IN THE MATTER OF AN ARBITRATION
UNDER THE *LABOUR RELATIONS CODE*
R.S.B.C. 1996, c. 244

BETWEEN:

METRO VANCOUVER REGIONAL DISTRICT

(the "Employer")

AND:

GREATER VANCOUVER REGIONAL DISTRICT EMPLOYEES' UNION

(the "Union")

(Chystal White Dismissal Grievance)

ARBITRATOR:	Elaine Doyle
COUNSEL:	Greg Heywood, for the Employer David Tarasoff, for the Union
DATE OF HEARING:	November 9, 10, 13, 16 & 18, 2020
PLACE OF HEARING:	Vancouver, B.C.
REVISED AWARD:	January 20, 2021

The Parties agreed that I have the jurisdiction as an arbitrator under the terms of their Collective Agreement and the British Columbia *Labour Relations Code* to hear and determine the matter in dispute.

This case concerns a grievance filed by the Union on behalf of the Grievor, Chrystal White, alleging that the termination of her employment as a result of her conduct at a Town Hall Meeting ("THM") on March 6, 2019 was excessive in all the circumstances of the case.

Metro Vancouver Regional District collects and treats the region's wastewater. Iona Island Wastewater Treatment Plant ("WWTP") is one of five wastewater treatment plants it operates. At the time of her dismissal, the Grievor worked as a Chargehand at the Plant. She was employed by the Employer for more than 28 years.

The Employer called the following witnesses: Andrew Hunt, Superintendent, Iona Island WWTP; Bryan Shoji, Division Manager, Wastewater Treatment Plants; Martin Gnos, Assistant Superintendent Maintenance (retired), Iona Island WWTP; and testifying under summons Rod Hatfull, Utility Worker; Veronica Perko, Storekeeper; and Anton Cojocariu, Operator. The Union called Bill Mitchell, Maintenance Mechanic; Geoff Tailford, Maintenance Mechanic; and Dana Bowe, Maintenance Mechanic.

The following elements of the Grievor's history with the Employer are not in dispute:

- On August 19, 1991 she was hired as Telephone Operator/receptionist with the Employer's Housing Department on a full-time regular basis. On January 1, 1993, she was awarded a WWTP Operator Trainee position at the Iona Island WWTP. The Grievor was promoted to a WWTP Operator I, II, IIA and ultimately, in October 2006, to WWTP Operator Chargehand at Iona Island WWTP.

- In or around September 2005, she was issued a warning as a result of a co-worker's complaint of bullying and harassment.

- In or around July 2011, she filed a written complaint against Andrew Hunt and a co-worker.

- On July 11, 2011 she brought a complaint before the BC Human Rights Tribunal against the Greater Vancouver Regional District and the Employer alleging discrimination in employment on the basis of sex dating back to 1992. The majority of the allegations were

dismissed for being out of time. The only aspect of the complaint that was accepted for filing was an allegation from May 2011. Ultimately, she withdrew the complaint.

- In January 2016, she brought a complaint alleging that unknown Respondents had written "fat bitch" on her jacket.
- She filed a WorkSafeBC claim on January 27, 2016 with respect to mental health issues related to her employment. The claim was declined on April 19, 2019.
- She was on medical leave from January 28, 2016 until February 13, 2018.
- On February 21, 2018, she filed a harassment complaint against Mr. Hunt alleging that he had trapped her in an office and berated her.
- On June 15, 2018, she received a letter of expectation.
- On July 26, 2018, she filed a complaint against a coworker alleging that she was inappropriately touched.
- On February 5, 2019 she received a written warning.
- On February 13, 2019 she received a two-day suspension.
- On April 2, 2019 her employment was terminated.
- On March 27, 2020 the Grievor filed a Human Rights Complaint naming the Employer as the Respondent

As outlined above, the Grievor was on medical leave from January 28, 2016 until February 13, 2018. In October 2017, she was cleared to return to work by the Employer's insurance provider. A dispute arose about conflicting medical reports regarding her restrictions and limitations. The Union filed a grievance over the Employer's request that she undergo an independent medical examination. The grievance was resolved by agreement that she would return to work in February 2018 on modified duties as identified by her physician. The temporary restrictions and limitations were outlined as follows:

1. a modified work week of 4.5 hours per day, 5 days a week.
2. cannot supervise others; and
3. needs more time to make decisions.

In his examination in chief, Mr. Shoji said he had been employed by the Employer for 11 years, worked for another employer for a period of time and returned to Metro Vancouver in November 2016. At that time, he was Division Manager, Wastewater Treatment.

According to Mr. Shoji, he scheduled a meeting at the plant on February 13, 2018 to welcome the Grievor back to work. Upon his arrival at Iona Island WWTP, he was notified that she was in the maintenance building, was not coming to the meeting, and did not want to attend a meeting in the administration building. He and Mr. Hunt proceeded to the maintenance building to greet her. She was not happy to see them and became anxious and distraught and did not want to talk to them. To avoid a confrontation, they left and sought support from Human Resources. An agreement was reached to meet with her in the maintenance building. She attended with her worker support people from the Maintenance Department. Mr. Shoji testified that she was emotional, confrontational, and angry. There was a disagreement about her limitations and restrictions. He said that he was shocked and confused by her reaction. She informed them that she could not attend meetings without her trusted support people and could not attend at the administration building because she did not feel safe there. The Grievor and a Union representative attended a second meeting with Mr. Shoji on February 14, 2018 to confirm that her medical restrictions were as outlined by her physician.

On February 22, 2018, the Grievor reported to the Assistant Superintendent of Maintenance, Mr. Gnos, that Mr. Hunt had trapped her in an office and berated her. In an email dated February 27, 2018 she advised Mr. Shoji of the incident. In addition, the email included a variety of other concerns including allegations which had been included in her 2011 Human Rights Compliant and dismissed by the Tribunal, an incident which occurred in 2015 and a 2016 allegation about a coworker who allegedly blocked her in a room and assaulted another coworker. The Employer retained an outside investigator to investigate the Grievor's Respectful Workplace Complaint regarding Mr. Hunt.

On May 23, 2018, the Grievor emailed Mr. Shoji to report an alleged safety issue regarding a co-worker sitting in his car and her fear that he would follow her out of the plant. Mr. Shoji

responded that he did not regard a co-worker in his car as a safety issue. She responded raising historical issues about the co-worker and employees at the plant with criminal records.

On June 11, 2018, Mr. Shoji called a meeting with the Grievor to discuss her return to work progress, review the findings arising from the Hunt Complaint investigation, and set expectations for the path forward. Human Resources attended as did the Grievor's shop steward and a worker support person.

On June 15, 2018, Mr. Shoji provided the Grievor with a letter confirming the Employer's expectations as discussed at the June 11, 2018 meeting. The letter reviewed the Grievor's return to work plan and noted that she had returned to work for little over a week before filing a complaint of alleged bullying and harassment against Mr. Hunt. The letter states that an independent investigator was retained and the investigator found the allegations unsubstantiated. The letter continues:

> In our view, your perception of the Respondent and a variety of other factors in the workplace are not reasonable nor objective.
>
> This situation created by your feelings of mistrust have had implications for you, those you mistrust and the workplace generally.
>
> We see the work environment as objectively safe. Your past views about the safety of the work environment and some co-workers have created a great deal of anxiety for you. In our meeting, you stated that you are working on these views with your doctor and there is one specific co-worker that you are having the most difficult time working with, but currently your tasks do not overlap with his.
>
> The investigation report notes that managing you in the workplace is also stressful to those charged with your supervision. The Respondent, as an example, indicated that he is aware of your sensitivity towards him, is cautious in how he deals with you, seeks to avoid conflict and this is causing him stress and impacting him personally.
>
> Your reintegration into the workplace is moving at a slower than anticipated pace as a result of your reluctance to engage with your supervisors and their corresponding hesitation to provide direction to you as they are seeking to avoid creating conflict. You have asserted reservations about entering into certain areas in the plant (i.e. the control room), working with certain people or even speaking with certain managers (i.e. Mr. Hunt). When you feel anxious you seek out your support people in maintenance (Mr. Sylvio, Mr. Mitchell, Mr. Marshall and occasionally Mr. Gnos). Excess interactions with your support group during working hours removes both you and them from engaging in their designated work activity. As a result, this activity is both disruptive and results in a loss of productivity….
> In terms of our expectations going forward they are as follows:

1. We will continue with your GRTW and manage the temporary limitations/ restrictions with the goal of getting you back to work in a 12 hour rotating shift.
2. You will be expected to work with all of your co-workers at the plant, even those with whom you have a preference not to work with.
3. You will accept workplace directions from any and all persons in authority which include charge hands, foremen and management staff.
4. You will be expected to follow reasonable workplace directions such as reporting to your charge hand, entering or working in all areas of the plant including the control room as required and working with employees who are junior to you. We confirm that even if you are the most senior person, you will not be working in a supervisory capacity.

The letter went on to address specific concerns the Grievor had raised about the Control Room being unsafe, working with a co-worker who made her feel uncomfortable, her inability to perform group lock outs, and assistance with her relationship with Mr. Hunt. Mr. Shoji reiterated that the workplace was objectively safe, reminded her of the agreed-upon limitations and restrictions, encouraged her to report any unprofessional behaviour and indicated that Human Resources would follow up with her and Mr. Hunt on the relationship issue. The letter concluded:

> You will need to become more objective in your views of the workplace, your colleagues and the day to day interactions that occur in the workplace. By objective, we mean meeting the standard of analysis considered by the Investigator, namely that of a reasonable person. Although we are encouraged by your June 11th email and what was said at our meeting, we are convinced that absent of this change in perspective there will continue to be further anxiety and frustration for you, and for other staff. This would have negative impacts to the operations and make our relationship not viable.

On July 16, 2018, the Grievor signed the letter to indicate her acknowledgement of the expectations and her commitment to abide by them.

On July 26, 2018, the Grievor reported that she was inappropriately touched by a co-worker. Her email to Maggie Boak, Lead Human Resources Advisor, reads as follows:

> This morning at approximately 9am, I was inappropriately touched by a worker that does not work at the Iona location. The workers name is [the Respondent]. The incident took place in the Operator's computer room, again. While I was on the computer, [the Respondent] (who I never even knew was on site) came thru the doorway, grabbed my arm, his face inches from mine and said, "how are you?". He was so close I couldn't recognize who it was immediately and when I did, I turned away. He let go of my arm and left the room. This encounter made me feel uncertain, powerless, offensive, uneasy, tense, anxious, paralyzed, dominated and frustrated. Since this is one of the individuals who wrongly accused me of harassment, I am not sure why he felt the need to touch me at all. I clearly

> want nothing to do with [the Respondent] and certainly was not expecting HIM to touch me at work since he is not situated at this plant.

The day after she sent the email to Ms. Boak, the Grievor commenced annual leave until September 17, 2018. At 7:33am on the morning of her return to work a Maintenance Supervisor emailed Mr. Hunt stating:

> I walked by Chrystal speaking to Bill. She was crying and said to Bill "and the supervisors won't do anything". I'm not sure of the context, but she is obviously upset.

The Maintenance Supervisor's email set off a chain of events. Mr. Hunt and an Operations Supervisor, Eugene Yeung, went to the Maintenance Building to talk to the Grievor. According to an email Mr. Hunt sent to Mr. Shoji at 9:05am, the Grievor demanded that there should be an investigation into an assault on her that occurred before she left for vacation. Mr. Hunt told her that he had looked into the incident and determined that the co-worker had lightly tapped her on the shoulder in a friendly way to say "long time no see" and he concluded there was no issue. However, he had advised Human Resources of the incident. The Grievor threatened to call the police about the alleged assault.

According to Mr. Hunt's email, the Grievor continued to yell at him and Mr. Yeung saying that the Joint Health and Safety Committee ("JHSC") did nothing. He asked her what things she thought the JHSC did not do and she would not say. She brought up a co-worker with a criminal record. Mr. Hunt asked her many times if she was going to return to work and she told him she was not going to until the alleged assault was investigated.

It is apparent from the email exchanges that Ms. Boak intended to follow up with the Grievor about her complaint but was waiting until the Grievor returned to work. Over the next couple of days, there were meetings with the Grievor and emails between her and Human Resources. The Grievor declined to meet with the Ms. Boak to discuss her complaint. On September 20, 2018, she emailed Ms. Boak setting out her view that the issue ought to be dealt with by the JHSC, not Human Resources:

> Thank you for your patience at this time for me. I am extremely disappointed that my Superintendent did not see the seriousness in this issue to even document it. While I appreciate that you would like to handle this, there are plant level safety issues that must be addressed. If you have undertaken an investigation of this incident, could you please

provide me with a copy of the investigation. I have been specifically told by Andrew that after speaking with [the Respondent], he said he "only touched my shoulder". Unwanted touching is assault and I am certainly not going to accept a worker from another plant who accused me wrongfully of harassment to touch me in any way.

I asked Andrew for his documentation on the incident and he said he had none. I asked for a copy of the incident report and he did not have one. As my superintendent I expected that he would act on the safety issues surrounding this. It was clear that Andrew did not understand that unwanted touching is assault, and even though he said, well, he just touched your shoulder, it is still assault. I expect the superintendent would act on a safety concern of one of his plant staff, but clearly has dismissed it and sided with a worker who does not work here. This is disturbing to me and should be of concern to some.

There have been two JHSC meetings since this incident with no resolution.

Here's the issue:

1. Raise awareness regarding not touching at work without permission.
2. End touching at work without permission.

Rationale:

Why is this a safety issue?

1. Workers want to conduct their duties without being concerned about their physical safety or well-being.
2. Workers want to attend work, complete the day without being physically intruded upon.
3. Workers have every right to not be touched at work.

Physical and mental health of workers becomes a safety issue when workers experience physical intrusions and personal space boundary violations.

Decision required:

If Safety Committee sees this as an issue, how is it elevated to ops?

On September 20, 2018, the Grievor sent a similar email to Mr. Hunt with a different first paragraph. The email was copied to the members of the JHSC. The first paragraph reads as follows:

> As the cochair of the JHSC I am requesting action on a very serious incident that happened on July 26th. This incident involved a GVRD employee not stationed at the Iona Island WWTP. It involved this person grabbing the arm of a worker who is stationed at this plant. Up until this point, it has been undocumented as two safety meetings have come and gone with no mention of this. As you were well aware, I reported the incident to you on July 26th. While you have chosen to ignore this incident, I am requesting that the JHSC consider the following: [The Issue, Rationale and Decision required was set out as above.]

The Grievor was on leave from September 14, 2018 until January 11, 2019.

On January 15, 2019, Mr. Shoji and a Human Resources Advisor, Vanja Cullen, convened a meeting with the Grievor, a worker support person and a Union representative to discuss her July 26, 2018 complaint and ongoing interactions with supervisory staff and Human Resources. Mr. Shoji followed up with an eight-page letter of warning dated February 5, 2019:

> The purpose of this letter is to follow up from our meeting on January 15, 2019. The reason that we met with you was to advise you that your disruptive behaviour in the workplace is causing significant adverse impacts on your coworkers and workplace productivity.
>
> You took vacation starting July 27, 2018 and returned to work on September 17, 2018. Prior to this vacation you filed a harassment complaint against a coworker alleging that he assaulted you. As a result of your complaint, Human Resources conducted an investigation and found that there was no contravention of the policy. The coworker in question had touched your shoulder in the course of greeting you. Your complaint was without merit and significantly, your response to this interaction was grossly out of proportion. Regrettably, this is not the first occasion in which you filed a complaint or raised a concern which is exaggerated and/or one that is not proportionate with any objective view of the incident and this behaviour cannot continue.

Mr. Shoji continued by thoroughly setting out the Grievor's employment history and the many issues of concerns to the Employer including that her reactions and perceptions to exchanges in the workplace were disproportionate and unreasonable; and how these reactions were affecting her coworkers. He noted that she had raised historical issues with a newly promoted supervisor and expressed her views about working with employees with criminal records. She also informed the supervisor that she did not wish to use a certain computer because of its proximity to Mr. Hunt's office. The letter continued:

> We met with you on January 15, 2019 after your requested time off from September 14, 2018 until January 11, 2019 to share the above noted concerns with you. At the conclusion of our review we provided you with an opportunity to respond and provide comment. During the conversation that followed, it was made clear that you were taking no responsibility for your actions. Instead, you indicated that you felt berated by Vanja Cullen and myself and noted that the concerns laid out for you paint you as a "troublemaker". It is unfortunate that you failed to see how you have negatively impacted the relationship with your employer and that you did not consider the comments and feedback presented to you. The behaviours you displayed following your return to work from time off further reinforces my belief that you fail to recognize the adverse impact of your behaviour on the relationship with your employer….
>
> Specifically, consistent with the general guideline for Metro Vancouver Regional District staff, you were asked by Eugene Yeung to submit your timesheet. You refused, referencing

a perceived existing unresolved time coding issue…. Chrystal, let me be clear, I expect you to submit time in the same manner as all other employees at your workplace….

In our meeting on January 15, 2018 as well as in an email you wrote to Vanja Cullen and myself on January 22, 2018, you continue to assert that you set your own safety standard and refuse to accept the notion that Metro Vancouver Regional District sets an objective safety standard for all staff in compliance with the laws and regulations which govern the Employer. Additionally, during the meeting and in the email which followed, you reference having suffered a brain injury due to the 2016 incident related to someone writing disparaging remarks on your work jacket. As stated earlier, the employer has investigated this matter. Dr. Lee, your treating physician provided us with limitations and restrictions prior to your return and the employer has been accommodating these limitations and restrictions. If there are additional limitations and restrictions, please provide us with the medical information so that we can review and assess.

Also, in our recent meeting you continually referenced gender as an issue in respect to your treatment by the management at the site. If you wish to file a complaint about gender discrimination, we will need detailed information of recent events so that we can investigate this matter. If upon reflection you determine not to file a complaint, that is fine, but in return you will need to stop making these allegations. You have been absent from the plant for a considerable period of time and we are not aware of any recent gender based discriminatory conduct.

Your actions and behaviours after filing your latest unwarranted complaint and following our meeting of January 15, 2019 are unacceptable. We are putting you on notice that your behaviour in the workplace has had a significant adverse impact on your coworkers and the organization as a whole. If you are unable or unwilling to have an objective view of your workplace we will have no option but to terminate your employment.

While we encourage you to reach out to Human Resources and to utilize the tools of our Respectful Workplace Policy in the event of any bona fide complaint, we ask that you seek counsel from your union or other advisors to get an objective perspective of any event prior to initiating the complaint….

Mr. Shoji concluded the letter by reiterating the expectations he had outlined in the June 15, 2018 letter and adding four new expectations:

- Most significantly, we will require you to become more objectively reasonable in your views of the workplace, your colleagues and the day-to-day interactions that occur in the workplace.

- If you file a subsequent bullying or harassment complaint, you must be prepared to participate in the process and meet with the investigators in a timely fashion.

- You must not engage in discriminatory behaviour or make discriminatory comments regarding employees who have a criminal record unrelated to their job. This is a prohibited behaviour pursuant to the BC *Human Rights Code* and under the Metro Vancouver Respectful Workplace Policy.

- More generally, you must be mindful of your impact on your coworkers and the operation.

Some of the expectations above have been laid out since June 15, 2018. The letter of June 15, 2018 was a letter of expectations and was not considered disciplinary. This is a disciplinary letter. Any further breach of these expectations will result in further discipline up to and including termination of the employment.

Chrystal, this employment relationship is very tenuous. If your employment is to be maintained you must immediately, consistently and irrevocably change your behaviour. If you were unable to or unwilling to modify your behaviour it will result in termination of your employment….

In a follow up to the January 15, 2019 meeting, Mr. Shoji scheduled a meeting with the Grievor for February 5, 2019. As set out below, the Grievor refused to attend the meeting resulting in Mr. Shoji issuing a letter of suspension on February 13, 2019:

On January 15, 2019, Vanja Cullen, Senior HR Advisor and I met with you to discuss a series of concerns we had about your behaviour at the workplace. In this meeting you asked for a copy of my speaking notes. You were advised that although I was not prepared to provide you with these notes that I would arrange a follow up meeting and would provide you with a letter outlining our concerns. You requested that we provide you with an agenda for that meeting.

On or about January 25, 2019, I sent you a meeting invite for 9:00 a.m. on February 5, 2019 and recognizing that you wanted an agenda, I advised you that this was a follow-up to the January 15, 2019 meeting and I would be providing you my conclusion regarding my concerns and what I see as next steps.

On February 5, 2019, Ms. Cullen and I arrived for our meeting but you refused to attend. Between 9:00 and 10:15 a.m. several attempts were made to have you attend. Despite providing you with these opportunities, you continued to refuse to attend the meeting and the meeting did not occur. Eventually, the letter I had prepared was provided to you and a copy given to your Union.

I called a meeting for February 8, 2019 to discuss the events of February 5, 2019, and provide you with an opportunity to explain why you refused to attend the February 5, 2019 meeting. At the February 8, 2019 meeting, you had your shop steward, Clay Pelchat, speak on your behalf. Mr. Pelchat, stated that you felt you were not provided with sufficient notice and was not provided with an agenda and my speaking notes that you requested. As such, you felt that the nature of the meeting was disrespectful.

The employer has every right to meet with our employees to discuss concerns and issues. You were given plenty of notice of the February 5th meeting and your refusal is another example of the unreasonable reaction that you have at the worksite. There is nothing disrespectful about the request to meet and your requirement to attend. Moreover, you were told the purpose of the meeting, you have no right to see my meeting notes and your refusal to attend the meeting was clearly insubordinate.

> Your reaction to the request to meet was disruptive and not proportionate to the situation. This was another example of management resources squandered as a result of your behavior. This simply cannot continue….
>
> I did not hear any rationale from you on February 8, 2019 that would alter this conclusion. As I advised you on February 8, 2019, you are suspended without pay on Monday, February 11, 2019 and Tuesday, February 12, 2019 and you are expected to return to your regularly scheduled shift on Wednesday, February 13, 2019.
>
> Chrystal, your employment with Metro Vancouver Regional District is in serious jeopardy. You are now at the cusp of termination of employment. Further incidents of discipline will lead to the termination of your employment.

The final incident involving the Grievor occurred on March 6, 2019, at a THM. As described by witnesses, a THM is held at Iona Island WWTP on the first Wednesday of each month primarily for Mr. Hunt to update staff on ongoing projects, new staff, retiring staff, and safety issues. Most, if not all, operations and maintenance workers attend. It usually lasts about 10-15 minutes and, at the end, Mr. Hunt opens the meeting for questions.

The Grievor took the opportunity of the question period following Mr. Hunt's report to raise issues that were of concern to her. The details of the incident and what followed are set out below in the Letter of Termination dated April 2, 2019:

> On Thursday, March 14, 2019, Vanja Cullen, Senior Human Resources Advisor and I met with you to get your views on the March 6, 2019, Iona Island WWTP Town Hall meeting. You were advised that you could have Union representation but chose to proceed without your Union being present.
>
> The Town Hall meetings are set up for employees to engage in an open discussion on operations, safety and other topics. Having said that, those in attendance are still expected to behave in a professional and respectful manner. Following our review of the concerns that were brought forward regarding your conduct at the Town Hall meeting and considering your responses in the March 14th meeting, we have determined that you did not behave in such a manner. Further, many of your statements made during the meeting were not accurate and breach the expectations that Metro Vancouver Regional District (MVRD) had previously set out for you.
>
> In the Town Hall meeting, in front of other staff and without providing an explanation, you ask your Superintendent, Andrew Hunt to step down as a Co-Chair of the Joint Health and Safety Committee. You advised us that you did this in a calm and respectful manner. We have reports to the contrary. On March 14th you indicated to Ms. Cullen and I that the reason you asked Mr. Hunt to step down was because he will not address any safety concerns. You continually state that safety issues never get dealt with at Iona Island WWTP. This statement

is simply not true. By your own admission in our meeting there have been safety issues that have been addressed. We have repeatedly informed you that the plant is safe and that you need to be more objective in your claims.

When Mr. Hunt asked you at the Town Hall meeting to provide a specific example of a safety issue that was not addressed you brought up a Respectful Workplace complaint that you filed in July 2018. This issue was addressed by our Human Resources team and you were advised that there was no merit in your complaint. In an effort to move forward, MVRD set expectations for you to follow, which included not bringing up past issues that have been addressed. You have failed to meet this expectation…. You may not have agreed with the finding but MVRD took your claim seriously, investigated your allegations and debriefed you on the findings.

You also raised concerns at the Town Hall meeting about your lock out being checked and that you feel as though you are being targeted. You were advised that this is not the case. Checking work is part of your supervisor's duties and other employees' work is also reviewed. You were not accepting of this response.

You continue to raise concerns about a co-worker who allegedly trapped other co-workers in a room and was aggressive. You indicated that this occurred in January 2016 but it was first brought up to me in October 2017. At that point you were told that we needed details of the incident and someone to come forward on the record. No details were provided and we informed you that we could not proceed without these details…. This is an example of where your concerns are not coming from an objective and reasonable viewpoint.

At the Town Hall meeting you asked for the MVRD Violence in the Workplace Policy to be reviewed by Iona's Joint Health and Safety Committee. It has been previously explained to you that this policy does not exist but that we do have a Respectful Workplace Policy. Further, if you feel unsafe then it is your duty to report the incident and provide details. In our meeting you stated that you had no issue with the policy; however, you continually ask for a review this is yet another example of where you cannot let go of previous issues….

Your actions at the Town Hall meeting of March 6, 2019, were disruptive and created a negative environment for co-workers and managers who were in attendance. It is clear that you cannot move forward in the employment relationship and will continue to focus on past events even when these events have been addressed or resolved….

Chrystal, although you claimed to have done nothing wrong, I find that you have contravened the expectations set out for you. These include, but are not limited to, being objective and reasonable in your views of the workplace, your colleagues and the day-to-day interactions that occur in the workplace; and to be mindful of your impact on your coworkers and the operations.

MVRD has invested significant time and resources in an effort to make this employment relationship viable. We have met with you to discuss your concerns, examined and reviewed allegations that you have brought forward and engaged external resources on multiple occasions to assist with this when required. At one point you requested training and assistance with your relationship with Mr. Hunt. MVRD agreed and attempted to make arrangements with you to for fulfill your request, only to have you decline to move forward once we suggested dates and times.

> You continue to have trust issues with the management team. We have repeatedly advised you that we need to move forward in this employment relationship and that you cannot continue to focus on the past especially when the issues you have raised have been appropriately dealt with. It is evident that you were unable to do this. You have been advised on more than one occasion that you are having a negative impact on your co-workers and the operations, that your employment is in serious jeopardy, and that you are on the cusp of employment termination. This has done little to change your views, your outlook, or your actions. You still maintain that you have done nothing wrong and we see no chance of any significant behaviour change in the future. Your employment with MVRD is frustrated and beyond repair. As such, we are terminating your employment effective immediately.

Positions of the Parties

The Employer submits that the Grievor made a premeditated, disruptive and insubordinate attack on Mr. Hunt at the THM. It claims that she made demonstrably false allegations in front of all her co-workers. The Employer argues that the Grievor had an adverse impact on the Iona Island crew as evidenced by their reactions during the meeting. She advanced an issue which she had been told repeatedly was not appropriate, namely that the JHSC review the corporate Respectful Workplace Policy; and she unreasonably demanded that Mr. Hunt step down as the Co-Chair of the JHSC.

The Employer submits that the Grievor's conduct at the THM warranted discipline because of its impact on management, the JHSC and employees at the Iona Island WWTP. It maintains that a thorough consideration of the Grievor's entire history with the Employer must lead to the conclusion that her assertion that she is capable of leaving the past behind is not credible and no more likely to be true than a similar assertion in 2018. The Employer argues that the Grievor is completely unmanageable and, in the circumstances of the case, it had just cause to terminate her employment. The Employer argues in the alternative that if it did not have just cause to terminate the Grievor's employment, an award of damages in lieu of reinstatement is appropriate rather than an order for reinstatement to employment.

The Employer relied on *Wm. Scott Co.,* [1976] BCLRB No. 98; *Faryna v. Chorny*, [1951] B.C.J. No. 152; *West Fraser Mills Ltd (Chasm Sawmill) v United Steelworkers, Local 1-417 (Brown Grievance),* [2011] B.C.C.A.A.A. No. 133; *Coast Hotel (c.o.b. Coast Bastion Inn) v United Here Local 40 (Larson Grievance)* 2016 BCCAAA No 120; *Ceva Logistics Canada ULC v Unifor, Local 222*

(Washington Grievance), [2014] C.L.A.D. No. 244; *Canadian Forest Products Ltd. v. United Steelworkers, Local 1-405 (Edwards Grievance),* [2019] B.C.C.A.A.A. No. 85; *Hayes Forest Services Ltd. v. United Steelworkers of America, Local 1-85,* [2005] B.C.C.A.A.A. No. 192; *Western Pulp Ltd. Partnership v. CEP, Local 514 (Keel*er), [1999] B.C.C.A.A.A. No. 589 (Korbin); *Westmin Resources Ltd. and CAW Canada, Local 3019*, [1996] B.C.C.A.A.A. No. 506 (Germaine); *Insurance Corp. of Canada v. Canadian Office and Professional Employees' Union, Local 378 (Matute Grievance),* [2014] B.C.C.A.A.A. No. 132 (McEwen); *British Columbia Hydro and Power Authority v. International Brotherhood of Electrical Workers, Local 258 (Crerar Grievance),* [2002] B.C.C.A.A.A. No. 415; *DeHavilland Inc. v National Automobile Aerospace, Transportation and General Workers Union of Canada, Local 112 (Mayer Grievance)* 1999 OLAA No 767; *BC Ferries Services Inc. v BC Ferry and Marine Workers' Union (Rayner Grievance),* [2005] BCCAAA No 68; *Brown and Beatty* (7:4312 – The final incident); *Surrey (City) v CUPE, Local 402 (Saliken Grievance),* [2007] B.C.C.A.A.A. No. 8; *International Forest Products Ltd v United Steel Workers, Local 1-3567 (Turner Grievance),* [2007] B.C.C.A.A.A. No. 111; and *Steel Equipment Co. Ltd.,* [1964] O.L.A.A. No. 5.

The Union submits that the Grievor did not give the Employer cause to impose any discipline in response to her conduct at the THM. It maintains that her suggestion that Mr. Hunt should step down as chair of the JHSC may have been socially inappropriate or audacious, but it did not rise to the level of an industrial offence such as insubordination. The Grievor did not refuse to carry out instructions given by her manager. She was persistent in raising certain issues, but given the Town Hall context, where employees can raise issues freely, that is not insubordination in the usual labour relations sense. The Union argues that there is a subtle difference between the Grievor's failure to meet expectations and a refusal to follow an order.

The Union acknowledges that arbitrators may find insubordination even where an employee has not refused to follow instructions or directions given in the workplace. However, it submits that these cases usually involve rude, abusive, and profane remarks by an employee directed at a person in authority.

In the alternative, the Union argues that discharge was excessive in all the circumstances of the case. It submits that the doctrine of culminating incident does not give an employer license to dismiss an employee for a relatively minor transgression; even if the conduct attracts some discipline, regardless of the extent of the record. It maintains that the prior record must constitute a sufficient base on which to apply the doctrine; the industrial offence must have some substance, and the record must be formidable.

The Union asserts that if this Board of Arbitration finds that discharge was excessive, it ought to substitute a lesser, more appropriate disciplinary measure taking into consideration that there is no evidence the Grievor was anything other than a competent operator at Iona Island WWTP. Her conduct never impeded the processes of the plan, she has nearly 30 years of service and certain bargaining unit witnesses spoke well of her.

The Union further maintains that should I find that dismissal was excessive, damages in lieu of reinstatement are not a sufficient remedy in the circumstances of this case. It argues that to find damages are warranted, it is not sufficient for an employer to say that someone is difficult or not well liked; there must be an intervening event, for example, a plant closure or a re-organization, that bars the employee's reinstatement.

The Union relied on *Westmin Resources Ltd. and CAW Canada, Local 3019*, [1997] B.C.C.A.A.A. No. 291 (Germaine); *B.C. Central Credit Union, Central Data Systems Department (Re),* [1984] B.C.L.R.B.D. No. 300; *Health Employers Assn. of British Columbia v. Hospital Employees' Union (Evans Grievance),* [2000] B.C.C.A.A.A. No. 104 (Jackson); *Coulson Forest Products Ltd. (Re),* [1995] B.C.L.R.B.D. No. 329; *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 195 v. Courtesy Dodge Chrysler (1998) Inc. (Sweetman Grievance),* [2001] O.L.A.A. No. 387; *Alberta Union of Provincial Employees v. Lethbridge Community College,* [2004] 1 S.C.R. 727; *B.C. Central Credit Union (Re),* [1980] B.C.L.R.B.D. No. 8; and *Mill & Timber Products Ltd. v. International Woodworkers of America, Local 1-357 (Devlin Grievance)*, [1984] B.C.C.A.A.A. No. 258 (Munroe).

Decision

As in any discharge or discipline case, the questions for the arbitrator to consider are those found in *Wm. Scott*. These questions are:

1. Has the grievor given just and reasonable cause for some form of discipline by the Employer?

2. If the answer to question #1 is yes, was the discipline imposed an excessive response under all the circumstances?

3. If the answer to question #2 is yes, what alternative measure should be substituted as just and equitable?

Where different or competing versions of events are presented, I have assessed the credibility of the witness to determine which version of events is more likely than not to be true. In this regard, I have kept in mind the considerations set out in *Faryna* v. *Chorny*:

> The credibility of an interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried the conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

The Grievor has a complicated history with the Employer which is evidenced by her allegations of bullying and harassment, her complaints of discrimination to the BC Human Rights Tribunal and her disciplinary record. However, the only issue in dispute in this matter is whether the Employer had just cause to terminate her employment. There are no outstanding grievances over the previous discipline.

On a review of the evidence, I find the Grievor to be an unreliable narrator. There were many instances where she claimed not to recall what was said to her or what she said at meetings with the Employer. She claimed not to recall receiving letters addressed to her. She seemed cautious about what she revealed in her responses yet, at times it was clear that despite her protestations to the contrary, her distrust of management and her belief that the workplace is unsafe for her had not changed since her termination. Where there are contemporaneous meeting notes and emails or where objective witness accounts differ from hers, I have preferred that evidence.

With respect to the first question in *Wm. Scott.*, the issue is whether the Grievor's behaviour at the THM was worthy of some form of discipline. In brief, her behaviour amounted to:

1. asking Mr. Hunt to resign from his position as Co-Chair of the JHSC;
2. stating that safety issue do not get dealt with by the Employer; and, as an example, bringing up her alleged assault in July 2018;
3. claiming that she was being targeted because only her lock outs were being checked; and
4. asking for the JHSC to review the Respectful Workplace Policy.

Employer Counsel asserts that the Grievor's conduct was insubordinate as she had repeatedly been told to be more objective and reasonable about her view of safety in the workplace, and to leave past issues behind. She had been told that the Iona Island WWTP is objectively a safe workplace. She had been told that the Employer does not have a violence in the workplace policy, it has a corporate Respectful Workplace Policy, and it is not within the mandate of a worksite JHSC to review or revise that Policy.

In *West Fraser Mills Ltd (Chasm Sawmill*), Arbitrator Hall set out the test for insubordination at paragraph 27 as follows:

> There is no dispute over the "three essential components" which must be present to sustain a charge of insubordination. As set out at paragraph 25 of *Cariboo-Chilcotin School District No. 27 -and- International Union of Operating Engineers, Local 859*, [2004] B.C.C.A.A.A. No. 317 (Hope), quoting Palmer, Collective Agreement Arbitration in Canada (Third Edition), at page 316:
>
> > What is Insubordination?
> >
> > Quite simply, insubordination might be defined as the flouting of a clear order of a person in authority. In general, then, there are three initial components of a charge of insubordination:
> >
> > (a) there must be a clear order understood by the grievor;
> > (b) that order must be given by a person in authority; and
> > (c) the order must be disobeyed.
>
> See also paragraph 22 of *Re Hunter Rose Co. Ltd. and Graphic Arts International Union, Local 28-B* (1980), 27 L.A.C. (2d) 338 (McLaren), cited here by the Union.

The Grievor did not deny that she raised the four issues at the THM. Based on the evidence, the Grievor's allegation that her supervisor had singled her out by checking only her lock outs was without substance. On cross examination, she acknowledged that she did not know if any other

operator's lock outs had been checked; she just felt that as a good, senior employee, hers ought not to have been checked. But that is not what she raised at the THM. Instead, she asserted that she was being targeted by her supervisor which is a serious allegation to make especially when made in front of 20-25 of your co-workers.

The Grievor had been directed not to continue bringing up matters that had been investigated and dealt with. She testified that she would not have brought up the July 2018 alleged assault if Mr. Hunt had not "badgered and goaded" her to provide an example of a safety issue that had not been dealt with. Even at the hearing, she seemed to believe that her assertion that safety issues do not get dealt with at the plant ought to have been accepted at face value. The allegation, made in front of a majority of her coworkers, was a serious charge given an employer's legal obligation to provide a safe workplace. The Grievor's assertion that safety issues did not get dealt with – in the absence of any evidence to support the contention – is, in my view, an example of her not adhering to the Employer's direction to be objective and reasonable about events in the workplace.

Her request that Mr. Hunt should step down as Co-Chair of the JHSC was also contrary to the Employer's directives. The JHSC is a joint committee comprised of Employer and Union representatives. Each party either asks for volunteers or appoints its representatives. It was not appropriate or reasonable for the Grievor to suggest that a management representative should step down from his role. She did not ask for both Co-Chairs to step down or for the entire committee to resign; she singled out Mr. Hunt to demonstrate her view that he was not fit to be in that role. I find her action was unreasonable, contrary to the directions she had been given and that she deliberately sought to humiliate him in front of her co-workers and undermine his authority in the role of Co-Chair.

Insubordination requires an element of open defiance or challenge to the employer's authority: *Insurance Corp of Canada (Matute)*. The Grievor's suggestion that the JHSC review the Respectful Workplace Policy was not a random idea. She had made it clear in the September 20, 2018 emails to Mr. Hunt and Ms. Boak that she did not consider it appropriate for Human Resources to deal with complaints of unwanted touching; she wanted the JHSC to deal with

them. In a meeting on October 3, 2018 with Ms. Boak and in a meeting with Mr. Shoji on January 15, 2019, she was told repeatedly that allegations of unwanted touching fell under the Respectful Workplace Policy and, as such, were handled by Human Resources, not managers or the JHSC. In my view, her demand at the THM demonstrated her belief that Human Resources and management representatives, Mr. Hunt in particular, had not done their jobs properly. If they had, that would have been the end of the matter. Instead, she was boldly launching a fresh attack on managerial authority by asking Mr. Hunt to step down as Co-Chair and for the JHSC to review the Respectful Workplace Policy.

The Grievor maintained that her tone at the meeting was respectful and calm, whereas the Employer claims that her demeanor was loud and aggressive. The Union's witnesses recalled that the Grievor started out in a neutral tone and became more insistent because Mr. Hunt interrupted her and would not deal with her concerns. Mr. Tailford maintained that Mr. Hunt was condescending and rude in his response to her. However, on cross examination, it was apparent that these witnesses had not taken contemporaneous notes of the exchange and could not recall the specifics of what was said. The Employer's evidence included emails sent immediately following the meeting that described what occurred as a disturbing verbal assault and a personal attack on Mr. Hunt. To resolve the conflict on this point, I have relied on what I regard as the more neutral evidence of the two bargaining unit employees who testified under summons and of Mr. Gnos whom the Grievor had previously described as the only member of management she could trust. Based on their accounts, I find that the Grievor's tone was loud or elevated and disrespectful; while Mr. Hunt remained calm and tried to de-escalate the situation and take the conversation off-line.

Union counsel confirmed with each witness who was present at the THM that the Grievor did not resort to name calling or use profanity during the exchange. Regardless, I am not satisfied that her conduct was appropriate in the workplace. While a THM is an opportunity for employees to hear updates about operations and bring forward issues and concerns, I accept that employees must conduct themselves in a respectful and professional manner. That is a minimum requirement in the workplace at all times. I am not persuaded that the Grievor met that standard.

Based on all the evidence, I have reached the conclusion that the Grievor honestly believes the workplace is unsafe for her. Honest belief may eliminate dishonesty as a cause for discipline, but it does not excuse the Grievor from following the Employer's directions. There was no medical evidence tendered at the hearing to suggest she is incapable of understanding the directions the Employer gave her. In January 2019 the Grievor claimed that she had suffered a brain injury as a result of the jacket incident in 2016. Mr. Shoji asked her to provide him with the medical information. She did not respond to his request. I find there is no conclusion to draw other than that she refused to accept the directions she was given. She is convinced the workplace is unsafe and only she is responsible for her personal safety. She believes that her views permit her to do and say whatever she wants without consequence despite management's warnings to the contrary.

I find that the Grievor's personal attack on Mr. Hunt's credibility and authority contrary to the clear directions she had been given by a person in authority, Mr. Shoji, meet the test for insubordination. The THM is intended for constructive dialogue, not a forum for employees to level baseless attacks at management in front of their co-workers. I find that the Grievor's conduct at the THM was insubordinate, disrespectful and worthy of some form of discipline.

Having found that the Grievor's conduct at the THM gave the Employer cause for discipline, I turn to the second question in *Wm. Scott*, whether termination was an excessive response in all the circumstances of the case. In reviewing the evidence, I have kept in mind the factors set out in *Steel Equipment Co. Ltd.,* at para 2:

1. The previous good record of the grievor.
2. The long service of the grievor.
3. Whether or not the offence was an isolated incident in the employment history of the grievor.
4. Provocation.
5. Whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses, or whether the offence was premeditated.
6. Whether the penalty imposed has created a special economic hardship for the grievor in the light of his particular circumstances.
7. Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination.

8. Circumstances negativing intent, e.g. likelihood that the grievor misunderstood the nature or intent of an order given to him, and as a result disobeyed it.
9. The seriousness of the offence in terms of company policy and company obligations.
10. Any other circumstances which the board should properly take into consideration, e.g., (a) failure of the grievor to apologize and settle the matter after being given an opportunity to do so; (b) where a grievor was discharged for improper driving of company equipment and the company, for the first time, issued rules governing the conduct of drivers after the discharge, this was held to be a mitigating circumstance; (c) failure of the company to permit the grievor to explain or deny the alleged offence.

The Employer submits that the Grievor's behaviour at the THM was a culminating incident. The doctrine of the culminating incident stands for the proposition that once an employee's misconduct has given an employer cause for some discipline, the employer may take the employee's entire record into account when determining the appropriate penalty. The doctrine is described in *Brown & Beatty* as follows:

> In order for an employer to make use of the doctrine of the culminating incident, it must prove the existence of a final incident deserving of some discipline or, in the case of non-culpable behaviour, a "proper and appropriate occasion" to review the employee's performance overall. Although there may be offences that are so trivial they will not satisfy the rule, the condition has been held to have been satisfied, and the prior record of the grievor properly considered, even where the final act only warrants a written warning.

In *Ceva Logistics* the Arbitrator expanded on the application of the doctrine at para 40:

> In *Re City of Hamilton, supra,* the doctrine of the culminating incident in the context of discipline is addressed at pp. 25-6:
>
> …
>
> The doctrine of the culminating incident...posits that where an employee has engaged in some final, culminating act of misconduct or course of conduct for which some disciplinary sanction may be imposed, it is entirely proper for the employer to consider a checkered or blameworthy employment record in determining the sanction that is appropriate for that final incident.
>
> As can be seen from the above, while culminating disciplinary events may not in themselves justify the level of discipline chosen by the employer, it is their occurrence per se which justifies an employer's consideration of the employee's employment record, including the discipline record. Thus, although the level of discipline imposed might perhaps be disproportionate to the nature of the misconduct associated with the culminating incident, the employer's decision may be deemed appropriate in consideration of the employee's entire employment record.

I agree with the Union's submission that the doctrine does not allow an employer to terminate an employee for any minor infraction such as arriving two minutes late. However, that is not the evidence in this case. As I have found, the Grievor seriously misconducted herself at the THM. Such an incident allows for a review of the Grievor's entire employment record.

The Grievor's misconduct is not the standard industrial offence such as recklessness or theft. The Employer's grounds for dismissal include both culpable and non-culpable elements. As Mr. Shoji stated in the January 15, 2019 letter of warning, "If you were unable or unwilling to modify your behaviour it will result in termination of your employment." An employee unable to modify their behaviour is arguably different than one who is unwilling to modify their behaviour.

I have found guidance on this point In *Lethbridge Community College*. The Supreme Court of Canada considered an appeal arising from a grievance arbitration regarding an employee's termination for unsatisfactory performance. The issue in that case was whether the arbitrator had erred by ordering damages in lieu of reinstatement rather than reinstatement once he determined that the employer did not have just cause for dismissal. The Court rejected the argument that in cases of non-culpable conduct, just cause may only be found to exist where the employer has abided by the five criteria set out in *Re Edith Cavell*; and if the employer has not followed the criteria, it is required to reinstate the employee. At paragraphs 42-43, Justice Iacobucci writing for the Court addressed the issue as follows:

> In my opinion, this narrow and mechanistic approach to employee conduct and arbitral authority does not take full account of the arbitrator's dispute resolution mandate, nor does it consider adequately the myriad of employment circumstances that employees and employers confront. As a result, I do not believe that the criteria set out in *Re Edith Cavell* by themselves determine the framework for analysis. More particularly, they should not be seen, in and of themselves, as dictating the terms of remedial authority exercised by the arbitrator.
>
> Further, one must consider whether the distinction between culpable and non-culpable conduct is relevant in the particular context. The theory underlying culpable discharge, namely that the employer is engaged in a contractual relationship with the employee and is thus entitled to the "benefit of the bargain", does not in my opinion differ greatly from that underlying non-culpable discharge. A failure to meet the obligations and reasonable expectations of employment whether by virtue of culpable misconduct or deficient performance of a non-culpable character equally constitutes a disruption of the employment

relationship. Arbitrator Hope's comments in *Re City of Vancouver and Vancouver Municipal and Regional Employees Union* (1983), 11 L.A.C. (3d) 121 (B.C.), at p. 140, on this point are apt:

> It must be remembered that the question of whether conduct is culpable or non-culpable is an elusive question directed at drawing inferences as to an employee's state of mind on the basis of his conduct. In the final analysis it is the conduct and not the state of mind which determines the issue of continued employment. An employee who cannot perform is no better off than an employee who will not perform, if the rights of the employer are to be respected.

The Grievor was a 28-year employee at the time she was dismissed. She had a relatively clean disciplinary record. She received a written reprimand in 2005 as a result of an inappropriate interaction with a co-worker. She received a written warning on February 5, 2019 because of what the Employer described as disruptive behaviour in the workplace causing significant adverse impacts on her co-workers and workplace productivity. On February 19, 2019 she received a two-day suspension for insubordination when she refused to attend a meeting with Mr. Shoji.

I note that the Grievor's performance of her job duties does not appear to be an issue. Rather, getting her to perform those duties had become increasingly more difficult. In spite of the clear expectations set out for her in June 2018, she continued to insist that certain rooms or buildings were unsafe and that a co-worker with a criminal record was a safety threat to her. Additionally, she would not take direction from certain supervisory staff and refused to work with employees who were junior to her.

The Grievor's behaviour at the THM was not an isolated incident in her employment history. Since 2011 when she filed her first Human Rights Compliant, she had demonstrated her dissatisfaction with management's handling of her complaints about her co-workers since 1992. Where her view of what had occurred in the workplace was in conflict with the Employer's view, she had refused to accept its findings and continued to pursue her claims. She had been repeatedly told that the workplace was objectively safe but, because she did not agree with the Employer's assessment, she raised the same issues over and over again.

There is no evidence that the Grievor was provoked at the THM. As stated above, I have not accepted that Mr. Hunt asking her for an example of a safety issue that had not been dealt with could reasonably be considered provocation for her to bring up the alleged assault contrary to Mr. Shoji's direction. In my view her dissatisfaction with how her allegation of assault had been handled and her distrust of Mr. Hunt was the motivation for her misconduct.

On cross examination, the Grievor did not deny that she brought a notebook with her questions in it to the THM. She acknowledged that she had come to the meeting prepared. Her misconduct was not committed on the spur of the moment and her belief that her safety issues are not being addressed at Iona Island WWTP is not a momentary aberration; rather, it could more accurately be described as a fixation.

The evidence did not indicate that the termination of the Grievor's employment imposed a special economic hardship for her other than the hardship caused by termination of employment.

Mr. Shoji and Mr. Gnos confirmed that a worker was disciplined for misconduct at a THM subsequent to the March 6th meeting. The worker used profanity in expressing his views which the Grievor did not do. That worker's history with the Employer was not the subject of this hearing. Suffice it to say that the worker was disciplined for misconduct at a THM and the discipline was not grieved. I find that the Employer has not tolerated disruptive and disrespectful behaviour in the workplace and its treatment of the Grievor was consistent with how it applies its rules of conduct.

Based on the evidence of Mr. Shoji's meetings with the Grievor on June 15, 2018 and January 15, 2019 and on the thoroughly detailed letters to her following those meetings, I have no doubt that the Grievor understood exactly what was expected of her. The issue was that she did not agree with the Employer's expectations. She had been asked to be more reasonable and objective in her view of the workplace. She had been told that the workplace was objectively safe. Because she did not agree with the Employer's assessment, she continued to raise historic issues that she had been told to leave behind. She had been repeatedly told that the JHSC did

not have a mandate to review the Respectful Workplace Policy, yet she asked for the JHSC to review it anyway. Her defiance of the Employer's right to manage the workplace is evident in her actions.

I agree with the Union's submission that the Grievor's conduct at the THM was not, at first blush, an extremely serious offence. She did not set off illegal and unsafe firecrackers at the workplace (*Insurance Corp. of Canada); s*he did not put herself and others at risk by negligently operating a vehicle (*Hayes Forest Services Ltd*.); nor did she put the Employer's reputation with its customers in jeopardy as in *Ceva Logistics*. I find the Grievor's behaviour is more in line with the grievor in *BC Hydro*. In that case the arbitrator heard grievances over an employee's discipline and termination for repeatedly disobeying instructions from management, and showing disdain when management tried to discuss his behaviour. I share Arbitrator McPhillips' view that an employee's symbolic and real threat to an employer's ability to supervise and manage the workplace is serious misconduct that goes to the root of the employment relationship:

> **64** With regard to the seriousness of Mr. Crerar's behaviour, it can be argued that any one of these incidents taken by itself is not worthy of serious discipline. However, when they are all combined, a picture is created of a defiant and contemptuous employee who has constantly and deliberately challenged management's right to operate the workplace. Mr. Crerar's activities have combined to create disruption for the clerical staff, embarrassment for Mr. Sharpe in dealing with the President's office, frustration for Mr. Crerar's superiors in attempting to assign work and have meetings with their employees, and have posed symbolic and real threats to their ability to supervise and manage the workplace. Insubordination of that nature is considered a very serious form of misconduct which goes to the very root of the employment relationship: *Mainland Sawmills Ltd*., *[1995] B.C.C.A.A.A. No. 371*, November 30, 1995 (Korbin); *Pacific Press*, (Bruce), supra.

The Union asserts that the Grievor's behaviour is not disruptive to the workplace. I disagree. The Grievor's impact is wide ranging. She has had a direct impact on those she has made allegations of improper behaviour against; and she continued to repeat those allegations long after they have been investigated and dismissed. She continued to assert that a co-worker with a criminal record was unsafe long after she had been put on notice that an employer cannot discriminate against employees because of a criminal record unrelated to the workplace. She had alleged that a co-worker blocked her in a room and assaulted another coworker and then failed to provide any information to allow the Employer to investigate the allegation; yet she

continued to repeat the allegation. The Grievor's impact goes beyond being difficult or not well liked. I have accepted that coworkers and managers, not unreasonably, had a reluctance to engage with her for fear of becoming a respondent in a complaint.

The Grievor's impact on the workplace is perhaps most evident in her attitude toward Mr. Hunt. As well as her February 2018 workplace complaint against him, allegations against him dating back to 1994 feature prominently in her 2011 and 2020 Human Rights Complaints. It is evident that she harbours a deep animosity toward him and her conduct at the THM was the latest evidence of that animosity. She believed that Mr. Hunt had "vetoed" her safety issues at JHSC meetings despite there being no evidence to support her belief. I am persuaded that what occurred at the THM was a personal attack on Mr. Hunt. Putting aside the public insubordination directed at the Superintendent of the plant, her emails to the JHSC and to Ms. Boak reveal a disrespect toward him that is simply unacceptable in the workplace.

Mr. Hunt expressed his fear of the Grievor in an email to Mr. Shoji on September 19, 2018. He stated, "Chrystal is clearly trying to jeopardize my career and to tell you the truth, I am starting to worry about what else she might do against me, personally." Such an email is evidence of someone who perceives the Grievor as a threat; and, given the Grievor's long-standing animosity towards him his fear does not strike me as unreasonable. No worker or manager should have to live in fear that someone is out to damage their career. Based on the evidence, I find it more likely than not that if she returned to the workplace, her campaign against Mr. Hunt would continue.

I am persuaded that the Grievor's persistent challenge to managerial authority made her unmanageable. Beginning with her refusal to meet with Mr. Shoji and Mr. Hunt on her first day back to work in February 2018, the Grievor has shown a complete disregard for management and her role in the workplace. At the meeting on January 15, 2019, she argued with Mr. Shoji that it was inappropriate for him to set the standard on what is safe at the plant. She outright refused to meet with him on February 5, 2018 even though she was present in the workplace and efforts were made to get her to attend. Notwithstanding the time and effort Mr. Shoji

invested in ensuring the Grievor understood that her behaviour must change, she became more insubordinate.

In a meeting with Mr. Shoji and Ms. Cullen on January 15, 2019, the Grievor asked about the steps to creating a violence in the workplace policy. They both explained to her that the Employer has zero tolerance for violence in the workplace and policies are not created by worksite JHSC committees; they are corporate polices. The Grievor responded to Mr. Shoji by saying, "you don't get to decide what is safe for me at HQ". She then proceeded to raise the issue of the JHSC reviewing the Respectful Workplace Policy at the THM. Twenty months later, on cross examination, she again maintained that when it comes to personal safety, others do not get to decide what is safe for her. Although the Grievor had been clearly informed that the Employer complies with its legal and regulatory obligations to provide a safe workplace and has corporate policies on bullying and harassment, the Grievor insists she and she alone will decide what is safe for her. I have accepted that her insubordination and lack of objectivity is harmful to the workplace.

The question of whether dismissal was excessive requires an examination of the Grievor's rehabilitative potential. In other words, what is the likelihood the Grievor has learned from her mistake and is prepared to make a fresh start. In *B.C. Central Credit Union*, the BC Labour Relations Board addressed the issue of weighing the interests of the employee and the employer as set out below:

> Moreover, it is this very question of whether the common theme of the concepts of industrial discipline, i.e., the premise that an employee will respond positively to disciplinary measures, is to be served that an arbitrator addresses when the arbitrator makes a determination about whether discharge was excessive. To state this conclusion in another way, it is our view that once an arbitrator has concluded that the grievor gave just cause for some discipline, and as a result, the arbitrator turns to address the next question, i.e., whether discharge was an excessive response, the essence of the judgement required of the arbitrator is whether, in all of the circumstances of the grievor's employment relationship, the grievor's entitlement to a second chance should prevail over the employer's entitlement to a "fair day's work". It follows that it is only when the interest of the employee and his or her opportunity to correct patterns or incidents of misconduct are outweighed by the employer's interest in obtaining value from the employment relationship that an arbitrator will conclude a discharge was not excessive.

The Grievor has maintained that the Employer has discriminated against her throughout her career. The evidence indicates that her distrust of management has increased since her return to work in 2018. Her dissatisfaction with the way the Employer handled her 2018 complaint against Mr. Hunt and her July 2018 complaint against a co-worker only added to her historic allegations and fueled a hostile attitude toward management and Mr. Hunt, in particular. I agree with the Union's submission that an employee may challenge the results of a Respectful Workplace complaint investigation if they are not satisfied with the Employer's findings. However, the way to do that is to challenge the report or file a grievance at the time the report is received. What one cannot do, is not challenge the report, continue to refuse to accept the findings and bring the same issue up again and again. In the Grievor's case, her belief that the Employer had not made the correct findings led to her campaign against Mr. Hunt, her growing insubordination toward Mr. Shoji and disrespect directed at Human Resources' staff.

The Employer's statement in the February 5, 2019 letter of suspension that "further incidents of discipline will lead to the termination of your employment", does not give it a license to terminate the Grievor for any infraction (*Canadian Forest Products*). But it does speak to her rehabilitative potential. In the face of a brightline warning from the Employer that she must cease her campaign about issues that had been investigated and dismissed, that the workplace was objectively safe, she stepped up and continued where she had left off. When I consider what it would be like if she were returned to the workplace, on a balance of probabilities, I find that she would not behave any differently. After an almost two-year absence, she returned to work in February 2018 and immediately refused to meet with Mr. Hunt and Mr. Shoji. Based on all the evidence, I believe she would pick up where she left off if she was returned to work today.

Finally, I have taken into account that the Grievor was not remorseful when she was interviewed by Mr. Shoji after the incident. She continued to maintain that safety issues are not dealt with and she was critical of how Mr. Hunt spoke to her at the THM. As stated by Arbitrator Foley in *Surrey (City), (Saliken Grievance)*:

> **85** The arbitral authorities support the principle that the degree to which there is an admission of guilt and an expression of remorse, and the content and timing of any such admission of guilt and expression of remorse, are key factors in determining whether an employment relationship can be restored.

> **86** For example, arbitrator Hamilton stated as follows in Maple Leaf Meats and UFCW Local 832 (2003), M.C.A.D. No. 31:
>
> > "On the question of 'rehabilitative potential', one of the primary benchmarks is a grievor's candour and admission of wrong doing not only at the time of the hearing, but also at the earliest opportunity when the matter is being investigated."

At the hearing, the most the Grievor was willing to allow was that her decision making was impaired and she ought to have talked to her worker support people before raising her issues at the THM. I was not persuaded that she was genuinely remorseful for her conduct.

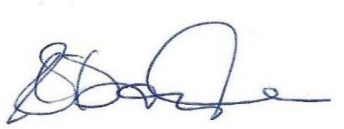
The Grievor's resolve to continue her campaign against the Employer and Mr. Hunt, is also evidenced by the fact that in March 2020, almost one year after her termination, she filed a Human Rights Complaint claiming that "throughout my employment at Iona Island WWTP, I was subjected to ongoing discrimination because of my sex (gender), which included bullying, harassment, unwanted sexual advances, and inadequate facilities because of my sex (gender)." Her examples of this discrimination include allegations about the 2011, 2016 and 2018 incidents with Mr. Hunt, her co-worker with a criminal record and the alleged assault by a co-worker in July 2018. As noted, that Complaint is not part of these proceedings and I make no determination on its merits; I simply point to it as evidence that the Grievor has not let go of her desire to re-litigate her claims against the Employer. I expect she will not let that desire go until she receives an outcome which satisfies her. The evidence leads me to conclude that she would continue to lack the necessary objectivity to simply attend at the workplace, work with any co-worker, take direction from anyone in authority, and move about the plant as required. I have concluded that having regard to the interests of all the parties, the employment relationship is no longer viable.

I find that in the circumstances of this case, the Employer has just cause for dismissal.

In summary, the second question in *Wm. Scott* is answered in the negative. The termination of the Grievor's employment was not excessive in all of the circumstances of this case.

For all of the above reasons, the grievance of Ms. White with respect to her termination on April 2, 2019 is dismissed.

Dated at Vancouver, British Columbia this 20th day of January 2021.



Elaine Doyle, Arbitrator