Date: 20240213

File: 566-02-12916

Citation: 2024 FPSLREB 18

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

ANGELA WALKER

Grievor

and

DEPUTY HEAD
(Department of the Environment)

Respondent

Indexed as

Walker v. Deputy Head (Department of the Environment)

In the matter of an individual grievance referred to adjudication

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

For the Grievor: Michael Fisher, counsel

For the Respondent: Pierre Marc Champagne and Joel Stelpstra, counsel

Heard by videoconference,
November 15 to 19, 2021, April 20 to 22 and 25 to 27, May 17 and 18, September 13 and 14, November 1, 2, 9, 10, 16, and 18, and December 15 and 16, 2022, and January 24, February 27, March 14 to 16, April 5 and 6, May 2 and 3, and June 22, 2023.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Angela Walker ("the grievor") was an operations manager with Environment and Climate Change Canada ("the employer" or "the department"). Her employment was terminated on October 1, 2015. The Federal Public Sector Labour Relations and Employment Board ("the Board") issued a decision on the grievance she filed against the termination of her employment in 2018 (2018 FPSLREB 78; "the 2018 decision"). A judicial review application of that decision was granted by the Federal Court of Appeal; see *Walker v. Canada (Attorney General)*, 2020 FCA 44. The Court set aside the Board's decision on the termination grievance and remitted it to another Board member for redetermination, on the following grounds:

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> *[2] While the applicant has raised several issues, I only need consider one of them, namely, the assertion that the Board's decision is unreasonable as it failed to address one of the principal arguments made by the applicant to the effect that her genuine fear of a subordinate was a mitigating factor that the Board was bound to consider.*
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> *[10] Here, the applicant's alleged fear of the subordinate played a central role in and was fundamental to her defence. It was also directly relevant to the issues the FPSLREB was required to determine and could have changed the outcome in the termination grievance. Consequently, the Board's failure to consider whether such fear constituted a mitigating factor renders its decision on the termination grievance unreasonable as it is impossible to discern from the decision what weight would have been attributed to this factor by the Board, had it considered it.*
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> …

[2] I am not bound by any of the Board's determinations made in the 2018 decision, although I have referred to some of the summarized evidence from the hearing that took place in 2017 and 2018 ("the 2018 hearing").

[3] The 2018 decision also denied Ms. Walker's complaint that the termination of her employment was retribution for a complaint she had made under the *Canada Labour Code* (R.S.C., 1985, c. L-2). That Board decision was not included in the judicial review application and that part of the Board decision is not before me.

II. Preliminary issues

[4] Before the completion of the evidence at the hearing, counsel for the employer, Pierre Marc Champagne, was appointed as a full-time member of the Board, effective March 13, 2023. He and this panel of the Board have had no discussion about this grievance beyond case management meetings and his hearing advocacy as counsel, both done in the presence of the grievor's representative, and all of which took place before his appointment to the Board.

[5] The parties were directed to provide witness statements in writing that each witness affirmed at the commencement of their testimony. Those witnesses were then asked supplementary questions by counsel and cross-examined on those statements, and they provided additional oral evidence. I allowed the employer to call three additional witnesses without providing witness statements because the nature of their testimony was known before they testified.

[6] The grievor was employed in Vancouver, British Columbia, at the time of the termination of her employment. Normal Board practice would establish Vancouver as the hearing location. However, the hearing commenced in November 2021, when all Board hearings were being conducted by videoconference, due to COVID-19 pandemic restrictions. In February 2023, the employer requested that the balance of the hearing be held in person, in accordance with the revised Board policy on scheduling hearings, after the pandemic restrictions were lifted. The grievor objected. I issued the following ruling on March 15, 2023:

> *The employer has requested that the remaining dates for the hearing … be in-person in Vancouver, B.C. The grievor objects to this request. The Board Member denies the request.*
>
> *The majority of the evidence in this grievance has been heard virtually, due to Covid-related restrictions. If the hearing had commenced in 2023, it would have been scheduled for an in-person hearing, in accordance with Board policy instituted in 2023. However, given that all of the witnesses for the employer have testified virtually and the main witness for the grievor (herself) has testified virtually, there is no benefit to changing the mode of hearing at this point. The employer relied, in part, on credibility assessment as a reason for an in-person hearing. Credibility was a key aspect of the testimony of the witnesses for the employer as well as the grievor's testimony, all of which has been given via video. Courts have generally accepted that credibility and reliability can be tested as effectively by video as in person (see* R. v McLaughlin*, 2022 YKSC 17 at para. 13 and* R. v. J.L.K.*, 2023 BCCA*

> *87 at para. 51). To change the mode of hearing at this late stage based on credibility assessment would imply that there were concerns about the ability of the Board Member to assess credibility of those witnesses who had already testified. There is no reason to assume that this is the case and, accordingly, credibility assessment is not a valid reason for in-person continuation dates.*
>
> *The other reason given by the employer for an in-person hearing is efficiency. Given the number of witnesses left to be heard from and the challenges in scheduling those remaining witnesses, it is likely as efficient or more efficient to have the hearing continue virtually. It would certainly have been more efficient to hear the employer's witnesses and the grievor in-person, given the length of most of that testimony. However, the testimony of the remaining witnesses does not appear to be as lengthy. There would be minimal efficiencies to be gained by hearing the remaining witnesses in-person, weighed against the considerable cost to the taxpayer and the grievor's counsel in travelling to Vancouver.*
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> …

A. Sealing order

[7] The grievor produced income tax returns from 2016 until 2021, related to her mitigation efforts. I ordered those documents sealed (Exhibit G-3, Tabs 4(d) and 6).

[8] The Supreme Court of Canada set out the test for sealing and confidentiality orders in *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 38, to require the party seeking a confidentiality order to establish that (1) court openness poses a serious risk to an important public interest, (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk, and (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

[9] Protecting Canadian taxpayers' information is an important public interest. Section 241 of the *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.)) provides among other things that no official or other representative of a government entity shall "… knowingly provide, or knowingly allow to be provided, to any person any taxpayer information …" (s. 241(1)(a)), "… knowingly allow any person to have access to any taxpayer information …" (s. 241(1)(b)), or "… knowingly use any taxpayer information otherwise than in the course of the administration or enforcement of this Act …" (s. 241(1)(c)). The *Income Tax Act* defines a government entity to include "a board or

commission … that performs an administrative or regulatory function of government…": s. 241(10).

[10] There is no alternative to a sealing order in this case that would be practicable. Most of the information in the tax documents is personal information, so redaction would not be appropriate.

[11] I also find that as a matter of proportionality, the benefits of protecting taxpayer information outweighs any drawbacks. The relevant portions of the income tax returns are summarized in this decision (gross and taxable income), and no other information in the tax returns is relevant to this grievance.

III. Summary of the evidence

[12] The grievor's termination arose out of interactions with a subordinate employee, Ken Russell ("the complainant"), who had made a harassment complaint against her. The complainant was on a performance management plan during the relevant period. To provide sufficient context for the harassment allegations that he raised, as well as the employer's misconduct allegations, it is necessary to summarize elements of his performance-related issues as well as the employer's efforts to improve his performance. In this decision, I express no opinion on the merits of the performance concerns about the complainant as raised by the employer.

[13] The complainant also used derogatory and crude or profane words or phrases to refer to the grievor. To understand her state of mind, it is necessary that I quote those words. I have, however, expurgated some of the words in this decision due to their obscene nature.

[14] I have first set out the grounds relied upon by the employer in its decision to terminate the grievor's employment. These are the grounds set out in the letter of termination of October 1, 2015. The grievor's alleged misconduct relates to founded allegations in the harassment complaint against her and misconduct allegations investigated after the harassment investigation completed.

[15] After setting out the grounds of termination as stated in the letter of termination, I will provide a brief overview of the work performed by the grievor and the complainant as well as the reporting relationships of the people involved in the events that led to the termination of her employment.

[16] I will then summarize the evidence relating to each act of alleged misconduct, first, under the harassment investigation, and then, under the fact-finding process. I will summarize in a separate section the evidence relating to the grievor's alleged fear for her personal safety. I will conclude the summary of the evidence with the fact-finding process and events that led to the termination-of-employment meeting on October 1, 2015, as well as the conduct of that meeting. Although any procedural defects in the fact-finding process were cured by the hearing (see *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (C.A.); and *Davidson v. Deputy Head (Canada Border Services Agency)*, 2017 PSLREB 42 at para. 171), the summary of the evidence is important as it relates to the opportunity for the grievor to express remorse or acknowledgment of wrongdoing.

[17] The complainant testified at the hearing. Some of his evidence related to unfounded harassment allegations that the employer did not rely on in its decision to terminate the grievor's employment. I have provided a brief overview of the unfounded allegations only for the purpose of understanding the grievor's state of mind during and after the harassment investigation.

[18] One of the grievor's colleagues, Deborah Portman, also testified. Her testimony related to one of the alleged grounds of misconduct. She also testified about other interactions with the grievor that the employer did not rely on in terminating the grievor's employment. Accordingly, I have not summarized that evidence.

[19] The grievor's direct supervisor, Marko Goluza, provided a witness statement and testified on matters that did not form the basis of the employer's decision to terminate the grievor's employment and are therefore not relevant. I have therefore not summarized his irrelevant evidence.

[20] Patrick Fraser was an officer based in Nanaimo, B.C., who reported to the grievor. Mr. Fraser testified at the 2018 hearing but died before 2018 decision was issued. One of the misconduct allegations (the breach of the confidentiality of the harassment investigation) involved Mr. Fraser. I heard additional evidence about the relationship between him and the grievor that I have not summarized in great detail for two reasons — firstly, it involved highly personal medical information about him, and secondly, apart from the breach-of-confidentiality allegation, the employer did not rely on that relationship in its decision to terminate the grievor's employment.

[21] I also heard testimony from former colleagues of the grievor about her good character and professionalism. They also testified about their willingness to work with her were she reinstated. The employer did not rely on her general character and professionalism, apart from the alleged misconduct, in its decision to terminate her employment. Therefore, I have not summarized this evidence. In its final submissions, the employer did not argue against reinstatement were the grievance allowed. Therefore, the testimony about the willingness to work with the grievor is not relevant, and I have not summarized it.

A. The grounds of termination

[22] The grievor's termination of employment was based, in part, on the findings of an investigation into the harassment complaint against her that was conducted by a third-party provider.

[23] In the letter of termination of October 1, 2015, Gordon Owen, Chief Enforcement Officer of the employer's Enforcement Branch ("the branch"), determined that the four founded allegations in the harassment investigation report met the definition of "harassment". He stated that the grievor's actions were "intended to demean and belittle" the complainant. He also stated that each of the allegations was in direct contravention of the *Environment Canada Values & Ethics Code* and the *Environment Canada policy on Preventing Conflict and Harassment*.

[24] The employer did not list the four founded allegations in the harassment investigation report in the letter of termination or provide any independent assessment of them. Accordingly, they were incorporated by reference into the termination letter and were as follows:

> 1) at a meeting in 2012, the grievor made inappropriate remarks to the complainant and his co-workers about how he had been transferred to the employer's Nanaimo office;
> 2) she excluded the complainant from a shotgun practice without providing an explanation;
> 3) she unilaterally cancelled his attendance at a swift-water rescue course without any notice to him; and
> 4) she compelled him to take a management course in either Edmonton, Alberta, Saskatoon, Saskatchewan, or Gatineau, Quebec, after he requested to take it when it was offered in Vancouver.

[25] The termination letter also included alleged acts of misconduct by the grievor during and after the harassment investigation process that the employer considered an

abuse of authority and as showing a lack of respect toward management's authority, as follows:

> 1) requesting the deactivation of the complainant's access card to the employer's Vancouver office without authorization;
> 2) improperly using the electronic leave system to access the complainant's leave records while he was not under her supervision;
> 3) discussing the harassment complaint with a witness after being told to respect the confidentiality of the investigation;
> 4) repeatedly demonstrating disrespectful behaviour toward her supervisor, including making public statements questioning his integrity; and
> 5) failing to follow management's direction, constituting insubordination.

[26] In the letter of termination, the employer also alleged that deactivating the complainant's office access card as well as accessing his leave records were acts of retaliation against him for making a harassment complaint against her.

[27] At the disciplinary hearing, the grievor raised concerns about the complainant making threats to her personal safety. Mr. Owen addressed her concerns as follows in the letter of termination:

> …
>
> *… you stated that you felt that your personal safety was threatened. Since the beginning of the harassment complaint process and until this date, no incident of violence towards you has occurred. To further ensure that your workplace was safe, a Threat Risk Assessment … has confirmed that your security was not at risk and that the Department has taken the necessary steps to ensure your safety.*
>
> …

[28] The termination letter concluded that the acts of misconduct were serious and that they breached the *Environment Canada Values and Ethics Code*, the *Environment Canada policy on Preventing Conflict and Harassment*, and the *Enforcement Branch Directive 3-3-3 Officer Conduct*.

[29] Mr. Owen also noted in the letter the following "very serious" aggravating factors: 1) a higher standard was expected of the grievor because she was a manager and a peace officer, 2) her lack of remorse and denial of accountability throughout the process, and 3) her repeated disrespectful behaviours toward the complainant and management.

[30] In the letter, Mr. Owen stated that he relied on the mitigating factors of no previous discipline, her length of service, and "all other relevant factors."

B. The workplace

[31] The grievor started working in the federal public service in 1993. She worked for 12 years at what is now the Canada Border Services Agency. While there, she worked first as a customs officer and then as an investigator. In 2005, she was appointed to a position as an investigator in the branch of Environment Canada, as it was then known. In 2006, she was appointed to a senior environmental investigator position. In June 2009, she started an acting assignment as the operations manager for the employer's Pacific Region's Coastal District. In August 2010, she was appointed to the position. Shortly after her confirmation as the operations manager, she went on maternity leave, returning in September 2011.

[32] The operations manager position involves, among other duties, leading a team of enforcement officers conducting inspections and investigations for offences under the *Canadian Environmental Protection Act, 1999* (S.C. 1999, c. 33) and the *Fisheries Act* (R.S.C., 1985, c. F-14). The Coastal District had an office in Vancouver and a satellite office in Nanaimo on Vancouver Island. At the relevant times for this grievance, the grievor was located at the Vancouver office. The complainant, Mr. Fraser, and Jarrett Brochez were the enforcement officers working from the Nanaimo office.

[33] The grievor had worked with Mr. Brochez, Mr. Fraser, and the complainant on several investigations before her appointment as an operations manager. The complainant received a deployment to the Nanaimo office in May 2010. Mr. Brochez had deployed there in 2009.

[34] The regional director of the branch, Mr. Goluza, was also located in Vancouver. The grievor started reporting to him in 2011, on her return from maternity leave. She testified that she had known him for 13 years at that point, as they had formerly been work colleagues. She testified that they continued to have a good working relationship when he became her supervisor.

[35] Mr. Goluza reported to Margaret Meroni, the director general of the branch, who was based at the employer's national headquarters in Ottawa, Ontario. Ms. Meroni

reported to Mr. Owen, Chief Enforcement Officer, who was also at the national headquarters and who remained in that position until his retirement in 2016.

[36] When the grievor returned from maternity leave in September 2011, Mr. Goluza told her that the complainant had advised him that he was not happy that she was his manager. She testified that her relationship with the complainant was "bumpy from the outset".

C. The harassment complaint

[37] The complainant's harassment complaint initially included 24 allegations. The harassment investigator determined that 1 of the allegations involved 3 separate incidents, so the number was amended to 26 allegations. The investigator concluded that 4 of the allegations were founded. Since part of the grievor's case rests on her state of mind during the harassment investigation, it is relevant to set out some of the unfounded allegations as well as the complainant's actions during the investigation process. Although I have set out in this section some of the unfounded allegations, the only allegations relied upon by the employer in its disciplinary decision were the 4 allegations that were founded.

[38] The complainant made the harassment complaint with the employer on January 14, 2014. The grievor was advised of it on January 23, 2014, but was not provided with the allegations. The narrative of the allegations in the complaint comprised 120 pages.

[39] In the letter to the departmental harassment coordinator, the complainant wrote that the complaint would show "a targeted and continued effort" by the grievor to have him resign from his position. He alleged that her harassment campaign led to him taking sick leave from August 2012 to March 2013 and from November 2013 to the date on which the complaint was made.

[40] On February 13, 2014, Mr. Goluza, acting on the harassment coordinator's recommendation, separated the complainant and the grievor by having him report to Peter Krahn, an engineer. At the time, the complainant was on sick leave. He returned to work on March 3, 2014. The grievor testified that Mr. Goluza told her about the temporary reporting relationship change, but she also testified that she was still required to maintain the complainant's performance records, as well as approve expenditures relating to his travel, equipment, and assets.

[41] In the letter advising her of the harassment investigation process, she was cautioned that "… all matters relating to this complaint should be treated with the utmost confidentiality" and that the disclosure of any information concerning the complaint to anyone other than those immediately involved in it could result in administrative or disciplinary action. The grievor signed an agreement on the confidentiality of the investigation process in September 2014. In that agreement, it was also noted that "[a]ny form of retaliation for participation in a harassment investigation is prohibited by policy and will be severely dealt with." The complainant was provided with the same warning about the confidentiality of the investigation process.

[42] The grievor was advised of the allegations in the complaint on March 28, 2014. She testified that the scope of the complaint was alarming to her.

[43] The complainant made 26 harassment allegations, including 4 related to Mr. Goluza's actions. Those 4 allegations related to the complainant's efforts at raising issues of concern about the grievor with him. These allegations were not investigated. The remaining allegations were directed against the grievor.

[44] Of the 26 allegations submitted, the employer deemed that 14 met the criteria for a harassment investigation. During the harassment investigation, the investigator determined that the first allegation included 3 distinct incidents; therefore, it was divided into separate allegations, resulting in a total of 16.

[45] One of the allegations related to an incident at a Diamond Jubilee Medal Presentation in 2013 and will be set out later in the evidence summary. The investigator determined that allegation unfounded.

[46] Other allegations related to the removal of some of his duties, as well as the recertification process that he was required to undergo after taking a period of sick leave. Other allegations related to the employer's actions in managing his performance, which he termed "belittling [his] work". The investigator determined that all these allegations were unfounded.

[47] The preliminary investigation report was provided to the grievor and the complainant on December 3, 2014, and contained only a summary of the facts. It did

not include any findings or conclusions on harassment. The complainant and the grievor were given time to respond to the preliminary report.

[48] The final investigation report was dated February 25, 2015, but was not provided to the grievor and complainant until April 3, 2015.

[49] In the next section, I will set out each founded allegation and the related summary of the evidence.

1. The "old boys club" comment

[50] The complainant alleged that the grievor belittled him when she made a comment about staffing a new position. He recalled that she stated that the staffing would not be done like an "old boys club" or a "back room deal" or words to that effect.

[51] The complainant testified that the comment was made at a meeting in Vancouver on May 15, 2012. He testified that when the grievor made it, she was looking at him. Since he was the most recent person to have obtained a lateral transfer to the Nanaimo office, he took the comment as directed at him. He testified that this was belittling and that it embarrassed him. He testified that it made him feel that he had received the position through improper means.

[52] The investigator reported that the grievor stated that she might have said that staffing another Nanaimo position would be done in a transparent manner or that it would not be a backroom deal; however, she stated that she never made any connection to the complainant's appointment.

[53] The grievor testified that at the meeting, the complainant proposed hiring another enforcement officer in Nanaimo. She said that Mr. Goluza had already told her that the complainant had contacted him to propose hiring a particular person for the position. She testified that she told the officers at the meeting that there was no plan to hire an additional enforcement officer at the Nanaimo office but that any staffing would be done through a transparent process. She testified that this comment reflected the operational realities and that it was not aimed at the complainant or his appointment.

[54] The investigator interviewed Mr. Brochez and Mr. Fraser. Mr. Brochez testified at the hearing. As earlier noted, Mr. Fraser is deceased. The investigator reported that Mr. Brochez told her that the grievor "alluded that the process" used to transfer the complainant to Nanaimo might not have been in accordance with proper hiring policy. The investigator reported that Mr. Fraser told her that the grievor made a "snide comment" about the complainant obtaining his position at Nanaimo through "the good old boys club."

[55] In his witness statement, Mr. Brochez stated that he could not recall the exact words used by the grievor. But at the hearing he testified that he did recall the "old boys club" comment. He stated that the grievor said that any new position would be staffed in a transparent manner and that he "got the impression" that it was related to how the complainant had obtained his position at the Nanaimo office. Mr. Brochez stated that he did not know what the grievor meant to say, although the complainant brought it up to him many times, saying such things as, "Can you believe she said that about me".

[56] The complainant recounted to the investigator a meeting he had with the grievor almost a year later, on March 13, 2013, at which he told her that he did not appreciate her saying that the only way he had received his position was because of an "old boys club backroom deal."

[57] The harassment investigator concluded that the grievor made the comment and that it was directed at the complainant. She concluded as follows:

> …
>
> *25. A supervisor stating an employee participated in an underhanded, backroom, or old boys' club deal to obtain a desirable transfer belittles and demeans that employee. It calls into question the employee's ethics by indicating he was involved in something devious, and implies he did not receive his transfer based upon qualifications or merit.*
>
> *26. Discrediting an employee in this manner, particularly in front of his peers, constitutes improper conduct. The comment was directed at the Complainant, offensive, and occurred in the workplace. The Respondent knew or ought reasonably to have known that such a comment would cause offense or harm. All of the elements of the definition of harassment are met.*
>
> …

[58] The investigator wrote that although harassment is normally a series of incidents, one single incident can constitute harassment when it is demonstrated that it is severe and that it has a significant and lasting impact on a complainant. She concluded that the incident was "sufficiently egregious to constitute harassment". She also concluded that although the incident happened more than one year before the complaint was made, it was one of a continuing series of incidents; therefore, it was considered.

2. The shotgun practice allegation

[59] The allegation in the harassment complaint was that the grievor prevented the complainant from attending a shotgun practice on April 16, 2013.

[60] The grievor testified that several times per year, she arranged firearm practice for officers in the Coastal District at a local gun range. The practice was not mandatory, but she stated that she encouraged the officers to practice because they might have needed to use a firearm in the field for safety against predators, such as bears. Ronald Graham, the officer responsible for organizing the shotgun practices, testified that not all officers attended it.

[61] The complainant was on extended sick leave from August 15, 2012, and returned to the office on March 5, 2013. During his absence, he regularly provided medical certificates to the grievor from a Dr. R. Bodenstab. In his last medical note, Dr. Bodenstab stated that the complainant would be unable to attend work until mid-January 2013. The complainant stated in the email forwarding the note to the grievor that "[w]e are making progress" and that he should be able to return to work on the date set out in the medical certificate.

[62] On January 10, 2013, the complainant provided a medical note from a Dr. S. Mulder, at a different medical clinic, stating that the complainant was unable to work until March 4, 2013.

[63] On his return to work on March 5, 2013, the complainant did not carry out the full duties of his position; he caught up on administrative work and reviewed employer policies that had been revised during his absence.

[64] After his return to work, the grievor wanted the complainant to be assessed for his fitness to work. Mr. Goluza agreed and on March 14, 2013, advised the complainant that his job description would have to be reviewed by a healthcare professional.

[65] The complainant testified that on April 9, 2013, he requested to attend a shotgun practice scheduled for April 16, 2013. He testified that the grievor told him that the session was only a practice and that he was not approved to participate until his doctor confirmed that he was fit to return to full duties.

[66] The grievor drafted a letter for the complainant to provide to his doctor. The letter was reviewed by Dominique Gilliéron, a labour relations advisor. Mr. Goluza edited the letter extensively before it was sent. The letter of April 10, 2013, to the complainant provided the following instructions to his doctor:

> …
>
> *… the employer would like to ensure that he can resume the full duties of his substantive position without aggravating any physical or emotional conditions which he may have experienced while on this long term leave.*
>
> *In accordance with the Federal Treasury Board "Policy on the Duty to Accommodate Persons with Disabilities in the Federal Public Service", it is necessary that we have a clear understanding of any restrictions, functional limitations, or disabilities* [he] *may have after returning from his recent absence. We are asking for this information so that we can then provide him with any appropriate workplace accommodation.*
>
> …

[67] After setting out the key job duties and intellectual and physical requirements of the position, the letter continued with this: "Please respond in writing to each question below, being as specific as possible in your answers. NOTE: We are not looking for a medical diagnosis, but information on any functional limitations within the workplace that the employee may have."

[68] Attached to the letter was the complainant's job description as well as 10 questions that the employer sought answers to. The 10 questions were these:

> …
>
> *1. Is the employee fit to continue reporting for work on a full-time basis (8.33 hours per day, 75 hours per two-weeks) or on a part-*

time basis? If part-time hours are being recommended, what are they?

2. Does the employee have any functional or health limitations that may arise due to medical (physical and mental) conditions? If so, please provide details of any functional limitations [he] *may have and if they must be accommodated.*

3. Are any of these functional or health limitations identified, permanent or temporary in nature? If temporary, please provide timeframes.

4. Has the physical condition … changed such that we should re-administer his Health Canada medical assessment?

5. Would assigning the employee voluminous amounts of work requiring significant concentration and intellectual effort cause any detriment to his physical or mental well-being?

6. Is the employee able to exercise the appropriate level of judgement to quickly interpret situations to keep themselves and/or other Officers or members of the public safe? Please note that we train Officers so that they can react safely in scenarios involving multiple stimuli in Use-of-Force situations which can result in either voluntary compliance right through to situations involving grievous bodily harm or death.

7. Would the assignment of duties involving stressful tasks with subjects be detrimental to his physical and/or psychological well-being? These scenarios have involved dealing with alleged violators who may be confrontational, name him personally in the media, and preparing the resultant documentation where voluminous information on these same stressful situations must be reviewed by Management and external entities for months or years at a time?

8. Would it cause any detriment to the employee if he was assigned tasks causing him to accommodate multiple and changing priorities, a heavy workload, tight deadlines and competing demands from clients, stakeholders and management?

9. If the employee was placed in a confrontational situation he had very little control over for a prolonged period of time, would it cause any detriment to any aspect of his well being (ie physical and psychological)? These situations could include spending hours with multiple accused, animated questioning in a very public forum, or questioning by defence counsel in trial situations.

10. Are there any considerations beyond this Management and/or his co-workers need to take into account in order to ensure he can return to the workplace and help to foster respect, integrity and professionalism in a very diverse workplace?

…

[69] The grievor received the medical certificate from Dr. Mulder on April 15, 2013. This was the entirety of the reply:

> …
>
> *After reviewing all documents and considering all your questions (1 to 10) I have to admit that I feel totally comfortable and confident to clear Kenneth on all demands and expectations related to performing his job effectively and successfully.*
>
> *I hope this is satisfactory.*
>
> …

[70] On the same day, the grievor sent the doctor's letter to Mr. Gilliéron for his "review and comment". He replied that he would send her an invitation to discuss the file. The shotgun practice was scheduled for the next day. The grievor testified that she spoke to Mr. Gilliéron over the phone.

[71] The following morning (April 16, 2013), the grievor emailed the complainant, stating that she was "seeking some advice" on the doctor's letter. She also stated that she and he would have to meet to discuss work assignments and "a path forward". She told him that given her travel and work schedule, the first opportunity for them to meet to discuss was the following week. The complainant testified that the grievor told him that she would consult the Labour Relations branch. He also testified that she told him that he was still not approved to attend the shotgun practice session.

[72] The complainant testified that he felt that this decision was not fair, as his doctor had confirmed that he was fit to return to full duties. He testified that he felt that he was being singled out and that he was being punished for taking time off work for medical reasons.

[73] In an email dated September 24, 2014, the grievor told the investigator that the complainant completed his shotgun certification training only on May 30, 2013, and that he was required to complete it before being cleared to attend shotgun practice.

[74] The grievor testified that while the complainant was on leave, a new certification standard was introduced into the new firearm directive, requiring officers to complete the department's Non-Enforcement Firearms Course before they could be authorized to use or practice with a departmental firearm. She testified that the complainant was

required to obtain this certification before he could be authorized to use a departmental firearm.

[75] The grievor testified that she did not allow the complainant to participate in the shotgun practice for two reasons, which were that he had not yet completed the recertification and that she was concerned about both his mental health and management's lack of sufficient information to confirm his fitness to work.

[76] The grievor testified that after consulting Mr. Goluza and Mr. Gilliéron about her concerns about the short letter from the doctor, Mr. Goluza told her that the letter was acceptable. She told the complainant this when she met with him on April 29, 2013.

[77] The complainant completed his firearm recertification on May 30, 2013. He was able to participate at shotgun practices after that. He testified that he attended a shotgun practice several weeks after the one on April 16, 2013. The grievor also testified that he was able to practice with his own firearm using a gun club membership that she had approved in March 2013.

[78] In the final harassment investigation report, the investigator stated that the only reason the grievor had given for not returning the complainant to his full duties (including approving his attendance at the shotgun practice) was that the doctor's letter did not address the questions asked in the employer's letter. The investigator did not refer to the firearm recertification reason also provided to her by the grievor.

[79] The investigator stated that the grievor did not provide evidence of her specific concerns or the foundation for them about the doctor's letter. The investigator also stated that there was no evidence indicating that the grievor had followed up to obtain additional information or clarification to address her concerns. The investigator either was not aware or did not report that the grievor had requested that Mr. Gilliéron review the letter.

[80] The investigator concluded that although supervisors have the authority to request medical certification and clarification as to a subordinate's fitness to work, "… there must be a bona fide reason for such actions." She concluded that even though the doctor had not addressed each of the 10 questions separately, he "clearly stated" the complainant was medically fit to return to full duties. She stated that to counter the doctor's opinion, "sound justification" was required, and that the evidence did not

establish that such a justification was provided. She concluded that "[u]njustifiably preventing an employee from fully participating in work activities constitutes improper conduct." She determined that the grievor knew or ought reasonably to have known that this conduct would cause offence or harm.

[81] The investigator concluded that although this was a single incident, it had a "significant and long lasting impact" on the complainant, stating this: "He was unable to participate … with his peers, missed a shotgun practice session that could have adverse safety-related consequences or complicate his recertification process, etc."

[82] The investigator included the following note, referring to this allegation:

> …
>
> *229. Although the* [grievor] *denies it, there is evidence from others to indicate she did not want the Complainant at the shotgun practice due to concerns about her personal safety. Specifically what* [she] *said to EOs Brochez and Leeden is not known; however, the similarity of their evidence and the fact* [she] *admits indicating to another employee the [sic] she feared for her safety by asking her to pick up her … child in case something happened to her is sufficient to conclude on a balance of probabilities that the* [grievor] *cast suspicion on the Complainant.*
>
> *230. Any statements or other indications the* [grievor] *made about her safety around the Complainant to other employees were extremely damaging to his reputation. If she legitimately had a concern about her safety and/or the Complainant becoming violent, then she should have addressed it properly through the correct channels. The gravity of such a serious allegation against an employee obviously dictates that the strictest confidentiality be maintained. The* [grievor]*, a supervisor, indicating in any way to the Complainant's peers that she had concerns about his volatility and/or her safety was a serious breach of confidentiality, discrediting of the Complainant, and a severe form of harassment.*
>
> …

[83] Although this was a fresh hearing of the evidence related to the alleged misconduct, it is important to summarize the part of the investigator's analysis that it appears the employer relied on without confirmation. The investigator stated that not being able to participate in the shotgun practice could have complicated the complainant's recertification process. The grievor testified that it was the other way around — the complainant had to be recertified to be able to participate in the shotgun

practice. In his testimony at the hearing, Mr. Owen agreed that the grievor's concern about the use of departmental firearms without recertification had been legitimate.

[84] Mr. Goluza found out after the fact that the complainant had been denied access to the shotgun practice. He testified that the grievor told him that she would not believe the opinion of a "mall doctor". He testified that he learned from the 2018 hearing of this grievance that the grievor had said that attending the shotgun practice was denied because the complainant had not been recertified to use a firearm. He disagreed with her interpretation and stated that she had not raised this concern with either him or Labour Relations. He testified that he believed that she made up this reason after the fact.

3. The swift-water rescue course cancellation

[85] The complainant was scheduled to take a swift-water rescue course from August 20 to 22, 2013, in Chilliwack, B.C. He registered for the course in July 2013 and sought authorization from the grievor. On July 31, 2013, she approved his training and later authorized the associated travel. He testified that he had arranged to travel with a work colleague.

[86] The complainant testified that the course was mandatory. The grievor testified that it had been in his individual learning plan for the previous year and that he had failed to take it then.

[87] The grievor assigned the complainant a mill-spill investigation on August 12, 2013. The spill had occurred on June 26, 2013. She set out a list of 11 questions that the investigation had raised to that time, for his consideration. She testified that the file had become urgent when on August 9, 2013, she learned that approximately 3.7 million litres of untreated effluent had been spilled into the marine environment. She also learned that the original report of the reason for the spill — a power outage — was incorrect and that it had been caused by other factors.

[88] The complainant replied to the email request on the same day, stating that he required some time to familiarize himself with the terminology and the systems at that mill before conducting an onsite inspection. The grievor replied the following day that she thought that the best way to research the systems and learn the operation was to go to the mill and take a tour from the environmental manager there. She asked if he

could confirm whether he could attend that week. He replied that it was his intent to conduct an onsite tour once he had completed his research, as he would feel more comfortable conducting interviews and would not be "snowed". He told the grievor that he did not think that a week or two would make a difference since the spill had occurred in June. He ended his email by stating that he could contact the mill to set up an onsite tour that week "to get the ball rolling." He stated that once he had her preference, he would "adjust accordingly".

[89] The grievor testified that it was her preference that the complainant start the investigation right away and that given the nature of the spill, it should be a priority. She testified that she contacted the third-party service provider of the swift-water rescue course to inquire if the training was available on other dates. She testified that she had anticipated receiving an email from the training provider with options for alternate dates.

[90] On August 14, 2013, the complainant received an email from the third-party provider, confirming that his swift-water rescue course training had been rescheduled to September 16 to 18, 2013, in Nanaimo. He replied to the third-party provider, copying the grievor, and asked if it had been sent in error as he had not rescheduled his training.

[91] The grievor testified that when she saw the email from the service provider, she emailed the complainant, explaining her inquiry to the provider and stating that a switch would facilitate his work on the new spill file that he had been assigned. The email was entitled, "Balancing investigative priorities, schedule, and cost". She wrote this:

…

> *I respect your preparation regarding the Mill investigation and recognize the challenge in negotiating the technical nature of mill operations in effective spill response. To balance that, our timeframes since the spill, and facilitate your ability to gather the best time sensitive evidence now that the significance of the spill is established, I inquired with* [the third-party provider] *as to their waitlisted courses. They said they would email confirmation if a switch was possible from the Chilliwack course to Nanaimo which it is.*
>
> *This will allow you more time to address the case in the short-term, saves you the travel time and being away from home (which you have identified is hard on you), lessens EC's* [the department's]

> *cost, and the change occurs prior to the time you indicated you may go hunting.*
>
> …

[92] The complainant testified that he did not believe that there was any urgency to the spill investigation. He noted that the officer originally assigned to the investigation had had the file for 45 days and had recently been to the site. He also noted that any time-sensitive effluent samples would no longer have been available. He testified that he did not remember telling the grievor that travel was hard on him, although he did remember saying that travelling too much was hard on everyone. He testified that there had been no prior discussion with the grievor about rescheduling the course. He testified that he was surprised when he received the email about the course having been rescheduled and that he felt that he had been singled out. He also testified that he felt that the cancellation of the training was retaliatory. He also testified that he felt embarrassed because he had to call the work colleague he had arranged to travel with to the course. He stated that he felt disrespected about not being consulted about the schedule change.

[93] The grievor testified that the complainant did not raise any concerns about the rescheduling of the training with her at the time. He took the training on the new dates.

[94] The investigator noted that the complainant had questioned the assignment of the spill investigation file to him and the sudden urgency to complete the site tour. She stated that the assignment of the file and the urgency attached to it were part of "normal management functions" and would not be addressed. She stated that the focus of the allegation was whether the grievor "demeaned, embarrassed, and/or undermined" the complainant "… in relation to rescheduling the course without consulting or informing him …".

[95] The grievor told the investigator that her intention behind calling the third-party provider was to obtain dates for a rescheduled training session, not to have the dates rescheduled without notice to the complainant. The harassment investigator did not interview the third-party provider.

[96] The harassment investigator concluded that by contacting the third-party provider without consulting the complainant "… because he did not meet a timeline

she never told him about and did not provide a legitimate reason for," the grievor had committed an act of harassment.

4. The project management course

[97] In July 2013, the grievor and the complainant met to discuss the annual performance management agreement, including his "Personal Learning and Development Plan" ("the learning plan"). In his witness statement, the complainant stated that he had previously told the grievor that he was looking into other employment opportunities. He stated that this was due to the way she was managing him and because the work environment was difficult for him. He provided her with information about a training program that he was interested in, but it turned out to be too expensive for the employer. He stated that the grievor suggested that he take an interviewing as well as a project management course.

[98] The grievor discussed with the complainant taking the project management course in the fall of 2013 in Edmonton, Saskatoon, or Gatineau. He emailed her on October 3, 2013, asking if he could take it in Vancouver in March 2014 instead. In his statement, he said that he had a heavy workload at the time and that he had preferred to delay the course. He added that it would have cost the employer less since it was closer to his home.

[99] The grievor responded to the complainant's request by email on October 11, 2013, stating this: "I believe that delaying your learning plan courses significantly impairs the career goals you advised me of." She also requested that he register for the interview training, which was available in Winnipeg, Manitoba, in November or in Victoria, B.C., in January.

[100] The complainant signed up for the interview training in Victoria. In an email to the grievor on October 17, 2013, he responded that he never really wanted to take the project management course in the first place and added this:

> …
>
> *I disagree with the assumption that these training courses will significantly impair my ability to seek other employment and even if it did, this is my decision to make.*
>
> *Very frankly, I felt pressured to take these courses to begin with and the tone of the reply Email leaves me feeling pressured to find employment elsewhere.*

> *This is my career path and this training is to assist me on this path and I should not fear any pressure or reprisal for exploring other alternatives.*
>
> …
>
> *I will not be registering for any of the training dates suggested for Gatineau, Edmonton or Saskatoon. Vancouver is my preferred choice with respects [sic] to timelines and if this is not suitable I will respectfully decline this training.*
>
> …

[101] The grievor replied in an email on October 18, 2013, stating this: "Given the nature of your statements below, I am going to seek advice from Labour Relations to inform my decision and address your assertions." She testified that given the tone of his email, she wanted to consult a labour relations advisor.

[102] The grievor testified that she spoke to a labour relations advisor on October 28, 2013, and that she was referred to a guide to developing learning plans, which she said "informed" her email response to the complainant on the same date. In the email, she agreed that he could take the project management course in Vancouver, as he had requested. Her email reads as follows:

> …
>
> *From your comments … there needs to be some clarification regarding the Individual Learning and Development Plan (ILDP), as well as the roles, rights and responsibilities in relation to it.*
>
> *I support the premise that continuous learning and growth gives Officers increased freedom and choice about where they work and what they do, as well as a competitive advantage in the work force. The ILDP lays out how you intend to learn and grow professionally. It assists you in reaching operational, personal and professional goals that prepare for work both inside and outside the federal Public Service. The development of the plan is a joint responsibility shared by Managers and Officers based on effective two-way communication to establish a mutually acceptable plan. While it identifies mandatory training, the definition of your professional development goals is optional. You may wish to consider where you want to be in five years, whether you want to progress in your current career stream or move toward another, if you are lacking knowledge or a specific skill in order to achieve your goals, or are there aspects of your abilities or behaviour that are holding you back.*
>
> *The Project Management Training course we mutually agreed to lays out practical and achievable training dates and costs within our allotment. It is directly linked to the long term personal career*

> *goal you wrote in your 2013 - 2014 Performance Objectives and falls in the optional portion of the ILDP we signed off on. If you elect to fulfill this professional development opportunity, I will support altering the plan to accommodate the Vancouver location this fiscal year and we can sign off on this change at your mid-year performance review in person.*
>
> *…*

[103] In his witness statement, the complainant stated that during all the exchanges with the grievor, he felt pressured to find another position. He did not take the course in Vancouver due to an extended sick leave that started in October 2013.

[104] In the final report, the harassment investigator noted that although supervisors have the responsibility and authority to change priorities based on operational requirements, "there must be a bona fide reason". She concluded that the training was optional and that the grievor did not have a *bona fide* reason for denying the complainant's request for a different location for the training. In the report, the investigator stated that a concern that the training course might "fall off the learning plan" did not constitute a *bona fide* reason.

[105] The harassment investigator found that the arbitrary denial of the change to the training, "… compounded by her bellicose response unnecessarily elevating the matter to Labour Relations followed by her convoluted email eventually agreeing to his request …", constituted improper conduct. She also concluded that the grievor ought to have known that this conduct would cause offence or harm. The investigator concluded that although it was a single incident, the impact or potential impacts on the complainant were significant and long-lasting. She wrote that undermining an employee by denying a reasonable request "… has numerous adverse effects such as eroded confidence and instability."

[106] Mr. Owen testified that he agreed with the investigation's finding and that by insisting that the complainant take an optional course as soon as possible, the grievor "was unnecessarily imposing her will and creating the impression that she wanted him to seek other employment". He also testified that her October 18, 2013, response that she would seek advice from Labour Relations was unnecessary "and an attempt to intimidate him for not proceeding as she wished". He stated that since this course was not mandatory and was "for personal interest", there was no reason for her to pursue it, "other than to send the signal that he should find work elsewhere".

D. The unfounded allegations

[107] A brief summary of the unfounded allegations is necessary to provide the context for the grievor's state of mind during and after the harassment investigation.

[108] Many of the unfounded allegations related to the performance management of the complainant, the management of his caseload due to his leave of absence from the workplace, or the work requirements associated with his reintegration into the workplace after the lengthy leave of absence. The investigator found that these actions were the exercise of normal management functions by the grievor.

[109] There were several unfounded allegations related to comments made by or actions of the grievor in closed-door meetings. The investigator found that there was no corroborating evidence to support the allegations.

[110] The remaining unfounded allegation related to a ceremony at which the complainant received a Diamond Jubilee Medal. He alleged that the grievor did not congratulate him with a personal or group email. He also alleged that while at the presentation ceremony, she did not say hello, avoided eye contact, did not shake his hand, and openly refused to take a photograph with him despite being urged to by Mr. Goluza. He further alleged that she failed to add the reward to his performance appraisal and personnel file. The investigator noted that the evidence showed that the grievor wrote "a glowing" letter recommending that the complainant receive the award, which the investigator concluded was "the most significant show of support" that the grievor could possibly have made. The investigator noted that there was significant public acknowledgement of the complainant's award in a communication sent by Mr. Goluza. The investigator also noted that the grievor attended the ceremony and facilitated the attendance of other employees as well. The investigator concluded that no further support or acknowledgment by the grievor was necessary.

[111] The investigator noted that the grievor had told her that she refused to have her picture taken because she did not like to have her photograph taken "at any time". The investigator also noted that the complainant provided to her "a significant number" of work-related photographs in which the grievor did pose for the picture. The investigator noted that individuals cannot be compelled to have their picture taken at work functions and that they may withhold their consent without providing a reason.

E. The harassment investigator's recommendation

[112] The harassment investigation report did not include any recommendations in relation to the grievor. However, the investigator did make this general recommendation on what she termed "Workplace Restoration":

> …
>
> *Whatever the outcome of this case as determined by the Delegated Manager, workplace restoration is likely to be a significant challenge. As part of that restoration, the organization may wish to consider* [a] *professionally facilitated meeting about how to move forward that includes not just the principals but all of the EOs* [enforcement officers] *that regularly work from the Nanaimo office … Such a process can help address not only harassing behaviours, but also behaviours that create a hostile work environment such as yelling at others over the phone, using exceedingly foul language, discussing ongoing conflicts with management, etc.*
>
> …

[113] The department carried out a form of workplace restoration after the termination of the grievor's employment, and evidence related to those efforts is set out in the later section of this decision on the post-termination evidence.

F. The misconduct investigation

[114] In this section, I will first summarize the misconduct investigation process. I will then address each of the four grounds of misconduct that were investigated.

[115] Ms. Meroni was responsible for the fact-finding investigation. She testified that she had met the grievor two times before the events at issue in this grievance.

[116] The grievor was provided with a letter on May 11, 2015, from Ms. Meroni, with a list of general allegations to be investigated. The grievor requested details of the allegations, but Ms. Meroni said that none would be provided at that time.

[117] Ms. Meroni prepared a preliminary fact-finding investigation report dated June 4, 2015, before interviewing the grievor. The invitation to the grievor to attend an interview was sent on June 10, 2015. The report contained both a summary of witness statements as well as conclusions on the misconduct allegations. The preliminary report was not provided to the grievor. Ms. Meroni testified that although a draft

conclusion on the misconduct was included in the preliminary report, the report was not finalized until after her meeting with the grievor on August 10, 2015.

[118] On June 17, 2015, the grievor was provided the following details about the allegations, in advance of her interview with Ms. Meroni:

> …
>
> *Allegation #1: Managerial Actions toward Ken Russell, an employee not reporting to Ms. Walker.*
>
> - *Contacting Security directly to request the deactivation of Ken Russell's security card*
>
> *Allegation #2: Misuse of government electronic data systems*
>
> - *Violation of employee privacy - accessing Ken Russell's leave records in Leave Self Service*
>
> *Allegation #3: Failure to respect the direction of the Harassment Coordinator regarding safeguarding the confidentiality of the harassment investigation.*
>
> - *Discussing the complaint with a witness in the investigation.*
>
> *Allegation #4: Disrespectful behaviour towards management*
>
> - *Content of out of office message (April 2015).*
> - *Response to management's direction regarding Ken's [sic] Russell's security pass de-activation.*
> - *Conduct during May 11 management meeting.*
> - *Response to management's direction regarding an incident in the Nanaimo office.*
>
> …

[119] Ms. Meroni met with the grievor on August 10, 2015. There are no notes or summary of that interview. Ms. Meroni testified that the interview was scheduled for one hour and that the grievor used the whole hour to read a statement, which left no time for discussion. As a result, Ms. Meroni asked the grievor no questions.

[120] Following this meeting, the grievor provided written submissions to Ms. Meroni, who testified that she reviewed the grievor's documents and submissions and that she found no facts or statements to support any errors in the allegations or remorse for the grievor's actions.

[121] Ms. Meroni prepared a final fact-finding investigation report on August 14, 2015. It concluded that all the misconduct allegations were founded. A copy of it was

provided to the grievor on October 1, 2015, when she received her letter of termination. The report was provided in a sealed envelope at that meeting, and the grievor was invited to read it after leaving the workplace.

[122] I have summarized the findings in that report under each section related to the alleged misconduct.

1. The deactivation of the complainant's access card

[123] Before the final harassment investigation report was released, the grievor told Mr. Goluza and other management representatives that she had concerns about the complainant's reaction to the report, given its findings. At the time, her view was that all the allegations would be dismissed. I have set out in more detail her concerns for her safety in a section that follows later in the reasons.

[124] In an email to Ms. Meroni relating to an upcoming meeting with occupational health and safety advisors and the security manager for the Vancouver office, Mr. Gilliéron noted that the grievor was afraid that the complainant "… could become more angry and could lose control …" when he received the investigation report. He suggested that occupational health and safety advisors and the security manager could be asked for their suggestions on what management could do "in this situation". Mr. Gilliéron did not attend the meeting, but he reported in an email to the director of labour relations and occupational health and safety that the occupational health and safety advisors and the security manager "… had not so much to propose in these circumstances".

[125] The grievor was provided with 48 hours' notice of the release of the harassment investigation report on Friday, April 10, 2015, at approximately 5 p.m. On Sunday, April 12, 2015, she emailed the manager of security, Linda Carriere, and asked her to deactivate the complainant's access card to the Vancouver office as of Monday, April 13. The grievor did not seek approval for this request. She took sick leave on April 13.

[126] Mr. Goluza testified that he was told of the grievor's direction to suspend the complainant's access card when he received an email from Ms. Carriere. He testified that he called Ms. Carriere immediately to ask her what was happening and that she told him that the only direction she had received was in the grievor's email. She told

him that she had suspended the access card. In an email to him after their call, Ms. Carriere asked if he could confirm whether the card should stay deactivated.

[127] Mr. Goluza told Ms. Carriere to suspend the complainant's card access to the Vancouver office for five days. He testified that he agreed to this in an effort to support the grievor because the complainant was not planning to go to the Vancouver office and because it "really wouldn't affect him". Mr. Goluza testified that he believed that the grievor was very frustrated that he would not suspend the complainant's access card for a longer period.

[128] Mr. Goluza emailed the grievor that day, stating this: "… please do not action or make requests towards Ken as he does not report to you. Just bring it to my attention for my action." The grievor replied a few minutes later with this: "Where my safety may be at risk or in this case clearly unassessed in a timely manner (report comes out today), I will not hesitate to take whatever action I deem necessary to be safe whether it be internally or with Police and Provincial Crown." The employer considered her email a separate act of misconduct, which is addressed in the section of this decision on alleged acts of insubordination.

[129] Mr. Goluza testified that normally, the complainant went to the Vancouver office around four times per year, to meet with his temporary supervisor, Mr. Krahn. He also stated that the complainant had never indicated that he would be at the Vancouver office on that day. He testified that the complainant was aware of the separation agreement and that he had always abided by it. He testified that he had always advised the grievor when the complainant was to be at the Vancouver office, and she would then work offsite.

[130] Mr. Goluza testified that he viewed the complainant's action of requesting the suspension of the complainant's access card as punitive and vindictive toward the complainant and as demonstrating her willingness to assert her position with no thought to its impact.

[131] Mr. Owen testified that by using her manager signature block in the email to the security manager, the grievor had led the security manager to believe that she had the authority to make the request. Mr. Owen testified that that was an abuse of authority. He also testified that there was no reason why she could not have contacted Mr. Goluza, as they both had smartphones. He also testified that she could have contacted

the director general or other levels of management had she been unable reach Mr. Goluza. He also testified that she could have refused to work.

[132] Mr. Owen testified that after reviewing the facts in the misconduct investigation as well as the threat-risk assessment (discussed in the later section of this decision on the grievor's fear for her safety), he concluded that contacting security without authority was "to camouflage retaliatory action" toward the complainant for making a harassment complaint. Mr. Owen also testified that he did not believe the grievor's rationale of safety concerns, since she and the complainant were in different locations, the complainant required management approval for travel, and he had cooperated with the complaint process throughout the investigation.

2. Accessing the complainant's leave records

[133] The grievor accessed the complainant's leave records during the harassment investigation, when she was not supervising him. The harassment complaint was made in January 2014, and the grievor and the complainant were advised of their separation on February 13, 2014. After the separation, the complainant reported to Peter Krahn, who was a manager at the Vancouver office.

[134] The grievor testified that after the separation, she was required to maintain the complainant's performance records as well as approve expenditures relating to his travel, equipment, and assets. She also testified that Mr. Goluza continued to engage in conversations and to email her about his meetings with the complainant. He also forwarded to her the complainant's performance action plans and assessments in December 2014 and February 2015.

[135] The leave system software continued to list the grievor as the complainant's supervisor, even though Mr. Krahn was now supervising him. Since the grievor was listed as the complainant's manager in the leave system, she was able to view his leave balances and transactions. Mr. Goluza testified that management could have changed the software access rights to prevent the grievor from seeing those leave records, which the department eventually did.

[136] The grievor emailed Mr. Goluza on January 30, 2015, about information she had received from Mr. Brochez that the complainant was in the Nanaimo office working late at night. In that email, she told Mr. Goluza that she had been told that the

complainant had booked vacation leave that week and that she had checked and that he had used up his vacation leave. Mr. Goluza replied, "Thanks for the info." He asked whether the photocopier recorded dates and times. He then concluded, "Keep your eyes on your team … the rest is noise."

[137] Mr. Goluza testified that he did not raise the issue of the grievor's access of the complainant's leave records at that time because he was concerned with her health situation.

[138] On March 2, 2015, Mr. Goluza asked the grievor for any assessment or performance management documents relating to the complainant from fiscal years 2012-2013 and 2013-2014. He requested the documents to help him prepare for a meeting he was to have with the complainant about his performance.

[139] On March 31, 2015, the grievor emailed Mr. Goluza, stating that after she had received multiple access-to-information requests about the complainant, she had made her own such request and had learned that he had submitted 12 requests during working hours. She told Mr. Goluza that she had verified in the leave system that the complainant was not on leave on the day he made the requests. Mr. Goluza's reply in its entirety was this: "Thank you for sharing. I am following up." Mr. Goluza testified that he had not asked her to verify the complainant's leave.

[140] In an email to his director general on April 7, 2015, Mr. Gilliéron noted that the grievor had told Mr. Goluza about the submission of access-to-information requests during the complainant's work hours. He wrote that he was in discussions at the time with Mr. Goluza on whether to go ahead with a fact-finding investigation, to determine if the complainant sent the requests during his work hours or if he did so on his breaks.

[141] Mr. Goluza forwarded the email exchange with the grievor about the complainant's leave to a labour relations advisor and Ms. Meroni on April 8, 2015. The labour relations advisor replied that this concerned her "greatly" and that it was important not to "encourage or condone this behaviour." In her email response to this email chain, Ms. Meroni said that she supported the labour relations advisor's advice. She said that it was inappropriate for the grievor to access the leave records and that it "… needs to be mentioned to her to ensure it is not assumed that this behavior would be viewed as acceptable." Ms. Meroni testified that this email exchange occurred when

she first became aware that the grievor was looking at the leave records of an employee who was not reporting to her.

[142] Mr. Goluza replied to both emails as follows: "I will address this in her year end as I think it will have more of an impact after the TRA [threat-risk assessment] is finalized."

[143] Mr. Goluza testified that he also recalled that the grievor once mentioned that she did not know how much leave the complainant had left and that she would verify it. He stated that he did not know if she followed through with that suggestion.

[144] Ms. Meroni testified that in her misconduct investigation, she concluded that the grievor's actions were inappropriate, a potential breach of privacy, and a violation of the department's values and ethics code and its policy on the use of electronic networks.

[145] Mr. Owen testified that he did not find credible the grievor's explanation for her access of the complainant's leave records. He stated that if she had concerns about the complainant's leave usage, she could have asked Mr. Krahn or Mr. Goluza. He testified that he considered her access of the leave records an attempt to portray the complainant in a negative light to management and as an act of reprisal.

G. Acts of alleged insubordination

[146] The employer concluded that the grievor was insubordinate on four separate occasions: 1) in an inappropriate out-of-office message in April 2015, 2) in her conduct at a May 11, 2015, management meeting, 3) in her conducting of a fact-finding meeting involving the Nanaimo office, against Mr. Goluza's direction, and 4) in her response to Mr. Goluza's decision on the deactivation of the complainant's security pass.

1. The out-of-office message

[147] Before going on sick leave on April 7, 2015, the grievor set up an email out-of-office message that listed Mr. Gilliéron as the point of contact.

[148] The grievor testified that she changed her out-of-office message out of frustration and that she was upset at the time. She testified that she felt that Mr. Goluza had deferred to Labour Relations by accepting the doctor's letter for the complainant's return to full duties, despite her concerns, and Mr. Gilliéron had

dismissed her safety concerns on multiple occasions. She also testified that she was in disbelief and shock and that she was profoundly disappointed by the harassment investigation's outcome.

[149] Mr. Goluza testified that he was advised of the out-of-office message by two employees. He testified that he was very surprised by the grievor's actions. He testified that in past conversations, she had accused him of not making his own decisions but instead following Labour Relations' advice "strictly". He testified that he took her out-of-office message as a way to point out to him her dissatisfaction with his leadership and her perceived lack of support from him.

[150] Mr. Goluza also testified that Mr. Graham asked him about the out-of-office message and that Mr. Graham acknowledged that it was inappropriate. Mr. Graham testified that he did not recall making such an acknowledgment, although he did not dispute that it might have been a topic of discussion. However, Mr. Graham testified that he would not have volunteered that information.

[151] Ms. Meroni testified that she concluded that the use of the out-of-office message was inappropriate and that the grievor ought to have had a clear understanding of roles and responsibilities, including knowing that listing a Human Resources employee as a contact was not only inappropriate but also could have had possible implications for her branch.

[152] Mr. Owen testified that he did not find her explanation credible. He stated that as a manager, she ought to have known that an expected course of action when out of the office would have been to list her director, another manager, or a direct report as her contact rather than someone from outside the branch.

[153] The grievor testified that the out-of-office message was inappropriate and immature. She stated that she should not have done it. She also testified that she should have apologized and "moved on".

2. Conduct at the May 11, 2015, management meeting

[154] Mr. Goluza testified that he convened a regional management team meeting on May 11, 2015, with the grievor and the other operations managers (Elizabeth Graca in person, and Ms. Portman by phone). He testified that when it was the grievor's turn in the round-table discussion, she said something to the effect that she was working in a

region where the regional director did not take safety seriously. He testified that she said that earlier that week, she visited the police with respect to her concerns and that Gordon Leek, the threat assessment investigator, had attended her office to measure "egress points". He also testified that she said that he had taken the complainant on a tour of the office, to show him where she was working. Mr. Goluza testified that she also said that he had influenced an officer in the region, Darin Conroy, not to participate in the threat-risk assessment that was being conducted by Mr. Leek.

[155] Mr. Goluza questioned the grievor about her assertion that he had interfered in the security investigation. She told him that she was only alleging and not accusing him of interference. He testified that he found this assertion confusing. He felt that she was accusing him of acting "very inappropriately". Mr. Goluza testified that he had not told Mr. Leek whom he could or could not talk to.

[156] Mr. Goluza testified that right after the meeting, he contacted Mr. Conroy to ask him if he (Mr. Goluza) had ever talked to him about the matter, and he replied that he had not. He also testified that he sent a note to Mr. Leek, to clear things up. He testified that he believed that her false accusation was meant to perpetuate mistrust.

[157] Mr. Goluza testified about the allegation by the grievor that he had shown the complainant where her office was. He testified that after a meeting with the complainant, he had taken him on a tour of the office after some renovations had been completed, in February 2015. He testified that in a conversation with the grievor after his meeting with the complainant, he had told her that he had given him a tour of the office. He testified that the grievor became angry. Mr. Goluza suggested that there was a "very real possibility" that the complainant would return to her team. He testified that the grievor then said that she could either be a motivated and good employee or she could become a very difficult employee and cause problems for the department.

[158] Ms. Portman testified that the grievor spoke about the security investigation and that it was her impression that the grievor was aggressive. She testified that at the meeting, the grievor stated that Ms. Portman's staff had been told not to say anything and that she should ensure that they cooperated. She testified that Mr. Goluza told the grievor that it was not appropriate to discuss this at the meeting and that they would discuss it "offline". She testified that the grievor did not mention Mr. Conroy by name

but that she had "an inkling" that the grievor was referring to him, as he often supported people in the employer's Pacific Region.

[159] Ms. Portman testified that the grievor did not yell but spoke "strongly and aggressively". She stated that the grievor spoke in a "strong and choppy" tone. She testified that this was the first time she had seen the grievor direct a "very aggressive and demeaning" attitude toward Mr. Goluza. Ms. Portman testified that she was "floored". She testified that at the meeting, it became clear to her that the grievor was unhappy and that she was accusing Mr. Goluza of inappropriate and illegal actions.

[160] Ms. Portman followed up with the officers who reported to her to confirm if they had been told not to cooperate, but they said they had not been so told.

[161] Mr. Owen testified that he found the grievor's actions "highly disrespectful" and insubordinate. He testified that it was inappropriate to accuse her director, in front of his subordinates, of unethical behaviour. He stated that this accusation had the potential to damage Mr. Goluza's relationship with his employees, especially since he had designated peace officer status, which might have brought into question his handling of cases at the branch. Mr. Owen testified that as a manager, she ought to have known that her statements could cast doubt about his intentions. Mr. Owen also stated that he viewed her statement as a deliberate attempt to discredit Mr. Goluza in front of his team.

3. The grievor's fact-finding interview

[162] On May 8, 2015, the grievor learned from Mr. Goluza of a conflict between the complainant and Mr. Fraser at the Nanaimo office that occurred in late January 2015. She emailed Mr. Goluza, thanking him for advising her of the conflict. She also wrote that after reviewing documents on workplace harassment, she was concerned that she would not meet her "… due diligence in regards to the harassment policy and guidelines …" if she did not gather preliminary facts about the conflict. In an apparent reference to the harassment investigation report (that Mr. Goluza had not seen), the grievor also stated that she had learned that unnecessarily elevating a matter to a labour relations advisor constituted harassment.

[163] In her email, the grievor then stated that she would schedule a fact-finding interview with Mr. Fraser the following week, "… to meet [her] obligations concerning

harassment in the workplace." She concluded her email by stating that she would advise Mr. Goluza of the outcome of the interview.

[164] Mr. Goluza testified that he did not understand her comment about not contacting Labour Relations. It was his view that she had to talk to Labour Relations before conducting a fact-finding interview. In an email, he told her to follow up with Mr. Gilliéron "for clarification." He concluded that since the situation involved a conflict between the complainant and Mr. Fraser, she was "not to action this" until she and the complainant were no longer separated.

[165] The grievor replied to Mr. Goluza's email, stating this: "My fact finding will go forward with the Officers that currently report to me. I do not have a bona fide reason to escalate the matter to Labour Relations at this time …".

[166] The grievor discussed the conflict between the complainant and Mr. Fraser with Mr. Fraser and Mr. Brochez. In an email on May 11, 2015, she told Mr. Goluza that it would be inappropriate for her to contact the complainant while she was under investigation for harassment and misconduct. She told Mr. Goluza that she had no indication that misconduct had occurred or that the definition of "harassment" had been met in the incident.

[167] Mr. Goluza testified that in his view, the fact-finding interview was "completely out of the blue, uncalled for and against [his] direction". He testified that he felt embarrassed, confused, and belittled.

[168] Mr. Owen did not accept the grievor's explanation for her conduct. He concluded that proceeding with the fact-finding interview was insubordinate and a breach of the separation of the parties during the harassment investigation process.

[169] The grievor testified that she now acknowledges that her actions were not appropriate.

4. The grievor's response to the decision on the deactivation of the complainant's security pass

[170] The employer alleged that the grievor committed an act of insubordination in her email response to Mr. Goluza about the deactivation of the complainant's security pass to the Vancouver office. I have already set out the details of the deactivation in an

earlier section of this decision. By necessity, some of that evidence will be repeated in this section.

[171] Mr. Goluza emailed the grievor on April 13, 2015, stating this: "… please do not action or make requests towards Ken as he does not report to you. Just bring it to my attention for my action." She replied by email a few minutes later with this: "Where my safety may be at risk or in this case clearly unassessed in a timely manner (report comes out today), I will not hesitate to take whatever action I deem necessary to be safe whether it be internally or with Police and Provincial Crown."

[172] The grievor testified that she did not intend to be disrespectful in the email. She testified that she was upset and very defensive after having just read the harassment investigation report.

[173] Ms. Meroni concluded that the email was an act of insubordination. She testified that the grievor's response was also disrespectful. She stated that the grievor had mechanisms to address her safety concerns other than defying Mr. Goluza.

[174] Mr. Owen testified that the grievor's response was considered insubordinate as it defied her direct manager's direction. He did not accept her explanation that she sent the email because she did not feel that management was taking her safety concerns seriously. He testified that she could have used other avenues to address her concerns, such as approaching Mr. Goluza or senior management. He also stated that she could have requested to work at an alternate location if she was concerned about the complainant coming to the Vancouver office. He also noted that part of the separation agreement included separating the parties and that there was an agreement that she was to be advised if he was coming to the Vancouver office. He stated that up to that point, the complainant had respected the separation of the parties.

[175] Mr. Owen testified that he concluded that her actions were insubordinate and that they were an attempt to create the impression that the complainant was unpredictable and that enhanced security measures would be required. He testified that there was no evidence to support that enhanced security measures would be required.

H. The breach of the confidentiality of the investigation process

[176] The employer alleged that the grievor breached the confidentiality agreement she signed at the beginning of the harassment investigation.

[177] The investigator emailed both the complainant and the grievor on August 27, 2014, outlining the confidentiality requirements for the harassment complaint investigation. In that email, the investigator noted that "… this matter is confidential and not to be discussed with anyone not formally involved in the investigation process", other than an assistant or bargaining agent representative. The email also stated that it was inappropriate to discuss the harassment complaint or investigation with anyone "… not directly involved in the resolution of this matter." The complainant and the grievor signed a document that included the confidentiality requirement.

[178] In the report, the harassment investigator observed that the complainant admitted to her that he had discussed the complaint with his co-workers after his interview on September 22, 2014. The investigator stated that she reminded him of his confidentiality obligations and that she instructed him not to discuss the ongoing case with his co-workers. He received no discipline for this breach of confidentiality.

[179] The harassment investigator also wrote that on December 22, 2014, Mr. Fraser reported to her that the grievor had discussed the harassment complaint with him. In her report, the investigator summarized what Mr. Fraser had told her as follows:

> …
>
> - *During one-on-one meetings with the Respondent [the grievor] in the preceding week, she raised the matter of the ongoing harassment investigation.*
> - *She told him that both parties (she and the Complainant) get to see the witness submissions.*
> - *She said to him in a snotty tone, "I read your statement."*
> - *She said words to the effect, "I don't know what [the Complainant] is expecting out of this. He's not going to end up reporting to another manager. The Island [Vancouver] is not going to become its own district. I am not going anywhere. I might get sensitivity training. I'm going to be here for 10 years and 11 months."*

> • *She told him there had been three other grievances about her and the results were for her to be more sensitive and go on sensitivity training.*
>
> …

[180] Mr. Fraser is deceased. He did testify at the 2018 hearing, and his testimony on the confidentiality breach was summarized at paragraph 69 of the 2018 decision, as follows:

> *[69] … She* [the grievor] *had called him to the Vancouver office to discuss his performance and the need for a fitness-to-work evaluation. She noted that she twice mentioned at the meeting the witness interviews conducted as part of the harassment complaint investigation. According to Mr. Fraser's testimony, she told him that she knew what he had told the Investigator in his interview.*

[181] At the hearing before me, the grievor denied that she told Mr. Fraser about the harassment investigation. She also testified that there had been no other grievances filed against her and that she had never been ordered to take sensitivity training.

[182] Ms. Meroni met with Mr. Fraser as part of the misconduct investigation. She testified that Mr. Fraser told her that the grievor had told him that she was aware that he had been interviewed by the harassment investigator and that she then proceeded to discuss his performance. Ms. Meroni testified that Mr. Fraser told her that he interpreted her reference to his performance as an attempt to intimidate him and as a threat.

[183] Ms. Meroni testified that she concluded that the allegation of a breach of confidentiality was founded because Mr. Fraser spoke to the harassment investigator, who had notes of the conversation, and the investigator concluded that the confidentiality had been breached. Ms. Meroni testified that since both Mr. Fraser and the investigator referred to the incident, it was more likely than not that the breach of confidentiality had occurred.

[184] Mr. Owen testified that he viewed the grievor's breach of confidentiality as an attempt to intimidate Mr. Fraser for speaking against her.

I. The GPS devices

[185] The grievor was involved in internal discussions about placing GPS devices on departmental vehicles. Although the employer did not rely on the decision to place the

GPS devices when it decided to terminate the grievor's employment, it relied on her alleged failure to inform the complainant of the device in its submissions to the Board. Therefore, I have summarized the context and the evidence related to placing the GPS device in a vehicle that he eventually used.

[186] The grievor testified that in the summer of 2014, the acting operations manager for the employer's Southern Interior District, Dylan Wood, approached her to discuss placing GPS devices in vehicles used for remote field work. He suggested that a GPS device would be more reliable for locating officers in the event of an accident or an emergency than relying on satellite phones. The grievor testified that she discussed the idea with Ms. Meroni, and she agreed to a pilot project. Ms. Meroni had no recollection of the discussion but did not dispute that it occurred. The grievor also testified that the matter was raised with Mr. Graham, who was a member of the Occupational Health and Safety Committee, and that his feedback was positive.

[187] The grievor testified that Mr. Wood selected two trucks from his district and that she selected one truck in Vancouver and two larger trucks at the Nanaimo office. At the time, the custodians of the Nanaimo trucks were Mr. Graham, Mr. Brochez, and, while Mr. Fraser was on extended leave, her. She testified that no GPS was installed on the complainant's vehicle. She also testified that all managers and supervisors were advised of the installation of the GPS devices, including the complainant's temporary supervisor at the time, Mr. Krahn. The grievor also testified that she advised Mr. Goluza of the GPS devices on his return from leave in the fall of 2014. Mr. Goluza did not raise any concerns about the pilot project. The pilot project ran until the summer of 2015.

[188] On October 31, 2014, Mr. Krahn told Mr. Goluza that the complainant had access to Mr. Fraser's truck, for an inspection. In her reply to Mr. Goluza's email about using the truck, the grievor wrote "please provide the dates for these inspections and ensure Peter has passed on the GPS OSH information" to the complainant.

[189] In his witness statement, Mr. Goluza stated that the grievor placed a GPS device on the complainant's work vehicle without advising Ms. Meroni and that he was unsure if the grievor had advised Mr. Krahn in an individual email or if he was included in a distribution list for an email sent to a larger group. Mr. Goluza testified that Mr. Krahn

admitted to him that he had not read the grievor's email. Mr. Goluza testified that there was no follow up by the grievor on the GPS, other than the one email.

[190] Mr. Goluza testified that he found the grievor's action of installing the GPS devices unfair. He suggested that she was collecting the complainant's information without his consent and without consulting departmental security or Labour Relations. He also stated that he did not know why she chose to install a GPS on the complainant's vehicle when there were 25 other vehicles in the region. He also testified that it concerned him that he believed that she never gave Mr. Krahn the login information or explained to him how to use the GPS. Mr. Krahn did not testify. Mr. Goluza also testified that he was never provided with a tutorial on how to use the GPS. He testified that he believed that the grievor's actions provoked the complainant and others in the region.

[191] Mr. Goluza testified that shortly after he learned that the complainant did not know about the GPS, he ordered the end of the pilot project and the removal of the GPS devices from all vehicles. He testified that the pilot project "was a complete waste of time and money" and that the way that the grievor handled the situation was "completely inappropriate".

J. The fear for her safety

[192] At a meeting with the grievor on May 22, 2013, the complainant told her that he felt raped by her. Mr. Goluza also attended. In his harassment complaint, the complainant referred to this comment and stated that the grievor "took exception" to it. He wrote in his harassment complaint that he thought to himself at the time that the use of the term accurately reflected how he felt as the result of her actions against him.

[193] The grievor took notes at a meeting to discuss the complainant's performance objectives held on July 30, 2013. She wrote that the discussions generated a "high degree of anger" on his part.

[194] The grievor testified that the complainant's behaviour at use-of-force training in April 2014 caused her concern. She made the following observation in her witness statement:

…

> *… He was making copious notes and appeared stressed. At the end of the day, I felt reluctant to go to the parking lot, and the PLO* [program liaison officer] *approached me to ask what I was waiting for. I asked her to contact an officer who lived close to me to pick up my daughter from daycare if something were to happen to me during training. The PLO advised Mr. Goluza what I told her, and the next day during the training he and I had a call with Mr. Gilliéron, where I discussed the indicators I had observed in Mr. Russell. Mr. Gilliéron seemed unconcerned and advised that I may withdraw from the use-of-force re-certification if I was struggling. However, I felt pressure to finish the training. As a female manager, I felt that if I did not attend the training it would reflect negatively on me. During the interactive portion of the training, I saw Mr. Russell forcefully striking the head of a training dummy with his baton instead of using the appropriate body strikes and level of force. I participated until the team exercise portion, where participants have to strike and push one another, so I would not have to interact with Mr. Russell.*
>
> …

[195] Mr. Leeden testified about a scenario at the use-of-force training called "running a gauntlet". In his witness statement, he described it as the attendees pushing their way through dummies and at the end, striking a dummy with a baton. He testified that the officers were taught to aim for the arms and legs and to avoid hitting the joints or the head, which could be fatal. He testified that he observed the complainant striking the dummy in the face with enough force to leave a mark. He testified that this struck him as odd as it was contrary to the training.

[196] On May 1, 2014, a shooting occurred at a mill in Nanaimo. The grievor testified that on that day, Mr. Leeden and Mr. Brochez called her to tell her that the complainant had described the shooter as someone who might have had issues with management or issues at home and other stressors in his life, which could have triggered a shooting. The grievor testified that this was alarming to her, as it appeared to her that he was associating himself with the perpetrator.

[197] Mr. Brochez testified that the complainant appeared to sympathize with the shooter as a person who might have had difficulty at home and with management at the mill. He testified that these were the same issues that the complainant "was venting to [him] [about] almost daily". Mr. Brochez testified that he "could feel an excruciating level of tension in the office" and that hearing the complainant speak about the shooting in reference to "comparators to [the complainant's] own life at the time" compelled him to speak to the grievor about his feelings.

[198] The complainant testified that there had been a discussion about the incident with his work colleagues and that he did not recall all of it. He testified that he never expressed sympathy with the shooter. He testified that he was "simply trying to seek answers or a reason or justification on why an individual would commit such a grievous act".

[199] In November 2014, Mr. Brochez advised the grievor that the complainant had been moving the ceiling tiles at the Nanaimo office, to see if there were listening or recording devices in the ceiling. The occupational health and safety advisor advised her that to be cautious, she should have a maintenance person check the stability of the ceiling tiles. She testified that Mr. Brochez told her that when the complainant learned that members of management knew that he had checked the ceiling tiles, he became visibly angry.

[200] The grievor set out in her witness statement the comments that the complainant made about her that Mr. Goluza, Mr. Leeden, and Mr. Brochez had reported to her. These included:

> …
>
> - *"Bitch," including with adjectives, e.g. "f***ing bitch," "stupid bitch"*
> - *"C***," including with adjectives, e.g. "stupid c***-"*
> - *"Miss Piggy"*
> - *"The Devil"*
> - *That I should be "burned at the stake"*
> - *"Split tail," which I understand is a reference to the female reproductive system.*
>
> …
>
> [original language expurgated]

[201] In his witness statement, Mr. Brochez stated that the complainant would refer to the grievor as "… 'bitch' or a 'c---' and sometimes with adjectives before them, such as 'f--ing' or 'stupid' [original language expurgated]". He also recalled hearing the term "split tail" but although he understood that it was not a compliment, he did not know what it meant. In Mr. Leeden's witness statement, he stated that he heard the complainant call the grievor "a bitch", along with other negative comments toward her.

[202] The grievor testified that Mr. Brochez and Mr. Leeden told her that particularly after the complainant returned from medical leave, he was "quick to anger" whenever she called the Nanaimo office. She testified that after she received the harassment allegations, she became very alarmed about his anger toward her. She testified that she wore her full uniform and duty belt when visiting the Nanaimo office because of concerns for her safety. She also testified that she informed the Royal Canadian Mounted Police (RCMP) detachment where she was going. She testified that she would book conference rooms away from the main office to avoid the complainant and that she would use different exits to leave the building. Mr. Brochez testified that he remembered thinking at the time "how concerned for her safety she must have been to go to such lengths for her own security".

[203] In typed notes that he made of his meetings with the grievor on December 17 to 19, 2014 (and provided to her at the 2018 hearing), Mr. Fraser reported that she had told him that unlike with the complainant, she had no fears for her personal safety from him.

[204] Mr. Goluza emailed Bert Engelmann, a senior occupational health and safety advisor to the department, on December 22, 2014, entitled, "For When You Return – Security Concerns". He listed a number of indicators that were "warning signs of a troubled employee" taken from the Canadian Centre for Occupational Health and Safety's website. He stated in the email that "we may have also seen some of the physical signs, and some of the 'other signs' found at that web-site [*sic*] as well". He also noted that they had seen "some small signs of paranoia". He asked Mr. Engelmann for advice on how to "engage constructively" and if he had any proposed actions.

[205] Mr. Engelmann testified that he had very little interactions with the grievor about the complainant but that he was aware of her concerns for her safety. He testified that he recalled talking to her on the phone once or twice in late 2014 about her concerns. He testified that he had no reason to disbelieve her concerns.

[206] In the covering letter to the final harassment investigation report, submitted on February 27, 2015, the investigator noted that the complainant's response to the preliminary report was "somewhat disquieting" in its size and tone, "… but the Complainant's inclusion of approximately 68 photographs of the Respondent [the grievor] is alarming." She noted that the photographs included pictures of the grievor

and her daughter during social events as well as photographs of training sessions in which it was obvious that the grievor was not aware of her picture being taken.

[207] In the covering letter, the harassment investigator also noted that Mr. Brochez and Mr. Leeden had concerns about retaliation from the complainant because they had participated in the investigation. The investigator reported that both officers had stated that they had seen the complainant react "very strongly" in situations in which it did not seem appropriate, and they described a "volatile temper". She reported that the officers told her that it was like "walking on eggshells" around the complainant due to "… not knowing what may set him off." She noted that the officers had told her that they had tried to raise their concerns with the complainant but that he had "adamantly" refused and essentially told them "f--- you guys."

[208] Mr. Brochez testified that the complainant would have extreme mood swings at work, especially after his return to work after his first leave of absence. Mr. Brochez stated in his witness statement that "[h]e would be laughing, crying and then angry within the span of a few minutes. He would be like this up to five or six times a day". He testified that the complainant's behaviour made him uncomfortable and that he felt like he was "walking on eggshells around him". He stated that the complainant's behaviour was "odd" and that the complainant's "vitriol" against the grievor and the department was concerning to him.

[209] Mr. Leeden also testified that the complainant's mood swings were "extreme and rapid". He stated that he had observed the complainant "run through emotions, from laughter to anger within the course of a short conversation". He testified that he started to avoid the complainant because of these mood swings.

[210] In the preliminary harassment investigation report, the investigator noted that the grievor had concerns for her safety around the complainant. When the complainant learned this from reading the preliminary report, he filed 12 access-to-information requests to obtain information about the allegation she made and who knew about it.

[211] The grievor filed a grievance about not receiving documentation filed by the complainant in the harassment investigation. On March 9, 2015, she provided some additional submissions after a grievance hearing with Ms. Meroni. In an email dated March 9, 2015, she stated this:

…

> *The decision made regarding this information is significant to me as I feel I am at risk. The Complainant has demonstrated an unhealthy focus on me as shown in his behaviour, statements and allegations. It is crucial that I have the ability to continue to assess this risk and anticipate any acceleration in Ken Russell's conduct which may result in an unsafe workplace for myself and others. Ken Russell has not had a Fit to Work Evaluation since his last (second) extended period of sick leave which followed a failed application for disability. He meets the majority of the warning signs documented on the Health Canada website indicating he is a troubled person and he continues to be disruptive in his workplace, behave in a paranoid manner, and negatively impact those around him.*

…

[212] She listed some of his workplace behaviours in the email, including documenting co-workers, paranoia that listening and monitoring devices had been installed at his workstation, the discomfort of his colleagues in working with him, and extremes of emotion. She stated in the email that she was "… very concerned about an extreme negative reaction when the results of the [harassment] investigation are complete …".

[213] Through her lawyer, the grievor advised the employer of safety concerns on April 3, 2015. In that letter, it was stated that the grievor "urgently fears" for her personal safety. The lawyer stated that the key point was that the final harassment investigation report was due to be released soon and that if it was not to the complainant's satisfaction, it could "… clearly cause further anger, despair and disgruntlement on his part which may again be directed very forcefully at Ms. Walker." The letter included a summary prepared by the grievor. She set out the following "circumstances" to substantiate her fear for her safety:

…

> *• Ken Russell has consistently demonstrated an unhealthy focus and preoccupation with me through his behaviour, statements and allegations.*
>
> *• He is an avid hunter and gun enthusiast. When he had to go for firearms certification he advised "he could teach the instructor a thing or two about guns".*
>
> *• I am very concerned about an extreme negative reaction when the results of the internal investigation are complete and released.…*

• I was advised by two Officers that Ken Russell engaged them in a conversation the day after the … saw mill shooting which took place in Nanaimo on April 30, 2014 … Ken Russell advised these Officers that the shooter was just 'probably a guy that just lost his job, has issues with management, lost his wife, and had something happen at home. Could have been someone relieved of his duties. When someone has major stressors in his life it can trigger these sorts of things. If a guy goes through a major stressful event and combine a couple of these it can trigger these sorts of things.'

• Ken Russell has stated to me he holds me personally responsible for all his personal (relationship) problems, health problems and work issues.

• He has not had a medical Fit to Work Evaluation when he returned from his most recent extended period of sick leave which followed a failed application for disability.

• He has advised me he has struggled with symptoms like depression as well as anxiety and periods of sleep deprivation.

• Ken Russell has expressed to me a strong need for "absolution", "hunger for justice", the need to feel "righteous" in my regard and stated he feels persecuted by me.

• I have spent hours one-on-one with him where he has cycled to extremes of emotion whether it be anger or tears. At one point in anger he referred to me as "Denise" who was his estranged common law spouse at the time and may be estranged again. He advised me that he had been "taking things out" on his spouse prior to her leaving him. At times I have had to force breaks to de-escalate the meetings in my office with Ken Russell.

• He meets the majority of the warning signs listed by Canada Centre of Occupational Health and Safety indicating he is a troubled person and he continues to be disruptive in his workplace, behave in a paranoid manner, and negatively impact those around him.…

• We are at close to the 15-month mark now of an internal harassment investigation … If he is unsuccessful in his complaint, (which the preliminary report suggests) it will negate years of his efforts and potentially accelerate his frustration and conduct.

• In the harassment complaint he alleges numerous times that I have: "threatened his livelihood, abused my authority, humiliated him, belittled him," stripped him of his Officer duties and behaved in an "unethical and unconscionable manner".

• He has devoted significant time and focus to document me including unpaid & paid leave as well as nights and even Christmas holidays (noted on his print outs).

• He took a week of vacation January 26-30, 2015 and worked days and evenings in the office on 4 banker boxes full of documents in further support of his complaint after receiving an

> *unfavourable preliminary report. My office received a bill for 3000 photocopies of documents subsequently.…*
>
> *• I am privy to hearsay said to be from Ken Russell where he states things like "his career is screwed so he is going to take down management with him," and am told he is on the phone voicing derogatory comments to other Officers in my regard.*
>
> *• Recently, I recertified in my annual Use of Force at the Justice Institute with another Environment Canada Region due to my fear in regards to Ken Russell. Last year I had to remove myself from the physical fighting exercises during Use of Force recertification where I would have had, to have physical contact with him. My region recertifies at the end of April 2015 which will include Ken Russell.* [sic]
>
> *• I remove myself from the Vancouver office building when Ken Russell attends due to my level of concern regarding his conduct. My Regional Director advises me when Ken Russell is scheduled to attend Vancouver as a courtesy to allow me to take leave or telework.*
>
> *• During supervision in my Nanaimo office, unlike my Vancouver Office, I wear my duty belt, use of force tools, bullet proof vest and have a driving route to the local hospital and RCMP detachment printed out for quick reference. I have taken steps to work in boardrooms in other areas of the Nanaimo building to avoid encountering Ken Russell or managed around his leave since I read his initial 1,159 page complaint.*
>
> *• He has just been put on a performance 'action plan' by his temporary supervisor and is grieving it with our Union. The consequences of failing to meet his performance objectives are demotion, or termination within 18 months. Given he blames me personally for all his work issues, this also seems to be a potential accelerating factor.*
>
> *…*

[214] She also identified the following "Workplace Behaviours" of the complainant: asserting that listening and monitoring devices had been installed in his work area, filing access-to-information requests to determine what information she and his colleagues had provided about him, statements that he felt that members of the public were taping his conversations with him, stating that someone broke into his locker and broke some of his equipment, and his co-workers' discomfort when working with him.

[215] The general counsel of the department's legal services, Michael Sousa, replied by email to the lawyer's letter on April 10, 2015. He stated that the department would conduct a threat-risk assessment to address the grievor's concerns. He also outlined as

follows the measures that had been and that would be undertaken to protect the grievor:

> …
>
> *… To address Ms. Walker's safety and security concerns, my Environment Canada client has also advised that it has undertaken a number of measures to address these matters, including:*
>
> *1. Changing the reporting relationship between Mr. Russell and Ms. Walker, which resulted in Mr. Russell reporting to another Environment Canada employee rather than Ms. Walker. This change was effected on February 13, 2014. This change was to effect a separation of the parties while the investigation into the complaint is undertaken;*
>
> *2. Since Mr. Russell and Ms. Walker work in different geographic locations in the region (Nanaimo and Vancouver respectively) additional measures were put in place to respect concerns expressed by Ms. Walker after the separation, by providing advance notice of when Mr. Russell would be traveling to Vancouver in order to enable her to work off site.*
>
> *3. Environment Canada will be providing 48 hour [sic] notice before the final report is released and offering Ms. Walker to telework from her home for an agreed upon period following receipt of the report.*
>
> …

[216] Mr. Krahn was supervising the complainant in April 2015. He did not testify at the hearing. His conversation with the complainant was summarized in the security investigation report, and several emails relating to an interaction with the complainant were entered as exhibits at the hearing.

[217] In a phone conversation with the complainant on April 5, 2015, Mr. Krahn raised the issue of the removal of documents from the Nanaimo office. The documents were requests made by the complainant under the *Access to Information* (R.S.C., 1985, c. A-1) and the *Privacy Act* (R.S.C., 1985, c. P-21). Approximately two-and-a-half hours after this interaction, Mr. Krahn emailed Mr. Goluza and summarized his conversation with the complainant. Mr. Krahn reported that when he raised the issue, the complainant became "exceptionally enraged". Mr. Krahn said that he tried to determine whether the documents belonged to the complainant and after asking several times, he reported that the complainant said this to him: "Angela Walker was not going to get away with this. That f---ing bitch is not going to get away with this. Peter, you are not f---ing going

to get away with this. You are supposed to be protecting me [original language expurgated]."

[218] In the same email to Mr. Goluza, Mr. Krahn provided the following conclusion:

> …
>
> *I felt that anyone entering the Nanaimo office at that moment could have been at risk of verbal abuse or physical injury from Ken. This caused me so much concern that I immediately notified Marko Goluza and subsequently Dominique* [Gilliéron].
>
> *I believe he should be given time away from work and urgently see a counselor.*
>
> …

[219] A few minutes after receiving this email, Mr. Goluza spoke to the complainant. Mr. Goluza replied to Mr. Krahn's email and summarized that conversation. He reported that the complainant told him that he had yelled at Mr. Krahn because Mr. Krahn had yelled at him. The complainant did not admit to using the language reported by Mr. Krahn. Mr. Goluza concluded as follows: "… I have never found Peter to be untruthful and knowing Ken has lost his temper in the past I believe Peter's statements."

[220] In his witness statement, the complainant stated that he raised his voice "firmly" and told Mr. Krahn this: "Quit f---ing yelling at me and that I don't care what the f--- she wants and that you need to start protecting me [original language expurgated]" In his statement, the complainant said that he recalled "feeling … bad" about the call and that he apologized.

[221] Mr. Leek, the manager of regional security for the employer's Prairie and Northern Region, was assigned to investigate the incident and the grievor's safety concerns. The terms of reference for his investigation set out the following purpose:

> 1) whether the complainant had committed violence in the workplace by verbal or written threats, threatening behaviour, or other prohibited conducted as defined in the *Violence Prevention Directive*, Version 14, July 23, 2013;
> 2) whether the grievor's allegations that the complainant posed a threat to her personal safety and the safety of others were founded; and
> 3) whether the department took all reasonable steps to ensure the safety of the grievor and other parties as a result of any actions taken, or feared to be taken, by the complainant.

[222] The terms of reference for the investigation included making recommendations on preventive or corrective security measures, identifying potential future threats to departmental employees, and whether any work restrictions should be considered.

[223] In his investigation, Mr. Leek spoke to Mr. Krahn about the interaction with the complainant about the documents. Mr. Leek summarized that interaction, as set out in the earlier paragraphs in this section. His report included the words used by the complainant, as reported by Mr. Krahn. Mr. Leek bolded and italicized those words in his report. In the report, Mr. Krahn's statement to Mr. Goluza was also quoted that he would "urge caution" for anyone dealing with the complainant "right now."

[224] In his report, Mr. Leek concluded that the complainant committed workplace violence in his interaction with Mr. Krahn. Mr. Leek did not accept the complainant's denial that he said the words reported by Mr. Krahn, as follows:

> …
>
> *… However, the conclusion that Russell did in fact utter these comments was reached after interviewing the parties involved that claimed to witness similar outbursts in the past by Russell; the statement of Peter Krahn, who also claimed that these statements had been uttered on several occasions in the past by Russell during previous conversations but never reported; and the result of the one-on-one interview conducted by the Investigator with Russell.*
>
> …

[225] Mr. Leek concluded that the grievor's allegations that the complainant posed a threat to her personal safety and that of other employees was unfounded. Mr. Leek noted that none of the witnesses stated that they had heard the complainant make any statement that he intended any harm to the grievor. None of the witnesses, other than the grievor, considered that they were at risk of physical harm, Mr. Leek reported. He also reported that the complainant "… stated emphatically that he had no desire or intention to harm her or anyone else."

[226] Mr. Leek made recommendations related to the complainant, including assigning him to a different team and providing him with anger-management training. He also recommended that a threat assessment of the grievor's physical work environment be conducted. He noted that although this investigation did not find a threat, the grievor's concerns about her personal safety were "nevertheless real to her."

[227] In a recorded interview with the grievor, Mr. Leek told her that there could be a confrontation if she and the complainant were in the same room. In the audio recording, she asks about the risks of an assault from the complainant, and Mr. Leek stated, "If for example, Marko calls him over to deal with him in his office and you saw him and walked in the office with Marko and putting yourself in a position, there could very well be a chance that it escalates to that" (referring to an assault).

[228] In his report, Mr. Leek recommended also that the separation of the grievor and the complainant be maintained, to limit their interactions. He also stated that "[c]onsideration should be given to restricting unfettered access …" to the Vancouver office by officers located elsewhere in the region. He continued with this:

> …
>
> *… This access appears to have been a legacy condition that has not been reviewed in recent years. Unrestricted access is not necessarily employed in other EC buildings or offices. For example, an officer not based in Whitehorse does not have unrestricted access to the Whitehorse office. By [sic] limiting access, unless for operational reasons, would bring the access control guidelines in line with those experienced throughout the Department as a whole.*
>
> …

[229] Both Mr. Brochez and Mr. Leeden testified that they believed that the grievor feared the complainant.

[230] Ms. Meroni testified that she was aware of the threat-risk assessment investigation but that she did not receive a copy of the report. She testified that she was not included in the management discussions about the report and that Mr. Owen deliberately kept her at arms length, to allow her to focus on investigating the alleged misconduct.

[231] In a June 19, 2015, email, the grievor advised Mr. Owen of her safety concerns and included an audio clip of Mr. Leek's statement to her that an assault could occur if she were in the same room as the complainant. She stated this in that email: "The safety of the employees around me as well as my own, is significant as I feel I have a greater duty of care given that I am a Manager." She provided the same text in an email to Ms. Meroni on the same date.

[232] In a document prepared by Mr. Owen to help him reach a decision on the appropriate discipline, he concluded that the grievor's concern about her personal safety was "camouflage", as she told some people that she had concerns but told others that she did not have concerns. He reviewed the security investigation report and concluded that it provided no justification for her actions.

[233] Mr. Owen testified that he was satisfied with the outcome of the investigation and that he relied on Mr. Leek's conclusions that the grievor's safety was not at risk.

K. The termination decision and meeting

[234] In the document prepared by Mr. Owen to help him reach a decision on the appropriate discipline, he noted that the results from a recent survey of federal public service employees indicated that harassment and fear of reprisal were significant issues of concern for employees in the branch. In particular, he noted that there was concern with the seriousness with which the branch treated harassment cases.

[235] Mr. Owen concluded that the "old boys club" comment allegedly made by the grievor was "… both disrespectful and demeaning towards him and meant to undermine his position with his peers and colleagues." He wrote that as a manager, the grievor "… must have known that a lateral transfer is an acceptable form of staffing …".

[236] With respect to excluding the complainant from shotgun practice, Mr. Owen wrote that the grievor excluded the complainant "… as a means to ostracize and demean him before his peers."

[237] Mr. Owen also wrote that he considered the grievor's request to a work colleague to pick up her child if something happened to her (in May 2014, at the training course) "especially egregious" as it was intended to discredit the complainant and "… to raise questions concerning his mental state in the eyes of administrative support staff."

[238] In his analysis, Mr. Owen noted that the grievor raised the issue of the complainant's shotgun certification only in her rebuttal to the harassment findings, "… suggesting she may have accessed his records subsequently to determine his certification status." He surmised that had she known that at the time, she would have "most certainly" used it as a reason to exclude him. The employer provided no

evidence that the grievor accessed the complainant's records during or after the harassment investigation for this purpose.

[239] In his analysis, Mr. Owen concluded that the schedule for the swift-water rescue course was changed without the complainant being advised, stating that it was "… quite paternalistic as she treated him like a child and it was demeaning to him." He suggested that she knew that such an act would be an affront. He found that her statement that the company changed the training date on its own, without her direction, was "simply not credible".

[240] In his analysis, Mr. Owen concluded that the grievor was wrong to "impose her will" and to make unilateral decisions about the complainant's personal training relating to the project planning course. He wrote that there was nothing to be gained by imposing training that was not mandatory, stating, "To do so suggests that she was again exerting control over him to prove she could and to teach him a lesson …". Mr. Owen stated that the training that she tried to impose related to preparing for selection interviews and that this showed that she was clearly sending a message that she wanted him to have the training "… so that he would be in a position to find himself a job elsewhere."

[241] In his concluding section on the harassment allegations, Mr. Owen stated that when looked at individually, the actions of the grievor "… may not seem to be significant or repetitive …" but when looked at as a pattern of behaviour, "… they clearly show that there was harassment and bullying of this employee."

[242] In his analysis, Mr. Owen then turned to the other misconduct allegations. He concluded that the grievor "clearly abused her authority" by requesting the deactivation of the complainant's access card. He stated that she should have known that such an order violated the separation agreement. He also concluded that her action was clearly meant as a reprisal against the complainant and to "further undermine, demean and discredit him." He also found that she misled the security branch into thinking that she was still his manager and that she had the authority to make such a request. He concluded that since the security investigation did not substantiate her claim that the complainant was a threat to her, her claim of concerns about her personal safety was made only to "camouflage [her] retaliatory action". He also stated that "[o]ne would assume that, had she truly been afraid of him, she would

not have wanted to have her name associated with the suspension of his access to avoid further angering him."

[243] In his analysis, Mr. Owen concluded that the grievor abused her authority and her privileged access to employee personal information when she accessed the complainant's leave records "for questionable purposes." He determined that she accessed his files "… for the sole reason of obtaining evidence of his activities as they related to the harassment investigation …". He stated that this was "clearly meant" as a direct reprisal against the complainant, as her intention was to "… get him into trouble with his superiors." He suggested that if she had truly felt that this information was important for her superiors to have, she should have approached Mr. Krahn and let him access the necessary records himself.

[244] In his analysis, Mr. Owen concluded that the grievor had breached the confidentiality of the harassment investigation process when she shared information about the investigation with Mr. Fraser. Mr. Owen wrote that what was of "much more significant concern" was that she subsequently displayed "… what could only be labelled as intimidation …" when she followed up this breach with additional comments to Mr. Fraser about his work performance and the future of the Nanaimo office. He concluded that this was meant to intimidate Mr. Fraser and to send him a signal to limit any further testimony.

[245] Mr. Owen concluded that using the labour relations advisor as the grievor's point of contact in her out-of-office message was disrespectful to Mr. Gilliéron as well as insubordinate. He also noted that it was a potential security risk as the advisor did not have the security clearance for much of the work done in the grievor's branch.

[246] Mr. Owen then analyzed the allegations relating to the grievor's conduct toward Mr. Goluza and concluded that she had been both disrespectful and insubordinate. He also wrote that she used her claims of personal safety as "camouflage".

[247] Mr. Owen's overall conclusion was that when viewed together, the grievor's actions showed a pattern of behaviour and were an indicator of her poor judgment and overall retaliation against the complainant and others for the complaint against her. He concluded that her actions showed a "blatant disregard" of the employer's *Value and Ethics Code* and the *Enforcement Branch Officer Conduct Directive*. He also stated that

she "clearly harassed" the complainant and abused her authority over him, concluding that she "… ostracized him and spread vicious rumours about his mental state."

[248] Mr. Owen wrote that the grievor had "… clearly shown she is unsuited for and unable to manage employees", as demonstrated by her "acrimonious behaviour and retaliation" against the complainant. His analysis concluded as follows:

> …
>
> *Ms. Walker has demonstrated significant insubordination and a propensity for reprisal and retaliation against her colleagues, managers and employees. Finally, she has shown absolutely no remorse, no contrition and no indication that she is prepared to change her behaviour. To the contrary she has clearly indicated that she feels her actions were appropriate and that she would conduct herself in the same manner, given the same situation. This suggests that she cannot be rehabilitated.*

[249] Mr. Owen testified that he did not find the founded harassment allegations severe and thought that by themselves, they would have justified a severe disciplinary response but not the termination of the grievor's employment. He testified that her actions as the harassment investigation was concluding and after that were much more serious and demonstrated to him that she could no longer be trusted.

[250] In his witness statement, Mr. Owen stated that as a peace officer, the grievor was held to a higher standard of integrity. He also stated that her managerial responsibilities, in addition to her peace officer role, were a "big factor" in his decision to terminate her employment.

[251] Mr. Owen testified that in considering the grievor's argument about her fear for her personal safety, he could not ignore the security investigation's findings that the complainant was not a threat to her. He also testified that had she been truly fearful, she would have taken steps to distance herself from him, but instead, she had engaged in actions that inflamed the situation, including curtailing the complainant's access to the Vancouver office.

[252] Before meeting with the grievor to discuss the findings of the misconduct investigation, a departmental labour relations officer had prepared a draft letter of termination on August 14, 2015. Mr. Owen testified that he was not aware of the draft

letter before meeting with her and testified that he had not requested that a draft be prepared.

[253] Mr. Owen testified that he met with the grievor on October 1, 2015, and that before he gave her the termination letter, he provided her with an opportunity to "… bring forward any extenuating circumstances that may have needed to be considered …". However, he stated that no information was provided that justified her behaviour and actions.

L. Post-termination evidence about the Nanaimo and Vancouver offices

[254] The complainant testified that after the grievor's termination of employment, Susanne Marble took over as the operations manager responsible for the Nanaimo office. He testified that the workplace became "very stable" and that he was "supported and respected by those in direct supervision over me along with my coworkers". He testified that his work and input were "once again valued and appreciated".

[255] Ms. Marble described the working relationship with the complainant as very respectful. She testified that they had disagreements "once in a while" but that they were respectful, and he told her that she was the manager and that he would do what she directed. She also testified that they were friends at that time.

[256] Mr. Goluza testified that following the grievor's termination, there was a "profound improvement in the work environment". In his witness statement, he stated that the complainant and Mr. Brochez, after many months apart, hugged each other. Mr. Brochez denied hugging the complainant. Mr. Brochez testified that his working relationship with the complainant was "tolerable" and professional. Mr. Goluza also testified that comments from unnamed individuals circulated in the region that the Nanaimo office was "great again". He also testified that work gatherings were no longer awkward or tense and that after-hours events were better attended by all employees.

[257] Jake McRae started working for the department in 2016 as the operations manager for the Coastal District (the same position that the grievor had occupied). He took over the position after Ms. Marble's acting appointment to the position ended. Mr. McRae came to the position from another department and had never worked with the

grievor. He was also not fully aware of the events that had led to the termination of her employment.

[258] The grievor objected to the introduction of his evidence because Mr. McRae had no direct knowledge of her and the situation before the termination of her employment. The employer submitted that Mr. Brochez's witness statement indicated that he would testify about the situation at the Nanaimo office after the grievor's departure. I allowed the testimony and reserved my decision on the overall weight to be given to it.

[259] Mr. McRae testified that shortly after he arrived, he suggested holding a team meeting. He testified that all the employees told him that they had reservations about an all-staff meeting and that it would be "awkward". He said that every officer had expressed some hesitancy about meeting as a group. The meeting went ahead, and Mr. McRae described the atmosphere as "quiet".

[260] Mr. McRae determined that the majority of the focus on improving relationships was to be at the Nanaimo office. He went there two or three times per week to coach and work with the employees (the complainant, Mr. Fraser, and Mr. Brochez). Mr. McRae testified that the three of them were not a functional team. He testified that Mr. Brochez told him that he did not feel comfortable working in the office. Mr. McRae described Mr. Brochez has having significant anxiety. Mr. McRae also stated that Mr. Fraser told him that there were serious issues. Mr. McRae testified that the complainant was "mired in paperwork and mired in ATIP requests".

[261] Mr. McRae testified that Mr. Goluza had arranged for a conflict resolution specialist to work with the Nanaimo office, and Mr. McRae also attended the first session. He described the meeting as "awkward". He stated that all three officers were cordial at the meeting.

[262] Mr. McRae testified that the complainant seemed stressed and overworked, although he was positive about "getting to a better spot". He testified that today, the Nanaimo office team is very functional and very reliable. He testified that it probably took about a year for it to become functional. He also testified about the challenges of dealing with Mr. Fraser's illness and his return to work in 2016. Mr. McRae testified that as of the hearing, the complainant and Mr. Brochez had a professional relationship and that he was able to call on them to work together to reach a goal. Mr.

Brochez testified that now, only he and the complainant work in the Nanaimo office, and that they have a "tolerable working relationship".

[263] Mr. Brochez testified that the conflict resolution specialist or "facilitator" hired to work with the Nanaimo office told him that based on his interview with the complainant, "he was unwilling to participate in the process". Mr. Brochez testified that the process ended abruptly and that it was never completed.

[264] Lisa Ng was an enforcement officer at the department from April 2014 and worked with the grievor until shortly before the grievor's employment was terminated. She was on leave for three months as of the termination. She testified that when she returned from her leave, she felt that the Vancouver office was tense for a time, with "almost a sense of distrust". She testified that Mr. McRae was professional, so the tension in the Vancouver office dissipated, but that she still found a "bit of unease at times" when the employees from the region gathered for training and other activities.

M. Evidence on remedies and mitigation

[265] The grievor seeks reinstatement in her grievance. The employer agrees that reinstatement is the normal remedy for an allowed grievance. Its position is that she did not adequately mitigate her damages. In this section, I will summarize the evidence related to her efforts to find work and the income that she received after the termination of her employment.

[266] The grievor's last day of employment was October 1, 2015. She testified that she was not eligible to receive Employment Insurance (EI) benefits because her employment had been terminated for cause.

[267] On October 26, 2015, the grievor's bargaining agent representative emailed Mr. Owen about the grievor's discussions with the British Columbia provincial Conservation Officer Service. The email stated this:

…

> *In a brief discussion I had with Angela Walker this morning, she mentioned that she had had some discussions about employment with the provincial conservation officer service. As I understand it, she had been working with them on a number of cases, and they felt that she could make a valuable contribution.*
>
> *However, it was also made clear to her that they would be checking with Marko Goluza to see if Environment Canada had*

> *any issues around her working with them, which gave her some concern.*
>
> *If the Department does have some objections or reservations, and plans to express them, it would be helpful to know whether or not this is something for us to worry about. We're hoping that it's not, as such a turn could have a significant negative impact on our member's future employability in a field where she has had some 21 years of successful employment.*
>
> *… we thought the question was worth asking. We are willing and able to discuss this further if necessary.*
>
> …

[268] Less than 20 minutes later, Mr. Owen responded by email as follows:

> *We will need some advice.*
>
> *As I recall, this often comes up as part of any agreement reached prior to arbitration. Not clear what we can or should say prior to third level being heard. Not clear on what restrictions we would or should have. Also not clear on what our view should be on her working on stuff with us. ln other words what post-employment restrictions dos [sic] she face ?*
>
> *We can wait till Michelle* [Michelle Daigle, labour relations officer] *is back.*
>
> …

[269] Mr. Gilliéron replied to Mr. Owen on the following day. He wondered if the grievor would be subject to the conflict-of-interest rules and the one-year limitation on employment that could place her in a conflict of interest. He expressed uncertainty as to whether she was in the category of employees subject to that restriction. He also identified some other potential issues, such as what kind of relationship she would have with the employer's staff and whether "management suspected any issues with that". He also asked if it could affect relations "with this stakeholder" (the B.C. provincial government). This email was forwarded to the grievor's bargaining agent representative, who stated that it was "difficult to answer your questions just yet", as he was reviewing a large amount of information from the grievor that he had just received. He asked if there was someone at the department he should talk to once he was in a better position to discuss. There was no reply, and there were no further emails in evidence relating to this request.

[270] Mike Sanderson is an employee of the B.C. Ministry of Environment and Climate Change Strategy and worked with the grievor on the Mount Polley joint-forces

investigation. He testified that because of her knowledge, skills, and experience, she had a high-level role in the investigation. He testified that he and the team commander often discussed that the grievor would be a great addition to their team "if that were possible". There is no further evidence related to any discussions about the possibility of the grievor working for the B.C. government. She testified that this opportunity was not pursued because it was "too political".

[271] The grievor was sick from December 2015 until the end of January 2016.

[272] The grievor made five applications to local municipalities for positions, such as a Canadian Police Information Centre operator, file reviewer, disclosure reviewer, and permits clerk in the period from January to April 2016. She was not successful in any of them. She also applied to a process-serving company during this period.

[273] In April 2016, the grievor established a sole proprietorship offering process serving and consulting. Her gross business income for 2016 was $4224.10. She had no taxable income.

[274] In February 2017, the grievor gave birth to her second child. She was denied EI maternity benefits.

[275] The grievor prepared for and attended the 2018 hearing in June, July, and August 2017 and in January, February, and March 2018.

[276] In 2017, the grievor had taxable income of $1719.54 and gross business income of $6330.58. In 2018, she had no taxable income and a net business loss of $1526.75. In 2018, she closed her process-serving sole proprietorship.

[277] The grievor applied for a position at a local library in October 2019.

[278] Starting in December 2018, the grievor was involved in the eldercare of a family member, and in December 2019, she went to live with the family member, to provide support.

[279] In 2019, the grievor had no income.

[280] From March 2020 until June 2021, she had one child learning remotely from home due to the COVID-19 pandemic restrictions, and her other child was of preschool age.

[281] In August 2020, the grievor started an incorporated business that provided ecological weed removal. In 2020, she had no income. In the business year of 2020-2021, she had a net loss of $10 146. All her business income was used to pay down capital debt and administration and advertising fees. In 2021, she had no personal income. As of the hearing, her business income tax filing for 2022 was pending.

IV. Summary of the employer's submissions

[282] The employer submitted that the grievor was insubordinate and disrespectful and that she took reprisals against the complainant. It submitted that her actions were not excused by her fear of him but that they were a persistent and deliberate campaign to discredit him. It also noted that the workplace-violence investigation determined that there was no risk to her personal safety.

[283] The employer noted that only when she was before the Board did the grievor accept limited responsibility for some of her actions. It submitted that she continues to demonstrate a lack of insight into the significance of her actions and their effect on others. It submitted that the bond of trust has been irreparably broken and that she has demonstrated that she is not suited to a managerial position.

[284] The employer submitted that the misconduct allegations were founded and that they established a serious pattern of insubordination.

A. The harassment allegations

1. Harassment allegation number 1: the "old boys club"

[285] Although the grievor denied making the comment about the "old boys club", the employer stated that Mr. Fraser and Mr. Brochez corroborated it. It also noted that she acknowledged that she made comments about transparency in hiring and that an appointment without an advertised selection process, as proposed by the complainant, lacked that transparency.

2. Harassment allegation number 2: the shotgun practice session

[286] The employer submitted that the grievor excluded the complainant from the shotgun practice at issue without a valid reason. It submitted that this exclusion had negative impacts on him, including potential consequences and delaying his firearm recertification, and that it added to a sense of isolation from the team when he returned to work after a lengthy absence.

[287] The employer accepted the investigator's finding that the grievor had no valid reason to question the medical certificate and that the grievor's position that it was inadequate was not reasonable. It noted that Dr. Mulder's note was clearly responsive to the questions it had posed. It submitted that the jurisprudence is clear that an employer's right to demand medical information is exceptional and strictly limited by the employee's privacy rights (see *Canada (Attorney General) v. Grover*, 2007 FC 28 at paras. 66 to 70). The employer also noted that the grievor's assertion that Dr. Mulder worked at a walk-in clinic at a strip mall was not supported by her testimony that the complainant had had a regular and ongoing relationship with Dr. Mulder since 2012.

[288] The employer submitted that the grievor did not attempt to obtain further information on the complainant's fitness to work and that she had made comments to others suggesting that he was excluded from the practice because of her personal safety concerns and for no other reason. The employer stated that this was supported by the statement she made at the use-of-force training exercise.

[289] The employer submitted that only after the fact, and at the hearing, did the grievor offer two further justifications for her action of excluding the complainant, which were the prudent management of an employee returning from a lengthy stress-related leave, and he did not meet the employer's requirements to handle firearms as part of his duties and so could not have been allowed to participate in the practice.

[290] The employer also submitted that the grievor's explanation that the complainant required further certification before he could participate in the shotgun practice was an after-the-fact explanation that was inconsistent with the reasonable interpretations of the policy, actual practice, and evidence. It submitted that regular practice is an integral part of the certification process, and that certification is not required before officers participate in practices. It also noted that earlier, the grievor had provided her approval to the complainant and Mr. Fraser to join local gun clubs for the purpose of maintaining their qualifications on departmental firearms. It submitted that such an approval was illogical and inconsistent with her stated belief that the complainant was not authorized to handle departmental firearms.

[291] Although the grievor testified that she believed that there was no lasting impact on the complainant as he was able to recertify within six months and was not in the field while he finished his work plan, the employer submitted that this did not

recognize the lasting psychological impacts on him from being excluded from the team.

3. Harassment allegation number 3: the swift-water rescue course rescheduling

[292] The employer submitted that the grievor's explanation that she contacted the third-party provider simply to obtain options for alternate dates to discuss with the complainant did not seem likely when considered against the documentary record. It noted that in the email exchange about the investigation, the grievor did not respond to the complainant's suggestion that he would like to do more research first but that he would attend at the site as directed; instead, she contacted the service provider directly. In addition, she had already approved the training after the spill occurred. The employer also noted that her explanation for the change at the time did not mention that the unilateral change by the service provider was unexpected. It noted that there was no follow up with the service provider to determine if other course options were available. It also stated that it was improbable that the service provider would have been able to unilaterally make a decision about balancing work priorities.

[293] The employer submitted that even accepting the grievor's explanation at face value, it is an acknowledgement that she contacted the service provider to explore a change without informing the complainant of her intention to or of the need to change the course scheduling, or even her preference as to timelines for the investigation, when he had clearly requested her preferences in their email exchange of the same day.

[294] The grievor stated that a one-month delay taking the course would not have had a lasting impact on the complainant's career. But the employer noted that Mr. Owen testified that her actions "were disrespectful, given the troubled relationship" and that the delay did not cause the harm — it was making the change without telling him. The employer stated that her unilateral actions suggested that she wanted to "stick it to him" and that they showed a failure to comprehend the significance of her actions as a manager on subordinate employees.

4. Harassment allegation number 4: the project management course

[295] The employer submitted that the complainant had told the grievor that he was not happy with his work environment and that he wanted to find work elsewhere. Given that context, it suggested that any exchange on training related to these "career

goals" ought reasonably to have been understood as delicate. The complainant testified that he wanted to take the course closer to home, saving time and expense, and that he never really wanted to take it in the first place. The grievor stated that she was concerned about a delay and that she wanted him to take the project management and selection interview courses as soon as possible, to prevent the matter from slipping. The employer submitted that given her stated concern with costs and travel time related to the swift-water rescue course training a few months earlier, as well as the complainant's proposal to take the course a few months later in Vancouver, her explanation was inconsistent.

[296] The employer also submitted that when the grievor told the complainant that she would escalate the matter to Labour Relations, it was a clear signal that she viewed the exchange as problematic. The employer submitted that her eventual response was bellicose when it ought to have been simple. Instead, it submitted that the obtuse "cut and paste" of statements from its policy further confused the matter.

B. Interfering with a witness, and breach of confidentiality

[297] The employer submitted that the grievor breached the confidentiality of the harassment investigation when she spoke to Mr. Fraser about it. It submitted that his recollections of this incident were clear and consistent over a prolonged period and were evaluated by the harassment investigator, Ms. Meroni, and a previous panel of the Board, who all deemed him reliable. The employer submitted that Mr. Fraser's hearsay evidence must be accepted as preferable on the balance-of-probabilities standard if it is more harmonious with the evidence as a whole (see *Faryna v. Chorny*, [1952] 2 D.L.R. 354).

C. Accessing personnel records

[298] The employer submitted that the instructions related to the parties' separation were unambiguous. It submitted that condonation requires management's clear understanding of inappropriate conduct. It submitted that the first email that the grievor sent to Mr. Goluza was, at best, ambiguous. It also noted that Mr. Goluza testified that following her email in January 2015, he focused on her health and that he encouraged her to focus on her team and her work. It noted that he did not ask her to keep tabs on the complainant and that he did not condone her actions (see *Chopra v. Deputy Head (Department of Health)*, 2016 PSLREB 89 at para. 83).

D. The request to deactivate the complainant's access card

[299] The employer stated that the grievor inappropriately had the complainant's card access to the Vancouver office deactivated. It submitted that her explanation for her actions made little sense in the context. It noted that she sent the message when she knew that she was to have no involvement in managing the complainant. It also submitted that Mr. Goluza had presented several options for addressing her safety concerns — she had been allowed to work from home, and she had a right to refuse work. The employer stated that Mr. Goluza was reachable by email or text and that the grievor ought to have attempted to raise her concerns with him before escalating the matter to the security manager.

[300] The employer submitted that the grievor demonstrated persistent and unreasonable behaviour in her attempt to restrict the complainant's building access, even when she knew that it would get her in trouble. It stated that this was demonstrated by her repeated requests to Mr. Leek to limit the complainant's building access, her requests to Mr. Engelmann, the letters from her lawyer, and the security manager's statement that the grievor appeared angry that Mr. Goluza had authorized only a one-week suspension of the card.

E. The out-of-office message

[301] The employer submitted that the grievor's apology and contrition at the hearing for using the inappropriate out-of-office message must be understood in the context of her open disdain for Mr. Gilliéron and her suggestion that Mr. Goluza would do whatever Mr. Gilliéron told him to do. The employer also noted that she had sought to have Mr. Gilliéron removed as her labour relations advisor, made negative comments about him, and made "passive-aggressive" comments to him.

[302] The employer noted that her actions did impact its operations. It noted that Mr. Goluza testified that employees receiving the message found it odd and concerning. In addition, it noted that because of her role as a contact person for outside agencies, her action conveyed a message that was disreputable to the organization or that could have resulted in a security breach.

[303] The employer also noted that her contrition at the hearing was in stark contrast to her statement to Ms. Meroni that her action was entirely appropriate.

F. Behaviour at the management team meeting

[304] The employer submitted that the grievor acted disrespectfully during a regional management team meeting on May 11, 2015. At the hearing, she acknowledged that she should not have talked about the workplace-violence investigation and that she should not have questioned Mr. Goluza in front of his management team. The employer submitted that this explanation made little sense, given her continued denial that she made the offending statements.

G. The fact-finding investigation

[305] The employer submitted that the grievor conducted a fact-finding investigation despite her separation from the complainant and against Mr. Goluza's direction, which it submitted was an act of insubordination.

[306] The employer submitted that the grievor's statements that she was required to follow up according to its harassment policy and that she did not have a reason to escalate the matter to a discussion with Labour Relations demonstrated a lack of insight into the impropriety of her actions. It stated that in addition to her insubordinate response to Mr. Goluza, she did not appreciate the obvious conflict of interest in initiating a fact-finding investigation involving the complainant. It submitted that she either willfully ignored or failed to understand the significance of Mr. Goluza's direction.

H. A pattern of misconduct

[307] The employer submitted that harassment is repugnant behaviour that merits discipline. It noted that harassment must be defined carefully so as not to include the frequent disputes that arise between employees and their managers in the workplace. It relied on the definition of "harassment" set out in its policies as consisting of both an objective element, in that it is objectionable and demeaning, and a subjective element, in that the victim or subject found it offensive. The conduct must have been unwelcomed and must have led to adverse job-related consequences. It must be understood not to be a legitimate tool in a workplace conflict, particularly as it relates to the exercise of managerial authority. The employer referred me to *Joss v. Treasury Board (Agriculture and Agra Food Canada)*, 2001 PSSRB 27 at paras. 40, 59, 63, and 69.

[308] The employer noted that harassment can be extremely subtle and in that way extremely insidious. It noted that a single, serious incident is more easily dealt with in

the traditional adjudication context because each incident can be evaluated against the standards of progressive discipline. It also noted that a subtle pattern of bullying and harassing behaviour does not lend itself to the same calculus. I was referred to *Peterborough Regional Health Centre v. Ontario Nurses' Assn.*, [2012] O.L.A.A. No. 251 (QL) at para. 114.

[309] Despite these difficulties quantifying the appropriate discipline, the employer asserted that it does not mean that harassment and bullying can be tolerated in the workplace; it is axiomatic that it cannot be tolerated. It submitted that although acts of harassment may, on their face, seem insignificant and unworthy of discipline, the effect is magnified when it is understood as being a pattern over time. It noted that the cumulative effect of harassing conduct is a poisoned work environment. It submitted that the cumulative nature of the grievor's misconduct in this case justified a more significant disciplinary response as proportional (see *Peterborough Regional Health Centre*, at para. 107; *Children's Hospital of Eastern Ontario v. OPSEU* (2015), 260 L.A.C. (4th) 147 at para. 109; and *Charinos v. Deputy Head (Statistics Canada)*, 2016 PSLREB 74 at para. 117.

[310] The employer submitted that each founded harassment allegation in this case was an example of subtle behaviour that might not justify a finding of misconduct standing on its own. It submitted that taken collectively, the incidents show a pattern of behaviours targeted at the complainant. It also submitted that the grievor's behaviour during and after the harassment investigation demonstrated an unrelenting determination to discredit the complainant. A persistent pattern of behaviour combined with a lack of acceptance of wrongdoing amounts to an inability to establish a viable employment relationship, the employer argued (see *Peterborough Regional Health Centre*, at paras. 118 to 121).

I. Aggravating factors

[311] The employer observed that the expectations placed on managers to lead by example means that they are held to a higher standard in terms of appropriate behavioural expectations. It also noted the higher standard expected of peace officers. It noted that although perfection is not the required standard, those responsible for enforcing the law are expected to behave ethically and under enhanced scrutiny in the discharge of their duties (see *Bazger v. Ontario (Ministry of Community Safety and*

Correctional Services), [2017] O.P.S.G.B.A. No. 6 (QL) at para. 110; and *Stewart v. Deputy Head (Canada Border Services Agency)*, 2016 PSLREB 106 at para. 62).

[312] When assessing whether the employment relationship has been irreparably severed, the Board must ask whether the grievor truly recognizes and acknowledges wrongdoing such that it can be concluded she would not engage in such behaviour in the future (see *MTU Maintenance Canada Ltd. v. IAMAW, Transportation District Lodge 140* (2022), 342 L.A.C. (4th) 65 at paras. 52 and 53; and *Rahim v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 121 at para. 83). The employer submitted that the grievor's inability to accept responsibility and her lack of insight into the significance of her actions leads to the conclusion that substituting a lesser penalty would not advance the goal of corrective discipline.

[313] The employer submitted that in this case, the grievor continued to deny any wrongdoing throughout the disciplinary process and that only at the hearing before the Board did she admit some responsibility, but with qualifications. It submitted that she minimized the potential consequences of her out-of-office message and that she failed to acknowledge the significance of inserting herself into the issues involving the complainant by conducting a fact-finding investigation. The employer noted the similarity in facts to the decision in *Teck Coal Ltd. (Fording River Operation) v. United Steel Workers, Local Union 7884* (2021), 332 L.A.C. (4th) 155 at paras. 28, 29, and 32, when the grievor suggested that she ought not to have raised the topic of the conversation during a regional management meeting but denied any impropriety in the manner of the conversation. The employer also noted that she continues to deny that she harassed the complainant and asserts that the facts, as alleged, either did not happen or can be explained away.

[314] The employer referred me to *Versa-Care Centre of Brantford v. C.L.A.C.* (2005), 146 L.A.C. (4th) 72 at para. 14, in which a failure to acknowledge wrongdoing and the lack of any insight into the misconduct was an aggravating factor justifying a termination of employment. I was also referred to *Stewart*, in which a lack of insight was found to be an aggravating factor in a case involving a 75-hour suspension.

J. Mitigating factors

[315] The employer noted the grievor's assertion that she feared the complainant and that it was an important mitigating factor to consider. It conceded that a consideration

of the mitigating factors relates to the grievor's state of mind and not to whether the alleged or perceived risk was well-founded. It noted that a sincere but mistaken belief by the grievor could still be an important mitigating factor. However, the employer stated that even accepting that she had a genuine fear of the complainant does not excuse her conduct. It submitted that state of mind as a mitigating factor relates to momentary lapses in otherwise good judgement; see *Wepruk v. Deputy Head (Department of Health)*, 2021 FPSLREB 75 at paras. 298 to 303. It noted that compulsion is central to the analysis (see *Cambridge Memorial Hospital v. ONA (M. (S.))* (2017), 273 L.A.C. (4th) 237 at para. 53). It submitted that the grievor's pattern of misconduct was sustained over a prolonged period and was largely unrelated to her allegations of fear and that she had other and better options available had she had a legitimate fear.

[316] The employer provided the following examples: 1) the allegations related to the complainant's training had no relationship to a perceived fear, 2) the decision to exclude him from shotgun practice could have been related to fear but she maintained otherwise, and 3) while she claimed that fear motivated her decision to deactivate his access card, she had other and better options to remove herself from potential conflict, while deactivating his card would have inflamed the situation, had he found out.

[317] The employer stated that instead of mitigating against discipline, the grievor's conduct, including her allegations of fear, displayed a campaign to discredit the complainant and to restore her reputation, at all costs. It submitted that the facts parallel those in *Anderson v. IMTT-Quebec Inc*, 2011 CIRB 606 at paras. 85 to 90 (upheld in 2013 FCA 90), in which a complainant showed disloyalty to his employer and a blind determination to vindicate himself.

[318] The employer also found it noteworthy that much of the activity that the grievor attributed to fear related to her belief that the complainant would "blow up" in the wake of a harassment investigation report that she expected to dismiss his allegations. The employer noted that the report concluded that there was harassment, and it would have had the opposite effect of validating his perceptions. It submitted that in this context, her actions directed toward him are more credibly understood as retaliation rather than as driven by fear.

K. Rehabilitative potential

[319] The employer submitted that if an employee knows and understands the risk of a continued pattern of misconduct and fails to respond, the default assumption of progressive discipline is displaced (see *Versa-Care Centre of Brantford*, at para. 13; and *Teck Metals Ltd. v. USW, Local 480* (2015), 254 L.A.C. (4th) 333 at paras. 72 and 79. It submitted that in the face of a known risk to her job, the grievor persisted not only in making denials but also in attempts to blame the complainant and to inappropriately manage his behaviour and, ultimately, in demonstrating insolence and insubordination toward her managers. It submitted that this pattern demonstrates that reinstatement is not appropriate.

[320] The employer submitted that the grievor's actions and words also showed a continued determination to prove herself correct at any cost. It referred to a number of examples, including the following. She gave Mr. Goluza an ultimatum that the complainant could not be returned to her team. She advised that she would become a very difficult employee, which would cause embarrassment to both the department and Mr. Goluza personally. And she stated that she would not hesitate "… to take whatever action [she deemed] necessary …".

L. Conclusion

[321] The employer submitted that termination was the appropriate penalty and that it ought not to be interfered with. It submitted that the grievor showed a serious pattern of misconduct that persisted over a prolonged period. It stated that despite knowing her employment was at risk, she continued; she justified her behaviour, and she denied wrongdoing. It stated that she continues to show a lack of insight into the consequences of her actions. It also submitted that when harassment and insolent behaviour are deliberate and obnoxious, they are not conducive to education and correction; rather, deterrence is required, and examples must be set (see *Hinton Pulp & Hinton Wood Products v. C.E.P., Local 855* (2009), 190 L.A.C. (4th) 222, particularly paragraph 60).

[322] In the alternative, the employer submitted that reinstatement is the normal remedy if a termination is not upheld. However, the grievor had a duty to mitigate her damages, and she made minimal efforts over a prolonged period to seek alternate employment. The employer did not accept her contention that she had been

"blackballed" from law-enforcement agencies. It submitted that while an employee is entitled to some time to adjust or to seek retraining, it is not reasonable to remove oneself from the job market (see *Haydon v. Deputy Head (Department of Health)*, 2019 FPSLREB 26 at paras. 107 to 126; and *Yellowhead Road & Bridge (Fort George) Ltd. v. BCGEU* (2021), 150 C.L.A.S. 148 at paras. 33 to 40).

V. Summary of the grievor's submissions

A. Introduction

[323] The grievor submitted that despite a long record of exemplary service with no prior discipline, her employment was terminated for conduct that even if true, would not support the termination. She submitted that the employer did not substantiate all the allegations. She submitted that those allegations that could be substantiated and that warranted disciplinary sanctions happened over a short period during which she reasonably feared the complainant, who had made outrageous allegations against her, had used sexist and violent language to describe her, and was known to be quick to anger. She also submitted that when the misconduct allegations were made after the harassment investigation, she was under extreme stress because of a demanding workload, her fear of the complainant, and the employer's delay addressing her concerns for her safety. She stated that the threat-risk investigation found that her concerns were legitimate.

[324] The grievor submitted that the termination of employment had a devastating impact on her, that there was no basis for a departure from progressive discipline, and that she should be reinstated.

[325] The grievor submitted that the testimonies of Mr. Goluza and Ms. Portman that suggested that there were other performance issues were not supported by her performance appraisals and should not be given any weight. She also noted the testimonies of former co-workers who confirmed her good management skills and expressed no concern about working with her again.

[326] The grievor submitted that the complainant's allegations against her must be viewed in context, including his sick leave, his performance generally and her attempts to assist him, and the anger he directed toward her and others, which manifested itself in disturbing ways. The complainant acknowledged in his testimony that he made derogatory statements about her, which Mr. Brochez confirmed. She also noted that

Mr. Brochez and Mr. Leedon testified that the complainant was quick to anger. She submitted that the complainant's comments were inappropriate, sexist, and demeaning and that they could have led to disciplinary sanctions against him, even if they were not spoken directly to her (see *Layne v. Deputy Head (Department of Justice)*, 2017 PSLREB 10 at paras. 75 and 91).

[327] The grievor submitted that the founded allegations were not as significant as the complainant contended and that they had no impact on his career. She submitted that he experienced many personal problems during this period that had an impact on his career.

B. Harassment allegation: "old boys club"

[328] The grievor denied that she made the alleged comment about the "old boys club", although she did recall a conversation about hiring another officer in which she told the officers present that there was no plan to hire another officer and that any hiring process would be transparent. In her testimony, she insisted that this was a general statement and that it had not been directed at the complainant. She noted that he did not mention the comment to her until almost a year later (on March 13, 2013) and that she received notice of the allegation only when she received the particulars of the harassment allegations in March 2014.

[329] The grievor submitted that the length of time between the alleged incident and the harassment complaint would make it difficult for anyone to recall what happened at the meeting. She noted that the complainant did not recall the exact phrase used. She submitted that although Mr. Brochez claimed to recall the comment in his testimony, this contradicts his statement to the harassment investigator. She also submitted that he had an opportunity to raise any concerns about the alleged comment during his performance review and that he failed to.

[330] The grievor submitted that even if she made the comment, it would not meet the test for harassment. She stated that harassment generally consists of a series of acts and requires more than mere unwelcome conduct, as "… not every offensive act has the effect of poisoning the work environment"; see *Joss*, at paras. 68 and 69. It does not "… cover petty acts or foolish words, where the harm by any objective standard is fleeting …"; see *Ivanoff v. Deputy Head (Correctional Service of Canada)*, 2023 FPSLREB 20 at para. 153. She submitted that it would have been an isolated

statement that might not have been well received by the complainant but that it was not part of a series of acts as none of the other allegations deemed founded involved offensive statements, and it was not made at the same time as the events in the other allegations. She submitted that if it was said, it was one isolated unwelcome comment made sometime in 2012.

C. Harassment allegation: the shotgun practice

[331] The grievor submitted that there were legitimate reasons for asking the complainant to sit out the shotgun practice, including that he required recertification to be able to use the departmental firearm (the shotgun), and because she wanted to consult on the brief response of his doctor to the employer's detailed questions. She also submitted that his inability to attend the practice had no consequences on his career.

[332] The grievor submitted that her understanding of the firearm directive was that the complainant was required to obtain certification before he could use a departmental firearm. She submitted that Mr. Owen agreed with this interpretation in his testimony at the hearing. She also submitted that Mr. Owen was mistaken in his belief that she did not raise this explanation in the harassment investigation, given that she had clearly raised it with the harassment investigator in an email.

[333] The grievor submitted that her concerns about the fitness-to-work statement from the complainant's doctor were legitimate. Throughout most of his sick leave, the complainant had provided medical notes from a different doctor. She submitted that at their first and second meetings on his return to work (March 13 and 14, 2013), he was emotional and expressed anger toward her and the return-to-work process. During this period, she prepared the detailed letter for his doctor, with the assistance of Mr. Gilliéron and Mr. Goluza. She submitted that she was surprised at the one-sentence response to the detailed letter and advised the complainant that she was seeking advice on it. She testified that she accepted the advice of Mr. Gilliéron and Mr. Goluza to accept the letter. She also submitted that at the next meeting with the complainant, he expressed no concern about the missed shotgun practice.

[334] The grievor submitted that missing the practice did not delay the complainant's return to duties or impact his firearm recertification. She also submitted that it did not

isolate him from his colleagues, as Mr. Graham testified that such practices were not mandatory, and it was not unusual for employees to miss them.

D. Harassment allegation: the swift-water rescue course rescheduling

[335] The grievor submitted that there were legitimate operational reasons to reschedule the complainant's swift-water rescue course. She submitted that it was not mandatory and that although it had been in his work plan the year before, he did not take it. She submitted that delaying the course did not delay his ability to return to full duties or otherwise impact his career. She submitted that the change was due to the assignment of a new file to him. She stated that although he disagreed that timely work had to be done, she had determined that there was heightened urgency to the file.

[336] The grievor submitted that the intention was to inquire about rescheduling options but that unfortunately, the provider went ahead and rescheduled the course. She noted that the rescheduled training was to take place three weeks later and closer to the complainant's home. She submitted that the new dates fit the new work assignment and that he did not object to the new dates. She testified that had he objected, the training could have been rescheduled.

[337] The grievor noted that Mr. Owen testified that the grievor had the right to reschedule the training, but he took issue with how she communicated it. She submitted that all her communications were professional. She admitted that she could have been more courteous in explaining the misunderstanding that led to the rescheduled training but that this did not constitute harassment.

E. Harassment allegation: the project management course

[338] The grievor submitted that there is nothing unusual about a manager recommending training. She testified that she believed that the project management course would help the complainant with his larger files, based on her observations about his lack of organization. She noted that he signed off on the learning plan, indicating that he agreed with it. She submitted that the reason for recommending against the delay taking the project management course was that she wanted to commit the training funds, and the course would have assisted him; she felt that he had a history of putting off training.

[339] She submitted that his response was out of proportion to her recommended course of action. She submitted that his allegation in his email to her that she was trying to push him out of the workplace as well as the tone of his communication were disconcerting, which led her to seek advice from a labour relations advisor. She submitted that she tailored her response to the complainant based on the advice she received. She submitted that it is inconceivable that this interaction could be considered harassment, especially since she accommodated his request to delay the course.

F. The grievor's fear of the complainant

[340] The grievor submitted that she had testified about how upset the complainant had become at several points in her interactions with him and that he had used violent language about her, both in and outside her presence. She submitted that his use of the word "raped" was an expression of violence. She submitted that it had been a very stressful time, especially when Mr. Goluza's response was that she should have more face-to-face meetings with the complainant.

[341] The grievor submitted that after the meeting at which the "raped" comment was made, the complainant became more volatile and angrier — in one case, he called her his estranged wife's name. She also submitted that his harassment complaint against her was difficult to read and deeply disturbing, both in the language he used to describe her and in his perceptions of meetings that were at complete odds with what had occurred in reality. She submitted that the facts that most of the harassment allegations were dismissed and that the founded ones did not support his general perceptions of events were significant. She submitted that this demonstrated an unhealthy obsession with her. She submitted that the fact that he blamed her for shortcomings in his personal life and career that had nothing to do with how he was being managed is illustrative of this obsession.

[342] The grievor submitted that the complainant's behaviour at the use-of-force practice session was so troubling that she spoke to Labour Relations about her concerns. She also submitted that Mr. Goluza testified that she was visibly upset and worried. She submitted that when she learned later about the complainant's troubling comments about a workplace shooting, as well as his odd behaviour in removing ceiling tiles, it caused her concern. She submitted that the harassment investigator also

noted the troubling tone of the complainant's communications to the investigator, describing it as "somewhat disquieting".

[343] The grievor submitted that Mr. Krahn's statement about a violent interaction with the complainant and his statement that he felt that anyone at the employer's Nanaimo office could have been at risk of verbal abuse or physical injury, supported her fears of the complainant. She also submitted that the founded workplace-violence incident in Mr. Leek's report confirmed that her concern for her safety was sincere. She submitted that although Mr. Leek believed that the complainant posed no physical threat to her, he did say that if she were at the same location as the complainant, things could escalate to a physical assault.

[344] The grievor submitted that from the time she received the preliminary harassment investigation report, she believed that the complainant would be frustrated by the results of the final report and lash out at her, because he had invested so much time into the complaint.

[345] The grievor also submitted that while she was dealing with the harassment complaint, she was also dealing with significant issues with Mr. Fraser, as well as being the departmental lead on a high-profile and intense investigation.

[346] The grievor submitted that her conduct that led to the events that gave rise to the misconduct allegations was influenced by her growing fear of the complainant, particularly in the period leading to the release of the final harassment report, the stress of dealing with a heavy workload concurrently with the harassment investigation, and the way the employer managed the situation. She submitted that although this does not excuse all her conduct, it does explain why she took the steps she felt were necessary to protect herself and why she acted in the manner she did in the period before the termination of her employment.

G. Accessing the complainant's leave records

[347] The grievor submitted that her accessing of the complainant's leave records was condoned by Mr. Goluza, an employer representative. She learned that there was an issue with her access to the leave records only on June 17, 2015, when she received the particulars about the misconduct allegations against her. She submitted that although she and the complainant were separated because of the harassment investigation, she

remained responsible for the Nanaimo office and was privy to information about him. She also continued to be responsible for administrative matters involving him. She also provided information to Mr. Goluza about the complainant, at Mr. Goluza's request.

[348] The grievor submitted that the employer is required to identify misconduct to employees in a timely manner so that they can modify their behaviour; see *Chopra*, at paras. 83 to 85; and *Ivanoff*, at para. 228. She submitted that a delay imposing discipline can lead the employee to believe that the conduct has been tolerated, and it is unfair to punish them later, after they have been lulled into a false sense of security. She submitted that she was prejudiced by the delay bringing this alleged misconduct to her attention and that Mr. Goluza gave her the impression that her access was acceptable.

H. The request to deactivate the complainant's access card

[349] The grievor submitted that when she received notice that the final harassment investigation report was released, she still had not been contacted about the promised threat-risk investigation. She submitted that she also first learned from the email about the report's release that she should refrain from any contact with the complainant. She submitted that she was confused, concerned, and fearful and that she believed that the complainant's behaviour might accelerate. She submitted that Mr. Goluza agreed to suspend the complainant's access for a week, while the threat-risk assessment was being completed. The grievor submitted that there was no detriment to the complainant from the deactivation of his access card.

I. The out-of-office message

[350] The grievor acknowledged that changing her out-of-office message was not appropriate. She stated that it was an emotionally charged period for her and acknowledged that she could have made better decisions.

J. The grievor's behaviour at the management meeting

[351] In her testimony, the grievor acknowledged that it was not appropriate to raise the security investigation meeting at the management meeting with Mr. Goluza. She also acknowledged that she should have apologized to him during the meeting.

K. The fact-finding investigation

[352] The grievor submitted that she was concerned that she might be subject to discipline for not conducting a fact-finding investigation in the dispute between Mr. Fraser and the complainant. She also submitted that the finding that contacting Labor Relations for advice constituted harassment was on her mind, which is why she felt that it was inadvisable to contact a labour relations officer. She also submitted that she was transparent with Mr. Goluza about her rationale for conducting a fact-finding investigation. She submitted that although at the time, she thought that she had done the right thing, she recognized in her testimony before the Board that it was not so.

L. The breach of confidentiality

[353] The grievor stated that she learned of the allegation of a breach of confidentiality of the harassment investigation process only at her fact-finding meeting of August 10, 2015. She denied that she discussed the harassment complaint with Mr. Fraser. She submitted that the evidence in support of this allegation is unreliable and that it cannot provide a basis to infer that the allegation is founded. She submitted that at the time that Mr. Fraser alleged that she discussed the investigation, it was a time in which he had duties removed, and he alleged that that removal was associated with his participation in the investigation, when it clearly was not. The grievor also noted that Mr. Fraser referenced grievances against her even though none had been filed.

[354] The grievor submitted that while hearsay is admissible, it is generally accepted that decision makers should give it limited weight and that importantly, they should be reluctant to base findings of critical facts based solely on it; see *Lortie v. Deputy Head (Canada Border Services Agency)*, 2016 PSLREB 108 at paras. 220 to 223.

[355] The grievor stated that is noteworthy that the complainant's breach of confidentiality was not investigated further and that he suffered no repercussions.

M. Additional grounds

[356] The grievor submitted that the only grounds for the termination of her employment were those set out in the letter of termination. She submitted that it was not open to the employer to attempt to bolster its case with additional allegations, including the allegation about installing the GPS devices on the trucks.

[357] The grievor submitted that the GPS-devices allegation was demonstrably false in that there was evidence that she told Mr. Krahn to inform the complainant of the device in Mr. Fraser's truck. She submitted that it is a well-established principle that if an employer had knowledge of alleged misconduct on the part of a grievor, or that it could have gained such knowledge, before it made its decision to impose discipline and did not rely on it, it is impermissible for the employer to later attempt to rely on such allegations to justify its disciplinary sanction; see *Pembroke General Hospital v. O.N.A. (R.M.)*, 2004 CanLII 94689 at para. 17; *Besirovic v. Deputy Head (Correctional Service of Canada)*, 2021 FPSLERB 33 at paras. 95 and 96; and *Ransome v. Deputy Head (Correctional Service of Canada)*, 2021 FPSLREB 138 at para. 89.

[358] The grievor submitted that the employer's attempt to rely on the GPS -devices issue undermined its original rationale supporting her termination. She submitted that Mr. Goluza's testimony raised alleged misconduct years after the fact without any explanation as to why he did not take steps to address it contemporaneously. That demonstrated animosity toward her that coloured the rest of his testimony, including with respect to her performance.

N. Mitigating factors

[359] The grievor recognized that she engaged in some conduct that was worthy of discipline. However, she submitted that significant mitigating factors in her case called for a penalty far short of discharge, which is the labour relations equivalent of capital punishment; see *William Scott & Co. v. C.F.A.W., Local P-162*, [1977] 1 Can. L.R.B.R. 1 ("*Wm. Scott*") at paras. 9 to 12; and *Corporation of the Town of Bracebridge v. Ontario Public Service Employees Union, Local 305*, 2012 CanLII 97802 (ON LA) at para. 51.

[360] The grievor submitted that a critical mitigating factor in this case was her state of mind; see *Walker*, at para. 5; *I.B.E.W., Local 2228 v. NAV Canada*, 2004 CarswellNB 670 at paras. 13 to 15 ("*IBEW*"); and *Corporation of the City of Calgary v. Calgary Local Union No. 38 of the Canadian Union of Public Employees*, 2018 CarswellAlta 1418 ("*Calgary*") at paras. 103 and 108. She submitted that her actions were influenced by her genuine fear of the complainant, particularly in the period preceding and just after the final harassment investigation report was released, which is when most of the misconduct allegations were made. In addition, she submitted that she was under extreme stress because of her workload, the length of the harassment investigation,

management's delay addressing her concerns about the complainant, and Mr. Fraser's declining health.

[361] The grievor also submitted that her length of service (22 years) is a significant mitigating factor; see *Walker*, at para. 6; *Calgary*, at para. 97; *Touchette v. Deputy Head (Canada Border Services Agency)*, 2019 FPSLREB 72 at para. 80; *Hughes v. Parks Canada Agency*, 2015 PSLREB 75 at para. 138; and *Sidorski v. Treasury Board (Canadian Grain Commission)*, 2007 PSLRB 107 at para. 104. The grievor also submitted that it is well established that a discipline-free record is a significant mitigating factor; see *Walker*, at para. 6; *Calgary*, at para. 98; and *Bracebridge*, at para. 50. She submitted that the misconduct for which her employment was terminated was isolated when viewed against her entire employment history; see *IBEW*, at para. 13.

[362] The grievor submitted that progressive discipline is the norm in unionized settings; see *Besirovic*, at para. 150; *Calgary*, at para. 104; and *Gauthier v. Deputy Head (Department of National Defence)*, 2013 PSLRB 94. She submitted that departing from the concept of progressive discipline requires that the grievor's conduct was so egregious as to warrant summary dismissal; see *Bracebridge*, at para. 51. She submitted that the evidence did not establish that a lesser form of discipline would not have corrected her behaviour, especially since the misconduct occurred within a limited period in her otherwise lengthy career and during her prior blameless disciplinary record.

[363] The grievor submitted that she has accepted responsibility for her disrespectful behaviour and her failure to follow directions. She stated that the timing of her acceptance of responsibility should be considered in light of her lack of an opportunity to respond to the final misconduct investigation report before she was terminated. She also submitted that a failure to accept responsibility is only one factor that decision makers consider when applying the contextual and proportional approach to the analysis; see *Dosanjh v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2003 PSSRB 16 at paras. 115 to 118, 120, 124, and 126; and *Sidorski*, at paras. 109 and 110.

O. Damages

[364] The grievor noted her testimony about her passion for her job, particularly investigations, and the devastating impact that the loss of employment has had on her

identity. She also submitted that she has had difficulty coping since the termination, which she feels has made her unemployable in law enforcement. She noted that the B.C. government had expressed some interest in hiring her but was advised that it was "too political". She also noted that she was unable to receive EI benefits and that she received no maternity or parental benefits after the birth of her second child.

[365] The grievor submitted that the termination of her employment devastated her family's finances and that although she has started her own business in a different field, her passion remains for her work at the employer, and given the circumstances of her termination, it cannot be concluded that the bond of trust was broken.

[366] The grievor submitted that a lesser form of discipline should be substituted for the termination of employment. She submitted that she had never been given any indication that her job was at risk. She noted that the employer conceded that the harassment allegations alone would not justify the discharge. She submitted that the founded harassment allegations and the later insubordination must be viewed separately, as they were not part of a pattern of conduct. She also submitted that acts of insubordination were not indicative of her prior performance.

[367] The grievor submitted that she took steps to mitigate her damages as best she could in the circumstances. She stated that she made legitimate efforts to find work; see *Haydon*, at para. 115 and the paragraphs that follow. She stated that her efforts applying for similar work were not fruitful. She also submitted that the COVID-19 pandemic was an unprecedented occurrence that made looking for work for anyone with young children difficult.

[368] The grievor submitted that having a second child also limited her ability to look for work. She submitted that she reasonably started her own businesses, first as a process server, and then as a landscaper; see *Ipsco Saskatchewan Inc. v. U.S.W.A., Local 5890*, 1999 CarswellSask 967 (SK LA) at paras. 19 and 20. She submitted that the business was a "going concern" and that she planned to continue developing it. She acknowledged that income from it must be set off from any retroactive compensation.

VI. The employer's reply submissions

[369] The employer submitted that drawing a comparison between the complainant and the grievor in terms of their respective behaviours was not appropriate. It agreed

that the complainant's behaviour was inappropriate at certain times. However, it noted that the grievor was a manager and a peace officer. It stated that part of the expectations of employees in such positions relates to managing stress. It argued that the type of conduct she exhibited must be discouraged and that sometimes, examples must be set.

[370] The employer submitted that length of service can be considered an aggravating factor when the employee ought to have known better, based on their experience.

[371] The employer stated that Mr. Owen recognized that the complainant's behaviour was not always appropriate. It noted that the complainant had a "filter" and that he did not use most of the inappropriate language to her face. It stated that the comment he made to her that he felt "raped" was both a poor and insensitive choice of words. It submitted that even if this comment is accepted at its worst, it demonstrates that he felt victimized.

[372] The employer submitted that the incident between Mr. Krahn and the complainant was not substantiated. The recording was not adduced in evidence, and Mr. Krahn did not testify.

[373] The employer stated that it was not open to the grievor to resile from her position at the 2018 hearing that she had done absolutely nothing wrong.

VII. Reasons

A. Preliminary observations

[374] In its submissions, the employer referred to the grievor refusing mediation of the harassment complaint. Mediation is a voluntary process, and it was inappropriate to rely on the failure to mediate — either directly or indirectly — to support its submissions. I also note that the employer did not cross-examine the grievor on her reasons for declining mediation.

[375] The employer also inferred in its submissions that filing access-to-information and privacy requests demonstrated an intent by the grievor to undermine the complainant. It did not ask her any questions about her motivation behind filing those requests. The access-to-information regime is a public process, and it is inappropriate to draw any inferences from filing such requests. If inferences are drawn from merely filing requests, this could have a chilling effect on the regime. I also note that the

complainant made multiple and extensive requests, as was his right under the legislation. Accordingly, I have given no weight to this submission.

[376] In its submissions, the employer relied upon the harassment investigator's observations about the use-of-force training session incident, in which the grievor expressed concerns about her personal safety. I have addressed that incident in the section of my reasons about her expressed concerns for her safety. However, the purpose of the employer's submissions was to buttress its case for her misconduct. The harassment investigator clearly stated that this incident was outside her mandate. In the letter of termination, for the harassment allegations, the employer relied only on the founded allegations in the harassment investigation report. It was not open to the employer after the termination to add to the grounds of discipline. Accordingly, I have not considered these submissions.

[377] The employer also relied on conduct by the grievor for which she was not disciplined to support its position that she had limited potential for rehabilitation. The actions it relied on for this argument included the use of GPS tracking devices on trucks without the knowledge of Mr. Fraser and the complainant, unnecessarily escalating conflict between the complainant and Mr. Brochez by disclosing access-to-information requests contrary to an express written direction, and a conflict with a colleague manager related to operational issues. The employer knew of all these events before the termination of the grievor's employment, and if it viewed them as undermining her ability to do her job, they should have been included in the grounds in the letter of termination or, at the very least, should have been drawn to her attention through a conversation with Mr. Goluza or in her performance appraisal. They were not included in the letter of termination or a performance appraisal, which leads to the conclusion that the employer did not consider the conduct to have undermined her ability to do her job.

[378] However, the evidence relied on by the employer to support its position that the grievor secretly installed a GPS device on the complainant's vehicle does deserve some comment. Mr. Goluza's testimony was tailored to support the employer's theory that the grievor retaliated against the complainant. However, his testimony was misleading in part and plain wrong in other parts. The idea of putting a GPS device on departmental vehicles was a safety consideration initially suggested by another operations manager. Ms. Meroni approved the GPS pilot project without raising any

concerns. The grievor told Mr. Krahn that he should advise the complainant about the GPS installed on the truck that he was to use. Mr. Krahn did not testify, but Mr. Goluza admitted that Mr. Krahn told him that he did not read that email. From the evidence put before me, it is clear that the pilot project was approved by senior management and that the grievor did advise the complainant's temporary supervisor about the GPS and specifically told Mr. Goluza to ensure that Mr. Krahn advised the complainant. The employer failed to establish how an approved departmental pilot project, with notice provided to the complainant by the grievor through his direct supervisor, could in any way have been retaliation toward the complainant. If the complainant did not know about the GPS, the blame rested with Mr. Krahn, not the grievor.

[379] The grievor maintained that the complainant engaged in conduct that could have resulted in discipline against him. He is not a party to this grievance, although his actions are central to it. It is inappropriate to come to any conclusions about his culpability in his interactions with the grievor and others.

[380] In its submissions, the employer also noted that it was inappropriate to compare the behaviours of the complainant and the grievor because the grievor was both a manager and a peace officer. Although I believe that it was understood, it should be noted that the complainant was also a peace officer. I agree that managers are held to a higher standard of behaviour than are their subordinates.

B. Introduction

[381] In a discipline case, an adjudicator must assess whether the alleged misconduct occurred and whether the discipline imposed was appropriate and if it was not appropriate, what the appropriate discipline should be (see, for example, *Basra v. Canada (Attorney General)*, 2010 FCA 24 at paras. 24 to 26; and *Wm. Scott*, at paras. 13 and 14).

[382] The grievor raised issues related to how the misconduct investigation was conducted. The hearing before the Board cured any defects in the investigation process (see *Tipple*).

C. Alleged misconduct – the harassment complaint allegations

[383] The employer provided the Board with its harassment policy ("Preventing Conflict and Harassment in Environment Canada…Our Policy") that was in place at the

time of the alleged harassment. The policy provides the following definitions of "harassment" and "abuse of authority":

> …
>
> *… Generally, the following kinds of conduct are considered to be harassment.*
>
> ***Unwelcome conduct** is unwanted by the person who is its target. The perpetrator knows, or reasonably ought to have known, that the behaviour would be unwelcome. Examples of **offensive conduct** could include degrading remarks, inappropriate jokes or taunting, insulting gestures, displays of offensive pictures or materials and unwelcome enquiries or comments about someone's personal life. This kind of behaviour stems from a lack of respect for others and can harm the working environment.…*
>
> …
>
> ***Threats** refer to both specific and implied threats. Creating an intimidating, hostile or offensive work setting for someone can be a kind of threatening conduct. For a statement to be considered a threat, it must point out a consequence that is totally out of proportion with the cause and the circumstances. Pointing out the reasonable consequences of an action is not a threat. For example, telling an employee about the consequences of poor job performance is not a threat, even if it makes the employee uncomfortable.*
>
> …
>
> ***Abuse of authority** means improperly taking advantage of a position of authority to endanger an employee's job, undermine an employee's job performance, threaten an employee's livelihood or interfere with or influence his or her career. It may include behaviour such as yelling, belittling an employee's work, reprimanding an employee in front of other staff members, arbitrarily withholding or delaying leave approval, favouritism, unjustifiably withholding information that an employee needs to perform his or her work, demanding overtime without reason, justification or prior notice and asking subordinates to take on personal errands.*
>
> *Some conflict situations can be attributed to **poor management practices**. For instance, not taking the appropriate measures to ensure that staff are provided with a healthy working environment is considered a poor management practice. Managers must ensure that appropriate business practices and regulations and guidelines in human resources management are respected and applied in a timely fashion. Although some management rights are inherent under present legislation, the manager is expected to demonstrate sound judgment in their application and be considerate to employee needs in doing so.*
>
> …

[Emphasis in the original]

[384] In *Joss*, the Board noted that although harassment may consist of one significant act, it is "… more often comprised [*sic*] of continuous conduct or a series of acts, which when regarded in totality are objectionable or offensive to the person to whom they are directed, and which have a detrimental effect on that person in the workplace."

[385] In *Ivanoff*, the Board relied on the arbitrator's statement in *British Columbia v. B.C.G.E.U.*, 1995 CanLII 18346 (BC LA) at 242 and 243, as follows:

> …
>
> *I do not think that every act of workplace foolishness was intended to be captured by the word "harassment". This is a serious word, to be used seriously and applied vigorously when the occasion warrants its use. It should not be trivialized, cheapened or devalued by using it as a loose label to cover petty acts or foolish words, where the harm, by any objective standard, is fleeting.…*
>
> …

[386] In *Joss*, the Board noted that a harassment complaint "… is not a weapon to be placed at the disposal of people in the workplace" (at paragraph 63). The Board continued that it should not be used as a tool to resolve disagreements or disputes that frequently arise between managers and employees.

[387] Also, in *Ivanoff*, the Board noted that when establishing harassment based on a course of conduct or pattern of behaviour, "… there is typically some similarity in character among the incidents comprising the pattern, and they are typically at least somewhat proximate in time" (at paragraph 215).

1. Harassment allegation number 1: the "old boys club" comment

[388] This allegation arose out of a meeting in 2012. There is agreement that at that meeting, the staffing of an additional position at the Nanaimo office was raised. There is also agreement that the grievor stated that if a position were to be staffed, it would be done in a transparent manner. The complainant wrote in his witness statement that the words "old boys club" or "back room deal", or words to that effect, were used. Mr. Brochez testified at the hearing that the words "old boys club" were used at the meeting, although he could not recall what words were used when he was interviewed by the harassment investigator two years after the meeting. The grievor denied using the term "old boys club".

[389] The complainant reported the grievor's comments in his harassment complaint only after over two years had passed since the meeting. In his witness statement, he was not certain of the exact words used when he added that the words were "to the effect of". Mr. Brochez's recollection was influenced by the complainant constantly raising the issue after the meeting, when he might have used the term "old boys club". I think it more likely that the grievor used the term "back room deal" — the complainant also referenced this phrase in his witness statement, and the grievor agreed with the harassment investigator that she might have used it.

[390] The underlying meaning of the words used is not much in dispute — a "back room deal" is a non-transparent process based on who you know or connections. In dispute is whether those words were intentionally directed at the complainant and whether they implied that his appointment to the Nanaimo office was a "back room deal". Clearly, the complainant thought that the comment had been directed at him. The grievor denied that it was anything other than a statement about the future and how any new position would be staffed. There is no evidence that she directly referred to his appointment at the meeting — he testified only that he took the comment as being directed toward him.

[391] To say that an appointment process will be transparent and will not rely on who you know is not, by itself, harassment. It might rise to the level of harassment if it was clearly directed at an individual employee and if it was clearly suggested that they received their appointment somehow nefariously. It is clear from the harassment complaint and his testimony that what the complainant found objectionable was the inference that he had obtained his position at the Nanaimo office in some underhanded way. However, the evidence did not show that this was the grievor's intent. The complainant testified that she said those words while looking at him. She testified that she knew that he had already asked Mr. Goluza about appointing someone he knew to a position at the Nanaimo office. Therefore, it was not unexpected that she would look at him when talking about any future hiring process.

[392] I find that on a balance of probabilities, the evidence did not show that the grievor intended the comment to refer to the complainant's work history. Therefore, the employer did not establish that she was being critical of the complainant's appointment when she referred to a "back room deal" at the meeting in 2012.

[393] The use of the pejorative phrase "back room deal" was not wise and could be considered a poor choice of words by a manager – the more neutral, and positive, terminology of "a transparent process" would have been a better choice of words. However, the use of the phrase "back room deal" by itself does not constitute an act of harassment.

[394] I also note that this harassment allegation related to events over one year prior to the complaint. Since I have found that the other harassment allegations are unfounded, this allegation did not form part of a pattern of conduct and was therefore untimely.

2. Harassment allegation number 2: excluding the complainant from shotgun practice

[395] The harassment investigator determined that excluding the complainant from shotgun practice was an act of harassment. The employer adopted the investigator's rationale for this finding.

[396] The harassment investigator found that the grievor did not have a "bona fide" reason for not accepting the medical clearance provided by the complainant's doctor and that she was required to have "sound justification" to question the doctor's letter. Therefore, the harassment investigator concluded that it was improper conduct to prevent the complainant from fully participating in work activities, including the shotgun practice. The investigator determined that the conduct was offensive and that the grievor knew or ought reasonably to have known that it would cause offence or harm.

[397] The harassment investigator also concluded that the exclusion from the shotgun practice had "a significant and long lasting impact" on the complainant. She found that missing the practice could have had an adverse safety-related consequence or that it could have delayed his recertification process.

[398] The grievor provided these two reasons for denying the complainant access to the shotgun practice: 1) her uncertainty about whether the doctor's letter was sufficient, and 2) the fact that he had not yet been recertified to be able to use departmental firearms. Although the employer suggested that the grievor provided a third reason (managing an employee on return from extended stress-related leave), I

find that this rationale is included in the first reason, related to her concerns about the sufficiency of the doctor's letter.

[399] The harassment investigator focused only on the first reason in her analysis, even though the grievor had raised the second reason with her. The employer's position was that she raised this second issue only at the hearing, after the harassment investigation report had been issued. Mr. Goluza and Mr. Owen both expressed this view in their testimony. When the grievor's concern about recertification was explained to him at the hearing, Mr. Owen recognized it as valid.

[400] The employer's submission on this issue ignores the grievor's important distinction between firearms owned by an employee and firearms owned by the department. Therefore, there is no inconsistency between approving gun club memberships (in which an employee uses his or her own firearm) and shotgun practice (at which departmental firearms are used).

[401] Even if the grievor was wrong in her interpretation of the firearm policy, her reliance on this interpretation did not constitute harassment. The firearm policy is open to such an interpretation. A disagreement with a supervisor's interpretation of a policy does not constitute harassment, especially when that opinion has a rational basis.

[402] The other reason relied upon by the grievor related to the doctor's letter. An important consideration is that the letter was received only the day before the shotgun practice was held. The letter to the doctor had been carefully crafted by both the grievor and Mr. Goluza and contained 10 detailed questions. It is important to note that both Mr. Goluza and the grievor had never dealt with a similar situation. It is not unreasonable to seek further labour relations advice on receiving a 1-sentence answer to 10 detailed questions. The grievor told the complainant that she would seek labour relations advice about the letter before accepting it. After she received that advice, the letter was accepted, and the complainant continued with his reintegration into the workplace.

[403] The harassment investigator implied that a manager cannot seek labour relations advice when receiving a doctor's letter without being found to have engaged in harassment. I agree with the employer's submissions on the law on obtaining and relying on medical information about employees. However, the employer did not

establish that the grievor knew about this jurisprudence and its implications on her actions. Clearly, this is why the employer has labour relations professionals to assist supervisors. In this case, the grievor asked for advice, was provided it, and implemented it. Such a course of action does not constitute harassment.

[404] The employer suggested that the grievor's failure to follow up on her concerns about the doctor's letter demonstrates that her concern about it was not legitimate. A labour relations advisor advised her that the letter was sufficient, and Mr. Goluza also supported this view. Therefore, it was natural that the grievor would not further pursue the issue.

[405] The harassment investigator's finding that excluding the complainant from the shotgun practice had a significant and long-lasting impact on him is also not supported by the evidence. He was not scheduled for any trips to the field, where he might have needed a firearm. He was able to participate in a shotgun practice a few weeks later. There was no evidence of any delay in his recertification. In addition, he was experienced in using a firearm, so there were no safety-related concerns. The evidence of a long-lasting psychological impact on the complainant was based on his opinion. I note that shotgun practices were not mandatory and that it was common for employees to miss them. Unless the complainant shared the reason for not attending, his colleagues would not have known that he missed the practice because the grievor did not approve his attendance.

[406] Therefore, I conclude that this allegation is unfounded.

3. Harassment allegation number 3: rescheduling the swift-water rescue course

[407] The harassment investigator determined that rescheduling the complainant's training without consulting him and without having a "bona fide reason" for changing the training date was an act of harassment. She stated that supervisors have the responsibility and authority to change work priorities based on operational requirements, including cancelling or postponing training. The employer did not dispute this statement.

[408] The issue in this allegation is whether a change in training must be made in consultation with an employee and if a supervisor is required to have a "bona fide reason" for cancelling or postponing training. If a "bona fide reason" for changing

training is required, a related question is whether in the circumstances of this grievance, there was a "bona fide reason" for rescheduling the training.

[409] The grievor testified that she called the third-party provider to see if the course could be rescheduled and that she expected the provider to come back to her with alternate dates. The employer's position is that she told the third-party provider to cancel the training and to schedule the complainant for later dates. The employer has the burden of proof in allegations of misconduct. In this case, the grievor's testimony was clear and plausible, and the employer provided no evidence to counter her evidence. It could easily have obtained the evidence to counter her testimony, if it existed, by calling the third-party provider as a witness. Therefore, I find that the grievor's explanation is to be preferred.

[410] There is, however, no doubt that the grievor had the intention of rescheduling the training. Once the third-party provider had rescheduled the complainant, she did not pursue the matter further or consult with the complainant about alternate dates.

[411] The grievor testified that she thought that it was necessary for the complainant to prioritize an investigation file. The harassment investigator agreed that a supervisor has the right to manage work priorities, but in this case, she second-guessed the grievor's reason for prioritizing the investigation and stated that the grievor's reason was not a *bona fide* one. Reasonable people can disagree on work priorities, and I am certain that they do so frequently. However, a supervisor's assessment of work priorities, if it has some foundation, should not be routinely considered an act of harassment. The grievor provided a valid explanation for the priority she set for the investigation and her testimony was not shaken on cross-examination.

[412] I also note that although the training was mandatory, the complainant had not taken it the previous year when it was on his training plan, and that he was able to take it a month later. There was no evidence of any harm to his career prospects because the training was rescheduled.

[413] In conclusion, I find that the employer did not establish that cancelling the swift-water rescue course constituted an act of harassment or an abuse of authority.

4. Harassment allegation number 4: the project management course

[414] This allegation relates to communication exchanges between the grievor and the complainant about a project management course that was included in his training plan. She suggested that he take it in either Gatineau, Saskatoon, or Edmonton. He did not want to take it in those places as he preferred to take it later, in Vancouver.

[415] The harassment investigator's conclusion was incorrect. In the end, there was no arbitrary denial of the complainant's request as to the training location. After an exchange of emails, the grievor agreed to his request. The investigator likely meant to conclude that the correspondence from the grievor relating to the request amounted to harassment.

[416] The grievor was concerned that the training might "fall off the learning plan". A learning plan is a contract of sorts between a supervisor and an employee. Although the training was not mandatory, it was part of the complainant's learning plan. A failure by management to follow up on a learning plan is a failure of the commitment management made in that plan.

[417] The complainant's position that the grievor's action demonstrated that she wanted him to leave and find another job is an especially egregious claim. He told her that he wanted to leave and find other employment. The course was included in a learning plan that he signed, and management cannot be faulted for providing training that enhances an employee's career advancement. Based on the harassment investigator's conclusion (which the employer adopted), any training opportunity offered by the employer that is not related to an employee's current duties could be interpreted as harassment.

[418] The harassment investigator asserted that supervisors must always have a "bona fide reason" to schedule (or reschedule) training. I am not so sure that management rights are constrained in this way. However, in this case, the grievor did have a reason — she was concerned that the training would be put off and not taken. This is what had happened with other training in the complainant's learning plan (such as the swift-water rescue course in the previous year). An employee is free to criticize or challenge the reason for scheduling training, but not being happy with the answer does not constitute harassment.

[419] The harassment investigator also criticized the grievor for "… unnecessarily elevating the matter to Labour Relations …", as well as for the "bellicose" tone in the initial email response to the complainant's request that he take the training in Vancouver. It is important to read her email response in the context of the email he had sent to her. In it, he suggested that he "felt pressured" and that the tone of her email left him "feeling pressured to find employment elsewhere." He also stated that he "… should not fear any pressure or reprisal for exploring other alternatives…". If an employee accuses a supervisor of pressure and reprisal, it is reasonable for that supervisor to consult a labour relations professional. Mr. Goluza was rightly offended when the grievor suggested that he unnecessarily consulted Labour Relations. If consulting Labour Relations for advice is an act of harassment, especially when dealing with employees who have suggested that a management decision is an act of reprisal, supervisors will question whether they should ever seek professional labour relations advice.

[420] The "bellicose" tone in the grievor's initial email is not substantiated by a plain reading of it. She simply stated that given the nature of his statement, she would seek the Labour Relations' advice.

[421] The harassment investigator also referred to the grievor's final email, outlining her decision to allow the complainant to take the training in Vancouver, as "convoluted" and considered it part of the misconduct. The grievor testified that she drafted her response after consulting a labour relations advisor. There was no testimony about the labour relations advisor's advice and about reviewing the department's policy on learning plans that she was referred to. In any event, if convoluted emails are acts of harassment, there would be many more harassment complaints than are already on hand in the federal public service.

[422] The harassment investigator concluded that the impact or potential impact on the complainant of the interactions with the grievor over the project management course "were significant and long lasting". She noted adverse effects, such as eroded confidence and instability. It is important to consider the fact that ultimately, the grievor agreed with his preference to take the course in Vancouver.

[423] I find that the employer did not establish that the grievor's email correspondence related to the project management course was an act of harassment.

D. Conclusion on the harassment allegations

[424] I have concluded that none of the founded allegations in the harassment investigation report constituted harassment. I note that in *Joss*, issued more than 22 years ago, concerns were raised as follows about the application of harassment policies in the workplace (at paragraph 41):

> *[41] Addressing harassment in the workplace is problematic. Most policies include a definition of harassment, which in my experience is often poorly articulated and/or far too liberal, thus resulting in problems upholding discipline based upon inconsequential acts which nevertheless fall within a liberal policy definition. The fact that harassment policies usually contain a statement to the effect that harassing conduct is or may be subject to discipline, is often erroneously regarded as an absolute requirement to discipline. Work places often have inexperienced or unqualified harassment review or investigative panels charged with making recommendations to management. Management may feel obliged to accept the findings and recommendations of such panels to demonstrate its acceptance of such programs, to demonstrate good faith and zero tolerance of harassment, or to protect itself from liability.…*

[425] In this case, the employer's harassment policy implied that poor management practices could constitute harassment. I am not certain if this was the intent of the policy, but a description of poor management practices is included in the section that defines harassment, so the implication that it is included in the definition is certainly there. While I do not condone poor management practices, I do not think that less-than-perfect management practices should be routinely considered harassment.

[426] Mr. Owen's statement in his reasoning for the termination of the grievor's employment is troubling in that a recent public service survey about harassment generally in the branch was a factor in his decision. He mentioned the concern of employees in the branch with the seriousness with which the branch treated harassment cases. This suggests that his findings were motivated by a desire to show employees that the branch took harassment seriously, rather than an objective examination of the grievor's alleged acts of harassment.

[427] It is also clear from reading the 26 allegations in the harassment complaint that the underlying issues in the relationship between the grievor and the complainant rested on the management of his performance — in fact, most of the allegations were dismissed on that basis. There were troubling signs in the complaint itself as well as in

the information that came to light in the investigation that the complainant was difficult to manage and that he was abusive toward the grievor. The employer ignored this evidence. In my view, the complainant successfully used the harassment process to shield himself from performance management by the grievor.

E. The misconduct allegations during and after the harassment investigation

[428] The letter of termination referred to four grounds of misconduct: 1) the grievor accessing the complainant's leave records, 2) the deactivation of the complainant's access card, 3) the breach of the harassment investigation's confidentiality, and 4) the acts of insubordination and disrespect to management. I will address separately the merits of each ground relied upon by the employer. After determining whether the employer met its burden of proof, I will address the appropriateness of the discipline for the founded acts of misconduct.

1. Accessing the complainant's leave records

[429] There is no dispute that the grievor accessed the complainant's leave records. However, I find that discipline was not warranted for this access for two reasons: Mr. Goluza's directions related to the separation of the complainant and the grievor were not clear, and Mr. Goluza condoned her access.

[430] Although the parties were separated, and it was made clear to the grievor that she was no longer responsible for approving leave requests, there were no explicit instructions about her access to the complainant's leave records. I note that Mr. Goluza testified that it was possible to change access rights to the leave software but that the employer failed to do it. Mr. Owen suggested that if the grievor had to access his leave records, she could have asked Mr. Krahn to do it. Mr. Goluza testified that Mr. Krahn did not have access to the complainant's leave records. In addition, Mr. Goluza continued to engage with the grievor on issues related to the performance management of the complainant, including seeking her input. Without express directions to not access his leave records, there is an implication that the grievor was not prevented from doing it, based on Mr. Goluza's requests.

[431] However, of more importance to this alleged act of misconduct is the employer's condonation, Mr. Goluza's in particular. In *Chopra v. Canada (Attorney General)*, 2014 FC 246 (upheld in 2015 FCA 205), the Federal Court stated (at paragraph 109) that the principle of condonation "… requires an employer to decide

whether or not to discipline an employee when it becomes aware of undesirable employee behaviour." The Court further stated that the employer's failure to discipline an employee in a timely manner can constitute condonation of the misconduct. The Court noted (at paragraph 218) that the "… purpose underlying the arbitral jurisprudence relating to delay and the principle of condonation is to give employees an opportunity to modify behaviour that an employer believes warrants discipline." Once the behaviour has been condoned, the employer cannot rely on that same conduct to justify discipline. The Federal Court summed up the consequences of condonation at paragraph 195 as follows:

> *[195] … a long delay in imposing discipline may entitle an employee to assume that their conduct has been condoned by their employer, where no other warning or notice of potential discipline is given. Allowing employees to believe that their behaviour has been tolerated, thereby lulling them into* [a] *false sense of security only to punish them later, is unfair to employees ….*

[432] Mr. Goluza first became aware that the grievor had accessed the complainant's leave records on January 30, 2015. He did not raise any concerns with her doing so at that time. When she mentioned accessing the leave records again on March 31, 2015, he simply acknowledged the information and said that he would follow up. About a week later, he forwarded the email exchange to a labour relations advisor and to Ms. Meroni. Both advised him that he should speak to her about it, as the labour relations advisor told him, so it would not appear that the employer condoned this behaviour. In spite of this advice, Mr. Goluza did not address it with the grievor, advising the labour relations advisor and Ms. Meroni that he preferred to wait until her "year end", which I assume was a reference to her year-end performance review. Mr. Goluza told Ms. Meroni and the labour relations advisor of his intention, and there is no record of either of them responding to his email.

[433] On April 3, 2015, the department received a letter from the grievor's lawyer about her safety concerns addressed to Michael Sousa, the department's general counsel, and copied to Michelle Laframboise, the director general of the Human Resources branch. That letter included an attached statement from the grievor in which she outlined her concerns, including providing information on the complainant's leave status. There is no record of Mr. Sousa or Ms. Laframboise responding to the grievor's lawyer and stating that accessing the complainant's leave records was considered inappropriate.

[434] Mr. Goluza's responses to learning of the grievor's access to the complainant's leave records was consistent — he made no reference to any concern about her access. When Labour Relations advised him that not responding could be considered as condoning the behaviour, he ignored this advice. I find that his response to learning of her accessing the leave records constituted condonation. It also suggested that he considered her behaviour a performance-related issue and not disciplinary, since he suggested that he would discuss it during her performance review.

[435] Accordingly, this ground of misconduct is not founded.

2. The deactivation of the complainant's access card

[436] The grievor requested that the security officer deactivate the complainant's access card for the Vancouver office in anticipation of the harassment investigation report's release. There is no dispute that the request was made and that the access pass was deactivated for a period of five days (with Mr. Goluza's approval).

[437] I agree that the grievor did not have the authority to request the deactivation of the complainant's access pass. There was still a separation agreement in place, and she had no supervisory role over him.

[438] The grievor made two main arguments against the discipline, which were her fear for her safety and security, and condonation. I find that the employer condoned the deactivation request and therefore that the discipline was inappropriate. Therefore, I do not need to consider the grievor's fears for her safety in the context of this alleged misconduct. Her emailed response to the deactivation request was a separate ground of misconduct relied on by the employer, and I have addressed her safety concerns in my analysis of that conduct.

[439] I have already summarized the principle of condonation in the previous section on accessing the leave records. In this case, after Mr. Goluza was made aware of the deactivation of the complainant's access card, he ordered the deactivation to stay in place for five days. He stated that he did so in consideration of the grievor's health and because the complainant was not going to the Vancouver office during that period. Although he told the grievor that her deactivation request was inappropriate, he did not reverse it. By maintaining the deactivation, Mr. Goluza condoned the grievor's initial card-deactivation request.

[440] Therefore, I find that the employer condoned the deactivation of the access card, and this ground of misconduct is not founded.

3. The breach of the confidentiality of the harassment investigation

[441] One of the grounds for the termination of the grievor's employment was the alleged breach of the confidentiality of the harassment investigation process. The employer also viewed it as an act of intimidation against Mr. Fraser.

[442] The employer alleged that the grievor breached the confidentiality requirements of the harassment investigation when she discussed it with Mr. Fraser. The grievor denied that she told him about the investigation. Because of his death, I do not have his direct evidence. However, I do have a summary of his evidence from the 2018 hearing, as well as the summary of what he told the harassment investigator about the alleged breach. For the following reasons, I do not find Mr. Fraser's allegation credible.

[443] When assessing the credibility of evidence, the Board has often referred to *Faryna* for the proposition that the test for the truth of testimony "… must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."

[444] I do not doubt that Mr. Fraser recounted to the harassment investigator the words that she recorded in her summary. What I find not credible is the content of his statement to the investigator.

[445] The investigator reported that Mr. Fraser had told her that the grievor and the complainant were permitted to see the witness statements and that she had read his statement. There is no evidence that either the complainant or the grievor was permitted to review witness statements before the harassment investigation was completed. The grievor also reportedly told him that three other grievances about her had been filed and that she had simply been ordered to go on sensitivity training. She denied this, and the employer provided no evidence to support this allegation. Mr. Goluza testified that he was not aware of any grievances being filed against the grievor.

[446] In the 2018 decision, the Board stated that according to Mr. Fraser's testimony, the grievor told him that she knew what he had told the investigator in his interview. This would imply that the investigator had breached the confidentiality of the

harassment investigation either by sharing witness statements or by briefing the grievor on the content of those discussions. The investigator was not called as a witness at the hearing before me to explain how the grievor might have come to know what Mr. Fraser had told the investigator.

[447] Mr. Fraser's statement is not credible because it contains fanciful information (that three grievances were filed, and that sensitivity training was ordered). Also, the employer did not explain how the grievor would have obtained his witness statement. Perhaps the investigator might have been able to shed some light on this issue; however, misconduct cannot be established on conjecture.

[448] In her testimony, Ms. Meroni seemed to rely on the investigator's statement about the breach as support for her finding on Mr. Fraser's credibility. The fact that the investigator believed Mr. Fraser did not support a finding of credibility. The investigator had no independent knowledge of a breach of confidentiality by the grievor — she relied solely on Mr. Fraser's statement when she informed the employer. In assessing credibility, the fact that others believed what they were told is not a relevant consideration.

[449] I find that the employer did not meet its burden of proving this misconduct.

F. Allegations of insubordination and disrespecting management

[450] These four incidents relate to this ground of termination:

1) The grievor's out-of-office message of April 2015.
2) Her response to the direction on the security pass deactivation.
3) Her conduct during the May 11, 2015, management meeting.
4) Her not following a direction related to a fact-finding investigation involving the complainant.

[451] These four incidents include allegations of disrespect toward management and toward Mr. Goluza in particular, as well as insubordination.

[452] To establish insubordination, the employer must establish that 1) a clear order was given, which the employee understood; 2) a person in authority gave the order; and 3) the employee disobeyed the order (see, for example, *Kenny v. Deputy Head (Department of National Defence)*, 2021 FPSLREB 91 at para. 234; and *Nowoselsky v. Treasury Board (Solicitor General Canada)*, PSSRB File No. 166-02-14291 (19840724)).

Insubordination can also be found when an order is followed but with a "contemptuous attitude" (see *Lortie*, at para. 168).

[453] I will address the merits of each incident separately.

1. The out-of-office message of April 2015

[454] The grievor used Mr. Gilliéron as her suggested point of contact in her out-of-office message in April 2015.

[455] There is no dispute that Mr. Gilliéron was not an appropriate contact person for individuals who would contact the grievor on issues relating to her work.

[456] The grievor testified that she used Mr. Gilliéron as her contact out of frustration with Mr. Goluza, and management generally, as to how her safety concerns were being addressed. While I have no doubt that she experienced great frustration, it was not a reason to provide an inappropriate out-of-office message.

[457] Using a labour relations advisor as an out-of-office contact was disrespectful to Mr. Goluza as well as a potential security risk.

[458] I find that the employer has proven this ground of misconduct.

2. The response to the direction on the security pass deactivation

[459] The employer considered the grievor's response to Mr. Goluza's email about the deactivation of the complainant's access card insubordinate and disrespectful. In his email, Mr. Goluza stated that the grievor should not take any actions or make any requests related to the complainant. He told her to bring any requests to his attention "for [his] action." The grievor's response was this: "Where my safety may be at risk or in this case clearly unassessed in a timely manner (report comes out today), I will not hesitate to take whatever action I deem necessary to be safe whether it be internally or with Police and Provincial Crown."

[460] I have already addressed the grievor's action of requesting the deactivation of the complainant's access card. This separate ground of misconduct relates to her statement that she would take "whatever action [she deemed] necessary" in the future. When read in conjunction with Mr. Goluza's email, it amounts to an announcement of future insubordination, based on her safety concerns.

[461] In this case, Mr. Goluza gave the grievor a clear order to not take any actions or make requests related to the complainant and to direct any requests to him for action. The order was given, and it was clear. She expressed an intention to disobey the order, although she did not act on that intention.

[462] I find that an expressed intention to disobey an order can constitute insubordination. Also, telling a supervising manager that an order will be disobeyed is disrespectful. Therefore, I find that there was misconduct.

3. Conduct during the May 11, 2015, management meeting

[463] The grievor referred to the threat-risk assessment being conducted by Mr. Leek and accused Mr. Goluza of telling an employee not to cooperate in it. She did this in front of other managers.

[464] Raising concerns about the threat-risk assessment with Mr. Goluza was not an act of misconduct. In my view, the misconduct arose when she raised her concerns in a forum with other managers who had no direct involvement in the assessment. She clearly expressed concerns about Mr. Goluza's direct involvement in the assessment, without any proof. This was a direct challenge to Mr. Goluza's authority in front of others who reported to him.

[465] Therefore, I find that the employer has proven this ground of misconduct.

4. Not following a direction related to a fact-finding investigation involving the complainant

[466] The grievor felt that under the department's harassment policy, she was required to conduct a fact-finding investigation of a reported conflict between Mr. Fraser and the complainant. When she told Mr. Goluza that she would conduct the investigation, he told her not to conduct it while she and the complainant were separated. He also told her to consult Labour Relations "for clarification." She replied that she would go ahead with the fact-finding investigation and that she would interview those employees who reported to her. In other words, she would not interview the complainant. She then interviewed both Mr. Fraser and Mr. Brochez.

[467] The grievor's words and actions were clearly acts of insubordination. Mr. Goluza's order was clear — she was not to conduct a fact-finding investigation, and she should contact a labour relations advisor "for clarification." She told him that she

would conduct the and that she would not consult a labour relations advisor, and then she conducted the fact-finding investigation.

[468] I find that the employer established this ground of misconduct.

5. Conclusion on the grounds of discipline

[469] I have determined that the employer met its burden of proving the following misconduct: 1) the grievor's inappropriate use of an out-of-office message, 2) her conduct at the May 11, 2015, management meeting, 3) her insubordinate email relating to the deactivation of the complainant's access card, and 4) her disobeying an order to not conduct a fact-finding interview.

G. Was the imposed discipline excessive?

1. Introduction

[470] To assess whether the discipline in the form of the termination of the grievor's employment was appropriate, it is necessary to look at both the mitigating and aggravating factors. The Federal Court of Appeal directed the Board to include the grievor's fear for her safety as a mitigating factor in the discipline imposed.

[471] I will first address the aggravating factors before reviewing the mitigating factors. I will then balance those factors in the determination of the appropriate discipline for the founded misconduct.

2. Aggravating factors

a. The seriousness of the misconduct

[472] In assessing whether a disciplinary action by the employer is excessive, the seriousness of the behaviour is a factor to consider (see *Wm. Scott*, at page 4).

[473] In *Sidorski*, in a case involving a suspension for insubordination, the predecessor Board concluded that the amount of discipline should "… reflect the real or potential harm caused by the misconduct …" (at paragraph 105). As noted in that decision (at paragraphs 104 and 105), the employer is required to provide evidence of the impact of the insubordination to support a finding on the seriousness of the misconduct.

[474] In this case, the grievor committed four acts of misconduct. The actual impact of her conduct was limited. While the acts were examples of insubordination, the impact on the employer's operations and reputation was minimal (the out-of-office message) to none (the other acts of misconduct). I find that the misconduct was not serious enough to justify the termination of employment.

b. Premeditated acts of misconduct

[475] In assessing whether a disciplinary action by the employer is excessive, whether the misconduct was premeditated or spontaneous is a factor to consider (see *Wm. Scott*, at page 4). The characterization of the behaviour will determine whether it is an aggravating or a mitigating factor. If the conduct was premeditated, it can be an aggravating factor, and if it was spontaneous, it can be a mitigating factor.

[476] There are four acts of misconduct at issue. Two were premeditated or planned — the out-of-office message and conducting fact-finding interviews. Although the out-of-office message was initially an expression of frustration with Mr. Goluza, it remained in place for about a week, and the grievor made no attempt to change it. She was clearly told not to conduct a fact-finding investigation related to Mr. Fraser and the complainant, but she went ahead with it. Therefore, I find that the premeditated nature of both acts of misconduct is an aggravating factor.

c. The grievor's management and peace officer position

[477] I agree with the employer that managers are held to a higher standard than other employees when it comes to conduct. In this case, the fact that as a manager, the grievor was insubordinate, is an aggravating factor.

[478] Her position as a peace officer is not relevant, I find, to the founded grounds of misconduct. Usually, peace officers are held to a higher standard when exercising their related peace officer duties. In this case, the misconduct was not directly related to her peace officer role but to her role as a manager.

d. Repetitive behaviour

[479] There were four acts of insubordination and disrespect. Therefore, I find that the repetitive acts of insubordination are an aggravating factor.

e. Acknowledgement of wrongdoing, and remorse

[480] The employer maintained that the grievor expressed no acknowledgement of any wrongdoing or any remorse for her actions. She submitted that she has expressed remorse for the justified grounds of misconduct.

[481] I have determined that none of the findings on the harassment complaint were founded. Therefore, there is no requirement that the grievor acknowledge any wrongdoing or that she expresses remorse for the harassment investigation's findings.

[482] For the founded allegations of misconduct after the harassment investigation report, the grievor was given no opportunity to respond to Ms. Meroni's fact-finding investigation conclusions. She did not acknowledge any wrongdoing in her interview with Ms. Meroni or in her detailed written response after it. However, at that point, the grievor did not have a full accounting of the misconduct allegations, including the summary of the interview with Mr. Goluza. She was not provided with the Ms. Meroni's report until her termination meeting and was given no opportunity to respond to it before the termination of her employment.

[483] The employer submitted that the grievor was bound by her statements at the 2018 hearing and that she could not amend or change them, which were about whether she acknowledged any wrongdoing. I agree that her statements at the 2018 hearing should be given more weight than her statements made four years later. I do not agree with the employer that her position at the 2018 hearing was that she had done "absolutely nothing wrong".

[484] At the 2018 hearing, the grievor acknowledged as follows that using the out-of-office message was not appropriate:

> *[268] … She admitted in her testimony that that was not the way to deal with her frustrations. It had been wrong, immature, and ridiculous, but in her words, she had been "at the end of [her] rope".*
>
> *[269] The grievor testified that she had exercised poor judgement in this matter and that it had been the wrong thing to do, although she disagreed that she did anything that compromised the branch or any of the ongoing investigations. There was no breach of confidentiality. The out-of-office message was not disrespectful of Mr. Goluza or the employer in any way.*

[485] I have already determined that the out-of-office message was disrespectful. However, the grievor did admit that it was wrong and that it was an exercise of poor judgment. She disagreed about the potential impact of her misconduct.

[486] At the 2018 hearing, the grievor also expressed some acknowledgement of her inappropriate behaviour at the May 11, 2015, regional management team meeting. From the 2018 decision:

> *[270] The grievor also testified as to her version of the events at the regional management team meeting, at which she was alleged to have made comments about Mr. Goluza interfering in the ongoing workplace investigations. According to her, she talked about her workplace investigation during the round-table part of the meeting. She advised Ms. Portman that Mr. Conroy may be contacted, following which, according to the grievor, Mr. Goluza "shot [her] an angry look", to which she responded to him that "[he] may not want him interviewed …". The grievor testified that she regretted saying this and that she should not have raised Mr. Conroy's name at the meeting.*
>
> *[271] Initially, the grievor's evidence was that she apologized for this comment and that it was "completely offside but [she] had concerns with Mr. Goluza's role in the investigation." In her opinion, Mr. Goluza did not take workplace violence seriously. She did not state it but understood that those present could have drawn that conclusion from her comments.*
>
> *[272] Her evidence at a later point in her direct examination was that during a follow-up meeting with Mr. Goluza, she told him that she had not accused him of anything and that she should have apologized. According to her evidence, at no time did the grievor say that Mr. Goluza had attempted to influence an officer. What she had said was that she was alleging it as a rumour, which she clarified in an email. According to her, her behaviour at the meeting had been intense and inappropriate, and she apologized for it at the hearing.*

[487] At the 2018 hearing, the grievor also acknowledged as follows that she had been insubordinate in proceeding with the fact-finding investigation, against Mr. Goluza's direction (from the 2018 decision, at paragraph 275):

> *[275] … She admitted that she had been insubordinate, and according to her testimony, she regretted it. She testified that she was not entitled to ignore a ranking officer's directions. She just did not listen. In in [sic] the future, she would follow any order or direction. She had to hold herself accountable for her actions, as she caused the situation.*

[488] Unlike the decision in *Charinos* (at paragraph 122), the grievor has shown some insight into the founded misconduct, however imperfect that insight might be.

[489] In addition, unlike in *Oliver v. Canada Customs and Revenue Agency*, 2003 PSSRB 43 at para. 103, cited in *Hughes*, at para. 142, the grievor did not mislead the employer or fail to cooperate with the investigation of the allegations against her.

[490] The grievor's acknowledgment of wrongdoing and any apologies did come late in the day. The first expressions of those sentiments were made at the 2018 hearing. I agree that this is an aggravating factor. However, it is reduced slightly by the fact that she was not provided with a full explanation of the employer's finding on the acts of misconduct before the termination of her employment.

3. Mitigating factors

a. The grievor's state of mind (including her fear for her safety)

[491] As noted by the Federal Court of Appeal in its decision (2020 FCA 44), one of the mitigating factors to be assessed is the grievor's state of mind, "… which has a direct bearing on culpability …" (at paragraph 5). The Court continued as follows:

> *[6] Here, determining whether the applicant genuinely feared her subordinate in respect of whom the acts of misconduct occurred was directly relevant to the issues the Board was called upon to decide as such fear could have made many of the applicant's impugned actions less culpable and more understandable, particularly given her lengthy service and previously blameless disciplinary record.*

[492] I am required to first determine whether the grievor had a genuine fear for her safety and if so, I must then determine whether that fear should mitigate the penalty of her discharge. For the following reasons, I find that the grievor had a genuine fear of the complainant. I will then assess the impact of that fear on the founded grounds of misconduct.

[493] In *Wepruk*, the grievor relied on her state of mind as a mitigating factor with respect to her being disciplined for making a threat of violence. The Board did not accept that her state of mind (being frustrated and feeling harassed) as a justification for the threat (at paragraph 303). I do not find that decision relevant to this grievance. First of all, the case did not involve a personal safety concern. Second, the ruling in

that case was dependent on the evidence provided about the grievor's state of mind and therefore is limited to its facts.

[494] The employer also referred me to *Cambridge Memorial Hospital* in its submissions on the grievor's state of mind as a possible mitigating factor. That decision was about compulsion in the context of an addiction. I do not find decisions relating to addiction relevant to the issue before me.

[495] Mr. Owen questioned the genuineness of the grievor's fear, but he did not have any direct knowledge of what she had experienced. In his threat-risk investigation report, Mr. Leek concluded that although there was no safety threat to the grievor, he did not question the sincerity of her fear. Mr. Leek also told her that he could imagine a confrontation if she and the complainant were in the same room. Mr. Leek did not testify to resolve this contradiction between the report and his statement to the grievor. However, there is no doubt that he reinforced her state of mind when he told her that a confrontation was possible.

[496] Mr. Leedon and Mr. Brochez also testified about the fear that she expressed to them, as well as her actions (such as wearing her duty belt) when attending the Nanaimo office. She also testified extensively about her fears of the complainant.

[497] I also find that the grievor had a foundation for her fear of the complainant. It is noteworthy that he was found to have committed an act of workplace violence in his conversation with Mr. Krahn, in which he used threatening language about both the grievor and Mr. Krahn. The employer argued that the interaction between Mr. Krahn and the complainant was not substantiated. The only direct testimony I heard about this incident came from the complainant, who denied making the threat. However, Mr. Leek's report was accepted by the employer and was used to support a written reprimand of the complainant. Therefore, I accept that the workplace-violence complaint against the complainant was substantiated.

[498] In addition to a finding of workplace violence against the complainant, there was evidence of his mood swings, observed by the grievor or reported to her by his co-workers. His use of violent and crude language to describe her also contributed to her state of mind.

[499] The employer submitted that it was relevant that the complainant did not use most of his inappropriate language about the grievor to her face. Although this might be a relevant factor in the context of discipline against the complainant, I fail to see how it is relevant to assessing her state of mind. Whether or not he used that language in front of her, she knew that he viewed her that way and that he routinely used that language to refer to her.

[500] Although the employer recognized that the complainant's statement that he felt raped by the grievor was a poor choice of words, it submitted that the use of those words demonstrated that he felt victimized, of which there was never any doubt. However, it is important to recognize what he was feeling victimized about in the context of that comment. It was made in the context of having his performance managed by the grievor, at Mr. Goluza's direction.

[501] The importance of that comment to this grievance is its impact on the grievor's state of mind. Firstly, it was made to her face. Secondly, it was a particularly violent use of language that was out of proportion to the circumstances he faced. Having your performance managed may be unpleasant but is a far cry from being raped. Finally, it is an indicator of the very strong feelings that he had against her. In this way, the comment contributed to the fear for her safety.

[502] The employer was aware of the grievor's state of mind (her fear of the complainant) because she reported that fear to management a few times, including via a letter from her lawyer. However, Mr. Owen dismissed those fears and failed to consider her state of mind when assessing the mitigating factors.

[503] The employer engaged in an after-the-fact analysis in its submissions on the grievor's state of mind. It correctly noted that much of her activity that she attributed to her fear related to her belief at the time that the harassment allegations would be dismissed. Before the harassment report findings were released, she believed that the complainant would react negatively and that it would lead, perhaps, to violence. The employer submitted that the harassment report concluded that there was harassment, which validated the complainant's perceptions, and that therefore, the grievor's actions are better understood as retaliation rather than as being driven by fear.

[504] The point in time to consider the grievor's state of mind was at the time of her actions, not after the dust had settled and she knew the full picture. That is often the

nature of fear — in the cold light of day, things do not always seem so dire. The moment in time to use to assess state of mind is the time of the misconduct, not after. Even had the grievor known the findings of the harassment investigation, she still might have had a legitimate fear for her safety, since the vast majority of the 26 allegations were dismissed.

[505] I find that the grievor had a genuine fear for her safety and that the employer knew of it.

[506] The grievor was also under a great deal of stress at the time the founded misconduct took place. Some of that stress related to her fear for her safety but also to the status of the ongoing security investigation, as well as the pressures of her work duties. Being under severe stress is not an excuse for poor conduct, but it can be a mitigating factor that explains a grievor's poor decisions (see *Calgary*, at para. 108).

[507] The second step in analyzing the mitigating factor is whether it applies to any of the founded acts of misconduct.

[508] I find that the mitigating factor of the grievor's state of mind is not applicable to the out-of-office message. She testified that this inappropriate response was related to her frustration with Mr. Goluza for his deference to Labour Relations and his failure to address her security concerns. Although she did assert that her response was, in part, due to her security concerns, I find that her action was motivated by her frustration with her belief that Mr. Goluza and others were not addressing her security concerns, rather than her genuine fear of the complainant.

[509] I also find that this mitigating factor is not applicable to conducting the fact-finding interview contrary to Mr. Goluza's direct order. The grievor stated that she carried out the interview because she felt that the employer's harassment policy required her to, not because of any fear of the complainant.

[510] I also find that the grievor's genuine fear for her safety was not a mitigating factor in her insubordination and disrespectful act of misconduct at the May 11, 2015, regional management meeting. Her actions were attributable to her frustration with the pace of the threat-risk assessment and her perception that the employer was not taking her concerns seriously.

[511] The remaining act of misconduct is the grievor's response to Mr. Goluza's email about the deactivation of the complainant's access card. I find that her state of mind at the time she sent this email (that is, her fear of the complainant) is a mitigating factor.

[512] I have included the complete text of the grievor's email to Mr. Goluza in the summary of the evidence; however, it bears repeating this part of it: "Where my safety may be at risk or in this case clearly unassessed in a timely manner … I will not hesitate to take whatever action I deem necessary to be safe …".

[513] As noted earlier, the grievor sent this message before seeing the conclusions of the harassment investigation report, and clearly, she was worried about the complainant's possible reaction to those conclusions. At the time, her view was that all the allegations would be dismissed.

[514] I find that the grievor's immediate reaction to Mr. Goluza's email was mostly motivated by her fear for her safety at the time. I find that this is a significant mitigating factor in assessing the disciplinary consequence of her misconduct.

b. Spontaneous misconduct

[515] As I noted earlier, the distinction between premeditated and spontaneous acts of misconduct can be an important consideration when determining the appropriateness of a disciplinary sanction.

[516] The misconduct at the May 11, 2015, manager's meeting was not premeditated. However, the grievor intervened at some length; in other words, it was not a simple outburst. I find that this conduct is not mitigated by the fact that it was not premeditated. She could have stopped discussing the matter as soon as she realized that Mr. Goluza was meeting it with disapproval.

[517] The misconduct of sending the email to Mr. Goluza at the time of the deactivation of the complainant's access pass was spontaneous. This is a slightly mitigating factor.

c. Employment record

[518] The grievor was employed in the federal public service for 22 years when she was terminated. She had good performance reviews in the period before the termination.

[519] The employer argued that the grievor's length of service could be an aggravating factor, as she should have known better than to engage in misconduct. I agree that this might be a consideration for a pattern of misconduct over a significant period. However, in this case, the misconduct was over a short period and did not demonstrate a pattern of misconduct.

[520] Her years of service and performance over 22 years is a mitigating factor in assessing the appropriate discipline.

d. Disciplinary record and progressive discipline

[521] The grievor had received no previous discipline before the termination of her employment.

[522] Progressive discipline is the norm in unionized settings. This is based on the premise that employees deserve an opportunity to demonstrate that they can correct their behaviour, if the employment relationship is not damaged beyond repair (see *Besirovic*, at para. 150).

[523] Discharge is the ultimate and most severe discipline that an employer can impose. A balance must be struck between the employer's legitimate interests in the efficient, productive, and harmonious operation of its organization with the grievor's equally legitimate interest in maintaining her employment, which she held for 22 years (see *Bracebridge*). To overcome the principle of progressive discipline, the employer had to convince me that the grievor's conduct was so egregious as to warrant summary dismissal or that she was not likely to respond to less-severe discipline to correct her behaviour.

[524] I agree that progressive discipline does not always require a step-by-step progression (see *Charinos v. Deputy Head (Statistics Canada)*, 2016 PSLREB 74 at para. 121). In *Charinos*, the Board relied on *King v. Deputy Head (Canada Border Services Agency)*, 2010 PSLRB 125, to support this view. However, in *King*, the grievor had had 5- and 10-day suspensions already imposed and argued that a subsequent 30-day suspension was not progressive discipline. Although it is not a requirement that discipline "progress by preordained steps" (see *King*, at para. 200), it is a big step from no discipline at all to a termination of employment. In the *King* case, I considered the

seriousness of the misconduct, the aggravating factors, and the previous discipline in concluding that a 30-day suspension was within the appropriate range for discipline.

[525] The employer submitted that the employment relationship is not able to be rehabilitated. The grievor disagreed.

[526] I have found that the employer established four acts of misconduct. All the misconduct can be characterized as insubordinate or disrespectful or both (and therefore serious). However, all the misconduct occurred over a short period, when the grievor was under significant stress involving a lengthy harassment investigation. Outside these acts of misconduct, she continued to perform the duties of her position, and the employer did not demonstrate that the employment relationship could not be rehabilitated. I note that the relationship with Mr. Goluza is no longer at issue, as another director has filled his position.

[527] The grievor's misconduct in this case did not justify her summary dismissal after 22 years of service without previous discipline on her record. Although the misconduct was serious, the employment relationship was not irreparably severed.

H. The appropriate discipline and damages

[528] I find that the termination of employment was excessive discipline. For the founded discipline, I find that a suspension of 15 days should be substituted.

[529] Discharge is a disciplinary action that has been characterized as the capital punishment of labour relations. In *Dominion Glass Co. v. United Glass & Ceramic Workers, Local 203* (1975), 11 L.A.C. (2d) 84, the arbitrator stated that the harsh penalty of discharge "… should be used only where it is clear that no other of method of discipline will be of any avail" (at page 85; cited in *IBEW*).

[530] Insubordination is a serious act of misconduct, since it is a direct challenge to the employer's right to manage its organization (see *IBEW*, at para. 14). However, each grievance must be examined on its facts, including an assessment of both the aggravating and mitigating factors.

[531] I have weighed both the aggravating and mitigating factors in determining that the termination of employment was excessive in the circumstances. The misconduct was not serious in its impact, and the grievor had a discipline-free record and had

received good performance evaluations. I have also found that her well-founded fear of the complainant was a mitigating factor in one of the acts of insubordination. However, the repetitive nature of the acts of insubordination is a significant aggravating factor. This elevates the appropriate discipline from a short suspension to one of 15 days.

[532] In the normal course, reinstatement is the appropriate remedy for an allowed grievance. In its final submissions, the employer conceded that reinstatement was the normal remedy in this case. The focus of its submissions was on the grievor's mitigation efforts in the eight years since the termination of her employment.

[533] A discharged employee is required to mitigate his or her losses or damages resulting from the termination of their employment (see *Red Deer College v. Michaels*, [1976] 2 SCR 324; and *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20). In *Bahniuk v. Canada (Attorney General)*, 2016 FCA 127, the Federal Court of Appeal concluded that this principle applies to the unionized workplace. The amount of any income earned from alternate employment from the date of termination is subtracted from the damages payable by the employer. In addition, damages may also be reduced if the grievor did not take reasonable steps to find alternate work between the date of dismissal and reinstatement (see *Bahniuk*, at para. 22).

[534] The obligation of an employee whose employment is terminated is to take reasonable steps toward mitigating monetary losses between the date of discharge (October 1, 2015, in this case) and the date of reinstatement. In *University Health Network v. Ontario Nurses' Association* (2012), 219 L.A.C. (4th) 237 (cited in *Haydon*, at para. 123), the arbitrator held that reasonable efforts include a period following the discharge for the employee to adjust to the dismissal and the need to seek alternative employment. See also *Yellowhead Road & Bridge (Fort George) Ltd.*, at para. 34.

[535] A discharged employee is allowed to confine his or her job search to job opportunities comparable to the previous position for a reasonable period of time, and when alternate employment is not obtained, it is reasonable for the employee to broaden the search to employment that "… while not similar, is, nonetheless, within his or her capabilities" (see *Haydon*, at para. 124). In *Yellowhead Road & Bridge (Fort George) Ltd.*, the arbitrator concluded that the obligation to seek employment does not

require seeking “just any employment” or seeking a job that has reduced earning power or that “was not comparable and paid less.”

[536] After October 1, 2015, the grievor did explore the opportunity of working for the B.C. government on the joint investigation that she had been working on at the time of the termination of her employment. A few weeks after the termination, her bargaining agent representative asked the employer how it might respond to the possibility of the B.C. government hiring her. Mr. Owen suggested that removing any roadblocks to such a position would be part of a negotiated settlement of the termination grievance. The employer never got back to the representative with the answers to the questions that it (the employer) had posed about conflict of interest considerations.

[537] One of the provincial officials involved in the joint investigation gave evidence of discussions about the possibility of hiring the grievor. The grievor testified that the hiring was not pursued because it was “too political”. This evidence demonstrates that she was engaged in mitigation efforts within a few weeks of the termination of her employment. Therefore, damages for her loss of income commencing on October 1, 2015, are justified. However, the duty to mitigate is ongoing, and I must assess whether she made reasonable efforts to mitigate in the months following October 2015.

[538] The grievor testified that she was sick and unable to work from December 2015 to January 2016. Had she not been discharged; she would have received sick leave benefits for this period. I also accept that she was not able to mount any serious efforts at mitigation during this period.

[539] The grievor made unsuccessful applications for jobs that were related to law enforcement and that were comparable to her former position from January to April 2016. She then started self-employment, offering process serving. The self-employment as a process server was comparable to her former position, and I accept this as a reasonable effort at mitigation. However, her self-employment efforts did not result in significant income, and she closed the sole proprietorship in 2018.

[540] In February 2017, the grievor had a child. I accept that had she been employed, she would have received EI benefits and a top-up of her maternity leave from the

employer. Therefore, the absence from the workforce for the one-year period from February 2017 to February 2018 was reasonable.

[541] However, after February 2018, the grievor made minimal efforts to find suitable employment within her capabilities. Therefore, I find that she failed to mitigate her losses after February 2018.

[542] The employer and the grievor made submissions on the impact of the COVID-19-pandemic-related restrictions on employment. I have found that she should have mitigated her losses by 2018, before the introduction of any employment-related restrictions.

[543] The grievor made no claim for lost overtime, so I have not ordered any compensation for possible overtime losses.

[544] Accordingly, the grievor is entitled to the following:

- Full pay and benefits from October 1, 2015, until the date in February 2017 that her child was born, less the 15-day suspension.
- As of the date of the birth of her child in February 2017, the equivalent of what she would have received in EI maternity leave benefits plus the employer top-up, in accordance with the relevant applicable collective agreement provisions in February 2017, for one year.
- Any income from other sources earned during these periods is to be deducted from the amount owing.
- Interest on the amounts owing, at the Bank of Canada's established rate, calculated yearly.
- She is deemed to have been on leave without pay for pension purposes from the end of the maternity leave period until the date of this decision.

I. Conclusion

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

(The Order appears on the next page)

VIII. Order

[546] The grievance is allowed in part.

[547] The termination of employment is substituted with a 15-day suspension without pay.

[548] The grievor is reinstated to her position as of October 1, 2015.

[549] The grievor shall receive full pay and benefits from October 1, 2015, until the date in February 2017 that her child was born, less the 15-day suspension.

[550] As of the date of the birth of her child in February 2017, the grievor shall receive the equivalent of what she would have received in EI maternity leave benefits plus the employer top-up, in accordance with the relevant applicable collective agreement provisions in February 2017, for one year.

[551] Any income from other sources earned during these periods is to be deducted from the amount owing.

[552] The grievor is entitled to interest on the amounts owing, at the Bank of Canada's Monthly Rate.

[553] The grievor is deemed to have been on leave without pay for pension purposes from the end of the maternity leave period until the date of this decision.

[554] The grievor is to receive full pay and benefits as of the date of this decision.

[555] Exhibit G-3, Tab 4(d) and 6, is ordered sealed.

February 13, 2024

Ian R. Mackenzie,
a panel of the Federal Public Sector
Labour Relations and Employment Board