister of Environment and Climate Change at that time. In 2017, the Minister, who did not testify, was an accomplished athlete and certified diver, and she expressed to Parks Canada an interest in diving with the UAT on the *Erebus*. The grievor was quite outspoken in his opposition to the Minister's expression of interest. He referred to his earlier testimony about the difficulties with guest divers, most notably the fatality involving the visiting scientist diving as a guest of Environment Canada.

[67] Mr. Bernier, who shared the grievor's safety concerns, had to weigh the options carefully while continually receiving pressure from the Minister's office to allow her to dive at the Arctic site. Mr. Bernier encouraged the grievor to find a way to allow the Minister to participate. Both he and the grievor testified about the requirement that any guest diver had to be medically cleared. Mr. Bernier advised the Minister's office of this requirement, and an appointment was made for the Minister to attend an Ottawa specialist's office for a medical examination that would clear her to dive. The Minister did not attend the appointment, and the doctor refused to reschedule it, so the UAT had to make alternative arrangements for the Minister's medical clearance.

[68] However, by then the grievor, who had remained adamant in his opposition to the Minister's participation, had recused himself from the decision about allowing her to dive with the UAT. The grievor testified that his stance on this issue created friction with Mr. Bernier, who testified that Mr. Bernier told him, "You don't know how much trouble you have caused me, now I have to drive seven fucking hours to undo the damage you have done".

[69] The grievor also testified to being introduced to the Minister at some point after the controversy about diving with the UAT had begun, and the grievor said that when the two were introduced, the Minister said to him, "Oh, you're the one."

[70] Mr. Picher also testified to receiving expressions of interest from the Minister's office. He testified that he instructed Mr. Bernier to "put aside the fact that she is the Minister, and explore how we can do this safely, and establish whether or not she has the ability to dive with the UAT."

[71] Arrangements were then made to have the Minister examined by the UAT's medical and hyperbaric specialist, Dr. Harpur, whose office is in Owen Sound, near Fathom Five National Marine Park in Tobermory, Ontario. The plan was to obtain the necessary medical clearance and then conduct a refresher dive at that location with the UAT to confirm the Minister's diving competency.

[72] Unfortunately, the Minister did not appear for the appointment with Dr. Harpur, and ultimately did not dive with the UAT in Tobermory. Mr. Bernier testified that the Minister did, in fact, dive there on May 19, 2017, but that she dove with a private charter and not with the UAT. The Minister sent a message on the online Twitter service. She included an underwater photograph and the caption, "The NEW @ParksCanada #PCApp will help you discover places you never thought you would go! Start exploring now: parkscanada.gc.ca/app" (Exhibit G-3).

[73] Mr. Harris, the UAT member in charge of the Arctic dive sites, also testified to the continual pressure from the Minister's office to permit the Minister to dive with the UAT on the *Erebus*. He testified to making arrangements for her travel to the Arctic, the deployment of the team, accommodation, outfitting, security, and medical support and the participation of the Gjoa Haven guardians (the Inuit near whose community the wrecks are located, and who maintain an important degree of stewardship over the historic sites). Mr. Harris expressed his frustration that after all the time and energy he spent, the Minister chose not to attend the *Erebus* site.

[74] Mr. Bernier testified that the 2017 diving season was characterized by several competing interests. Aside from the ministerial pressures, he received signals from other stakeholders about the UAT's existing commitments at three other major project locations, namely, the Gulf Islands project, headed by Mr. Moore, and the TSW and Red Bay projects, both of which were headed by the grievor.

[75] Mr. Bernier testified about Parks Canada's commitments to the other projects. He could not allow them to languish. He testified to his duty to carefully allocate his

resources, and he decided to remove the grievor from the Arctic dive sites so that he could focus his attention on the TSW project.

[76] Both Mr. Bernier and the grievor testified to the grievor's extensive experience in diving the TSW with the UAT.

[77] Mr. Bernier and Mr. Harris testified to Mr. Harris's experience and qualifications, which Mr. Bernier found were entirely suitable to qualify Mr. Harris to lead the Arctic project, which Mr. Harris had already been doing since he discovered the wreck in 2014, and to safely organize and conduct diving operations there in the DSO's absence. Mr. Bernier had already appointed Mr. Harris as the alternate dive officer because of his experience and qualifications and was convinced of Mr. Harris's ability to safely lead the team diving the Arctic sites.

[78] Mr. Bernier testified that he knew his decision would not go over well with the grievor. He planned an in-person meeting on July 5, 2017, with the UAT's senior underwater archaeologists, to relate his deployment decisions. He specifically wanted the grievor at the meeting in order to discuss his decisions in person. The grievor was not in the office that week, so the in-person meeting did not take place.

[79] Meanwhile, the grievor telephoned Mr. Moore and Mr. Harris, who both told him about Mr. Bernier's deployment plans. They both testified to their clear impressions that the grievor seemed upset.

[80] The grievor did not speak to Mr. Bernier until Mr. Bernier was at home packing to leave for England as a guest speaker at an international forum on the Franklin expedition generally and the wreck sites of the *Erebus* and *Terror* in particular. Their telephone conversation on July 11, 2017, lasted approximately 90 minutes. Mr. Bernier testified that the grievor raised his voice over the phone when he made his points. Mr. Bernier testified that he was animated in their conversation but did not answer when he was asked on the witness stand if he had raised his voice. The two were obviously at an impasse, and the conversation ended with an agreement to meet later, in person, to continue the discussion.

[81] The grievor made handwritten notes during their conversation, and soon afterward, he typed them up and gave a copy of them to Mr. Bernier in advance of the July 31, 2017, meeting that they had agreed to hold. The grievor's notes were entered

as an exhibit (Exhibit G-10). Under the heading "First Discussion between MAB [Mr. Bernier] and FR [the grievor] on the 2017 Arctic Project (via telephone)" is his typed text, as follows:

> …
>
> *MAB confirmed that FR would not be going to the Arctic and outlined the staff that would be going and shared their respective roles.*
>
> *MAB stressed that the priority for FR is the TSW,*
>
> *FR presented the case as to why the DO* [Dive Safety Officer] *would be best utilized in the arctic,*
>
> - *It falls under the historic role and responsibility of the DO for the UAT*
> - *These duties were clearly laid out in my job description and signed off on by management*
> - *FR explained there is a growing culture of complacency in and around the team, and a growing trend to ignore instructions from the DO.*
> - *FR shared that in his opinion, if FR is not present in the arctic, it weakens the credibility and authority of the position of DO.*
> - *The TSW does not require immediate fieldwork*
>
> …
>
> *MAB was ordered to divide up the UAT into two teams, one for arctic and other for TSW. UAT is to do more field work on the TSW whenever possible*
>
> *MAB would allocate resources towards TSW and as the TSW lead FR to stay behind. The team can manage risks without FR in the arctic*
>
> …

[82] The grievor testified that over the course of the lengthy telephone conversation on July 11, 2017, both he and Mr. Bernier raised their voices from time to time.

[83] Mr. Bernier and the grievor met in person on July 31, 2017, at Parks Canada's Walkley Road office, to discuss the DSO's presence at the Arctic dive sites. Mr. Bernier remained steadfast in his decision to place the grievor on the TSW project rather than on the Arctic sites. The following are excerpts from the grievor's meeting notes, which he typed shortly afterward (Exhibit G-10):

> …

Conversation started with MAB asking that if FR is not on site as DO, will I shut the project down?

FR shared that we are not even at that point, and that we are here for a discussion

…

MAB provided a summary of his role as manager and how its his job is to help achieve the goals laid out by the Minister, and the directors

MAB reports to his Boss, and the Director had told him to assign FR to TSW file because that is what is needed

As DO, FR explained that his role, duties and responsibilities are to ensure dive safety

MAB said it is his team and that FR needs to find his role in it

FR said there is a difference in opinion on what his role is, not as an employee, but as the DO

MAB said I am misinterpreting the role as Dive Officer, FR said I am familiar with the role of DO, as I have been doing it for years and trained under Pete Waddell, the previous DO. Historically the role of DO has been clearly understood by everyone, but now decisions about diving and diving safety are being made without the involvement of the Dive Officer.

MAB said he felt confident the team could mitigate the risks in the arctic, as the site is shallow and we already have over 250 dives on site and the staff are familiar with the hazards. There will be a Dive Supervisor and two DMT's [Diving Medical Technician] *on site*

…

FR stated out of respect to MAB, he did not go to Jarred (Director) to discuss. FR waited for MAB to return to the office to see if there was a change from his previous stance. FR had given MAB a week after getting back to catch up, before re-addressing the above concerns

…

FR said as DO, his sole concern is safety of divers and that he is not swayed by pressures that the Minister or the Director are under.

FR asked MAB what is the new role of DO, if management can decide when and where to use the DO with regards to safety, planning, decide which dive jobs the DO goes on, and make other decisions that historically were carried out by the DO?

FR stressed that his job has two roles, DO and archaeology and when there is a diving health and safety issue the DO's hat should and will trump archaeological responsibilities.

FR expressed desire to show some leadership and try to resolve this impasse between himself and the manager, MAB.

> *MAB said his decision was final and reiterated that he is doing what has been asked of him by his manager. MAB invited FR to discuss with Jarred and if FR can convince him, then MAB will change staff going to arctic*
>
> *FR stated his preference was to resolve this at this working level, but that he felt strong enough about the impasse that their might be a need to explore OHS avenues.*
>
> …
>
> [*Sic* throughout]

[84] Mr. Bernier told the grievor that if he did not like the decision, he could take the matter up with the Director. The grievor said that he would do so. Mr. Bernier testified that he interpreted the grievor's response as a threat.

[85] The grievor testified that he was troubled by his discord with Mr. Bernier, and he reached out to Rebecca Dalton, Parks Canada Values and Ethics, about other conflict-resolution avenues to explore. On August 3, 2017, he emailed her the following (Exhibit G-14):

> *Good afternoon Rebecca,*
>
> *My name is Filippo Ronca and I am with the Underwater Archaeology Team of Parks Canada. I was wondering if you could please provide me with some resources regarding Informal Conflict Management and working towards a Healthy Workplace.*
>
> …

[86] The grievor testified that he received information on informal conflict management and that he proposed mediation with Mr. Bernier, who refused. In his testimony, Mr. Bernier could not recall the offer or his refusal of informal conflict management.

[87] Mr. Bernier also testified to a telephone conversation on August 15, 2017, with the grievor and Travis Halliday of Parks Canada, Law Enforcement. The purpose of the call was to discuss the security of the *Erebus* and *Terror* dive sites and the possibility of unauthorized access to these sites. The grievor was upset because site-security discussions had apparently already taken place in his absence. Mr. Bernier testified that his rationale for setting up the call in the first place was "to keep him [the grievor] in the loop". Mr. Bernier felt that the grievor was aggressive in his tone in the

conversation, which the grievor denied. He testified to feeling frustrated, not aggressive.

[88] Mr. Halliday, in his testimony, recalled the August 15 conversation but could not recall any indication of aggressive behaviour.

[89] As he said he would do, the grievor brought his concerns about Mr. Bernier's decision to Mr. Picher. Mr. Picher testified to being aware of the concerns because he had already spoken with Mr. Bernier. In a meeting in early August 2017, Mr. Picher and the grievor discussed Mr. Bernier's decision. Mr. Picher testified to supporting Mr. Bernier's decision and to his opinion that Mr. Bernier's decision accorded with Parks Canada's managerial priorities. Mr. Picher also testified to his opinion that Mr. Bernier's decision did not compromise safety issues because the diving personnel assigned to the Arctic sites were qualified and experienced.

[90] Mr. Picher testified that he did not feel Mr. Bernier's decision compromised the DSO's role, adding that the role of the DSO, as defined in the 2002 Dive Directive, required modification anyway.

[91] Mr. Picher testified to a need to review the DSO's role because the grievor behaved as though he had the authority, in the name of diving safety, to decide who could dive and where and when they could dive. Those are resource-allocation issues, testified Mr. Picher, and the difference of opinion between Mr. Bernier and the grievor indicated the need to review certain aspects of the Dive Directive.

[92] At the meeting, Mr. Picher told the grievor that he supported Mr. Bernier's decision. In his testimony, Mr. Picher repeated his conviction that it was the right thing to do at the time for two reasons: first, the importance of the TSW project and the grievor's obvious position on the UAT as the best person to lead that project, and second, Mr. Bernier's ability to properly assess the risks associated with the Arctic dive sites and to assign qualified and experienced personnel accordingly.

[93] The grievor testified to his dissatisfaction with Mr. Picher's stance because although Mr. Picher was the director of archaeology and history, he was not a diver, and their discussion did not allay the grievor's growing conviction that health-and-safety issues were being compromised.

[94] The grievor then testified to a later conversation with Nicholas Proulx of Occupational Health and Safety in mid-August, during which he asked Mr. Proulx for his opinion about safety issues. The grievor testified to being upset at Mr. Proulx's response, which was to the following effect: "I work for management; I already spoke to Bernier and Picher about this and they have no concerns, so I have no concerns". Mr. Proulx did not testify at the hearing.

[95] As a result of that conversation, the grievor set up a meeting with the OHSC for August 22, 2017. On the OHSC were Thomas John "T.J." Hammer, Director of Collections, Conservation Curatorial (Parks Canada). Mr. Hammer was the employer's representative. Michael Eisen, the manager of conservation science, represented employees. The grievor testified that the meeting was held to ascertain whether the OHSC was supposed to be objective when it assessed health-and-safety concerns rather than simply adopting management's view.

[96] The grievor arrived at the meeting after most of the participants were already seated. He sat across from Mr. Bernier at the same table. The grievor asked Mr. Hammer whether the OHSC should be neutral when it comes to safety issues. Mr. Hammer testified to not knowing the context of the question and asked the grievor to rephrase or restate it. The grievor then asked Mr. Eisen the same question, and Mr. Eisen replied that the OHSC should be impartial.

[97] The grievor then turned to Mr. Bernier, leaned slightly forward on the table, and looked him in the eye and said, "And what do **you** think?" Mr. Hammer, Mr. Bernier, and the grievor all testified to this event. Mr. Bernier said that the grievor had "fire in his eyes" and testified that he had "never seen such anger directed at [him] in any fashion, and this scared [him]".

[98] Mr. Bernier felt that the grievor was very aggressive when he asked his question, but after it was asked, the grievor adopted a friendly and relaxed attitude, "like a switch was turned". The rest of the meeting was without incident, and the witnesses described the grievor's demeanour as friendly.

[99] The grievor agreed that he was demonstrably impassioned at that point of the August 22, 2017, meeting but denied that he had been angry. He agreed that he emphasized the word "you", which is why the word appears in capital letters in the investigation report.

[100] The only other participant from the August 22, 2017, meeting to testify was Mr. Hammer, who described the grievor as passionate when he turned to Mr. Bernier and said, "And what do **you** think?" Mr. Hammer said that the grievor "… may have leaned over to Mr. Bernier …" when he asked that question. Mr. Hammer told the investigators that "… there was nothing untoward in the [grievor's] behaviour or tone of voice …", and in his testimony, he said that that is exactly how he recalls the meeting.

[101] The following day, Mr. Bernier authored a formal harassment complaint to Mr. Picher (Exhibit J-1, Tab 7, page 273).

[102] Mr. Picher arranged for an independent investigation. Mr. Bernier testified about his continuing difficulty managing the grievor and the level of stress that it caused him. When asked about the *CLC* investigation, Mr. Bernier testified that he felt that it was an effort on the grievor's part to stop the work being done on the *Erebus* and *Terror* and that it was an attempt by the grievor to demonstrate that Mr. Bernier had failed his managerial health-and-safety duties. Mr. Bernier also testified that the passing of his father at some point in these interactions with the grievor added to the stress he was feeling.

[103] In October of 2017, Mr. Picher temporarily moved Mr. Bernier from the Walkley Road office to the Gatineau office. In the fall of 2017, the grievor was dispatched to the Red Bay project and from that point on did not work with Mr. Bernier.

[104] Meanwhile, Mr. Hammer and Mr. Eisen, in their capacity as the Walkley Road office's OHSC, investigated the *CLC* complaint. In the course of their investigation, they interviewed UAT members.

[105] Mr. Bernier testified that he had been frustrated with Mr. Hammer and Mr. Eisen, neither of whom are divers, and about how the grievor seemed to continually provide them with additional information to support some of the safety issues he raised. In Mr. Bernier's words, the investigation "snowballed", widened into many different issues, and adversely affected the UAT's operations. Mr. Bernier testified that the *CLC* investigation adversely affected the UAT's morale, and he worried that it would jeopardize operations.

[106] In cross-examination, Mr. Picher testified that the *CLC* matter went from being about a specific issue to what he termed a "full program review". He received the *CLC*

investigation report and testified to disagreeing with some of its conclusions, so he ordered a further safety investigation by Employment and Social Development Canada, which produced a report that was provided to him on January 30, 2019 (Exhibit J-1, Vol. II, Tab 33). The parties agreed that the report's date, which was noted as "January 30, 2018", had to be an error and that the true date was likely January 30, 2019. Mr. Picher also testified to his concern that the *CLC* investigation "destroyed the fabric of the team" and that it had the potential to jeopardize operations.

[107] On April On April 3, 2018, the grievor wrote this to Mr. Picher (Exhibit J-1, Tab 9):

> …
>
> *I have watched the "team cohesion" and the interpersonal interactions slowly degrade over a number of years now and as a member of that team I accept some portion of the blame for this.*
>
> …
>
> *Jarred, I have no doubt that Marc genuinely feels that I have questioned his right to manage and schedule and that I have argued, at times aggressively, with him regarding his decisions. I fully acknowledge that this has complicated his role as a manager and added stress to his work environment.…*
>
> …

[108] A couple of weeks later, in response to the draft harassment investigation report, the grievor emailed Mr. Picher on April 19, 2018 (Exhibit J-1, Vol. I, Tab 11), which included the following:

> …
>
> *I would like to start off by thanking everyone for participating, especially the investigator, who summarized a large amount of material. The process has been painful for me and my family, and I am looking forward to resolution.*
>
> *As Dive Officer I have taken the role seriously. It is a lot of responsibility. I have always followed my job description and the dive directive with professionalism and integrity. More often than not, this role is underappreciated and unrecognised, and its authority is sometimes tested by staff.…*
>
> *The nature of the job and ensuring that the team follow [sic] the Dive Directive and the Canada Labour Code has unfortunately put me in conflict with the staff. While I understand that management is results oriented, it should not be at the expense of the well-being of their staff. At times safety is a necessary inconvenience but a staff violation of the CLC and dive directive is still a violation.*

…

Complacency over the years by the team without the support of management of my role has been frustrating and taxing. None of my decisions have put staff at risk. However, when even the manager does not follow the rules, it sets a bad example.

Performing the duties as per my job description and directive has made me unpopular and at times even reviled. The resulting tense relationships with some colleagues were known to the complainant for some time but were not properly addressed. I have already taken stress leave because of the difficulties in 2013/2014.

…

In the last few years, the pressures of the job have increased significantly, and we have been away from the office and our families much more often. The complainant communicates via email and often to a just [sic] select few. As a team player I had difficulty with this change and coupled with the feeling of being repeatedly disrespected, at times had difficulty coping in a professional manner.

…

[109] On April 23, 2018, the grievor circulated the following email to the UAT:

Good morning All,

The following commentary was provided by the Departmental Dive Committee regarding the 2016 HOIR diving incident, and its subsequent investigation.
Please review at your convenience:

Regarding the 2016 Arctic diving out-of-air/exceeding no-decompression limits incident:

A diver running out of air is an emergency situation. Thanks to training, this incident was handled--not perfectly as practised, but it was handled and an accident was avoided.

Exceeding of no-decompression limits was treated in the standard recognised format.

Three things need to be addressed as standard follow up to any emergency incident:

1) *Who was directly involved in this incident?*

2) Why did this incident occur? Were there mistakes made in the procedure? One example here--air monitoring. Identify mistakes made, record them, share them, own them and be prepared to learn from them and move on.

3) What can be done to prevent this happening again? Determine this, modify procedures or directives as required and share it with all dive staff. This needs to be addressed and handled by all parties affected--management and the dive staff.

> *The final handling of the 2016 incident was completed at a meeting of two people Marc Andre Bernier (Manager) and Michael Eisen (Employee -OSH employee rep).*
>
> *This means effectively that the primary diver involved in the incident met with the OSH investigator(not extremely well be versed in diving practices) to finalise a report. Does this seem at all reasonable?*
>
> *Where is the report and are the answers to Who, Why and What recorded and have they been shared with dive staff?*
>
> *NO meetings of this nature should take place without the Diving Officer responsible for diving safety and at least some other dive knowledgeable person(s) there to assure the facts are not distorted, accounts are accurate and the three items outlined above are satisfactorily addressed.*
>
> *On a related note, the following attachment were the recommendations provided by Dr Harpur following a past DCI incident*
>
> [The first attachment was the subject of a sealing order.]
>
> *Lastly, I have also attached the last two DDC meeting minutes for review.*
>
> [2014 DDC Diving meeting minutes]
>
> [2016-17 Dive Meeting minutes]
>
> *Perhaps we could all meet in before we leave for the field to discuss the above and any other concern's that you may have regarding the dive program, directive, etc.*
>
> *See you at the pool*
>
> …
>
> [*Sic* throughout]

[110] The first attachment contained an email from Mr. Bernier to Mr. Waddell, who was on the National Dive Committee along with the grievor, about dive-safety recommendations that Dr. Harpur had made to him (Exhibit G-15). Mr. Bernier's email was the subject of a sealing order application because it potentially contained advice that Dr. Harpur had provided to Mr. Bernier.

[111] The Supreme Court of Canada has ruled that the party seeking a sealing order bears the onus of justifying its issuance, based on sufficient evidence. What has become known as the "*Dagenais/Mentuck*" test arose from the Supreme Court of Canada's decisions in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835, and *R. v. Mentuck*, 2001 SCC 76. The test has these two parts:

> 1) Is the order necessary 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?
> 2) Do the salutary effects of the 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?

[112] The Supreme Court of Canada had the occasion to consider those principles more recently in the case of *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 33, as follows:

> *[33] Personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest relevant under* Sierra Club*. Dignity in this sense is a related but narrower concern than privacy generally; it transcends the interests of the individual and, like other important public interests, is a matter that concerns the society at large. A court can make an exception to the open court principle, notwithstanding the strong presumption in its favour, if the interest in protecting core aspects of individuals' personal lives that bear on their dignity is at serious risk by reason of the dissemination of sufficiently sensitive information. The question is not whether the information is "personal" to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting.*

[113] Exhibit G-15 consists of several pages, but only the first contains a communication from Dr. Harpur to Mr. Bernier. I accepted the employer's argument that that first page contains information of a personal or medical nature. It remains unclear whether the information and diving recommendations pertained directly to Mr. Bernier or whether they were meant for the UAT's general edification, but since Dr. Harpur did not testify, I chose to err on the side of caution and interpret the recommendations, only for the purposes of the sealing order, as applying to Mr. Bernier.

[114] In the language of the Supreme Court of Canada in *Sherman*, at para. 35, I find that the information on that first page is as follows:

> *… sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an*

> *exceptional order, the affected individual will suffer an affront to their dignity.*

[115] I will not order the entire exhibit sealed, only the first page. This minimizes the compromise to the open court principle. I am satisfied that such an order, pertaining as it does to only one page of text, does not impede the fairness of the process; nor is the public interest compromised in any meaningful way.

[116] Mr. Bernier testified to his displeasure with the grievor's dissemination of what he considered his personal medical information. Mr. Bernier brought his concerns to Mr. Picher, who also testified about his concern that the grievor had distributed the information to the UAT without Mr. Bernier's permission. Both witnesses offered their opinions that the grievor did it in an effort to undermine Mr. Bernier's leadership.

[117] On May 24, 2018, the grievor emailed Mr. Picher about the harassment investigation, stating as follows (Exhibit J-1, Vol. I, Tab 16):

> *Good evening Jarred,*
>
> *I would like to take this opportunity to share some information that I hope will be considered in determining what discipline is warranted.*
>
> *In my letter to the investigator, HR and to yourself dated April 19th, 2018, I acknowledged that I did not always act in a professional manner, and that I have allowed my frustration to get the better of me. During the investigation itself, I also acknowledged that my tone of voice is too elevated at times and have taken responsibility for it.*
>
> *After reading the investigation report it is clear that I must continue my efforts to moderate my tone and communicate more diplomatically to remain with Parks Canada and the team. I do not want my colleagues and management to perceive me in the way as some described in their interviews. I can, and I will learn to acquiesce to management decisions that I disagree with after I have voiced my disagreement in a professional manner. I will also communicate my disagreement with colleagues' decisions in a professional and respectful way. These are skills that can be learned, and I am committed to learning and implementing them.*
>
> *This past year I feel that I have shown progress on all these fronts. Throughout all this adversity I have led field projects, followed directions and worked collaboratively with the team/directorate in [sic] effort to support several field units, partners and Parks Canada's own objectives.*
>
> *After reading the report, I also recognize that I need to apologize to Marc-André and to some of my colleagues for the way I have*

> *treated them in the past. As I have already done with Jonathan Moore Acting manager, this action hopefully will contribute to the overall healing of the unit and I am committed to working with everyone on the team in the future.*
>
> *As you are aware, I took medical leave in 2014 because of a tense relationship with a colleague that caused my mental health to deteriorate. At that time, I began to receive treatment for my mental health issues, including for severe stress and anxiety, among other issues I prefer not to disclose at this time. I recognize now that I need to increase my efforts to address the severe stress and anxiety that I experience in the workplace that led me to elevate my tone and communicate in an unprofessional manner.*
>
> *…*
>
> *As I was already experiencing mental health issues prior to this harassment complaint, these issues have been significantly exacerbated by the complaint process. Reading the complaint, the interviews, and the investigator's report has negatively affected my mental health to the point that I am concerned about my ability to work in the near term. For that reason, I will be consulting further with my physician.*
>
> *I hope in deciding what discipline is deserved, you will consider that I have never been disciplined before, for harassment or for any other reason, in close to 17 years of service. I also feel I have worked extremely hard for Parks Canada throughout these years, and I bring a lot of positive qualities to the job. I hope that you will give me the opportunity to continue to learn and use the news skills I have begun to develop to be a productive member of the organization and the Underwater Archaeology Team.*

[118] Mr. Picher delivered the final harassment investigation report to the grievor on May 17, 2018, and it bears that date. The report relied on the following definition of "harassment" as it appears in a Parks Canada policy (Exhibit J-1, Vol. I, page 324):

> ***Harassment*** *is defined as "any unwelcome and offensive behaviour towards one or more other persons displayed by a person inside or outside the workplace who knew, or reasonably ought to have known, that his or her behaviour could be offensive or hurtful. Harassment usually involves repeated incidents or a pattern of behaviour but it could be an isolated incident. It connotes any act, comment or conduct that demeans, belittles, or causes personal humiliation or embarrassment to an employee, or any act of psychological violence, bullying or threats. It includes harassment within the meaning of the* **Canadian Human Rights Act**. *Harassment may be intentional or not.*
>
> [Emphasis in the original]

[119] The final report concluded that some but not all of the incidents amounted to harassment.

[120] On the witness stand, Mr. Picher was invited to comment on the grievor's written apologies, explanations, and acknowledgements. At every turn, Mr. Picher rejected the grievor's comments as lacking sincerity and considered the inclusion of explanations surrounding the DSO's role purely a defensive stance. Mr. Picher considered it an indication of the grievor's refusal to take responsibility for the consequences of his actions and a lack of remorse.

[121] The grievor did not agree with Mr. Picher on the issue of remorse, and testified to feeling sorry for Mr. Bernier, testifying, "I still care for him, and feel empathy for him. I could also see he is not the same person." The grievor added that while he wanted to apologize to Mr. Bernier face-to-face, he was unable to do so because he had been ordered to stay away from him.

[122] Nevertheless, on the basis of the final investigation report, on May 18, 2018, Mr. Picher suspended the grievor without pay in a letter that reads, in part, as follows (Exhibit J-1, Vol. I, Tab 15):

> *This is further to the letter you received on 17 May 2018 regarding the final harassment investigation report.*
>
> *Given these results, I have determined that your continued presence in the workplace presents serious and legitimate concerns to the Agency. As such, you are hereby suspended without pay pending my full review of this matter. You are not to present yourself at the workplace or contact any employee in the Archaeology and History Branch until you receive authorization to do so.*
>
> *I will communicate with you soon to schedule a disciplinary hearing. The purpose of this meeting will be to establish which disciplinary and/or administrative measure is appropriate.*

[123] The disciplinary hearing took place on September 28, 2018, but a pre-disciplinary hearing was held on August 27, 2018, in advance of which the grievor submitted several documents for Mr. Picher's consideration. Among them was a set of his speaking notes, which he said he read aloud because he was very nervous and did not want to forget anything. The notes were entered into evidence (Exhibit J-1, Vol. II, Tab 22). He testified to his sincerity in his expressions of remorse, and he referred to certain passages from his notes (at pages 27 to 39), as follows:

I would like to start off by thanking you Nathalie Gauthier and Thank you Jarred for the opportunity to speak today

I appreciate the lengths Parks Canada has gone to address this issue

I would especially like to take this opportunity to thank you for granting me the medical extension for this meeting.

I want to use this opportunity to show you that I want to come back to work, I need to come back to work and am prepared to do whatever is required to do so.

…

The investigation and subsequent suspension has given me time for personal reflection and introspection.

…

I wear my emotions on my sleeve and while I am not well versed with political awareness the time away from work also allowed me more time to work on my diplomacy and continue to hone my skill set as an effective communicator. I am learning

…

I am a strong advocate for health and safety, trained and qualified by Parks over a period of many years

I was assigned a specific role by management, specifically handpicked for a job that was very specialised and unique: to be dive officer for the UA team and as an archaeologist

Over the years I have tried to carry out this job best of my ability, and with honour and integrity.

I strived to satisfy the terms in my job description, and also the dive directive.

But most importantly I have been honoured to protect the UAT team

…

As I have shared with you today and in previous correspondence I acknowledge that I have argued issues of health and safety and other related issues too passionately at times.

For this I am sorry and I take responsibility for my actions

Even though these arguments were motivated by my sense of responsibility for the health and well safety of the team, I acknowledge that I must be more diplomatic moving forward.

I will voice my concerns respectfully, and I will accept management decisions even when I disagree with then.

In Regards to the investigation and the Report (I would like to make a few comments)

> *I have read the report and accept it. It has been made crystal clear by the investigation that I have argued health and safety too passionately.*
>
> *For this I am truly sorry.*
>
> …
>
> *I would appreciate that you consider the following in your decision*
>
> *I have a clean disciplinary record in 17 years of service, nothing in Hr file or my evaluations*
>
> *I was never warned or cautioned that my conduct could lead to discipline let alone discharge*
>
> *The incidents of harassment arose out of my concern for the health and safety of the staff. I was raising these concerns about what I viewed were unsafe practices by the team*
>
> *Identifying and advising on health and safety is one of my responsibilities as* [the DSO]
>
> *I recognise that my behavior was inappropriate and have apologised for IT*
>
> *I can share with you the reasons why my voice is sometimes elevated comes from my passion for the job and the fact that I struggled to contain my frustration due to mental health issues*
>
> *Mental illness, stress and anxiety is my new realty and therefore I must diligently undertake measures to address these issues.*
>
> *I will continue follow physicians' recommendations and ensure to take my take the medication*
>
> …
>
> *Through counselling I have sought and continued to work on implementing strategies to improve my mental health and learn to contain this frustration and express myself diplomatically*
>
> *The lawyer Mrs Korngold Wexler has acknowledged this in final report*
>
> …
>
> [Emphasis in the original]
>
> [*Sic* throughout]

[124] The grievor received an email from Parks Canada's senior labour relations advisor on September 14, 2018, inviting him to a meeting on September 28, 2018. At the meeting, Mr. Picher handed the grievor the following letter:

> *Mr. Ronca,*
>
> *This letter will serve to render my decision following the pre-disciplinary hearing held on 27 August 2018. During this meeting we discussed the harassment complaint filed by your manager 23*

> *August 2017, the investigation conducted by [M.K-W] and your actions during and after the investigation. You were represented by Denis McCarthy of the Union of National Employees and I was accompanied by Nathalie Gauthier, Senior Labour Relations Advisor.*
>
> *During our meeting you indicated that you were passionate about safety, which is why you overreact sometimes. You did not demonstrate responsibility for your actions, nor did you appear to understand the seriousness of your inappropriate behaviour, nor the impact that this has had on your colleagues and the Agency's reputation with other stakeholders.*
>
> *I have carefully considered all the information before me and I can only conclude that the bond of trust that is fundamental to the employment relationship has been irrevocably broken. This trust is paramount to safely carry out the duties of your position.*
>
> *Furthermore, your wilful conduct has revealed a profound disregard for the Parks Canada Code of Values and Ethics, the principles by which Parks Canada team members fulfil their roles and responsibilities and which are part of the terms and conditions of your employment with the Agency. This behaviour is unacceptable and can be neither condoned nor tolerated.*
>
> *In determining this disciplinary sanction, I have considered your years of service and your clean disciplinary record as mitigating factors. I also reflected on aggravating factors such as the seriousness of your misconduct, including your ill-mannered behaviour towards your colleagues, your lack of remorse and your apparent failure take responsibility for your actions (sic).*
>
> *Therefore, in accordance with the authorities delegated to me under Section 13(1)(a) of the Parks Canada Agency Act, I am terminating your employment, effective 22 May 2018. Upon receipt of this letter, you are no longer required to report for work.*
>
> …

[125] Mr. Picher testified that he had "no option" but to terminate the grievor because of the workplace stress and tension he had created.

[126] Mr. Bernier, Mr. Moore, and Mr. Harris all testified about an immediate change in the work environment after the grievor was suspended and terminated. The tension created by the grievor's differences of opinion about dive-safety protocols was no longer present, and once again, a sense of collegiality and trust was in place among all the divers.

[127] Mr. Bernier, who has since retired, expressed profound misgivings in his testimony about the prospect of the grievor's return to the UAT. The nature of the

work is such that lives depend on the trust each team member must place in his or her fellow team members. Mr. Bernier feels as though the grievor, through his actions, created a climate of mistrust among his former teammates.

[128] Mr. Picher, Mr. Moore, and Mr. Harris remain with Parks Canada. Mr. Moore and Mr. Harris are still on the UAT, and both testified to the same misgivings as Mr. Bernier about the prospect of the grievor's reinstatement.

[129] Charles Dagneau is a diver on the UAT who worked with the grievor for many years before the grievor was terminated. Mr. Dagneau testified to what he termed a degree of toxicity on the UAT that was present before the grievor's termination and that is still present. There seem to be two camps, testified Mr. Dagneau, those who supported the grievor and those who did not, and a degree of animosity remains between them.

[130] Mr. Dagneau testified to one last interaction with the Minister's office in the summer of 2018. He described a sheltered area near Prescott, Ontario, which the UAT uses for annual recertification dive exercises, and the Minister once again expressed a desire to accompany the UAT on a dive. A dive was scheduled for the site. As the dive supervisor for that particular dive, and since he was responsible for safety issues, Mr. Dagneau testified that he had to see the Minister's recent dive logbook, to evaluate the nature and quality of her recent dives to assess her suitability for the dive in question. Mr. Dagneau also wanted to see the requisite medical certificate clearing her to dive. He testified to making these inquiries of "management" without naming anyone in particular.

[131] Mr. Dagneau testified to "going with the flow" and to allowing the Minister to dive with the UAT at the sheltered site in Prescott, despite not having seen her dive logbook or her medical clearance. He testified that he was keenly aware of what had happened to the grievor under identical circumstances, and he specifically said that he did not want the same thing to happen to him.

[132] Mr. Dagneau testified that he had worked closely with the grievor in the past. They got along very well, and he would have no difficulty working with him again in the future.

[133] Alexandre Poudret-Barré testified by videoconference link from France. He was relatively new to the UAT, having joined in 2016. He testified to strained relations on the UAT. Information was not forthcoming on all projects, which caused him to feel somewhat excluded from the decision-making process. He testified to arguments about the lack of information sharing at team meetings, at which all team members seemed to argue with each other.

[134] Mr. Poudret-Barré could sense tension between the grievor and Mr. Bernier and between the grievor and Mr. Harris and Mr. Moore. When they dove together at the Arctic sites, Mr. Poudret-Barré observed Mr. Harris and Mr. Moore talking disrespectfully about the grievor's capability. Mr. Poudret-Barré was certified as a dive medical technician, and he worked in that capacity on the Arctic dive sites.

[135] The prospect of the Minister diving with the UAT was the subject of much conversation on the UAT, according to Mr. Poudret-Barré, and was the source of a great deal of tension. This witness testified that "No one wanted her to dive with the UAT", yet he said that he interpreted management's messaging as meaning, "she is coming along, no matter what".

[136] Mr. Poudret-Barré testified to reconciliation meetings after the grievor's departure that he did not find very satisfactory because every time the issue of the grievor's termination was raised, the conversation would be shut down. The theme of the meetings was how to improve the workplace environment, but he testified to seeing little progress. In fact, his dissatisfaction with the UAT workplace environment began to affect his health, and he went on a period of medical leave in November of 2019. He had very little to do with the Ottawa office from that point until his departure in March of 2020, when he and his wife decided to relocate to Masseube, France. He has lived there since then.

[137] Carol Pillar is a draftsperson and an artist. She performs contract work for Parks Canada from time to time. She has worked closely with the grievor in the past and always found him pleasant to work with. She testified to working with him in the Fall of 2016, at which time she had received a contract to create drawings of a longrifle, which is a firearm the UAT retrieved from the *Erebus*.

[138] The grievor testified to the devastating impact of his termination on his professional and personal life. His depression spiraled downward, and it took him

some time to find alternate employment. His wife altered her work arrangements to compensate for the loss in income, and his family life was disrupted. He testified that he was unable to purchase Christmas presents for his children that year, which exacerbated his depressive state.

[139] Documents were entered into evidence (Exhibits J-1, Vol. II, Tab 37, and E-2), which detail the grievor's total gross income since his termination. He testified that although his efforts to mitigate financial losses can be easily quantified, other important factors must also be taken into account, including his public service pension, which has been greatly affected since his termination. He testified that he has been frustrated at being unable to use his training and experience as an underwater archaeologist. He also testified to the termination's negative impact on his diving, in that he no longer dives recreationally.

[140] The grievor testified to his desire for reinstatement. He has invested considerable emotional and professional capital to attain a high level of proficiency in underwater archaeology, and he wants to resume work in his chosen field. There is simply no other organization in Canada that does the UAT's work. He acknowledged the potential for some friction on the UAT should he return, but in his opinion, it would not be insurmountable.

IV. The employer's closing arguments

[141] The employer pointed to aspects of the evidence that indicate the grievor's ongoing pattern of unacceptable behaviour in the workplace and to his strained relationships with many teammates. All the witnesses, submitted the employer, described a pattern of behaviour that seemed to increasingly bring the grievor into conflict with his teammates.

[142] Mr. Bernier found the grievor difficult to manage. He interpreted the grievor's actions as intending to undermine his authority.

[143] The employer submitted the case of *Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 Can. L.R.B.R. 1 ("*Scott*") (employer's book of authorities, Tab 1), for its enunciation of the "… three distinct questions in the typical discharge grievance." Page 13 of that decision states this:

…

> *…. First, has the employee given just and reasonable cause for some form of discipline by the employer? If so, was the employer's decision to dismiss the employee an excessive response in all of the circumstances of the case? Finally, if the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?*
>
> *…*

[144] The employer then turned to the definition of "harassment" in a Parks Canada policy (Exhibit J-1, Tab 5, page 240) and noted that similar policy language was present in the case of *Joss v. Treasury Board (Agriculture & Agri-Food Canada)*, 2001 PSSRB 27 at para. 59, as follows:

> *[59] According to the Treasury Board policy, for general harassment to exist, there must be 1) objectionable conduct; 2) the conduct must be directed at the complainant; 3) the conduct must be offensive to that employee; 4) the perpetrator must know or ought to have known, the conduct would be unwelcome; 5) the conduct must demean, belittle, or cause personal humiliation or embarrassment to the complainant; and 6) the incident may be conduct, comment or display made either on a one-time or continuous basis. Therefore, in harassment that is not sexual in nature, it is not sufficient that the conduct was improper and that the perpetrator knew or should have known it would be unwelcome; the object of the conduct must find it offensive, and the conduct itself must be objectionable because it demeaned, belittled, or caused personal humiliation or embarrassment to the victim. As a result, harassment that is not sexual contains both an objective and a subjective element. The objective element is that the conduct must be objectionable and be demeaning, belittling, or have caused personal humiliation or embarrassment. The subjective element is that the victim or object of the conduct must have found it to be offensive for one of those reasons.*
>
> [*Sic* throughout]

[145] The employer submitted that the grievor's behaviour met both the objective and subjective tests for harassment. Mr. Bernier testified at length about the impact of the grievor's behaviour, and there should be no question that he felt harassed. Reference was made to Mr. Bernier's testimony about the August 22, 2017, meeting, at which he had never seen such anger directed at him.

[146] With respect to the objective element of the test, the employer emphasized the subtle distinction between normal work-related disagreements and workplace harassment. Challenging a decision of one's manager, objectively speaking, is

objectionable. The case of *Children's Hospital of Eastern Ontario v. Ontario Public Service Employees' Union* (2015), 260 L.A.C. (4th) 147 ("*CHEO*"), states this at paragraphs 109 to 111:

> ***109*** *The conduct the Grievor engaged in [sic] this case is not the usual sort of yelling or name calling that is commonly recognized as personal harassment. However, the subtle nature of the conduct does not militate against a finding of harassment. Whether the comments or conduct are overt, or whether it is passive non-verbal behavior, a finding of harassment is only dependent on whether the conduct is vexatious and was known or ought to have been known to be unwelcome.*
>
> ***110*** *In the present case, I find the Grievor's conduct was vexatious. I see the logic of the Union's suggestion that one should be cautious in making a finding of harassment on the basis of an individual's personality, because it is inevitable that there will be a multitude of personalities in the workplace. However, personality is not a defense to harassment. People are expected to behave in accordance with the workplace rules of conduct, not their own preferred way of dealing with people. In the present case, the Grievor clearly knew how to behave in a manner that was supportive and respectful. Most of the witnesses testified they had seen her behave in a positive fashion towards certain people at certain time [sic].*
>
> ***111*** *The evidence is also clear that if anyone took a position or view that the Grievor did not support, or even was collegial with such a person, her response to that was to act in an intimidating, ostracizing manner. While the Grievor gave an inordinate amount of evidence about the reasons for all her workplace concerns, addressing workplace disagreements in that manner is simply inappropriate. The issue is not that she had concerns, but rather how she treated her colleagues.…*

[147] The employer stressed the importance of the final sentence in that paragraph. What really matters in this case are not the safety-related reasons behind the grievor's actions but how he brought those reasons forward. A reasonable person, argued the employer, viewing the matter objectively, would find that the grievor's conduct of belittling Mr. Bernier and challenging him on his staffing decision was objectionable and that it warranted a disciplinary response.

[148] The subjective component of harassment, argued the employer, is easily made out by Mr. Bernier's testimony. He was afraid for his safety. He testified to health problems that shortened his career.

[149] The grievor's explanation for his behaviour was not a defence. Arguing health-and-safety concerns does not justify harassing a colleague. The employer referred again to *CHEO*, at para. 110, which states, "… personality is not a defense to harassment."

[150] The employer characterized the many references to the Dive Directive and the work description as red herrings, because the issue is not why the grievor did what he did but how he did it.

[151] In the final analysis, argued the employer, the grievor's safety concerns made little sense, given the UAT's experience diving the Arctic sites, and the DSO's inability to attend each and every dive, given the number of projects that were underway. It was impossible for the DSO to be present at each and every dive.

[152] Turning to the *Scott* analysis of whether the disciplinary measure was excessive, the employer submitted that the grievor's actions amounted to serious misconduct. The pattern of behaviour was sustained, and its cumulative impact on Mr. Bernier and the workplace was very serious. Paragraphs 122 and 123 of *CHEO* state this:

> ***122****… On the spectrum of harassment, the Grievor's conduct only appears to fall at the lower end if each incident is considered on its own. However, the significance and the impact of the Grievor's misconduct was magnified by its insidious and sustained nature. The cumulative impact of her behavior was so significant that it created a situation where people began to doubt their own abilities and worth, and were uncomfortable expressing their own views for fear of her reaction or some sort of reprisal behaviour from her. They described it as "walking on eggshells" or being "in an abusive relationship". Furthermore, this was not one or two incidents of ill-advised behaviour, but rather a pattern of conduct over a number of years towards a group of people with the "target" changing and growing. The impact of the Grievor's behavior is best illustrated by the fact the concerns of her colleagues extended to their physical safety. While I find that there is absolutely no evidentiary basis for such concerns, I accept that these concerns were honestly held by her colleagues. It speaks to how profoundly they were impacted by the Grievor's behavior and the magnitude of the sense of fear and uncertainty her conduct instilled in them.*
>
> ***123*** *The cumulative effect of this sustained pattern of behavior was the creation of a poisoned work environment where staff either avoided her completely or felt they could not express their views on the very issues they were supposed to be discussing – patient care and workplace processes.…*

[153] Similarly, submitted the employer, *Peterborough Regional Health Centre v. O.N.A.* (2012), 219 L.A.C. (4th) 285 at para. 108, states that "[i]t is axiomatic that intimidation and bullying should not be tolerated in the workplace." It states this at paragraph 115:

> *115 In this matter the grievor's actions were extremely subtle, and in that sense were extremely insidious. Bullying and harassment can consist of a single incident, or a series of repeated incidents both of which can have great impact upon the victim of the behaviour.…*

[154] In *Teck Coal Ltd. v. U.S.W., Local 7884* (2021), 332 L.A.C. (4th) 155 ("*Teck Coal*"), behaviour similar to the grievor's in this case was at issue. That decision states as follows at paragraphs 28 and 29:

> *28 … the Union seeks to excuse the Grievor's conduct on the grounds that the Grievor was only bringing up safety concerns about driving to fellow employees. Indeed, the Union says that employees are encouraged by Company policy to discuss such concerns with each other. In relation to the Grievor's conduct with Ms. Power and Ms. Charbonneau, the Union's key defense is that the Grievor did not intend to humiliate, harass, or bully those individuals. It says that the Grievor's conduct did not rise to the level of harassment because there was no intention to harass. The Union claims that because the Grievor is such a large man, his conduct towards others may come across as more intimidating and aggressive than he means it to be.*
>
> *29 I cannot accept these defenses. In relation to discussing safety incidents with fellow employees, the Union's argument completely misses the mark. The problem with the Grievor's interactions with both Ms. Nichols and Mr. Grasdal was not the* subject *of the discussions, but rather with the* manner *of them.…*

[155] The employer drew attention to the repetitive nature of the grievor's misconduct over a period and referred to incidents that occurred before the summer of 2017.

[156] The employer cited *Canadian National Railway Company v. Teamsters Canada Rail Conference* (2022), 338 L.A.C. (4th) 268 ("*CNR*"), as an example of serious misconduct that resulted in termination.

[157] Similarly, argued the employer, in *Teck Metals Ltd. (Trail Operations) v. United Steelworkers, Local 480* (2015), 254 L.A.C. (4th) 333 ("*Teck Metals*"), which dealt with

behaviour that consisted of an aggressive challenge to managerial authority, a discharge was not found excessive.

A. On the issue of reprisal for initiating a *CLC* investigation

[158] With respect to the grievance pertaining to an alleged reprisal for having initiated the *CLC* investigation, the employer submitted that the termination and the *CLC* investigations have no nexus. The case of *Burlacu v. Treasury Board (Canada Border Services Agency)*, 2022 FPSLREB 51 at para. 96, states the analytical principles as follows:

> *[96] …*
>
> *1. Has the complainant acted in accordance with Part II of the Code or sought the enforcement of any of the provisions of that Part (section 147)?*
>
> *2. Has the respondent taken against the complainant an action prohibited by section 147 of the Code (sections 133 and 147)? and*
>
> *3. Is there a direct link between (a) the action taken against the complainant and (b) the complainant acting in accordance with Part II of the Code or seeking the enforcement of any of the provisions of that Part?*

[159] The burden of proof rested squarely on the grievor, which was not met, argued the employer. It legitimately launched an investigation into alleged misconduct. The contemporaneous nature of the investigation and the *CLC* issues did not, in and of itself, create a nexus.

[160] The employer submitted the case of *Ouimet v. VIA Rail Canada Inc.*, 2002 CIRB 171 at para. 56, for the following analytical framework to use in such a case:

> *[56] The Board's role is not to determine if the level of discipline was fair, nor even whether the employer had just cause for taking whatever disciplinary action, as an arbitrator would do in a grievance procedure, according to the collective agreement. Its role is to be satisfied that the employer's action is not tainted with retaliation against the complainant ….*

[161] The employer argued that this case is similar to *Anderson v. IMTT-Québec Inc.*, 2011 CIRB 606, which involved a complainant who (at paragraph 10) "… explained that he had wanted to point out fellow managers' shortcomings in the area of health and

safety on the company site, and this had led to highly acrimonious interpersonal relations among members of management."

[162] The complainant in *Anderson* had exercised a right under Part II of the *CLC* on March 26, 2009, and had been terminated on April 2, 2009. The Canada Industrial Relations Board found (at paragraph 85) that "[t]he balance of evidence suggests that the complainant was suspended and dismissed not because he reported the potential danger posed by the light standard, but because of his behaviour prior to this event and his actions following it."

[163] Thus, submitted the employer, even the contemporaneous nature of a complaint being made and disciplinary action being taken was not sufficient to create a nexus between those events.

[164] The employer submitted that the grievance pertaining to a reprisal under the *CLC* should be dismissed accordingly.

B. On the issue of reinstatement

[165] Finally, argued the employer, should the Board find that the termination was not justified, reinstatement is not appropriate under the circumstances. The case of *Lâm v. Deputy Head (Public Health Agency of Canada)*, 2011 PSLRB 137, stands for the proposition that adjudicators have the jurisdiction to award compensation in lieu of reinstatement, should they deem it appropriate in the circumstances. In making this determination, the Board is entitled to consider the grievor's non-disciplinary conduct, per *Bahniuk v. Canada Revenue Agency*, 2012 PSLRB 107 at paras. 356 and 357, which read as follows:

> ***356*** *What then are the factors to be considered in determining whether the employment relationship is viable? As the employer submitted, the most commonly accepted test is that established in* DeHavilland*. In that decision, having reviewed several cases, the arbitrator set out the following factors "in no particular order" at paragraph 5 of the decision:*
>
> 1. *The refusal of co-workers to work with the grievor.*
> 2. *Lack of trust between the grievor and the employer.*
> 3. *The inability or refusal of the grievor to accept responsibility for any wrongdoing.*
> 4. *The demeanor and attitude of the grievor at the hearing.*

> *5. Animosity on the part of the grievor towards management or co-workers.*
>
> *6. The risk of a "poisoned" atmosphere in the workplace.*

357 *The employer cited* NAV Canada v. I.B.E.W., Local 2228 (Coulter)*, (2004) 131 L.A.C. (4th) 429, where, having set out the* DeHavilland *factors, the arbitrator added at paragraph 16:*

> *Doubtless there are others, for the practices enumerated are but instances of a principle generally understood namely, that where the relationship between the grievor and the employer is no longer a viable one, having been so irretrievably damaged that it cannot be resuscitated, it is inappropriate to order reinstatement even though the penalty of discharge does not meet the just cause standard.*

[166] In the present case, argued the employer, Mr. Bernier, Mr. Picher, Mr. Moore, and Mr. Harris all rigidly opposed returning the grievor to the UAT. The work is so dangerous that a high level of trust is required among all the teammates, and the grievor has irreparably broken that bond of trust. These divers simply do not trust his judgement.

[167] Mr. Bernier has already retired, but Mr. Moore and Mr. Harris both stated that they would consider leaving Parks Canada should the grievor be reinstated. Even those divers who said that they would work with the grievor again, such as Mr. Dagneau, said it would be "shocking and disruptive" to reintroduce the grievor to the UAT.

[168] Cases such as *CHEO* and *Peterborough Regional Health Centre* offer reliable precedents for the importance of closely examining the nature of the work environment when considering reinstatement. In those cases, the hospital setting was a similar environment in that teamwork and cooperation are essential to ensuring proper patient care.

V. The grievor's closing arguments

[169] The grievor submitted that the events in question were all a legitimate exercise of his duty, given his DSO position, to raise safety issues and advocate strongly for the UAT's well-being.

[170] A reasonable person, viewing the matter objectively, argued the grievor, would not find that any of his conduct in any of his meetings or discussions with Mr. Bernier amounted to harassment. Mr. Bernier's perceptions, including his feeling that the grievor was becoming "angrier and angrier" in the July 11, 2017, call or that he had

"fire in his eyes" at the August 22, 2017, meeting, were highly subjective. In *Cara Operations Ltd. (c.o.b. Toronto Flight Kitchen) v. Teamsters Chemical, Energy and Allied Workers Union, Local 647* (2005), 141 L.A.C. (4th) 266 ("*Palmieri*"), the importance of an objective assessment was at issue. The arbitrator stated as follows at paragraphs 18 to 20:

> ***18*** *Arbitrator Shime defined workplace abuse and harassment in Stina at p. 241, which I adopt for the purposes of the case before me, as follows:*
>
> Abuse and Harassment Defined
>
> Abusive conduct includes physical or mental maltreatment and the improper use of power. It also includes a department from reasonable conduct.
>
> Harassment includes words, gestures and actions which tend to annoy, harm, abuse, torment, pester, persecute, bother and embarrass another person, as well as subjecting someone to vexatious attacks, questions, demands or other unpleasantness. A single act, which has a harmful effect, may also constitute harassment.
>
> ***19*** *The above definition indicates that an objective standard is to be applied in determining whether workplace abuse and/or harassment have occurred, as opposed to the subjective impressions of the alleged victim. This is consistent with the leading decision of the Supreme Court of Canada in Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252, wherein Chief Justice Dickson adopted an objective test to the definition of sexual harassment at p. 375.…*
>
> ***20*** *I accordingly adopt the foregoing as authority for the proposition that I must objectively assess the evidence to determine whether workplace harassment has occurred. Consequently, even if the Grievor believed she was a victim of such harassment, and suffered real medical consequences as a result, her perceptions and their result are not enough, in themselves, to support a finding of harassment.*

[171] The workplace context, argued the grievor, is extremely important. Divers discuss safety issues all the time. In his DSO capacity, he had a duty to bring them forward for discussion. He had been working at Parks Canada for over 17 years, and not once had he ever been spoken to or reprimanded about how he brought safety concerns forward. Regarding his difference of opinion with Mr. Bernier, the grievor simply did what he had always done, and did it in the same way.

[172] The grievor disagreed with the employer's contention that serious misconduct occurred. Nothing was premeditated or repetitive about his actions. The grievor was always talking about safety issues because it was his job to do so. No threats were made, no profanity was uttered, no rudeness occurred, and no insults were made.

[173] The grievor disagreed with the employer's contention that his email dated April 23, 2018, violated Mr. Bernier's privacy rights. The Government of Canada's website on material privacy breaches states, in part, as follows:

> *… **A material privacy breach has the highest risk impact and is defined as:***
>
> - *Involving sensitive personal information; **and***
> - *Could reasonably be expected to cause serious injury or harm to the individual ….*
>
> ***"Sensitive personal information" includes, but is not limited to, the following:***
>
> - *Medical, psychiatric or psychological information ….*
>
> *…*
>
> ***"Serious injury to the individual" includes the following:***
>
> *…*
>
> - *Lasting harm or embarrassment that will have direct negative effects on … an individual's career, reputation, financial position, safety, health or well-being.*
>
> *…*
>
> [Emphasis in the original]

[174] The grievor submitted that the email provided by Mr. Bernier to the Dive Committee contained nothing more than commonly known dive-safety precautions and recommendations, with which the UAT was already well acquainted. Nothing in it, argued the grievor, could reasonably be expected to have caused serious injury or harm to Mr. Bernier or to anyone else on its disclosure.

[175] The grievor accepted the *Scott* criteria as an analytical framework and submitted that the first criterion has not been met. Nothing in his behaviour at any of the discussions or meetings could be construed as harassing. The series of meetings was not indicative of a pattern of abusive behaviour, as the employer contended. They were all separate discussions about the same thing.

[176] In the alternative, argued the grievor, if his behaviour is found to have constituted harassment, the penalty imposed was disproportionately harsh. He submitted the case of *Upper Grand District School Board v. Canadian Union of Public Employees, Local 256*, [2004] C.L.A.D. No. 282 (QL), which dealt with a school caretaker whose 10-day suspension for engaging in what was described as "extremely abusive" behaviour was reduced to 2 days. When he was instructed not to use vinegar in a scrubbing machine, he said this: "I'll use whatever you want, Bridgitte, I'll even piss in the machine". The caretaker had a disciplinary history, including suspensions.

[177] In the case of *Ajax Pickering Transit Authority v. Canadian Union of Public Employees Local 129-01* (2003), 123 L.A.C. (4th) 51, a transit operator was suspended and soon after that terminated for uttering, "What do I have to do to be heard around here, come in and shoot someone?"

[178] This, the grievor submitted, was far worse behaviour. No threats of any kind, overt or otherwise, were ever uttered by the grievor. It came as a shock, a surprise, and a disappointment to him to learn, at the hearing, of Mr. Bernier's fears for his safety. Nothing in the evidence, argued the grievor, could have given rise to any such fear. It was an unreasonable and disproportionate reaction on Mr. Bernier's part.

[179] In *Canada Safeway Ltd. v. United Food and Commercial Workers, Local 401*, [2003] A.G.A.A. No. 60 (QL), an employee was terminated for becoming angry in the course of a discussion about time off. Words were exchanged, and then he lightly shoved his supervisor on the shoulders with the palms of his hands. He had a disciplinary record and had been suspended for a similar incident two months earlier. He was reinstated on the condition that he receive anger-management training. This misconduct, argued the grievor, was also much more serious because there was never even the hint of violence in any of the interactions with Mr. Bernier.

[180] In *Canada Post Corp. v. Canadian Union of Postal Workers*, [2016] C.L.A.D. No. 189 (QL) ("*Canada Post*"), a postal worker with a history of suspensions was terminated for engaging in bullying and intimidation. The employee was terminated for doing the following in the course of a single shift:

- directing profanity at other employees;
- calling co-workers "babies", stating the following: "I think I will go to Walmart and get them some Kleenex", and later approaching one of the co-workers

with a box of Kleenex and stating, “Don’t cry too much about me being in the way”; and
- directing that co-worker to give a box of Kleenex to another co-worker he considered a “baby”.

[181] In *Canada Post*, four other disciplinary suspensions were imposed in the 12 months prior to the shift which resulted in the termination. Page 1 of the decision describes the previous suspensions:

> *… a one-day suspension for an unauthorized absence from his workstation; a two-day suspension for making inappropriate comments to his supervisor; a three-day suspension for delay of the mail; and a five-day suspension for inappropriate behaviour on the work floor. These suspensions were incurred within 12 months of his termination ….*

[182] Despite such a strong aggravating factor, the grievor noted, the employee in *Canada Post* was reinstated, and his termination was replaced with a sanction of one months’ suspension. The grievor argued that he was never sarcastic and that he did not belittle or humiliate Mr. Bernier. Nor did the grievor have a disciplinary record, unlike the employee in *Canada Post*. In similar fashion, argued the grievor, he should be reinstated.

[183] In *Cyr v. Parks Canada Agency*, 2016 PSLREB 111, a 30-year seasonal employee experienced some health problems requiring accommodation and was advised that he would be placed on sick leave indefinitely. He did the following (at paragraph 27):

> *[27] … immediately lost his temper and shouted that the employer was going to pay; that he would cause a ruckus; and that he would take his boat, tour the islands, and bother visitors by playing music very loudly. When Ms. Chrétien tried to calm him down by stating that there were different options to consider, he turned against her, insulted her, and said, “[translation] You’re going to pay for this,* ma calice *(curse in Quebecois), when you come back to Havre.” His tone was so angry that his words frightened Ms. Chrétien, even though she is inured to the reactions of employees, who do not always like what human resources has to tell them.*

[184] The decision-maker in *Cyr* found the 10-day suspension excessive because although the employer recognized a clean disciplinary record as a mitigating factor, it did not consider the context in which the grievor had become angry. In the present matter, argued the grievor, no such angry outburst occurred, and no profanity was ever used. Most importantly, he argued, the employer ignored the context in which the

misconduct occurred. The employer went so far as to label as a "red herring" the context in which the discussions between Mr. Bernier and the grievor took place.

[185] Quite the contrary is true, argued the grievor. Context is all-important. The grievor was just doing his job, arguing safety issues.

[186] The grievor argued that all the cases that the employer cited to support termination feature behaviour much worse than that he displayed. In *Lâm*, even ongoing and persistent belligerence was not sufficient to justify termination. The grievor argued that on the strength of the precedents offered by the case law, a verbal or written warning should have been imposed on him.

[187] The grievor argued that he was not solely responsible for the workplace tension since many other things were going on at the time. Both Mr. Dagneau and Mr. Poudret-Barré described some ongoing animosity on the team. In particular, the Minister's persistence to accompany the UAT on a dive to the *Erebus* site created a great deal of workplace tension, and the grievor should not be faulted for doing his DSO duty by opposing the Minister's plan.

[188] Turning to the mitigating circumstances, the grievor argued that his clean disciplinary record should have been given considerable weight. In all his years as the DSO, in situations in which his decisions as the DSO gave rise to workplace tension (the decision to deny clearance to dive on medical grounds to Mr. Boyer's spouse, for example), he was never told that his tone or his stance were inappropriate. How could the termination be justified when he simply did what he had always done? Mr. Picher's contention that he had "no option" but to terminate the grievor's employment was preposterous, he argued. If behaviour is thought inappropriate, management not only **can** talk to the employee about it, but also, it **should**. Termination should not be the first course of action.

[189] The context in which the disagreement between Mr. Bernier and the grievor arose must be taken into account as a mitigating factor. The entire team was aware of the deaths that had occurred in the past, and everyone knew that the grievor, as the DSO, had a duty to uphold safe diving practices.

[190] The grievor's attempts to find a way to engage the conflict-resolution process on August 1, 2017, must also be considered as an important mitigating factor. He was

looking for a peaceful resolution and was not seeking to escalate the conflict. In his communications with Mr. Picher, he frequently mentioned his willingness to participate in an informal conflict-resolution process.

[191] Obviously, the employer was not concerned about the grievor's ability to perform his job because it dispatched him to the Red Bay site in October of 2017. Its continuing confidence and trust in him, despite the ongoing harassment investigation, should be taken into account as a mitigating factor.

[192] Another mitigating factor, argued the grievor, was his cooperation and honesty throughout the harassment investigation. He was not argumentative or defensive; he simply stated repeatedly that as the DSO, he had a duty to uphold safe diving practices.

[193] The grievor argued that Mr. Picher's perception that he lacked remorse is not borne out by the evidence. Many times in his correspondence, he shouldered his share of the blame for the workplace tension as a result of the decisions he had to make as the DSO. He would have apologized face-to-face to Mr. Bernier, as he testified, but he was told to stay away from him.

[194] Mr. Picher testified that he felt that he had no option but to terminate the grievor because of his impact on the team. This was a nonsensical and illogical statement because the only reason the grievor found himself at odds with Mr. Bernier in the first place was due to his DSO obligations. It is important to note that all the employer's witnesses testified to an improvement on the team after the DSO position was abolished and dive safety became a collective responsibility. The grievor argued that it is unfair that he alone should be held responsible and made to pay.

[195] With respect to the reprisal issue, argued the grievor, the circumstances of his termination lead to the inescapable conclusion that he was terminated, at least in part, for initiating the *CLC* investigations.

[196] The grievor's DSO duties had their origins in Part II of the *CLC*. He had legitimate concerns about the Dive Directive not being complied with. He agreed with the employer that the Board's duty is not to pronounce on the validity of the *CLC* issues or on safe diving practices, but it is important to note the changes that occurred after recommendations were made, after the safety investigations concluded. It is not

as though the grievor made things up. Some safety issues were identified, and these issues were addressed, in large part because of the *CLC* investigations.

[197] It is indisputable, argued the grievor, that the *CLC* investigations caused a great deal of workplace tension. Both Mr. Bernier and Mr. Picher, as well as Mr. Harris and, to a lesser extent, Mr. Moore, said as much in their testimonies. Mr. Bernier (and most notably Mr. Picher) were worried that the *CLC* investigations would scuttle the UAT's projects. Mr. Bernier testified to the friction that the investigations caused the team and to his fear that they would, in his words, "take everything down". Mr. Picher testified that this "destroyed the fabric of the team."

[198] Management and employees alike seemed unhappy with the DSO's ability to create such an impasse, which is why the position was abolished, submitted the grievor. It was not his fault, but he certainly paid the price for it. No other conclusion can be reached, he argued, but that it all came from his execution of DSO duties, which had their origins in Part II of the *CLC*.

[199] The case of *Ouimet* stands for the proposition that retaliation need not be the only reason for a termination; it only taints the decision to terminate. Paragraph 56 states as follows:

> *[56] The Board's role is not to determine if the level of discipline was fair, nor even whether the employer had just cause for taking whatever disciplinary action, as an arbitrator would do in a grievance procedure, according to the collective agreement. Its role is to be satisfied that the employer's action is not tainted with retaliation against the complainant for his role as co-chairperson of the committee and other related activities.…*

[200] Since the termination was a disproportionately harsh response to the grievor's behaviour, and since the *CLC* investigations had such a profoundly negative impact on the workplace, the inescapable conclusion must be that the decision to terminate him was at least tainted by, if not directly linked to, the investigations initiated by the grievor under the *CLC*.

A. The grievor's position on reinstatement

[201] The grievor argued that reinstatement is the only viable option. His life work is as an underwater archaeologist, and nowhere else in Canada can he employ his skill set other than with the UAT.

[202] Mr. Moore and Mr. Harris are still leaders on the UAT, and their testimonies leave no doubt they would not be happy to work with the grievor again and that they may consider other options, but that cannot be the reason that the grievor, who was unjustly terminated, cannot be reinstated. There is no question that things would be awkward at first, but the grievor has always been forthcoming and straightforward in his dedication to rebuilding trust on the team.

B. The grievor's position on remedy

[203] The grievor seeks the following as remedy:

1) that the suspension without pay and the termination both be rescinded;
2) that his complaint under s. 133 of the *CLC*, alleging that his termination was a reprisal for having initiated the *CLC* complaint, be allowed;
3) that he be compensated with full back pay, with interest, including pay for the loss of overtime, which averaged $30 000 to $40 000 per year; and
4) that he retain full seniority and regain the pension benefits that he has lost.

[204] The grievor also asked that the Board remain seized of this matter to permit the full execution of the terms of his reinstatement.

C. The grievor's additional arguments regarding aggravated damages

[205] The grievor submitted the case of *Lyons v. Deputy Head (Correctional Service of Canada)*, 2022 FPSLREB 95, in support of an application for aggravated damages. Also cited was the case of *Mattalah v. Treasury Board (Department of Foreign Affairs, Trade and Development)*, 2018 FPSLREB 13.

[206] Section 228(2) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2) specifies that after considering a grievance, the Board must render a decision and make the order that it considers appropriate in the circumstances.

[207] In the course of the hearing, argued the grievor, testimony was received that characterized him as a violent and dangerous man. Mr. Bernier and Mr. Picher effectively stated that "reinstatement would endanger the lives of the other members of the UAT". It was a completely disproportionate and exaggerated reaction, which resulted in considerable psychological harm to him. He found those new revelations extremely hurtful.

[208] As a result, the grievor also seeks $50 000 in aggravated damages.

VI. The employer's rebuttal

[209] The exemplary damages application is completely unwarranted, submitted the employer. To begin with, the application, arising as it did on the last day of the hearing, not only expanded the scope of the grievances at issue, but also, it fundamentally changed them because they never mentioned exemplary damages. This is at odds with *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.).

[210] Enlarging the scope of a grievance with respect to corrective measures was also at issue in *Tulk v. Deputy Head (Department of National Defence)*, 2020 FPSLREB 25, which stated the following at paragraph 44:

> *[44] The grievor is not permitted to change the nature of his grievance into something beyond the investigation scope or to add to the requested corrective measures (see* Burchill *…). An adjudicator's jurisdiction is determined by the terms of the original grievance (see* Schofield v. Canada (Attorney General)*, 2004 FC 622). The grievor could not fundamentally alter the nature of his grievance ….*

[211] Similarly, *Cameron v. Deputy Head (Office of the Director of Public Prosecutions)*, 2015 PSLREB 98, stated this at paragraph 88:

> ***88*** *I agree with the employer that a grievance and the remedies cannot be modified at adjudication, as stated in* Burchill*. If I had jurisdiction and were to allow the grievances, I would only consider awarding the remedies requested in the grievances. As for the grievances themselves, their scope is limited to the allegations that the employer failed to provide a proper and unbiased review of her position and that the employer failed to investigate her formal complaint about the alleged bias and lack of transparency in the review process. I will not deal with the grievor's submission made at the hearing about the employer's alleged failure to report a work-induced illness arising from stress in the workplace, as it was not part of the grievances before me.*

[212] Thus, argued the employer, the Board does not have jurisdiction to consider the issue of aggravated damages. Even were it to find that it has jurisdiction, damages are not warranted because of the high threshold set in *Honda Canada Inc. v. Keays*, 2008 SCC 39, which stated this at paragraph 57:

> *[57] Damages resulting from the manner of dismissal must then be available only if they result from the circumstances described in* Wallace*, namely where the employer engages in conduct during*

> *the course of dismissal that is "unfair or is in bad faith by being, for example, untruthful, misleading, or unduly insensitive" ….*

[213] There is no hint of bad faith, argued the employer. There was perfect transparency throughout the investigative process, due process was followed when it administered discipline, and the grievor was permitted to keep working throughout the investigative process.

VII. Decision and reasons

[214] The employer cited *Cooper v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 119, for the proposition that if a disciplinary measure is within a range of reasonable outcomes, it should not be disturbed. I disagree with this proposition. The grievances and the complaint before me were heard *de novo.* I am not tasked with an analysis of whether dismissal lies within a range of reasonable outcomes. I owe no deference to the employer's decision to terminate the grievor. In any case, my decision will show that termination was not within the range of reasonable outcomes.

[215] *Scott* has been correctly cited as the foundation for analyzing termination cases. To paraphrase, its criteria are as follows:

- Was there conduct that warranted a disciplinary response from the employer?
- Was the disciplinary measure (termination, in this case) excessive?
- If so, what disciplinary measure is appropriate?

A. Was there conduct that warranted a disciplinary response from the employer?

[216] To begin with, I agree with the decision maker in *Palmieri* on the importance of establishing, on an objective standard, whether harassment occurred. The victim's subjective perceptions, as stated at paragraph 20 of *Palmieri*, "… are not enough, in themselves, to support a finding of harassment."

[217] I find the present circumstances similar to those described in *CHEO*. Each incident involving Mr. Bernier was so subtle that on its own, it did not amount to harassment. Four meetings took place in a relatively short period, as follows:

- July 11, 2017 (the 90-minute call about staffing the Arctic dive sites);
- July 31, 2017 (the follow-up meeting to the July 11 call);
- August 15, 2017 (the call about Arctic site security); and
- August 22, 2017 (the OHSC meeting).

[218] The subject matter of all those meetings was the same. Mr. Bernier was unequivocal and unwavering in his decision to remove the grievor from the Arctic dive sites. The grievor felt this decision gave rise to safety issues. This was the only subject on his mind.

[219] I agree with the employer that the manner in which the grievor raised his concerns was more important than the subject of his concerns, but I disagree that the subject matter is a complete red herring.

[220] As the DSO, the grievor felt that his presence at the Arctic dive sites was necessary. It is not my place to determine whether his stance on this issue is justifiable, only that it was a reasonably held belief on his part, and I find that it was. Historically, the DSO played a major role in dive safety, and the testimonies of the witnesses established that the DSO was, in fact, present at a significant percentage of UAT dives. The expanding number of dive sites across Canada made it impossible for the DSO to be physically present at each and every dive.

[221] Mr. Picher correctly assessed the situation as having its roots in an outdated Dive Directive that had the potential to bring the DSO into conflict with the manager. Conflict is exactly what happened. I find it extremely important to note that soon after the grievor's termination, the Dive Directive was significantly revised so as to (among other things) eliminate the DSO position and to make dive safety a collective responsibility rather than place safety issues squarely on the shoulders of one individual. The employer has tacitly acknowledged that the outdated directive was a major part of the problem. Perhaps a timely revision of the Dive Directive should have been the focus of attention, rather than the grievor's termination.

[222] In any case, the subject matter of the grievor's discussions with Mr. Bernier is not a red herring at all. It is an important part of the analysis.

[223] The 90-minute call on July 11, 2017, was the first time the grievor raised his concerns, and it was cited as the first incident of harassment. An hour-and-a-half was a very long time to discuss Mr. Bernier's managerial decision, but it indicates how important the safety issue was to the grievor. In their conversation, the history of the DSO position was discussed, as was the need to exercise managerial discretion when allocating resources. They also discussed personnel assigned to the Arctic sites, dive-safety issues generally, and safety issues at the *Erebus* site in particular. Mr. Bernier

said that the grievor raised his voice at times, and Mr. Bernier did not remember raising his voice. The grievor said that at times, both voices were raised.

[224] I accept Mr. Bernier's testimony about his frustration at having to conduct a 90-minute call with the grievor while he was busy packing for a trip to England to speak at an important international conference about the *Erebus* and *Terror*. While I find it more likely than not that both parties raised their voices at times, I also find that not much hinges on this point. The important thing is that there was no profanity, there were no threats, and there was no disrespectful commentary, just disagreement over the DSO's role.

[225] Since this issue was not resolved, the two agreed to resume their discussion later, which to me is an indication of the relatively benign nature of the discussion. Had the call been characterized by disrespectful language or profanity or by aggressive or threatening behaviour, there is likely no way that Mr. Bernier would have agreed to a subsequent face-to-face meeting.

[226] The two met a few weeks later, on July 31, 2017. The testimonies of the grievor and Mr. Bernier, as well as the grievor's meeting notes, reveal no indication of unacceptable behaviour. The same issue was on the table, and neither party changed his approach. The grievor simply refused to take no for an answer. Again, nothing about the July 31, 2017, meeting amounted to harassment.

[227] The discussions of July 11 and 31, 2017, did not include an independent, impartial participant, but there was one on the August 15, 2017, call about site-security issues. Parks Canada Law Enforcement Officer Halliday testified about the call. Mr. Halliday remembered the grievor sounding as though he was upset at not being kept in the loop about site-security issues, but he recalled no aggressive behaviour. Once again, considered in isolation, nothing about the August 15, 2017, call can be considered harassment. There is no evidence of profanity, raised voices, inappropriate or insulting or disrespectful commentary, or threats.

[228] The straw that broke the camel's back as far as Mr. Bernier was concerned was the August 22, 2017, meeting with the OHSC. Mr. Bernier made his harassment complaint the next day. The meeting took place in the company of a few other people, but only one participant testified, other than the grievor or Mr. Bernier. Mr. Hammer, who then was the director of conservation and collections at Parks Canada, was on the

OHSC and recalled the grievor asking a question about the OHSC's impartiality. Mr. Hammer recalled the grievor turning to Mr. Bernier and asking, "And what do **you** think about that?" Mr. Hammer said that the grievor spoke with intensity and passion.

[229] Mr. Bernier spoke of fire in the grievor's eyes and of his feeling that he had never seen such anger directed at him. I do not doubt the validity of Mr. Bernier's feelings, but there is simply no objective evidence to support the contention that the grievor behaved in an overtly threatening or aggressive manner at the August 22, 2017, meeting.

[230] Mr. Hammer testified that he was unaware of the context in which the question was raised. This is important because it reveals that Mr. Hammer had no stake in the game and was as objective an observer as one might hope for. He recalled finding nothing untoward in the grievor's question. More to the point, Mr. Hammer saw nothing untoward in the grievor's behaviour. Once again, I cannot find any element of workplace harassment at the August 22, 2017, meeting, when it is considered in isolation.

[231] However, similar to the decision maker in *CHEO*, I must take a broader view of things and consider the cumulative impact of the meetings when determining whether the grievor's behaviour amounted to harassment.

[232] There is room in the workplace for a healthy discourse on safety issues. I disagree with the employer's characterization to the effect that disagreeing with one's boss is objectionable in and of itself. The context must be considered, which is where the subject matter of all of the meetings becomes important.

[233] The grievor raised what he felt were legitimate safety concerns. It is not my place to pronounce on the validity of his concerns, but it is not as though he fabricated things out of thin air. His DSO position, according to the Dive Directive and the work descriptions, placed him in a unique position on the UAT to raise safety issues. It was his duty to raise them.

[234] The problem is that he just did not know when to quit. Mr. Bernier did not waffle or waver at any point; he remained steadfast from the outset in his decision to assign the grievor to UAT projects other than those in the Arctic. If this did not become crystal clear to him after the 90-minute call on July 11, 2017, it should

certainly have become clear after the face-to-face meeting on July 31, 2017. Mr. Bernier made it clear (he was certainly very clear in his testimony) to the grievor that he felt that Mr. Harris and Mr. Moore were perfectly capable of running a safe dive program in the Arctic, and the presence of the DSO at each and every dive was not necessary.

[235] That should have been the end of the matter because all the witnesses, including the grievor, agreed that it was within Mr. Bernier's authority as manager to allocate resources between the UAT's projects. Unfortunately, the grievor did not let the matter drop, and he continued to press ahead with his concerns.

[236] I agree with the grievor that safety issues were at the heart of the telephone discussion with Mr. Halliday on August 15, 2017. The last thing that Parks Canada needed was the possibility of tourists or recreational divers attempting to gain unauthorized access to the *Erebus* and *Terror* wreck sites. Mr. Bernier testified that he took special measures to ensure that the grievor was on the call, and for good reason. Safety and liability issues were within the grievor's area of responsibility as the DSO. I disagree with the employer's characterization of the grievor's behaviour as inappropriate on the August 15, 2017, call. There was nothing inappropriate about the grievor's behaviour.

[237] The grievor called the August 22, 2017, meeting due to an earlier discussion with Mr. Proulx, who said this to the grievor (to paraphrase): "I have management's take on the issues, I work for management, and I don't need to inquire further". It is easy to understand the grievor's frustration with this point of view, which is why he wanted to call the OHSC meeting. It was probably not necessary for him to turn to Mr. Bernier and ask, "And what do **you** think?" because he already knew what Mr. Bernier thought, and he had known since July 11, 2017. Obviously, he disagreed with Mr. Bernier's position, but he made that known as well, and the August 22, 2017, meeting was the point at which the cumulative weight of the previous discussions brought the grievor across the foul line. This situation was no longer a simple discourse on safety issues. Objectively viewed, the grievor finally became directly and openly insubordinate. I disagree that his behaviour at the August 22, 2017, meeting was, as the employer submitted, belittling or demeaning. But it was the straw that broke the camel's back. His inability to take no for an answer amounted, at that point, to insubordination.

[238] The first of the *Scott* criteria is met; the cumulative weight of the July 11, July 31, and August 22, 2017, meetings amounted to insubordination, and mild discipline was warranted for it. I do not include the August 15, 2017, call with Parks Canada Law Enforcement because even Mr. Bernier recognized the wisdom of including the DSO in a call about dive-site security in the Arctic and the related safety and liability issues.

B. Was the disciplinary measure (termination, in this case) excessive?

[239] The second step in the *Scott* analysis involves considering the gravity of the misconduct as well as the aggravating and mitigating factors.

[240] I disagree with the employer. It was not serious misconduct. The cases that both the grievor and the employer supplied described behaviour much worse than the grievor displayed in his three interactions with Mr. Bernier. In *Teck Coal*, termination was justified on the basis of conduct that included the following interactions with four different individuals:

> …
>
> *14 … She said that he put his finger to her face and said, "Why would they offer training to you? ….*
>
> …
>
> *17 … the Grievor was standing about 15 feet away from her. She says that he yelled at her in an angry tone as he walked towards her. She said he yelled loudly enough that those around the area could hear… She said he looked and sounded mad. He came to within two feet of her.…*
>
> …
>
> *19 … She testified about an interaction in the mining pit where her vehicle and the [sic] that of the Grievor had what might have been a "near miss." According to her, the Grievor berated her on the radio, which is overheard by all drivers in the pit. That caused her to be worried for the rest of that shift that she might have to have further interactions with him. She said that at the end of the shift, when the drivers got into the pit bus to take them to their locker areas, the Grievor, in the presence of others on the bus, brought the incident up again, "very angrily." She said that both on the radio and in the bus, he was condescending and that she felt humiliated and embarrassed.…*
>
> *20 Mr. Grasdal testified that the Grievor approached him at his locker at the end of a shift (other workers were also there changing) in an aggressive and loud manner and told him that he (Mr. Grasdal) did not know how to do his job… there was a second event a week or two later. Again, the Grievor approached him at*

> *his locker and berated him, again suggesting that he did not know how to do his job.…*
>
> *…*

[241] The chief distinction between *Teck Coal* and the present situation is the seemingly indiscriminate nature of the bullying by the grievor in *Teck Coal*. He targeted four different individuals, one of whom he bullied twice. In the present case, the grievor did not display anywhere near the same level of aggression and did not randomly lash out at others.

[242] The employer also submitted the *Charinos v. Deputy Head (Statistics Canada)*, 2016 PSLREB 74, decision to support its contention that the grievor's behaviour was repetitive. In *Charinos*, the employee was first given a verbal reprimand for inappropriate behaviour in 2013, then the following (at paragraphs 5 to 8):

> ***5*** *The grievor received the three-day suspension for failing to do portions of his mail run on July 8 and 9, 2014; for failing to complete mail tracking sheets as directed on July 8, 9, and 10, 2014; and for disappearing on July 9, 2014, after completing part of his mail run.*
>
> ***6*** *Approximately a month-and-a-half later, the respondent imposed a five-day suspension without pay on the grievor for failing to complete his mail rounds on August 21 and 22, 2014, for again failing to complete mail tracking sheets as directed by the respondent, and for sending an email critical of his manager to senior management and copying it to his supervisor and union.*
>
> ***7*** *Following a workplace accident in late summer or early fall 2014, the grievor required accommodation. He was assigned to the task of address searches. Despite that change of duties, his behaviour in the workplace continued to be unacceptable. During this period, he received the 10- and 20-day suspensions without pay for his unacceptable behaviour. As indicated, he did not grieve them.*
>
> ***8*** *By December 11, 2014, after the 20-day suspension was completed, the respondent continued to have concerns with the grievor's behaviour in the workplace. On both December 11 and 15, 2014, he still did not properly conduct address searches. He was away sick on December 14, 2014. On December 15, 2014, the respondent convened a fact-finding investigation into his ongoing refusal to comply with directions. On December 16, 2014, he sent another email critical of his supervisor and on the same day made a call to his assistant director's home in an attempt to intimidate him. The assistant director recognized the grievor's voice and reported the call to senior management. As a result, the grievor was terminated ….*

[243] The *Charinos* case describes far worse behaviour than the grievor in the present matter displayed. In fact, I find that *Charinos* has little in common with the present set of facts. *Charinos* is a textbook case of positive, progressive discipline. Once misconduct is identified, it must be addressed immediately by means of a short, sharp disciplinary response. Once the individual has been made aware that inappropriate behaviour will attract a disciplinary sanction, and the individual continues to engage in the same misconduct, progressively harsher sanctions must be imposed in an effort to correct the behaviour in question.

[244] In *Charinos*, the grievor was given two reprimands and three increasingly lengthy suspensions before he was terminated. In the present matter, the grievor was terminated the first time he stepped offside. One-time misconduct committed by an individual with an otherwise clean disciplinary record can certainly result in dismissal, but the misconduct has to be serious indeed.

[245] As I have noted, each of the grievor's individual interactions with Mr. Bernier was insufficient to warrant a disciplinary response, so the principle of positive and progressive discipline does not apply. Nothing occurred in the July 11, 2017, 90-minute call that warranted discipline. The same was true for the July 31, 2017, face-to-face meeting. Only the cumulative effect of the grievor's persistence after the August 22, 2017, meeting brought matters over the threshold. The cumulative effect, however, even taking into account its profound effect on Mr. Bernier, did not warrant a response anywhere near a termination or suspension.

[246] The employer submitted *CNR* as an example of serious misconduct resulting in dismissal. The similarity between *CNR* and the present matter is apparent. At paragraph 35, *CNR* states, "The Grievor is a long-service employee. At the time of his discharge, he was fifty-two years old and had thirty-one years of service. He had no active demerit points. These are significant mitigating factors." I find these quite similar to the grievor's circumstances, as he was also in his fifties and had 17 years of discipline-free service.

[247] However, the similarity ends there. In *CNR*, the employee at issue had harassed a female co-worker with a series of approximately 24 emails over 3 days. The emails are reproduced in full at paragraph 5 of *CNR*, but these extracts from them will suffice to distinguish *CNR* from this case:

…

- *… your emoji means shit to me …*
- *Kiss this* [followed by five middle-finger emojis]
- *…False pretence, its all bullshit, you are only fooling yourself … you are such a fraud! …*
- *… Good thing you had the indians in your corner…*
- *… SUCH BULLSHIT …*
- *… You don't think people are seeing through your propaganda? Think again you selfshit bitch!*
- *So fare you well …*
- *Upon a knife*
- *… age is upon your back….shall Andrew enjoy the aged [Coworker name] of shaggy skin???? A young queen of freshness is near….Wake up….wrinkled…..*
- *… fuck we are all old…look in the mirror……We both are ugly and got big fuckin heads….*
- *You are sick in the head……*
- *… sent from thee to thee to be upon face book…..fuck…..you sickie in the head…*
- *I have pics of you…dirty ones…a friend has sent me Do you wish me to tell? ….*

[*Sic* throughout]

[248] Nothing in the grievor's messaging to Mr. Bernier even approached the racist, misogynist, lewd, insulting, and profane rants authored by the *CNR* employee, whose termination grievance was quite rightly dismissed by the decision maker.

[249] The employer also submitted the case of *Teck Metals* as an example of misconduct resulting in dismissal. I do not find *Teck Metals* on all fours with the present matter. To begin with, the individual in *Teck Metals* had a lengthy disciplinary record and was warned in January 2012 (at paragraph 13) that "[t]his discipline places [him] on the cusp of termination". Further incidents of insubordinate behaviour occurred in 2012, and then an incident resulting in a disciplinary measure occurred in June 2014. Then, on November 14, 2014, the individual became angry about an overtime situation (at paragraph 18) and then "… took a felt pen out of his pocket and wrote 'you fucking fudge bucket' and 'Bob's boy toy Roy' on the wall above where Crockett sits to 'shame' him."

[250] I find the conduct of the individual in *Teck Metals*, occurring as it did following a program of positive and progressive discipline, far worse than the grievor's behaviour. *Teck Metals* states this at paragraph 89:

> *89 I am cognizant of the serious impact termination will have on the Grievor. Dismissal is challenging for any employee, but is particularly difficult for an individual at his stage of life and after over 34 years on the job. However, even giving those factors significant weight, they are insufficient to overcome the other circumstances. I cannot require the Employer to do more than it has already done to try and work with him. I conclude that termination was not an excessive response.*

[251] There was no program of positive and progressive discipline in the present case.

[252] The employer submitted the *Munroe v. Treasury Board (Department of National Defence)*, 2021 FPSLREB 136, decision as an example of a pattern of behaviour that attracted a disciplinary response. Again, I find that the main point of departure from the circumstances in this case was a program of positive and progressive discipline. In *Munroe*, the employer engaged in a lengthy and painstaking rehabilitation program after numerous incidents of unjustified absences and inappropriate behaviour for which discipline was meted out, as well as a series of performance meetings and letters of expectations. All that is absent from the present set of facts.

[253] The employer referred to the impact of the harassment on Mr. Bernier as an indication of the gravity of the misconduct. I had the opportunity to view Mr. Bernier's demeanour on the witness stand. He claimed to be weak and in ill health, and I agree, he seemed so. Other witnesses, such as Mr. Harris, Mr. Moore, and Mr. Picher, noted that Mr. Bernier's well-being deteriorated appreciably following the interactions with the grievor. I accept all that, but I have difficulty placing the blame for all of Mr. Bernier's health issues squarely on the grievor's shoulders. To begin with, the misconduct at issue was not all that serious, when viewed objectively.

[254] Many other significant workplace events undoubtedly contributed to the stress load Mr. Bernier faced in the summer of 2017. The international significance of the discoveries of the *Erebus* and *Terror* placed additional demands on his time. He testified to how he was preparing to speak at an international conference on the Franklin expedition on July 11, 2017. The stress associated with international recognition as an eminently qualified underwater archaeologist and the leader of the

team tasked with the stewardship of historically important sites was probably more "good" stress than "bad", but it must have been stressful all the same.

[255] Mr. Bernier was being called on to allocate resources between four different projects: Red Bay, the TSW, the Gulf Islands, and the Arctic sites. Mr. Picher, Mr. Bernier, Mr. Harris, and the grievor all testified to the increasingly strident demands that different stakeholders were placing on the UAT to deliver on its obligations with respect to all the different projects. Just one person was tasked with allocating resources between all these pressing demands, namely, Mr. Bernier.

[256] There was also the *CLC* investigation, which both Mr. Bernier and Mr. Picher described as having "snowballed into a full-on program review". Responding to the investigators' demands was stressful upon him as well, testified Mr. Bernier.

[257] It was stressful for the Minister to have applied unrelenting pressure to accompany the UAT on a dive to the *Erebus*. Mr. Picher contributed to the pressure, testifying to advising Mr. Bernier to "put aside the fact that she is the Minister, and explore how we can do this safely, and establish whether or not she has the ability to dive with the UAT." Mr. Harris and Mr. Dagneau corroborated the ministerial pressure in their testimonies. One person bore the brunt of this, namely, Mr. Bernier.

[258] I believe the grievor when he testified that Mr. Bernier told him, "You don't know how much trouble you have caused me, now I have to drive seven fucking hours to undo the damage you have done". I also believe the grievor's testimony that when he finally met the Minister in person, she said to him, "Oh, you're the one."

[259] The grievor, as the DSO, was justifiably adamant in his refusal to permit the Minister to dive. It is significant that while he served as the DSO, two diving fatalities occurred, one of which caused Parks Canada to temporarily suspend all its diving operations on the TSW. The other fatality involved a visiting scientist, diving as a guest of Environment Canada. The Minister was looking to dive as a guest of the UAT. The grievor testified that these fatalities weighed heavily on him, and I believe him. There is clear evidence that the grievor's unrelenting opposition to the Minister's plan created a great deal of extra work and additional stress for Mr. Bernier.

[260] Finally, Mr. Bernier also testified to having to deal with the unfortunate passing of his father in the midst of all the turmoil.

[261] Mr. Bernier was being pulled in many directions at once. There is little wonder that his health suffered, but it would be unfair to place the blame for this entirely on the grievor's shoulders.

[262] I also have difficulty seeing how Mr. Bernier feared for his physical safety. There is no evidence of overt aggression or threats. To echo the decision maker in *CHEO*, at para. 122, who said this: "While I find that there is absolutely no evidentiary basis for such concerns, I accept that these concerns were honestly held …."

[263] In summary, then, with respect to the second of the *Scott* criteria, I find that termination was a disproportionately harsh disciplinary response.

C. What is the appropriate disciplinary measure?

[264] The third of the *Scott* criteria calls for an appropriate disciplinary sanction if termination is found, as it is in this case, too severe. It involves a further analysis of the aggravating and mitigating factors.

[265] The employer referred to Mr. Picher's testimony, in which he described the grievor as lacking remorse and as failing to take responsibility for his actions. That, according to Mr. Picher, was the chief aggravating factor. I find very little in the evidence to justify his position. Mr. Picher is entitled to his opinion about the sincerity of the grievor's apologies, but I find that the evidence bears out the grievor's genuinely held regret for the impact of his actions.

[266] The grievor testified to feeling sorry for Mr. Bernier. He said, "I still care for him, and feel empathy for him. I could also see he is not the same person." The grievor added that while he wanted to apologize to Mr. Bernier face-to-face, he was unable to because he had been ordered to stay away from him.

[267] The grievor's written messages reveal many indications of a genuinely held feeling of remorse. On April 3, 2018, he wrote this to Mr. Picher (Exhibit J-1, Tab 9):

> …
>
> *I have watched the "team cohesion" and the interpersonal interactions slowly degrade over a number of years now and as a member of that team I accept some portion of the blame for this.*
>
> …

> *Jarred, I have no doubt that Marc genuinely feels that I have questioned his right to manage and schedule and that I have argued, at times aggressively, with him regarding his decisions. I fully acknowledge that this has complicated his role as a manager and added stress to his work environment.…*
>
> …

[268] Those sentiments indicate an acceptance of responsibility. On April 19, 2018, the grievor wrote this to the entire UAT (Exhibit J-1, Tab 11page 295): "As a member of the team I am responsible for some of these difficulties and have contributed to this dysfunction. I accept my part in it. I am fully committed to improving …."

[269] On May 24, 2018, the grievor wrote this to Mr. Picher (Exhibit J-1, Tab 16 page 365): "After reading the report, I also recognize that I need to apologize to Marc-André and to some of my colleagues for the way I have treated them in the past."

[270] At the August 27, 2018, disciplinary meeting, the grievor read aloud from his notes (Exhibit J-1, Tab 22 page 29), stating this in part:

> …
>
> *As I have shared with you today and in previous correspondence I acknowledge that I have argued issues of health and safety and other related issues too passionately at times.*
>
> *For this I am sorry and I take responsibility for my actions*
>
> *Even though these arguments were motivated by my sense of responsibility for the health and well safety* [*sic*] *of the team, I acknowledge that I must be more diplomatic moving forward.*
>
> *I will voice my concerns respectfully, and I will accept management decisions even when I disagree with then* [*sic*]*.*
>
> …

[271] These sentiments do not support Mr. Picher's contention that the grievor refuses to accept responsibility for his actions and feels no remorse. I cannot accept this as an aggravating factor.

[272] The employer submitted that the timing of the grievor's April 23, 2018, email, coming as it did only four days after reviewing the investigation report, is an indication of a lack of acceptance of responsibility and a lack of remorse. I disagree. The grievor did nothing different at that point than he had done all along, which was to simply state his position with respect to safety issues. Nor can I accept the employer's

contention that he deliberately released Mr. Bernier's privately held medical information in an attempt to further humiliate or undermine him. The contents of the email that the grievor circulated to the UAT was the subject of a sealing order because it potentially contains personal information. While that may be true, I also find that Mr. Bernier waived whatever privacy right he thought might have attached to that information by sharing it with the Dive Committee, of which the grievor was part, because it contained recommendations from Dr. Harpur that Mr. Bernier felt would be beneficial to the UAT. For this reason, I do not accept that the grievor's circulation of the email was either a breach of privacy or an aggravating factor.

[273] The employer properly recognized the grievor's 17 years of service with a clean disciplinary record as a mitigating factor. There were many more mitigating factors, but none were given any consideration. I will consider them now.

[274] An important mitigating factor, which the employer repeatedly dismissed as a red herring, was the reason underlying much of the tension between Mr. Bernier and the grievor. As the DSO, the grievor was responsible for safety issues. These responsibilities were not imaginary or exaggerated; they existed in the Dive Directive and were in the grievor's work description, especially under Core Activities 7 and 8. As much as the employer wants to distance itself from them, they formed the basis of every single issue that the grievor put forward to Mr. Bernier. I find it highly significant that the Dive Directive was extensively revised and that the DSO position has been eliminated as a direct result of the incidents that gave rise to this hearing. This was a tacit acknowledgement by the employer that the factor dismissed as a red herring actually played a crucial role in the conflict. It should have been recognized as a significant mitigating factor, but it was not.

[275] In his representations to Mr. Picher, the grievor acknowledged several times his role in creating tension on the UAT by taking his DSO role too seriously. He indicated a genuine willingness to engage in any suitable form of conflict resolution, mediation, training, or team building in an effort to rehabilitate himself and regain the team's trust. I find this a mitigating factor as well as a strong indicator of his chances of successfully reintegrating with the UAT.

[276] In his testimony, Mr. Picher referred to documents that the grievor had supplied in advance of his disciplinary hearing. They included doctor's notes referring to his

mental health. Mr. Picher expressed a need to consider what he called "these extenuating circumstances" and testified to having asked the grievor for clarification as to whether those conditions might have contributed to his behaviour. Mr. Picher did not receive a response from the grievor. Since the grievor did not advance this as a mitigating factor, I am reluctant to consider it as one.

[277] The cases that both the grievor and the employer cited describe misconduct far worse than that the grievor engaged in. Many of those cases extol the virtues of a program of positive and progressive discipline. The first step in such a program is bringing the individual's attention to the precise nature of the misconduct in question and making it clear that repeating the behaviour will result in sanctions of an increasingly harsh nature, up to and including dismissal. This information normally appears in a letter of reprimand.

[278] A letter of reprimand is the sanction I find most appropriate under the circumstances of this case. There is no need to draft one; this decision is a declaration that the grievor's persistent refusal to accept Mr. Bernier's legitimate exercise of managerial discretion amounted to insubordination bordering on harassment, and this decision stands as a written reprimand for his misconduct.

[279] Therefore, the grievor is to be reinstated to the UAT at his former classification and level, from which he was improperly suspended without pay on May 18, 2018, and from which he was improperly terminated on September 28, 2018.

VIII. The issue of reprisal for initiating a *CLC* investigation

[280] The *CLC* provides as follows:

…	[…]
Complaint to Board	***Plainte au Conseil***
133 (1) *An employee, or a person designated by the employee for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.*	***133 (1)*** *L'employé — ou la personne qu'il désigne à cette fin — peut, sous réserve du paragraphe (3), présenter une plainte écrite au Conseil au motif que son employeur a pris, à son endroit, des mesures contraires à l'article 147.*

Time for making complaint

(2) *The complaint shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.*

Restriction

(3) *A complaint in respect of the exercise of a right under section 128 or 129 may not be made unless the employee has complied with subsection 128(6) or the Head has received the reports referred to in subsection 128(16), as the case may be, in relation to the matter that is the subject-matter of the complaint.*

Exclusion of arbitration

(4) *Notwithstanding any law or agreement to the contrary, a complaint made under this section may not be referred by an employee to arbitration or adjudication.*

Duty and power of Board

(5) *On receipt of a complaint made under this section, the Board may assist the parties to the complaint to settle the complaint and shall, if it decides not to so assist the parties or the complaint is not settled within a period considered by the Board to be reasonable in the circumstances, hear and determine the complaint.*

Burden of proof

(6) *A complaint made under this section in respect of the exercise of a right under section 128 or 129 is itself evidence that the contravention actually occurred*

Délai relative à la plainte

(2) *La plainte est adressée au Conseil dans les quatre-vingt-dix jours suivant la date où le plaignant a eu connaissance — ou, selon le Conseil, aurait dû avoir connaissance — de l'acte ou des circonstances y ayant donné lieu.*

Restriction

(3) *Dans les cas où la plainte découle de l'exercice par l'employé des droits prévus aux articles 128 ou 129, sa présentation est subordonnée, selon le cas, à l'observation du paragraphe 128(6) par l'employé ou à la réception par le chef des rapports visés au paragraphe 128(16).*

Exclusion de l'arbitrage

(4) *Malgré toute règle de droit ou toute convention à l'effet contraire, l'employé ne peut déférer sa plainte à l'arbitrage.*

Fonctions et pouvoir du Conseil

(5) *Sur reception de la plainte, le Conseil peut aider les parties à régler le point en litige; s'il décide de ne pas le faire ou si les parties ne sont pas parvenues à régler l'affaire dans le délai qu'il juge raisonnable dans les circonstances, il l'instruit lui-même.*

Charge de la preuve

(6) *Dans les cas où la plainte découle de l'exercice par l'employé des droits prévus aux articles 128 ou 129, sa seule présentation constitue une preuve de la*

and, if a party to the complaint proceedings alleges that the contravention did not occur, the burden of proof is on that party.

contravention; il incombe dès lors à la partie qui nie celle-ci de prouver le contraire.

… […]

General prohibition re employer

147 *No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee*

Interdiction générale à l'employeur

147 *Il est interdit à l'employeur de congédier, suspendre, mettre à pied ou rétrograder un employé ou de lui imposer une sanction précuniaire ou autre ou de refuser de lui verser la rémunération afférente à la période au cours de laquelle il aurait travaillé s'il ne s'était pas prévalu des droits prévus par la présente partie, ou de prendre — ou menacer de prendre — des mesures disciplinaires contre lui parce que :*

(a) *has testified or is about to testify in a proceeding taken or an inquiry held under this Part;*

a) *soit il a témoigné — ou est sur le point de le faire — dans une poursuite intentée ou une enquête tenue sous le régime de la présente partie;*

(b) *has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or*

b) *soit il a fourni à une personne agissant dans l'exercice de fonctions attribuées par la présente partie un renseignement relatif aux conditions de travail touchant sa santé ou sa sécurité ou celles de ses compagnons de travail;*

(c) *has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.*

c) *soit il a observé les dispositions de la présente partie ou cherché à les faire appliquer.*

Abuse of rights

147.1 (1) *An employer may, after all the investigations and appeals have been exhausted by the employee who has exercised rights under sections 128 and 129, take disciplinary action against the employee who the employer can*

Abus de droits

147.1 (1) *À l'issue des processus d'enquête et d'appel prévus aux articles 128 et 129, l'employeur peut prendre des mesures disciplinaires à l'égard de l'employé qui s'est prévalu des droits prévus à ces articles s'il peut*

demonstrate has wilfully abused those rights.	*prouver que celui-ci a délibérément exercé ces droits de façon abusive.*
Written reasons	***Motifs écrits***
(2) *The employer must provide the employee with written reasons for any disciplinary action within fifteen working days after receiving a request from the employee to do so.*	***(2)*** *L'employeur doit fournir à l'employé, dans les quinze jours ouvrables suivant une demande à cet effet, les motifs des mesures prises à son égard.*
…	[…]

[281] With respect to the *CLC* grievance, I reject the employer's contention that there is no link between it and the discipline. The testimonies of Mr. Harris, Mr. Bernier, and Mr. Picher made it clear that the investigation of the grievor's *CLC* complaint created a great deal of unrest in the workplace and greatly added to the stress felt by Mr. Bernier and Mr. Picher, who both characterized the safety investigation as having had a profound impact on the workplace and as having had the potential to negatively impact (or put a halt to) ongoing UAT projects. I refer in particular to Mr. Picher's testimony, in which he stated that the *CLC* complaint destroyed the fabric of the UAT and jeopardized its operations.

[282] The *CLC* investigations were directly linked to the decision to terminate the grievor's employment, thus tainting it. I find the termination was a reprisal. This complaint is upheld.

IX. The issue of aggravated damages

[283] I agree with the employer on both issues that it raised. First, *Burchill* and *Cameron* provide ample authority for a grievor's inability to expand or change their grievance at a hearing. Aggravated damages are not mentioned in the initial grievances. Mentioning them on the last day of the hearing greatly expands the scope of the grievance. Second, the circumstances of this matter do not lend themselves to a discussion of aggravated damages. There is no indication, as per the wording in *Honda Canada Inc.*, of employer behaviour during the dismissal process that was untruthful, misleading, or unduly insensitive.

[284] The grievor's claim for aggravated damages stemmed, in part, from comments that witnesses made at the hearing. I disagree that any witness suggested that the

grievor's reinstatement would place lives at risk. That was never said or implied. Mr. Harris and Mr. Moore did state that they do not trust the grievor's judgement, which may not be a kind remark but is not unduly insensitive. The grievor has his work cut out for him trying to rebuild trust, but I believe that he will give it his best effort. I expect every UAT member to put their best foot forward as well.

[285] For these reasons, aggravated damages are not forthcoming.

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

(The Order appears on the next page)

X. Order

[287] The grievances in Board file nos. 566-33-39662 and 39663 are allowed, but only in part because discipline was, in fact, warranted. The sanctions consisting of a period of unpaid suspension and termination were excessive. Those sanctions are to be replaced by a written reprimand, of which this written decision serves as a record.

[288] No evidence was led at the hearing pertaining to the grievance in Board file no. 566-33-39664, and the grievor did not argue it. Therefore, I order this file closed.

[289] The grievor's complaint in Board file no. 560-33-39561 is allowed. His suspension and subsequent termination were, at least in part, a form retaliation by the employer for the grievor's having launched the *CLC* investigations.

[290] I have stated elsewhere that one of the significant consequences of this case is the elimination of the position of DSO. As a result, the grievor cannot be reinstated to it. He must therefore be reinstated to the group and level from which he was suspended on May 18, 2018, and terminated on September 28, 2018. He is to receive all the salary and benefits (less the usual deductions), including pension, to which he would have been entitled as of May 18, 2018, and interest at the appropriate Bank of Canada rate is to be applied to that amount.

[291] Overtime that would normally have been earned is also payable. The amount is to be calculated by means of an average of the overtime earned by all UAT divers from May 18, 2018, to the present.

[292] Of course, all of these amounts are to be offset by the amount to which the grievor has mitigated his losses by means of other employment.

[293] The Board retains jurisdiction over this matter for a period of four months following the date of the issuance of this decision, should issues arise with respect to the calculation or implementation of these remedies.

October 31, 2023.

James R. Knopp,
a panel of the Federal Public Sector
Labour Relations and Employment Board