

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 4776 & 4777

Heard in Calgary and with Zoom Video Conferencing, June 8, 2021

Concerning

VIA RAIL CANADA INC.

And

UNIFOR

DISPUTE:

4776: The assessment of 60 demerits and subsequent dismissal of Employee Service Centre In-Charge S. Fradette of Halifax, Nova Scotia. (October 7, 2019).

4777: The assessment of 60 demerit marks and the dismissal of Employee Service Centre In-Charge Serge Fradette of Halifax, Nova Scotia. (November 14, 2019).

JOINT STATEMENT OF ISSUE:

4776: Mr. Fradette made a complaint of “inappropriate behaviour, harassment and discrimination” against a co-worker that he believed to be a breach of VIA Rail’s Employee Code of Conduct. This complaint prompted a counter-complaint by the co-worker whom asserted that the allegations were without merit and in breach of the same Code of Conduct. The Corporation contracted a third-party investigator to conduct fact-finding investigations into both complaints to determine if there were breaches to VIA Rail’s Workplace Violence and Harassment Prevention Policy and Employee Code of Conduct. Based on the investigator’s report, the Corporation conducted a disciplinary investigation of Mr. Fradette on October 7, 2019 pursuant to the collective agreement. Subsequent to this investigation, 60 demerits were assessed as a disciplinary measure for violating the Employee Code of Conduct and the Workplace Violence and Harassment Prevention Policy for submitting a complaint that they believe, in agreement with the third-party investigator, was made in bad faith.

The Union questions the impartiality of the third-party report. The Union contends that the investigation that was administered under the terms of the collective agreement was subjective, and that the Corporation was in breach of Articles 24, 27.17 and 27.18 of the collective agreement; the Workplace Violence and Harassment Policy; the Employee Code of Conduct; and Canadian Human Rights legislation. The Union further contends that the imposition of 60 demerits causing Mr. Fradette’s discharge is excessive, unjust and unreasonable and requests it be expunged. The Union asks that he be reinstated to service without loss of wages, benefits and seniority.

Considering that the investigation conducted by Jennifer Innis concluded that Mr. Fradette made his complaint in bad faith as contemplated in VIA Rail Canada’s Code of Conduct and that Mr. Fradette’s actions of knowingly sending his complaint to the audience mentioned in the investigation was unwelcome and created embarrassment for Mr. Cox as contemplated in VIA Rail Canada’s Violence and Harassment Prevention Policy, the Corporation disagrees with the

Union's contentions and maintains it conducted fair and impartial investigations, and that the discipline was fair given the circumstances in this case.

4777: Mr. Fradette made a complaint of “inappropriate behaviour, harassment and discrimination” against a co-worker that he believed to be a breach of VIA Rail’s Employee Code of Conduct. This complaint prompted a counter-complaint by the co-worker whom asserted these allegations were without merit and in breach of the same Code of Conduct. The Corporation contracted a third-party investigator to conduct a fact-finding investigation into both complaints, and found that the allegations made against Mr. Fradette, on a balance of probabilities, were substantiated. The Corporation followed-up with their own investigation pursuant to the collective agreement and assessed 60 demerits as discipline. In light of the statements made by 11 witnesses who were called during the initial third-party investigation, a secondary third-party investigation was conducted to determine if there were further grounds for another internal investigation, which ultimately was held on November 14, 2019. The Corporation debited Mr. Fradette’s disciplinary record with another 60 demerits as a disciplinary measure for violating the VIA Rail Workplace Violence and Harassment Prevention Policy.

The Union questions the evidence in the third-party investigator’s report as being hearsay and circumstantial. The Union contends that the Corporation violated Articles 24, 27.17 and 27.18 of the collective agreement, the VIA Rail Workplace Violence and Harassment Prevention Policy and section 7 of the Canadian Human Rights Act by their imposition of 60 demerits. The Union further contends that the discipline is excessive, unjust and unreasonable and requests it be expunged. The Union asks that Mr. Fradette be reinstated to service without loss of wages, benefits and seniority.

Considering that the Investigator of the second investigation concluded that Mr. Fradette engaged in a pattern of behaviour over a number of years of approaching women who visited the Station and engaged them in non-work related conversation for personal purposes or personal satisfaction, created an environment where other employees felt uncomfortable, humiliated or demeaned, and that a reasonable individual would know, or ought reasonably to know that that the comments were unwelcome, the Corporation disagrees with the Union's contentions and maintains it conducted fair and impartial investigations, and that the discipline that was assessed was appropriate and fair given the circumstances in this case.

FOR THE UNION:
(SGD.) B. W. Kennedy
National Representative

FOR THE COMPANY:
(SGD.) K. Chapados
Specialist Advisor, Employee Relations

There appeared on behalf of the Company:

A. Baril	– Counsel, McCarthy Tetrault, Montreal
K. Chapados	– Specialist Advisor, Employee Relations, Montreal
R. Coles	– Observer, with Via Rail Inc., Montreal

And on behalf of the Union:

B. Kennedy	– National Representative, Edmonton
J. Murray	– Regional Representative, Moncton
S. Fradette	– Grievor, Halifax

AWARD OF THE ARBITRATOR

INTRODUCTION

The Union and the Company dealt with both grievances consecutively on June 8, 2020. For ease of reference, the Arbitrator will refer to the incident involving the complaint of harassment arising from the photo incident on June 21, 2019 as Case #1, and to the incident involving a further complaint of harassment arising out of behavioural issues by the grievor as Case #2.

INVESTIGATIONS

Case #1 CROA 4776

The grievor, at the time of his termination on December 2, 2019 had seventeen years of service as an Employee Service Agent at the VIA Employee Service Centre in Halifax. Mr. Jeff Cox, the subject of the grievor's initial complaint and the author of a counter-complaint against the grievor for having filed the initial complaint, is a 40-year employee working as a ticket agent at the Halifax station. Mr. Cox was also a bargaining unit member who, similar to the grievor, acted as a lead-hand assigning and directing their co-workers on their daily tasks. Mr. Cox, however, as the Union noted in their brief, oversees the grievor's work assignment as the In-Charge Employee Service Agent, which meant that the grievor often reported to Mr. Cox. The grievor and Mr. Cox worked together at least three shifts per week, and up to four or five days per week when overtime was considered.

On June 21, 2019, Constable Eric Cutnam with the Halifax Police Department was visiting VIA's Halifax station as part of a celebration day for International Union of Railways Rail Security Awareness Day. During his visit, it was arranged to have a photo taken with him and some of the Corporation's employees, including the grievor and Mr. Cox. After an inquiry from Constable Cutnam regarding where he should stand for the picture, Mr. Cox said out loud; "You can lay on the floor". Mr. Cox maintains that he made this statement in a humorous fashion relative to when hockey teams have a photo taken and one of the teammates lays across the floor. The photo was eventually taken with Constable Cox kneeling down on one knee in the front with the grievor also kneeling down on one knee on the right side of Mr. Cox. Another individual was also kneeling on one knee on the other side of Mr. Cox while the five other employees participating in the photo stood in the back row. On June 25, 2019, the grievor filed the following complaint:

From: Serge Fradette
Sent: Tuesday, June 25, 2019 2:33 PM
To: S. Duffy; S. Williams
Cc: E. Cutnam; J.E. Celestin; L. Tremblay; P. Lambrinakos
Subject: Code of Conduct "Complaint" June 21, 2019
Importance: High

Good afternoon Sheila and Susan,

Wanted to bring to your attention an incident in regards to Via Rail Canada Inc. "Code of Conduct" of "Inappropriate Behaviour & Harassment and Discrimination" that took place in the Halifax station involving an employee Jeff Cox Friday June 21, 2019.

As it was this year, June 19, mark the International Union of Railways (IUC) Rail Security Awareness Day. And Via Police Force were traveling on board many of our trains that day and the week (including Train #14) to promote security awareness. As well as, visiting many stations throughout the Via Rail Canada network. Upon arrival in Halifax Thursday June 20, the station staff had the pleasure of meeting Constable Eric Cutnam. Myself and a few others not present upon arrival met Constable Cutnam on Friday June 21.

Shortly after Friday's train departure Constable Cutnam ask Senior Manager Sheila Duffy if she would be willing to gather up the group of employees willing to take a picture with Via Rail's Police Constable Cutnam. Mrs. Duffy asked those present in the office and we left to go to the Ticket office to gather the remaining employees.

As our Ticket office is small to take a picture we all gather outside and I suggested we take a picture in front of the Ticket Office.

The disturbing discriminatory behaviour depicted from this is when Constable Cutnam ask the group where we would want him in the picture as we all gather in front. In Charge Ticket office agent Jeff Cox was quick to jump to tell the Constable that "you can lay on the floor!" With Constable Cutnam and I being both male visible minorities we immediately look at each other with utter shock and disbelief that such a cruel, belittling, demeaning and racist gesture of a comment towards Constable Cutnam. Furthermore, I noticed the shocked look on Senior Manager Mrs. Duffy's face, as well as, a couple other colleagues as I quickly glance at the entire group. Shortly after the comment was made, a decision by the Police Officer Cutnam was to take a knee at front of the group and CSA Cailen Rippley and I joined him side by side.

I just want to let you know Constable Cutnam, that I sincerely regret the comment made by the In Charge and by no means is it a reflection of the entire group. Hence, this is why I felt it necessary to bring to your attention as it affects and makes it tolerable if no one steps up to denounce the actions of others. As there are very few who identify as visible minorities in the Halifax station some employees feel that it is acceptable as we are a minority in numbers. As Via Rail Canada continues to try to bring an increase representation of the designated minority groups, in the East under the direction of General Manager Susan Williams, there is still a great deal of room for improvement within all the ranks.

I regretfully can say that this type of ongoing issue with this particular employee has and continues to affect the moral and work conditions of employees. It is necessary for those in power of authority to make decisions so that all employees are treated fairly and equally with all aspects of their work tasks, responsibilities and environment. As our Canadian culture is continuously changing from sea to sea, many employees look, speak different languages and should be encourage by all with what they have to offer to the company.

As many of you are all aware, the Halifax station is under major construction with the installation of a new roof and other accessories to make it accessible for all while still keeping its Heritage designation. And although, the employees strive to keep the floors clean it is an ongoing work construction site with unsanitary floors. If required to elaborate on the complaint made please do not hesitate to contact me and will gladly share my thoughts on the incident.

Please review this incident and make the necessary actions to resolve this complaint.
Sincerely,
Serge Fradette
Administration Clerk

The Company hired an independent investigator, Ms. Jennifer Innis from the Morneau Shepell firm, to conduct an investigation into the grievor's complaint. Ms. Innis is an experienced investigator with a career in the field dating back to 1996. She

interviewed eleven witnesses over the incident, including the grievor, Mr. Cox and Mr. Cutnam. Her report reads in part:

Investigation and Methodology:

This investigation was conducted by the principles of natural justice and procedural fairness. Findings of facts were based on a balance of probabilities. The standard test for discriminatory harassment were based on VIA Rail Canada's *Workplace Violence and Harassment Prevention Policy* and the *Canadian Human Rights Act*. Similarly, the standard test for a frivolous and vexatious complaint was based on VIA Rail Canada's *Code of Conduct*.

On July 29, 2019, this Consultant met with Mr. Fradette and Mr. Cox, separately, to determine the nature of the complaints, if there was *prima facie* evidence to support an investigation, and if there was an opportunity to resolve the matter more informally. Both men were accompanied by their Union Representative, Ms. Jennifer Murray.

During his initial meeting, Mr. Fradette spoke of his concerns regarding a systemic issue of racial discrimination within VIA Rail, dating back over his 17 year career with the organization. While Mr. Fradette spoke anecdotally regarding his concerns, he agreed this process was to look at his specific complaint of the alleged comment by Mr. Cox to Constable Cutnam. When exploring the opportunity to resolve this matter more informally, it quickly became evident this was not a route either individual was willing to pursue.

Both Mr. Fradette and Mr. Cox were given the opportunity to name potential witnesses they believed would be able to provide relevant information/evidence to this investigation. 14 individuals were identified as potential witnesses. Three potential witnesses, provided by Mr. Fradette, have been out of the workplace for an extended period of time, and were not present during the alleged incident. These individuals were also on medical leave and it was determined by this Consultant, after speaking with Mr. Fradette, that they would not be able to provide any material evidence with respect to the actual complaint, and therefore were not contacted for interviews.

Background:

Both Mr. Cox and Mr. Fradette have been long term employees with VIA Rail. Mr. Cox has worked with VIA Rail for 40 years and currently is the In-Charge Ticket Agent working on the main station floor, and is the floor supervisor. Mr Fradette has worked for VIA Rail for 17 years and is currently the In-Charge Employee Service Agent, working in the Employee Service Centre (ESC). There are times when Mr. Fradette works on the floor and would report to Mr. Cox. Additionally, there are times with Mr. Fradette acts as the In-Charge Ticket Agent.

Both Mr. Fradette and Mr. Cox acknowledge there has been tension between the two, and that the working relationship is often strained. Both individuals agree that they do not like one another and there is a history of complaints to management between the two, some in which disciplinary action has been taken against both Mr. Cox and Mr. Fradette. Management is aware of the conflictual dynamic between these two individuals and tries to limit the interactions between them by offering Mr. Fradette assignments that sometimes takes him to the Truro location.

Finding

Mr. Fradette alleges Mr. Cox made a discriminatory and harassing comment when he told Constable Cutnam to lay on the floor for the group photo that took place on June 21, 2019. While there is no consensus of the evidence of what Mr. Cox actually said during the incident of June 21, 2019, or to whom the comment was directed, the evidence, as given by Mr. Cox, confirms that he made a comment to the group that Constable Cutnam could lay on the floor in order to have his picture taken with them. Many of the witnesses could not recall the exact wording of the comment, who may have said it, or to whom the comment was directed. Several of the witnesses agreed with Mr. Cox's assertion the reference to lay on the floor was in keeping with how many sports teams pose for photos, such as in the NHL.

Mr. Fradette's testimony on July 29, 2019 and September 5, 2019 was vague and inconsistent with respects to the tone in which the comment was made and his recollection of events did not correspond with the witnesses who participated in the group photo. Witnesses 5, 7, and 10 did not agree with Mr. Fradette's categorization of their reactions after the comment was made, and provided contradictory evidence regarding their responses. In particular, Witness 10, whom Mr. Fradette alleges the comment was directed towards, did not agree with Mr. Fradette's version of events or Mr. Fradette's insistence that Witness 10 was upset by the comment. Additionally, the witnesses that participated in the photo taking also provided contradictory evidence regarding the atmosphere or mood of the group before, during, and after the incident.

With the exception of Mr. Fradette, the remaining participants for the group photo agreed the atmosphere was positive. For those participants who referenced a feeling of awkwardness, this Consultant accepts the evidence that this was attributed to the fact some participants were not comfortable with having their photo taken, and there was an awkwardness in having to pose for the photo rather than a candid shot of the group.

This investigation was not able to establish a repeated pattern of behaviour by Mr. Cox that would suggest he exhibits racist or discriminatory behaviour in the workplace. The evidence does support that there is a long history of conflict between Mr. Fradette and Mr. Cox, however, it was not able to support that the conflict is due to discriminatory harassment with respect to any of the prohibited grounds as outlined in the *Canadian Human Rights Act* or *VIA Rail Canada's Workplace Violence and Harassment Prevention policy* or *Program*.

....

Mr. Fradette provided contradictory statements when explaining why he sent his complaint to the individuals he did. Mr. Fradette admitted he was aware of the proper reporting procedure but stated he did not follow it in part because he wanted to keep it private to those involved. Mr. Fradette's actions contradict this explanation because he sent it to Constable Cutnam's chain of command, who were not involved in the incident. Mr. Fradette then stated he intentionally sent his complaint to these individuals because they were visible minorities, he wanted them to know of his concerns of systemic racism within the Halifax station, and he wanted someone at the same management level as Ms. Williams to be aware of his concerns because he did not feel confident that she would address the matter.

Mr. Fradette's email contained more than his complaint regarding the comment Mr. Cox made during the group photo. He used this forum to personally address Constable Cutnam,

and his chain of command, in a manner that was not appropriate for a formal complaint as contemplated in the *Program*. By addressing Constable Cutnam in this manner, it appears to have influenced his reaction of the situation, thereby providing him with a characterization of Mr. Cox that was determined to be false through the investigation of the complaint.

Both Mr. Fradette and Mr. Cox agree that by sending the complaint to the individuals he did, Mr. Fradette knowingly went outside of the reporting process to present this complaint in a manner that would get as much attention as possible. This further contradicts Mr. Fradette's assertions that he wanted to keep the matter private to those involved.

Concluding Remarks

Considering the history between Mr. Fradette and Mr. Cox, and a previously unsuccessful attempt at informally resolving the issues between the two, it is unlikely another attempt at alternative dispute resolution or more restorative approaches will be successful at this time. The lack of resolve to their conflictual relationship is also contributing to considerable stress to both Mr. Fradette and Mr. Cox. Both individuals have shared that they are tired of dealing with each other and feeling the way they do towards each other.

The dynamic between Mr. Fradette and Mr. Cox, management attempts to resolve the conflict, and a staff complement that is taxed with a high number of staff off on extended leave appears to be negatively impacting the work environment and staff morale.

Assignments that provide Mr. Fradette and Mr. Cox duties with little overlap or contact with one another seem to have relieved some of the tension, however, is likely unsustainable, especially considering the strain on staff due to the extra work and shifts that need to be picked up because of the number of staff that are currently off of work.

These are considerable obstacles for the employer to navigate and neutral third party assistance may be beneficial in developing a plan of action to help resolve some of these issues.

Ms. Innis also prepared a supplementary report which led to further investigation of the grievor's conduct. Her supplementary report of September 9, 2019 reads in part as follows:

During the course of the investigation conducted under VIA Rail's Workplace Violence and Harassment Policy and Code of Conduct, I interviewed both Mr. Fradette and Mr. Cox, as well as 11 individuals identified as potential witnesses. Throughout the interviews, a group of witnesses spoke of concerns of potential sexual harassment they either experienced or witnessed directly, or incidents they heard about pertaining to the behaviours of Mr. Fradette. Additionally, Mr. Fradette spoke of at least one incident, although he provided a different perspective than the others.

It is important to note, at no time was this a focus of the current investigation, rather witnesses felt comfortable to disclose these incidents to me. The discussions stemmed from open questions regarding their interactions with Mr. Fradette.

Seven (7) of the witnesses raised concerns of inappropriate behaviour and conduct by Mr. Fradette towards female employees and female members of the public. Six (6) of the witnesses are unionized employees, and Ms. Jennifer Murray, Union Representative, was present for all of these interviews and heard the same concerns that were raised. The other witness was the Customer Service Manager.

Concerns were raised that Mr. Fradette may take reprisal action against individuals that participated in the investigative process, particularly witnesses that disclosed concerns of alleged inappropriate behaviour. In order to protect these individuals at this time, names will not be provided, however, I would make myself available to discuss the matter more fully if requested.

Case #2 CROA 4777

The grievor was investigated for a second time by a third party as a result of statements made by the witnesses interviewed during the investigation into the photo incident of June 21, 2019. The second investigation was conducted by Ms. Kathryn Coll of the firm HR Atlantic. Ms. Coll interviewed the seven witnesses identified in the Supplementary Report of Ms. Innis concerning the grievor's behaviour. Ms. Coll focussed on two allegations against the grievor, as set out in her report:

Allegation one:

For a number of years, Mr. Fradette has changed from his street clothes into his uniform in both the ESC and the Ticket Office (at the Halifax Station), rather than using the employee locker room. Several employees have gone into those areas in the course of their work and found Mr. Fradette in a state of undress, causing them to be uncomfortable. Mr. Fradette has continued this practice despite being told by two employees to not change in public areas for staff.

Allegation two:

For a number of years, Mr. Fradette has engaged in a pattern of behaviour at the workplace which involves approaching young and attractive employees, train or bus passengers, or members of the public visiting the facility, and engaging them in private conversations which other employees who observe this regular pattern of behavior, find to be "*creepy*", "*predatory*" and "*inappropriate*" for a male staff member in a VIA uniform at the workplace and during work hours. Mr. Fradette talks to other staff about his attraction to "young, pretty 20 year olds" and frequently refers to them as "*hotties*" to other staff.

Ms. Coll's findings with respect to allegations one and two are set out in her report as follows:

Factual Findings Allegation One

The evidence provided by Witness 6 and Witness 1 was consistent in terms of the Respondent having been observed changing in or out of his VIA Rail uniform in areas of the Halifax Station that were areas of work for employees, specifically the ESC and the Ticket Office. The Investigator confirmed that the ESC and the back area of the Ticket Office where the changing allegedly took place, were not observable by the general public visiting the Station.

...

Given the consistency of the evidence of Witness 6, 1, and 5 who observed the Respondent changing into or out of his uniform in public employee areas of the Halifax Station and Witness 7, the Manager who recalled speaking to the Respondent about this issue, the Investigator prefers this evidence over that of the Respondent's which was inconsistent. The Respondent acknowledged that he had changed into or out of his uniform shirt in both the ESC and the Ticket Office, but could not recall ever changing his uniform pants. The credibility of the Respondent was compromised by his responses to the Investigator's questions on this allegation and the evidence of the direct witnesses are considered more probable given the inconsistency of the Respondent's evidence, that he did not see changing in work areas as a concern, and also his suggestion that it was a common practice of other male VIA Rail staff.

....

The Investigator notes that the Respondent's practice of changing into or out of his uniform in areas of the Halifax Station that are work areas, despite having options for a private change area at his disposal, was known to at least one Manager.

The Investigator considered the *Code of Conduct* when assessing this allegation and did not find that it applied to the particulars of this allegation.

Factual Findings Allegation Two

Allegation Two 1)

Pattern of behaviour of "chatting up" young attractive new female staff, described as "being overly friendly", asking for a date or coffee, asking to add them on social media, putting hands on shoulder or arm around shoulder when talking to them. These behaviours reportedly make the recipient uncomfortable and uneasy as it is unwelcome and viewed as inappropriate.

The evidence provided by the Witnesses was very similar in terms of the pattern of behaviour that was alleged, however the first hand factual evidence was limited to Witness 1, 4 and 11. These three Witnesses described experiencing behaviour from the Respondent, while at work, which they considered to be a personal overture. Witness 1 felt the Respondent had been hitting on her in two instances that she described as occurring approximately fifteen years ago. The Respondent denied both of these incidents and also denied more generally that he was hitting on Witness 1. Witness 11 stated that four years ago the Respondent asked her on a date while at work, however it did not

bother her. The Respondent denied asking any woman to go on a date while at work. Witness 4 said that the Respondent touching her when he talked to her made her uncomfortable, but not enough to say anything to him, and that it had not happened for about three years since they last worked together. The Respondent denied touching any female employee on the shoulder while talking to them.

Allegation Two 2)

Pattern of approaching young attractive non-employees in the Station during work hours, in uniform, and engaging them in conversation which other employee find disturbing and predatory given your comments made to them about your attraction to young attractive women in their early 20's.

The evidence from Witness 1, 2, 3, 8 and 13 provided very consistent evidence that they observed the Respondent approaching attractive women in their early 20's who are in the Station and engaging them in conversation which could generally not be overheard. These Witnesses felt that the conversation was personal for the Respondent, that he was engaging them for personal social purposes, but did not have the evidence to support their belief. Witness 2 provided the one example where part of the Respondent's conversation with a young woman was overheard when he asked if he could hug her. Many of the references made by the Witnesses were dated as the Respondent was working in the Administrative Office for a period of time and then most recently was posted to the Truro Station for a number of months. The Respondent denied all of the allegations of personal conversations with female passengers or visitors to the Station and stated that he only had work related conversations in line with his job and customer service.

Allegation Two 3)

Talking to other staff in the course of work about his attraction to "young, pretty 20 year olds" and frequently referring to them as "hotties" to other staff which they find inappropriate and makes them uncomfortable.

The evidence provided by the Witnesses in support of Allegation Two 3) was the same evidence provided to support Allegation Two 2) for several Witness. No specific examples with timeframes were provided. The evidence provided by Witness 2, 3 and 9 however was very consistent in terms of the Respondent offering details of his social life and referring to the young attractive females he was attracted to as "hotties". The Witnesses each provided at least one recent example of this type of conversation, and reference to women as "hotties", initiated by the Respondent in 2019.

The Respondent denied each of the specific examples brought forth by the Witnesses. The Respondent generally denied talking to work colleagues about his personal preferences toward women. The Respondent also denied using the term "hotties" to workplace colleagues to reference young attractive women, and clarified that if he used the term outside of work that was his choice. The Respondent reiterated his belief that that statements made in the course of a separate allegation, that led to this employer initiated investigation, were vindictive and a form of retaliation as a result of him filing an earlier complaint against another employee.

Investigative interviews were conducted by the Company with the grievor pursuant to the collective agreement on October 7, 2019 and on November 14, 2019. On December 2, 2019, the grievor was provided with a letter terminating his employment for having violated the Company's *Workplace Violence and Harassment Prevention Policy* ("the *Policy*"), the Company's *Workplace Violence and Harassment Prevention Program* ("the *Program*") and VIA's *Code of Conduct*. The letter indicates that the grievor was assessed 60 demerits under the *Policy* for submitting a frivolous, vexatious and bad faith allegation against his colleague Mr. Cox and a further 60 demerits under the same *Policy* for his unwelcome behaviour and creating an environment where his colleagues felt uncomfortable, humiliated and demeaned. The grievor was consequently dismissed for having exceeded 60 demerits under the Brown system

SUBMISSIONS OF THE CORPORATION

After citing the references to "Workplace Violence" and "Harassment" under the Corporation's *Policy*, the Corporation noted in its brief the following references in the Corporation's *Code of Conduct*:

If an individual makes a frivolous, vexatious, or bad faith disclosure, disciplinary action may be taken against him or her.

As well as in the Corporation's *Code of Ethics*:

If someone files a report that is futile, abusive or in bad faith, corrective or disciplinary measures may be taken against that person.

Counsel for the Corporation also noted that the **Canada Labour Code** was amended in 2018 to strengthen the legal framework for the prevention of harassment at work, such as took place by the grievor in this case.

With respect to the investigation, the Company noted that the grievor, at the outset of the Innis investigation, was given the opportunity to name potential witnesses and provide details of his complaint. Of the fourteen individuals identified for interviews, three of the individuals identified by the grievor himself were on medical leave. Given that they would be unable to provide any material evidence with respect to his complaint against Mr. Cox, the grievor was in agreement that it would not be necessary to contact them for interviews. In the end, the Corporation complied with all the terms of the investigative process set out in the Corporation's *Policy*, the Corporation's *Program* as well as the Collective Agreement and the relevant case law.

In terms of the allegation of impartiality, the Corporation noted that it retained the services of an experienced, competent and independent investigator. Ms. Innis maintained an open mind throughout her investigation and met with all the witnesses in-person, with the exception of one witness where the interview took place by telephone. Further, the grievor was offered an opportunity to give his version of events on each occasion that he met with Ms. Innis and was always accompanied by a Union representative. In the end, the Union's claim that the investigation was not impartial has no merit.

The Corporation also went out of its way to avoid any appearance of bias by retaining the services of Ms. Coll to conduct the second investigation. The Corporation notes in its brief that Ms. Coll allowed each interviewee the opportunity to review her

electronic notes for accuracy and make any required corrections if necessary. Further, the investigator protected the identity of the witnesses and their gender to the fullest extent possible. The investigator also based her conclusions on the evidence from the various witnesses as well as the documents provided to her. The Company also notes the recent comments of Arbitrator Clarke in **CROA 4591** that the evidence from an investigation report, which is an open-ended inquiry into the facts, is an essential part of the record in CROA proceedings such as this. The Corporation maintains that the Union's assertions about the impartiality of the investigation have no merit.

Turning to whether the grievor's termination was the appropriate measure of discipline, the Company maintains that the grievor's actions, individually and combined, constitute just cause for termination. Either way, his disciplinary record would be in excess of 60 demerits.

The Corporation notes that the evidence is clear that the grievor never approached Mr. Cox about his concerns over his comments during the taking of the group photo with Constable Cutnam nor did he raise his concerns with his immediate supervisor, as required under both the *Policy* and the *Program*. The grievor's motive, as corroborated in his interviews, was to damage Mr. Cox's reputation through accusations of racism and discrimination. The grievor, who admitted that he was familiar with the reporting procedure, knowingly went outside of the Corporation's reporting process to present his damaging complaint in a manner that would gain as much attention as possible. His actions in doing so call for a serious disciplinary response, as acknowledged in the arbitral

case law. The Corporation cites in support Arbitrator Laplante in *STT du CSS de Québec-Sud (CSN) et CSSS de la Vielle-Capitale (Hélène Pelletier)* 2015, QCTA 703 where he states at para 229 :

“In a work environment and considering new legislations on harassment, the filing of a false psychological harassment complaint or false allegation toward an employer representative or an employee is a serious misconduct that can have catastrophic consequences of the accused.”

With respect to the discipline resulting from the second investigation, the Corporation submits that the grievor, by his behaviour over a number of years of approaching women who visited the station and engaging them in non-work-related conversation for personal purposes, and by making unsolicited comments to co-workers regarding his personal preferences for young women, created an environment where other employees felt uncomfortable, humiliated or demeaned. A further aggravating factor is that the grievor never admitted misbehaving, nor showed any remorse over his actions. Indeed, several witnesses interviewed indicated that they were concerned about retaliatory action on the part of the grievor as a result of participating in the investigation.

A reasonable individual in the grievor’s position would know, or ought reasonably to know, that his comments in the station were unwelcome. Mr. Fradette’s actions fall within the definition of harassment in the *Policy* and therefore offend the *Policy* and the *Canada Labour Code*.

Under the circumstances, the Corporation submits that the two grievances should be dismissed.

SUBMISSIONS OF THE UNION

With respect to the incident with Mr. Cox, the Union underlined that there had been a strained relationship between the grievor and Mr. Cox for some time. The Union noted that the Innis Report commented in that regard that there was a “history of complaints to management between the two”. Some of the staff also indicated in their statements to the investigator that employee issues were not often dealt with in a timely manner, which in turn allowed them to escalate. This apathy on the part of management, the Union maintains, contributed to the passive aggressive behaviour of Mr. Cox and the grievor. The Union noted that the grievor defended his decision to file his complaint outside the reporting procedure set out in the *Program* because of his past experience with some supervisors whom he felt would not properly address his complaint.

The Union notes in its brief that the basis of the grievor’s written complaint against Mr. Cox was not meant to be discriminatory or demean Constable Cutnam. The Union agrees with those present at the time that Mr. Cox’s comment was made in humour, and in a sporting sense, to replicate the scene of when a sports team takes a photo after winning a championship. Constable Cutnam informed Ms. Innis that he took no offence to the comment of Mr. Cox at the time.

In the end, the Union notes in its brief that it “...understood Mr. Cox’s reasons for making the complaint and the obligation to conduct the investigation they did.” The Union notes, however, that the grievor himself believed at the time that Mr. Cox’s comment was

made in bad faith and discriminatory and accordingly felt it was necessary to report the matter to Company officials.

The Union further submits that the Innis investigation was subjective in the sense that it contains opinion statements of individuals as well as hearsay comments of what the witnesses heard from others that were ascribed to the grievor. The Union's view is that these hearsay comments are very prejudicial and undermine the results of the investigation. Nor does the Union support the conclusion that the grievor's comments were frivolous and vexatious complaints. The grievor had an honest belief at the time he reported the comment that it fit within a prohibited ground under the **Canadian Human Rights Act**. In any event, the Union maintains that the Corporation did not follow the principles of progressive discipline under the Brown system, which as noted by Arbitrator Picher in **CROA 1877**, is based on "...an overall view to correcting rather than merely punishing".

The Union further submits that there is no evidence that the Corporation told either the grievor or Mr. Cox, either in a mediated session or otherwise, of any need to report any conflict to a supervisor, or the consequences of failing to follow the Corporation's complaint reporting directives. In the absence of such evidence, the Union submits that the Corporation's failure to be more attentive in addressing these issues, and to pre-warn the grievor and Mr. Cox of the potential disciplinary consequences of their behaviour, lulled them into a false sense of security in how they were conducting themselves in the workplace.

In terms of Case #2, the Union maintains in its brief that the Company "...fabricated their own complaint against the Grievor based on hearsay information they solicited from the interviews taken." The Union submits that the Coll report is only a statement of opinion which is based on innuendo and hearsay. The Union also submits that the arbitral jurisprudence is clear that employers have an obligation to warn employees of inappropriate behaviour before resorting to discipline.

The Company, in the Union's view, clearly did not follow the *Program* or *Policy*, which requires managers to assess and respond to all allegations of workplace violence or harassment. According to the Coll Report, three of the front-line managers did not find any policy violations, or any evidence that would warrant an investigation, or the need to warn the grievor of any issues that needed to be resolved. Nor did Ms. Coll find evidence of a pattern of harassment of new female employees, or sufficient evidence to support the witnesses' belief that the grievor often approached and then engaged young females in conversation in the station for personal social purposes. Further, there were never any formal complaints filed against the Grievor pursuant to the policy.

For all the above reasons, the Union requests that the grievances be upheld.

ANALYSIS

The Union submits in the Joint Statement that the independent third-party investigations in both cases were subjective and that the Corporation failed overall to

conduct a fair and impartial investigation as required under the collective agreement. As the Corporation noted in its submissions, the standard of conduct required from an investigator is that an open mind be maintained throughout the process.

There is no evidence that either investigator approached their investigations with closed minds. In fact, the opposite occurred. Both investigators were experienced individuals who maintained their impartiality throughout their interviews and other fact-gathering tasks. In the case of Ms. Innis, she met with both the grievor and Mr. Cox separately, and conducted further interviews with a total of eleven witnesses. In the case of Ms. Coll, she met with all those individuals who had come forward with concerns regarding the grievor's behaviour.

The detailed reports filed by each of the investigators indicates the process in each case was fair, impartial and without any suggestion of bias.

On a procedural issue raised by the Union, I would also add that Ms. Coll did not rely on any hearsay evidence as a basis for her report. Although an arbitration board may consider hearsay evidence as part of its quasi-judicial functions, there was no evidence that Ms. Coll did so in this case. All the witnesses' statements to Ms. Coll during their respective interviews were first-hand accounts of their observations or discussions with the grievor. There was no reliance placed on any conversations that the witnesses had heard from some other persons, or reliance on any other second-hand documents or testimony.

It is also worth noting, by way of background, that there was a history of animosity between the grievor and Mr. Cox. Both were long-term employees that held lead-hand positions in the Halifax station. The grievor, however, was often required to take directions from Mr. Cox. That evidently led to friction between the two to the point where, as Ms. Innis noted in her report, a mediator was brought in at one time a few years ago to try and resolve their workplace differences.

Turning to Case #1, there is no real dispute that the grievor took Mr. Cox's comment at the time of the photoshoot the wrong way. By all accounts, no one else read into Mr. Cox's remarks had any malicious intent. Constable Cutnam, in particular, did not have any problems with the comment which was clearly alluding to the type of team photo one is familiar with after a team wins a championship.

The grievor knew that any complaint should have been first brought to the attention of his supervisor, Mr. Lateigne. The fact that Mr. Lateigne was away in Montreal on other business is a hollow excuse for his decision to damage Mr. Cox's reputation through unfounded accusations of discrimination that he made in an email to several senior managers and three senior individuals in the police force. The grievor eventually admitted to Ms. Innis that the motive for his complaint against Mr. Cox was to draw as much attention as possible to it. It is worth noting that Mr. Cox's reaction was to file his own counter-complaint against the grievor where he indicated that the allegations of the grievor were without merit and in violation of the Corporation's *Code of Conduct*.

I agree with the conclusions of Ms. Innis and the Corporation that the comments of the grievor were vexatious and made in bad faith with the clear intent of undermining and humiliating Mr. Cox, in breach of the *Policy* and *Program*. The grievor recklessly took the completely unwarranted step of bypassing his supervisor in favour of causing reputational damage to Mr. Cox by disseminating his accusations to upper management and the police. Adding to the damage is the fact that there was no basis for a complaint arising from the photo incident to begin with.

Although some incidents merit outright discharge, I agree with the Union that the Brown system contemplates a stepped approach to discipline. As Arbitrator Picher stated in **CROA 1877**:

“...As a general matter, therefore, it is incumbent of management administering discipline under the Brown system to do so judiciously, progressively and with an overall view to correcting the employee rather than punishing...”

Are there mitigating factors which weigh in favour of a lesser penalty than termination? In my view, there are. A significant factor is the grievor's length of service, with some seventeen years working for the Corporation. His disciplinary record stood at only 5 demerits at the time of his complaint of Mr. Cox. Another mitigating factor is the incident itself which, albeit serious, at its core involves an overblown and misplaced reaction by an employee to a benign comment made by another employee with whom he had a hostile relationship. This is a case which merits discipline, but not one which has resulted in irreparable harm to the employment relationship.

Turning to Case #2, context is important in cases involving sexual harassment. As stated in *Hodgins v. St. John Council for Alberta* 2007 CarswellAlta 559 at para 47:

Sexual harassment is a serious employment offence. It does not, however, necessarily lead to summary dismissal.

The Court goes on to cite *McKinley v. B.C. Tel* [2001] S.C.J. No. 40 where the Supreme Court of Canada stated at para 53:

Underlying the approach I propose is the principle of proportionality. An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed.

Of note in this case is the fact that the Coll investigation came on the heels of the Innis Supplementary Report wherein she stated that several of the witnesses identified unacceptable behaviour by the grievor during his working hours.

Ms. Coll dismissed the instance of the grievor changing his clothes over the course of a number of years as not meeting the threshold set by the definition of harassment in the policy to "create an environment where employees feel uncomfortable, humiliated or demeaned." She noted that the practice was known to at least one manager. She came to a different conclusion with respect to the other allegations:

Based on the evidence provided by the Witnesses and the Respondent, the Investigator finds it more probable than not that the Respondent engaged in a pattern of behaviour over a number of years of approaching women of a certain age who visited the Station and engaged them in non-work related conversation for personal purposes or personal satisfaction. Given also the Investigator's acceptance that based on an assessment of evidence that the Respondent made unsolicited comments to co-workers regarding his personal preferences for young women, his experiences with those young women and his use of the term "*hottie*" to describe those women, the Investigator concludes that the Respondent, by these actions, created an environment where other employees felt uncomfortable, humiliated or demeaned, and that a reasonable individual would know, or ought reasonably to know that that the comments were unwelcome.

These accounts of approaching young women in the station were also observed by three front line managers, as noted in the Coll report:

The three Witnesses interviewed who were front line management stated that they were aware of the Respondent's behaviour from personal observation and from other employees bringing it to their attention. Witness 7 stated that when staff brought forward a concern about the Respondent, that the information provided was so general that nothing could be done. The management witnesses confirmed that the Respondent's work took him into the public area of the Station and that it is VIA Rail's expectation that staff are friendly and welcoming to passengers and visitors to the Station. Witness 8 and Witness 13, both in management positions, observed the Respondent approaching young attractive women in the Station on a regular basis and watched for any signs that the women were uncomfortable. Seeing none, they did not feel they needed to intervene.

The grievor, despite his denials, was clearly observed by his co-workers and managers making unsolicited approaches to young women. His comments to his co-workers for his preference for young women, and referring to them as "hotties", were totally unacceptable and disrespectful. In my view, the grievor's behaviour warrants a disciplinary response on the basis of the evidence and conclusions of Ms. Coll.

In mitigation, I would again note the grievor's seventeen years of service with his record standing at 5 demerits prior to the photo incident. In addition, as further noted, his dismissal for sexual harassment arose initially from the photo incident and not from any direct complaints from individuals in the station or his co-workers. Apart from his reference to women as "hotties", which is clearly demeaning, he was never directly overheard or observed propositioning young women. Indeed, the managers did not believe his approaches to women in the station made them feel uncomfortable and they never spoke to him about it.

CONCLUSION

After considering the facts and evidence, I believe the Corporation's disciplinary response to the first incident was excessive. The grievor's record of 60 demerits for Case #1 will be reduced to 25 demerits. In lieu of 60 demerits for Case #2, which investigation arose concurrently out of the investigative statements obtained in case #1, I substitute a disciplinary penalty of a warning letter.

The grievor shall be therefore be reinstated to his former position without loss of seniority.

This is not a case, however, where the awarding of compensation is appropriate. In addition to the false complaint against Mr. Cox, the grievor's behaviour vis-à-vis young women at the station, as observed by his colleagues, was completely inappropriate. Should the grievor not immediately cease such unacceptable behaviour, he will certainly be placing his continued employment in jeopardy.

At the request of the parties, I shall retain jurisdiction should any issues arise as a result of the implementation of this award.

June 21, 2021



**JOHN M. MOREAU, Q.C.
ARBITRATOR**