

IN THE MATTER OF AN ARBITRATION PURSUANT TO
THE FIRE PROTECTION AND PREVENTION ACT, 1997, as amended

BETWEEN

THE TOWN OF OAKVILLE
(the “Employer”)

AND

THE OAKVILLE PROFESSIONAL FIRE FIGHTERS' ASSOCIATION
(the “Association”)

GRIEVANCE OF ANDREW LEE

ARBITRATOR Diane Brownlee

APPEARANCES

FOR THE ASSOCIATION Howard Goldblatt, Counsel
 Heather Ann McConnell, Counsel
 Chuck Lewis, Local President
 Carmen Santoro, Member, Grievance Committee
 Dan Vanerlelie, OPFFA, District 4 Vice President

FOR THE EMPLOYER Stephen Bird, Counsel
 Lyn Hunt, Manager, Labour Relations
 Julie Clarke, Director of Human Resources
 Sharon Caeiro, Human Resources Consultant
 Brian Durdin, Fire Chief
 George Birtig, Deputy Fire Chief
 Paul Bissonneault, Deputy Fire Chief

A HEARING IN THIS MATTER WAS HELD IN OAKVILLE, ONTARIO
on June 15, 16, December 7, 9, and 19, 2016; February 17, 21,
March 31 (by conference call) and April 25, 2017

AWARD

[1] The Grievor was discharged on March 30, 2016 for allegedly creating a poisoned and hostile working environment for a fellow employee, Robert Kingston. On March 31, 2016 the Association filed a Grievance on the Grievor's behalf that the Grievor had been discharged without just cause.

[2] The Employer called fifteen witnesses to testify: Fire Chief Brian Durdin; Robert Kingston; Mike Lucas; Brett Eyers; Grant Lawson; Tyler Kelloway; Jason Black; Ken Cutmore; Bill Forbes; Greg Reilly; Kerry Fry; Peter Fullerton; Dave Kramer; Ryan Szacas and Christopher Weatherhead. The Association did not call any witnesses. The Grievor did not testify.

[3] I have carefully considered all of the evidence and testimony, and I find the relevant facts to be as follows.

THE FACTS

The Employer's Decision to Discharge the Grievor

[4] At the time of the Grievor's discharge, he had more than twenty years of service and was a Captain on Platoon 1B at Station 4. Chief Durdin testified that as a Captain, the Grievor was an officer in a leadership role and was required to manage his staff and demonstrate behaviours consistent with the employer policies. Chief Durdin also testified that as a Captain, the Grievor has a role in ensuring that everyone is getting along and that there is no conflict or harassment in the workplace.

[5] The Grievor's disciplinary record consisted of a four day suspension (two 24-hour shifts) in June 2014. The discipline letter described the Grievor's misconduct in June 2014 as "violating the Town's Respectful Conduct Procedure and that [he] hacked and vandalized the web site of a co-worker through the use of Town property and while he was being paid by the Town to work. This constitutes not only vandalism and harassment of [his] co-worker, but is a misuse of Town property and a theft of time."

[6] The Employer has policies that prevent discrimination and harassment in the workplace. The Grievor was aware of the policies and had completed all of the required electronic training modules.

[7] At the time of the Grievor's discharge on March 30, 2016, Chief Durdin held the position of Deputy Chief. He became the Chief on May 1, 2016.

[8] Mr. Bill Forbes is the Platoon Chief on platoon 2A. Mr. Forbes was working on November 24, 2015 at the same station where Mr. Kingston was working overtime when the main incident occurred that led to Mr. Kingston's complaint.

[9] Chief Durdin became aware of Mr. Kingston's concern when Platoon Chief Forbes came to him to tell him that "an issue" or a "potential conflict" had occurred between Mr. Kingston and the Grievor at a multi-crew training event on November 27, 2015.

[10] Chief Durdin testified that he told Platoon Chief Forbes that if Mr. Kingston thought the incident was serious enough, he should formally launch a complaint. Chief Durdin did not ask Platoon Chief Forbes whether he had done anything to address the issue. Chief Durdin did not suggest to Platoon Chief Forbes that any attempts at conflict resolution should occur.

[11] As a result of the November 24, 2015 incident and its aftermath, Mr. Kingston filed a Respectful Workplace Complaint on December 2, 2015. The Employer retained an external investigator to conduct the investigation. Chief Durdin was not involved in the decision to retain an external investigator, or the selection of the investigator. These decisions were made by Human Resources.

[12] The investigation commenced on December 11, 2015. Chief Durdin's role after the investigation started was to ensure that individuals were made available to meet with the investigator and to ensure that the individuals had union representation at their interviews. The investigation report was submitted to the Employer on March 4, 2016.

[13] After receiving the investigation report, Chief Durdin and Human Resources met with the senior administrators of the Town, all the way up to the Chief Administrative Officer, to discuss what the Employer's response would be. The Employer decided to discharge the Grievor based on the conclusions in the investigation report and the Grievor's previous disciplinary record.

[14] Human Resources held a meeting with the Grievor to review the investigation report on March 30, 2016. This was the Grievor's only opportunity to read, review, assess and respond to the investigation report. Chief Durdin attended in the last part of the meeting in order to discharge the Grievor. Chief Durdin testified that at the end of the discharge meeting, the Grievor said that the investigation was a "witch hunt". This indicated to Chief Durdin that the Grievor did not take any responsibility for the misconduct that the investigator found had occurred.

Employer Policies

[15] Mr. Kingston's complaint was filed pursuant to the Employer's Respectful Conduct Policy:

Purpose Statement

The town is committed to maintaining a healthy, safe and supportive workplace for all employees that is free from discrimination, harassment and workplace conflict. This procedure is designed to resolve complaints and disputes in a manner that is respectful and maintains an employee's dignity.

Procedure

Employees who believe they have been subjected to an action which is in contravention of the respectful workplace policy by another employee in the workplace should:

If possible, tell the offending person that their behaviour is offensive and against the respectful workplace policy;

.....

In some situations telling the offending person may be difficult or the concern may be ignored. If an employee is unable to talk to the offending person or the concern is ignored they should notify either their own supervisor or the offending persons supervisor;

The supervisor will address the concerns immediately;

...

If the offending behaviour does not stop after the employee or supervisor has spoken to the offending person then the employee should proceed to file a formal complaint.

Definitions

Harassment

Includes a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome. It may include but is not limited to:

- Written or verbal insults
- Unwanted remarks or comments on a person's mannerisms or body,
- Practical jokes that cause embarrassment or endanger an employee's safety,
- Behaviour that undermines or sabotages the employee's job performance,
- Behaviour that threatens the livelihood of the employee,
- Behaviour, conduct, comments or activities not directed specifically at an individual, but which nonetheless create a degrading, offensive, "poisoned" work environment. It may include, but is not limited to:
 - Circulating or displaying sexually explicit, racist or derogatory pictures, graffiti or other offensive materials,
 - Patronizing behaviour, language or terminology that reinforces stereotypes and undermines self-respect or adversely affects work performance or conditions

Personal Harassment/Bullying

Personal harassment or bullying is any unwelcome, disrespectful, intimidating, abusive, cruel, vindictive or offensive behaviour, conduct or communications directed at an individual or group. In some cases, it may

erode their self-confidence or self-esteem and it may create an intimidating, offensive or embarrassing work environment often referred to as a Poisoned Work environment.

Personal harassment may include, but is not limited to: name calling; insults; inappropriate jokes; threats; shouting; derogatory remarks (including messages that are threatening, derisive, or defamatory); spreading malicious rumours; persistent criticism and exclusion.

Harassment does not include:

- Legitimate, reasonable management actions that are part of the normal work function that may include, but is not limited to appropriate direction, delegation, performance management or discipline administered by a member of management or a management designate;
- Professional debate
- Attendance management
- Relationship of mutual consent or mutual flirtation;
- Stressful events encountered in the performance of legitimate job duties;
- Occasional disagreements or personality conflicts

Workplace Conflict

- Inappropriate workplace conflict occurs when two or more employees disagree on a matter which results in a disruption to the cohesive relationships necessary for a productive and harmonious workplace.

Responsibilities

Employees' Responsibilities

- Refrain from harassing and inappropriate workplace conflict as outlined in this procedure;
- If they feel they are being harassed or discriminated against, are encouraged where possible to inform the alleged offender about unwelcome conduct or actions;
- If the harassment, discrimination or workplace conflict does not stop, they are encouraged to notify the next level of supervisor/management not involved in the complaint as soon as possible about the alleged violation. This will assist to resolve issues quickly and in the least adversarial way.

Supervisors' Responsibilities:

- Provide a workplace free from harassment and conflict – setting a good example and not participating in or ignoring harassment, discrimination or workplace conflict;
- Be aware of the potential for harassment and conflict and proactively intervene before problems arise;
- Act quickly and appropriately as soon as becoming aware of possible policy violations in consultation with Human Resources
- Cooperate fully and must make their staff available to participate in investigations and other resolution processes
- Be sensitive to the nature of the complaint and implement recommended changes in the workplace;
- Keep any information about the complaint and/or investigation confidential

Human Resources' Responsibilities

- Train and educate all staff on the Respectful Workplace policy and procedure including their responsibilities;
- Act quickly and appropriately as soon as receiving a complaint under the policy;
- Provide guidance on the policy to supervisors and staff;
- Keep any information about the complaint and/or investigation confidential.

The Complaint against the Grievor

[16] Mr. Kingston's main complaint against the Grievor was with respect to an incident that occurred on November 24, 2015 and its aftermath. I will refer to this incident as "the conference badge incident."

[17] In his complaint, Mr. Kingston described the conference badge incident as "the culminating event in a long history (spanning two years) of coordinated attacks against me in the workplace brought by [the Grievor], and has been wilfully assisted by Mike Lucas and Brett Eyers. These attacks accuse me of criminal activities, unethical behaviour, and have resulted in damage to my personal property and threats being made against me and my family".

Background to Mr. Kingston's Complaint

[18] Mr. Kingston testified that the start of the strained relationship between him and the Grievor was in 2011 or 2012 when he raised an issue at an Association general meeting about concerns related to a renovation in Station 1. Mr. Kingston testified that he was chastised for raising the issues in a general meeting and he felt the concerns he raised were belittled by the executive, of which the Grievor was a member at that time.

[19] However, Mr. Kingston agreed in cross examination that the person who belittled him was the Association president, not the Grievor. He further clarified that he was permitted to speak without interruption for twenty to thirty minutes about his concerns, and that Association executive members told him that he could pursue his concerns by filing a health and safety complaint or by requesting a transfer. Mr. Kingston did not pursue either of these options.

Mr. Kingston's time as Treasurer of OPFA

[20] Mr. Kingston decided to put his name forward to be Treasurer of the OPFA in the fall of 2013.

[21] Mr. Kingston testified that once it was known that he would run for Treasurer, that "comments were being made in the station that would cause his character and his abilities to do the job to be called into question". Mr. Kingston testified that he "had members come to me to tell me that this was happening on shift and that the Grievor was making these comments."

[22] However, in cross examination this testimony was further clarified to the following. In September 2013, after Mr. Kingston had declared his intention to run for Treasurer, Dave Kramer told him that the Grievor said to Mr. Kramer: "Do you really want a guy like that running our finances when he can't even run his own household?"

[23] Mr. Kramer testified that around the time of the election in the fall of 2013, there were "lots of conversations in the stations about union politics" and one of the conversations he had was with the Grievor about Mr. Kingston taking over as Treasurer. Mr. Kramer testified that the Grievor said something like, "he can't even manage his own personal finances – he can't manage the Association's". Mr. Kramer testified that it was a twenty second conversation.

[24] Mr. Kramer testified that he was surprised when the Grievor said this to him, and that a shift or two later he told Mr. Kingston about what the Grievor had said, so that "the two of them could work things out". However, Mr. Kingston did not speak to the Grievor about it. Mr. Kingston testified that he and the Grievor were not speaking, because of the carry over of tension from the health and safety issue brought up in 2012.

[25] Mr. Kramer also testified that but for this one comment, he never heard the Grievor make any other negative remark about Mr. Kingston.

[26] Mr. Kingston testified that after Mr. Kramer told him what the Grievor had said, that he told the Association president that he had heard that his name was being "trash-talked" in the halls and that it was coming from the Grievor who was the Vice President at the time. Mr. Kingston testified that he asked the Association president to "put a stop to it" and that he told the Association president that he was "not going to tolerate any old school bully tactics".

[27] Mr. Kingston testified that he believed that the genesis of the Grievor's comment to Mr. Kramer was that he had spoken with the Grievor in 2010 or 2011 and told him of his family situation. Mr. Kingston testified that he told the Grievor that he had a one-year-old child and a second child on the way, and that his wife was laid off and his finances were "tight".

[28] Mr. Kingston was acclaimed as Treasurer of the OPFA for the term January 1, 2014 to December 31, 2016. The Grievor's term as Vice president ended on December 31, 2013. Accordingly, the Grievor and Mr. Kingston never served together on the Association executive. Rather, the Grievor's term was ending just as Mr. Kingston was commencing his term as Treasurer.

[29] Mr. Kingston testified that events that transpired during his tenure as Treasurer further strained his relationship with the Grievor.

[30] Mr. Kingston testified that his transition to Treasurer did not go well and that he was not given the information he needed to have a successful transition.

[31] Mr. Kingston testified that throughout his tenure as Treasurer, that there were three issues that were the source of conflict and tension within the Association executive, and the cause of a strain in his relationship with the Grievor and others. Mr. Kingston testified that these issues were being discussed in the workplace, causing a poisoned work environment for him. These issues were: an important tax issue related to source deductions, remittances and issuing T4's for honorariums; duty exchange payments and the issue of whether executive members should accept overtime or not.

[32] With regard to the issue of whether executive members should accept overtime, Mr. Kingston testified that in May 2014, he accepted an overtime shift but he needed to attend a Association meeting during that shift. He testified that he arranged for coverage, with the approval of the Chief, so that he could attend the meeting. He testified that statements "quickly went around the floor", suggesting that it was unacceptable for executive members to accept overtime. He testified that he felt these statements criticising him "were intended to incite anger and animosity amongst the members against me".

[33] The tax issue in particular was a difficult issue that was causing tension in the executive. There was a disagreement between Mr. Kingston and the rest of the Association executive about the appropriate course of action to take in respect of the tax issue.

[34] Mr. Kingston testified that the tax issue was discussed at general membership meetings throughout the period from April 2014 to September 2014. Mr. Kingston testified that the Grievor was present at some of those meetings.

[35] Mr. Kingston testified that the Grievor was present at the June 2014 general meeting and expressed a contrary view to what Mr. Kingston had presented. However,

there was no evidence that the Grievor did so in a manner that was inappropriate or contained any personal attacks against Mr. Kingston.

[36] Mr. Kingston testified that by June 2014, it was necessary to make a decision about the tax issue. A decision was made, and as a result of the decision, Mr. Kingston testified that he was being painted in “a very negative light” and that he was approached by members “basically every shift with rumours they had heard or accusations they had heard without the full story.”

[37] Mr. Kingston testified that this culminated in August 2014 when a member who learned that he was affected by the tax issue, angrily said to Mr. Kingston that if [the member] got audited that Mr. Kingston should cut down all the trees in front of his house and keep the lights on because “we are coming for you.” It was not the Grievor who made this angry statement to Mr. Kingston.

[38] Mr. Kingston testified that in the September 2014 meeting he made a presentation to educate the members about the tax issue and to explain his obligations as Treasurer. Mr. Kingston testified that he hoped that once the members had the information in front of them on the screen that it would put the confusion and the personal attacks to rest.

[39] Mr. Kingston testified that by September 2014, he had “had his name trashed in the halls, his reputation called into question, his cell phone smashed, and his family threatened”. Mr. Kingston testified that “enough was enough”. So, in the September 2014 meeting, Mr. Kingston explained to the members that “all of these things had happened to me now, I was at the end of my patience with this type of treatment and it better stop because if it continues to escalate, I would be forced to seek the maximum solution.” Mr. Kingston did not explain in his testimony what he meant by “seek the maximum solution”.

[40] Mr. Kingston testified that the Grievor was present at the September 2014 meeting, but he did not say anything at the meeting.

[41] Mr. Kingston testified that after September 2014, he recalled only one other incident related to Association issues. This incident happened in December 2014. He did not say what the incident was, but he did confirm that the Grievor was not involved in that December 2014 incident.

[42] Mr. Kingston confirmed that there were no other incidents all through 2015, until the conference badge incident on November 24, 2015.

[43] Against this backdrop, the conference badge incident occurred. In addition to the Grievor, two other employees were involved in this incident: Brett Eyers and Mike Lucas. As stated above, Mr. Kingston described this incident as, “the culminating event in a long history (spanning two years) of coordinated attacks against me in the workplace brought by [the Grievor], and has been wilfully assisted by Mike Lucas and Brett Eyers.”

[44] Mr. Kingston provided some background about the conference. It was a two day legislative conference being held in Toronto on November 23 to 25, 2015. Mr. Kingston testified that the Association executive registered two spots: one in the President's name and one in his name. However, he testified that he had a personal commitment for November 24, 2015 and so he could not attend that day. The Association executive decided that Mr. Lawson would attend in Mr. Kingston's place on November 24, and Mr. Kingston would attend on November 25. Subsequently, Mr. Kingston's personal commitment got rescheduled, and when he was offered an overtime shift for November 24, he decided to take it. Mr. Kingston testified that he did not receive a per diem for attendance at the conference on November 24.

Part 1 – Grievor sends conference badge to Fullerton and Evers

[45] There is no dispute about what the Grievor did on November 24, 2015. The Grievor was attending the legislative conference and saw Mr. Kingston's conference badge on the registration table early on November 24. The Grievor took a photo of Mr. Kingston's conference badge and at 8:09 am, emailed the photo to Peter Fullerton with the message, "Here, pin this on Kingston today. Double dipper!"

[46] Mr. Fullerton was working as Acting Captain at Station 3 when he received the Grievor's email. Mr. Kingston was working overtime at Station 3.

[47] Later that morning, the Grievor sent a Blackberry message text to Mr. Evers, with the photo of Mr. Kingston's conference badge attached.

Part 2 – Evers sends conference badge to 5 people

[48] Mr. Brett Evers holds the rank of Acting Captain and is currently assigned to platoon 1B at Station 2. Mr. Evers testified that his understanding of what happened on November 24, 2015 is that Mr. Kingston was supposed to be at a union function and that he accepted overtime instead of attending the function. He became aware of this from a Blackberry message text from the Grievor.

[49] He testified that the Grievor texted an image of Mr. Kingston's conference badge with a message, "something to the effect of Rob's not here he is supposed to be here but he is working overtime". Mr. Evers testified that he did not have a copy of what the Grievor had texted him because it was a BBM chat.

[50] Mr. Evers testified that he spoke to the Grievor on the phone and that the Grievor told him that "he was at the Conference and Mr. Kingston was not there but his name tag was sitting in the table where the tags were and it was the last one there and Mr. Kingston was working overtime at Station 3."

[51] Mr. Evers testified that he checked for himself whether Mr. Kingston was working overtime that day. Having confirmed that Mr. Kingston was working overtime, Mr. Evers composed a message and sent the photo of Mr. Kingston's conference badge to

five people. Mike Lucas was one of the five people that Mr. Eyers sent the message to. The message that Mr. Eyers composed and sent said,

“FYI
Skipped out on Legislative conference in Toronto today to work OT.
Five weeks before our CA expires.”

[52] Mr. Eyers sent his text at 11:59 am.

[53] Mr. Eyers testified that he sent the message to the five people because they were people who he discussed union issues with and “it was an extension of all the discussion we were having about the union over the years and I wanted members to know we were paying a guy to be somewhere and he wasn’t there”.

[54] Mr. Eyers testified that the Grievor did not ask him to forward the photo of Mr. Kingston’s conference badge to anyone, or provide the wording for the message that Mr. Eyers sent out. Rather, Mr. Eyers composed the message. Mr. Eyers testified that he did not tell the Grievor that he was forwarding it to other people or who he was forwarding it to.

[55] Mr. Eyers testified that held some animosity toward what Mr. Kingston did with the tax issue. Mr. Eyers testified that Mr. Kingston “went against the decision of our executive board and violated our constitution and I believe he was given several options and he chose the one that inflicted the most harm on our members.”

[56] Mr. Eyers testified that he was impacted by the tax decision and he assumed that the Grievor was also impacted because the Grievor had been an executive member.

[57] Mr. Eyers' actions in sending the conference badge and message to five people was not found to be a violation of the Employer’s Respectful Conduct Policy, and accordingly, he did not receive any discipline.

Part 3 – Lucas sends conference badge to 52 people

[58] Mr. Mike Lucas holds the rank of Acting Captain and is currently assigned to platoon 1A, station 6. He does not work directly with the Grievor, but he knows the Grievor from Association events. Mr. Lucas has also not worked directly with Mr. Kingston.

[59] Mr. Lucas testified that he received an email from Mr. Eyers on November 24, 2015, that contained the message composed by Mr. Eyers and had Mr. Kingston's conference badge attached.

[60] Mr. Lucas testified that when he received the email from Mr. Eyers, that he checked to confirm whether Mr. Kingston was actually working overtime. Upon confirming this, Mr. Lucas believed that Mr. Kingston was registered for that conference and that he worked overtime instead of attending the conference. Mr. Lucas decided to

forward the information that he received from Mr. Eyers to 52 other employees, and he forwarded the email at 12:38 p.m. The email addresses were all personal email addresses, except for one, which was sent to a work email address. Mr. Lucas testified that his only purpose was to share information about a union issue with fellow union members.

[61] Mr. Lucas testified that he did not know how Mr. Eyers was aware that Mr. Kingston was not at the conference and he did not discuss with Mr. Eyers how he knew about this. Mr. Lucas testified that he did not tell Mr. Eyers that he sent the email to 52 people and he did not tell the Grievor either.

[62] Mr. Eyers was one of the people who received the email from Mr. Lucas. Mr. Eyers testified that after he received the email from Mr. Lucas, he apologized to the Grievor for sending the text to the five people. He testified that he apologized because he felt that “he had broken a bit of trust between himself and [the Grievor], that he had broken a bond.”

[63] When asked if there was any animosity against Mr. Kingston during the period from November 2013 to November 2015, Mr. Lucas testified that he was not aware of any animosity toward Mr. Kingston.

[64] However, Mr. Lucas did have some concerns about how Mr. Kingston carried out his duties as Treasurer. Mr. Lucas testified that he had concerns about the tax issue and that he discussed these with the Association executive. He testified that he did not discuss his concerns about the tax issue with the Grievor or with Mr. Eyers.

[65] Mr. Lucas also recalled an incident about Mr. Kingston getting a duty exchange to attend a meeting in 2014 when Mr. Kingston was working overtime. Mr. Lucas testified that that was “an issue”.

[66] Mr. Lucas testified that there were differences between the old Association executive and the new Association executive, but that the differences were about union issues and that as far as he was aware, they were not personal.

[67] Mr. Lucas testified that the Grievor has never expressed any dissatisfaction to him about Mr. Kingston, nor has he ever seen any indication that the Grievor harbours any ill feelings toward Mr. Kingston.

[68] Referring to some of the investigator’s notes of witness interviews, Counsel for the Employer asked Mr. Lucas if he had ever seen the Grievor bully anyone or spread “rumours” or “poison” or “cancer”. Mr. Lucas testified that he had never seen the Grievor do any of these things.

[69] When asked if he had ever seen the Grievor “beat on people who get in his way”, Mr. Lucas testified that he had never seen the Grievor behave in this fashion.

[70] Mr. Lucas testified that the next day, November 25, 2015, Mr. Kingston approached Mr. Lucas about his part in the distribution of the conference badge. Mr. Kingston was off duty, but went to Station 1 where Mr. Lucas was working as Captain. Mr. Kingston and Mr. Lucas had very different perspectives about that encounter. However, I do not need to resolve the differences between Mr. Kingston's and Mr. Lucas' accounts in order to determine the issues before me, so I will not include the details here.

[71] However, Mr. Lucas testified that Mr. Kingston explained that he was not at the conference because "he was never going to go even though he was registered, and that someone else was going to attend in his place." But Mr. Lucas did not believe Mr. Kingston because in Mr. Lucas' experience, "it has never been done – you register and you go. You don't register and put a name later. The Association does not operate like that."

[72] Mr. Lucas' action in forwarding the email he received from Mr. Eyers, to 52 people was found to be a violation of the Employer's Respectful Conduct policy. Mr. Lucas received a six shift suspension. Mr. Lucas filed a grievance and that grievance is not before me.

Impact of the distribution of the conference badge on Mr. Kingston

[73] Mr. Kingston testified that as a result of the Grievor sending the photo of his conference badge, his Captain, Mr. Fullerton, approached him at 0815 "with accusations that I was double dipping – meaning taking money from the Association at the same time as working overtime." Mr. Fullerton gave a different account. This will be resolved later in this Award.

[74] As a result of the further distribution of the conference badge by Mr. Eyers and Mr. Lucas, Mr. Kingston testified that "once again I am explaining myself to members who are being given part of a story to paint me in a negative fashion."

[75] Mr. Kingston testified that he was approached by many people, both on and off shift, asking for an explanation, and that in the following days he was "constantly answering questions from other workers who had not yet spoken to [him] about it".

[76] Mr. Kingston addressed both crews at Station 3 that day to explain that it was pre-arranged that another executive member was attending on November 24 and he was attending on November 25.

[77] Platoon Chief Forbes testified that Mr. Kingston was still getting phone calls and text messages at dinnertime. Platoon Chief Forbes testified that Mr. Kingston was "upset and stressed out and had had enough".

[78] Mr. Forbes testified that every station that he visited on November 24 brought up the topic of Mr. Kingston being at work rather than at the conference and some asked if Mr. Kingston should have been at the conference or not.

Further communication between the Grievor and Mr. Fullerton

[79] Mr. Fullerton testified that when he received the Grievor's email at 8:09 a.m., that he felt that the Grievor "wanted [him] to go after [Mr. Kingston] for something" but he did not know what it was at the time. Mr. Fullerton did not receive any other communication from the Grievor that day.

[80] Mr. Fullerton testified that he was in training for the morning and that he intended to ignore the Grievor's email. Mr. Fullerton testified that he became aware that an email was circulating about Mr. Kingston's conference badge later in the afternoon when Mr. Kingston showed him the email. Mr. Kingston had the email because someone else had forwarded it to him. At that time, Mr. Fullerton believed that the Grievor had sent the conference badge to Mr. Lucas.

[81] Mr. Fullerton testified that when Mr. Kingston showed him the email that was circulating, that Mr. Kingston explained that it had been prearranged that he was not going to attend the conference that day, but another person was attending in his place. Mr. Fullerton accepted this explanation.

[82] Mr. Fullerton testified that he thought that the Grievor was trying to get him and "whoever else he sent the email to" to "do the dirty work" of confronting Mr. Kingston. Mr. Fullerton thought that "enough was enough".

[83] Mr. Fullerton testified that he did not want to get involved in the situation, but since he was Captain that day, he felt that he had to do his duty and report it. Mr. Fullerton reported what he knew to Platoon Chief Forbes.

[84] At 9:15 p.m., Captain Fullerton emailed the Grievor to provide Mr. Kingston's explanation for why he wasn't at the conference. Mr. Fullerton testified that he hoped that this would "smooth things over" and "convince [the Grievor] that he was wrong in accusing Mr. Kingston of being a "double dipper".

[85] The email exchange between Mr. Fullerton and the Grievor was part of the evidence. The Grievor's responses to Mr. Fullerton's email show that the Grievor did not accept this explanation and he gave Mr. Fullerton reasons for not accepting it. He told Mr. Fullerton, "Skipping in and out for a day here and there is bogus BS for someone who wanted to work his OT shift instead of representing the members."

[86] He also said "When someone attends the legislative conference, they go for the whole thing. Today, everyone heard from the 3 political parties and they were taught about the 3 issues that they are lobbying the government for. Tomorrow is known as lobby day and they spend the day at Queen's Park meeting with MPP's trying to gain their support on issues that they learned about today. Why would Kingston feel that he already knows the issues?"

[87] The Grievor also told Mr. Fullerton that he thought it was "self serving" for executive members to accept overtime when they were supposed to be serving the

members, and reminded Mr. Fullerton that Mr. Kingston had accepted an overtime shift in 2014 but then needed a duty exchange to attend an Association meeting.

[88] While Mr. Fullerton did not agree with the views expressed by the Grievor, he said to the Grievor that he "appreciated his concerns and they are legitimate."

The training incident – November 27, 2015

[89] On November 27, 2015, just a few days after the conference badge incident, a training session was held about using tablets in the fire vehicles. November 27 was the Grievor's first scheduled shift since before the conference badge incident on November 24.

[90] Mr. Kingston and his crew consisting of Captain Fry, Tyler Kelloway and Jason Black, were the first to arrive for the training session and took the chairs in the back row. Mr. Kingston testified that they took the back row because they prefer to sit in the back. The Grievor's crew was the last to arrive. Mr. Kingston testified that the Grievor and his fellow crew member Mr. Christopher Weatherhead squeezed chairs in behind where Mr. Kingston was sitting. Mr. Kingston testified that there was not sufficient room behind his row to sit comfortably.

[91] Mr. Kingston testified that within minutes of taking a seat behind Mr. Kingston, the Grievor whispered to Mr. Kelloway, "Did you work overtime on Tuesday?" Mr. Kingston acknowledged in cross examination that the Grievor was asking a legitimate question, however, he testified that the Grievor's comment was "passive aggressive" and "full of innuendo".

[92] Mr. Christopher Weatherhead was on the Grievor's crew and arrived at the training session with the Grievor. Mr. Weatherhead testified that the door to the training room is at the back of the room, and that he entered the training room ahead of the Grievor. The Grievor was walking behind Mr. Weatherhead. Mr. Weatherhead testified that he took a chair from the side and placed it behind the back row where Mr. Kingston and his crew were sitting. Mr. Weatherhead testified that there was sufficient room for the chairs to fit. The Grievor was following Mr. Weatherhead and he also took a chair from the side and sat beside Mr. Weatherhead.

[93] Mr. Weatherhead testified that the Grievor did not ask Mr. Kelloway if he worked overtime on Tuesday. Mr. Weatherhead thought another person had asked Mr. Kelloway that question. Mr. Black and Mr. Kelloway testified that the Grievor did ask Mr. Kelloway if he worked overtime on Tuesday.

[94] I am satisfied that the Grievor did ask Mr. Kelloway if he worked overtime on Tuesday.

[95] A number of Chiefs were present at the training session, including Chief Durdin. Chief Durdin testified that he did not notice any disruptions in the training session.

The Potential Reinstatement of the Grievor

[96] All of the witnesses who were asked about their relationship with the Grievor described their relationships as "good" or "fine". Mr. Weatherhead, who works on the same crew as the Grievor, testified that the Grievor has been his Captain since 2009 and described his relationship with the Grievor as "excellent".

[97] When asked if he had any concerns about the Grievor being reinstated, Mr. Kingston said that he did not think that he and the Grievor could work on a crew together. When asked why, he said, "so much of our job is based on trust. Every shift we have the potential to go into a life and death situation – you have to be able to rely on your crew members and trust that when you are 20 to 30 feet in the air that the person at the bottom is concerned for your safety." With regard to the Grievor, he said, "that trust is long gone".

[98] Mr. Kingston was concerned about working with the Grievor in the capacity of Captain because "in an emergency you have to obey the orders of your Captain" and that he did not trust the Grievor to protect his safety.

THE EMPLOYER'S SUBMISSIONS

[99] The Employer submitted that workplace harassment is a very serious issue, prohibited by the *Occupational Health and Safety Act*, and that allegations of harassment must not be trivialized, but rather, must be taken seriously. In this regard, the Employer relied on *Re Kingston (City) v. Canadian Union of Public Employees, Local 109* (2011), 210 L.A.C. (4th) 205 (E. Newman) and *Rheem Canada Limited and United Steel. Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW)*, 2012 CanLii 51437 (ON LA) (E. Newman).

[100] The Employer submitted that the conference badge incident was "the straw that broke the camel's back" in regards to Mr. Kingston, and that the Grievor's actions are part of a pattern of behaviour that is properly characterized as harassment, and that created a poisoned work environment for Mr. Kingston.

[101] The Employer relied on the conclusions in the investigation report, and on the repeated references to "spreading cancer and rumours" contained in the investigator's notes of witness interviews, in support of its position that the Grievor worked through others, namely Mr. Fullerton, Mr. Eyers and Mr. Lucas, to harass Mr. Kingston.

[102] The Employer submitted that the Grievor's failure to testify should lead me to draw an adverse inference on a number of points. In this regard, the Employer relied on *Vieczorek et al. v. Piersma et al.* (1987), 58 O.R. (2d) 583 (C.A.).

[103] First, the Employer submitted that there is no evidence from the Grievor about his rationale or purpose in sending the first message to Mr. Fullerton, and that I should therefore draw an adverse inference that his purpose was to incite harassment against Mr. Kingston.

[104] Second, the Employer submitted that the Grievor's choice of words to Mr. Fullerton to "pin this on Kingston today. Double dipper!" is supportive of the Grievor's intention to incite harassment against Mr. Kingston. The Employer pointed out that the Grievor did not say that Mr. Fullerton should talk to or ask Mr. Kingston about the conference. In the absence of an explanation from the Grievor, the Employer submitted that I should draw an adverse inference that he intended the consequences of the words used.

[105] Third, absent an explanation from the Grievor, the Employer submitted that I should draw an adverse inference that the Grievor knew that the conference badge and message would be disseminated broadly throughout the workplace.

[106] Fourth, with regard to the training incident, the Employer submitted that there was no other purpose for the Grievor to sit behind Mr. Kingston other than to harass him. The Employer pointed out that there were no chairs behind Mr. Kingston's row, but there were other empty chairs in the room where the Grievor could have sat.

[107] The Employer submitted that the Grievor's question to Mr. Kelloway, asking him if he worked overtime on Tuesday, the same day as the conference, was for no other purpose than to harass Mr. Kingston in front of his coworkers. The Employer submitted that, again, absent testimony from the Grievor to explain why he sat behind Mr. Kingston, that I should draw an adverse inference that the Grievor's actions were intended to harass Mr. Kingston.

[108] Fifth, with respect to the Grievor's comment to Mr. Kramer at the time of the Union elections in 2013 that Mr. Kingston could not manage his own finances, and therefore could not manage the Association's, the Employer submitted that in the absence of any testimony from the Grievor, that I must conclude that the Grievor made the comment to Mr. Kramer. Furthermore, the Employer submitted that in the absence of any explanation from the Grievor about why he made the comment to Mr. Kramer, that I must conclude that the Grievor's purpose was to cast aspersions on Mr. Kingston.

[109] The Employer relied on *Re Canada Safeway Limited and United Food & Commercial Workers Union, Local 401* 2012 CanLII 92339 (ON LA) (Ponak) for the principal that even simple comments like "Don't come back" are harassment. In light of this, the Employer submitted that I should find that the Grievor's comment about Mr. Kingston's finances in 2013, and his comment, "Pin this on Kingston" are properly characterized as harassment.

[110] The Employer submitted that Grievor's conduct is a pattern of behaviour that calls for discharge when considered along with the Grievor's previous discipline for harassing a coworker. The Employer submitted that the previous discipline has had no impact whatsoever on the Grievor. In light of this, the Employer submitted that I must assume that the Grievor would do the same thing again if he were reinstated.

[111] The Employer submitted that other than the Grievor's long service, that there are no mitigating factors that support reducing the penalty. In contrast, the Employer

submitted, there are aggravating factors including the fact that the Grievor has previous discipline for harassing a coworker and the Grievor did not offer any apology for the words used, or take any responsibility for his actions. In this regard, the Employer relied on *Re Wm. Scott & Company Ltd. and Canadian Food and Allied Workers Union, Local P-162* [1976] B.C.L.R.B.D. No. 98 (Paul Weiler, Chair).

[112] The Employer submitted that in the event that I were to find that it did not have just cause to discharge the Grievor, that I should not reinstate the Grievor but should award compensation in lieu of reinstatement. In this regard, the Employer relied on *Re Peterborough Regional Health Centre and Ontario Nurses' Association* (2012), 219 L.A.C. (4th) 285 (Starkman).

THE ASSOCIATION'S SUBMISSIONS

[113] The Association submitted that it does not dispute that workplace harassment is a serious issue that should be taken seriously, nor does it dispute the Employer's policy preventing bullying and harassment in the workplace.

[114] However, the Association submitted that in this case, the Employer acted on an investigation report where the conclusions are unsupported by the evidence.

[115] The Association submitted that this case has to be decided on basis of objective evidence, not rumour or unsubstantiated hearsay or reckless accusations or words that are venomous or vindictive. The Association submitted that the evidence does not support a finding that the Grievor engaged in a course of vexatious conduct, or a finding of harassment or a poisoned work environment.

[116] In light of this, the Association submitted that there is no need for the Grievor to testify. The Association submitted that its decision not to call evidence speaks clearly and unequivocally to what it sees as a weak and unsupported action by the Employer.

[117] The Association submitted that the onus is on Employer to establish by clear, cogent and convincing evidence that on the balance of probabilities that there is just cause to discipline the Grievor and that the appropriate penalty is discharge.

[118] However, the Association submitted that there is no just cause for any discipline. In the alternative, the Association submitted that even I were to find that some misconduct has been established, that discharge was excessive.

[119] With regard to remedy, the Association submitted that reinstatement is the normal remedy where there is no just cause for discharge. The Association relied on *A.U.P.E. v. Lethbridge Community College*, 2004 SCC 28 (S.C.C.), where the Supreme Court of Canada stated that departure from the normal remedy of reinstatement should only occur in exceptional circumstances where an arbitrator is satisfied that the employment relationship is no longer viable.

[120] The Association submitted that compensation in lieu of reinstatement is a remedy that is resorted to only in extreme cases where the relationship has been irreparably damaged and there is no prospect that it can be repaired. In this regard, the Association relied on *Maplewood Nursing Home Ltd. and CAW-Canada, Local 302* (2011), 108 C.L.A.S. 119 (Levinson) and *The Crown in Right of Ontario and Ontario Public Service Employees Union*, 2007 CanLII 14614 (ON GSB).

[121] The Association submitted that this is not an extreme case where there are exceptional circumstances that support a remedy of compensation in lieu of reinstating the Grievor. In light of this, the Association urges me to reinstate the Grievor with full compensation, and no loss of seniority, service or benefits, and to remain seized of any issues that arise with respect to the Grievor's return to work.

SUBMISSIONS WITH RESPECT TO WORKPLACE CONFLICT

[122] At my request, the parties addressed the section of the Respectful Conduct Policy that deals with inappropriate workplace conflict.

[123] The Association submitted that the purpose of the Policy is to maintain a supportive workplace and that within the policy there is a distinction between harassment, bullying and workplace conflict. The distinction is that harassment is a course of conduct that is vexatious, whereas a conflict can occur over issues that are both legitimate and illegitimate, and in the absence of vexatious behaviour. The Association submitted that to the extent that this situation is a conflict, it should not be treated as harassment.

[124] The Association submitted that to the extent that this situation is properly characterized as a conflict, the content is an internal union issue that was exaggerated in the complaint. To the extent that this conflict spilled into the workplace, the Association submitted that it is not appropriate to deal with it by targeting one side and penalizing one side and one individual. Rather, the Association submitted, there is a responsibility on the Employer to resolve the conflict.

[125] The Employer submitted that while workplace conflict is not harassment, that inappropriate workplace conduct over a disagreement could become a harassing event.

[126] The Employer submitted that it could theoretically be said that there is a dispute between the Grievor and Mr. Kingston about the propriety of Mr. Kingston being at the conference or working overtime, however, the Grievor's email to Mr. Fullerton brought the issue into the workplace. The Employer submitted that this action ramped it straight into harassment.

DECISION

[127] The Employer's decision to discharge the Grievor was based on the conclusions contained in the investigation report.

[128] With respect to the conference badge incident, the investigator concluded that:

“Based on the evidence and considering all the factors, it appears that when the Complainant did not show up to the conference to pick up his nametag, the Respondent took active and purposeful steps to determine whether the Complainant had accepted overtime and based on this information drew erroneous conclusions, which he then forwarded to two other members.

Although the evidence does not support the Respondent directed one of the individuals to whom he sent a copy of the nametag to forward this to others, witness statements suggest that the Respondent’s behaviour in this instant is consistent with how he operates. For example, he gets others to “spread the cancer” or do his “dirty work” for him. Therefore, based on a balance of probabilities, it is more likely than not that the Respondent knew that forwarding a picture of the nametag was bound to make it way to the membership and would spark rumours and gossip within the fire hall.”

The evidence also suggests that once the Respondent learned the facts regarding the Complainant’s decision not to attend the conference on November 24, 2015, he chose to ignore the explanation and continued to circulate inaccurate information to members in an apparent effort to discredit the Complainant.”

[129] With respect to the training incident, the investigator concluded:

“..based on a balance of probabilities, the investigation finds that it is more likely than not that the Respondent was aware that he was sitting directly behind the Complainant and that this action was a deliberate attempt to intimidate the Complainant.”

and

“The evidence supports that based on a balance of probabilities, the Respondent was aware that he was sitting behind the Complainant during the November 27, 2015 training session although there were other vacant seats in the room. In doing so, the Respondent ought to have known that the Complainant would perceive such action as intimidating, particularly since the training occurred so soon after the November 24, 2015 issue and given the mistrustful and antagonistic relationship between the Complainant and the Respondent.”

[130] With respect to whether the Grievor created a poisoned work environment for Mr. Kingston, the investigator concluded:

“The evidence suggests that the conflict has extended beyond a difference of opinion on Association matters and a difference in the politics between the former Executive Board and the new Executive Board to a personal vendetta and retaliatory behaviour by the Grievor that has spilled over into the workplace, creating a poisoned and hostile environment.

Based on the evidence, it appears that rumours, gossip and half-truths that were widely circulated in the workplace following the November 24, 2015 issue were instigated both directly and indirectly by the Respondent and created a poisoned and hostile work environment."

[131] The investigator concluded that all of the foregoing amounted to "vexatious comment or conduct that [the Grievor] knew or ought to have known to be unwelcome".

[132] Based on the evidence before me, it appears that the investigator's conclusions were based primarily on the opinions that she heard from the participants in the investigation, rather than on the direct evidence available to her, or any first hand observations of the Grievor's behaviour. I have not included in the relevant facts for this case all of the inflammatory statements that witnesses made to the investigator. These statements were opinions based on things that the witnesses had heard about the Grievor, and not based on any direct observations of the Grievor's behaviour. Most of the witnesses had never even worked with the Grievor.

[133] Unfortunately for the Grievor, the investigator included pages of such inflammatory opinion statements in the investigation report. It appears that she relied upon them in making her findings. This is entirely improper. Such statements are not evidence, they are not relevant and they are not admissible.

[134] The jurisprudence is clear that findings of harassment cannot be made on the basis of conjecture or rumours, or on the opinions of the witnesses in the investigation. Rather, such findings must be made on the basis of objective facts, and thoughtful consideration of whether the Grievor's behaviour can be said to be "engaging in a course of vexatious comment or conduct against [a worker] that is known or ought reasonably to be known to be unwelcome." This is the definition of harassment as set out in the *Occupational Health and Safety Act* and mirrored in the Employer's policy.

[135] As noted by Arbitrator Ponak in *Canada Safeway*, the need for objective evidence has been emphasized by many arbitrators.

[136] Arbitrator Ponak quoted from Arbitrator Knopf's decision in *Nunavut and Public Service Alliance of Canada* (2006), 151 LAC (4th) 35 (Knopf):

An allegation of harassment is a serious matter. It cannot be taken lightly... A finding of harassment can only be made if there is objective evidence to support that claim. The fact that [the grievor] honestly felt that she was being harassed, and the fact that she suffered greatly, is not enough to make this claim succeed. This grievance can only succeed if the objective evidence supports a finding that there has been abusive conduct as a result of the improper use of power or a departure from reasonable norm. Harassment also includes actions which annoy, harm, persecute and embarrass another person, as well as subject someone to vexatious attacks, questions and unnecessary unpleasantness.

[137] Arbitrator Ponak also quoted from Arbitrator Laing's decision in *Government of British Columbia* (1995), 49 L.A.C. (4th) 193, where Arbitrator Laing said :

In these times there are few words more emotive than harasser. It jars our sensibilities, colours our minds, rings alarms and floods adrenaline through the psyche. It can be used casually, in righteous accusation, or in a vindictive fashion.

Whatever the motivation or reason for such a charge, it must be treated gravely, with careful, indeed scrupulous fairness given both to the person raising the allegation of harassment and those against whom it is made.

The reason for this is surely self-evident. Harassment, like beauty, is a subjective notion. However, harassment must also be viewed objectively. Saying this does not diminish its significance. It does, however, accentuate the difficulty of capturing its essence in any particular circumstance with precision and certainty.

For example, every act by which a person causes some form of anxiety to another could be labelled as harassment. But if this is so, there can be no safe interaction between human beings. Sadly, we are not perfect. All of us, on occasion, are stupid, heedless, thoughtless and insensitive. The question then is, when are we guilty of harassment?

I do not think that every act of workplace foolishness was intended to be captured by the word harassment. This is a serious word, to be used seriously and applied vigorously when the occasion warrants its use. It should not be trivialized, cheapened or devalued by using it as a loose label to cover petty acts or foolish words, where the harm, by any objective standard, is fleeting. Nor should it be used when there is no intent to be harmful in any way, unless there has been a heedless disregard for the rights of another person and it can be fairly said, "you should have known better."

[138] And, from Arbitrator Bilson's decision in *Correctional Service of Canada*, citing *Joss v. Treasury Board*, 2001 PSSRB 27:

Hard feeling, feelings of resentment, and out right feuds between employees crossing all ranks are not unique in employment relationships. Such situations do not always amount to harassment and more often than not, are two way streets. These problems are not necessarily effectively remedied by disciplinary action, and certainly not by indiscriminate use of harassment policies or harassment complaints as this unfortunate tale reveals.

The Events Pre-November 24, 2015

[139] Before I commence the analysis, I should address the events that took place from the fall of 2013 to the end of 2014 that Mr. Kingston and others testified about. It was the Employer's position that the conference badge and training incidents must be

considered within the context that Mr. Kingston described in order to be understood as harassment and/or bullying.

[140] Many witnesses referred to the work environment being "poisoned". However, it is clear that what the witnesses were referring to was the differences about Association issues that existed and that were being widely discussed in the workplace.

[141] This case is not about who is right or wrong with respect to the difficult union issues that were under discussion. It appears that the issues were both important, and complicated, and that reasonable people might well disagree about how best to resolve them.

[142] This case is also not about whether the divisions in the Association caused a poisoned work environment generally, or for Mr. Kingston in particular. Rather, the issue is whether the Grievor's actions can be characterized as vexatious conduct or comment that created a poisoned work environment for Mr. Kingston.

[143] The comment that the Grievor made to Mr. Kramer falls into the 2013 to 2014 time frame.

[144] The only direct evidence about the 2013 comment is that of Mr. Kramer. Mr. Kramer testified that the Grievor said to him in the fall of 2013 that Mr. Kingston "could not even manage his own finances, so could not manage the Association's." I accept this evidence and find that the Grievor made this comment to Mr. Kramer in the fall of 2013.

[145] Within days of the Grievor making this comment to Mr. Kramer, Mr. Kramer told Mr. Kingston so that Mr. Kingston and the Grievor could work it out. Mr. Kingston did not discuss the matter with the Grievor, because he was not on speaking terms with the Grievor.

[146] Except for this one comment in 2013, there was no evidence that the Grievor ever made any other uncomplimentary or critical statement about Mr. Kingston, to anyone.

[147] At worst, the Grievor's comment to Mr. Kramer suggests that he held a poor opinion of Mr. Kingston as a suitable candidate for Treasurer. The comment was not an insult communicated directly to Mr. Kingston, nor did it contain any offensive language. Rather, it was an opinion expressed about a candidate for a union position in an upcoming election. It was not repeated throughout the workplace, but rather it was a single comment to one person.

[148] Moreover, Mr. Kingston was aware of the comment at the time that it was made, back in 2013. It was not serious enough for Mr. Kingston to take any action at that time, including a conversation with the Grievor. For all of these reasons, I do not find that the Grievor's comment to Mr. Kramer rises to the level of vexatious.

[149] The background facts that Mr. Kingston testified about also do not suggest that the Grievor was the cause of the difficulties that Mr. Kingston was experiencing

throughout 2014. The evidence was that the Grievor disagreed with Mr. Kingston about the tax issue at Association meetings. The Grievor was entitled to disagree with Mr. Kingston. Except for the one comment in the fall of 2013, discussed above, there is no evidence that the Grievor was making critical remarks about Mr. Kingston or spreading rumours. Mr. Kingston testified that his phone was smashed, but the Grievor was not involved in that incident. The Grievor was also not the person who made an angry threat to Mr. Kingston over the tax issue. There was no evidence that the Grievor ever bullied Mr. Kingston or anyone else.

[150] Moreover, Mr. Kingston's plea to the membership in September 2014 that the aggressive behaviour stop appears to have been very effective. Mr. Kingston testified that there were no further incidents, except for one in December 2014, which also did not involve the Grievor.

[151] In light of this, the November 24, 2015 conference badge incident and training incident cannot be characterized as a "culminating event in a long history (spanning two years) of coordinated attacks against me in the workplace brought by the Grievor", as characterized by Mr. Kingston in his complaint. These incidents must be examined on their own.

[152] The objective facts of the conference badge incident and the training incident are not in dispute. The Association conceded that the Grievor emailed the conference badge to Mr. Fullerton, and texted it to Mr. Evers. The Grievor admitted this in the investigation. The Grievor also admitted that he sat behind Mr. Kingston in the training session. The evidence establishes that the Grievor whispered to Mr. Kelloway, asking him if he had worked overtime on Tuesday. I will address these two events in detail below.

The photo of Mr. Kingston's conference badge, and accompanying message

[153] The conference badge incident is the main complaint. The Grievor took a photo of Mr. Kingston's conference badge that was sitting on the registration table at the conference. He sent the photo to Mr. Fullerton, with the message, "Here, Pin this on Kingston today. Double dipper!"

[154] The Employer asks me to conclude that the Grievor's purpose in communicating with Mr. Fullerton was to incite Mr. Fullerton to harass Mr. Kingston. The evidence does not support this conclusion. Rather, the objective evidence relevant to the conference badge incident is the following.

[155] The Grievor was off duty attending a conference and he saw Mr. Kingston's conference badge on the registration table. The conference was a legislative conference that pertained to union issues. Mr. Kingston held the position of Treasurer on the union executive. Mr. Kingston was not present at the conference. Mr. Kingston was working overtime at Station 3.

[156] One of the ongoing issues of concern and disagreement amongst Association members was whether it was appropriate for executive members to take overtime. Mr. Kingston had been criticised by some in May 2014 when he arranged a duty exchange to attend a union meeting while doing an overtime shift. The issue of union executive members accepting overtime was an issue that the Grievor and Mr. Kingston had different views about.

[157] All of this evidence supports the conclusion that the Grievor was concerned about a legitimate issue: that Mr. Kingston was working overtime rather than attending the conference.

[158] It was reasonable for the Grievor to assume that Mr. Kingston was registered for the conference. It is common knowledge that the credential that shows that a person is registered for a conference and entitled to participate in the conference events is the conference badge. The fact that there was a conference badge for Mr. Kingston meant that he was registered for the conference. It is also a fact that Mr. Kingston was registered for the conference, although he planned to split his registration with another executive member.

[159] Even if the Grievor wrongly assumed that Mr. Kingston was “double dipping”, as he expressed to Mr. Fullerton, he was not wrong to raise his concern, and to provide the conference badge as evidence of his understanding of the facts. These facts as recited above are a sufficient basis to seek an explanation from Mr. Kingston as the Association Treasurer.

[160] This evidence also suggests why the Grievor decided to communicate with Mr. Fullerton. Mr. Fullerton was a sub-executive member who was friendly with the Grievor. The Grievor knew that Mr. Fullerton was working as Captain at Station 3 that day and knew or suspected that Mr. Kingston was working overtime at Station 3. The Grievor did not communicate with Mr. Fullerton again all day.

[161] Even though the Grievor did not testify to explain his rationale in sending the email to Mr. Fullerton, the 9:15 p.m. email communication initiated by Mr. Fullerton to the Grievor on November 24, 2015 provides further evidence of the Grievor’s concern about Mr. Kingston not attending the conference that day.

[162] Mr. Fullerton’s purpose in initiating the email conversation at 9:15 p.m. was to inform the Grievor that Mr. Kingston had provided an explanation and that he accepted Mr. Kingston’s explanation. Mr. Kingston’s explanation was that it was intended all along that Mr. Lawson would attend the conference on November 24, and that Mr. Kingston would attend the following day.

[163] The Grievor’s responses to Mr. Fullerton’s email show that the Grievor did not accept this explanation and he gave Mr. Fullerton reasons for not accepting it. One of the reasons was that the Grievor did not accept the concept of sharing a conference registration between two people. He said, “when someone attends the legislative conference, they go for the whole thing”.

[164] The Grievor also expressed the view that attendance at the entire conference is important for understanding the issues. He said, "Today, everyone heard from the 3 political parties and they were taught about the 3 issues that they are lobbying the government for. Tomorrow is known as lobby day and they spend the day at Queen's Park meeting with MPP's trying to gain their support on issues that they learned about today. Why would Kingston feel that he already knows the issues?"

[165] I now turn to the content of the Grievor's message to Mr. Fullerton to "pin this on Kingston today", and the Employer's characterization of it as an incitement to harass Mr. Kingston.

[166] The Association's characterization is that the Grievor meant that Mr. Fullerton should ask Mr. Kingston for an explanation of why he was working overtime and was not at the conference. The Grievor might have meant that Mr. Fullerton should ask Mr. Kingston. However, the Grievor did not testify and I therefore have no evidence from the Grievor about what he meant when he emailed, "Here, pin this on Kingston today. Double dipper!"

[167] Accordingly, I must consider the usual meaning of the phrase "pin this on Kingston" in context. The context of this situation suggests that the usual meaning that should be given to this phrase is that Mr. Fullerton should hold Mr. Kingston responsible for his wrong decision (in the Grievor's view) to work overtime rather than attend the conference. It is also clear that the Grievor believed that Mr. Kingston had received a per diem for attendance at the conference, and therefore believed that Mr. Kingston was "double dipping".

[168] I now turn to the Employer's position that the Grievor acted through Mr. Evers and Mr. Lucas to harass Mr. Kingston.

[169] Both Mr. Evers and Mr. Lucas testified about their decisions to forward the conference badge to others. Mr. Evers testified that the Grievor did not ask him to send the conference badge to anyone, or to compose any message. Mr. Evers did not tell the Grievor that he was going to forward the badge to anyone, or that he had done so.

[170] I conclude from Mr. Evers' testimony that Mr. Evers made his own independent decision to compose a message and send the picture of Mr. Kingston's name badge to five people, including Mr. Lucas. I do not find any basis to hold the Grievor responsible for what Mr. Evers did.

[171] Mr. Lucas is even further removed. Mr. Lucas testified that he received the email message and photo from Mr. Evers. He did not know that Mr. Evers got the photo from the Grievor. Mr. Lucas testified that he did not speak with the Grievor about it, and he confirmed that the Grievor did not ask him to send the photo or the message to anyone.

[172] Mr. Lucas testified that he sent the photo and message to share information about an ongoing union issue. Accordingly, I do not find any basis to hold the Grievor responsible for what Mr. Lucas did.

[173] In light of all of the foregoing, I do not find that the Grievor's message and accompanying photo to Mr. Fullerton was an incitement to harass Mr. Kingston. The photo in itself was not inflammatory or vexatious, rather it was a neutral part of the fact situation. Mr. Kingston's non-attendance at the conference was a legitimate issue that the Grievor was entitled to raise with Mr. Fullerton as a member of the Association sub-executive, and with other union members.

[174] The content of the Grievor's message to Mr. Fullerton, and the fact that the Grievor knew that Mr. Fullerton was Mr. Kingston's Captain on November 24 are different matters that cause me some concern.

[175] While I do not find that the Grievor's message to Mr. Fullerton was an incitement to harass Mr. Kingston, I do find that the Grievor's message to Mr. Fullerton to "pin this on Kingston today" is properly characterized as encouraging Mr. Fullerton to confront Mr. Kingston at work about a non-work related matter, thereby facilitating inappropriate conflict in the workplace. As an Acting Captain himself, the Grievor ought to have known that Mr. Kingston had a right to a work environment where he could focus on his work, rather than finding himself in a confrontational position with his superior officer over a non-work related matter. I find that the Grievor's message to Mr. Fullerton was a breach of the Grievor's duty to maintain a harmonious workplace free from unnecessary conflict.

[176] However, I find that the impact of the Grievor's behaviour on Mr. Kingston was minimal. Although Mr. Kingston testified that Mr. Fullerton confronted him at 0815, just minutes after receiving the email from the Grievor, that is not accurate.

[177] I accept Mr. Fullerton's evidence that he was going to ignore the Grievor's email and not confront Mr. Kingston at all. I accept Mr. Fullerton's evidence that he learned in the afternoon, from Mr. Kingston, that Mr. Lucas had broadly distributed the conference badge and message.

[178] I also accept Mr. Fullerton's evidence that he did not confront Mr. Kingston, but rather, that Mr. Kingston offered the explanation about his attendance at the conference without being asked by Mr. Fullerton.

[179] Moreover, the message that was distributed throughout the workplace was not the message that the Grievor sent to Mr. Fullerton that accused Mr. Kingston of double dipping. Rather, it was the message composed by Mr. Eyers, and forwarded by Mr. Lucas, that said, "skipped out on legislative conference. Five weeks before our collective agreement expires." The Grievor's message accusing Mr. Kingston of being a double dipper was not distributed to anyone other than Mr. Fullerton.

[180] Accordingly, the impact that Mr. Kingston testified about, having to provide repeated explanations to his fellow employees was not the result of the Grievor's email to Mr. Fullerton, but rather it was the result of Mr. Lucas' decision to widely distribute Mr. Eyers' message, and the result of the decisions of those who received the email from Mr.

Lucas to ask Mr. Kingston for an explanation about his attendance at the conference. It is unclear how many people confronted Mr. Kingston at work, but it appears that most of the inquiries were by email, which, presumably, Mr. Kingston could have ignored while he was at work, and dealt with them later. It is clear that Mr. Kingston was distracted and upset for a good part of the day.

The training event

[181] The evidence establishes that the Grievor was off duty when he sent the conference badge to Mr. Fullerton and Mr. Eyers. He did not return to duty until the day of the training, November 27, 2015.

[182] Mr. Weatherhead, Mr. Kelloway and Mr. Black testified about the training incident. The Grievor's station was the last to arrive at the training session. The entry door was at the back of the training room. The Grievor was walking behind Mr. Weatherhead who took down a chair and placed it behind Mr. Kingston's crew who were sitting in the last row. The Grievor did the same and sat next to Mr. Weatherhead, a chair and a half away from Mr. Kingston.

[183] The behaviour complained of is that from this space behind Mr. Kingston, the Grievor whispered one question to Mr. Kelloway: "did you work overtime on Tuesday."

[184] Mr. Kingston testified that the Grievor's whisper was "passive-aggressive, and full of innuendo". Mr. Kingston, Mr. Kelloway and Mr. Black all believed that the Grievor was asking the question because of Mr. Kingston working overtime on Tuesday.

[185] There is no evidence that the Grievor knew or ought to have known that he should not sit near Mr. Kingston at a training event. No one had brought to the Grievor's attention that Mr. Kingston had been badgered all day at work about the conference badge and was upset about it. To the extent that the Grievor and Mr. Kingston had actively disagreed about union issues in 2014, there had been no conflict or disagreement between them since September 2014. It also appears that there was little or no contact between them at work since September 2014.

[186] I accept Mr. Weatherhead's testimony that he was the one who chose where to sit, and that the Grievor followed him. I also accept Mr. Weatherhead's testimony that he was not aware of any reason why he should not sit near anyone in the fire service and that he was not aware of any reason why the Grievor should not sit near Mr. Kingston.

[187] Moreover, there is nothing objectionable about the Grievor's question to Mr. Kelloway. Even if it was a reference to Mr. Kingston working overtime on Tuesday, the evidence establishes that it was a norm in this workplace to discuss union issues. The evidence also establishes that the Grievor asked Mr. Kelloway quietly with no bravado or actions that would call attention to the situation. The Grievor also did not persist when Mr. Kelloway did not answer him.

[188] In summary, I do not accept the Employer's characterization that the Grievor's message to Mr. Fullerton was an incitement to harass Mr. Kingston. Nor do I accept the Employer's submission that the Grievor worked through Mr. Eyers or Mr. Lucas to harass Mr. Kingston.

[189] The conference badge incident and the training incident do not meet the definition of vexatious conduct or comment that ought to be known to be unwelcome. Accordingly, I do not find that the Grievor harassed Mr. Kingston or created a poisoned work environment for him.

Has there been any misconduct that deserves a disciplinary response?

[190] I have found that the Grievor's misconduct does not constitute harassment, but rather the Grievor's misconduct is properly characterized as a breach of the Grievor's duty to maintain a harmonious workplace free from unnecessary conflict.

[191] This conduct goes to the leadership component of the Grievor's job as an Acting Captain. As a leader, the Grievor ought to have known better than to encourage Captain Fullerton to confront Mr. Kingston at work when Mr. Kingston was one of the fire fighters reporting to Captain Fullerton. Mr. Kingston had a right to a work environment where he would not be confronted by his Captain about union issues.

[192] I find that this is misconduct that deserves a disciplinary response. However, the misconduct is not so serious as to warrant discharge. Accordingly, I find that while the Employer did have just cause to discipline the Grievor, the Employer did not have just cause to discharge the Grievor.

The appropriate remedy – reinstatement or compensation in lieu?

[193] Having found that the Employer did not have just cause to discharge the Grievor, the remaining issues are whether I should reinstate the Grievor and substitute a lesser penalty for his misconduct, or whether I should award compensation in lieu of reinstatement. And lastly, if I do reinstate the Grievor, what should the discipline be?

[194] The jurisprudence is clear that the usual remedy where an employee has been discharged without just cause is reinstatement. Compensation in lieu of reinstatement is an exceptional remedy that should be resorted to only where an arbitrator has determined that the employment relationship is no longer viable.

[195] In *Lethbridge*, the Supreme Court of Canada said, "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."

[196] The factors frequently considered in addressing this question were articulated by Arbitrator Rayner in *Dehavilland Inc. and CAW Canada* (1999), 83 L.A.C. (4th) 157. The factors were:

1. The refusal of co-workers to work with the grievor.
2. Lack of trust between the grievor and the employer.
3. The inability or refusal of the grievor to accept any responsibility for any wrongdoing.
4. The demeanour and attitude of the grievor at the hearing.
5. Animosity on the part of the grievor towards management or co-workers.
6. The risk of a "poisoned" atmosphere in the workplace.

[197] Considering these factors, there is no basis for me to conclude that the employment relationship is no longer viable.

[198] The witnesses who were asked about their relationship with the Grievor described it as "good" or "fine". Except for Mr. Kingston, no other witnesses expressed any reservations about working with the Grievor. Mr. Kingston does not feel that he could work with the Grievor given their poor relationship and the lack of trust between them. However, I do not see this as an impediment to returning the Grievor to work.

[199] There was no evidence of a lack of trust between the Grievor and the Employer. The Grievor is a long service employee who had been promoted to the rank of Captain at the time of his discharge, which suggests an implicit level of trust between the Grievor and the Employer.

[200] While the Grievor's comment at the end of his discharge meeting that the investigation was a "witch hunt" is indicative of some level of trust lost between the Grievor and the Employer, I do not consider it appropriate to deny the Grievor the usual remedy of reinstatement because of the Grievor's reaction to an investigation report that led to his discharge and where the conclusions against him have not been substantiated. This would be most unfair to the Grievor.

[201] I do not find that the Grievor refused or is unable to accept any responsibility for any wrongdoing. The Grievor admitted what he had done but he framed it in a different light. That different light is supported by my analysis and conclusions. No one has framed the Grievor's actions of asking Mr. Fullerton to confront Mr. Kingston at work about a union matter as facilitating inappropriate conflict in the workplace. Accordingly, the Grievor has had no opportunity up until now, to accept responsibility for a fair framing of his misconduct.

[202] The Grievor did not testify and so I did not have an opportunity to assess his demeanour as a witness. However, the Grievor attended every day of the hearing and always behaved appropriately. He sat quietly even through all of the testimony of the witnesses who testified about the critical opinions they gave to the investigator about the Grievor, all of which were based on things they had heard in the workplace, and not on any firsthand observations of the Grievor's behaviour.

[203] There was no evidence of animosity toward management on the Grievor's part. The "witch hunt" comment does suggest animosity toward the investigation process, and the Employer's role in that. But again, it would be most unfair to hold this against the Grievor given the outcome of this arbitration.

[204] The last factor is the risk of a poisoned atmosphere in the workplace because of the Grievor's reinstatement. There was no evidence from any witness that they had ever observed any behaviour from the Grievor that they would describe as "bullying".

[205] As discussed earlier, many of the witnesses testified about a poisoned work environment. In this regard, they were referring to the disagreements about union issues that were being broadly discussed in the workplace. The issue of whether a poisoned work environment existed at some earlier time because of discussions and disagreements about union issues in the workplace is not before me.

[206] I do not find that there is a risk of a poisoned atmosphere in the workplace because of the Grievor's reinstatement. To the contrary, I think it is likely that there will be a change in the behaviour of many as a result of this arbitration.

[207] In light of all of the foregoing, there is no basis for me to award the exceptional remedy of compensation in lieu of reinstating the Grievor.

The Appropriate Discipline

[208] The last issue is to determine the appropriate discipline for the Grievor's misconduct. The assessment of the appropriate disciplinary response must be made in light of the seriousness of the misconduct as well as the usual list of relevant factors as articulated in *William Scott*.

[209] The most relevant factors in this case are the seriousness of the misconduct, the Grievor's long service, his years of experience as an Acting Captain and the Grievor's previous discipline.

[210] As I have said earlier in this decision, the Grievor ought to have known better, as an Acting Captain and a leader, that it would be inappropriate to send the email that he sent to Captain Fullerton, asking him to confront a fire fighter at work about a non-work related matter.

[211] The Grievor's previous disciplinary record consists of a single incident, albeit a serious one. In 2014, the Grievor received a four shift suspension, which totalled 48 hours, for using the town computers to deface the business website of a Platoon Chief. This action was found to be vandalism, harassment, misuse of town property and time theft.

[212] In contrast to the Grievor's misconduct in 2014, the Grievor's misconduct in this case does not involve vandalism, harassment, misuse of resources or theft of time. It is different in nature, and is much less serious than his misconduct in June 2014.

[213] A progressive discipline approach does not necessarily require that the discipline should be more severe than that imposed for the Grievor's first incident of misconduct. As stated above, the seriousness of the misconduct must be taken into account. In this case, I have not found that the Grievor harassed a coworker. Rather, the Grievor's misconduct is limited to his communication asking Mr. Fullerton to confront Mr. Kingston at work about a union matter, thereby encouraging inappropriate conflict in the workplace.

[214] Taking into account all of the above, I find that the appropriate discipline for the Grievor's breach of his duty as an Acting Captain to maintain a harmonious workplace is a suspension equivalent to 24 hours.

[215] In the result, the Grievance is allowed. I direct the Employer to reinstate the Grievor with no loss of compensation, seniority, service or benefits, subject only to the imposition of the 24 hour suspension and the Grievor's duty to mitigate his losses. In light of the strained relationship between Mr. Kingston and the Grievor, it is prudent, and I so order, that the Grievor be reinstated to a station and a platoon which limits his contact with Mr. Kingston. Furthermore, the Employer should ensure that Mr. Kingston and the Grievor do not work together as a result of overtime or duty exchanges. For further clarity, the restriction on overtime and duty exchanges could affect both the Grievor's and Mr. Kingston's opportunities for overtime and duty exchanges.

[216] The parties are directed to address the remedial issues without delay.

[217] I remain seized to deal with any issues that arise as a result of this decision.

Dated at Toronto this 21st day of June, 2017.



Diane Brownlee, Sole Arbitrator