THE SASKATCHEWAN EMPLOYMENT ACT

PROVINCE OF SASKATCHEWAN

IN THE MATTER OF THE ARBITRATION PURSUANT TO A COLLECTIVE BARGAINING AGREEMENT RESPECTING THE GRIEVANCE OF JACLYN BREARS

BETWEEN:

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400 AND JACLYN BREARS

UNION/GRIEVOR

– And –

AFFINITY CREDIT UNION

EMPLOYER

AWARD

Before

John Comrie, KC, FCIArb	**Arbitrator and Chair**
Lorraine St. Cyr	**Union Nominee**
Laura Sommervill	**Employer Nominee**

Heard in Saskatoon, Saskatchewan in September, October, November and December 2021 and March, April and June 2022

For the Union:	**Dawn McBride** **Heath Smith**
For the Employer:	**Robert Frost-Hinz**

INTRODUCTION

[1] The arbitration out of which this award ("Award") arises concerns a dispute ("Grievance") between Local 1400 of the United Food and Commercial Workers Union ("Union") on behalf of the Grievor, Jaclyn Brears ("Grievor") and Affinity Credit Union ("Employer" or "Affinity").

[2] The Grievance ("Grievance") was dated July 23, 2020, was numbered # 463 C4 20 and arose under a Collective Bargaining Agreement ("CBA") between the parties dated September 17, 2018.

[3] The Grievance states that the Grievor was "…unjustly terminated, in violation of the Collective Agreement and any applicable legislation." The termination was effected by means of a letter given to the Grievor on July 16, 2020 which stated among other things that she was being terminated for just cause effective immediately, "…due to your conduct and behaviour which we have found to constitute harassing and bullying of your coworkers, creating an unwelcoming and toxic work environment."

[4] The letter was the culmination of an investigation and deliberations made by Affinity in June and July 2020, led by Todd Joyes, the Employer Services Manager for the Employer.

[5] By letter November 25, 2020, Arbitrator Comrie was appointed by Minister Don Morgan, Minister of Labour Relations and Workplace Safety to arbitrate the Grievance. Nominees St. Cyr and Sommervill were appointed as additional members of the Board by the Union and the Employer respectively. There was an initial dispute regarding discovery of documents which was resolved and incorporated in a Preliminary Award dated March 18, 2021. Due to Covid, the parties were unable to start the hearing until September 15, 2021 which then continued at various times and days in September, November, December 2021 and March and June, 2022

[6] At the outset of this arbitration, the parties agreed that the Board had jurisdiction to deal with the initial issues dealt with in this Award, and all issues arising in respect thereof and waived compliance with section 6-50(2) of *The Saskatchewan Employment Act* for a period of seven months, subject to the reservation that the Board will remain seized of this matter as outlined in para 279 below.

[7] Due to the factual complexity of the evidence and the various issues in this dispute, the Award is segmented into several parts. The following index is provided to facilitate ease of review:

PART I. FACTUAL FRAMEWORK OF THE DISPUTE

1. The Employer's business

[8] Todd Joyes was the first witness to testify on behalf of the Employer. At the time of his testimony, he had held the position of Employee Services Manager for three years, and prior to that for six years, he was a Human Resources Advisor with Affinity having started his employment in 2012. His total career in human resources spans 15 years.

[9] His duties have him involved in the whole life cycle of an Affinity employee. Among his various responsibilities, he is, and was at the relevant time, primarily responsible for all investigations relating to the conduct of employees of the Employer. He has a staff of nine people to support him, he has formal training in investigation procedures and processes and he reports to the Executive VP for Human Resources.

[10] Joyes also testified as to the general features of the Affinity business. He described it as a "financial institution" organized as a "co-op" which functions like a conventional bank. The company is provincially regulated, with 56 service centres and two advice centres and a campus headquarters in Saskatoon.

[11] Affinity has over 800 employees, with approximately 150 organized under two collective agreements – one for the Hudson Bay location and one for all the Saskatoon centres and five outside of that City. The relevant collective agreement for this dispute was signed on September 17, 2018 and although it expired, carried on in effect through July 2020 during all times relevant for this Award.

[12] The Dealer Finance Centre ("DFC") is an organization developed jointly by three Saskatchewan credit unions to give them one central body to compete with other financial institutions like banks for the loan business generated by private auto dealers throughout the Province.

[13] Affinity has one Dealer Finance Team which is seconded to this central body called the Credit Union Dealer Finance Corporation. In June 2020 that Team was made up of five Dealer Finance Specialists: Colleen Dear, Eileen Dureault, the Grievor Jaclyn Brears, Kathy Vance and Katie Loi all led by their Team Lead and Manager, another Specialist named Michelle Block. As such, Block was the immediate supervisor of all five members of her team.

[14] As the Dealer Finance Specialist Team of six people was seconded to an outside central body, it worked somewhat independently of the rest of the Affinity campus. One feature of this group testified to by Block was that unlike all other Affinity employees eligible for performance based pay, the calculation of the annual bonus payment for each of her team was based on the collective performance of the team as a whole, not on their individual performances.

[15] As a result all six of the Dealer Finance Specialists had an economic interest and incentive to work together to earn their annual bonus, determined as it was by their overall group performance.

[16] As well, all six of the dealer Finance Specialists sat at cubicles in close proximity to each other at the DFC, located at the Affinity Campus in Saskatoon. Their schedules were organized on a rotation they managed themselves which consisted of a 36 hour work week with 2 people working on Saturdays. This system was established to ensure Dealer Finance Specialists were on duty and available at the same time that the auto dealers were open.

[17] Much of their internal communication was face-to-face because the team members worked in such close proximity. However, they also used Skype systems for online communication, including a Skype "texting" service that allowed the team to internally send and receive messages quickly and directly, in a manner similar to phone "texts" or SMS messages. There was also evidence that some of the team members, particularly the Grievor and Loi, "texted" between themselves on their personal phones. A few, but definitely not all, of those texts were disclosed in the harassment investigation process.

[18] The main function of Dealer Finance Specialists is to assess the credit worthiness of potential borrowers in prospective loan transactions proposed by an auto-dealer in an online process. The system allows Affinity to bid on the loan application in a competitive process with other banking institutions in Saskatchewan.

2. The Employer's internal policy documents

[19] Joyes also introduced several Employer exhibits and testified about three documents in particular that are relevant to this matter: the Affinity Code of Conduct ("Code"), the HR Practices Manual ("HR Manual") and the Information Technology Acceptable Use Policy ("IT Policy"), the relevant portions of which are set out below:

a) **Affinity Code of Conduct**: This is a document that applies to all employees, whether unionized or not, and is meant to provide guidance with respect to acceptable business behaviour and an employee's responsibilities in this regard. Some provisions relevant to this Award are as follows:

> **"Compliance with the Code**
>
> Adherence to the Code is mandatory for all employees…Every new employee must:
>
> - read the Code of Conduct; and
> - sign a declaration confirming their understanding and commitment to compliance.
>
> On an annual basis current employees are required to re-affirm their understanding and commitment to uphold this code by signing a declaration….

Failure to comply with this Code may result in disciplinary action including dismissal… …

"6. Individual Responsibility

"Harassment

Affinity Credit Union is committed to a harassment free work environment where everyone is treated with dignity and respect. Harassment will not be tolerated, and Affinity Credit Union will take all reasonable steps to prevent harassment and stop it if it occurs, including taking disciplinary action …

As defined in The Saskatchewan Employment Act,

"harassment" means any inappropriate conduct, comment, display, action or gesture by a person:

(i) that either:
  (A) is based on race, creed, religion, colour, sex, sexual orientation, marital status, family status, disability, physical size or weight, age, nationality, ancestry or place of origin; or
  (B) subject to subsections (4) and (5), adversely affects the worker's psychological or physical well-being and that the person knows or ought reasonably to know would cause a worker to be humiliated or intimidated; and

(ii) that constitutes a threat to the health or safety of the worker.

"7. Respecting Trust

"Electronic Mail/Internet Use

Internet access and e-mail are provided to employees and elected and/or appointed officials as a tool to support their business needs. All company computer equipment and the data stored on that equipment is the property of the credit union. The company routinely monitors Internet usage, electronic mail and computer files."

b) **HR Practices Manual**: Again, this is a document that Joyes testified applies to all employees regardless whether they are unionized. The document describes certain procedures and processes used to deal with various human resource issues that arise from time to time. He pointed out in particular the provisions of two main sections that applied to this matter:

   i. Section 5 entitled "Work Environment" which deals with a number of different potential workplace environment issues, including section 5.10 entitled "Harassment". That sub-section uses the same language as found

on this subject in the Code of Conduct and among other provisions, includes information on how employees can report concerns anonymously through a third party service called "Ethics Point Hotline". Joyes also testified about the procedures to be followed upon receipt of an initial complaint if it looks like harassment. He stated they evaluate the complaint to determine if it has substance and if so, they "…will put the perp on paid administrative leave during the investigation" while the relevant facts were determined; and

ii. Section 4 entitled "Employment and Career Development" which deals with a whole range of subjects in the potential life cycle of an employee, from initial recruitment and performance management through potential dismissal and involuntary termination. Joyes testified in particular about the following major subsections:

1. Section 4.6 entitled "Performance Management" where under sub-section 4.6.2.4 in the "Corrective Discipline" heading, "Step 4: Termination" is described and outlines typical offences for termination, including "harassment/sexual harassment/bullying"; and

2. Section 4.7 entitled "Wrongdoing and Unethical Behaviour" which in sub-section 4.7.1 "wrongdoing or unethical behaviour" is defined as conduct which constitutes an "inappropriate act" including without limitation "harassment or abusive behaviour". Section 4.7 also outlines provisions (among others) for prevention, detection, investigation and resolution of alleged wrongdoing or unethical behaviour. Section 4.7.6 provides "An act of wrongdoing by an employee…will be subject to discipline, up to and including just cause dismissal as outlined in the Corrective Discipline and Termination Dismissal Section 4.3.2." (This *last section reference appears to be incorrect and should be 4.5.3 Just Cause Termination and 4.6.2 Corrective Discipline – ed).* Joyes also made mention of Section 4.7.2.3 which requires employees to identify and report such acts "in good faith", meaning that "they believe the information to be substantially true, are not acting maliciously or making false accusations and do not seek personal or financial gain.

c) **Information Technology Acceptable Use Policy**: The document put into evidence was the policy as it existed at all times relevant to this matter and as with other policies introduced at the hearing applies to all employees, both unionized and non-union alike. All employees get training that applies to the devices they have been given access to such as a computer, or a phone and regardless where it is used – at home or at work or on the road. Joyes pointed out the following particular aspects of this policy:

i. The policy applies to email systems owned by Affinity and distinguishes between email use (which includes text or short message services via Skype) and internet use and in each case outlines the purpose of such services,

appropriate and inappropriate use, confidentiality and consequences for failure to comply with the policy; and

ii. The policy requires the execution by each employee with email or internet access of a written agreement under which the employee agrees to abide by the policy and further stipulates that he or she understands that violation of the policy may give rise to disciplinary action according to applicable law or policy.

[20] In response to questioning from counsel about how employees were informed about the above policies, Joyes outlined a system of annual training. Every employee, usually in Q1 but no later than the end of Q2, must complete a full course in Affinity's virtual campus for online training which includes ongoing education in each of the above documents, including testing and use of factual situations developed in part using in-house real life experiences from the Employer's history.

[21] It should also be noted that the definition of "harassment" found in the Code above is taken verbatim from Sections 3-1(1), (4) and (5) of Part III of *The Saskatchewan Employment Act*, SS 2013, c S-15.1 entitled "Occupational Health and Safety" ("SEA"). For ease of reference the relevant provisions of the SEA on harassment are set our below:

Section 3-1(l) of the *SEA* defines harassment for purposes of the Part III of the *Act* dealing with Occupational Health and Safety:

> (l) "harassment" means any inappropriate conduct, comment, display, action or gesture by a person:
>
> (i) that either:
>
> (A) is based on race, creed, religion, colour, sex, sexual orientation, marital status, family status, disability, physical size or weight, age, nationality, ancestry or place of origin; or
>
> (B) subject to subsections (4) and (5), adversely affects the worker's psychological or physical well-being and that the person knows or ought reasonably to know would cause a worker to be humiliated or intimidated; and
>
> (ii) that constitutes a threat to the health or safety of the worker;

Section 3-1(4) and (5) say:

> (4) To constitute harassment for the purposes of paragraph (1)(l)(i)(B), either of the following must be established:
>
> (a) repeated conduct, comments, displays, actions or gestures;
>
> (b) a single, serious occurrence of conduct, or a single, serious comment, display, action or gesture, that has a lasting, harmful effect on the worker.

(5) For the purposes of paragraph (1)(1)(i)(B), harassment does not include any reasonable action that is taken by an employer, or a manager or supervisor employed or engaged by an employer, relating to the management and direction of the employer's workers or the place of employment.

The relevant portion of section 3-8 says:

3-8 Every employer shall:

(a) ensure, insofar as is reasonably practicable, the health, safety and welfare at work of all of the employer's workers;

…

(d) ensure, insofar as is reasonably practicable, that the employer's workers are not exposed to harassment with respect to any matter or circumstance arising out of the workers' employment;

…

The relevant portion of section 3-9 says:

3-9 Every supervisor shall:

(a) ensure, insofar as is reasonably practicable, the health and safety at work of all workers who work under the supervisor's direct supervision and direction;

(b) ensure that workers under the supervisor's direct supervision and direction comply with this Part and the regulations made pursuant to this Part;

(c) ensure, insofar as is reasonably practicable, that all workers under the supervisor's direct supervision and direction are not exposed to harassment at the place of employment;

…

The relevant portion of section 3-10 says:

3-10 Every worker while at work shall:

(a) take reasonable care to protect his or her health and safety and the health and safety of other workers who may be affected by his or her acts or omissions;

(b) refrain from causing or participating in the harassment of another worker;

…

3. Introduction to Dureault and the Grievor

[22] Dureault commenced work at the DFC in June of 2019. She testified she had been employed by Affinity for more than 22 years and had worked generally in the finance field for 36 years. She worked originally as a teller in various Affinity locations until she applied to become a personal banker in 2018 and began work in that capacity at Affinity's Westview location. She also testified that she had known the Grievor for some time prior to working together at the DFC in November 2019.

[23] The Grievor was hired originally in 2010 as a permanent part-time Member Services Representative in. Since 2010 she followed a career progression that included a series of both permanent and temporary positions such as Financial Services Representative, Relationship Banking Officer, Personal Banker, Sales and Services Representative and Dealer Finance Specialist in at least 7 different Affinity locations.

[24] At the time of her termination, the Grievor was a Permanent Dealer Finance Specialist in the Dealer Finance Centre (DFC") in Saskatoon having held that position since November 4, 2019. Immediately prior to that position, she had worked at Affinity's Martensville branch where she had worked in a different position since April 4, 2019.

[25] The Grievor started work in the DFC in November 2019 and was on site until March 1 of 2020 when she took leave to work at the Union for one month. Her union leave ended on April 1, 2020. She then worked from home and physically returned to the DFC sometime in May, 2020. Under Affinity's Covid policy at the time, the Grievor could have stayed at home until early September, but she elected not to.

[26] Both Dureault and the Grievor testified they had each completed the required employee training in Affinity's corporate policies, including the provisions of the Code, the HR Manual and the IT Policy provisions outlined above. Among other things, the training included online interactive sessions which were designed to give the employees practical experience in identifying potential workplace issues.

4. Early Interactions between Dureault and the Grievor

[27] Dureault testified that she actually called the Grievor in September 2019, told her she might think of applying for a new opening in the DFC and was excited in due course to hear she was the successful candidate for the position.

[28] Dureault also said that when the Grievor started work she welcomed her arrival and did what she could to help her get introduced to the DFC. She said she took the Grievor to a dealer appreciation dinner and introduced her to some of the dealers.

[29] However, she testified that after 2-3 weeks, things started to change and she started to see a lot of rude and derogatory comments from the Grievor directed towards her.

[30] As described by Dureault, things continued to deteriorate over December, January and February until the beginning of March when the Grievor left the DFC for union leave which was planned to continue for several months.

[31] The Grievor described Dureault as a "kind" person and said when she first arrived at the DFC in November 2019, she was very helpful and was "eager to see me there". However, over time she

said Dureault began to shrug her shoulders and would not answer me when I spoke to her. She also said that by Christmas their relationship had started to change.

[32] By the time the Grievor left the DFC for her union leave on March 1, 2020, both parties testified that their relationship was not good.

5. The Grievor returns from union leave to work with Dureault

[33] The Grievor's union leave was cut short due to Covid interrupting the work that had been planned for her, so she returned to the DFC. However, when she returned everybody was working from home.

[34] Dureault testified that as long as the Grievor was away from the DFC offices – either on union leave or working from home – their working relationship was not a problem.

[35] However, by May the Grievor made the decision to return to work in the DFC office as the other members of the DFC team had already made that decision and she found she was more effective when she was at the office physically. This however resulted in a resumption of the poor relationship between Dureault and the Grievor. They had not worked together physically in the same office since the end of February when the Grievor left for her union leave.

[36] Dureault testified that from early December through June 17 the Grievor had engaged in a series of negative behaviours towards her. She testified that she had spoken to Block about problems with the Grievor back in February but had not pressed the issue as Block said she would keep an eye out for problems and then the Grievor left on union leave and did not return to the office physically until mid-May when the problems resumed. Dureault did not speak again to Block about the negative behavior of the Grievor until June 12.

[37] Dureault's allegations of negative acts by the Grievor from late November 2019 to June 17, 2020 are summarized below in the "Alleged Negative Acts Chart" in paragraph 133 of Part V below.

[38] The evidence of these negative acts consisted largely of comments about patterns of behaviour which the Employer summarized in its brief as a "number of generalized comments and allegations about the harassment" Dureault was subjected to and then added a few details of specific actions. The Alleged Negative Acts Chart tries to systematically collect every allegation – whether general or specific – and list them in order of potential negative impact.

[39] The Grievor denied a number of the specific allegations from Dureault. As well, other allegations were answered by providing some context which in the Grievor's mind, explained her actions in a manner that did not constitute negative behaviour.

6. Known Dealer Complaint

[40] The Grievor also testified about an incident with a very good client of the DFC (the "Known Dealer"). The incident occurred over the lunch hour when only Dureault and the Grievor were present, as it was a Saturday and they were the only two people working that day.

[41] The incident consisted of a series of three phone calls on Saturday, June 6. In the first call from the Known Dealer, the Grievor explained to him that a particular loan application he had submitted online was being declined. The Known Dealer is someone with significant experience with such applications at the same time as the Grievor was a new employee in the DFC. He felt the loan should be approved and he got very upset and hung up on the Grievor when he learned about the denial of his loan application.

[42] The Grievor described two further calls from the Known Dealer which followed fairly quickly and during which he got increasingly upset. By the end of their final exchange, the Known Dealer called the Grievor a "fucking idiot".

[43] The Grievor also testified that during this incident she had asked Dureault for help with the file, but that Dureault had only "shrugged" in response. That led to the Grievor approaching a manager in the Prince Albert office of Affinity for help, because she felt she was not getting any from Dureault.

[44] Standing back from these events, it is clear that by this time, Dureault felt the Grievor was angry with her all the time, did not like her and criticized the way she did her work. As a result, Dureault was afraid the Grievor would just criticize her for any work she undertook on this kind of application which meant she did not want to help the Grievor.

[45] On the other hand the Grievor said she had asked Dureault for help and the response she got was a "shrug". As a result, Grievor interpreted this as meaning Dureault did not want to help her without understanding what had really motivated Dureault.

[46] Following the incident with the Known Dealer, the Grievor spoke to her manager Block about these events on June 8, the following Monday morning. She explained to her that the dealer had called her a "fucking idiot" and "hung up on me". Block told her "you have to get used to him and learn how to talk to him". Block came back to talk to her later in the day and advised she would need a couple of days to determine how to deal with the situation.

[47] By Wednesday that same week (ie June 10), the Grievor said she asked Block again about the status of the matter and Block told her she had spoken to the Known Dealer and reminded the Grievor the loans are his income and Covid issues made things worse for him and all of us. The Grievor did not like her response and asked Block if anything would change or did she (ie the Grievor) have to file a complaint. Block asked her not to file a complaint and told her she would no longer be processing loans for the Known Dealer.

[48] Later that same day, the Grievor filed a written harassment complaint with the Employer's HR department describing the incident ("Known Dealer Complaint"). She explained she was not looking for a specific result from filing the Known Dealer Complaint, but rather just wanted this practice of calling her derogatory names to be disavowed by Affinity and didn't want it to continue into the future.

7. Dureault's emotional breakdown

[49] On Friday, June 12, Dureault met with Block and criticized some work of the Grievor on a particular loan application. Block took in the information and then went outside for fresh air.

[50] Dureault had felt for some time that the Grievor and her friend Katie Loi, another member of the DFC team, had been texting behind her back about Dureault herself using SMS messages on their personal phones. After Dureault had spoken negatively about the Grievor's review of a loan application, she noticed Loi texting at her cubicle.

[51] Dureault walked over to Loi and demanded to know if she was texting to the Grievor about Dureault. Loi admitted to the practice then and previously, which caused Dureault to be very upset. Dureault demanded that this activity stop and Loi agreed.

[52] Dureault started to cry and shake in a very disturbed emotional state. Block then returned from outside and Dureault complained to her that Loi and the Grievor were "ganging up on her" and said she shouldn't have to go through this every day, being ridiculed at work, going home crying every day. Block sent Dureault to a quiet room to allow her to cool down. She undertook to speak to HR and to the Grievor and see what she could do about resolving these problems.

8. The week of June 15, 2020 leads to two harassment investigations

[53] The Grievor was not in the office on Friday June 12. On Monday June 15, Block spoke to the Grievor about whether she would be willing to meet with Dureault to resolve the interpersonal conflict between the two of them. The Grievor advised Block that she did not see any great problems between them and therefore did not want to meet with Dureault for that purpose. She said she would handle herself any problems that needed to be dealt with.

[54] The Grievor testified subsequently that she did not understand how upset Dureault was and had she known that, she would have been willing to meet to mediate or otherwise resolve any issues between them.

[55] However, on June 16, Block told Dureault that the Grievor had refused to meet with her and did not acknowledge there were any issues between them that needed to be resolved. That resulted in Dureault going home concerned that nothing was going to be done. She testified it was hard to keep working when she knew for example people were talking about her behind her back.

[56] Block also spoke to the Grievor about her written harassment complaint and said something would be done, but she needed time to deal with the situation.

[57] On June 16, Block met with Joyes to discuss the situation between the Grievor and the Known Dealer.

[58] On the morning of June 17, Dureault confronted Block and told her she had been going home crying every night, that she had contemplated suicide the night before and that she felt nothing was being done to resolve her issues with the Grievor. For the first time, she told Block that the Grievor was harassing her and categorized her issues with the Grievor as "harassment" ("Dureault Complaint").

[59] Block immediately reported this conversation to Joyes which led to his first meeting with Dureault on June 17 where he had intended originally to talk to her about the Known Dealer Complaint, but now added to that plan additional inquiries about the state of the relationship between Dureault and the Grievor and the Dureault Complaint.

[60] During the meeting, Joyes concluded that the Grievor was causing harm to Dureault and that she needed to be suspended with pay, pending a harassment investigation that he would conduct.

[61] Joyes then used the already scheduled meetings with the DFC team with a view to determine whether the Grievor had harassed Dureault in contravention of the Employer's Code and whether there was merit to the Known Dealer Complaint.

[62] That investigation then continued with interviews of all members of the DFC team and concluded with his written Harassment Assessment ("Harassment Assessment"), the purpose of which was to "determine whether occurring events (*namely the conduct of the Grievor –ed*) match Affinity Credit Union's recognized definition of harassment outlined in the Code of Conduct and HR Practices, and if they do, what remedy is required".

[63] The written Harassment Assessment was issued on July 16 and concluded "a common theme was found that Jaclyn's conduct and behaviours towards colleagues contributed in creating an unwelcoming and toxic work environment". However, the Assessment made no formal conclusion about whether "harassment" as defined in the Code and the HR Manual had been found to exist.

[64] Nonetheless, the Harassment Assessment concluded with a recommendation that the Grievor be terminated because her conduct and behaviour had "…created an unwelcoming and toxic work environment for other employees".

[65] On July 16, the Grievor was terminated and her termination letter ("Termination Letter") delivered to her which stated "…your employment with Affinity Credit Union is hereby terminated for just cause, effective immediately, due to your conduct and behaviour which we have found to constitute harassing and bullying of your coworkers, creating an unwelcoming and toxic work environment".

9. Inappropriate Skype messages

[66] During the harassment investigation, Joyes thought he saw patterns of behaviour from the Grievor that reminded him of previous issues around the Skype messages of the Grievor and others. This led to a decision to seek permission from Affinity, which was granted, to review Skype messages to and from the Grievor during the time period from April 30, 2019, when the Grievor worked at Martensville until June 17, 2020. These Skype messages were sent on an Affinity owned technology platform that allowed employees to quickly send immediate messages to each other that operated like SMS messages on their personal phones. (In this Award the practice of sending such Skype messages is referred to as "messaging" and sending SMS messages on personal phones is referred to as "texting").

[67] The purpose of requesting the Skype messages was a) to see if there was corroboration of Dureault's evidence and b) to verify the truthfulness of any statements taken during the investigation. The Skype messages were introduced in evidence as Exhibit 20 (a) to (u) and are collectively referred to in this Award as the "Skype Messages".

[68] A chart summarizing the content of the Skype Messages is set out in paragraph 138 below.

10. Timeline[1]

[69] The following three pages provide a chronological summary of the events described above and referred to in the evidence by the various witnesses on behalf of both parties:

a) **Early interactions between Dureault and the Grievor: September 2019 to April 1, 2020**

June 2019 – Dureault commences work at DFC.

September 2019 – Dureault calls Grievor to advise a position would be opening up in the DFC and says "you might think of applying".

November 4, 2019 - The Grievor commences work in the DFC and Dureault initially tries to help her.

December to January 2020 – Dureault says problems began with Grievor.

Late January 2020 – Dureault goes on vacation.

[1] The information presented in this timeline is duplicative to some extent but is provided to give the reader a convenient place to review the entire factual chronology in this case which is somewhat complicated.

February 2020 – Dureault returns from vacation and problems with Grievor remain. She speaks to Dear about problems with Grievor and has her first meeting with Block and advises "Grievor has some anger issues with me". Block does not consider the issues "serious".

March 2020 – Grievor goes on union leave but leave is subsequently cancelled due to Covid.

b) **Interactions between Grievor and Dureault: April 1 to June 5**

April 2020 – Grievor returns from union leave but chooses to work from home.

April 23, 2020 – Grievor passes probation.

Early May 2020 – Grievor returns to DFC and works in office with rest of team. Dureault testifies that her problems with Grievor resume.

End of May 2020 – Grievor notified that her request for another union leave was denied.

c) **The Known Dealer incident and Grievor's harassment complaint**

June 6, 2020 – Incident at the DFC in which Grievor asserts that the Known Dealer harassed her in connection with her review, and ultimate refusal of a loan application made by the dealer on behalf of one of his customers.

June 8, 2020 – Grievor reports to Block the incident with the Known Dealer and that becomes the basis of a formal written harassment complaint on June 10.

June 10, 2020 – Grievor submits written Known Dealer Complaint to Affinity Human Resources at 8:56 am.

June 10, 2020 – Text at 5:54 pm from Block to Grievor acknowledging that Block "should have dealt with it differently" referring to her response to the Grievor's verbal report of the Known Dealer Harassment Complaint.

d) **Dureault's emotional breakdown on June 12 and Grievor's refusal to meet**

June 12, 2020 – Dureault discusses with Block some issues with work performed by the Grievor which leads to Loi texting the Grievor at home and Dureault confronting her about it which she admits and apologizes for.

June 15, 2020 – Block speaks to the Grievor about problems interacting with Dureault and asks Grievor if she is willing to meet with Dureault to try and work out and resolve the

problems between them. The Grievor says she does not want to meet with Dureault and advises Block that she sees no problems and will deal with any issues that arise by herself.

June 15, 2020 – Block also speaks to Grievor about the Known Dealer Complaint.

e) **Investigations of Two Harassment Complaints**

June 15, 2020 – Initial interview of Grievor by Joyes about the Known Dealer Complaint.

June 16, 2020 – Joyes interviews Block at 2pm about both the Known Dealer Complaint and the incident between Loi and Dureault on the 12th.

June 17, 2020 – About 9 am – Dureault speaks to Block to advise she did not feel safe at work and "could not take this kind of treatment anymore" because the Grievor was "harassing" her. She also advises she had contemplated suicide the previous night all of which is confirmed in a memo from Block to Joyes at the end of this day.

June 17, 2020 – Shortly thereafter Block reports the Dureault Complaint to Joyes and he immediately commences an interview with Dureault at 9:42 am. He testifies the purpose of the interview is to follow up regarding both the Dureault Complaint and to determine what she knows about the Known Dealer Complaint by the Grievor. Joyes testifies he was in shock after seeing how upset Dureault was in their interview and understanding that she had contemplated suicide the night before.

June 17, 2020 – Grievor is suspended with pay at 1 pm based on Joyes' interview with Dureault and is given a letter advising her suspension is "pending a harassment investigation".

June 17, 2020 – Joyes interviews Dealer Finance Specialist Vance at 3:30 pm. Vance waives right to have a union rep present.

June 18, 2020 – Joyes interviews Dealer Finance Specialist Loi with Vance present as Union rep.

June 19, 2020 – Marilynn MacFarlane (UFCW) emails Lolita Humm (Affinity HR manager) requesting documents and detailed information about an unidentified harassment complaint against the Grievor (which was later identified as the Dureault Complaint).

June 19, 2020 – Joyes interviews Dealer Finance Specialist Dear with Vance present as Union rep.

June 19, 2020 – Joyes interviews Jolene Teskey from Martensville branch with Jessica Reimer present as Union rep.

June 22, 2020 – Lolita Humm replies to June 19 email from MacFarlane and does not provide any information and requests the names of Union reps who will represent the Grievor and "the complainant" without saying who that was. Humm also states that "Information regarding the alleged accusations will be communicated to Ms. Brears once an interview is conducted."

June 22, 2020 – Keith Tsang (UFCW) replies to Humm with his name and that of Marilynn MacFarlane as the two Union reps who will represent the Grievor and the complainant who at that time was still unidentified to the Union. However, by this point the bulk of the DFC interviews have already been conducted with Vance acting as the Union rep for every team member except herself.

June 24, 2020 - Joyes interviews Erin Inglehart from Martensville branch who waives having a Union rep present.

June 24, 2020 – Joyes interviews DFC Team Lead Block.

July 7, 2020 – Joyes re-interviews Loi with Vance present as Union rep.

July 8, 2020 – Joyes re-interviews Teskey with Vance present as Union rep.

July 10, 2020 – Joyes interviews Grievor at 1 pm with Keith Tsang present as her Union rep.

f) **Affinity conducts internal meetings to assess interview results and concludes with Harassment Report**

July 10 – 16, 2020 – At some point during this time period, Joyes, Affinity HR Manager Lolita Humm and Eli Wachniak (an associate of Joyes who sat through many of the investigation interviews and took notes) conduct an assessment of the evidence gathered in the above investigations, resulting in the Affinity Harassment Assessment.

July 16, 2020 – Written Harassment Assessment is issued by Affinity.

July 16, 2020 – Grievor is terminated.

July 22, 2020 – Loi is disciplined with a three day suspension for the Skype Messages.

July 27, 2020 – Letter of Expectation issued to Teskey for the Skype Messages.

[70] The termination letter signed by Joyes and dated and delivered to the Grievor on July 16, 2020 stated among other things "This letter confirms that your employment with Affinity Credit Union is hereby terminated for just cause, effective immediately, due to your conduct and behavior which we

have found to constitute harassing and bullying of your coworkers, creating an unwelcoming and toxic work environment."

PART II. SUBMISSIONS OF THE EMPLOYER

[71] The complaints of Dureault were summarized by the Employer in its Brief of Law ("Employer Legal Brief") as follows:

a) "Ms. Dureault informed Affinity that the Grievor screams at her, makes her feel stupid, expresses angers towards her for no reason, name calls, and purposely ostracizes or leaves Ms. Dureault out of conversations" (para 13)

b) "One way in which the Grievor makes Ms. Dureault feel stupid is by answering Ms. Dureault's questions with short, rude, and condescending answers" (para 14)

c) "In terms of name calling, the Grievor refers to Ms. Dureault as a "kiss-ass" for being friendly to clients" (para 14)

d) "Ms. Dureault described an incident in February 2020 during which the Grievor yelled or screamed at Ms. Dureault regarding a pending loan application" (para 15)

e) "Ms. Dureault also provided a number of generalized comments and allegations about the harassment she was subjected to by the Grievor, including that she avoids looking at the Grievor's deals out of fear of retaliation if a deal is denied, that the Grievor will make false harassment allegations against others, and that the Grievor has created a toxic working environment. As a result of the Grievor's conduct, Ms. Dureault feels as though she has to "walk on eggshells" and "tread lightly" when the Grievor is present." (para 16)

[72] The Employer also provided evidence from fellow DFC team members Vance, Loi, Dear which in its opinion confirmed the harassment allegations of Dureault, although as outlined in Part IV below, that is not as obvious as the Employer argues.

[73] The Employer suggested that Vance confirmed "that there was a lot of tension within the Dealer Finance Team that was mainly caused by the Grievor" (para 22). Loi described how the Grievor ostracized Dureault by saying "good morning to everyone in the department except Dureault, intentionally leaving her out (para 23). As well according to the Employer, Dear testified that "she was aware that the Grievor was harassing and bullying Dureault" and that this behaviour had been going on since February 2020 (para 27)

[74] The Employer also submitted the following characterization of Joyes' interview with the Grievor:

a) "During the meeting, Mr. Joyes and Mr. Wachniak provided a summary of the allegations against her (*ie. the Grievor -ed*) and showed her copies of several Skype conversations between the Grievor and other employees wherein the Grievor spoke about other employees in an inappropriate manner" (para 30);

b) "The Grievor did not deny any of the allegations against her and acknowledged that she authored the comments in the Skype Messages. Rather than being apologetic or displaying remorse for her actions, the Grievor was surprised that other employees felt that her conduct was harassing, bullying, and creating a toxic work environment" (para 31)

[75] The Employer therefore concluded in its brief:

> "As a result of the investigation, Affinity determined that the Grievor had harassed and bullied a number of employees at Affinity including Ms. Dureault. Affinity also determined that the Grievor created an unwelcoming and toxic work environment. Affinity terminated the Grievor's employment with just cause on July 16, 2020." (para 32)

[76] To buttress these findings, the Employer argued it had just cause to discipline the Grievor and referred the Board to an excerpt from Brown and Beatty. The section of the text referred to (S 7:32) dealt primarily with the situation "… where there is no dispute about whether the grievor mistreated another person or about the wrongfulness of the conduct". Accordingly, the text does not help the reader to understand what constitutes harassment or whether it existed in a particular set of facts, but rather attempts to explain how to determine what sanctions are warranted, assuming some misconduct is conceded.

[77] The text was also quoted to confirm that "in the absence of exceptional circumstances, arbitrators usually do not reinstate employees who continue to deny they did anything wrong, or who refuse to take responsibility for the harm they caused".

[78] The Employer also submitted a series of cases to establish the propositions a) "that employees have an inherent right to a respectful workplace free from abuse"; and b) that the Employer "is entitled to expect that its employees will cooperate with each other".

[79] The Employer also described in paragraphs 82 to 96 several cases where specific examples of negative behaviour are described in which an arbitrator concludes that the described actions amount to bullying or harassment in the workplace or a termination is upheld for just cause.

[80] Paragraph 97 of the Employer's brief then concludes without any further explanation that "The Grievor's behaviour in the present case clearly amounts to bullying and harassment. Such conduct jeopardizes the safety of the workplace contrary to the… *(the SEA, the Code, the HR Manual and IT Policy)*…regarding the prohibition of harassment in the workplace. Further, the Grievor did not offer any type of apology for her actions at any time." Presumably, in the Employer's opinion this conclusion follows from some similarity between the facts of this case and the facts in the quoted cases, but that connection is never made.

[81] The Employer accepted at the hearing and in its legal brief that it carried the burden of proving it had just cause to discipline the Grievor. However, the argument justifying that conclusion is never made. Its brief simply announces in paragraph 76 that "On the facts above" (referring to its own summary of same), "…there can be no doubt that the Employer had just cause to dismiss the Grievor from her employment." The Employer does suggest that its factual summary provides examples of the Grievor's "harassment and bullying". However, it never provides any analysis of how such facts satisfy the SEA or its own policies' definition of "harassment" (which were identical to that of the SEA). The Employer just takes the position that it has established that the Grievor did "harass" Dureault, presumably because of the examples of the Grievor's behavior which it says constitute harassment. The Employer then proceeds to argue why termination is justified in the circumstances of this case and why even if it is wrong on that score, the Grievor should not be reinstated.

PART III. SUBMISSIONS OF THE UNION

[82] The Union's main argument throughout was that the Employer had from the very beginning completely mischaracterized the facts of this case and was blinded by a tunnel vision driven by its desire to remove the Grievor from its workplace and a general anti-union animus.

[83] The Union acknowledged this dispute as "a very unfortunate case", complicated by the basic observation that both the Grievor and Dureault perceived what was happening in their work relationship through very different experiences and assumptions.

[84] The Union accepted that Dureault held an honest and deeply held belief that she had been harassed by the Grievor. However it suggests Dureault "…has from her own lens of perception, misconceived a lot of her assumptions and has overreacted and was oversensitive to Jaclyn's demeanor and especially her complaint against the *Known Dealer*…The Union submits that Eileen, maybe through no fault of her own, has translated Jaclyn's words and actions into exaggerated threats and personal insults." - pg 11, Union Brief of Law and Argument ("Union Legal Brief).

[85] The following quotation from the Union Legal Brief is a good summary of its views of the overall factual picture presented to the Board:

> "Eileen has no knowledge or perspective of what was going on for Jaclyn and the Employer took no steps to properly inform Eileen which would have alleviated a lot of her concerns. There are many outside occurrences that lead both Eileen and Jaclyn to think the worst of the other, most noticeably the significant involvement of their coworker Katie Loi and the management of the issue by their supervisor, Team Lead, Michelle Block. While back in February 2020 Michelle Block was informed of Eileen's feelings of discomfort with her relationship with Jaclyn, Michelle took no steps whatsoever to bring the parties together to have a discussion. Even after Eileen's emotions boiled over, Michelle did not ever explain to Jaclyn that Eileen was feeling bullied and harassed. Eileen had no knowledge that Katie was feeding Jaclyn information that Eileen was badmouthing her at work in Jaclyn's absence. No

> one ever told Jaclyn what was going on from Eileen's perspective and Eileen had no idea of what was being told to Jaclyn. Even worse, Eileen was told twice that Jaclyn did not want to resolve matters with Eileen causing her to have more emotional stress and this was not true of Jaclyn's position." (pg. 11)

[86] Over and above what the Union described as a misperception of the facts, it also argued that the way the Employer investigated and handled the case amounted to discrimination towards the Grievor contrary to the CBA and *The Saskatchewan Human Rights Code*.

[87] The Union also argued that the context and circumstances of the case suggest that "a reliable inference can be drawn that the Employer acted in retaliation for Jaclyn's complaint about the dealer and her union involvement." The actions of Joyes in particular amounted to "bad faith" which is prohibited under Section 5.02 of the CBA which reads as follows:

> "5.02 The Employer agrees, that in exercising its management rights, it shall act in good faith and shall not evade, alter or encroach upon any of the specific provisions of the Agreement. The Employer will not, in exercising its rights under this Article or under any other provision of the Agreement, discriminate against any employee because of such employee's activity in or for the Union."

[88] From those submissions, the Union concluded that aggravated general and punitive damages should be awarded to it and to the Grievor personally.

PART IV. ANALYSIS OF SUBMISSIONS

1. The Employer's summary of evidence from Vance and Loi is inaccurate

[89] The Employer's description of the Vance and Loi evidence in the Employer's Legal Brief is inaccurate in certain important respects. For example, the Employer suggests (para 22) that Vance testified the Grievor "caused" tension in the DFC.

[90] Vance was a member of the DFC team who prior to her retirement, was a very active member of the Union with several years' experience at Affinity. She was very careful in her testimony to be as objective and neutral as possible. She did acknowledge that when the Grievor was not present physically in the DFC there was less tension. But that is not the same as saying the Grievor "caused" the tension. The tension existed between Dureault and the Grievor and she could just as easily have said that there was less tension when Dureault was not present, if that had ever been the case. In the circumstances, it was the Grievor who went on leave or stayed working at home so it is her absence that is referred to.

[91] In fact a much more representative summary of Vance's evidence would be the following taken from the notes of her first interview with Joyes:

> "[Joyes] "Do you see a change in others since Jaclyn has joined?" [Vance] "I think, I haven't seen a change in Coleen. She's pretty easy going. Michelle I think it's been hard on her because she wants people to be happy, she doesn't want this conflict…I think like Eileen is quite you know shows her emotions, or rather it hurts her. If someone doesn't like you, or doesn't do that, it hurts her. I've seen her get more defeated, if that's the right word. And it's hard because she normally runs things by me. So when if people are put out, with this (*Known Dealer*) thing, or whatever Jaclyn is feeling. You do it by not talking. That just brings everyone in the whole department down, and it's hard you know. And so if there's tension between two people, everyone kind of feels it. [Joyes] "Has it been fairly, a lot of tension in the last few weeks?" [Vance] "Yeah".

[92] Loi's evidence as provided at the hearing and summarized by the Employer is also suspect. Loi was a primary culprit in the messaging and texting practice that had developed between her and the Grievor. Indeed on the morning of June 12 when Dureault had her emotional breakdown, the texting in issue was initiated by Loi. While the Grievor was on a day off at home, Loi was feeding information to the Grievor about what Dureault had been saying to Block about the Grievor's work. It is clear from the Skype Messages that Loi's role in the evolution of this negative practice was undoubtedly material.

[93] As well, it is worth noting that over the time period from June 2020 to Loi's evidence at the hearing, her description of the Grievor's conduct changed from trying to protect her best friend to the extent possible to being considerably more supportive of the Employer's position.

[94] Loi was eventually disciplined for her Skype Messages. However, when Joyes was asked why Loi only received a three day suspension he said that in part it was because of her cooperation in the investigation, which it was noted carried on for some time after the Grievor's termination.

[95] The point is if Loi received less discipline because of her cooperation, it begs the question if she was indirectly incentivized to support the Employer, thus explaining the change in her testimony from June 2020 when she originally was trying hard to find a neutral position between the Grievor and the Employer, unlike her evidence at the hearing. She eventually gave up the effort to be neutral and defend her conduct. During her oral evidence she condemned her own role in the texting practice and explained that she had not spoken with the Grievor since her original interview with Joyes. The net result of this whole evolution is that regardless what happened, it leaves the Board unsure to what extent one can rely on Loi's characterizations of the Grievor's conduct.

2. The Employer's decision to terminate the Grievor was very confused

[96] The Employer's decision to terminate the Grievor was very confused, starting with the Harassment Assessment and the Termination Letter on July 16, 2020 right through to the oral argument in June 2022. Its presentation of evidence throughout that time period suggests various – and at times confusing – analyses of the facts.

[97] Joyes was the Employer's first witness and provided detailed testimony regarding his investigation over several hearing days from mid-September to mid-November 2021. One of the most confusing aspects of the Employer's oral evidence was that although significant time was spent reviewing the Skype Messages – and they are clearly supportive of some discipline - they are not mentioned in the documentation issued at the time of the termination.

[98] Joyes testified that once all the investigative steps were complete, he and his staff assembled all the accumulated evidence and put it up on a whiteboard. They then met from July 11-16, 2020 to assess the results of the investigation and made a conclusion that the Grievor had "harassed" Dureault. However, the logic of that decision is never made clear.

[99] Did they analyze the definition of "harassment" in their own corporate policy documents and conclude the facts matched the definitional requirements? As an alternative, did they look at some of the case law which used other definitions of harassment or did they just compare the negative acts outlined in certain cases such as the University Health Network case referred in its Legal Brief and determine the facts here matched those examples. In fact, as will be seen no explanation of the derivation of the harassment conclusion is put forward here or ever.

[100] From the beginning the investigation of the Grievor was unnecessarily labelled a "harassment" investigation and the whole process appears in hindsight as if this conclusion was baked into the process from the beginning. It may be common practice to label investigations as "harassment investigations" when that is what is alleged by a complainant. However, the investigation could just as easily have been labelled a simple "workplace investigation" about alleged misconduct. Dureault's allegations were of "harassment", but labelling the investigation as such gives the appearance of prejudging the eventual conclusion and provides no benefit. At a minimum it unnecessarily undermined the apparent neutrality and objectivity of the investigation with no corresponding benefit.

[101] In chronological order from July 16, 2020 forward, the following information was provided by the Employer to explain and justify its decision to terminate the Grievor.

Harassment Assessment – July 16, 2020

a) Stated purpose of the Formal Harassment Assessment. The report starts with a statement that the purpose of the assessment "is to determine whether occurring events match Affinity Credit Union's recognized definition of harassment…and if they do, what remedy is required." The report then correctly summarizes the formal definitions in corporate policies as falling into two categories: "1) harassment based on prohibited grounds; or 2) personal harassment".

b) Summary of investigative steps. After quoting from the definitions of "harassment" in the Saskatchewan Employment Act and the relevant text in corporate policies under the title of "Allegations", the report states that the "Complainant indicated that they were fearful for their safety in the workplace because of actions made by Jaclyn Brears" and then proceeds to outline the investigative steps taken to answer the question posed at the

beginning of the report – namely, "whether occurring events match Affinity Credit Union's recognized definition of harassment".

c) Do the facts match the definition of "harassment"? One would therefore expect some analysis of how the information discovered in the investigation matched the definition quoted at the beginning of the Harassment Assessment. However, that never happens. The net result leaves the reader wondering what the point of the report is. This lack of analysis in assessing whether the Grievor's conduct matched the definition of harassment continues into the Employer's Legal Brief.

d) No finding of "Personal Harassment". The Harassment Assessment is supposed to summarize the results of the investigation. However, the only conclusion one can find in the report is that "The complainant did not provide information that would substantiate that any harassment was based on prohibited grounds." Under the title of "Personal Harassment" there is no finding of "personal harassment", just a summary of certain evidence presented during the investigation and a statement that "Jaclyn's conduct and behaviors towards colleagues contributed in creating an unwelcoming and toxic work environment."

e) No mention of Skype Messages. It should also be noted there is no mention in the Harassment Assessment of the Skype Messages. The Union argued that these Messages could not, almost by definition, be considered as any form of "harassment" because they were issued with an expectation of privacy. Perhaps the Employer simply agreed with that conclusion as the messages seem to be ignored in the termination decision. However, there is a good argument that messaging and texting in the manner pursued by the Grievor and Loi (and others) was negative to Dureault because the practice actually "injured" her, in that the texts promoted a negative image which made her working environment more difficult. However, the Employer never made that argument and never even describes the Skype Messages as the cause of the toxicity in the DFC.

f) Skype Messages constitute "misconduct". Regardless whether the practice of messaging between the Grievor and Loi constituted "harassment", it clearly constituted "misconduct" because of the breach of the Code and the IT Policy and contravened the obligation of employees to provide each other with a respectful workplace, as outlined in the case law submitted in the Employer Legal Brief. Again however, none of these arguments are made by the Employer.

Termination Letter delivered to Grievor – July 16, 2020 (E25)

a) Termination letter refers to a "finding" of harassment. The termination letter is also confusing. It states that the Grievor is being terminated for "just cause" because her conduct and behavior has been "found to constitute harassing and bullying of your coworkers, creating an unwelcoming and toxic work environment." But, as indicated

above, there is no written evidence that such a "finding" exists or that it was the basis of the termination decision.

b) No mention of Skype Messages in the termination letter. Again, since the Employer never mentions the Skype Messages, let alone draws a conclusion that they constitute "harassment" or are the cause of the "toxicity" referred to, one must assume they were not part of the decision to terminate the Grievor.

Joyes' evidence-in-chief at the hearing in the fall of 2021

a) No mention of "just cause" provisions of HR Manual. In his verbal testimony, Joyes reviewed some of the corporate policies that he felt were relevant and which had been used as a basis for the decision to terminate. Although the termination letter says that the Grievor is being terminated for "just cause", Joyes never reviews or refers to Section 4.5.3 of the HR Manual entitled "Just Cause Termination". Presumably that is because that section does not list "harassment" as one of the stated grounds for such a termination. The section does refer to "gross insubordination" and also says the list is not intended to be all inclusive. However, the combination of the "just cause" reference in the termination letter and the lack of reference in Section 4.5.3 begs for some analysis to explain these facts.

b) HR Manual provisions. Joyes does review the relevant portions of both Sections 4.6.2.4 and 5.10 both of which have extensive provisions relating to "harassment" and termination of employment as potential discipline. However, he makes no mention of the investigation guidelines in Section 4.7.4 which were not followed as discussed below.

c) IT Policy. Joyes also reviews certain provisions of the IT Policy and reviews several provisions relating to "appropriate use" of both email and texting systems in place from time to time at Affinity. He suggests that the evidence of the Grievor's messaging activity on the Skype system clearly contravened that Policy.

d) Joyes' conclusion. Accordingly, at the end of Joyes' evidence-in-chief, he reviewed these same corporate policies and in response to why he had testified that the Grievor had fractured the employment relationship" he cited the following:

i. He stated Affinity had no spot in its unionized operations in Saskatchewan where the Grievor could have been placed;

ii. Reinstatement of the Grievor would send a message to all other Affinity employees that the Grievor's behavior was acceptable;

iii. The Grievor's conduct did not pass muster as contemplated in the questions at the top of p.4 of the Code relating to Affinity values;

iv. The Grievor's conduct did not comply with the Section 6 requirements of the Code in respect of harassment;

v. The Grievor violated the harassment provisions of Section 5.10 of the HR Manual; and

vi. Failing to discipline the Grievor would cause the Employer to breach its Code and other legal obligations to keep the workplace safe.

e) Lack of support for conclusion. However, although Joyes' says there is a violation of both the HR Manual and the Code, he does not explain how or why that is true – he just declares it to be true as if it is self-evident.

Joyes cross-examination

a) Joyes says decision to terminate was based on a "holistic" finding. In response to a question from Union counsel about what specific conduct was the basis of the decision to terminate the Grievor, Joyes testified the Grievor was fired because of a "holistic" finding, not because of the specific complaints of Dureault. It was the total picture of events that came to light during the investigation that justified the termination.

b) Joyes does not mention Skype Messages as a basis for discipline. Although Joyes says the decision to terminate was "holistic" and refers to the "total picture" for some reason again he does not make any mention of the Skype Messages. If the Skype Messages are part of the alleged "finding" of harassment, or DFC toxicity, they should be described as such, but they never are.

c) Joyes does not provide evidence of frequency or duration of alleged Grievor harassment. Union counsel repeatedly asks Joyce why he didn't ask for more specific information on the various allegations of negative Grievor conduct. His answer was that he already had sufficient information to justify his conclusions.

3. The Employer Legal Brief describes two reasons for termination of Grievor

[102] As summarized above, the termination letter is very confusing because it states the Grievor was terminated due to a "finding" of harassment and bullying (but which was not documented in the Harassment Assessment) that created "an unwelcoming and toxic work environment". The clear implication of this letter is there was one reason for terminating the Grievor, namely a "finding" of "harassment and bullying" and that the harassment and bullying created the toxicity. Then inexplicably, Joyes testified that the decision to terminate was a "holistic" finding.

[103] However, the Employer Legal Brief suggests the Grievor was actually terminated for two reasons, namely for "harassment and bullying of her coworkers" and for "creating an unwelcoming and toxic environment" (para 32).

[104] However, as outlined below the reasoning behind these two conclusions is not obvious. To begin with, what definition of "harassment and bullying" underlies this conclusion is never explained. As well, there is no mention of whether, and if so, to what extent the Skype Messages were the cause of the toxicity.

4. Employer Legal Brief argues just cause for discipline did exist.

[105] The case law, the SEA, the Code and the HR Manual quoted by the Employer all make it clear that if "harassment" has been proven, that proof clearly constitutes "just cause". However, one must first establish the existence of personal harassment. To do that, it must be proven within the meaning of the term in the SEA, the Code and the HR Manual. If anything is self-evident in this dispute, that requirement is. In fact, the beginning of the Harassment Assessment said that was the explicit purpose of the Report.

[106] However, for absolute clarity, the definition of "harassment" in Section 3-1(1) of the SEA is incorporated verbatim into both the Code and the HR Manual (all quoted above). Moreover, Sections 3-8, 3-9 and 3-10 of the SEA impose obligations on every employer in the Province of Saskatchewan and every "supervisor" and every "worker" to ensure the safety of workers and to the extent practical, ensure all employees are not exposed to "harassment" as so defined. In these circumstances – particularly where the precise terms of the statute are written into the Employer's own corporate policies - it is hard to imagine how an employer might argue anything other than that any decision about the existence of personal harassment, must meet the definitional requirements of the SEA.

[107] The Employer's Legal Brief finally makes a clear summary statement of the reasons for the termination – namely the Grievor bullied and harassed Dureault and created a toxic work environment. However, nowhere can one find an analysis of how and why the requirements of the SEA definition of harassment have been met and satisfied or whether the Skype Messages are the cause of the toxicity.

[108] The SEA requires that for any conduct to meet and satisfy the definition of "harassment", the following four conditions must be proven:

a) The conduct must adversely affect the worker's psychological or physical well-being; and

b) The person engaging in the conduct must know or ought reasonably to know the conduct would cause a worker to be humiliated or intimidated; and

c) The conduct must constitute a threat to the health or safety of the worker; and

d) The conduct must be i) repeated; or ii) a single, serious occurrence that has a lasting harmful effect on the worker.

[109] However (and as explained in para 80 above), the Employer Legal Brief and oral submissions never describe how the facts of the case fall within the above requirements. Without any demonstration of the Grievor's conduct having met and satisfied these conditions, it is difficult to follow how the Employer concludes the Grievor has "harassed" Dureault.[2]

[110] If the Employer wanted to ignore the SEA definition notwithstanding its obvious applicability, it might argue the facts of this dispute are similar enough to the facts of the cases quoted in its brief (paragraphs 82-96) to support a finding of harassment, without reference to the definition of the term. However, although the cases are summarized, there is no explanation of whether those facts match the details of this case in one or more respects.

[111] Similarly, the Employer's Legal Brief just summarily states that the Grievor created a toxic work environment and an unwelcoming atmosphere, without any further explanation. Presumably that is related at least in part to the Grievor's conduct demonstrated in the Skype Messages, but that is not made clear either.

[112] Accordingly, without any demonstrated proof of the existence of either "harassment" or the "creation of toxicity", there is no demonstrated basis to conclude "just cause" for discipline exists. The Employer simply makes a summary declaration, after summarizing the facts in other cases, that "The Grievor's behavior in the present case clearly amounts to bullying and harassment." (para 97). Unfortunately, the logic of that conclusion is not self-evident.

5. Legal brief summarizes why termination of employment was justified in the circumstances.

[113] Thinking that it has thus demonstrated the existence of "just cause" for discipline, the Employer then proceeds to argue why termination is appropriate.

[114] The Employer does argue in the alternative that a 12 month suspension would be appropriate if the Board were to determine that termination was not appropriate.

PART V. ISSUE NO 1: Has the Employer established on a balance of probabilities that the Grievor engaged in harassment?

1. Summary conclusion on the issue of harassment

[115] In its simplest terms and although there is other conduct considered below, the main allegation against the Grievor was that she harassed and bullied her coworkers as described in the Termination Letter (E25) and the Employer Brief (para 97) respectively as follows:

[2] This issue and in particular, how facts proven did or did not meet the definitional requirements is analyzed in more depth in Part V below.

a) "This letter confirms that your employment…is hereby terminated for just cause…due to your conduct and behavior which we have found to constitute harassing and bullying of your coworkers, creating an unwelcoming and toxic work environment"; and

b) "The Grievor's behavior in the present case clearly amounts to bullying and harassment."

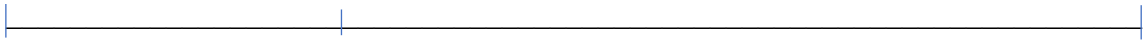
[116] Proof of this allegation was clearly intended by the Employer as the main justification for terminating the Grievor. To make this proof it was incumbent on the Employer to demonstrate how the Grievor's conduct met and satisfied the definitional requirements for "harassment" in the SEA [ie. Section 3-1(1)(l) and (4)] and as repeated verbatim in the HR Manual] (the combined requirements of which are referred to in the remainder of this document as the "SEA Harassment Threshold". They are quoted above in para 21). The relevant time period was from November 10, 2019 to June 17, 2020, bearing in mind the actual personal contact between the Grievor and Dureault over that time period was only 13 weeks.[3]

[117] In the end a conclusion about whether the SEA Harassment Threshold was met requires the Board to place the totality of evidence about the Grievor's conduct over a period of time[4] along a line which in this Award is labelled as the "Negative Conduct Continuum". This concept allows one to see the conduct in question in terms of its overall negativity. On the left end of the continuum, the conduct does not qualify as "harassment". On the other end, the conduct is so bad that the only discipline is termination of the employee. At some point along the continuum, the conduct passes the SEA Harassment Threshold, namely the point where the conduct meets and satisfies the definitional requirements of "harassment" in the SEA, thus justifying some degree of discipline, short of termination. The continuum looks like this:

[3] The total duration of time that the Grievor and Dureault were employed at the same time by the DFC was 6 months. However, for the purposes of analyzing inter-personal conduct and conflict, a more appropriate number may be the amount of time the two parties worked in the physical presence of each other. That number is calculated as 13 weeks starting from December 22, 2019 (ie 6 weeks after the Grievor's start date when Dureault testified the harassment began) to June 17, 2020 when the Grievor was suspended for a total of 25 weeks and 3 days. From that total one would subtract 12 weeks and 3 days when one of Dureault or the Grievor were absent from the DFC (calculated as 2 weeks holiday for Dureault in February plus 4 weeks and 3 days union leave for the Grievor in March and approximately 6 weeks working from home in April and May).

[4] The SEA definition does allow for a single serious occurrence act to qualify as "harassment" if it has a "lasting, harmful effect on the worker" but that was never suggested in this case. Therefore, in this case, among other requirements, the conduct must be "repeated" to meet and satisfy the SEA Harassment Threshold.

Negative Conduct Continuum



Not harassment	SEA Harassment Threshold	harassment conduct
(but possible misconduct)	(meets SEA requirements for harassment)	justifies termination

In this case, the Board has assessed the totality of evidence and found that when it is matched against the requirements of the SEA, in summary it falls well short of crossing the SEA Harassment Threshold shown above. The Board did conclude the overall assessment of the Grievor's conduct towards Dureault constituted "general misconduct" and was thus deserving of some discipline. However, in light of the problems caused by Dureault's poor perception of the Grievor's conduct, combined with her lack of specifics and the lack of corroboration from coworkers, the Grievor's misconduct should be placed nearer the far left end of the continuum, a considerable distance away from the SEA Harassment Threshold. How and why this determination was made follows below.

[118] To understand why the Board concluded the definitional requirements of harassment were not met and satisfied, it is helpful to first understand how two big picture assessments of the evidence in this case lead to two preliminary conclusions. They are labelled as "Assessment A and Assessment B". In summary form these two assessments lead to the following two conclusions:

a) Assessment A: There were problems with the evidence of Dureault and the Grievor which undermined many aspects of their testimony. Dureault's perception of the Grievor's conduct was prone to exaggeration driven by unrealistic fears. As a result, Dureault's more substantive allegations of conduct are not reliable for much the same reason – namely, her assessments of past or threatened conduct are all affected by her overriding fear of the Grievor and her tendency to exaggerate in respect of such conduct. The Board did accept the occurrence at least once of six of Dureault's allegations defined here as the "Actual Negative Acts"[5]. The reason for accepting the occurrence of these Actual Negative Acts on a limited basis, notwithstanding the denial in large part by the Grievor, is that such conduct is consistent with her general attitude in the Skype Messages that refer to Dureault and her denials on these issues are not believable. However, there were only five such Skype Messages (namely exhibits 20 i), m), o), p) and q), which are referred to in the remainder of this Award as the "Five Dureault Skype Messages").[6] Outside of the Five

[5] In this Award the phrase "Actual Negative Acts" means the combined individual acts set out in items 2, 3, 5, 6, 7 and 10 of the Alleged Negative Acts Chart in para 133 below. These Acts consist of claims by Dureault of negative conduct by the Grievor where the Board accepts they happened at least once, but not often enough or long enough or with enough intensity or corroboration to meet the SEA Harassment Threshold requirements in Conditions 1-4 above.

[6] In addition to the Actual Negative Acts (defined in footnote 5), the Skype Messages are a second form of Grievor misconduct dealt with in Part VI below. They consist of a series of 21 Exhibits representing a practice of sending inappropriate messages to fellow employees at Affinity. Only five of them demonstrate the Grievor's negative attitude to Dureault.

Dureault Skype Messages, there was not enough evidence of the frequency or duration or corroboration of these Actual Negative Acts to satisfy the SEA Harassment Threshold, as described in Assessment B.

b) Assessment B: There was insufficient context, insufficient specific detail and insufficient corroboration to support the alleged misconduct. Dureault's evidence about the conduct of the Grievor was either reports of "one-off" events and less hurtful actions that may well have happened once or vague suggestions about other conduct that she said happened regularly or "every day" without further detail or context. None of these allegations of more frequent misconduct were confirmed by any other witnesses, all of whom worked in very close proximity to Dureault. At least one of them should normally have been able to confirm some of such conduct if it truly happened regularly or every day, even if the Grievor did her best to keep it hidden or downplayed it, at least when her supervisor was present.

[119] Then using these two conclusions, the Board analyzed the conditional requirements of the SEA Harassment Threshold which can be summarized as follows:

Condition 1. The conduct must "adversely affect the worker's (*ie Dureault's*) psychological or physical well-being" [section 3-1(1) (i) (B)].

Condition 2. The Grievor "knows or ought reasonably to know" her conduct "would cause a worker (*ie Dureault*) to be humiliated or intimidated" [section 3-1(1)(i)(B)].

Condition 3. The conduct must constitute "a threat to the health or safety of the worker (*ie Dureault*)" [section 3-1(1)(ii)].

Condition 4. The conduct must have been "repeated" [Section 3-1(4)(a)].

Conditions 1-3 are essentially "causation" requirements. As stated above and set out in more detail below, the Board accepted that the Grievor did engage in the Actual Negative Acts. However, in the opinion of the Board, these Actual Negative Acts were not proven to be conduct which met the SEA Harassment Threshold. The fundamental reason for that conclusion is that the evidence of such Acts failed to satisfy either the causation requirements in Conditions 1-3 above or the repetition requirements in Condition 4.

[120] To prove causation and to prove repetition as required by the SEA, there must be both a witness or witnesses whose perception and credibility is reliable and testimony from such witness or witnesses that identifies conduct which is a) hurtful or intense enough, and b) frequent enough, and c) with enough duration that the Board could reasonably conclude on a balance of probabilities that such conduct met the causation and repetition requirements outlined in Conditions 1-4 and which in total define the SEA Harassment Threshold. In this case, as is described in Assessments A and B below, the Board concluded those requirements were not met:

i. Dureault's perception was too influenced by irrational fears of what the Grievor was doing behind the scenes or might do in the near future with the result that her descriptions of the Grievor's conduct are not entirely reliable and are subject to exaggeration;

ii. The Grievor did engage in the Actual Negative Acts, but such conduct was neither intense enough or frequent enough or done with enough duration to meet the SEA Harassment Threshold;

iii. The conduct that could be confirmed such as the Grievor "friending" everyone in the DFC except Dureault on Facebook or sharing photos of her animals with others but not Dureault, was not "hurtful" or intense enough or frequent enough to satisfy the causation requirements of Conditions 1-3

iv. There was insufficient corroboration from Dureault's coworkers of any of the more substantive misconduct itemized in the Alleged Negative Acts Chart, such that it was impossible to draw the conclusion that the SEA Harassment Threshold was met and satisfied.

2. Assessment A – Problems with the Evidence of Dureault and the Grievor

[121] During the hearing significant evidence was presented about various aspects of both Dureault's and the Grievor's conduct, personalities, incentives and related matters that must be considered to make a proper answer to the question whether the Grievor's conduct satisfied the SEA Harassment Threshold. The Board therefore identified a series of factors to be considered which are set out in the following paragraphs. They conclude with the following summaries of the evidence of Dureault and the Grievor:

> Summary of Problems with Dureault's Perception of the Evidence. Generally the Board accepts that Dureault's evidence was her honestly held belief, but found her perception of events was unreliable due to her exaggerated fears. Such fears resulted for example in an apprehension that she was being targeted by the Grievor. She genuinely feared for her position at the DFC which, until the arrival of the Grievor, was the best job she had ever had. Because Dureault was overly sensitive and exaggerated her fears, her ability to accurately assess her workplace dynamics was compromised and unreliable. Although her instinct about the texting between the Grievor and Loi was accurate, her fears about more substantive matters such as the prospect of the Grievor charging Dureault with harassment or interfering with Dureault's pay grievances were gross exaggerations of reality. Indeed, she and others testified that she reported the Grievor's harassing behavior as a means to protect herself, and prevent the Grievor, from filing a harassment claim against herself. As a result, these obvious overly sensitive reactions to both her surroundings and motives of the Grievor all colour her observations about everything else. In the Board's opinion they undermine some of her most important evidence, particularly the extent to which any of the Actual Negative Acts can be

said to have resulted in consequences which satisfy the definitional requirements of the SEA Harassment Threshold.

Summary of Grievor's Credibility. While Dureault's evidence must be seen through the lens of her over-sensitive reactions and fears which undermine her perception, the Grievor's conduct towards Dureault must be seen through the lens of the Five Dureault Skype Messages. The Grievor clearly did not like Dureault and did not like working with her for several reasons. She adopted the attitude at the hearing that because Dureault never spoke to her she had no idea of the kind of impact she was having on Dureault. She said she just put on her headphones and ignored her, but she would have been aware of not greeting Dureault in the morning if at the same time she was greeting others. The Five Dureault Skype Messages clearly show what her attitude to Dureault was and it is unlikely that her attitude was much different when face to face, except as modified by fears of what her coworkers would think. Apart from the issue of whether the Skype Messages generally constitute harassment or are just a lesser form of misconduct, the Five Dureault Skype Messages clearly show the true attitude of the Grievor towards Dureault. So for example when Dureault says the Grievor called her a "kiss-ass" or said she was "stupid" or the Grievor made fun of her work habits, all of which are denied by the Grievor, the Board has concluded Dureault's allegations on these issues are more accurate because the Grievor's denial is not consistent with the Five Dureault Skype Messages. It is on this basis that the Board concluded that the Grievor did engage in some misconduct identified as the Actual Negative Acts. However, the issue remains with these examples as with others, as to how often they happened. Did the Grievor call her a "kiss-ass" once or every day? If more than once, one would have expected Dureault's coworkers to have been able to confirm this conduct, but they did not. Moreover, many of these Acts are not hurtful enough or intense enough to meet the causation requirements of the SEA Harassment Threshold.

[122] The above summaries are based on an analysis of the following factors some of which are positive and some negative, but which in total provide the detail and context for the above conclusions:

Factors relevant to the Dureault evidence:

a) Dureault appeared to be "very sensitive" and wants everyone to get along. The personalities of the Grievor and Dureault could not have been more different. Dureault appeared as someone who did not deal well with not being liked by another coworker, as if she had a fragile ego. Several of her coworkers testified to this characteristic. Two witnesses also commented that she "had a difficult home life" which made it more difficult for her to process and deal with problems at work.

b) Dureault's psychological state in her June 17 meeting with Joyes was highly emotionally charged. Dureault's first meeting with HR happened almost immediately after she had informed Block that the Grievor was bullying and harassing her and that she had contemplated suicide the night before. Dureault said "she has never felt so bad or low" (E14). Demonstrations of feelings like this are normally real and difficult to create

artificially. Dureault was no doubt feeling "harassed and bullied". Her psychological state demanded immediate action which the Employer initiated by suspending the Grievor with pay, to allow for an investigation.

c) Dureault was clearly afraid of the Grievor. Block's memo (E14) states Dureault "did not feel safe at work and …couldn't take this kind of treatment anymore". The evidence from all Employer witnesses was very consistent on this point. There were many reasons given to explain this fear – some rational and some not so much – as discussed below. However, it is clear that Dureault experienced a real and general undefined fear of the Grievor that grew over time to the point that it led to her "emotional breakdown" with Loi on June 12 and her report to Block on the morning of June 17. Representative evidence of these fears can be seen from the following excerpts taken from Joyes interview with Dureault on June 17th (pgs 2 and 3 – E15):[7]

> [Dureault] "…Out of fear of retaliation, I won't look at her deals."
>
> [Joyes] "Fear how so?"
>
> [Dureault] "…I'm just scared. Hearing how she talked to mgmt…I had to be careful w/what I said around her."
>
> [Joyes] "Jaclyn + looking at pay, contract signed, then now worried about retaliation…?"
>
> [Dureault] "Yes. She may not go forward…"
>
> [Joyes] "Are you fearful of Jaclyn? Personal, Safety."
>
> [Dureault] "I'm fearful of what verbally she says to me. She has no qualms w/charging So I am scared of that."

[7] During the interview process, an associate of Joyes named Eli Wachniak took notes of most of the interviews and the notes were entered as Exhibits at the hearing. The text in this Exhibit as with most others reads as if it is *verbatim*, but it clearly is at best a reasonable attempt to record as much of the actual conversation and related events (such as crying) as was reasonable in the circumstances. Undoubtedly, however it is not perfect. In the excerpted portions of these interview notes here as well as elsewhere below, the text is put in quotation marks to signify reference to the precise language in the Exhibit. Often that text reads like an actual quotation from someone's speech in the meeting. It is worth remembering that the text of this Exhibit is an attempt to render actual conversation, but may not be accurate all the time. It is also worth noting however, that in all the testimony about these various sets of interview notes (ie E15 here and several other exhibits) nobody who was present in the interviews ever complained about the accuracy of the notes.

d) Dureault accurately assessed the Grievor's skill and experience with Union issues. The Grievor demonstrated an expertise in identifying and processing Union claims of one kind or another. She had already proved this by actually supporting Dureault on two separate occasions with pay grievances. The final proof of this expertise was the Grievor's ability to prepare and file a written harassment complaint against a major client of the Employer which was obviously being taken seriously by Affinity.

e) Dureault saw the Grievor as powerful in the Union resulting in a perceived power imbalance between Dureault and the Grievor. Dear testified that the Grievor "let us know that she was big in the Union". Indeed, it was common knowledge that the Grievor had been hoping to use her agreed union leave in March as a method to transition into a full time Union position and the Union appeared to be interested, because in part of the Grievor's demonstrated expertise with a number of pay issues. The Grievor testified that she was proud of her Union work, did want to transition to a full time Union job and wanted people to know that she was available to help them with Union issues, including helping Dureault with her pay grievance during the very time period that Dureault says she was being harassed. The net result was that Dureault felt a significant power imbalance in their respective positions at Affinity, although that was not a rational basis for her fear that the Grievor would withdraw her pay grievance, which the Grievor had actually helped to advance. (Several people testified that this fear was unfounded.) One reason Dureault - who was herself a Union member - never approached the Union for assistance was that she felt they would not support her over the Grievor. However, in the end Dureault proved herself to be more powerful than she felt. By reporting to Block she felt she was being bullied and harassed, she clearly proved herself as powerful as anyone in protecting herself as she was able to initiate a harassment investigation against the Grievor.

f) Dureault correctly identified the texting behind her back between Loi and the Grievor. On the morning of June 12, Dureault accused Loi of texting the Grievor about Dureault's conduct that day. Dureault's instincts and perceptions thus gained credibility in her own eyes because she had been correct and Loi admitted to the texting. What Loi and the Grievor were texting about was conduct of Dureault which according to the evidence had been taking place from December 2019 (U25) to June 12, 2020 (U17). Moreover, it looked to Dureault as if the Grievor was recruiting people to the Grievor's point of view by her ongoing texting and the obvious support from Loi.

g) The immediate motivation for Dureault's harassment complaint to Block was fear that the Grievor was going to file a harassment claim against her. Several witnesses testified to this fact, including Dureault herself. Based on her assessment of the Grievor's status and expertise with Union claims, there is no doubt that Dureault felt she had to start "fighting back", as demonstrated by her decision on June 12 to call out Loi for texting behind her back. This was followed up by her report to Block on the morning of June 17 that she was being bullied and harassed. Confirmation of this fear can be seen in this excerpt again from E15 on June 17 (at pgs 4 and 5):

> [Joyes] "What happened this morning?

[Dureault] "Knowing harassment, it just hurt. Scared of retaliation. Concerned about what's going to happen to my position. I have to walk on eggshells."

[Joyes] "Why?"

[Dureault] "I'm scared of retaliation. It seems like its just me. 7-8 months, all coming up."

[Joyes] "Concerned about my position"

[Dureault] "What would she do to someone she's worked with?"

[Joyes] "Clarify, you are concerned she would allege harassment to get you fired?"

[Dureault] "Yes"

Vance was the first person interviewed by Joyes after the above interview with Dureault. She was interviewed later on the same day as Dureault – that is June 17 at 3:30pm. Excerpts from that interview (pg 9 – E18) to confirm the same fear (as well as Dureault's problems at home) are set out below:

[Wachniak] "What happened this morning, how did Eileen approach you today?"

[Vance] "When I came in she was working, Michelle asked her to speak with her, they went off and spoke together, and then Michelle came to me and asked could you (*ie Vance –ed*) talk to Eileen. That's when I went in, asked her what's going on. She was really worried bc Michelle said you guys wanted to talk to her. And she was worried that Jaclyn may have filed harassment against her. I don't think she was aware of the whole investigation process and how it works. I think she thought it was about her"

[Wachniak] "At the end when she left the office, how was she feeling, what happened?"

[Vance] "She calmed down a bit, I think she was, I mean she was obviously upset, she didn't know how things were going to turn out, and she didn't, but she wasn't crying anymore. All I told her was, you can call me. She doesn't have really much support at home, so…That is why I said, call me, text me, I can come over. I do worry that she doesn't have much of a support at home."

h) Dureault was clearly in emotional turmoil for a few weeks in May and June, but many factors contributed to this state. Dureault testified that the Grievor was "bullying and harassing her" and that was the cause of her emotional distress. The Grievor's conduct did undoubtedly contribute to that state to some extent, but how much is what is missing from the Employer's case. However, the evidence disclosed several other factors that also contributed her distress, such as :

i. Covid – The Grievor worked outside the DFC office continuously from March 1 until mid-May when she returned. At that time, all offices were at the height of the unknowns around Covid and everyone was affected and tense to a greater or lesser degree, particularly when many offices were still working from home to avoid disease spread – the DFC had made return to work optional and everyone did that because it was easier to work together, but it was undoubtedly stressful for everyone;

ii. Dureault's home life was difficult. There was evidence from Vance (see quote from Vance in g) above), Dear and Loi that Dureault was experiencing some difficulty in her home life such that it made it more difficult for her to deal with or process problems at home that arose in her daily work life;

iii. Dureault suggested herself that many things were upsetting her. In the notes of Dureault's interview with Joyes on June 17, Dureault is quoted at the end as saying "I just want it all to stop So much going on in the world". This suggests broader problems than just the conduct of the Grievor.

iv. Dureault testified her immediate fears were caused by the Known Dealer Complaint, not by the Grievor's harassment or bullying of her. This testimony was confirmed by Dureault herself and by Vance and Dear who both said this is what drove Dureault to go to Block.

Was Dureault's emotional upset on June 17th caused by the Grievor's conduct or by the Grievor filing the Known Dealer Complaint or something else? The evidence was that all of the above factors contributed. The lack of context and details to many of the allegations makes it difficult to draw any more precise conclusions.

i) Dureault's "over-sensitive" nature undermined her perception at times. The Union suggested that Dureault was so over-sensitive that she was prone to "exaggerate" issues. The immediate concern which obviously drove her to claim harassment was the fear the Grievor would file a written harassment claim against her. That was obviously an over-reaction as was her fear that there were grounds for believing the Grievor would withdraw her then current grievance for an adjustment in her pay.

j) Although Dureault may have felt intimidated by the Grievor, she was not powerless. In the end Dureault proved herself to be more powerful than she felt. By reporting to Block that she felt she was being bullied and harassed by the Grievor, she clearly proved herself

as powerful as anyone. She was, for example, successful in initiating a harassment investigation against the Grievor which resulted in her termination.

k) Dureault was not an innocent victim in the whole sequence of events relative to her relationship with the Grievor. Texts between Loi and the Grievor clearly show Loi texting the Grievor to advise her for example "I'm so over Eileen blaming you for things…" (U25, Dec 30, 2019) and "I'm going to punch E soon…Major judgement on one of your deals. Which I have a feeling Michelle will chat with you tomorrow." (U18, June 9, 2020). These were private texts on personal phones between Loi and the Grievor. Only a limited number of such texts were put in evidence. Presumably they carried on with some frequency between December 2019 and June 2020, although there is no evidence about that other than general comments that they texted to each other frequently.

l) Block said back in February 2020 that she would keep an eye on the Grievor's behavior but nothing was ever reported. This suggests either Block didn't take the complaint seriously or she did and there was nothing to report. The Union suggests the latter, but it is just as likely that the reason Block never saw anything was any negative conduct by the Grievor or anybody else, would not normally be done within earshot of their supervisor.

m) Dureault testified the Grievor was rude to Block but Block denied that. Again, this is likely an example of an oversensitivity of Dureault clouding her judgement of the Grievor's conduct as Block had no incentive to deny any rudeness and would certainly have been aware of it if it existed.

n) Dureault does not report being called "stupid" or told to "shut-up". The Union argued the fact Dureault did not report these facts to HR or Block suggests they never happened. That may be true, but it is just as likely they were not heard by anybody else and for that reason Dureault knew they would just be denied and saw no point in making the accusation.

o) The total duration of personal contact between the Grievor and Dureault was limited to only 13 weeks. This fact needs to be factored into the assessment of whether conduct that was intermittent and interrupted by vacations or union leave or episodes of working from home and totaled only 13 weeks is sufficient to qualify as "repeated" as required by the definition. "Duration" is one of the main concepts in addition to "frequency of negative conduct" that must be proven to satisfy the causation and repetition requirements of Conditions 1-4 of the SEA Harassment Threshold. Without proof of any one of these concepts – in this case duration – no harassment can be established.

p) One can argue Dureault was herself in breach of Section 4.7.2.3 of HR Manual. This section states in the third paragraph that "An employee who retaliates against someone who has reported a violation in good faith is subject to discipline up to and including termination of employment." The Grievor's Known Dealer Complaint was a good faith report of a violation of the third party harassment provisions of the Code and HR Manual. Dureault testified, confirmed by several others, that the reason she spoke to Block and

accused the Grievor of bullying and harassment was because she was afraid the Grievor was on the verge of filing a complaint against her. It could very easily be argued that Dureault's action in speaking to Block was retaliation for the Grievor's Known Dealer Complaint. This was apparently never considered by Joyes. A more neutral investigation by Joyes might have seen this.

[123] The following factors must be considered or understood in assessing the evidence of the Grievor:

a) The personality of the Grievor was very different from Dureault. Apart from factors like a difference in age and working styles in terms of computer literacy, one large personality difference existed between these two parties which underlay much of the dysfunction in their relationship. Whereas Dureault was very sensitive and felt the need to get along with everyone, the Grievor was just the opposite. She was smart, confident, ambitious and when faced with a personality conflict of the kind she experienced with Dureault she testified that she would respond by keeping to herself.

b) To avoid frustration, the Grievor would just tune Dureault out. For example, the Grievor testified that her reaction to Dureault's singing or talking was to put her headphones on and just tune her out so that she would not be bothered or get frustrated by her. Dureault misperceived this, like she misperceived other surrounding facts, and interpreted this as being "shunned". The Grievor testified this was the explanation for example of limited "good mornings" at the beginning of the day.

c) The Grievor's Skype Messages clearly amount to misconduct. The Union argued that the messages could not be "harassment" as they did not meet the definition because they were sent with an expectation of privacy. Accordingly, they could never meet the requirement that the Grievor knew or ought to have known that her conduct (ie the messages) would adversely affect the psychological well-being of Dureault. That may or may not be true. However, in sending the Messages, the Grievor was causing consequences which made the DFC workplace environment worse than it was.

d) The Grievor's daily conduct in the workplace in regards to Dureault must be interpreted in a manner that is consistent with the Five Dureault Skype Messages. The point here is the messages do show very clearly without any distortion of any kind what the Grievor's attitude was towards Dureault at the time they were sent. When the Grievor sent the message saying in reference to Dureault "I have a feeling Eileen is going to fuck us over" [E20 (p)], it is unlikely that attitude did not carry into her daily interpersonal contacts with Dureault, at least when alone together. The next time that day the Grievor met Dureault at the water cooler, does anyone realistically think the attitude displayed in that message did not negatively affect her interaction with Dureault at least to some extent? It is very difficult to completely hide such emotions, although the demands of political correctness among coworkers will normally dampen such an attitude, which may be why there was no corroboration from the DFC team members. The Union and the Grievor admitted these

messages were misconduct deserving of discipline and tried to excuse them by saying she was frustrated by Dureault. However, that does not excuse the conduct.

e) The Grievor went out of her way to support grievance claims by Dureault. It was obvious that the Grievor was proud of her Union work and wanted it to be successful when she worked on something like a pay classification for Dureault. However, it is unclear whether this help of the Grievor for Dureault should be interpreted as proof of the Grievor's support for Dureault or proof only that she was doing everything she could to prove to the Union that she would be very good working for them full time. Whatever the Grievor's motivation, it is clear that Dureault misperceived any threat that the Grievor would "withdraw" her grievance if she complained about her. All witnesses agreed the Grievor would never undertake that kind of action and did what she could to support Dureault's pay grievance. This was not the conduct of someone who could be said to be "harassing" Dureault. It adds substance to the conclusion that although the Grievor may not have liked Dureault, she was not intentionally or unconsciously trying to humiliate or intimidate her or otherwise harass her.

f) The months of April, May and June were the height of Covid concerns and the Grievor was significantly immunocompromised. Those severe health conditions undoubtedly made the Grievor more anxious than others at the DFC. The Covid circumstances made life much more difficult than normal for both the Grievor and Dureault and indeed, everyone around them. It also drove the Grievor to keep herself isolated and separate from the others in DFC whenever possible, which no doubt contributed to the misunderstanding between Dureault and the Grievor.

[124] As a result, the Board concluded the evidence of both the Grievor and Dureault must be seen through the lens of the above summaries, which means the reliability of their statements of fact is compromised to some extent.

3. Assessment B: Insufficiency of context, specific detail and corroboration to prove harassment

[125] The above analyses provide a general qualification in respect of all the evidence of Dureault and the Grievor. It is important to note that a second set of deficiencies in the Employer's evidence was the lack of context, the lack of specific detail and the lack of corroboration for the alleged acts of misconduct. In what follows, the Board has developed a chart labelled the "Alleged Negative Acts Chart" as a summary of both the alleged misconduct and an overview of these deficiencies.

[126] The Union in its cross- examination presented a similar list of specific complaints made by Dureault, but the Employer did not make a similar effort. Joyes testified that the Grievor was terminated based on a "holistic" finding where all the negative acts and the Skype Message activity was considered as one large whole which justified termination.

[127] The Board has concluded that the lack of context, specifics and corroboration for the Actual Negative Acts is an important consideration when assessing whether Conditions 1 to 4 inclusive were met and satisfied in the Employer's case. It is important to see in a summary fashion for example exactly when some specificity is provided and the extent to which it is missing from aspects of the evidence. The Alleged Negative Acts Chart below is an attempt to provide that summary.

[128] How often did the specific conduct occur? When did it occur? How intense was the conduct? How long was the conduct repeated? Who else saw or heard it? Without at least some of this type of context for each negative act, it is very difficult to determine whether the causation and repetition requirements of Conditions 1 to 4 have been met.

[129] A major component of the Union Legal Brief is the argument that when you assess the totality of the factual evidence presented to the Board, there is not enough context, and in particular not enough corroboration or specific detail about frequency or duration of the allegations, to make a determination of harassment. What follows in the Alleged Negative Acts Chart is an attempt to show the totality of the contextual evidence presented by the Employer. Was it sufficient to satisfy the definition?

4. The Alleged Negative Acts Chart

[130] The first step is to list the alleged negative acts and then provide whatever contextual facts have been put in evidence. One can then begin to assess the degree of negative conduct. The assessment allows an objective observer to place the conduct somewhere along the Negative Acts Continuum.

[131] Starting with the list of alleged negative acts (items 1- 15 in column 1), the Chart is extended by using other evidence of context if provided in the hearing or noted as absent if not provided. In each row, the Board has added a summary of whatever detail is proven from the evidence in respect of intensity and frequency as follows:

a) Intensity of alleged negativity. Each negative act is noted as being either high, medium or low intensity based on a reasonable person assessment of negativity. For example, not saying good morning might be ranked as "low"; calling someone a "kiss ass" might be medium; and, calling someone "stupid" might be "high". The list shows the alleged acts in the order of their perceived intensity, starting with the higher intensity at the top. It is necessarily subjective to some extent, but not every negative act is the same in terms of its hurtful impact and the Board considered it helpful to rate the negative acts in this manner.

b) Frequency of alleged negative behaviour. Again, this is based on the Employer's evidence to the extent available and is shown as either unclear if no evidence presented or daily, weekly, or a "one-off event" or perhaps "regularly" or "ongoing" without definition. The SEA definition requires conduct which has been "repeated" and frequency is one measure of that requirement.

[132] In addition to the above information and because of the requirement that conduct be "repeated" to qualify as harassment, the "duration" of misconduct is also relevant and needs to be distinguished from frequency. Duration is a measure of how long the conduct continued.

[133] For example, conduct that occurred daily or weekly only for a few weeks might not qualify as harassment, but might if it extended over 6 months. Another way to make this point is that the requirement that conduct be "repeated" is not satisfied if it happens every day, but only for one or two weeks. The conduct must be sustained over a period of time that the Board determines is necessary, in the context of all the factual information, to meet the definitional requirements. The Chart follows:

ALLEGED NEGATIVE ACTS CHART

Negative Acts of Grievor ("G") Alleged by Dureault ("D") in the Employer's evidence	**Intens-ity (degree of hurt)**	**Frequency and/or duration – as per Employer evidence**	**Comments – as per Union evidence**	**Did evidence prove harassment (H)?**
1. "Jaclyn has issues with me…within 6 weeks she was angry with me all the time"	High	"all the time"	D misperceived G's conduct as "anger" when it was really G's attempt to ignore D due to G's frustration	Genuine misunderstanding between G and D – **Not H –** G thought D was angry with her
2. *Grievor was rude and condescending in replies to D – "I was made to feel stupid" – in testimony D says G called her stupid and told her to shut up	High	Ongoing? - unclear	No context-not enough info provided – G denies and no corroboration from any DFC team members	Vance and Block did not see any incidents – Vance says G could be "sharper in tone"– **Not H -** not frequent enough or would have been heard
3. *G screamed at D about a loan application in February	High	One -off act	G Doesn't remember	**Not H**
4. G would inappropriately gossip, message and text with Loi and others about the behavior of her coworkers –	High	Unclear – at least "often", perhaps	Not H – texts were intended to be private	**Not H** – the evidence of general inappropriate Skype Messages

	only 5 of such messages dealt with D		daily or weekly?		included 21 days of messages between June 11, 2019 and June 10, 2020 – dealt with separately in Part VI – see Summary Chart of Inappropriate Skype Messages at para 138 below
5.	*Grievor said "You're a kiss ass" when I was friendly with customers – "made me feel - I'm doing something wrong"	Medium	Unclear – one off or weekly or monthly?	G denies use of term "kiss-ass" – G says comments not intended to be demeaning	**Not H** – G made fun of D for being so friendly with customers – implied D a "keener" as per Block who said she thought it was said as a joke.
6.	*Grievor made fun of Dureault taking notes during a loan application	Medium	Unclear – one off or regularly?	No comment from G	**Not H** – comments were sarcastic criticism
7.	G made negative comments about D every day	Medium	Unclear - No context or info on frequency	G complains no context – impossible to answer	**Not H** – a negative attitude to D would be consistent with the Five Dureault Skype Messages – however, saying things out loud was likely very limited as there was no corroboration from anyone else.
8.	Grievor refused help from Dureault and did not want Dureault to review her work and D afraid to do so	Medium	Ongoing	G did not think D was good at her job – and D afraid of retaliation	**Not H**
9.	G excludes D socially – Vance and Dear say G did not treat D the same way she treated others – excluded her from photo shares for	Low	Vance says social exclusion happened "several	G apologizes and says she had no intent to hurt or harm D	**Not H**

example outside of work and did not "friend" her on Facebook		times in May"		
10. *G was annoyed by D talking to herself or singing during work – told her to shut up	Low	Unclear – one off or ongoing?	G says she just put her headphones on to ignore D	**Not H**
11. Grievor complained about Dureault copying emails to everyone in DFC	Low	No context provided – very unclear	G says impossible to answer	**Not H**
12. Grievor says "good morning" to everyone but excludes Dureault- Dear says G continued to make snide comments and did not acknowledge D in May/June	Low	Regularly in May and June – Dear says before that as well	D does not provide specific examples or dates – G says can't reply w/out more info	**Not H**
13. G was rude to Block and dealers	Low	Unclear – no context from D	Vance and Block deny – confirmation of D's poor perception	**Not H**
14. D was afraid that G would charge D with H after G charged Known Dealer with H	Not rational fear	Unclear – D and others testify this is why she charged G with H – to prevent the reverse	All witnesses say this was D being overly-sensitive – example of irrational fear of G – overly sensitive nature of D	**Not H**
15. D was afraid the G would withdraw or interfere with D's grievances that G had helped D with originally	Not rational fear	Unclear – makes no sense as would not help G with union	All witnesses say this was nothing to fear	**Not H**

** [Items 2, 3, 5, 6, 7 and 10 above are defined in para 118 above as the "Actual Negative Acts" which describe conduct the Board accepts happened at least once, but not often enough or long enough or with enough intensity to meet the SEA Harassment Threshold requirements in Conditions 1 -4 above. Such Acts are however, found below to be misconduct deserving of discipline. As well, the general Skype Messages described in item 4 are separate from this defined term and are dealt with as a second kind of misconduct in Part VI below – see the Skype Message Summary Chart at para 138 below. They are also found to be deserving of discipline, resulting in findings of misconduct below for both the Actual Negative Acts (which were acts directed towards Dureault) and for the Grievor's general practice of issuing inappropriate Skype Messages (which refer to several of the Grievor's coworkers, including the five that refer to Dureault).]*

5. Conclusion – Employer did not prove Grievor engaged in harassment

[134] Applying the factual analyses in Part V, 1 - 4 above to the legal requirements of the SEA Harassment Threshold as set out as Conditions 1-4, the Board finds that none of the conduct summarized in this Chart meets and satisfies the definitional requirements for the SEA Harassment Threshold as described below:

> Condition 1. The conduct must "adversely affect the worker's (*ie Dureault's*) psychological or physical well-being" [section 3-1(1)(i)(B)]. The Board interprets this requirement as one where the conduct must cause – in whole or in material part – the adverse effect on Dureault's psychological or physical well-being. This is a causation requirement. This is a difficult requirement to meet in this case because the evidence made clear there are several apparent causes of the emotional distress of Dureault, including the following:
>
> a) Dureault's various fears of the Grievor: Dureault was afraid of the Grievor because she was very powerful in the Union, very knowledgeable about how to file a harassment complaint against someone (as proven by the Known Dealer Complaint), and on the verge of filing a similar harassment complaint against Dureault herself. This last fear is clearly an exaggerated over-reaction and misapprehension of the Grievor's conduct but also the main motivation for going to speak to Block and making the harassment claim against the Grievor. Dureault's poor perception as evidenced by her exaggerated fears undermine the reliability of her report to Block that the Grievor was harassing and bullying her.
>
> b) Dureault's other fears: There was evidence about a number of other factors that were causing Dureault distress, including the general anxiety in all offices around Covid in the spring of 2020, Dureault's problems at home and Dureault's own statement at the end of her interview with Joyes: "I just want it all to stop So much going on in the world" which suggests a more generalized upset with everything in her world.
>
> Accordingly, none of the Alleged Negative Acts in the above Chart were proven to have met the causation requirements of Condition 1. To make that determination, corroboration from coworkers and further specifics as to context, frequency and duration would be required from a more perceptive witness than Dureault. None of that was provided.
>
> Condition 2. The Grievor "knows or ought reasonably to know" her conduct "would cause a worker (*ie Dureault*) to be humiliated or intimidated" [section 3-1(1)(i)(B)]. This is another area where it is difficult to conclude with any confidence that the Grievor knew or should have known that her actual negative conduct (ie the Actual Negative Acts) would humiliate or intimidate Dureault. The evidence was nobody, including Dureault or management, ever spoke to the Grievor about her problems with Dureault until June 16 – one day before the Grievor was suspended. June 16 was the Tuesday when Block approached the Grievor to see if she would speak to Dureault, following Dureault's emotional breakdown on Friday the 12th. We can argue the Grievor knew or ought to have known her actual negative conduct - whether

it was being rude, complaining about her work habits or just being angry with her all the time – would be seen as "disrespect" if it happened, but it is not reasonable to conclude the Grievor should have known it would "humiliate" or "intimidate" Dureault as required by Condition 2. Again, more detail about specific events might have buttressed this argument, but as presented it does not meet the requirement of Condition 2.

Condition 3. The conduct must constitute "a threat to the health or safety of the worker (*ie Dureault*)" [section 3-1(1)(ii)]. The Board interprets this Condition 3 as another "causation" condition. One or more of the acts of the Grievor alleged on the Alleged Negative Acts Chart must either be a direct threat or because of the hurtful nature of the conduct, actually or potentially endanger the health or safety of Dureault. After reviewing the seriousness or the intensity of the hurt caused by the acts listed in the Alleged Negative Acts Chart, the Board concludes that some of them could actually endanger the health or safety of Dureault if they had happened and were repeated for some material period of time. However, if for example one looks at the conduct in rows 1, 2 or 3 (the only conduct identified as "high" intensity in the Chart), the evidence about repetitive duration is spotty at best. Bear in mind, even if it occurred, it did so over 13 weeks spread out over 6 months. In the circumstances where there is limited detail about when or how often these acts occurred it is not possible to conclude harassment resulted, although again, misconduct may be present to some uncertain degree.

Condition 4. The conduct must have been "repeated" [Section 3-1(4)(a)]. The requirement of this Condition 4 is not very explicit as to how long or how frequent the negative conduct must have carried on to qualify as having been "repeated". The Board concludes there must be some measure of materiality to this requirement. For conduct which occurred sporadically over 13 weeks with large gaps between acts of negative conduct (due to the absence of either Dureault or Grievor) to qualify as "repeated", there must be some specific detail as to the frequency or duration of the negative acts. In this case, there was not sufficient evidence of that kind presented at the hearing to justify a finding of harassment.

[135] The Board therefore concludes that the Grievor's conduct, when looked at in its entirety and in its proper context, does not meet and satisfy the definitional requirements of the SEA Harassment Threshold.

PART VI. ISSUE NO. 2: If no harassment was established, did the Grievor engage in other misconduct?

1. The issue of the Skype Messages

[136] During the hearing there was also significant evidence presented concerning the Skype Messages. The Skype Messages consist almost entirely of 21 communications to or from the Grievor to fellow employees during the work day, all of which contain some measure of inappropriateness. As well, the Skype Messages were all sent using the Employer's electronic equipment and as such are the property of the Employer.

[137] The Grievor's role in the ongoing exchange of inappropriate Skype Messages to and from others in the DFC as well as in other parts of Affinity was a breach of the Employer's IT Policy. The appropriate provisions of that policy are as follows (with emphasis added):

> "The goals of this policy are to outline appropriate and inappropriate use of Affinity Credit Union's Internet resources, including the use of browsers, electronic mail and **instant messaging**, file uploads and downloads, and voice communications. Use of these services is subject to the following conditions. Use of all the above is a privilege, not a right, and access to these services could be revoked or suspended.
>
> …
>
> **Inappropriate Use**
>
> Individual Internet use will not interfere with others' productive use of Internet resources. Users will not violate the network policies of any network accessed through their account. Internet use at Affinity Credit Union will comply with all Federal and Provincial laws, all Affinity Credit Union policies, and all Affinity Credit Union contracts. This includes, but is not limited to, the following:
>
> 1. The Internet may not be used for illegal or unlawful purposes, including, but not limited to, copyright infringement, **obscenity, libel, slander**, fraud, defamation, discrimination, plagiarism, **harassment, intimidation**, forgery, impersonation, illegal gambling, soliciting for illegal pyramid schemes, and computer tampering (e.g. spreading computer viruses).
> 2. **The Internet may not be used in any way that violates Affinity Credit Union's policies, rules, or administrative orders including, but not limited to Affinity's Code of Conduct policy** (2000.01), Acceptable Use of Technology and Communication Devices (7000.16) and Technology Controls (11000.01). Use of the Internet in a manner that is not consistent with the mission of Affinity Credit Union, misrepresents Affinity Credit Union, or violates any Affinity Credit Union policy is prohibited."

[138] The Skype Messages below show the Grievor and others in a very bad light. It is helpful to look at a summary of the Skype Messages in chart form to see their overall effect.

SUMMARY CHART – INAPPROPRIATE SKYPE MESSAGES

Employer's Description of Grievor's Skype Message	**Date**	**Sample Quotation**
Inappropriate talking behind back of fellow employee – Ex 20a) and b)– Grievor to Teskey	June `11and 19, 2019	"fuck she is useless…didn't get the cash order done, nothing" and "i hate her so much"
Inappropriate talking behind back of fellow employee – Ex 20c) – Grievor to Teskey	July 15, 2019	"where does she keep going…before she was talking to Kathi she was in the staff room for like 5 min too"

Inappropriate discussion of fellow employee's bathroom schedule – Ex 20f) – Grievor to Teskey	September 24, 2019	"why the fuck does she keep leaving today…to go to the bathroom 19 times"
Inappropriate expression of frustration – Ex 20g) – Grievor to Teskey	October 10, 2019	"the other thing that pissed me off was I said I wanted to do treasury so that I could hide if I needed to"
Inappropriate need to comment on other employee discussions – Ex 20h) – Grievor to Loi	December 2, 2019	"there are two HR people at the water cooler whispering…they've been there about 10 min but that's all I could really hear"
*Inappropriate expression of frustration – Ex 20i) – Grievor to Loi	December 20, 2019	"I know me being grumpy is my own fault today…but her singing is driving me bonkers"
Inappropriate expression of frustration – Ex 20j) – Grievor to Ingelhart	December 23, 2019	"that is why we are all getting in shit and talked to today because the two people who trained all of us 'newbies' aren't here today"
Inappropriate discussion of other employees – Ex 20k) – Grievor to Teskey	December 23, 2019	"why is she taking an hour lunch"
*Inappropriate discussion of Dureault – Ex 20m) – Grievor to Loi	January 8, 2020	"we had a long talk about how I don't trust her and the couple of times I've asked for help and Eileen has literally turned away…I used to really like her…but she needs to put her nose into everything"
Long series of messages with Loi – every 5 min on average for 90 min – Ex 20n)	January 8, 2020	"but I also know she is going to turn around and bitch"
*Inappropriate comment re Dureault – Ex 20o)	February 19, 2020	"right, how does she know so much about a deal i didn't discuss with her…I think Eileen may seriously want to apply for Conexus"
*Inappropriate discussion of another employee behind her back – Ex 20p) – Grievor to Loi	February 24, 2020	"they changed the vehicle…sent back with same condition…I have a feeling Eileen is going to fuck us over"
*Inappropriate comment re Dureault – Ex 20q)	February 25, 2020	"you know Eileen is good friends with her hey… watch what you say…also, I don't like asking E questions because of reasons like that"
Confirmation of inappropriate messaging habits of Grievor and how they disrupt her work – Ex 20s) – Grievor to Ingelhart	April 1, 2020	"It's ok – passes probation and then got in trouble for skyping people too much and 'disrupting their work' because another manager complained"

**(Exhibits 20 – i), m), o), p) and q) referred to above are defined in para 118 a) as the Five Dureault Skype Messages)*

[139] When the Employer issued its Termination Letter, it said the Grievor was being terminated for just cause because her behavior had been "found to constitute harassing and bullying of your coworkers, creating an unwelcoming and toxic work environment". Whether the Employer considered the Skype Messages as part of the behavior that created the toxic work environment is not clear.

[140] Regardless what the Employer thought at the time, it is the conclusion of the Board that the Grievor's conduct as demonstrated by the Skype Messages did contribute to an "unwelcoming and toxic work environment" and for that reason on their own constitute just cause for discipline.

[141] Not only was the Grievor's conduct a breach of the IT Policy and thus deserving of discipline for that reason, it was also an important factor in preventing the DFC as a whole from performing in a manner that was reasonably expected by Affinity management.

[142] However, the same issues exist here with understanding the context of each of the acts in the Alleged Negative Acts Chart. There was evidence from Loi for example that there were significant texts being exchanged with the Grievor about which she said some of them would be considered derogatory. Very few of these actual SMS texts on personal phones made it into evidence. However, there is little doubt that the Skype Messages on their own are deserving of some discipline.

2. If none of the 15 acts listed in the Alleged Negative Acts Chart qualify as "harassment", do any of them qualify as general misconduct?

[143] It is worth bearing in mind the points made earlier about what the Five Dureault Skype Messages allow one to infer about the Grievor's general conduct during the day in any of her interactions with Dureault. It is simply hard to believe that the negative attitude shown towards Dureault in those messages did not carry over into other areas in some manner and to some extent. However again, this is very difficult to assess because of the lack of specific detail and corroborating evidence. There are only Five Skype Messages where the Grievor is speaking about Dureault. They were sent between December 20, 2019 and February 25, 2020. Although the negative attitude evident towards Dureault is obvious, it is not enough evidence to substantiate the occurrence of the Actual Negative Acts, except on a very limited basis.

[144] The Board therefore concludes it is reasonable to assume that each of the Actual Negative Acts happened once and perhaps more than once for one or two of the Acts (although not often enough to be considered harassment). This negative attitude of the Grievor almost certainly carried over into her daily interactions with Dureault, although limited by the demands of political correctness in the eyes of her coworkers. However, apart from the fact there are only five Messages from which to draw inferences, there is limited evidence of specific detail and there is no corroboration from coworkers. Dureault's own evidence about the Actual Negative Acts must be seen as having been compromised by her poor perception of the Grievor's overall motivation.

[145] The Actual Negative Acts carried on at these minimum levels therefore constitute just cause for additional discipline, as the Grievor thus breached the duty every employee owes to all other fellow employees to treat them fairly and with dignity and respect.

[146] Nonetheless, the extent to which these Acts breached this duty is difficult to discern. However, there is little doubt that the Actual Negative Acts even if only done infrequently amount to a breach of this duty and therefore, are deserving of some discipline.

PART VII. ISSUE NO. 3: Did the Employer's conduct throughout compromise its findings?

1. Overview of Employer Conduct

[147] In the sequence of events that make up the bulk of this dispute, there are two primary actors from Affinity: Michelle Block, the Supervisor of the DFC team and the Grievor's supervisor and Todd Joyes, who was responsible for the handling of the Dureault Complaint and the Known Dealer Complaint from June 17, 2020 onwards.

[148] The performance of each of these actors was deficient in a manner that ultimately compromised the Employer's findings in all material respects, except with regard to the Skype Messages which stand on their own and are deserving of discipline despite the conduct of the Employer.

[149] Block meant well, obviously cared about the people under her supervision and wanted the dysfunction in her department to come to an end.

[150] Block had recently been promoted to a supervisory position at the DFC, having previously been a "Specialist" like the others working in the group. She gave no evidence of getting any management training or any training in recognizing how and when to intercede in a workplace problem, especially with the use of some form of intervention using mediation or other expert assistance. She had the harassment training that all employees received but there was no evidence of any other management training.

2. Block's performance February to May 2020

[151] Block testified that in the week or two before the Grievor began her union leave on March 1, Dureault informed her of personal relationship problems with the Grievor. She said Dureault told her she was "unsure" how serious the problems were.

[152] Dureault gave Block the example of the Grievor calling her a "keener" because of the very friendly tone she took with her auto dealer customers. She also told Block she felt she was being

excluded from conversations by the Grievor. Block testified she "would keep an eye on it because she wasn't sure if it was just a personality conflict or something more serious".

[153] These reports were given to Block while the Grievor's probation period of 84 days was ongoing and did not expire until mid-April. At that point Block passed the Grievor out of probation to become a permanent member of the DFC team.

[154] Block was not questioned about this decision when she testified, but in hindsight it is difficult to understand the logic behind it. The DFC team worked in very close quarters in a matrix of six adjacent cubicles where smooth and effective inter-personal cooperation was a fundamental requirement of the working environment.

[155] Block had been told of a potential problem that at a minimum she said she assessed as a "personality conflict". The bonus compensation of every member of the team depended not on their individual performance, but on the success of the team as a whole in meeting their group's objectives. Even a personality conflict of this kind would undermine the team's performance if it existed and so Dureault raising this issue was not something that could be ignored because Block did not see any further evidence of problems.

[156] Block said she would monitor the situation but it appears she did nothing or at best did not observe anything. However, the Grievor left on her union leave within a week or two at the most after this report was made to Block. As a result, she had almost no time to observe the issues raised by Dureault as the Grievor never returned to work physically until the end of May according to Block. Was there at a minimum a personality conflict or even something more substantial? Block never saw the interaction between Dureault and the Grievor long enough to monitor anything.

[157] Accordingly, she had minimal time to "monitor" the situation and when it came time to assess the Grievor's performance in April, the issue appears to have simply disappeared. That is understandable because the Grievor had not physically been at work since the end of February and never returned to work for another six weeks. But when she did, the issue had not disappeared.

[158] By the time of the physical return of the Grievor to the DFC workplace, nothing had improved from Dureault's perspective and indeed, it got worse. Query whether Block should have responded more aggressively to the concerns of Dureault as reported to her at the end of February or at a minimum, arranged to delay the probation assessment until she had more opportunity to see Dureault and the Grievor working together.[8]

[8] There is a disagreement amongst Board members on this point. The Board Chair is of the opinion that Block should have either a) delayed the probation review to allow for more observation time, or b) raised the issue directly with the Grievor on her probation review and if necessary, caused the issue to be discussed directly with Dureault with expert help as appropriate. Two of the Board members are of the opinion that Block's performance relative to this issue was understandable as they feel Dureault's report did not at the time signal enough seriousness to prompt more aggressive action from Affinity management. Block also questioned the Grievor's messaging practices in this probation review but did not apparently have enough factual information to pursue the topic which

3. Block's performance with the Known Dealer Complaint

[159] The facts around the Known Dealer Complaint were reviewed above (paras 40 to 48). The incident is important for several reasons in the larger scheme of events in this case. Most importantly, it turns out the immediate and direct cause of Dureault going to Block on the morning of June 17 was that Dureault was afraid the Grievor would be filing a harassment complaint against her and that fear was triggered by the Known Dealer Complaint.

[160] If the Known Dealer Complaint did not exist or had been handled differently in a manner that did not lead to the Grievor filing a written complaint against the Known Dealer, it is conceivable that events would have transpired after that in a very different fashion. Removing a "triggering event" like this would have at a minimum made things different and perhaps better. The point is Block's poor management of the situation led directly to another management problem that was even more difficult.

[161] Block herself acknowledged her poor response. If one reads the text of the formal complaint filed by the Grievor, one gets a sense of how poorly the situation was handled by Block. The formal complaint (exhibit U1) was an email submitted to HR Manager Lolita Humm on the morning of June 10 and reads in part as follows:

> "Good morning Lolita,
>
> "The HR Manual does not say who in HR to send these complaints to, so I hope it is okay that I am sending it to you.
>
> "I would like to make a formal complaint about harassment happening in the Dealer Finance Department from a representative at a dealership. The more discussion that was had on this incident has made it very clear that this is an ongoing issue and not just a onetime issue.
>
> "On Friday, June 5th – I made a decision on a loan for (Known Dealer). The representative for the dealership (Known Dealer) was not happy with my decision and proceeded to call me, and scream at me over the phone. During this call he would not give me the ability to explain my decision. He then hung up on me. He called back and another staff member answered the phone, by the way he asked for me and the tone of his voice, she could tell he was mad and expressed this to me before transferring the line to me. When I answered he then screamed at me again and again would not allow me to talk to explain my decision and again hung up on me. He then called a 3rd time and by this point I was nearly in tears, I cut him off and told him I would escalate it to someone else in PA or Regina. He then said, "good clearly you don't know what you are doing" and hung up on me for a 3rd time.
> …

became a bigger issue with the disclosure of the Skype Messages. Query as well whether she should have followed up with this issue at the time before making a final decision on probation.

"During my "conversations" with (Known Dealer), he used many derogatory phrases including "What the hell do you think you are doing?" and "Do you even know your job or are you just a fucking idiot?"

…

"I reported this incident to Michelle Block on Monday, June 7th shortly after 8:30am…I told her this was harassment the way he treated me. The response from her was that "That is just the way [Known Dealer] is, he can be an ass sometimes." She also told me about how he has made numerous other coworkers cry by the way he has treated them over the years, and said "I would just have to get used to it, because he has been an ass for the last 10 years."

….

"She came up to me around 11:45am in the morning, when it was just me in the area and let me know that she needed to think about how to handle this situation. She then proceeded to use the same lines about "I would get used to him." She also expressed her concern that if I reported it, it would be bad as the [Known Dealer] stores are money makers for CUDF. I expressed to her that I was upset by the way she said I just need to get used to it and if I talked to him differently then he would not harass me.

…

"This culture has allowed the staff in Dealer Finance to be harassed by dealers for countless years and it is continuing to promote the harassment of the staff in the department. Staff (myself) are being told to accept the harassment and get used to it. As of current, I have informed Michelle I will be filing this complaint she did let me know she talked to [Known Dealer] and then proceeded to explain why he was mad and defended him and the way he treated me. She has also said I am no longer allowed to take deals from that dealership (which in my opinion is not allowing me to properly do my job and punishing me for being harassed).

"So please consider this my formal complaint to HR to address this situation. Please advise me if you would prefer I file this complaint through OHS. Thank you.

"Jaclyn Brears
Dealer Finance Specialist
Affinity Credit Union"

[162] Both Block and the Grievor testified about the events described in the above letter and none of their testimony is inconsistent with the facts described in it, although Block was never asked directly whether the Grievor's description of her response was accurate. The Grievor's summary of Block's response to her is substantially the same as she reported in her meeting with Joyes on June 15 where she was asked to describe what happened.

[163] However, Block herself recognized she had not acted properly in her initial reaction to the Grievor's complaint about the Known Dealer. Indeed, she apologized in one of her texts saying to the Grievor "…You shouldn't have been treated that way and I should have dealt with it differently. Life lessons" (U24).

[164] Regardless what the above letter says about the state of affairs generally in the DFC, it is clear that Block's management of this situation was far from ideal and clearly was a direct cause of the filing of the Grievor's Known Dealer Complaint, which as described earlier, was a pivotal event in Dureault initiating a harassment complaint against the Grievor.

4. Block's response to Dureault's June 12 emotional breakdown

[165] On June 12, Dureault spoke to Block and told her she had seen Loi texting madly and said nothing more. Block went for a walk and when she returned, Dureault was in the middle of her breakdown, in the quiet room crying and wondering why Loi and the Grievor were ganging up on her as described earlier. (The Grievor was not at the DFC this day as it was her day off.)

[166] Block testified that she spoke to the Grievor the next week (ie June 16) and asked her if she would sit down with Dureault and talk it out. The Grievor told Block "no, there is nothing to talk about". The Grievor was upset that Block had even brought up the topic and Block said that the Grievor didn't really accept that anything was going on between her and Dureault.

[167] At this point, Block could have and should have done more to intervene in the situation. Block just seemed to throw up her hands and asked "what can you do when someone doesn't want to be coached".

[168] The reality however, was obvious – namely, that things were not getting better on their own, but were getting worse. How could the Grievor ever improve if she never received a full explanation, and was completely unaware, of how badly Dureault felt? The Grievor testified that had she known how bad Dureault was feeling she would certainly have met with and entered into discussions to attempt to resolve the situation.

[169] At the very same time, Dureault was watching how easily the Grievor had developed a written harassment complaint against the Known Dealer and caused Affinity to pay attention to her complaints. All the while, Dureault thought the Grievor did not like her and was angry with her, resulting in an irrational fear that the Grievor might file a harassment complaint against her.

[170] Indeed, Dureault testified that when she saw how easily the Grievor could file this complaint against one of Affinity's best customers, she became very fearful that the Grievor could do the same thing to her without any trouble at all. This was the main motivation for Dureault speaking to Block on the morning of June 17.

[171] At this point, Block should have asked for some kind of workplace intervention or mediation to help settle her Department's problems. But she seems to have been overwhelmed, and decided to pass Dureault's problems onto Joyes who immediately met with Dureault.

5. Dureault reaches breaking point after limited Affinity response to her issues

[172] When Dureault appeared before Joyes on the morning of June 17, he correctly perceived Dureault's emotional state and intervened to act on what he thought was her poor treatment from the Grievor. Joyes deserves credit for recognizing the seriousness of the situation. On the other hand, he appears to have accepted most everything Dureault alleged without much else to go on, other than her obvious distress right in front of him. There is another way of looking at what happened that morning and why Dureault was so upset.

[173] Standing back from the combined testimony of all the witnesses, Dureault displayed an increasing level of discomfort starting back in February when she first spoke to Block about her problems with the Grievor. The discomfort continued until it ended with the suspension of the Grievor based upon her allegations of harassment made early in the morning of June 17. When that happened, she was very upset and near some kind of a breaking point. The question is what was the cause of this turmoil and what, if any, was the responsibility of the Employer in this sequence of events from February to the termination of the Grievor.

[174] It is helpful to recall that on Friday June 12, Dureault accused Loi and the Grievor of texting behind her back and was proved right, resulting in what one witness called a "meltdown" by Dureault. She was sent crying to the quiet room and ultimately sent home. She told Block she "didn't know why Loi and the Grievor were ganging up on her", and she listed a whole series of complaints.

[175] That led Block to meet with the Grievor on June 16 (she wasn't at work on the 12th). The Grievor told Block she did not want to sit down and talk through the issues with Dureault. Block reported this to Dureault who could also see that Affinity was very busy responding to the Grievor's harassment complaint against the Known Dealer. Nobody appeared to be doing anything about her fears of what the Grievor would do to her.

[176] Dureault testified she was going home crying every night. She felt there was no hope of any resolution of her issues with the Grievor through dialogue. Indeed, when she came to see Block on the morning of June 17, Dureault's eyes were red, she looked distraught and said she was so depressed she had considered suicide the night before.

[177] Block had just told her the previous day there was nothing that could be done to resolve issues as the Grievor didn't want to meet with her and had told Block she had done nothing wrong. Block did nothing in response to this retort other than tell Dureault the Grievor didn't want to meet.

[178] What choice was left to Dureault? She had just seen how quickly Affinity responded when the Grievor made a harassment complaint and Dureault testified she feared the Grievor would file a complaint against her.

[179] So, when she met with Block on June 17, at a time when she was in severe emotional distress, she told her supervisor she was being harassed by the Grievor to protect herself from the Grievor

making that same complaint against her. Rather than pursue the option of meeting with the Grievor which looked like a dead end, she became more assertive.

[180] Throughout this sequence of events from mid-February to June 17, the Employer had several opportunities to deal with Dureault's issues. When looked at in hindsight, the Employer must bear some responsibility for how these events unfolded up to that point and after.

6. Joyes' June 17 interview of Dureault

[181] Joyes had his interview with Dureault on June 17 starting at 9:42am. When it was over, he too now had the option to ask for a workplace intervention. Interventions of this kind are typically overseen by an experienced workplace mediation counsellor who would have encouraged each of the parties to talk through the kinds of issues that were bothering Dureault. They are also often conducted with the full cooperation of the Union, especially when two Union members are making claims against each other.

[182] At a minimum Joyes could have established a neutral framework for an investigation, rather than accept Dureault's allegations at face value and suspend the Grievor "pending a harassment investigation".

[183] Dureault presented as someone in significant emotional distress and Joyes had good reason to determine she should take some kind of paid break - whether called a leave or something else for health reasons. If Joyes had simply determined that both Dureault and the Grievor needed some time off to let things cool down, he could have established a framework that would have allowed for a much more neutral investigation over the next 3 weeks.

[184] It is entirely conceivable that had some form of intervention taken place at this time, that the problems between Dureault and the Grievor might have been resolved and made workable, especially if a mediator had been called in with the cooperation of the Union. Ultimately, this could have allowed the department to work more effectively and given the Grievor the opportunity she sought for a Union career which was made impossible by her termination.

[185] However, that is not what happened. Joyes testified that he too was upset after his interview with Dureault and said he had concluded that the Grievor's conduct had harmed Dureault. He therefore – without ever speaking to the Grievor and hearing from her – decided to issue a suspension letter and suspend her "pending a harassment investigation". This letter was the beginning of an investigation that from the very beginning had built into it a pre-conceived notion that the Grievor might have harassed Dureault. Other problems in the investigation soon followed as well.

[186] The manner in which Joyes decided to proceed from that point onwards caused a number of further problems that could have been easily avoided. As mentioned above, Joyes could have also put Dureault on paid leave and encouraged or recommended that both parties engage in a workplace mediation with instruction that they could not return to work until they had resolved the issues

between them and were both comfortable working at the DFC or had agreed to some other workable solution.

[187] Whether he suspended both or just the Grievor or neither of them, he did not have to label the investigation a "harassment" investigation, unless and until further information was developed. Instead, he testified that he accepted from the beginning the Grievor was causing harm to Dureault.

[188] Joyes also had the option to retain a third party investigator experienced with such investigations to make an assessment of the nature of the problems reported by Dureault and propose some remedial action. Joyes even testified that he actually did consider this option, but decided to do it himself rather than follow his instinct. In hindsight, Joyes made two fundamental mistakes: a) he should never have combined the two investigations; and b) he should have hired an outside investigator for at least one of the Complaints.

[189] The Union argued there should have been an independent investigation for another reason, namely that Joyes had a conflict of interest. According to the Union, Joyes had the power to discipline and was on the Employer's bargaining committee and as such should not have been involved in an investigation of a Union employee who was also on the bargaining committee. These facts if true do display a conflict. The Employer denied Joyes was on the bargaining committee. Regardless, on the surface, some conflict appeared to exist in the Union's eyes and that appearance of conflict would have been reason enough to retain an outside investigator.

[190] Finally, the manner in which Joyes conducted the investigation, particularly his interview with the Grievor was very poorly executed. Joyes testified he was "shaken" by Dureault's first meeting with him on June 17. By this point, he had clearly concluded he was facing a tense situation and pretty much accepted everything Dureault alleged against the Grievor.

[191] From the outset, Joyes appears to have been sold on the idea that the Grievor was the sole cause of the inter-personal problems with Dureault. There is no evidence he stood back and tried his best to give the Grievor a fair opportunity to explain herself. Confirmation of that attitude is evident from the analysis of the Harassment Assessment referred to above at para 101. Remember that the criticism levelled at the Employer is that it failed to reach a conclusion on the question it posed for itself at the beginning of the document – namely, did the occurring events "match Affinity Credit Union's recognized definition of harassment"? The Employer never engaged in any analysis whatsoever of this question. The Employer should have set out the requirements of the SEA Harassment Threshold and then summarized its investigative conclusions in the context of the definition. The whole document begs the question why was this analysis skipped over? The most obvious answer is that the writer of the report had already come to a conclusion about the answer to this question and there was no perceived need to explain it. The report simply jumps to the conclusion that "Jaclyn's conduct and behaviors towards colleagues contributed in creating an unwelcoming and toxic work environment" and then recommends the termination of the Grievor's employment.

[192] Rather, after interviewing everyone else in the DFC with respect to both Complaints, he met with the Grievor on July 10. That interview is summarized below. By this time based on the leading

questions he asked and his failure to give the Grievor a fair opportunity to answer the allegations against her, he had clearly made up his mind as to the guilt of the Grievor.

7. Principles of a proper investigation – Affinity Policy and case law

[193] It is important to interrupt the chronology at this point to summarize the Affinity corporate policy on how such an investigation is to be conducted. Excerpted below from the Affinity HR Manual (put into evidence by Joyes himself) are some of the key aspects of that policy which were applicable to the Grievor's interview:

"Affinity HR Manual: Section 4.7.4 Investigations"

"Investigations will be conducted by the HR Department in conjunction with the VP Compliance, **in accordance with industry best practices** *(emphasis added)*. Following are the principles that will guide all investigations:

- The HR Department will conduct the investigations independently – outside the control of management in the area in which the investigation will take place.

  …
- All parties are assumed innocent unless and until evidence indicates otherwise.

  …
- Investigations will be objective. External investigators may be utilized as the magnitude, complexity or sensitivity of the matter dictates.

  …
- Accused individuals have the right to know the general nature of the complaint or allegations against them in order to be able to properly defend themselves.

- Witness statements may be disclosed to the complainant or respondent, depending on the circumstances in an effort to validate or explain the statement contents."

[194] In addition to the above principles which should have guided Joyes, but which were almost completely ignored, there is significant case law setting out what is necessary for a proper investigation. Presumably that is what the policy is referring to when it states that investigations will be conducted "in accordance with industry best practices". The Union Legal Brief outlined a number of the leading cases. The cases are surprisingly consistent in their elaboration of the principles that must apply and must surely be the basis of the "industry best practices" incorporated into these corporate policies. Presumably Joyes learned these best practices in the investigation training he testified he had received.

[195] Three cases in particular standout as worthy of attention. As part of the Union submission in support of an order for aggravated damages, it put forward several cases involving faulty employer investigations. One that has some similarities to this dispute is *Vision Loss Rehabilitation Alberta and*

UFCW, Local 401 (Belyea), 147 CLAS 200, 325 LAC (4th) 173 ["Vision Rehab"]. That case involved a grievor accused of sexual harassment after three employees came forward to the employer as alleged witnesses. The alleged victims did not raise any concerns with the employer. The grievor suggested the alleged witnesses were upset about being displaced in a recent bumping process in the department. The following quote from Arbitrator Oviatt is helpful:

> "88. In this case the Employer's investigation and termination were not done in bad faith, but they were unfair, and that unfairness was a marked departure from being reasonable. The Employer interviewed the Grievor during its investigation, but it never advised her of the nature of the allegations against her…The Grievor did not get a chance to respond to that allegation and the Employer did not consider her position in finding she had sexually harassed Mr. Mailloux and others. This was a marked departure from being a reasonable investigation.
>
> "89. Similarly, the Employer did not advise the Grievor who she was accused of harassing. Questions posed to her were most often vague and compounded with up to five questions being asked at once. It also does not appear that the Employer considered her outright denials of certain allegations…"

[196] A second case with closer connection to Saskatchewan is *Oberg v. Board of Education of the South East Cornerstone School Division No. 209 of Saskatchewan* 2020 SKQB 96 (confirmed on appeal at the *Saskatchewan Court of Appeal at South East Cornerstone School Division No. 209 v Oberg 2021 SKCA 28*). In this case both the Court of Queen's Bench (as it then was) and the Court of Appeal made a thorough review of the requirements of procedural fairness in this Province. Neither the Union nor the Employer cited this case in their briefs, although it is directly relevant and may well be the controlling jurisprudence in this Province.

[197] The case involved the administration by a public body of a procedure authorized by statute, so in that respect it is different from this dispute. However, the QB Court went to some length to describe the basic tenets of procedural fairness applicable in general terms. The Defendant Board had its own investigation policies which it did not follow and the impact of the Board's decision on the individual was very significant (he was demoted from a Principal's position). In the Court's opinion, the failure of the Board to follow its own policies and the significance of the outcome on the employee were on their own sufficient justification to support the Plaintiff. As the Court explained, the obligation to provide Oberg with "sufficient particulars of the allegations" and "a fair opportunity to respond" were perhaps the most significant breaches of the duty, "as they are the central tenets of procedural fairness: knowing the case one has to meet and being given an opportunity to meet it" (at para 42).

[198] Citing these same two principles, the Court of Appeal endorsed this conclusion (at para 103): "The Chambers judge did not err in her conclusion that the investigation was not procedurally fair." Accordingly, the Court of Appeal then determined that the decision of the Board was void, the penalty imposed was unreasonable and Mr. Oberg was reinstated. In discussing the issue of voidness, the Court of Appeal concluded (at paras 119 and 122)

> "I begin by observing that, in declaring the Decisions to be void *ab initio*, the Chambers judge acted consistently with the direction given in *Dunsmuir* (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 115, [2008] 1 SCR 190 [*Dunsmuir*])….that the effect of a breach of procedural fairness is to render the dismissal decision void *ab initio* (at para 108 of *Dunsmuir*)…
>
> "Here, the Chambers judge concluded, and I agree, that the consequences of the breaches of procedural fairness affected the substantive outcome of both Decisions."

The Court of Appeal made it clear that it did not have to decide whether every breach of procedural fairness rendered a decision void, but in a case where such breaches affected the substantive outcome, that should be the result. That was clearly the case in *Oberg* and it is clearly so in the circumstances of this case, where the Board has determined there was no harassment and that might well have been the conclusion much earlier if the Employer had followed its own guidelines for a proper investigation. The directions of the Saskatchewan Court of Appeal on the issue of voidness must be adhered to in this Award.

[199] A third case with a connection to Saskatchewan is *University of Saskatchewan and CUPE Local 1975 (Jerry Jumalon)* cited by the Union at tab 21 of its brief ("*Jumalon*"). Arbitrator Ish identified several breaches of procedural fairness in *Jumalon* that bear some similarity to the present case (although much less egregious) and did not find the process to have resulted in a conclusion which was void *ab initio*. However, apart from the fact that the breaches were less serious, the Employee admitted the wrongdoing in *Jumalon*" which makes the case fundamentally different from this case. The investigation process in *Jumalon* only confirmed what the Employee admitted to at the hearing, all of which was confirmed by video evidence displaying the misconduct. It would therefore have been meaningless and completely inappropriate to have considered the investigation void, as the unfairness could not have been considered to have any effect on the outcome. In this case a fair investigation might well have come to the same conclusion that the Board did – namely, that the Grievor did not harass Dureault.

[200] Combining the general principles of Affinity's corporate policy on investigations with general principles from the case law which are particularly applicable to the circumstances of this case, one finds the following requirements:

a) The investigation must be conducted in accordance with "industry best practices".

b) The Grievor should be assumed innocent unless and until evidence indicates otherwise.

c) The investigation must be objective.

d) The Grievor must be given sufficient particulars of the allegations against her and a fair opportunity to respond.

e) Witness statements should be given to the Grievor to allow her an opportunity to explain them.

[201] Unfortunately, none of these principles were adhered to by the Employer in the July 10 interview of the Grievor.

8. Status of investigation immediately before July 10 interview with Grievor

[202] It is also helpful to summarize the complete factual predicate to the status of Joyes' investigation immediately prior to his interview with the Grievor. This was the situation on the afternoon of July 10 at 1pm when he began what became a 2 hour and 50 minute session with the Grievor:

a) The Grievor had filed the Known Dealer Complaint on June 10;

b) On June 17 the Grievor was suspended with pay "pending a harassment investigation" and was told "you are not to contact or have any communication with **any** employee of Affinity Credit Union;

c) The President of the Union, Lucy Figueiredo, testified on behalf of the Grievor and stated that she told Humm shortly after the Grievor's suspension that the Union had a special process to be followed when two different Union members were involved in claims against each other. The whole purpose of the process was to insure that everyone had proper support from the Union. Nothing ever happened after that to allow the Union a chance to participate or be informed about the progress of Joyes' investigation.

d) From June 17 to July 10 the Grievor testified she tried without success on many occasions to get further information about what was going on with respect to this harassment investigation. She said she repeatedly called Keith Tsang, the Union rep assigned to assist her but he told her he was unable to give her any information. She also testified she had had trouble sleeping during this time and was very upset.

e) The Union similarly testified that it had tried to get information about what was going on and never received any information of any kind. Figueiredo said she had many phone calls to Joyes to get further information but was unable to speak to him. It appears she did not even know until July 8 that Kathy Vance, a shop steward had been sitting in on Joyes' employee interviews.

f) On July 8, Figueiredo sent an email to Joyes confirming the missed phone calls and advised Joyes she wanted him to know that she had previously spoken to HR Manager Lolita Humm about the process to be followed when there are allegations of member to member misconduct. She said this situation necessitated the need to appoint separate Union reps for each member. Her email says (U6):

> "I have asked for the details of the complaint in order to designate a different representative for the member who initiated the complaint, but as of yet have not

received that information…If you can share with me the information needed to proceed, I can assign the rep and ensure that the process of investigating the alleged misconduct is expedited and fair to all involved."

g) However, at this point the entire investigation was complete except for the meeting to be held on July 10 with the Grievor and neither the Union nor the Grievor had been given any information. The Union had only been told that there was a harassment investigation involving the Grievor and another of its members, notwithstanding attempts from several people to obtain further information.

h) In late June bargaining was very active for a new Collective Bargaining Agreement. Figueiredo also testified that she was told by Affinity that all bargaining would cease unless and until the Grievor was removed from the Union's Bargaining Committee which then took place.

i) When the Grievor walked into her July 10 interview with Joyes she had no information as to why she had been suspended on June 17 other than the reference to the "pending harassment investigation" in her suspension letter. She had no idea what the purpose of the meeting was on July 10 and she presumed the meeting would be dealing with her Known Dealer Complaint, although she was not sure and perhaps also a second harassment complaint about which she had only second or third hand information.

j) Also bear in mind that the Grievor had never spoken to Dureault about any of this and had no idea of Dureault's allegations of harassment. The Employer had never even given her the courtesy of telling her that Dureault was now making allegations of bullying and harassment against her.

k) Indeed, the Employer never put forward any evidence to establish that the Grievor knew or should have known anything about her conduct was upsetting to Dureault other than that one or two fellow employees confirmed the Grievor could be "curt" in her replies and often did not say "good morning". No one had ever told the Grievor of the effect on Dureault and Dureault had never told the Grievor. Block did not tell the Grievor.

l) The Grievor's testimony was that she did not know Dureault was upset and she wished that someone had told her. She did testify that she thought Dureault hated her because of the feedback Loi was giving the Grievor and indeed in the interview summarized below, she explicitly told Joyes "she did not want to cause harm to anyone".

m) She also testified that had she known how upset Dureault was, she would have agreed to speak to her when Block raised the issue.

[203] The above is a fair overview of the state of the investigation from the perspective of the Union and the Grievor when they walked into the July 10 interview with Joyes, based as it is upon the combined evidence of many witnesses, none of which was contradicted.

9. Joyes' July 10 "interview" of the Grievor

[204] The notes of this interview (like many other witness interviews in his investigation) is contained in an exhibit (E24) which consists of 30 pages of notes taken by Eli Wachniak on his computer as the discussion took place.[9] Present at the meeting was Joyes, Wachniak, Tsang and the Grievor. It began at 1pm.

[205] If Joyes had followed "best industry practice", prior to July 10 he would have given the Grievor a complete summary of the allegations against her in advance of the meeting. That would include giving her a copy of the notes from every person interviewed in the investigation prior to July 10 and a copy of all the texts in Joyes' possession. All of that would be provided in advance of the hearing with sufficient time for the Grievor to review the nature of the claims and prepare herself for the kind of interview she went to on July 10. Unfortunately, that never happened and neither the Grievor nor even the Union was given enough information to prepare in advance or at any time for the July 10 interview.

[206] Joyes testified that the purpose of the meeting was to present the Grievor with the information he had collected so she could respond and tell her side of the story. However, already in his initial presentation to the Grievor of information regarding the Dureault Complaint, he is quoted as saying "there was some information presented…that in the same light were construed to be living up to a threshold of harassment." That text and the following 30 pages all read as if Joyes had already concluded the Grievor was guilty of harassing Dureault.

[207] Instead of the objective and neutral interview process required by best industry practice and Affinity's own corporate policy, Joyes set up, and the Grievor walked into, what can only be described as something of an ambush designed to first put her in an awkward and defensive position, and then confront her with unexpected and inflammatory suggestions about her conduct at the DFC and elsewhere over the past 12 months – all put forward in a setting where the Grievor is often crying, distraught and in the middle of a panic attack where she was unable to speak.

[208] The Union brief described the manner of this interview as "unjust…(and done)… with anger and hostility" and it certainly appears this way to a neutral reader now trying to discern what was going on from the 30 pieces of paper that make up E24. The Grievor testified that's how it felt to her. The Employer denied the Grievor the ability to know the allegations against her ahead of time, and then interrogated her at length about the allegations over an almost 3 hour interview. When the allegations were finally put to her near the end of the interview, the Grievor was "distraught and incapable of responding" in the words of the Union Legal Brief.

[9] *Cf* footnote 7 in para 122 above with respect to the *verbatim* appearance of the text in these Exhibits.

[209] Joyes described the interview as "difficult" for several reasons. In particular, Joyes said Tsang, the Union representative, was "obstructionist". He said Tsang interfered and asked questions in place of allowing answers from the Grievor. Even after a warning from Joyes, Tsang answered in place of the Grievor and Joyes said it made it difficult to present all the information to the Grievor. Joyes concluded the interview was not successful.

[210] In fact, however, a more accurate summary of the whole 3 hour process was that its design by Joyes made it unsuccessful. On several occasions Tsang properly intervened to object to what was going on. Tsang and the Grievor walked into the meeting without any idea of its purpose.

[211] It is only on page 6 of the notes that Joyes first starts talking about harassment by the Grievor and Tsang says he is confused.

> "If this is harassment against Jaclyn now, you've found some information, the Employer presents what's being accused. Perhaps it would be more open if you would be more open. At this point she doesn't know what she's being accused of harassment of….The Employee has the right to know that."

At this point, Tsang should have walked out of the interview and demanded the Employer provide them with a summary of the allegations against the Grievor and arrange for a follow-up meeting after the Grievor had had enough time to understand the allegations against her. Unfortunately, that never happened.

[212] This kind of event occurs several times during the 3 hours. At one point the Grievor responds to Joyes saying "I am having a hard time putting words together right now. I do not intend that, I've spent the past three weeks being completely awake. My intent is never to hurt anybody. I want to know the steps going forward."

[213] At this point, Tsang starts to get frustrated because of the lack of specifics. Joyes responds with what is simply more general complaints typical of the Employer's allegations:

> [Tsang] "Does Eileen have a specific incident of what triggered harassment?"
>
> [Joyes] "Eileen's specifics are in regards to multiple items where Jaclyn had ignored her, not responded to her, being a participant in convos, where Jaclyn had showed pictures of cats, dogs…"

[214] From p.19 until the bottom of p.24 (E24) the questions from Joyes and the topics being considered are very convoluted and difficult to summarize because they jump around starting with the first substantive allegations about the Dureault Complaint all interwoven with the presentation to the Grievor of many more of the Skype Messages.

[215] The result is the Grievor becomes incapable of making any reasonable response. At the end of p.24, the Grievor says "So at… (crying) At this point we are going in circles. I want to know what steps are going forward. Is that fair to say Keith? I'm not sure how much more I can digest."

[216] The first detailed information about the Dureault Complaint (although not described as such) is the following quote from Joyes:

> [Joyes] "Eileen brought forward bullying, harassment, and actually characterized it as feared because of your union position. She walks on eggshells around you, that you will lodge a harassment complaint against her, had conversation about this is how you deal with this in the centers and is concerned about the impact it would have if, she is not on your good side that was echoed by other members in both DF and Martensville. There are concerns in regards to how you treat people who do not agree with you, how you treat people end up not agreeing with you or being correct, and there's a view from a lot of people when someone overrules you, when someone points out you are incorrect, that your tone towards them changes, ignoring them, refusing to speak to them, hiding in the vault, talking to them behind their back including Jolene. Conversation in regards to yourself and Erin that involve around Jolene. Convos with Katie that evolve around Michelle and in general conversations about anything in regards to it and there is a view from those examples they follow along because they are scared of you (pauses)"
>
> [Grievor] "I can't do anything (begins to cry)
>
> [Tsang] "That was quite harsh"
>
> [Grievor] "Sorry, I just need a minute"

[217] At this point the Grievor testified that Joyes was speaking in a very hostile and loud manner and "it seemed to me that he went on forever". This was really the climax of the interview and everyone was upset. In response to Union counsel's question as to why she only responded to one of these allegations, she says "I didn't understand"

[218] Eventually, Joyes gets back to asking the Grievor again about more Skype Messages – this time he refers to Exhibit 20a) where she is quoted as saying "fuck she is useless" and asked to explain. The Grievor testifies that this was inappropriate language, but the context was that this was said to someone who understood her frustration because she was doing so much more work than a coworker.

[219] Throughout the entire process from June 17 to July 16, Joyes as well as Humm also displayed a misunderstanding of the requirement of confidentiality in an investigation such as this. Joyes appears to use the requirement of confidentiality, not to protect people or the process the way it is intended, but as a means to control the outcome of the investigation.

[220] One of the more egregious examples of this attitude is that, after Joyes presents sample Skype Messages to the Grievor and lays them in front of her, she tries to explain some of the context to the texts but becomes very upset for the third time in the interview. She says she can't remember some aspects of the texts and asks if she can have copies of them to take home with her, presumably so she can provide better answers to Joyes about what was going on when they were sent, which in some cases was a year earlier. Joyes takes back all the Skype Messages and refuses to give the Grievor copies of them.

[221] Joyes' attitude about confidentiality obligations in this kind of process likely explains why Vance never reported information about the Dureault Complaint to the Union. There simply was no reason he could not have given copies of the texts to the Grievor.

[222] If the Grievor had been given the witness interview statements and especially the Skype Messages in advance of her meeting with Joyes, she may well have come to the meeting recognizing how bad she looked in the messages and had the kind of response that Loi had in facing up to her conduct.

[223] Joyes' Harassment Assessment concluded with the completely misleading statement that "Jaclyn and her Union representative present were interviewed on July 10 and were dismissive of any evidence presented and provided no further information that would refute the allegations". That summary of what the Grievor tried to provide to Joyes in the July 10 interview is so inaccurate, it makes one wonder what was the purpose of making such a conclusion.

10. Conclusion: the conduct of the Employer undermined its entire case

[224] As a direct consequence of Affinity's performance in the management of the issues between the Grievor and Dureault by both Block and especially by Joyes, the Board has concluded that the Harassment Assessment itself must be considered as void, along with the determination that the Grievor harassed and bullied Dureault. The reasoning behind this conclusion is discussed in more depth in para 274 a) below.

PART VIII. ISSUE NO. 4: What is the appropriate discipline for the misconduct demonstrated in Part VI?

1. General Seriousness of the Misconduct

[225] The Board has concluded that the Grievor's conduct with respect to the Skype Messages constituted general misconduct and is much more serious and deserving of discipline than the Employer apparently considered appropriate. They are not mentioned in the Grievor's termination letter and the Employer felt Kati Loi's texting and messaging conduct deserved only a three day suspension.

[226] The lack of respect and dignity shown to fellow employees by the Grievor as displayed in the general Skype Messages is particularly bad and can be fairly said on its own to have contributed to a toxic work environment in the DFC.

[227] Additionally, the Board finds and determines that the Actual Negative Acts were also deserving of discipline because of the inference of negative conduct by the Grievor that can be fairly drawn from the existence of the Five Dureault Skype Messages.

[228] With respect to the Skype Messages, there was some limited evidence about the involvement of Loi in exchanges to and from the Grievor. Although there was not enough evidence to understand the full impact of Loi's activity in this regard, the discipline for her misconduct seems low at only a three day suspension. Neither of the Union or the Employer seem to have understood the seriousness of this conduct.

[229] The Employer explained that Loi's discipline was affected by the fact she immediately expressed remorse for her actions, which increased as time went on. Moreover, Joyes also explained that because Loi cooperated in the overall investigation, that too had impacted the length of her suspension.

[230] The Union then took up this analysis. It acknowledged the Skype Messages as deserving of discipline and argued the Grievor and Loi had equal responsibility for the wrongdoing. Accordingly, the Union accepted the limited discipline for Loi and suggested the same suspension should be assessed for the Grievor's misconduct.

[231] Unfortunately, throughout the hearing there was not a lot of attention paid to the extent of the impact on the working atmosphere of the DFC as a result of the Skype Messages. However, that impact can be estimated. The Employer put into evidence 21 exhibits representing texting communications between the Grievor and various Affinity personnel on 21 days between June 11, 2019 and June 10, 2020.

[232] Importantly, there was no effort made to summarize all the messaging and texting activity by the Grievor during this time period, so it is unclear how much more existed. Moreover, what was disclosed in these exhibits were only messages which were found on Affinity's Skype messaging system. There were several other exhibits which showed considerable ongoing texting activity between Loi and the Grievor on their personal devices. Loi testified that she engaged in texting regularly and without disclosing any of them in her first interview with Joyes, she did say about half of them would be derogatory.

[233] The Grievor seemed to think it was acceptable to engage in personal Skype messages as long as it didn't interfere with her work. She testified that was her response when Block raised the issue of the frequency of her messages in the probation review. When asked about the interference with the person receiving the messages, the Grievor said she assumed that person wouldn't answer her messages unless she had the time. This is a somewhat perverse observation.

[234] The whole issue of personal texting in the modern work environment is perplexing and often causes difficulties for Employers. Block testified to those problems and said she felt some limited personal texts were not problematic if they were undertaken because of a valid personal or business issue during the work day. Indeed the IT Policy seems to allow something of that kind. However, the messaging activity of the Grievor and of Loi as presented to the Board served no valid personal or business purpose of any kind.

[235] In fact, when one looks at the complete exchanges disclosed in the exhibits, most of them carry on throughout the day with 9 out of the 21 messages taking 2 or sometimes 3 pages to display the entire exchange. The combination of the amount of personal time devoted to these Skype Messages on these 21 days combined with the derogatory content in many of them makes for a total picture which the Board has determined created a serious problem in the DFC work environment. As outlined above, the Employer's attitude to the Skype Messages is confusing in part because they are ignored in the Termination Letter.

[236] Apart from the impact on the work environment, the Skype Message practices of the Grievor clearly constitutes a breach of the IT Policy and therefore a breach of the Code. The discipline for this kind of misconduct should be significant.

[237] In addition to the above, the evidence made it clear that for the DFC to be effective, it was absolutely necessary that all 6 members work closely together. The Skype Messages undermined that business requirement by not only distracting others from their work, but by creating and recruiting people into cliques which undermined the need to work together. Bear in mind the DFC was the only unit at Affinity where the personal bonus remuneration of the members of the DFC was dependent on the performance of the group, rather than their individual performance.

2. Other Considerations for Appropriate Discipline

[238] Arbitral practice has developed a number of indicia to consider in assessing discipline for conduct established to be "just cause". The Employer's brief quoted summary information from a leading text on this subject. In addition to the seriousness of the misconduct, the Employer listed the following additional factors that should be considered: seniority, disciplinary record, rehabilitation and deterrence, provocation, Employee state of mind, admission of misconduct and consistency with Employer practice.

[239] Considering all of these factors, the Board has concluded that the last two factors are not relevant as the Grievor was never given a fair opportunity to consider her conduct until this hearing and the only discipline for texting in evidence was unique and not applicable – namely, the three days for Loi. As well the Grievor's discipline record is not material because of the sunset clause which eliminates most of whatever history may have existed so that it was not available to the Board.

[240] The factors of the Grievor's seniority, the need for deterrence at Affinity, her lack of real provocation, and state of mind all suggest a more serious penalty. At the time of her termination, the

Grievor had been at Affinity for almost 10 years with significant experience in different positions throughout the organization. Similarly, the frustration she used as the excuse for her messaging does not pass muster as all employees must learn to work with people or work habits they don't like. Most importantly in the Board's view, there is a need to send a message to all employees that the kind of texting and messaging practices the Grievor engaged in will not be tolerated.

3. Conclusion on discipline for the Skype Messages and the Actual Negative Acts

[241] Accordingly, considering the seriousness of the messaging activity shown in the Grievor's Skype Message practices and her conduct in the Actual Negative Acts, the Board has determined that the appropriate discipline for such misconduct considered as a whole should be a suspension of one month plus a reduction in the amount of monthly severance per year of service by a factor of 10%. The suspension would normally be combined with an order for reinstatement outside the DFC following the suspension and perhaps an order for training on the resolution of workplace conflict. However, as discussed below there will be no such order for reinstatement. How the suspension of one month and the reduction in general damages factors into the overall damage calculations is explained in more depth in Part X below.

[242] The Employer argued that if termination was not upheld by the Board, that a suspension of 12 months would be appropriate. In *Jumalon,* Arbitrator Ish determined that a six month suspension was appropriate for theft. However, in this case the Employer undermined its own argument by giving Loi only three **days** for her messaging conduct which was arguably as bad as that of the Grievor. In several of the Exhibits, Loi is the instigator of the negative conduct. So one month and the 10% reduction in general damages is not only consistent with the general guidelines for appropriate discipline, it is a reasonable determination of accountability relative to the discipline for Loi, a standard established by the Employer itself. (The overall financial cost of this combined discipline is discussed in footnote 14 below.)

PART IX. Damages

1. Damages in lieu of reinstatement

[243] Both the Grievor and the Employer suggested that the remedy of reinstatement was not appropriate in the circumstances. The Employer obviously did not want reinstatement as it terminated the Grievor. In this case where the DFC required a close-knit group working together in a constrained physical space made up of six cubicles adjacent to each other, it is clear why the Employer would not want reinstatement, at least at the DFC.

[244] Several of the Employer witnesses testified that the working atmosphere was improved after the Grievor was suspended. This of course does not mean that the Grievor was the cause of all the problems at the DFC, but from the Employer's perspective, improving the operating effectiveness of the DFC team was obviously high on its priority list. Proof that had been achieved by the removal of

the Grievor confirmed in the Employer's mind its decision to terminate, regardless whether that was done properly or not.

[245] As well, Joyes testified that he had looked at reinstatement, but decided it was inappropriate because it sent the wrong message to other Affinity employees, but also because "there was no spot in a union shop in Saskatchewan where the Grievor could be relocated". Joyes was not cross-examined as to how seriously he had considered this option. His testimony is difficult to reconcile with other aspects of his conduct, such as the comment quoted in the next paragraph.

[246] On the other hand, the Union announced during the hearing and the Grievor subsequently testified that although she originally was looking to reinstatement as a remedy, she had decided that due to the nature of the Employer's investigation and the tone of the Employer's testimony, she would find it too difficult to return to work. Being referred to by Joyes as a "toxic mold that must be removed" was one such aggravating factor. The employment relationship between Affinity and the Grievor is thus no longer viable, particularly after the manner in which the three hour interrogation by Joyes was conducted, resulting in the emotional damage the Grievor recounted in her testimony.

[247] Reinstatement normally remains the primary remedy for an improperly terminated employee. However the Board has concluded that there are "exceptional circumstances" in this case which justify the alternative remedy of damages in lieu of reinstatement. The Employer argued that Article 16 of the CBA limited the Grievor's right to severance pay to one week's pay for each year of service up to a maximum of fifteen weeks' pay where an employee is "discharged for other than just cause. In this case however, there should not have been any discharge and the Grievor would normally be entitled to reinstatement. The alternative remedy of "damages in lieu of reinstatement" is not some kind of "severance pay" as conceived in the CBA or under common law (although it may include some element of that concept). It is designed as the cases make clear to compensate the Grievor not just for lost salary or lack of notice, but also for the value of employee benefits under a collective agreement for an indefinite period of time which is a very broad concept. Union employees for example – unlike common law employees – cannot be terminated except for just cause. Damages in lieu of reinstatement are calculated in an attempt to make a gross estimate of the value of that total package of benefits. Thus, such damages may include some element of "severance pay" as contemplated in Article 16 and nothing in that clause precludes that. However, nothing in Article 16 limits the quantum of damages in lieu of reinstatement to "severance pay" as described in that clause.

[248] There is also significant case law on how to calculate such an award. In certain circumstances, where an employee should be entitled to reinstatement, but where reinstatement is precluded by extenuating circumstances, an employee may be awarded damages in lieu of reinstatement. The Supreme Court explained the concept as follows[10]:

[10] *Alberta Union of Provincial Employees v Lethbridge Community College*, 2004 SCC 28. The approach has been adopted in Saskatchewan in, *inter alia*, *Canadian Union of Public Employees, Local 4777 v Prince Albert Parkland Health Region*, 2016 CanLII 48150 (SK LA).

> 55 I am convinced that the arbitration board properly considered the whole of the circumstances in concluding that an award of damages was more appropriate than reinstatement of the grievor. The arbitrator considered, among other factors, the *bona fide* reorganization of the grievor's former position, the difficulty with which an alternative position may be found for her, and the likelihood that reinstatement would prolong the ultimate resolution of the issue and present further disputes in implementation. The arbitration board recognized that the grievor had been dismissed without cause, contrary to the terms of the collective agreement, and was thus owed compensation. On balance, the board's comments reflect concerns about the continued viability of the employment relationship, and fall squarely within the ambit of exceptional circumstances as reflected in the arbitral decisions noted above.
>
> 56 As a general rule, where a grievor's collective agreement rights have been violated, reinstatement of the grievor to her previous position will normally be ordered. Departure from this position should only occur where the arbitration board's findings reflect concerns that the employment relationship is no longer viable. In making this determination, the arbitrator is entitled to consider all of the circumstances relevant to fashioning a lasting and final solution to the parties' dispute.
>
> 57 In light of the above, I am not persuaded that the arbitration board acted in an unreasonable manner by substituting an award of four months' notice for reinstatement. The arbitration board took due account of all the circumstances before it, and reached a reasonable conclusion as to the continued viability of the employment relationship. This decision fell well within the bounds of arbitral jurisprudence requiring a finding of exceptional circumstances prior to substitution of remedy. It is worth noting that a similar decision was taken by the arbitration board in the *Van Steenoven Grievance*, *supra*, at para. 32, where the arbitrator denied reinstatement on the basis that the grievor was unable to perform the work required of her position, and despite the employer's failure to properly terminate her employment. The board in that case viewed itself in possession of "sufficient evidence" indicating that reinstatement would not provide a lasting solution.

[249] Awarding damages in lieu of reinstatement is not unfamiliar to arbitrators in Saskatchewan. Arbitrator Ish, in *The City of Regina v The Regina Civic Middle Management Association*, summarized the respective approaches by Saskatchewan arbitrators. In particular, he noted the summary of the approaches by the Saskatchewan Court of Appeal in *IATSE* 2008 SKCA 136 and by Arbitrator Stevenson in *The Government of Saskatchewan and S.G.E.U. (Irene McGunigal)* (Supplementary Award, March 28, 2011, unreported, Stevenson, Q.C.) In considering these cases, Arbitrator Ish stated[11]:

> [18] It is acknowledged by virtually all arbitrators that the determination of the quantum of damages where compensation is considered the appropriate remedy is very difficult. While lost salary is relatively easy to quantify, the value of employee benefits under a collective agreement are considerably more difficult. As acknowledged by Arbitrator Stevenson in *The Government of Saskatchewan* case*, supra,* "Arbitrators and the Courts have acknowledged that it

[11] *Regina(city) v Regina Civic Middle Management Association*, 2014 CanLII 86901 (SK LA).

is reasonable and efficient to make a gross estimate of the value of the employee benefits under the Collective Agreement in awarding damages in lieu of reinstatement". (para. 32)….

[19] The traditional method for determining damages in a case such as this was to apply the common law principles for the assessment of damages which calculated a reasonable period of notice of dismissal and compensating the Grievor for that period of time, subject to the duty to mitigate. In recent years several arbitrators have taken a different approach. They have determined that compensation should reflect the value of the loss of the employee's rights under the collective agreement. Arbitrator Raynor in the *De Havilland* case*, supra*, was one of the first arbitrators to adopt this approach. Other cases include *NAV Canada and I.B.E.W., Local 2228* (Coulter), [2004] C.L.E.D. No. 617 (Kuttner); *Health Sciences Centre and C.U.P.E., Local 1550* (Werner) (2001), 2001 CanLII 62079 (MB LA), 96 L.A.C. 4th 404 (Graham); and *Metropolitan Toronto (Municipality and C.U.P.E., Local 79 (*Dalton) (1999), 1999 CanLII 35953 (ON LA), 78 L.A.C. (4th) 1 (Simmons) and (2001), 2001 CanLII 62110 (ON LA), 99 L.A.C. (4th) 1 (Simmons). The approach that assesses the value of the loss of a Grievor's rights under the collective agreement in effect views the loss of the employment as the loss of a capital asset rather than a replacement of salary. The consequence of determining a monetary value for loss of employment caused some arbitrators to conclude that the rights, and the value of those rights, were "crystallized" at the date of termination. A damage award was made for the loss of rights which, among other things, did not take into account any mitigation of damages or the conduct of the grievor. This, of course, was a vast departure from the common law that saw damages as a replacement of salary representing an ongoing loss from the time of termination, which imposed upon a grievor a duty to mitigate.

[20] In Saskatchewan an excellent summary of the respective approaches is contained in the decision of the Saskatchewan Court of Appeal, written by Justice Sherstobitoff, in the *I.A.T.S.E.* decision, *supra.* Also, the Supplementary Award of Arbitrator Stevenson in the *Government of Saskatchewan* case, *supra*, contains an excellent discussion of the principles and factors that should be taken into account in awarding damages in these situations. The upshot of these two decisions is that regardless which approach is adopted virtually the same factors must be taken into account. In the *I.A.T.S.E.* decision the Saskatchewan Court of Appeal determined that it did not have to decide whether the loss of rights approach or the common law assessment of damages was the correct one. Nevertheless, the Court clearly acknowledged that in assessing damages it is appropriate to place additional value on the loss of rights conferred to an employee by a collective agreement. At paragraph 18 the Court said:

> "[18] The reasons for the move by the arbitrators from the common law measurement of loss by means of an express or implied notice period are obvious. The first reason is that this collective agreement, like most collective agreements, does not allow for dismissal by notice, but allows dismissal only for cause. The second is that the common law method makes no allowance for many benefits conferred by collective agreements that are not available under non-collective agreement employment contracts. The most obvious is the right to reinstatement, not available as a common law remedy, which gives much greater security of tenure. Other benefits not available under non-collective agreement contracts will depend on the individual collective agreement, but in most cases they are substantial. They include such things as seniority privileges including bumping privileges against lay-

offs, promotions within the workforce on the basis of seniority, and no discipline without just cause."

It is important to appreciate that the collective agreement benefits are not absolute because they are subject to management rights, contracting out, discipline up to and including termination and reorganization (normally a management right).

[21] The Saskatchewan Court of Appeal in the *I.A.T.S.E.* decision clearly did not adopt the "crystallization" loss of rights principle since it concluded that mitigation of damages had to be considered in any assessment of damages, contrary to the view taken by arbitrators who adopted the crystallization approach. Also, in the *Government of Saskatchewan* award Arbitrator Stevenson determined that it was appropriate to take into account the conduct of the Grievor in assessing damages. Again, this approach is not consistent with the crystallization philosophy but one that has been adopted by several arbitrators in addition to Arbitrator Stevenson. **In summary, the Saskatchewan approach is that collective bargaining rights are a proper consideration for arbitrators in determining the quantum of damages but both the duty to mitigate and the conduct of the grievor can be taken into account.** *(emphasis added)*

[250] Arbitrator Ish awarded the grievor in *The City of Regina* case 1.75 months' pay for each year of service and 25% for the loss of benefits. He also assessed a fixed amount for pre-judgment interest based on a 3% interest calculation. Because the non-reinstatement was due to non-culpable reasons he awarded a non-culpable amount of $3,000.

[251] The Saskatchewan Court of Queen's Bench (as it then was) has also considered payment of damages in lieu of reinstatement as a remedy. Though the court recognizes that it is an "exceptional" remedy, it also accepts that the remedy must be available as a tool for arbitrators in crafting "lasting, practical solutions:"

[7] The arbitrator allowed the second grievance and determined that Cameco should not have terminated Mr. Simon. The arbitrator found that while Cameco had just cause to discipline Mr. Simon, termination was too severe a disciplinary response. However, the arbitrator declined to order Mr. Simon's reinstatement. The arbitrator, rather, provided an award of damages in lieu of reinstatement. The arbitrator awarded Mr. Simon's compensatory damages as follows, at page 56 of the decision:

1. Two month's salary for each 6 years of service, i.e. 12 month's salary;
2. Twenty-five percent of the 12 month's salary calculation representing compensation for loss benefits;
3. Severance pay calculated pursuant to s.235 of the *Canada Labour Code,* R.S.C. 1985, c. L-2; and
4. Five percent per annum interest on the foregoing amounts from February 14, 2006 to the date of payment.

[8] Cameco then brought this application challenging the award in relation to the compensatory damages of 2 month's salary for each of the grievor's 6 years of service, and in relation to the damages of 25% of the 12 month salary calculation for compensation for loss of benefits.

….

[47] The arbitrator here was dealing with what courts have sometimes termed the "exceptional circumstances" of substituting compensation for reinstatement. As the Supreme Court of Canada stated in *Alberta Union of Provincial Employees v. Lethbridge Community College* 2004 SCC 28 (CanLII); (2006), 238 D.L.R. (4th) 385; [2004] 7 W.W.R. 1, at paragraph 54, the courts must give deference to arbitrators in such circumstances:

> 54 For arbitration to be effective, efficient and binding it must provide lasting, practical solutions to workplace problems. Commensurate with the notion of exceptional circumstances as developed in arbitral jurisprudence is the need for arbitrators to be liberally empowered to fashion appropriate remedies, taking into consideration the whole of the circumstances. To rob arbitrators of access to the full breadth of the employment context risks impairing their role as final arbiters of workplace disputes. Arbitrators are well positioned on the front lines of workplace disputes to weigh facts and assess credibility as the circumstances warrant.

[48] I am satisfied that the arbitrator here properly considered the whole of the circumstances, including the grievor's personal circumstances and the collective agreement, in fashioning a lasting and final solution to the parties' dispute. I am not persuaded that the arbitrator acted in an unreasonable manner. [*emphasis added*][12]

[252] Accordingly, bearing in mind the Board's factual determinations outlined above, there is clear guidance from the Supreme Court and the Saskatchewan Court of Queen's Bench along with the analysis of Arbitrator Ish as the basis for its decision to award general damages in lieu of reinstatement.

2. The Employer's motive for termination of the Grievor

[253] At the end of the hearing, the Union argued that supplementary damages should be available to both the Grievor and the Union, primarily because of the conduct of the Employer throughout this case, particularly in respect of its unfair interrogation of the Grievor and its "improper motives" for discipline.

[254] With respect to this latter item, the Union suggested "the Employer's decision to terminate Jaclyn Brears was based on her union activity and for filing a claim of harassment against the dealer."

[12] *Cameco Corporation v United Steel Workers of America, Local 8914*, 2008 SKQB 499 (CanLII).

[255] Because of that alleged motivation, the Union argued it and the Grievor were each entitled to "aggravated damages" and "punitive damages". The use of these terms and the case law that supports such awards for the Union and a terminated employee requires a fairly extensive review of both the facts and the law that might apply. However, the starting point is to understand what the evidence said about the motivation of the Employer.

[256] The main observation of the Board in this regard is that the Employer was determined to remove the Grievor from the workplace. The improper manner in which Joyes interrogated the Grievor can only be explained by such a determined motivation, regardless of the consequences. From a pure management perspective this may have seemed appropriate because of the impact of the Skype Messages on the workplace, although the Employer never made that case very clearly. The disruptive potential for an employee engaging in the kind of messaging and texting conduct displayed over a long period by the Grievor seems obvious. However, the Employer assessed only a three day suspension on Loi for similar activity, so the disruptive potential may have been less obvious to it.

[257] It may be that in a non-union setting, the Employer can make unilateral decisions of this kind with the only consequence being that they may have to make a severance payment to the discharged employee. However, in the unionized workplace the Collective Bargaining Agreement and labour law generally insures there is more protection for the unionized employee, which must be honored by the Employer.

[258] As well, the fact the Employer may have had an understandable management reason to want to terminate the Grievor does not change the fact there were several other facts established that suggest possible additional motives to remove the Grievor from the workplace. There was no direct evidence of these factors, but there was plenty of circumstantial evidence that arguably could support the existence of other nefarious motives of the Employer.

[259] For example, the Union argued that the Employer wanted to remove the Grievor so it could tell its good customer, the Known Dealer, that they had removed the problematic employee and therefore would like that dealership to resume its business with Affinity at past levels. The Grievor's written harassment complaint referred to a comment from Block to the effect that the Employer's main motive was it wanted to protect its ongoing business with the Known Dealer. Block also testified that the Known Dealer did a lot of business with Affinity and that this was a concern, although she was unable to quantify the extent of the reduction in business after the Known Dealer Complaint.

[260] The Union also argued an anti-union animus motivated much of the Employer's conduct. The Board has determined there was no direct evidence of an anti-union animus that would justify such a conclusion; however, there certainly were facts established during the hearing that could be interpreted as indirect evidence of an anti-union animus which underlay the Employer's determination to remove the Grievor from the workplace.

[261] The Union Legal Brief argued that any employer action animated by such an anti-union sentiment is seldom reported as such because every employer knows this is a forbidden practice and

it must hide such a motivation. For that reason the case law suggests that "…in appropriate circumstances, anti-union animus may be inferred from circumstantial evidence". [*OPSEU (Morgan)*]

[262] As well, the Saskatchewan Labour Relations Board explained:

> "However, even if the Board is satisfied that there were valid reasons for the actions that the employer took, the Board may nonetheless still find a violation has occurred if the Board is satisfied that the employer's actions were motivated, even in part, by an anti-union animus…Therefore, even if an employer demonstrates a credible explanation for the actions it took, it is nonetheless a violation of the Act if we find that a component of the employer's decision -making process involved a desire to punish an employee because of his/her support for a trade union or to signal to other employees that unionization was undesirable." [*Comfort Cabs Ltd. Et.al., (2014) 246 C.L.R>B>R> 92d)1, 2014 CanLIi 63998(SK LRB)*]

[263] As a result the Union argues that it is not enough for an employer to say that anti-union animus was not determinative of a management decision. Rather, in the Union's view the Employer must establish that anti-union animus was completely or substantially absent in all material respects from its decision making process.

[264] The facts one might consider in such an evaluation would be the following:

a) There was evidence from the Union President and from an employee named Jolene Teskey that Affinity employees were difficult to recruit to union positions because accepting such a position was not looked upon favourably by Affinity management;

b) Under the guise of a need to preserve a cloak of secrecy over the whole proceeding, Joyes and Humm clearly prevented the Union from any active involvement in the investigation process. The situation called for Union involvement because there was a union member versus union member complaint and the Employer had been informed two days after the suspension of the Grievor that the Union had a special process to help protect and support members in this kind of difficult situation. However, the Employer played the "need for confidentiality card" and never provided any information to help the Union or the Grievor prepare for the investigatory process which involved interviews with many Union members. The Employer arranged for a Union member – Kathy Vance – to be present during interviews, but for some reason no information ever got back to the Union or to the Grievor. Each interview was conducted with a reminder that the investigation process was very confidential and to be kept secret except on a need to know basis.

c) The Grievor was very involved in the bargaining that was going on at the same time as the Joyes harassment investigation. The Union President testified about how useful the Grievor was to the Union's ability to develop its strategic position in such activity because she knew so much and was so good at analyzing the Employer's HR activity generally. Moreover, the fact that the Employer demanded it would not continue with any further bargaining with the Union unless and until the Grievor was removed from the bargaining

table is a highly irregular move which again suggests an anti-union animus to this decision. The Grievor was supposed to be given a fair and objective evaluation, yet here she was being judged "guilty" and punished along with punishing the Union because of the Dureault Complaint.

d) The fact the Grievor was very active in arbitrations against Affinity is another indirect way in which the Employer could undermine the activities of the Union if it had an anti-union animus.

e) Finally, the unfair, improper and personally damaging interview of the Grievor undertaken by Joyes was a clear attempt to confound her ability to respond to any of the charges against her and could be read as an anti-union activity designed to develop the best case possible to terminate the Grievor and to undermine the Bargaining Committee by removal of a valued member of that group.

[265] The Employer argued in its oral submissions that any remedy for anti-union animus was a claim that could only be made before the Saskatchewan Labour Relations Board which is the only body with the jurisdiction to hear that kind of a dispute.

[266] However, the Union replied with reference to a decision of Arbitrator Vancise (the former Mr. Justice Vancise, of the SK Court of Appeal) in which he suggests that discrimination against an employee and the Union for union activity falls under the Saskatchewan Human Rights Code ("SK HR Code") relative to the right to associate. As such, he concluded that conduct based on an anti-union animus could attract damages:

> "[The] substantive rights and obligations of the Human Rights Code are incorporated into each collective agreement over which the Board had jurisdiction. Under a collective agreement, the broad rights of an employer to manage the enterprise and direct the work force are subject not only to the express provisions of the collective agreement, but also to the statutory provisions of the Human Rights Code and other employment-related statutes. [*Saskatchewan Joint Board Retail, Wholesale Department Store Union-and-101239903 Saskatchewan Ltd. And Broadway Lodge Ltd* at para.42]

[267] Section 31.4 of *The Saskatchewan Human Rights Code, 2018* ("SK HR Code") reads:

> "The court may, in addition to any other order the court may make pursuant to section 31.3, order the person who had contravened or is contravening that provision to pay any compensation to the person injured by that contravention that the court may determine, to a maximum of $20,000…"

[268] Accordingly, there are grounds to consider whether an anti-union animus constituting discrimination for union activity might make the Employer liable for damages under the SK HR Code. Such an argument would be framed as flowing from a breach of the "Right of Free Association" in Section 6 which reads as follows:

> "Every person and every class of persons has the right to peaceable assembly with others and to form with others associations of any character under the law."

3. Other considerations for damage claims

[269] The evidence demonstrated other factors that might be relevant to a claim by the Union and/or the Grievor for either aggravated or punitive damages.

[270] From the perspective of the Union, in addition to whatever damages might flow from a possible finding that anti-union animus existed or a finding that the Grievor was terminated to preserve a business relationship with the Known Dealer. The Board makes no determination about whether such facts support claims for aggravated, punitive damages or SK HR Code damages, but it is arguable.

[271] From the perspective of the Grievor, in addition to her claim of general damages, she has also suffered emotional damage about which she testified at the hearing. She has also lost the economic opportunity of a career working as a Union employee. Her Union leave - which was cut short because of Covid - was designed to be a kind of trial run on a special project to determine whether the Union and the Grievor were each interested in such a move.

[272] The evidence from both parties – without the benefit of the whole Union leave – was that they both were very interested in pursuing this objective. However, as the Grievor testified, because of the termination there was no longer any opportunity for her to pursue a career at the Union as a staff person. Again, the Board makes no determination and has no views about whether such loss of opportunity supports a claim for damages, but it is arguable.

PART X. DECISION AND AWARD

1. Allowance of Grievance and award for general damages in lieu of reinstatement

[273] The case law referred to above provides guidance on the quantification of general damages when they are being ordered in lieu of reinstatement. The decision of Arbitrator Ish concludes with the following helpful summary of those general principles in Saskatchewan:

> [22] In the many cases that assess damages in a collective bargaining context the number of years of employment become one of the paramount factors. In recognition of forgone collective agreement rights arbitrators have generally fallen within a range of 1.25 to 1.75 months of pay per year of service. The arbitration board in the *I.A.T.S.E.* case used a factor of 1.25, Arbitrator Raynor in the *De Havilland* case calculated damages based on one month's wages per year of service and Arbitrator Barclay based his award on 1.75 months' salary for each year of service. Arbitrator Barclay also included a top-up of 25 percent to acknowledge

lost benefits. The more typical top-up by arbitrators is in the 15 percent range. For instance, the arbitration board in the *I.A.T.S.E.* case awarded 14 percent for loss of benefits.

…

[24] The Association argued that the conduct of the Grievor leading up to termination has been taken into account either expressly or impliedly by most arbitrators. Arbitrator Stevenson explicitly took it into account in the *Government of Saskatchewan* case awarding only 12 months' pay for 19 years of service. The Association argued that since there is no element of culpable conduct in the present case and since most past cases do involve some culpable conduct by the grievors, Ms. Anderson should be given the benefit of a higher award. Also, it was argued, correctly, that age and employability are proper factors for an arbitrator to take into account. Ms. Anderson is 55 years of age and since the date of her termination has been unable to achieve comparable employment.

[25] I have reflected on the various factors that apply in the present case in light of the considerable amount of jurisprudence in this area. I am of the view that there is merit to making an award that is consistent with the *Decelles* award since it involved the same parties. Nevertheless, I am aware that there are elements in the *Decelles* decision, primarily the dishonesty of the Grievor in that case (albeit tempered by clinical depression) that are lacking in the present case. Nevertheless, the *Decelles* award both in terms of the 1.75 months' pay for each year of service and the 25 percent factor for loss of benefits is at the high end of the range when compared to past arbitration cases other than the *Cameco* decision, *supra*. That said, I am prepared to acknowledge the total lack of culpable conduct in the present case and factor it into an overall award. Rather than adding to the formulaic approach, I add a fixed $3,000 for this factor. In addition, as requested by the Union, the award of damages should reflect pre-judgment interest at approximately a simple three percent from the date of termination to the time of payment. Again, in the interest of calculating one final total amount for damages, I will fix the three percent amount at $4,000. Subject to these two qualifications, the offer of the City made in its submissions, based on the *Decelles* award or the common law (both were relied upon by the City), is fair and reasonable. The City's higher offer was one year's salary ($71,402) less the 12 weeks' severance pay already received by the Grievor for a net amount of $54,980.92 plus 25 percent for loss of benefits which it quantified at $17,850.50. To this amount I add $3,000 for the non-culpable aspect of this case and interest of $4,000 at approximately three percent for 20 months on the assumption that the compensation will be paid no later than October 2014. Since it is clear that the determination of a damage award is not intended to be formulaic and not intended to be a mere replacement of salary, I fix the amount of total compensation at $80,000.

[26] The $80,000 damages will be paid in any lawful manner that Ms. Anderson may direct, with a view to minimizing tax consequences, and subject to such documentation and deductions as may be required.

[274] The Board has considered all the foregoing analysis and case law in Parts II to IX above and on the basis of that review, makes the following award and orders as follows:

a) The Harassment Assessment is void along with the finding in the Termination Letter that the Grievor harassed and bullied coworkers for the following reasons:

    i. The Harassment Assessment correctly identified its purpose as determining "whether occurring events match Affinity Credit union's recognized definition of harassment", but then completely failed to make any such determination. Lacking such a determination, the Harassment Assessment is void and invalid on its face for this reason alone. If the Harassment Assessment is void and invalid, the Termination Letter must suffer the same consequences as there is no foundation for the decision to terminate the Grievor;

    ii. The investigative process, particularly the interview of the Grievor was so flawed and compromised in its procedure that any conclusions reached or actions taken as a result of such a process are completely invalid; and

    iii. For greater certainty both documents are also determined to be false because of the failure of the Employer's evidence to meet and satisfy the requirements of the SEA Harassment Threshold.

The Grievance is allowed to the extent that the termination of the Grievor is set aside;

b) Although just cause for termination was not established, just cause for discipline was proven. Accordingly, for the combined actions of the Grievor consisting of general misconduct (based on the Actual Negative Acts) plus the general misconduct in respect of the Skype Messages, a one month suspension will be assessed against the Grievor and general damages in subparagraph 274 c) below will be reduced by a factor of 10% as outlined below;

c) In lieu of reinstatement, the Grievor will be entitled to an award of general damages. The aggregate amount of such damages will be made up of the following amounts calculated as described below:

    i. The amount of 1.57 months' salary for each year of service. In this case that will amount to the Grievor's salary on July 16, 2020 multiplied by her years of service. (The Union Legal Brief suggests that number is 11.25 years of service, but the Board's notes from the hearing are that the Grievor commenced work at Affinity on September 13, 2010 which would result in 10.85 years of service up to July 16, 2020. The parties presumably can agree on this date including making adjustments as necessary for such things as the amount of time the Grievor was on Union leave.) The Board recognizes this amount is on the low end of the scale referenced in the above case law, but the Grievor was not an innocent party in this dispute. Although there were no grounds for her termination, there were grounds for discipline because of the Actual Negative Acts and the general impact on the workplace of the Skype

Messages. The Board therefore has determined that the higher amount of 1.75 months per year of service which it would normally consider appropriate in these circumstances, must be reduced by a factor of 10% to 1.57 as explained in para 274 b) above. As well from the total years of service dollar amount, there must be deducted 1 month's salary in lieu of the suspension that would have been ordered if a reinstatement had been ordered, again as explained in para 274 b) above. The net amount of such severance after agreement on the years of service and deduction of one month's salary is referred to as the "Net Severance Amount".

ii. Twenty-five percent of the Net Severance Amount representing compensation for loss of all benefits from the CBA;

iii. $3000 for a non-culpable factor;[13]

iv. Five percent (5%) per annum simple interest on all foregoing amounts calculated since July 16, 2020 to the date of payment; and

v. From the aggregate total of items i., ii., iii. and iv: DEDUCT the gross income received by the Grievor from July 16, 2020 to the end of the Damage Mitigation Period. That "Damage Mitigation Period" is a period of time that begins on July 16, 2020 and ends on the expiry of a total number of months calculated as follows: the Grievor's number of years of service (to be agreed between the parties) multiplied by 1.57.

[275] The Net Severance Amount will be paid in any lawful manner that the Grievor may direct, with a view to minimizing tax consequences, and subject to such documentation and deductions as may be required. The Board will be remain seized of this dispute to allow *inter alia* the parties to resolve the details of the above calculations and the further matter of entitlement to aggravated, punitive or SK HR Code damages as described below.[14]

[13] The primary reason for the payment of general damages rather than reinstatement is a result of the conduct of the Employer which made reinstatement impossible. The Grievor was found deserving of discipline in respect of the Skype Messages and related conduct, but in the normal course that would not necessitate payment of general damages in lieu of reinstatement. Accordingly, the Board concluded a "non-culpable" factor should be included in this Award.

[14] An award of damages in lieu of reinstatement is uncommon. It may therefore be more difficult to appreciate the full extent of the discipline imposed by a reduction in general damages. Using reasonable assumptions about years of service for the Grievor and evidence from the case about her pay, the 10% reduction in general damages in this Award is approximately equal to two months' pay or about double the cost to the Grievor of a one month unpaid suspension. The total discipline can therefore be seen as approximately akin to a three month suspension.

2. Aggravated, punitive and SK HR Code damages

[276] In light of the factual findings outlined in Parts I to IX that may be relevant to possible claims for aggravated, punitive and SK HR Code damages, the Board has determined that it would not be appropriate to make a determination about the merits of these claims at this time. Neither the Union nor the Employer had the benefit of understanding the full nature of the factual chronology of this case as now determined by the Board and outlined above. That chronology is different in material respects from the original perspectives of both parties. The Union made both oral and written submissions about some of these issues and the Employer made oral submissions and no written submissions. However, neither party was in a position to make legal arguments using the factual chronology now established for this case. In light of the seriousness of the claims made and to insure the best decision possible, the Board requests further written briefs from the Employer and the Union on the issues of the applicability of aggravated, punitive and SK HR Code damages in light of the evidence presented at the hearing, with particular emphasis on the factual chronology outlined in this Award as and to the extent it is relevant to these issues. As a result, the parties are directed to submit written briefs on these remaining issues on or before March 1, 2023, subject to any mutual agreement of the parties to resolve such issues as outlined below.

[277] The parties will be required to meet to resolve the details of the general damages award outlined above in paragraph 274 above. Obviously, if they can reach agreement at the same time on these remaining damages issues that would be best for all concerned. The parties are therefore further directed to attempt to negotiate a resolution of the Union's claims for aggravated, punitive and SK HR Code damages at the same time as they attempt to finalize the implementation of the general damages award above. If such a final resolution is reached, the parties are directed to so notify the Board. These discussions should be complete – one way or the other – by February 15, 2023.

[278] Should either one of the Employer or the Union conclude at any time after midnight on February 15, 2023 – but no later than midnight March 1, 2023 - that the parties are unable to agree on a resolution of any of these outstanding matters in this Part X, such party may provide written notice to the Board Chair with copies to the other parties and the Union and Employer nominees (the "Reconvene Notice"). The Reconvene Notice must identify the unresolved issues from the implementation of the general damages award or any of the claims for aggravated, punitive or SK HR Code damages or any other unresolved issue between them that is preventing a conclusion to this matter. The Board will then outline an expedited process to consider any further argument or written submissions necessary and make a final decision on all outstanding matters. The Board will consider an extension to the deadline of March 1, 2023 for the submission of briefs upon the request of either party, subject to the provision of a reasonable explanation.

[279] In the meantime, as stated above, the Board will remain seized with this matter and it will remain adjourned *sine die* until the parties have notified the Board that they have resolved all the outstanding issues in this case or that they wish to reconvene the hearing process as described above.

[280] *Addendum*[15]

Dated at Saskatoon, this 10th day of January, 2023.

John Comrie KC, Chair of the Board

Lorraine St. Cyr, Union Nominee

[15] The Board wishes to make a few observations about this case and the Award to insure it is read with the perspective necessary to understand one feature that often accompanies allegations of workplace harassment – namely extreme emotional distress. Harassment allegations regardless whether proven can be devastating to the person accused of such conduct. Similarly, being subject to workplace harassment can also be devastating to the complainant, and sometimes results in suicide. It is obviously necessary therefore to develop a clear and comprehensive approach to the proof of such allegations and hopefully, this Award is another step in the process of that development. This is a subject about which much more needs to be written – both inside and outside arbitral awards. All Boards could also benefit from expert evidence on the nature of harassment about which there is a significant body of research, but rarely shows up in any of the cases. Considering the potential impact of harassment allegations on both the person accused of such conduct and the complainant, obviously more knowledge would be helpful. Finally, in this Award, the Board has been critical of both the Grievor and the Employer, particularly the latter with respect to its investigation process. However, the most important aspect of the facts in this case was the appearance of an employee who was obviously suffering considerable pain and emotional distress. Whether that was caused by harassment or something else is secondary to the need to accurately recognize the emotional state of an employee and be able to intercede in a manner that protects him or her. The Employer deserves credit in this case for accomplishing that goal immediately upon presentation of the distress, regardless of what was its cause. Unfortunately, the Employer was not similarly sensitive to the emotional state of the Grievor throughout the investigation. That should seem a self-evident requirement, but the pressures of work sometimes make this kind of sensitivity difficult to achieve.

DISSENT, in part – Employer Nominee

UFCW, LOCAL 1400 (Jaclyn Brears) and Affinity Credit Union

I respectfully provide this dissent to the Board's decision and provide the following comments and arguments with the Board's findings under the following heads:

1. Determination of Harassment
2. Application of the provisions of the *Saskatchewan Employment Act*
3. Procedural Fairness
4. Appropriate Discipline
5. Award of Damages

1. Harassment

The Board concluded harassment was not established, and with respect, I disagree with their determination.

The Board made the following findings of fact:

a) Actual Negative Acts

From the chart titled "Alleged Negative Acts" at paragraph 133, the Board identified a list titled the "Actual Negative Acts" (footnote 5, paragraph 118) which were behaviors the Board accepted had happened, at least once. That conduct was:

Item 2 *Grievor was rude and condescending in replies to D – "I was made to feel stupid" – in testimony D says G called her stupid and told her to shut up*

Item 3 *G screamed at D about a loan application in February*

Item 5 *Grievor said "You're a kiss ass" when I was friendly with customers – "made me feel - I'm doing something wrong"*

Item 6 *Grievor made fun of Dureault taking notes during a loan application*

Item 7 *G made negative comments about D every day*

Item 10 *G was annoyed by D talking to herself or singing during work – told her to shut up*

The Board did not include two further items to the list on the basis that while they occurred, they were not significant enough to be meet the Board's definition of "Actual Negative Acts". Those were:

Item 9 *G excludes D socially – Vance and Dear say G did not treat D the same way she treated others – excluded her from photo shares for example outside of work and did not "friend" her on Facebook.*

The witness Vance indicated "social exclusion happened 'several times in May'. The Board found that the behaviors described in Item 9 occurred but did not support a finding of harassment. I disagree.

Item 12 *Grievor says "good morning" to everyone but excludes Dureault- Dear says G continued to make snide comments and did not acknowledge D in May/June*

The witness Dear said the behavior occurred before May as well. The Board found the behavior did not

support a finding of harassment. I disagree.

b) Five Dureault Skype Messages

Additionally, from the summary chart titled "Inappropriate Skype Messages" at paragraph 138, the Board identified "Five Dureault Skype Messages" sent by the Grievor and which identify Dureault:

December 20, 2019 *"I know me being grumpy is my own fault today…but her singing is driving me bonkers"*

January 8, 2020 *"we had a long talk about how I don't trust her and the couple of times I've asked for help and Eileen has literally turned away… I used to really like her….but she needs to put her nose into everything"*

February 19, 2020 *"right, how does she know so much about a deal I didn't discuss with her… I think Eileen may seriously want to apply for Conexus*

February 24, 2020 *"they changed the vehicle… sent back with the same condition… I have a feeling Eileen is going to fuck us over"*

February 25, 2020 *"you know Eileen is good friends with her hey…watch what you say…also, I don't like asking E questions because of reasons like that"*

c) Key findings

The Board referred to the Five Dureault Skype Messages in the following key findings:

At paragraph 121:

"*…the Grievor's conduct towards Dureault must be seen through the lens of the Five Dureault Skype Messages. The Grievor clearly did not like Dureault and did not like working with her for several reasons. She adopted the attitude at the hearing that because Dureault never spoke to her she had no idea of the kind of impact she was having on Dureault. She said she just put on her headphones and ignored her, but she would have been aware of not greeting Dureault in the morning if at the same time she was greeting others. The Five Dureault Skype Messages clearly show what her attitude to Dureault was and it is unlikely that her attitude was much different when face to face, except as modified by fears of what her coworkers would think. Apart from the issue of whether the Skype Messages generally constitute harassment or are just a lesser form of misconduct, the Five Dureault Skype Messages clearly show the true attitude of the Grievor towards Dureault. So for example when Dureault says the Grievor called her a "kiss-ass" or said she was "stupid" or the Grievor made fun of her work habits, all of which are denied by the Grievor, the Board*

has concluded Dureault's allegations on these issues are more accurate because the Grievor's denial is not consistent with the Five Dureault Skype Messages." (Emphasis added)

At paragraph 122 (c):

"…it is at least arguable that in sending the texts and in thus contributing to what the Employer called a "toxic atmosphere in the workplace", the Grievor was causing consequences which made the workplace environment for Dureault worse than it was. "

And at paragraph 123(d):

"… The Grievor's daily conduct in the workplace in regard to Dureault must be interpreted in a manner that is consistent with the Five Dureault Skype Messages. The point here is the messages do show very clearly without any distortion of any kind what the Grievor's attitude was towards Dureault at the time they were sent. When the Grievor sent the message saying in reference to Dureault "I have a feeling Eileen is going to fuck us over" [E20(p)], it is unlikely that attitude did not carry into her daily interpersonal contacts with Dureault, at least when alone together. The next time that day the Grievor met Dureault at the water cooler, does anyone realistically think the attitude displayed in that message did not negatively affect her interaction with Dureault at least to some extent? It is very difficult to completely hide such emotions, although the demands of political correctness among coworkers will normally dampen such an attitude, which may be why there was no corroboration from the DFC team members. The Union and the Grievor admitted these messages were misconduct deserving of discipline and tried to excuse them by saying she was frustrated by Dureault. However, that does not excuse the conduct." (Emphasis added)

It is arguable, based on the Actual Negative Acts chart, the Five Dureault Skype Messages and the conclusions at paragraphs 121, 122(c) and 123 (d), that the conduct of the Grievor as described in those pieces of evidence, is of a nature, sufficient enough on their own, to warrant a finding of harassment.

Even if the entirety of Dureault's remaining evidence is discounted, as the Board appears to have done, (and which is not supported by the evidence, with respect) the Grievor's behaviors as demonstrated by the Board's findings above, meet the legislative definition.

Concerns with the Board's Assessment of Dureault's evidence

i) Specificity

Dureault gave her evidence, under oath, from her experiences and recollection. Given the general and recurring nature of some of her complaints (the Grievor was always angry, the Grievor didn't say good morning, the Grievor made negative comments every day), other than having kept a daily journal to record the details of date, time and who was present, how else was she to have described the regular occurrence of behavior of that nature other than by her testimony that it happened often and/or every day. Items 3 and 6 above refer to specific incidents (a loan application in February, another loan application). Otherwise the lack of specificity is consistent with the general and recurring nature of the Grievor's behavior.

ii) Corroboration

The Board's concern about lack of corroboration is confusing in that the decision does acknowledge evidence of corroboration. Some of the DFC coworkers testified to the change in Dureault's behavior (not her usual self, she gets more defeated, she had shut down). There was also testimony from coworkers to confirm the Grievor's behavior (not saying good morning, not showing photos, social exclusion). And the Grievor also confirmed some of Dureault's complaints, in that she admitted to not saying good morning, to ignoring Dureault, and to putting on her headphones.

iii) Minimization

Given the Board's findings from the Actual Negative Acts chart and the Skype messages, the general repeated nature of Dureault's complaints and corroboration from witnesses and from the Grievor herself, the Board's subsequent discounting and/or minimizing Dureault's evidence to the extensive degree done is confusing and of concern.

Nor did the Board accurately assess the overall impact of the Grievor's behavior. In the Alleged Negative Act chart, the Board assessed the intensity of behavior, and which the Board acknowledged was "subjective to some extent". To say as the Board that many of these Acts were not hurtful enough or intense enough to meet the causation requirements of the SEA Harassment Threshold (which is itself a subjective scale created by the Board) fails to consider the cumulative effect of inappropriate behavior. To rank behavior of one type as low, as the Board did for not saying "good morning", and other behavior such as calling someone "stupid" as high, separates out the behavior in a way that is artificial. The Actual Negative Acts Chart and the Skype messages, along with Dureault's testimony demonstrate the behaviors were varied and some may have overlapped, in that some or many may have occurred on the same day.

I believe the Board over-emphasized Dureault's personality traits to minimize her experiences and discount her testimony regarding the frequency of the Grievor's behavior and the impact the Grievor's behavior had on her.

iv) Chronology leading to June 17th

The Board found Dureault was in emotional turmoil for a few weeks in May and June, and that many factors contributed to her state and to her emotional upset on June 17th. Indeed there were other factors affecting Dureault at the time of her complaint. However, those factors don't replace or minimize her report regarding the Grievor's behavior. The evidence is that on June 12 she accurately identified the texting occurring between the Grievor and Loi and that event was the trigger for her complaint against the Grievor.

In considering the factors that may have been affecting Dureault at the time she brought her complaint, it is important to recall the chronology of events that have been established:

In November the Grievor began work in DFC and the evidence was that the first few weeks were ok. Both the Grievor and Dureault indicated that thereafter their relationship changed. In February, Dureault raised her concerns with Block and Dear. In early March the Grievor left on union leave and then worked from home until mid-May when she returned to the workplace.

Then within a week of each other, three events occurred: on June 6 was the Known Dealer incident, on June 10th the Grievor brought her harassment complaint against the Known Dealer, and on June 12th the texting incident occurred. Thereafter on June 17th, Dureault brought forward her complaint against Grievor.

Dureault's evidence was that she was experiencing issues with the Grievor within 3 weeks of the Grievor's start at DFC, and at least by February, as corroborated by Block and Dear, when she spoke to each of them to express her concerns with the Grievor's behavior towards her. While she didn't make a formal complaint or use the term "harassment" in those conversations, she did identify and express her concerns to them at that time. The Grievor then left the workplace and returned in mid-May. Dureault's evidence was that when the Grievor returned to work in mid-May, the Grievor's behavior towards Dureault carried on.

By those conversations with Block and Dear in February, Dureault had identified issues with the Grievor's conduct at least 4 months before the three June events. When the Grievor returned to the workplace in May, that timing aligns with the Board's determination that Dureault was in "emotional turmoil".

Undoubtedly the events – the Known Dealer incident, the Grievor's harassment complaint and the texting incident - all of which occurred within a week of each other, heightened the level of anxiety in the workplace. The evidence is clear that the texting incident on June 12th caused Dureault's breakdown, and five days later she brought her complaint to Block. It is reasonable to conclude that each of those events contributed to Dureault's decision to bring the complaint when she did. And that is when she referenced other factors: her concern that the Grievor would bring a harassment complaint against her and her concern over the Known Dealer complaint, and which would also explain her comment that she "just wanted it all to stop". It is however most probable that the texting incident was the precise trigger for the complaint against the Grievor, which explains her immediate complaint to Block on June 17th that the Grievor was "bullying and harassing her". And which is also consistent with her evidence regarding the Grievor's treatment of her since December. The point is that Dureault's complaints about the Grievor's treatment of her prior to June cannot be attributed to the Known Dealer incident.

v) Fear of Withdrawal of the Grievance

The Board referred to Dureault's fear that the Grievor might withdraw an outstanding grievance as a "gross exaggeration" and used that belief to discount her credibility. I disagree with the majority's finding on this point, and in particular because of the Board's findings at paragraph 122(d): "*Dureault accurately assessed the Grievor's skill and experience with Union issues*", and at paragraph 122(e): "*Dureault accurately saw the Grievor as powerful in the Union…"*

Dureault and others testified they were aware of the Grievor's role with the union; the Grievor made her union role public and was proud of it, she was able to take leave from the workplace to work for the Union, and one witness indicated the Grievor had made it known that she even knew the union lawyer. Added to that was Dureault's knowledge that the Grievor had successfully filed a grievance for her on a previous occasion.

The Union's evidence established that the Grievor did not have the authority to withdraw a grievance. More importantly however is that no evidence was presented to demonstrate Dureault was aware that the Grievor did not have the authority to withdraw a grievance. Nor was there any evidence that Dureault was familiar with the Union's hierarchy relating to who can and cannot file or withdraw a grievance.

From that perspective, if the Grievor could file two grievances for Dureault, one of which was successful and the other pending, why it is a "gross exaggeration" for Dureault to have concerns the Grievor could have the second grievance withdrawn? She knew the Grievor was powerful in the union, she was aware the Grievor had the knowledge and ability to bring the harassment complaint against the Known Dealer and she had been experiencing the Grievor's negative behaviors towards her.

I do not support the Board's conclusion that Dureault's belief was a "gross exaggeration" nor do I agree that it undermines her credibility. Dureault held an honest, and in the circumstances, I assert a reasonable belief and fear for her to have had.

The same argument, for the same reasons, can be made regarding Dureault's concern that the Grievor might bring a harassment complaint against her, and which the Board also described as a "gross exaggeration". And with which I do not agree.

2. SEA, Section 3-1 Definition of harassment

a) Requirement of a witness(es)

In determining that the evidence did not meet the requirements of Section 3-1, the Board indicated at paragraph 119 that "*The fundamental reason for that conclusion is that the evidence of such Acts failed to satisfy either the causation requirements in Conditions 1-3 above or the repetition requirements in Condition 4.*"

I respectfully disagree with those findings, and foremost with the Board's statement at paragraph 120, that *"To prove causation and to prove repetition as required by the SEA, there must be both a witness or witnesses whose perception and credibility is reliable …"*

The Board's statement that the behavior must be witnessed for a determination of harassment is, with respect, incorrect. The definition in the SEA does not require that there are witnesses to harassment.

As noted earlier in this dissent, the Board incorrectly discounted Dureault's evidence, failed to consider the impact of the behaviors on Dureault, did not consider the corroboration of witnesses (including that of the Grievor) and failed to consider the cumulative effect of the behaviors. The phrase "a death by a thousand cuts" is one that could be applicable here. By the assessment used in the Alleged Negative Acts chart and assigning a rating of high, medium and low to the behaviors, each were considered in isolation, without considering the behaviors in their entirety and the overall impact they had on Dureault.

b) The Grievor's knowledge

Section 3-1 requires that " *The person engaging in the conduct must know or ought reasonably to know the conduct would cause a worker to be humiliated or intimidated;* "

The Union has argued the Grievor "didn't know". The Board concluded that she did, at paragraph 120: "*The text messages clearly show what her attitude to Dureault was and it is inconceivable that her attitude was much different when face to face…… they clearly show the true and honest attitude of the Grievor towards Dureault* And again at paragraph 121(d) "*it is inconceivable that attitude did not carry into her daily interpersonal contacts with Dureault, at least when alone together… does anyone realistically think the attitude displayed in that text did not carry over into some form of negative interaction with Dureault?"*

If however, the Grievor didn't know how her behavior was impacting Dureault, the remaining argument is that she ought reasonably to have known. The Board described the Grievor as being "smart, confident and ambitious". She is a trained and experienced shop steward. Her evidence is that she chose to ignore Dureault and to put on her headphones. However, the Skype messages indicate the Grievor was doing more than ignoring Dureault. The nature, tone and content of the Skype messages undermine the Grievor's testimony and her claim that she didn't know.

Further, given the Skype messages, the Grievor's claim that Dureault misconceived or misunderstood her intentions is also unacceptable. It is not unusual for someone who is alleged to have done something to claim they don't recall or that their actions were misinterpreted or to blame the other for being over reactive or oversensitive or to have misunderstood.

At several points in the Award the Board suggests that the Grievor may have engaged in further inappropriate conduct than what was observed because she didn't want to behave inappropriately in the presence of her coworkers:

At paragraph 118 – "*At least one of them should normally have been able to confirm some of such conduct if it truly happened…. even if the Grievor did her best to keep it hidden or downplayed it, at least when her supervisor was present.*" We know from the charts that Vance and Dear did indeed confirm some of Dureault's complaints.

And at paragraph 123 (d) – "*It is very difficult to completely hide such emotions, although the demands of political correctness among coworkers will normally dampen such an attitude, which may be why there was no corroboration from the DFC team members.*"

Also, at paragraph 144 – "*This negative attitude of the Grievor almost certainly carried over into her daily interactions with Dureault, although limited by the demands of political correctness in the eyes of her coworkers".*

The Board suggests the Grievor was concerned about "political correctness". Another explanation is that harassing behavior is often subtle and insidious, and often does not occur in the presence of witnesses.

c) Frequency

The legislation requires that the conduct must be repeated. The time when Dureault and the Grievor actually worked together has been narrowed down to 13 weeks, over a lengthier period of time. The evidence from both is that first few weeks were fine, thus that time is reduced further, such that the conduct was repeated over a time frame of less than 13 weeks.

The Actual Negative Acts chart indicate the Board has accepted Dureault's evidence that the Grievor made negative comments about her every day. (Item #7 determined to be an "Actual Negative Act" at paragraph 134.) The Five Dureault Skype Messages were sent during that time period, over a period of one month, between mid-December to mid-February, and which is consistent with Dureault's evidence of when she identified her concerns to Block and Dear.

In assessing whether the conduct was of a frequency to be considered "repeated", the "conduct" to be considered is all of the inappropriate behaviors, not the frequency of each individual action. Again, the concept of the cumulative effect of all forms of behavior must be considered.

A final point with regard to the Board's assessment of the legislation is regarding its use of "the SEA Harassment Threshold" and the "Negative Conduct Continuum". The legislation doesn't set out any such frameworks for the determination of whether behavior does or doesn't amount to harassment. Along with the "Alleged Negative Acts Chart", such tools may be of use to assist with the analysis of the evidence, but as the Board noted, they are subjective.

Thus, the Board's assessment of the behaviors based upon intensity, frequency and duration is not helpful because again, the Board considered the alleged acts in isolation of each other. With respect, the Board's determinations at paragraph 133 that "*conduct that occurred daily or weekly only for a few weeks might not qualify as harassment but might if it extended over 6 months…. the requirement that conduct be 'repeated' is not satisfied if it happens every day, but only for one or two weeks*" are not necessarily accurate unless the nature of the conduct and the context in which it occurred is also considered. To determine harassment, the requirements of the SEA must be met, having also conducted an overall assessment of the conduct.

3. Procedural Fairness

I disagree with the Board's conclusion that the investigation was so flawed as to render it and its conclusions void altogether.

i) Industry Best Practices

At paragraph 193 the majority referred to "Affinity HR Manual: Section 4.7.4 Investigations" which provides that investigations will be conducted … "in accordance with industry best practices." It is acknowledged that there was no evidence presented of what are "industry best practices." However, the Board raised concerns related to procedural fairness in the context of the Employer having "prejudged" or "baked" the outcome of the investigation, and in response, the following are related to "industry best practices" to address the Board's issues with each:

a) Suspension with pay pending investigation

Suspension with pay pending investigation or "administrative leave" which is another term, is a best practice in the industry where it is appropriate for many reasons (safety, conflict, the nature of the allegation, such as harassment, a small work group as it was here, and other reasons) to not have the respondent in the workplace during an investigation. Such a suspension is not meant as a medical leave, nor is it a practice for the complainant to be placed on a similar leave or suspension. Additionally, the suspension often includes a direction that the respondent is not to attend at the workplace or contact co-workers, to prevent escalation or influence, and which is also a best practice.

b) Naming the investigation as a harassment investigation

It is also a best practice, when the allegation is harassment, to name the investigation as such. Harassment is defined in SEA, unlike other workplace misconduct. Harassment is also separated out and addressed separately in most workplace policies, for a reason. It is a level of employment behavior beyond general workplace misconduct. I disagree the Employer was offside when it identified the process as a harassment investigation. By calling the investigation what it was did not in itself "prejudge" the investigation. The complaint was of harassment. The investigation was to investigate a complaint of harassment.

c) Letter of Suspension

Similarly, the letter of suspension of June 17th specifically indicated the Grievor was being suspended and that the suspension was pending a "harassment investigation". That is also a best practice and, by doing so, provided the respondent with the first indication of the nature of the investigation.

As of June 17th, 2020, when she was given the letter of suspension, the Grievor was aware of the general nature of the reason for the suspension and was also informed that an investigation into the complaint of harassment against her would be conducted.

d) Caution of Confidentiality

It is also a best practice to ensure confidentiality of an investigation and the interviews, to provide a caution or direction of confidentiality. Cautioning witnesses not to speak about the process is to ensure information is not tainted. The purpose of the practice is to prevent those who have been interviewed from "comparing notes" with those who haven't yet been spoken to.

The Board's speculation that the Employer intended the caution of confidentiality to prevent the Shop Steward or union representative from reporting back to the Union is unfounded. How it was that the Union President was not aware of the interviews in this case is not the responsibility nor fault of the Employer. An Employer is not required to ensure a Shop Steward reports back to the Union. The Employer's responsibility was to ensure employees were offered union representation

at the interviews, which was done. With one exception, the same union representative attended each interview.

From June 17, 2020, when the first interview was conducted, the Union, through the attendance of their representative at the interviews, had knowledge of the investigation, had knowledge of the identity of the complainant and had knowledge of the allegations against the Grievor.

e) Witness Statements

The Affinity HR practices manual set out that witness statements *may be disclosed*. It is not however a requirement.

ii) Reliance upon *Oberg v. Board of Education*

Having determined the investigation was flawed, the majority concluded that the Harassment Assessment and the letter of termination were void. In making the determination that the decision was void, the Board referenced the decision of *Oberg v. Board of Education of the South East Cornerstone School Division No. 209 of Saskatchewan.*

Neither the Union or the Employer referred to or argued the decision in their submissions, nor was it contained in either of their books of authorities.

The Board indicated that *Oberg* may now be the current law in Saskatchewan on procedural fairness. Given the importance and weight given to the decision by the Board, and because it may be distinguishable from this case on its facts, I strongly believe the parties should have had an opportunity to speak to its application.

Other cases, decided prior to *Oberg*, are not unanimous that a flawed investigation automatically amounts to a breach that voids the process. In *Mosaic Potash Colonsay ULC and USW, Local 7656* at Tab 22 of the Union's brief, arbitrator Chad Smith indicated she did not agree that an employer's error in procedure voids resulting discipline. She indicated that a procedural shortcoming may be a factor in consideration of the appropriate penalty.

In *University of Saskatchewan and CUPE1975 (Jerry Jumalon)* decision cited by the Union at Tab 21 of their Brief, Arbitrator Ish identified six (6) concerns with the investigation meeting, most of which are very similar to the Board's concerns with the investigation in this instance. Having identified his concerns regarding the process, Arbitrator Ish did not however void the investigation. He determined that a serious penalty short of discharge was appropriate and substituted a six-month suspension for the termination.

I make one further point regarding the *Jumalon* case, related to appropriateness of discipline. In that case Arbitrator Ish determined a six-month suspension in lieu of termination was the appropriate consequence for an employee who stole property (cleaning rags) of a value of $5.00, had eight years seniority, no discipline record and who eventually admitted his wrongdoing.

Given the Grievor's conduct in this case is significantly more egregious than theft of a minor item, a one-month suspension in lieu of termination does not seem sufficient. Further I disagree with the

Board's conclusion at paragraph 242 regarding the other employee disciplined in these circumstances. She was suspended for three days for her participation in the Skype messaging. She did not however have any involvement in the other misconduct (Actual Negative Acts) for which the Grievor was found responsible.

4. Appropriate Discipline

If the Grievor's conduct did not amount to harassment, it was certainly sufficiently serious to warrant significant discipline. The Board confirmed that concept in the passages below. The Board found discipline was warranted for the Skype messages, the Grievor's conduct towards Dureault (the Actual Negative Acts) and a breach of the IT Policy. I concur with the Board's findings regarding each:

At paragraph 226: The lack of respect and dignity shown to fellow employees by the Grievor as displayed in the Skype Messages is particularly bad and can be fairly said on its own to have contributed to a toxic work environment in the DFC.

At paragraph 227: Additionally, the Board finds and determines that the Actual Negative Acts were also deserving of discipline because of the inference of negative conduct by the Grievor that can be fairly drawn from the existence of the Skype Messages themselves.

At paragraph 236: Apart from the impact on the work environment, the Skype Message practices of the Grievor clearly constitutes a breach of the IT Policy and therefore a breach of the Code. The discipline for this kind of misconduct should be significant.

At paragraph 237: In addition to the above, the evidence made it clear that for the DFC to be effective, it was absolutely necessary that all 6 members work closely together. The Skype Messages undermined that business requirement by not only distracting others from their work, but by creating and recruiting people into cliques which undermined the need to work together....

At paragraph 240: The factors of the Grievor's seniority, the need for deterrence at Affinity, her lack of real provocation, and state of mind all suggest a more serious penalty. At the time of her termination, the Grievor had been at Affinity for almost 10 years with significant experience in different positions throughout the organization. Similarly, the frustration she used as the excuse for her texting does not pass muster as all employees must learn to work with people or work habits they don't like. Most importantly in the Board's view, there is a need to send a message to all employees that the kind of texting practices the Grievor engaged in will not be tolerated. (Emphasis added)

I agree with the Board's conclusions on each of the foregoing. Where I disagree is with the Board's determination that a suspension of one month was the appropriate level of discipline for the full range of misconduct found by the Board.

In reviewing the full range of behaviors, the Board described the misconduct as "deserving of discipline", "a breach of the IT Policy …and Code", "creating and recruiting people into cliques

which undermined the need to work together", " lack of respect and dignity", "particularly bad", "contributed to a toxic work environment".

The messages set out in paragraph 138, which the Board describes as showing "the Grievor and others in a very bad light", demonstrate a much darker picture. On a stand-alone basis, the messages in the Chart at paragraph 138 could be considered as grounds for termination on their own, for the violation of the IT policy, the use of company time, and much more importantly, the egregious and insidious nature of the messages regarding coworkers, the lack of dignity and respect towards them, and the nature of the messages as the Board found as "contributing to a toxic work environment".

Admission of conduct

As a further concern regarding the Board's assessment of the appropriate discipline, the Board declined to consider the Grievor's lack of admission of misconduct for reason that the Grievor was never given a fair opportunity to consider her conduct until the hearing.

I disagree with the Board's rationale. At any time during the disciplinary process, from the initial investigation through to the hearing, a grievor can admit to misconduct, even up to the time when they are on the witness stand. There is always an opportunity for a grievor, if they wish, to accept their responsibility, to show remorse and make apology. The Grievor still, at the 11th hour as she was giving her evidence, had the opportunity to acknowledge and admit to her treatment of Dureault. Her claims that she didn't know, she didn't intend to hurt anyone, she would have done things differently had she known, are not credible given the attitude displayed and the language used in the Skype messages, as the Board has determined.

Indeed, the Grievor was quite aware that the language in her Skype messages was inappropriate as it was of a similar nature to the language used by the Known Dealer and for which she claimed harassment against him.

5. Decision and Award of Damages

Consequently, and with respect, I disagree with the Board's decision and award of damages as follows:

a) I disagree with the Board's finding that harassment of Dureault by the Grievor was not established.
b) I also disagree with the Board's determination that the Harassment Assessment and the letter of termination are void.
c) Whether harassment is determined, a suspension of one month in lieu of termination is wholly insufficient for the multiple findings of misconduct.
d) The amount of 1.57 months' salary for each year of service (plus 10% reduction for misconduct) for a total of 1.75 months' salary is at the highest end of the scale outlined by Arbitrator Ish in paragraph 22 of his decision cited at paragraph 273 of the award, without

any explanation as to how or why that amount was determined. I disagree that 1.75 months' is an appropriate starting point.

e) Twenty-five percent for loss of benefits is not agreed, when the more typical amount is 15% (Ish, at paragraph 22 of his decision, noted above)
f) The $3,000 payment for a non-culpable factor is not agreed to in consideration that culpability was found.

Dated at the City of Saskatoon, in the Province of Saskatchewan, this 9th day of January 2023.

Laura C. Sommervill, Employer Nominee