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Paynter v. Deputy Head (Canada Border Services Agency), 2024 FPSLREB 116

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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

STEPHEN PAYNTER

Grievor

and

DEPUTY HEAD
(Canada Border Services Agency)

Respondent

Indexed as
Paynter v. Deputy Head (Canada Border Services Agency)

In the matter of individual grievances referred to adjudication

Before: Audrey Lizotte, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Alexandra Hobson and Bonnie Pollard, Professional Institute of the Public Service of Canada

For the Respondent: Marc Séguin, counsel

Heard at Ottawa, Ontario,
August 14 to 17, 2023.

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REASONS FOR DECISION

I. Individual grievances referred to adjudication

[1] At the time of his indefinite administrative suspension and subsequent termination of employment, Stephen Paynter ("the grievor") was employed as a CS-03 project leader in the Information, Science and Technology Branch section of the Canada Border Services Agency (CBSA or "the respondent").

[2] The respondent's decisions to suspend and subsequently terminate the grievor were based on two incidents alleged to have occurred on February 22, 2018. The first occurred at the entrance of his workplace at approximately 9:48 a.m., where it is alleged that he was in an altercation and that he pushed another employee (Martin Desbiens). The second occurred in an elevator at approximately 11:50 a.m., where it is alleged that the grievor verbally threatened two other employees (Rami Alqarra and Laurie Walker).

[3] The termination letter, dated October 30, 2018, stated that in rendering its decision, the respondent considered all the mitigating and aggravating factors, which included the grievor's discipline-free record, his lack of remorse and the fact that he did not recognize the seriousness of his actions. The respondent considered the termination justified on the basis that those factors resulted in a definite breach of trust.

[4] The grievor grieved the suspension on March 23, 2018, and the termination of employment on November 1, 2018. Both grievances were referred to adjudication in early 2019 and were joined to be heard and dealt with together. In his grievances, he claimed that the respondent's actions were unfounded, were in violation of the collective agreement between the Treasury Board and the Professional Institute of the Public Service of Canada for the Computer Systems (CS) group that expired on December 21, 2018 ("the collective agreement"), were in violation of the respondent's "Discipline Guidelines", and that they represented discrimination of him on the basis of race and colour.

[5] In his March 23, 2018, grievance, the grievor denied encountering anyone on February 22, 2018, while entering the building or accessing the fourth floor, where he worked. However, during the hearing, he acknowledged that he had interacted with Mr.

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Desbiens, Mr. Alqarra, and Mr. Walker that morning but denied the accuracy of the respondent's version of the events. The grievor claimed that the respondent should have considered his extensive years of service and positive work appraisals as mitigating factors. He further claimed that the respondent failed to consider the context of the events, specifically his ongoing and unresolved sexual harassment complaints against Mr. Desbiens and other men working at the CBSA.

[6] The respondent argued that it had just cause to terminate the grievor's employment. As the termination was made retroactive to the date on which he was first suspended, it claimed that the suspension grievance is moot. It further took the position that he failed to establish that he was discriminated against.

[7] For the reasons stated in this decision, I have concluded that the grievances must be denied.

II. Summary of the evidence

[8] Seven witnesses were called to testify. The respondent called Mr. Desbiens, Mr. Alqarra, and Mr. Walker, who were all directly involved in the incidents on February 22, 2018. The respondent also called Sylvie Gingras, the grievor's director, and Daniel Tremblay, the director general when the incidents occurred, who has since retired. The grievor testified on his own behalf. He also called Dr. Kerry Kawakami as an expert witness in the area of implicit racial bias toward Black individuals.

[9] During the grievor's testimony, several allegations were made involving other individuals. Those allegations were not part of the grievances before me, and the affected individuals were not called upon to testify and provide their account of events. As such, I have chosen to only refer to those individuals by their initials.

A. Background information

[10] At all relevant times, the grievor worked as a CS-03 project leader and was a few months shy of 33 years with the federal public service. He first became a project leader in 1998 with another organization and joined the (then) Canada Customs and Revenue Agency in 2000, which subsequently became part of the CBSA.

[11] The grievor worked in software development. He stated that his work required thinking, creativity, adaptability, and the ability to work with different people. He provided examples of work that he had performed that demonstrated these skills and

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stated that he had received several recognitions for his work, including an award. He stated that he demonstrated throughout his career that he has a can-do attitude and that before he was terminated, he had planned to work for another 10 years.

[12] His work location was Place Vanier, located in Ottawa, Ontario. Place Vanier is composed of three Towers — A, B, and C. The grievor worked on the fourth floor of Tower B.

[13] The incidents on February 22, 2018, involved three individuals. The first incident, involving Mr. Desbiens, occurred in Tower B's entrance. Mr. Desbiens is an IT solutions architect with the CBSA's IT department and occupied that position when the incident took place.

[14] The second incident, involving Mr. Alqarra and Mr. Walker, occurred in an elevator in Tower B. Mr. Alqarra is a business consultant with the CBSA and other departments and occupied that position at the time of the incident. Mr. Walker occupied a senior policy analyst position with the CBSA at the time of the incident and has since retired.

B. The events leading up to the February 22, 2018, incidents

1. Mr. Desbien's evidence

[15] Mr. Desbiens stated that he did not know the grievor but that he had had three incidents with him in January 2018. He denied having any encounters with the grievor prior to that time.

[16] He stated that the first incident occurred on January 12, 2018. He stated that on that day, freezing rain had fallen. He stated that he arrived at his vehicle at around 5:00 p.m. and that the grievor's car was parked across from him. Mr. Desbiens stated that he is friendly and that he said to the grievor, "[translation] There is a lot of freezing rain; it's unfortunate." He stated that in response, the grievor started yelling, "F*** you - f*** you!", to him. He stated that since he did not know the grievor, he just thought that the grievor had a problem.

[17] Mr. Desbiens stated that the second incident with the grievor occurred on January 18, 2018, while he was smoking a cigarette outside the building. He said that he saw the grievor walking toward the building and that while he was looking in the grievor's direction, the grievor made a gesture to him with his middle finger.

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[18] Mr. Desbiens stated that the third incident occurred on January 24, 2018, while he was smoking a cigarette outside the office building during his lunch hour. He stated that he saw the grievor and so he called out to him and asked, “Why are you so angry at me?”, and the grievor responded, “Speak to your boss.”

[19] He stated that he reported the incidents to his managers, Sebastien Petit and Brad Simon. He stated that at that time, the grievor’s identity was still unknown. He added that he did not know the grievor, his name, or anything about him.

[20] On cross-examination, Mr. Desbiens stated that he was unaware on January 24, 2018, that the grievor had made a complaint against him the day before.

2. Mr. Walker’s evidence

[21] Mr. Walker stated that he did not know the grievor and that he did not have any interactions with him before the February 22, 2018, incident. He stated that he had seen the grievor at Place Vanier before that day but that he had not met him. He stated that Place Vanier is located in a part of Ottawa that has a significant number of homeless individuals. He stated that it is open to the public and that it has a cafeteria in the lobby that homeless people frequently enter to warm up and even sleep. He stated that the first time he saw the grievor, he thought that the grievor was among the homeless since he had seen the grievor yell at a tree outside the building. He stated that he had also seen the grievor looking quite confused while walking. He stated that one day, he was surprised when he noticed that the grievor had a CBSA pass card, meaning that he was an employee.

[22] Mr. Walker testified that he did not know Mr. Alqarra prior to the February 22, 2018, incident.

3. Mr. Alqarra’s evidence

[23] Mr. Alqarra stated that before February 22, 2018, he did not know the grievor. He stated that they had never met, spoken, or communicated before then.

[24] On cross-examination, Mr. Alqarra was asked if he recalled whether he had ever seen the grievor before February 22, 2018. He replied that he probably would have seen him around but that he really could not recall. Mr. Alqarra denied following the grievor before the incident. He was asked whether he knew Mr. Desbiens and replied

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that he did not; nor had he heard of Mr. Desbiens before being asked that question at the hearing during his cross-examination.

[25] Mr. Alqarra also testified that he did not know Mr. Walker before the February 22, 2018, incident.

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4. Ms. Gingras's evidence

[26] Ms. Gingras testified that prior to February 22, 2018, the grievor had reported to her his concern that men were following him. Specifically, he told her that his supervisor, E.C., had made inappropriate gestures to him. She stated that to address it, she instructed E.C. to have only conference calls with the grievor going forward until they found a solution to the situation. She stated that she also told the grievor that he could make a harassment complaint if he felt threatened, so that the situation could be investigated.

[27] Ms. Gingras denied receiving any complaints about Mr. Desbiens prior to February 22, 2018. According to her, she did not hear of Mr. Desbiens before that date.

5. The grievor's evidence

[28] The grievor stated that he did not know Mr. Desbiens, Mr. Alqarra, or Mr. Walker. However, he stated that it was his belief that they had been following him and keeping him under surveillance for a period of time before February 22, 2018. He stated that Mr. Desbiens was the leader of an organized group of men who monitored him (referred to by the grievor and throughout this decision as "the network"). He stated that people were assigned to doors to monitor his comings and goings in the building and that his movements were being tracked.

[29] The grievor stated that Mr. Desbiens began to intercept him at work and seemed to want to make eye contact with him. He stated that at first, he ignored it, but as Mr. Desbiens continued, he conveyed to Mr. Desbiens that it was of no interest to him. He did not state how this was conveyed. He stated that he saw Mr. Desbiens moving whom he referred to as "guards" between locations, to monitor him.

[30] The grievor stated that on January 12, 2018, Mr. Desbiens came to where he was parked. He stated that freezing rain fell that day and that his parking spot was a 10-minute walk from the building. He stated that he recalled thinking that it had been too easy to obtain that parking spot on that day. He stated that he called it "the parking

trap". He stated that the network would call people to intercept him. He stated that when he arrived at his vehicle at 4:30 p.m., along came Mr. Desbiens. He stated that whatever Mr. Desbiens had to say, he just made it clear to Mr. Desbiens that he was not interested. The grievor did not state what Mr. Desbiens actually said to him or what he said or did in response.

[31] The grievor stated that the January 12, 2018, incident was not the first time that Mr. Desbiens had intercepted him and that he had spoken to his director, Ms. Gingras, about it.

[32] He clarified that he did not speak to her about Mr. Desbiens specifically. He stated that he brought to her attention other workplace incidents involving E.C. and K.C. He stated that Ms. Gingras appeared dismissive about it and that she just told him to make a harassment complaint.

[33] The grievor stated that he followed Ms. Gingras's advice and that he sent a complaint to Vice-President (VP) Minh Doan, who was identified as the person to whom harassment complaints should be sent. The following email was sent on January 22, 2018, at 1:49 p.m. to Mr. Doan:

> ***Subject:*** *Sexual Harassment [male on male]* – [E.C.]
>
> *Mr. Vice-President,*
>
> *Per the existing policy, and the Treasury Board Policy on Harassment in the Workplace, I am directing the following matter to your office for your attention and action.*
>
> *The behaviours of the manager,* [E.C.], *assigned to my team has led me to feel tremendous anxiety, trepidation and stress when reporting to work and even in the periods where I am away from the office.*
>
> *I brought my concerns to my director, Sylvie Gingras some weeks ago and the fact that I was not required to attend meetings led by the manager led to a lessening of the anxiety and trepidation. However, I haven't seen any timely followup and have not received any regular updates. I made Ms Gingras aware of this and advised that I would have to file a formal harassment charge as it seemed to be the only option available to me to arrive at a remedy that will allow for the absence of future anxiety and trepidation.*
>
> *In brief, after one particular meeting, it seemed that* [E.C.] *was following in a manner that made it seem as if he some prurient interest in my person. The next one on one meeting with him, I changed the direction of my exit and in accordance with my suspicions he followed me quite intently. I stopped in the office of a*

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colleague and rather than be on his way, he stayed until I made it clear that I had particular business to attend to which would keep me in the colleague's office. Only then did he continue on his way. From that point, I have had to linger in boardrooms after meetings to avoid this unsettling behaviour from [E.C.].

At some other meeting, [E.C.] *entered and immediately wondered where I would be sitting. I purposely enter meetings after he arrives or arrive where I can situate myself between two people so there is no chance of him sitting next to me. I have had dozens of other managers and supervisors and have never felt the need to be concerned about my seating relative to their own. This causes me a great deal of anxiety and consternation. I have had occasion to file a sexual harassment charge against another male manager at CBSA so this is the first occasion since the last time.*

[E.C.] *assigned me the task of updating the spreadsheet dealing with CSSD Release Impacts. I was only a go between, between the main players in the section and passing on their updates. My own original input was minor as I was only dealing with Eman and SWI inputs, so I found it odd when he suggested this assignment would form the basis of one on one meetings for the two of us. At best, it seemed that any discussion would be best performed at the end of the section's regular meeting discussing the area's releases. There was no solid basis for a one on one meeting and it seemed quite suspicious. I really don't need my time wasted to address his non-work interests.*

There was another occasion where there was a meeting of the CECP leadership contingent meaning me and another P/L and [E.C.]. *I sat at the end on one side of the boardroom table and had purposely placed 2 chairs between me and the other end of the table.* [E.C.] *entered and seemed disturbed by the arrangement and angrily moved one of the chairs and then sat facing me with an exaggerated 'manspreading' posture, thus not facing the other p/l. I found the posture bizarre and just not something I had ever seen in the context in place. I found the behaviour in line with seeking an intra-gender affiliation [homosexual]. The interest expressed is and was alien to my mode of living. The only other time I have seen a manager interested in my person, my seating arrangements and unnecessary one on one interaction was a previous manager which caused me to file a sexual harassment charge against him.*

I had asked that I be able to report to Ms Fortin to avoid the anxiety, consternation, trepidation and stress I have experienced. I am a very experienced and proficient project leader so I would not add a burden to any other managers workload. Perhaps, I could report to Luc Audet and that would be an acceptable conduit for information flow at this time.

As the phenomenon of male on male sexual harassment, is not uncommon, in the early 21st century, as evidenced by recent news reports, having the manager indulge in this behaviour poses difficulties for me in the workplace. I have at least 4 contractors

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> *who sit close to me who are pestering me. Who do I talk to about that??*
>
> *#METOO*
>
> …
>
> [*Sic* throughout]

[34] The grievor stated that he sent the complaint to Mr. Doan since he wanted to convey his discomfort with E.C. He stated that he had also made a previous complaint against a supervisor who had said, "hello handsome", to him and had touched his shoulder. He stated that he had told the supervisor that his name was not "handsome" and that he did not want to be touched. He stated that he also filed a grievance about it since he did not believe that the situation would change. He stated that he thought that E.C. would have been aware of that previous situation. He stated that because E.C. was following him, he thought that he had legitimate reasons to fear for his safety; however, it never seemed to register with Ms. Gingras.

[35] The grievor stated that another incident occurred with Mr. Desbiens when he was crossing the street one day, saw a car patrolling the area, and noted that the driver was Mr. Desbiens. He stated that when he went to park, someone he referred to as "a corrupt" was watching him. He stated that Mr. Desbiens was still there late in the afternoon when it came time to leave work. He stated that at that time, "the network" seemed very concerned about where he was and where he parked. He stated that this is when he first mentioned to Mr. Doan that he felt that he was under surveillance, which he felt whenever he left his desk. He stated that after he first started to feel that people he did not know were intercepting him, he decided to just stay at his desk, to give them fewer opportunities to intercept him. He stated that that was when Mr. Desbiens felt that it was time to "get his hands dirty" and to go after the kind of interaction that he was looking for.

[36] The grievor stated that he again emailed Mr. Doan, on January 23, 2018, at 9:52 a.m., as follows:

> ***Subject:*** *SEXUAL HARASSMENT/STALKING [MALE ON MALE] - MARTIN DESBIENS*
>
> *Mr. Vice-President,*
>
> *Per the existing policy, and the Treasury Board Policy on Harassment in the Workplace, I am directing the following matter to your office for your attention and action.*

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On Friday, January 12, 2018 at approximately 5 pm, I was clearing ice of my car windows on Selkirk Avenue when one Martin Desbiens approached me as his car was parked behind my own. I knew his car as he has seemed to stalk me in the past.

On at least three occasions in the lobby of the Vanier Towers, he has attempted to establish eye contact with me to confirm his male to male interest. I have always avoided these attempts and have made rude hand gestures after the first occasion to convey the absence of any interest in the behaviours that appear to be of interest to him. The last distant interaction I had near him was when he seemed to be waiting at the back entrance for me. The entrance closest to the garage exit. I say he seemed to be waiting there for me because as I approached it I saw him but, ended up talking to a former colleague for close to 20 minutes and noticed that M. Desbiens was not leaving. He would cast regular glances my way. I made rude hand gestures, again, to convey my non-interest and disgust. When my conversation ended I turned and proceeded to the front of the building by way of the garbage dumpster platform, adjacent to Tower C.

As Mr. Desbiens approached on the Friday mentioned above, he made exaggerated sucking and slurping sounds as he simulated addressing some sort of orally consumed treat. I made a sharp and direct admonition in his direction as I shook my head in horror and disgust. He continued as he walked past and I repeated my words. As I was opening my rear car door to put away my brusher/scraper, he seem to simulate a couple of pelvic thrusts and then leaned over his car and pointed to his buttocks. I again issued a sharp and direct admonition to him and entered my car and drove off.

I should also mention that I do not know M Desbiens. I am only aware of his existence as he works on a project that is within my division.

On Monday, January 15, 2018, at about 10am, I was crossing over to Washington Avenue from the Loblaw's on MacArthur. I was surprised to see a familiar car. It turned out to be Mr. Desbiens patrolling Marguerite Avenue looking for my car or so I believed. He must have surmised I had parked in the Loblaw's parking lot because at 12:10pm [C.R.] *was watching me as I entered my car and drove off. He was 2 cars over just standing and watching my car. At 12:30, as I entered the Vanier Tower complex via the entrance facing MacArthur, I noticed* [M.B.] *standing in front of the main entrance.*

He called out to me and I acknowledged him. I found it odd. Later in the day, at about 3:35, I was walking along MacArthur to move my car again and [M.B.] *came up alongside me and greeted me. I didn't think it was coincidental as the network which I know tracks my movements knows I generally leave the building at that time. Once I was in Loblaw's,* [M.B.] *lingered as the network is intent on finding where it is that I park as it seems to disturb them that they do not know. Regardless, the point is that Mr. Desbiens was able to*

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> *summon the network to surveil me on two occasions within 90 minutes of first seeing me at 10 am. I was also greeted by two 'watchers' when I entered the building on Tuesday and Wednesday morning [16th, 17th].*
>
> *I find the fact that M. Desbiens could organize such surveillance within a 90 minute window akin to the actions of some sort of crime boss and clear evidence of a nefarious network in place for some time.*
>
> *The network at CBSA/Vanier Towers has links to another or the same network operating elsewhere in the city. I am being terrorized throughout the city and I have seen at least 2 directors from CBSA seeming to be connected to this criminal network. I only raise the point to show that what M. Desbiens is Is up to is no laughing matter.*
>
> *#METOO*
>
> …
>
> [*Sic* throughout]

[37] The grievor, who had the opportunity to listen to Mr. Desbiens's testimony, stated that he did not believe Mr. Desbiens's claim of not knowing on January 24 that the grievor had asked Mr. Doan the day before that Mr. Desbiens refrain from any contact with him.

[38] The grievor stated that he again emailed Mr. Doan, on January 24, 2018, at 1:54 p.m., providing as follows:

> ***Subject:*** *RE: SEXUAL HARASSMENT/STALKING [MALE ON MALE] - MARTIN DESBIENS*
>
> *Mr. Vice-President,*
>
> *At 12:05 pm today, I was accosted by M Desbiens just outside the MacArthur exit. He seemed to reference the January 12, 2018 issue. As I turned to ask him to leave me alone, one of his burly henchmen came upon us from the other direction. I see M Desbien's actions as those of a crime boss, with lieutenants or thugs at the ready on a moment's notice. A week and a half after January 12, 2018, why is he bothering me? I have made clear over the past many months, I have no interest in changing the state of our interaction, meaning, I want it to stay at zero unless a work purpose dictates otherwise. Should I be in contact with Security about possible physical threats and ongoing stalking? Why does he know my schedule well enough that he able to lie in wait for me, along with members of his network? At the very least, I want some instruction given to M Desbiens that he is not to approach me in any way shape or form, directly or indirectly.*

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> *When I returned to the building today, another burly person was waiting for me and tried to get on an elevator with me. I changed direction and avoided any untoward situation, but, what is going on at Vanier Towers? I worked here many years ago and was never stalked. I was subjected to racial harassment but, that's another story.*
>
> *#METOO*
>
> …
>
> [*Sic* throughout]

[39] The grievor stated that the email referred to the event that occurred in Tower B on January 24, 2018, at 12:05 p.m., when Mr. Desbiens accosted him. He stated that again, the network knew the timing of when he left, when he arrived — everything. He stated that he was with a colleague and that Mr. Desbiens said something to him but that he did not know what it was. He stated that he responded to Mr. Desbiens by saying only, "Look, contact your management."

[40] The grievor stated that he came to know the identity of the individual whom he referred to as a "henchman" of Mr. Desbiens in his email to Mr. Doan of January 24, 2018. He stated that it was Mr. Alqarra. He stated that Mr. Desbiens and Mr. Alqarra were not strangers because they looked at him and talked about him. He stated that Mr. Alqarra would follow him to the local Loblaws supermarket for a reason of which he was unaware.

[41] When asked about his experience with Mr. Alqarra before February 22, 2018, the grievor replied that he did not know him before seeing him in the incident with Mr. Desbiens on January 24, 2018. He stated that Mr. Alqarra worked on the second floor and that every day at 12:00 p.m., just as he passed the second floor in the stairwell, Mr. Alqarra would pop out just as the grievor was heading down the stairs. He stated that Mr. Alqarra would also follow him to the Loblaws grocery store. He stated that when he was in the Loblaws, Mr. Alqarra looked at him. He stated that when he left the Loblaws, Mr. Alqarra still followed him, so he had to take another street. He stated that in hindsight, the network had to know his location to do whatever it was it wanted to do. He stated that Mr. Alqarra was part of the mob network trying to mess with his mind.

[42] On cross-examination, the grievor acknowledged that Place Vanier is composed of three office towers and that the Loblaws is the only grocery store in the vicinity. He did not agree that Mr. Alqarra's presence there was coincidental. He stated that enough

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actions occurred that caused him to think that it was not coincidental that Mr. Alqarra was there at the same time he was. He stated that it was clear to him that he was being followed.

[43] The grievor agreed on cross-examination that 12:00 p.m. is the start of lunch for most people. He did not agree that meeting Mr. Alqarra in the staircase at that time was coincidental since Mr. Alqarra's arrival coincided with when he arrived at the second-floor landing.

[44] In terms of parking, the grievor agreed on cross-examination that Place Vanier had limited parking spaces, which resulted in some employees parking at the Loblaws. He did not respond directly when asked whether it was possible that it was simply a coincidence that others parked in the same area as he did.

[45] On cross-examination, the grievor disagreed that the use of the word "henchman" to describe Mr. Alqarra was too strong a statement. He stated that Mr. Desbiens organized his associates. The grievor also felt that the reference to Mr. Desbiens as akin to a mafia crime boss was appropriate since the grievor was made to feel that he had to videotape everything around him since he knew that what was being done to him was for malicious and criminal purposes. He stated that no one understands it until they actually experience it. He stated that when one reads literature on people who are being stalked, one understands it after it happens to them.

[46] When asked about his experience with Mr. Walker before February 22, 2018, the grievor replied that he had entered the elevator with him one time. He stated that the only reason he noted it was that Mr. Walker turned very bright red after the grievor entered the elevator. He stated that in hindsight, there was a look of recognition in Mr. Walker, as if his hand was caught in a cookie jar.

[47] The grievor stated that he had email exchanges with Mr. Doan on February 9, 12, and 13, 2018.

[48] On February 9, 2018, the grievor sent the following email to Mr. Doan at 10:09 a.m.:

> ***Subject:*** *SEXUAL HARASSMENT / STALKING / BULLYING* – [D.S.]*;* [I.M.]*; CBSA MOB NETWORK*

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Mr. Vice-President,

I thought there had been some relief from the relentless bullying and sexual harassment I have faced for the last 2+ years at CBSA but instead I had to experience a sharp burst of malicious activity from Wednesday 5 pm to Thursday, February 8, 2018, 5 pm.

I have rejected sexual advances from [D.S.] *and* [I.M.] *in the past 6 months and with recent actions on the part of CBSA, I thought there would be no further attacks or even a hint of malicious behaviour on the past* [*sic*] *of CBSA personnel, employee or contractor.*

Quite the contrary, at a meeting with at least 15 persons, [D.S.] *in a series of moves made an attempt to sit beside me. I turned and noted that it was he who had abruptly moved beside me. He turned red and I moved to a table adjacent to the main boardroom table. I thought CBSA had provided ample warning to the members of what I will call the 'mob network' that I wanted to be free of harassment for male same sex affiliation of any sort. Beyond that, I really would never associate with persons who would participate in the kind of gang behaviour I have been forced to witness/endure while on the job in the Vanier Towers/CBSA. I want steps taken so that* [D.S.] *will stay away from me for future meetings.*

[C.M.] *used to scheme to engage me but his behaviour seems to have changed when I saw him yesterday. I would surmise he has heeded whatever instruction he has received from his employer, namely, CBSA.*

At 5 pm yesterday as I was leaving my cubicle and as I turned the corner into the common hallway, I was accosted by [I.M.], *a contractor in the section. He had heard me prepare to leave and had position himself about 20 ft from the corner I cited above. He had his hand on his crotch and made what appeared to be pelvic thrusts and was darting his tongue out of the side of his mouth as he walked towards me. Again, I rebuffed his grotesque attempt at engagement as I had done on three previous occasions. The fact that he seems free to ignore CBSA directives is quite disturbing.*

I really don't understand why I have to have the patience of Job in the face of all these egregious provocations. Do these people not take CBSA seriously or are they in fact, sanctioned by the organization?

On top of all these things, on Wednesday at 5:40pm as I cleared my car off in the Loblaw's [*sic*] *parking lot, it appeared that a car was lying in wait and observing me as I cleared off my car. I was in the least occupied section of the parking area. As I proceeded to drive along my route home, I felt as if I was being followed and had to alter my path and could see a car up ahead seeming to 'wait' for traffic to catch up. All to say, that if the 'mob network' here at CBSA is going to take this stalking of me to 'insane' heights, I will obviously have to engage the Ottawa Police Force. Regardless, why should I feel that I need to wear a bodycam, or have a dashcam in*

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> *my car or have surveillance videocams installed all over the exterior of my house? Is that what CBSA is allowing to be made of my life?*
>
> *The other day, I watched a news broadcast where someone was lynched in a distant country. The story made me think of my situation and I asked myself if things were being taken seriously enough. I am a straight black man being stalked by a mob of mostly white men. North American history, including Canada's, is quite clear on possible endings when mobs of white men go after lone black males. No one else seems to be being stalked and hounded as I am. Everyone knows, that crowds or packs of wild/domesticated dogs can 'flip' in an instant. Why I am the subject of daily 'virtual' lynchings and or 'prison rape' scenarios? Why, I ask?? This is beyond ridiculous..beyond unreasonable…beyond words, for that matter. Will CBSA rise to the level of an 'employer of choice' or will it reside in the nether regions of performance or behaviour much like a Trump White House??.*
>
> *#METOO*
>
> …

[49] On February 12, 2018, Mr. Doan replied to the grievor at 4:01 p.m. as follows :

> ***Subject:*** *RE: SEXUAL HARASSMENT / STALKING / BULLYING –* [D.S.]*;* [I.M.]*; CBSA MOB NETWORK*
>
> *Hi Stephen;*
>
> *Thank you for sharing this information with me, this is to acknowledge reception of your Harassment complaints.*
>
> *A formal process is engaged when an employee submits a Harassment complaint. You will be contacted by the delegated authority regarding the next steps.*
>
> …

[50] On February 13, 2018, the grievor emailed the following to Mr. Doan at 10:30 a.m. :

> ***Subject:*** *RE: SEXUAL HARASSMENT / STALKING / BULLYING –* [D.S.]*;* [I.M.]*; CBSA MOB NETWORK*
>
> *Hi Minh,*
>
> *Thanks for the update.*
>
> *I would like the following to be added to the larger file because I believe all the activity seemed to start with the aftermath of the first harassment charge I filed back in late 2015. None of the subsequent behaviours I was subjected to were random. I believe there has to have been some type of malicious sabotage. The*

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> *following article outlines what could have been the source of the underlying paradigm of harassment.*
>
> *https://www.wired.com/2017/01/grinder-lawsuit-spoofed-accounts/*
>
> …

[51] The grievor explained that he wrote those emails to report that there were issues in the workplace and that he was not receiving any kind of support or feedback for them. He stated that he had to resort to staying at his desk and writing letters to the VP about the sexual harassment against him by two people who sat close to him. He stated that that is why he spoke about some kind of misinformation on social media.

[52] The grievor stated that he also thought that he might have been followed home and that he had to take alternate routes to escape. He stated that he had to have security cameras installed on his house. He stated that he experienced terror from early childhood, growing up in Montréal, Quebec, as the only Black person in his school, other than his sisters. He stated that he would pick up a newspaper and see a report of a lonely Black person being mobbed by a group of white men. He stated that this explains the terror that he felt. He stated that he was afraid, but Ms. Gingras and Mr. Doan did not take it seriously. He felt that he was on his own. He stated that he suspected that management was behind it all. He stated that he was so afraid that he told his sister that if anything happened to him, she should not take anything at face value. He stated that when he talked about being stalked by a mob of white men, he meant that history is clear on it, and he is not making things up.

[53] The grievor stated that Mr. Doan responded to him with almost a form letter but that he would have expected someone to be assigned to the issues that he raised.

C. The first incident on February 22, 2018

1. Mr. Desbiens's evidence

[54] Mr. Desbiens stated that on February 22, 2018, he arrived at work and that while parking his car, he looked in his rearview mirror and saw the grievor giving him the finger again.

[55] Mr. Desbiens stated that he was becoming quite tired of the grievor's aggressive behaviour toward him and that he wanted to know why the grievor was so angry with

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him. He stated that when he saw the grievor in the building's entrance that morning, he decided to approach the grievor and ask him, "What is going on? Why are you mad at me?" He said that at that moment, the grievor pushed him in the chest, which Mr. Desbiens stated caught him by surprise. He stated that the grievor began to scream at him, something like, "F*** you!" Mr. Desbiens stated that he stepped back and that he raised his hands in front of his chest and told the grievor, "Calm down; calm down." He demonstrated the position of his arms as having his hands next to his chest with his elbows next to his hips in a position of surrender.

[56] Mr. Desbiens described the grievor as appearing enraged. When asked what that meant, he explained that it was the intensity of the grievor's behaviour, the force of his words, and the volume of his voice. Mr. Desbiens stated that the grievor yelled loud enough that the Commissionaires sitting at the security office turned to look their way and got up, to see what was going on. He stated that a cafeteria is adjacent to the lobby, separated by a window, and that everyone there also turned to see what was going on. He described the situation as incredible.

[57] Mr. Desbiens said that he felt stunned. He said that he was surprised and that he never would have expected such a reaction from the grievor. He said that he was not physically injured in the incident.

[58] When asked why he approached the grievor, Mr. Desbiens replied that in honesty, he was feeling "a bit pissed off" since the grievor had just given him the finger in the parking lot, and he wanted to know why the grievor was doing those things to him and was so angry with him.

[59] Mr. Desbiens was shown a video, which he identified as capturing the incident that involved him and the grievor on February 22, 2018.

[60] The video shows an entrance made of two sets of glass doors that is commonly seen in office buildings. The first set of doors is the entrance to the building from the street, while the second set is the access to the building's main lobby area.

[61] The video shows the grievor approaching the building at 9:48 a.m. and carrying a plastic grocery bag. Shortly after that, Mr. Desbiens is seen in the building's lobby area, walking rapidly toward the grievor. The grievor enters the first set of doors from the street, and Mr. Desbiens swings opens the second set of doors from the lobby into

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the entrance. He is seen addressing the grievor, who immediately pushes Mr. Desbiens twice, with both hands on Mr. Desbiens's chest. The pushing action results in Mr. Desbiens stumbling backward into the lobby area while the door is still open. Mr. Desbiens is seen with his hands open on each side of his chest in a position of surrender. The grievor continues to walk forward through the second set of doors into the building as Mr. Desbiens walks backward. The grievor is seen turning back and speaking to Mr. Desbiens and pointing his index finger in Mr. Desbiens's face. He walks past Mr. Desbiens, who is seen following and speaking to him. Mr. Desbiens's hand gestures are consistent with a person asking a question as he opens his arms on each side of his body with his palms facing upward. The grievor stops, turns around, and says something to Mr. Desbiens, as he points his index finger in Mr. Desbiens's face and then back at his own chest. The grievor then makes a motion pushing his hips forward toward Mr. Desbiens and then turns around and keeps walking. Mr. Desbiens is then seen looking to each side and then walking in the same direction as the grievor. Both disappear from the camera's view at that point.

[62] Mr. Desbiens said that he immediately reported the situation to his managers, Mr. Petit and Mr. Simon. He stated that he had also told them previously of the three other incidents that had occurred. He stated that he still did not know whether the grievor worked in the building, since the cafeteria is open to the public; however, he thought that it would be very worrisome for his employer if the grievor was in fact an employee. He stated that he suspected that the grievor might be an employee after the incident when the grievor told him to speak to his manager, since that implied that the grievor might be an employee. He stated that it was confirmed to him only that morning that the grievor was a CBSA employee.

[63] Mr. Desbiens stated that his managers told him to go to Security and report the incident. He stated that when he arrived at Security, those present were already aware of the situation, since they had heard the yelling in the lobby earlier. He said that he sat down with them to prepare a security incident report. The report provided as follows for the February 22, 2018, incident:

…

> *On Friday January 12 2018, on my way to get my car, I initiated a conversation about the weather (it was really bad day in terms of weather) with a person that was park just in front of me who was cleaning is car from ice, and he starts saying* [f**k you f**k you] *to*

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> *me many time and pointing me with his finger and behaving like he was enraged, I didn't engage any further with that person thinking he was somehow deranged. I didn't want to put oil on the fire, so I just got to my car and he finally stop yelling at me those F words. At the time I did not think he was working in our building and thought that it was a person with problem.*
>
> *On Thursdays January 18, 2018, while I was smoking just outside the Vanier Tower A building, I heard a yell so I looked at the direction where it came from and I saw the same guy that was about to enter our building and he make me the big finger.*
>
> *On January 24, 2018 while I was having a smoke outside the Vanier Tower B, I saw the same guy accompanied by a women getting out of Vanier Tower B, so I confront him, I asked him what is going on, why he is so rude with me, I told him I don't know you, I just wanted to know why you behave like that on me. The guy just kept going and told me to talk to my manager.*
>
> *On Thursday February 22, I saw the same person entering the Vanier Tower main entrance so I try again to ask him why he is so mad at me, he start yelling really loud (everybody in the lobby heard him) get out of my way and then he pushed me physically, he looked like he was enraged.*
>
> *I don't know that person I never work with him, and because of the gratuity of his acts and because I don't have any clue why he is so mad at me like this, I thought that if he did it to me without any reason, he could do it to other people as well, so for the good of the agency I've decided to report on that person.*
>
> …
>
> [*Sic* throughout]

[64] Mr. Desbiens stated that he never saw the grievor again after that.

[65] On cross-examination, Mr. Desbiens was shown an investigation report dated August 16, 2018, and authored by Thomas J. Torosian. He confirmed that he had participated in Mr. Torosian's investigation into the incidents. The report stated that Mr. Desbiens was interviewed on April 17, 2018, and provided as follows:

> …
>
> *a) On 12 January 2018, DESBIENS initiated a general conversation/idle chit-chat about the weather as PAYNTER was clearing snow off of his vehicle. PAYNTER started yelling, "*[F**k you - f**k you]*" and gave DESBIENS 'the finger'. DESBIENS did not know PAYNTER or that he was a CBSA employee;*
>
> *b) On 18 January 2018, DESBIENS was standing alone smoking outside of Tower A. DESBIENS heard someone yelling to get his attention and PAYNTER then proceeded to give DESBIENS 'the*

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*finger' again. DESBIENS did not know if PAYNTER was an employee or not as he was entering the public area of the building. DESBIENS reported this to his manager (PETIT, Sebastien) as he suspected PAYNTER **may** be a CBSA employee;*

c) On 24 January 2018, DESBIENS was standing alone smoking outside of Tower B. DESBIENS saw PAYNTER who was accompanied by a female. DESBIENS approached PAYNTER in a calm manner and inquired why PAYNTER was so angry with him as he did not even know who PAYNTER was and asked if he had done something wrong to/with PAYNTER. PAYNTER gave him 'the finger' again. PAYNTER then stated, "I don't want to talk to you - talk to your manager" and left. DESBIENS again spoke to his manager as he now believed he was an employee based on PAYNTER'S statement regarding talking to his manager;

d) On 22 February 2018, DESBIENS was in the cafeteria and observed PAYNTER approaching the front main doors of Vanier Towers. DESBIENS decided he was going to confront PAYNTER with respect to the three previous incidents and inquiry as to why PAYNTER was so angry at him;

e) On 22 February 2018 at approximately 0948hrs EST, CCTV footage shows DESBIENS approaching the front/main entrance (from the cafeteria and glass doors located nearest to the Commissionaires' office) and PAYNTER was approaching from the outside. PAYNTER entered the first set of exterior doors and proceeded to the second set of interior doors. DESBIENS opened the door quickly of the interior doors and stopped in front of PAYNTER. DESBIENS again proceeded to ask PAYNTER what he did to make PAYNTER so mad at him. PAYNTER can be seen pushing DESBIENS on his chest with both hands and DESBIENS gets pushed back into the door frame. PAYNTER then again pushed DESBIENS on his chest with both hands for a second time and resultantly, DESBIENS is pushed back through the door into the lobby area. DESBIENS has both his hands raised up with palms facing PAYNTER in a 'surrendering' manner. PAYNTER started to yell at DESBIENS words to the effect, "Get the hell out of my way!" CCTV also shows PAYNTER interacting with DESBIENS and then PAYNTER thrusts his hips/pelvis in a forward motion toward DESBIENS, while DESBIENS is standing there;

f) DESBIENS again reported this to his manager. DESBIENS then proceeded to a meeting on the 4th floor in Tower B and was shaken due to what just occurred. DESBIENS told those in attendance what just occurred. The other people provided a description and asked if this was the person who DESBIENS just had the interaction with. DESBIENS confirmed this. The other people advised that he (PAYNTER) works on the 4th floor. DESBIENS then submitted a SIR detailing all four incidents as described above; and

*g) (*NOTE- DESBIENS advised during the course of his interview that he received a couriered package from CBSA containing three complaint letters whereby, PAYNTER accused him of being a "mob*

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> *boss", "crime boss" and having a network in relation to another ongoing investigation. The Writer had, nor, has any knowledge of this investigation.)*
>
> …
>
> [Emphasis in the original]
>
> [*Sic* throughout]

[66] On cross-examination, Mr. Desbiens stated that when he confronted the grievor on February 22, 2018, he was unaware that the grievor had made complaints against him or that the grievor had asked not to be approached by him. He stated that he was made aware of it only after February 22, 2018, and most likely in March. Mr. Desbiens stated that he learned that the grievor had made three complaints against him to the VP. He stated that he did not recall the details of the grievor's complaints but that he recalled being amazed at what he saw and that he could not believe his eyes. He stated that only at that moment did he see why the grievor was angry with him. He said that he did not know the grievor; nor had he had any relationship with him before, but the complaints referred to him as being worse than Harvey Weinstein and the chief of a mafia. Mr. Desbiens stated that the complaints were absurd.

[67] Mr. Desbiens stated that the respondent hired an external investigator, Deborah Jelly, to investigate the complaints that the grievor made against him. He stated that she interviewed him in the summer after the incident, likely between May and August of that year. Mr. Desbiens was not referred to Ms. Jelly's investigation report or asked to confirm that she accurately captured the information that he had shared with her.

2. The grievor's evidence

[68] The grievor was asked to describe the first incident that occurred on February 22, 2018. He stated that due to his sad and unfortunate situation, his normal protocol was to park 20 minutes' walk from the building, rather than 10 minutes away, as everybody else did, so that he would not be intercepted. He stated that on February 22, 2018, he wanted to run an errand for his elderly father, so he parked close to the building. He stated that he saw Mr. Desbiens patrolling around the building, looking for him. He stated that he parked his car and walked toward the building. He stated that he could see Mr. Desbiens trailing him with his car. He stated that he walked up to the ramp to the outdoor area. However, this is when he saw an associate of Mr. Desbiens at the door, so he wondered what to do next. He stated that he did not want a

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confrontation, so he went out of his way to the main doors and thought that he saw someone at the door, but no one was there.

[69] The grievor stated that he almost made it to the lobby doors next to the security office and the cafeteria. He said that at that point, he felt really good since he was only two or three steps from the convenience store. He stated that at that point, Mr. Desbiens approached him while yelling at him. He stated that he was very startled and afraid. He stated that he was holding a heavy bag and that he completely froze. He stated that he stumbled forward, so he was not sure if that was perceived as a push. He stated that he then moved forward and that maybe that was perceived as the second push.

[70] The grievor stated that he went to his office via the convenience store direction because it is frequented less. He stated that he wanted to avoid the lobby because of the confrontation that was planned with Mr. Desbiens's associate. He stated that he went to his office and that he emailed Mr. Doan to inform him of being accosted by Mr. Desbiens at 9:05 a.m. He stated that he sent that email at 9:39 a.m. It provided as follows:

> ***Subject:*** *RE: SEXUAL HARASSMENT/STALKING [MALE ON MALE] - MARTIN DESBIENS*
>
> *Dear Mr. Vice-President,*
>
> *Once again, I have been accosted by M Desbiens as I entered the building at 9:05 am. It was bad enough that as I walked down Carlotta Avenue after parking my car, I was followed by M Desbiens in his car. I crossed North River Rd so I could proceed to the main entrance as I wanted to avoid the Usual stalkers at the MacArthur entrance. As I walked down the street I saw someone lying in wait at the MacArthur entrance, clearly, one of M Desbiens henchman.*
>
> *The harassment process is clear. It is a simple matter of explaining it to M Desbiens. I thought this would have already been done. I also thought that after the last time he accosted me he would have been told to stay away from me. So, we have a situation where CBSA at Vanier Towers has descended into complete lawlessness. Why are complete strangers wanting to bully me???? The main question is they have been told to stop yet they don't. This is probably worse that the RCMP case of sexual harassment. Clearly, M Desbiens as the crime boss he appears to be thinks he runs this asylum.*
>
> *What does he have to hide??? Why can't he own his behaviour????*

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> *When will CBSA assert itself so that these crime networks cease and desist???*
>
> *Today, we see clear evidence that I am being watched as soon as I come within at least a 2 block radius. We see a mob network having members watch the entrances to do god knows what to me.*
>
> *M Desbiens has stalked me for months and has 'gotten in my face' on two occasions in recent weeks. He is a burly individual and has clearly tried to intimidate me on both occasions. When will this garbage end????? He is making Harvey Weinstein seem like a minor punk.*
>
> *#METOO*
>
> …
>
> [*Sic* throughout]

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[71] The above noted email was entered into evidence at the hearing as an exhibit showing of a series of emails. It was noted from that exhibit that the grievor also sent a blank message to Mr. Doan at 8:41 a.m. with the same subject line as the 9:39 a.m. message. The grievor did not speak to it during his testimony nor was he questioned on it.

[72] The grievor stated that the message sent to Mr. Doan at 9:39 a.m. was a contemporaneous recount of the events and that he was in his office when he composed it. The grievor stated that again, this was the indication of a coordinated network in operation.

[73] On cross-examination, the grievor was asked to describe the events in greater detail. He stated that Mr. Desbiens came at him from behind. He added that Mr. Desbiens approached him violently from behind and yelled at him. He stated that he turned in reaction to the noise and that he stumbled as a result of being in a state of shock. When asked how he stumbled, he repeated that he was in shock and that he turned around to react. He stated that as a result, there might have been an overexaggerated movement, so to get back to normal equilibrium, he might have over-rotated as well. When asked about the video and the fact that it did not accord with his description of the events, the grievor pointed to the time on the video, which showed that it took place at 9:49 a.m. He stated that he emailed Mr. Doan at 9:39 a.m., meaning that he did not have enough time to leave and return. He asked how it could be possible that he was there at 9:48 a.m. He stated that the incident involving him and Mr. Desbiens occurred at 9:05 a.m. and that it is not the one shown on the video. He

stated that his contention was that the video on which the respondent relied is a deepfake.

[74] The grievor stated that Ms. Jelly investigated his harassment complaints against Mr. Desbiens and E.C. He did not recall when he was interviewed but believed that it might have been in October that year. He was asked to identify Ms. Jelly's final investigation reports dated March 2019 and confirmed that he had received copies of them.

[75] A review of Ms. Jelly's investigation reports revealed that the grounds for the investigations were based on the content of the grievor's emails to Mr. Doan, which included the allegations he made against Mr. Desbiens in his February 22, 2018, email to Mr. Doan.

[76] The investigation reports indicated that the grievor was interviewed, but he did not respond to Ms. Jelly's requests to approve his interview summary. The portion of the report that referred to his complaint against Mr. Desbiens of February 22, 2018, provided as follows:

> …
>
> *ALLEGATION FIVE*
>
> *The complainant, Mr. Stephen Paynter, alleges that he was harassed by the respondent, Mr. Martin Desbiens as follows:* "…I have been accosted by Mr. Desbiens…I was followed by Mr. Desbiens in his car…Mr. Desbiens has stalked me for months and has 'gotten in my face' on two (2) occasions in recent weeks…"
>
> *INFORMATION AVAILABLE FOR ANALYSIS*
>
> *COMPLAINANT – STEPHEN PAYNTER*
>
> *The statements below have been transcribed from Mr. Paynter's interview with the investigator. However, Mr. Paynter did not respond to requests for approval, and as such they are presented here in italics to represent his unapproved interview notes:*
>
> *1.* "Mr. Paynter said he was once more accosted by Mr. Desbiens as he entered the building at 09h05 on 22 February 2018. Mr. Paynter said that morning, as he walked down Carlotta Avenue after parking his car, he was followed by Mr. Desbiens in his car.
>
> *2.* Mr. Paynter said he crossed North River Road and proceeded to the main entrance in an effort to avoid the usual individuals who waited for him at the MacArthur entrance. Mr. Paynter said when he got close enough, he saw a member of the network waiting for him at the MacArthur entrance.

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> *3.* Mr. Paynter said the individual waiting for him at the main entrance was doing so on Mr. Desbiens' orders. Mr. Paynter said it is clear that he is being watched and monitored as soon as he enters a two-block [radius] of the CBSA Vanier Towers.
>
> 4. Mr. Paynter said Mr. Desbiens monitored and followed him for the last several months, and "got in his face" on two (2) occasions in recent weeks Mr. Paynter said Mr. Desbiens is a burly individual who tried to intimidate him on multiple occasions."
>
> …

3. Ms. Gingras's and Mr. Tremblay's evidence

[77] Ms. Gingras stated that on the morning of February 22, 2018, Mr. Desbiens's manager, Mr. Simon, informed her that an altercation had taken place involving the grievor and Mr. Desbiens. She said that she then informed Mr. Tremblay. She stated that they contacted Security, which confirmed that an altercation had taken place, and it sent Pedro Lobo, a security officer, to help them. She stated that when they went to find the grievor in his office, he was not there.

[78] Mr. Tremblay's testimony confirmed that of Ms. Gingras. He added that a labour relations representative also joined them, to review the incident. He stated that given the seriousness of the altercation, a decision was made to remove the grievor from the workplace, to ensure the safety of all employees, as well as the grievor. It was also deemed appropriate to call the police, in case police intervention became required. After the police arrived, they went to the grievor's desk, but he was not there. Mr. Tremblay stated that the police left and said to call them back when the grievor returned.

D. The second incident on February 22, 2018

1. Mr. Alqarra's evidence

[79] Mr. Alqarra stated that he is a smoker and that he took a break at around 11:15 to 11:20 a.m. on February 22, 2018. He stated that the incident occurred in the elevator as he was returning to his office located on the second floor. He stated that Mr. Walker was also in the elevator, although he did not know Mr. Walker at that time. He stated that he entered the elevator and that he stood near a corner. He stated that as the doors were closing, the grievor suddenly approached and forced them open, using both hands. He stated that the grievor then came up to him and commenced shouting, "What is your f***ing problem? Why are you looking at me? You are going to be in [*sic*]

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f***ing problem." He testified that it shocked him. He described the grievor as being "right in [his] face". When asked to show the distance, he demonstrated approximately six inches.

[80] Mr. Alqarra stated that he remained calm and repeated, "Do you know me? Do I know you? I don't know you." He stated that the grievor said, "Yes you know me, and you're going to be in [*sic*] big f***ing problem." Mr. Alqarra stated that he kept calm and then said, "Excuse me", went around the grievor, and left on the second floor.

[81] When asked to describe the volume of the grievor's voice, he replied that the grievor shouted and that it was very loud. He described the grievor as having been very upset and very angry.

[82] Mr. Alqarra stated that the incident did not last very long since the elevator ride from the lobby to the second floor is short. However, it made him feel miserable since a stranger yelled at him that he would be in big trouble.

[83] Mr. Alqarra stated that he went back to his office and spoke with his manager to tell him what had happened because it had been very uncomfortable. He stated that his manager told him to report the incident. Mr. Alqarra stated that he completed a security incident report. It is dated February 22, 2018, and refers to the type of incident as "employee being aggressive". The details of the report provided as follows:

> …
>
> *Approximately at 11:20 am on Thursday morning, in elevator #4, Tower B- Vanier building- I was in the elevator with Laurie Walker (CBSA employee) - all of a sudden a black 5'6", bald and wearing glasses- entered the elevator and jumped in it and forced door to open and targeted me and cornered me and began screaming and shouting at me saying: "what is your f*** problem? stop looking at me, he got very and extremely close to me and right into my face and kept shouting .. yes i know you .. you are going to be in trouble.. you keep looking at me… look away ..look away he added in a very loud voice"!!! I kept quiet and calm and told him: do you know me? do I know you? please stay away and back from me.. he yelled yes I know you and continued "you will have a problem then I said "excuse me I don't know you and I got off the elevator on the second floor where my office is!*
>
> …
>
> [*Sic* throughout]

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[84] On cross-examination, Mr. Alqarra denied that he and Mr. Walker had been observing the grievor before the incident.

2. Mr. Walker's evidence

[85] Mr. Walker stated that on February 22, 2018, he entered the elevator at approximately 11:20 a.m. and that he pressed the button for the 14th floor, where his office was located. He stated that two sets of elevators face each other and that he noticed the grievor standing in the elevator facing his. He stated that as the doors to his elevator were closing, he saw the grievor run across from the opposite elevator and force the doors to his elevator to reopen.

[86] Mr. Walker stated that he recognized the grievor as the same man whom he had previously seen yelling at a tree, since that behaviour had stood out to him. He stated that that made him become alert when he saw the grievor enter the elevator. He stated that the grievor entered the elevator and pressed the button for the fourth floor. He stated that as soon as the doors closed, the grievor turned toward Mr. Alqarra, began to yell at him, and went directly up to him. He stated that it was so extreme, exaggerated, and over the top that he initially thought that they were friends. He stated that in a matter of seconds, he could tell that they were not friends by the look of confusion on Mr. Alqarra's face. He stated that Mr. Alqarra looked very scared. He stated that Mr. Alqarra had his hands up with his palms facing out on each side of his chest in a position of surrender. He stated that from his perspective and based on what he saw, the grievor pushed into Mr. Alqarra. He stated that he could not recall the location of the grievor's arms or hands.

[87] Mr. Walker stated that the grievor was yelling, "Stop looking at me! You got a problem? You are going to have a problem!", and that Mr. Alqarra said, "Do you know me? I don't know you." He stated that Mr. Alqarra had his hands up and that he said, "Please let me by", and stepped out on the second floor.

[88] Mr. Walker stated that after the doors closed, the grievor turned to him and began yelling at him. He stated that the grievor said, "You got a problem? You are going to have a problem!" Mr. Walker stated that he thought that he was in danger and that he would be attacked since the grievor had such a deranged and angry look. He stated that he thought that he had to defend himself, so he said, "No, YOU are going to have a problem", which seemed to shock the grievor, who then backed away.

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[89] Mr. Walker stated that after Mr. Alqarra exited the elevator, the incident with the grievor did not last very long, just the time it took to rise from the second to the fourth floor.

[90] He stated that the grievor did not get as close to him as he did with Mr. Alqarra. He stated that the grievor was perhaps an arm's length away from him but that there is no place to run in a confined space like an elevator. Mr. Walker stated that his back was against the wall.

[91] Mr. Walker drew a picture of everyone's location in the elevator during the incident. He stated that he stood about two-thirds toward the front on the right-hand side and that Mr. Alqarra stood against the back wall in the opposite corner on the left-hand side. He stated that after entering, the grievor immediately pushed himself up against Mr. Alqarra in the left-hand corner. He stated that after Mr. Alqarra left, the grievor moved to the middle and faced him.

[92] Mr. Walker stated that when the elevator stopped on the fourth floor, the grievor ran out. Mr. Walker stated that based on what he had just observed, he thought that the grievor might attack someone else, so he decided to follow him. He stated that with a pass card, the grievor entered a door at the southeast corner of the building. He stated that he saw another staff member in the lobby area and told her that he had just had an incident with an individual in the elevator and that he was afraid that that person would harm someone. He stated that she brought him to the director general, Mr. Tremblay. He stated that when he arrived, the security team was already onsite since it was looking into another incident. He stated that he reported what had happened in the elevator. He was told to leave and that someone would be in touch with him afterwards.

[93] He stated that he then went to the second floor since he wanted to find Mr. Alqarra and let him know that he had reported the incident and to tell Mr. Alqarra that he should report it as well. He stated that he did not know who Mr. Alqarra was at the time, so he was not sure if he could find him, but that it turned out to be easy since Mr. Alqarra was in the process of telling other people what had happened when Mr. Walker came across him.

[94] When asked how the incident made him feel, Mr. Walker replied that it was a range of emotions. He stated that he had been scared and genuinely afraid. He stated

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that he felt like he was underselling how bad it was. He stated that he remembered thinking, "I am not going to be killed on an elevator today."

[95] Mr. Walker stated that he took detailed notes while the incident was still fresh in his mind but that he was not certain when he completed the security incident report. He was shown a copy of the report and confirmed that it accurately reflected the incident. The report, dated February 22, 2018, referred to the incident as an "Assault in the form of threat, physical menacing, intention to commit harm" and provided as follows:

> …
>
> *At approximately 11:20 AM, Thursday February 22, 2018 I entered elevator 4 at Place Vanier Tower B. Another CBSA employee (later identified as one Rami Alqarra) was on the elevator. As the doors began to close a man raced across from an elevator on the opposite row, thrust his arm into the elevator to stop the doors from closing and entered the elevator when the doors opened. He was a bald black man with black rimmed glasses - I estimate 5"4 to 5"6", mid 40s and approximately 300 pounds. I recognized him from as a CBSA staff member at Place Vanier - I had noted the individual lingering at Place Vanier and often exhibited strange behaviours, so I had checked to see that he had a CBSA employee identification card. I had not seen him exhibit anything violent or physically threating until this incident. He selected his floor (number four) and immediately turned and cornered Mr. Alqarra, forcing him into the North Eastern corner of the elevator and began shouting at Mr. Alqarra. He screamed - why are you looking at me? you got a problem with me? what is your* [f***ing] *problem? stop looking at me - look away -look away - you are going to be in trouble - you are going to have a* [f***ing] *problem - look away - stop looking at me." He had pressed himself up against Mr. Alqarra.*
>
> *It was so over the top I thought these two were friends and carrying on by the extreme intensity - however, it was clear by Mr. Alqarra's reaction this was a serious incident and the two were not known to each other and this was an act of violence, assault and potentially greater harm. I have to commend Mr. Alqarra's management of the situation - he calmly and clearly asked the assailant "do you know me? I don't know you. Please stand back" The assailant continued to threaten and scream at Mr. Alqarra.*
>
> *This all took place in the amount of time it took the elevator to go from the main to second floor. The elevator stopped at the second floor. Mr. Alqarra said "excuse me, I don't know you" put his hands up in front of him in a non-threating manner (open palm facing the assailant) moved around the assailant and quickly exited the elevator.*

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> *The assailant turned to me and started yelling at me in much the same manner, "you got* [f**king] *problem? you are going have a* [f**king] *problem." I very calmly and neutrally faced the assailant and stated – "no, YOU are going to have a problem" at which point he stopped and just stared at me - it was a bit of a show down, but I did not want to give in to the threatening physical posturing or permit him to think he could easily attack me. I felt this was my only option to de- escalate the situation. I was trapped in a confined space with a threating individual who clearly intended greater harm. At this point the elevator doors opened on the fourth floor and the assailant ran out of the elevator. I followed him out as I felt he was intent on causing harm to someone and wanted to be in a position to stop the individual. I encountered one of Dan Tremblay's admin staff - in the foyer (Sylvie) and I asked about the individual and she asked me to come with her instead of following the individual. There was a security team on site.*
>
> …
>
> [*Sic* throughout]

[96] The report also stated that the incident resulted in an injury and described the injury as "employees accosted, assault by threat of violence, physical menacing and verbal threat". When asked why he stated that someone had been injured, Mr. Walker replied that he thought that Mr. Alqarra had been pushed up against the wall and that he (Mr. Walker) had been verbally assaulted, that it bothered him, and that such a situation is not expected in the workplace. He stated that being threatened at work is upsetting and that he was psychologically injured. He assumed that Mr. Alqarra was also similarly injured, particularly since he had been pushed into a corner of the elevator.

[97] On cross-examination, Mr. Walker was asked whether he watched the grievor approaching the building before the elevator incident. Mr. Walker replied that he had no such recollection.

3. The grievor's evidence

[98] On cross-examination, the grievor was asked if he disputed being in the elevator with Mr. Alqarra and Mr. Walker. He replied that he was there with them but that he disputed what they said occurred.

[99] The grievor stated that he came up to the elevators and that he saw Mr. Alqarra and Mr. Walker standing side by side and chit-chatting outside the elevators next to the window looking toward the inside of the building. He stated that he felt exasperated

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and flabbergasted. He stated that people knew when he left the building, so now they also cared about when he returned. He stated that he was walking toward the elevator, at which point he debated whether to go in because his normal protocol is to wait until an empty elevator arrives. However, he was so exasperated that he touched the safety bar and then entered the elevator. He explained that the safety bar is the mechanism between the doors that if touched, opens them.

[100] He stated that he was exasperated, and so he wanted to ask them what was going on. He stated that this is what happened. He stated that when he was in the elevator, four eyes stared at him.

[101] When asked what happened next, he replied that nothing happened other than him saying, “What are you looking at?” He stated that Mr. Alqarra and Mr. Walker were just intent on staring at him. He stated that he was positioned with his back against the wall but that nothing was there and that he did not impede anyone. He stated that Mr. Alqarra exited on the second floor and that Mr. Walker exited on the same floor as the grievor, which surprised him since he had never before seen Mr. Walker exit on that floor.

[102] On cross-examination, the grievor denied Mr. Walker’s evidence that the grievor had crossed the floor from the opposing set of elevators. He stated that the distance is at least 12 feet and that the idea that he could sprint across that distance is just not possible. He stated that he did not and could not sprint like that. He also denied Mr. Walker’s description of where each of them stood in the elevator. He stated that he was located along the elevator’s back wall and that Mr. Alqarra and Mr. Walker were to his left, Mr. Alqarra was the furthest from him.

[103] On cross-examination, the grievor also disputed Mr. Walker’s claim that the grievor touched Mr. Alqarra. He explained that Mr. Walker stated categorically that he (Mr. Walker) was in the front of the elevator, that Mr. Alqarra was in the back, and that the grievor had his back to Mr. Walker. The grievor stated that Mr. Walker does not have X-ray vision, so he could not have seen whether the grievor touched Mr. Alqarra. The grievor stated that Mr. Walker did not equivocate and say that he was unable to see exactly what had happened. Rather, Mr. Walker was unequivocal that the grievor touched Mr. Alqarra.

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[104] The grievor stated that he then went to his desk and that Mr. Tremblay came to see him. He stated that Mr. Lobo was also there, who told the grievor that he would have to take the grievor's pass card. The grievor stated that he responded, "Me?!", and that he then realized what was going on and said, "This is white racism!" He stated that he left the office accompanied by Mr. Tremblay after first going to his office to pick up his things. He stated that as he left his office, he saw a police officer. He stated that that was the end of it.

4. Mr. Tremblay's evidence

[105] Mr. Tremblay stated that his administrative assistant brought Mr. Walker to his office and explained that she had just met him in front of the elevators and that he had informed her of an incident that had just occurred. He stated that Mr. Walker informed him of the incident that had just occurred in the elevator involving Mr. Walker, Mr. Alqarra, and the grievor and that this augmented the seriousness of the situation. He stated that the police were called back to ensure that they would be onsite if needed. He stated that he and Ms. Gingras then went to find the grievor and that they met with him in Mr. Tremblay's office. He stated that they described the situation to the grievor and explained that to protect everyone, they would remove him from the workplace. He stated that he could not recall the grievor's reaction, as several years had passed. He stated that they then went to the grievor's office so that he could pick up his personal belongings. He stated that Mr. Lobo then escorted the grievor out of the building. He stated that they then proceeded to suspend his account, per the usual procedures.

E. The decision to suspend the grievor pending an investigation

[106] Mr. Tremblay and Ms. Gingras stated that they met on February 23, 2018, to discuss the events of February 22, 2018. Ms. Gingras stated that Yoann Huberdeau, a CBSA labour relations advisor, also attended. She stated that Marie-France MacMillan (her role was not specified) was also there since she had been involved in the other files involving the grievor. She stated that at the meeting, they discussed the events of February 22, 2018, along with other previous incidents involving the grievor. Ms. Gingras stated that other employees had reported seven previous incidents in which the grievor had exhibited unacceptable behaviours toward them, such as "giving the finger", or he had told employees not to talk to him or to look at him. She stated that they were concerned for the employees' safety, including that of the grievor.

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[107] The grievor's representatives objected to the respondent's attempt to introduce documents about the previous incidents involving other employees on the basis that they were not referred to in the termination letter. I upheld the objection after obtaining the respondent's confirmation that it did not rely on those other alleged incidents as grounds for terminating the grievor's employment.

[108] Ms. Gingras stated that during the February 23, 2018, meeting, it was decided to proceed with imposing an administrative suspension on the grievor pending an investigation into the previous day's incidents. Mr. Tremblay stated that he decided as much to ensure the safety of all involved, given the violent nature of the actions and the threat that it posed. He stated that the suspension letter was prepared based on a template. It was addressed to the grievor and dated February 23, 2018, and it provided as follows:

…

> *This letter is to advise you that serious allegations of misconduct have been made against you. Specifically, it has been alleged that you have physically pushed another CBSA employee who was attempting to exit the building.*
>
> *Given the seriousness of the allegations, I have determined that your continued presence in the workplace presents a serious and immediate risk to the health and safety of CBSA employees including yourself. As such, you are hereby administratively suspended indefinitely without pay pending the outcome of the investigation, effective February 23, 2018.*
>
> *During the investigation and prior to management rendering a final decision, you will be afforded an opportunity to present any clarifications or extenuating circumstances that you feel have not been addressed in the course of the investigation. You are encouraged to cooperate fully in the investigation. It is management's intention that the investigation be exhaustive and swift.*
>
> *Please refer to your conditions of employment as to your right of representation, if applicable. Should it be determined that the allegations against you are founded, administrative and/or disciplinary measures may be taken.*

…

[109] The grievor grieved his suspension on March 23, 2018. His grievance provided as follows:

…

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> *I grieve the suspension imposed on me by the employer as outlined in the employer's letter dated February 23, 2018. The suspension is unwarranted, unjustified and unprecedented. Disciplinary action was levied in bad faith and without proper regard to context, senior management's role, and the grievor's lack of disciplinary record.*
>
> *The grievor entered CBSA premises on the morning of February 22, 2018, namely, the 4th floor of Tower B, Vanier Towers, without encountering any person, exiting or otherwise. The grievor entered the private property of the Vanier Towers on the morning of February 22, 2018, via an exterior access door without encountering any person, exiting or otherwise. The interior access door adjacent to the aforementioned exterior access was entered without encountering any person, exiting or otherwise. The grievor was not and has not been afforded due process prior to his access pass being confiscated or at any time after.*
>
> *Senior management was made aware of concerns regarding the anti-social conduct of many persons towards the grievor as far back as 2 years ago. More specifically, since January 2018, management has been made aware of multiple instances of behaviour, by a senior member of the CBSA, that meets the definition of criminal harassment towards the grievor. It would have been perfectly reasonable for the grievor to have expected the employer to address the grievor's concerns on a timely basis.*
>
> *Managerial inattention, malpractice or worse is at the root of this regrettable miscarriage of justice Persecution of the innocent unarmed black man is just another step along this continuum of egregious disrespect.*
>
> …

[110] In terms of corrective action, the grievor requested the following:

> …
>
> *1. the suspension letter be rescinded in its entirety;*
>
> *2. the suspension letter be removed from his personnel file and destroyed;*
>
> *3. he be reinstated without any loss of pay and benefits;*
>
> *4. he be made whole; and*
>
> *5. he receive any other relief necessary to remedy the situation.*
>
> …

F. The investigation into the events of February 22, 2018

[111] Mr. Tremblay stated that he requested that an investigation be conducted. He stated that he believed that the CBSA's Labour Relations branch took care of it and that

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it retained a contractor to investigate. He stated that Ms. Gingras communicated with the grievor, to inform him of the investigation.

[112] Ms. Gingras confirmed that on May 25, 2018, she informed the grievor via email that a formal investigation had been initiated and that Mr. Torosian would contact him. She emailed him again on May 29, 2018, about the allegations made against him. Her email provided as follows:

> …
>
> *I would like to informed* [*sic*] *you of the general allegations known at this time are the following two acts that occurred on 22 Feb 2018;*
>
> *1) On Duty Misconduct: Section 11. Of the Code of Conduct - Contact With People We Work With*
>
> *2) On Duty Misconduct: Section 11. Of the Code of Conduct - Contact With People We Work With*
>
> *Could you please confirm the reception of the email.*
>
> …

[113] Section 11 of the CBSA's *Code of Conduct* provided as follows:

> *Our CBSA values of Respect, Integrity and Professionalism guide our interactions with the people we work with including colleagues, clients, and stakeholders. As CBSA employees we demonstrate these values in a number of ways, including:*
>
> - *by valuing the unique contributions of others within our diverse workforce;*
> - *by fostering collaboration, professional learning, and innovation by being open and honest;*
> - *by communicating with others, at all times, in a respectful manner including on social media fora and when using electronic communications;*
> - *by never engaging in discriminatory or harassing behaviour;*
> - *by considering the effect our decisions and actions have on others; and*
> - *by never making abusive, derisive, threatening, insulting, offensive or provocative statements or gestures to or about another person. Consult section 2 of the* Canadian Human Rights Act.
>
> …

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[114] The grievor stated that on June 7, 2018, he received an email from Mr. Torosian, informing him that on June 14, 2018, an investigation was to be conducted into two incidents that occurred on February 22, 2018. The email provided that the interview would be conducted at the Ottawa Police Professional Standards Office. Upon arrival, the grievor and his observer, if he chose to have one, would be escorted to the interview room by a plainclothes police officer. He was also advised that the interview would be video and audio recorded and that the CBSA's *Code of Conduct* and the Government of Canada - *Values and Ethics Code for the Public Sector* applied and he was required to conduct himself accordingly. The email also advised him that the interviewer truly wanted to hear what the grievor had to say. Lastly, the grievor was asked to confirm his attendance by no later than 10:00 a.m. on June 12, 2018.

[115] The June 7, 2018, email enclosed the following notification:

> ***PROFESSIONAL STANDARDS INVESTIGATION***
>
> ***INTERVIEW NOTIFICATION TO RESPONDENT***
>
> *Please be advised that you have been identified as a Respondent regarding the following Professional Standards Investigation:*
>
> *Name: Mr. PAYNTER, Stephen*
>
> *PSI File #: PS 18-080*
>
> *Allegation(s):*
>
> *1) On Duty Misconduct: Section 11. of the Code of Conduct - Contact With People We Work With*
>
> *2) On Duty Misconduct: Section 11. of the Code of Conduct - Contact With People We Work With*
>
> *Accordingly, your presence is required for an interview in conjunction with this administrative investigation as follows:*
>
> *Date: Thursday, 14 JUNE 2018*
>
> *Time: 1000hrs*
>
> *Location: Ottawa Police Professional Standards Office located at19 Fairmont Ave, Ottawa, ON, K1Y 1X4, Interview Room # 106.*
>
> *You are required to cooperate with the investigator in accordance with the* Policy on Internal Investigations into Alleged or Suspected Employee Misconduct. *A copy of this policy is posted on the CBSA Intranet for your reference. You are required to reply to this e-mail immediately upon receipt, acknowledging this notification.*
>
> *This interview can be conducted on a 1-on-1 basis or you may be accompanied by an observer at the Investigator's discretion,*

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> *provided this person does not form any part of the investigation. The observer is not allowed to interfere in any way with the interview process; the third party's role is limited to that of an observer only. The observer must be willing to show identification. Should you choose to have an observer accompany you, you are required to provide their name to me 48 hours prior to the interview. I will then advise you whether the individual can act as your observer or not.*
>
> *You will not require your duty issued firearm / defensive baton / Oleoresin Capsicum (OC) spray / handcuffs; therefore, you and/or your observer shall not be equipped or bring any of these items with you to your interview. Lastly, this investigation is strictly confidential and therefore, it shall be treated accordingly.*
>
> *Thank you,*
>
> *Thomas Torosian*
>
> *Senior Investigator*

[116] The grievor stated that he recalled only the portion of the email about firearms and handcuffs and that the interview would be conducted at the police office. He stated that he was an office worker and that the letter said that he would be escorted by a plainclothes police officer and that the interview would be recorded. He stated that that was contrary to the guide on how interviews are to be conducted and that he viewed it as intimidation since he was an office worker.

[117] He stated that he had seen it before since senior managers did not hesitate to abuse him. He referred to a harassment complaint made against him in 2016 by P.H., another employee. He stated that Ray Bonnell launched the investigation into it. The grievor then filed a grievance against Mr. Bonnell for comments that he made during the interview. The grievor's union then withdrew it after the respondent agreed to relaunch the investigation with a different investigator.

[118] The grievor stated that in the June 7, 2018, email, he was invited to a police office and was told that a police officer would accompany him and that a video recording would be made. He stated that the respondent would stop at nothing to intimidate him. He stated that he could not believe what he was seeing. He stated that he is generally a cool person; however, he just knew, "here you are, just two people; one of them has a gun." He stated that he would not go to a police office to be with an armed police officer. He stated that it was scheduled right after a Black man was killed in front of his mother in Hintonburg (a suburb of Ottawa, where the police office is located), so he felt fearful, and he did not want to die at the police office.

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[119] Mr. Torosian sent a follow-up email on June 12, 2018, at 7:37 a.m., requesting that the grievor confirm his attendance at the interview scheduled for June 14, 2018. The grievor was sent another email at 1:13 p.m. that same day. The email provided that the grievor could have an observer with him and that if he failed to respond by 10:00 a.m. the following day, the interview would be cancelled, the investigation would proceed, and a decision would be made without his input.

[120] On June 13, 2018, at 10:02 a.m., Mr. Torosian informed the grievor that his interview was cancelled, as he had failed to respond by the deadline provided to him. He was informed that nevertheless, the investigation would proceed without his involvement.

[121] On cross-examination, the grievor was asked why he did not ask for the interview to be held elsewhere. He replied that he gave the meeting invitation the response that he believed it merited. He stated that if someone insults him, he will not get into a long back-and-forth with them. He stated that it was a malicious email and that it was not an accident. He stated that his union should also have been copied; it was not. He stated that when someone emails without copying his union, it reduces the value of that communication.

[122] Ms. Gingras and Mr. Tremblay were both asked on cross-examination whether it was customary to hold investigations at the police office. Both replied that they did not have prior experience with investigations and that therefore, they were unsure of the usual process.

[123] The investigation proceeded without the grievor's participation.

[124] During his testimony, the grievor was shown a copy of an investigation report dated August 16, 2018, and authored by Mr. Torosian that detailed the two February 22, 2018, incidents as follows:

> ***BACKGROUND***
>
> *1. On 22 February 2018, Mr. PAYNTER, Stephen (will be referred to as "PAYNTER" for the remainder of this report) was involved in two separate incidents, involving three Canada Border Services Agency (CBSA) employees (one of whom was a consultant). Both of these incidents occurred at Vanier Towers located at 355 River Road (Rd) North, Ottawa, which is one of the headquarters (HQ) buildings for the CBSA. The incidents involved both physical and*

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> *verbal altercations and occurred during the 'normal work day' period. These incidents were reported to management immediately and as a result, PAYNTER was escorted from the workplace this same date by his CBSA Management (Director General TREMBLAY, Dan), CBSA Labour Relations (A/Senior Labour Relations Advisor HUBERDEAU, Yoann) and CBSA Security and Professional Standards Directorate (Strategic Advisor LOBO, Pedro). Ottawa Police Service was also called and responded to assist; however, they only observed and did not become involved. PAYNTER was placed on administrative leave and subsequently, it was determined that a Professional Standards Investigation would be initiated.*
>
> *2. The first incident occurred at approximately 0948 hours (hrs) in the front/main entranceway of Vanier Towers between PAYNTER and another CBSA employee, Mr. DESBIENS, Martin (will be referred to as "DESBIENS" for the remainder of this report) – IT Solutions Architect, Information, Science and Technology Branch. There is Closed Circuit Television (CCTV) of this incident which was obtained for this investigation. The video shows a physical altercation between PAYNTER and DESBIENS, whereby, PAYNTER pushes DESBIENS with both hands on two consecutive occasions.*
>
> *3. The second incident allegedly occurred at approximately 1120hrs EST in elevator # 4 in Tower B, whereby, it was alleged by CBSA consultant, Mr. ALQARRA, Rami (will be referred to as "ALQARRA" for the remainder of this report) and CBSA employee, Mr. WALKER, Laurie (will be referred to as "WALKER" for the remainder of this report) that PAYNTER entered their elevator in a very abrupt manner (used his arm to stop the doors from closing) and then proceeded to verbally assault/threaten both of them.*
>
> …

[125] When asked whether he recalled seeing the report, the grievor replied that he had seen the cover page and that he thought that he might have seen elsewhere that Mr. Bonnell was an investigator.

[126] The grievor stated that he was aware of the report's findings. He stated that it found that the first allegation was unfounded and that the second one was founded. However, he stated that he was never provided with a real opportunity to participate.

G. The decision to terminate the grievor's employment

[127] Mr. Tremblay stated that after receiving the August 16, 2018, investigation report, the respondent invited the grievor to attend a pre-disciplinary meeting. He stated that it was important to meet with the grievor, to provide him with the

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opportunity to share any further information or details that Mr. Tremblay should account for when deciding on potential disciplinary action.

[128] The grievor acknowledged that on August 31, 2018, he received a letter from Mr. Tremblay inviting him to attend a pre-disciplinary meeting on September 6, 2018. The letter stated that the purpose of the meeting was to discuss the allegations that had been held as founded in the August 16, 2018, investigation report. The letter also provided that he could be accompanied by a union or other representative as an observer, that Ms. MacMillan, from Labour Relations, would also attend, and that there would be a second meeting at a later date if it was determined that discipline was required.

[129] The grievor stated that he attended the meeting with two union representatives. He stated that his understanding was that the purpose of the meeting was to discuss the allegations that were set out as founded in the August 16, 2018, investigation report and to present any other mitigating factors that should be considered. He stated that during the meeting, he gave his account of what occurred in the elevator and that Mr. Tremblay took notes. He stated that management did not mention any other complaints from any other employees.

[130] Mr. Tremblay offered evidence to the contrary. He stated that the grievor did not speak to the February 22, 2018, incidents. He stated that during the meeting, the grievor was provided with the opportunity to provide more information. He stated that he recalled the grievor referring to many short stories that were unrelated to the incidents. For example, he recalled the grievor referring to a story involving a young girl. He stated that his only recollection of the grievor speaking to the actual incidents was when the grievor referred to the individuals involved in the February 22, 2018, incidents and stated that there was nothing he could do but that those individuals should seek help.

[131] Mr. Tremblay stated that the grievor provided no other information or acknowledgment of the actions that occurred during the incidents. He stated that the grievor did not demonstrate remorse or refer to mitigating factors that could guide the final decision. He stated that at the end of the meeting, the grievor's union representative said that the events did not occur in the way that they were reported in the August 16, 2018, investigation report and referred only to the grievor's long years

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of service, clean record, and good appraisals as mitigating factors. Mr. Tremblay stated that nothing else was provided for consideration.

[132] Mr. Tremblay stated that he took notes during the meeting. These were entered into evidence and are consistent with Mr. Tremblay's testimony.

[133] Mr. Tremblay stated that a meeting was subsequently held and that all the information gathered was assessed against the respondent's *Code of Conduct*. He did not state when that meeting took place or specify who attended it. He stated that those in attendance considered the fact that the grievor provided no explanation of what occurred and that he expressed no remorse or acknowledgement of wrongdoing. To the contrary, the grievor had stated that it was the others involved in the incidents that had issues. Mr. Tremblay stated that he also considered the fact that the incidents involved more than one person and that this did not lessen his concern that this type of incident could occur again. Finally, Mr. Tremblay stated that those involved in the meeting also considered the fact that the grievor had refused to participate in the investigation. He stated that based on all that, the decision was made to terminate the grievor's employment.

[134] On cross-examination, Mr. Tremblay was asked whether the grievor's harassment complaints against Mr. Desbiens constituted relevant background information leading up to the incidents that should have been considered. He replied that that would have been for the investigator to determine, based on their expertise. However, he was not sure how it could have influenced or contributed in any way.

[135] Mr. Tremblay stated that he was no longer the director general when the decision was made to terminate the grievor. Mr. Tremblay was replaced by Cameron MacDonald. However, it was decided that for continuity, Mr. Tremblay would remain involved in the file.

[136] Ms. Gingras recalled meeting with Mr. Tremblay and Mr. MacDonald. She stated that they reviewed the labour relations advisor's recommendation that the grievor be terminated and that they all agreed. She stated that Mr. MacDonald signed the termination letter, given his new role.

[137] On cross-examination, Ms. Gingras stated that her opinion that the grievor should be terminated was based on all the incidents that employees had reported. She

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also stated that before February 22, 2018, discussions were held on the possibility of sending the grievor for a fitness-to-work assessment (FTWA). However, given the circumstances of February 22, 2018, the decision was made to proceed with an administrative suspension. On cross-examination, she was asked to explain her understanding of the purpose of an FTWA. She replied that it assesses an employee's suitability to work. She stated that the respondent never got to that point, given the circumstances.

[138] On October 24, 2018, Mr. MacDonald invited the grievor to a disciplinary meeting, to be held on October 30, 2018. The letter advised the grievor that he could be accompanied by a union representative or another person as an observer, and that Mr. Tremblay and Ms. MacMillan would also be attending.

[139] The grievor stated that he attended the October 30, 2018, disciplinary meeting with the respondent and was told that he was terminated. He stated that the respondent referred to an altercation with two other individuals and that he replied, "Yes, while Black." He was provided with the following termination letter:

> …
>
> *The present follows the Professional Standard investigation (PS 18-080) and the disciplinary hearing that occurred on September 6, 2018 and during which you and your union representative had the opportunity to present your comments regarding the following misconducts:*
>
> - *Physical altercation and the altercation between you and two other individuals.*
>
> *This behaviour is unacceptable and can be neither condoned nor tolerated. As public servants, we are responsible for acting at all times in such a way as to uphold the public interest and for exhibiting conduct that is in keeping with the* Values and Ethics Code for the Public Sector *and the CBSA* Code of Conduct
>
> *In rendering my decision regarding these misconducts, I have taken into account all mitigating and aggravating factors including, but not limited to your discipline free record, your lack of remorse and the fact that you do not recognize the seriousness of your actions. In light of the foregoing, I conclude that your actions were inappropriate and reprehensible, resulting in a definite breach of trust.*
>
> *Therefore, with the authority vested in me pursuant to section 12 (1) (c) of the* Financial Administration Act, *your employment with the Canada Border Services Agency is terminated effective February 22, 2018.*

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…

[*Sic* throughout]

[140] Mr. Tremblay stated that the physical altercation referred to in the termination letter was the incident with Mr. Desbiens at the entrance of the building. Mr. Tremblay stated that he relied on it despite the conclusion in the August 16, 2018, investigation report. He stated that while the report stated that it was unfounded, it was still part of the report and that it provided details about what had happened. He stated that the report had deemed it unfounded on the basis of giving the grievor the benefit of the doubt since there might have been an element of provocation. Mr. Tremblay stated that that did not take away the fact that the altercation was still violent, and in his opinion, the grievor's reaction could have been dealt with in a less violent manner.

[141] The grievor grieved his termination on November 1, 2018. The grievance provided as follows:

…

I grieve the employer's decision to terminate my employment, as was communicated to me in person and by way of letter on October 30, 2018.

This decision was made without just cause and was in violation of the CS Collective Agreement, the Treasury Board of Canada Secretariat's guidelines on Discipline and the Canadian Human Rights Act.

…

[142] In terms of corrective action, he requested as follows: "That my employment be reinstated; That I be compensated for all lost wages and benefits; That I be made whole; That I be granted damages under Section 53 of the CHRA; Any other redress deemed necessary to resolve my concerns."

H. The investigation into the grievor's harassment complaints

[143] The grievor stated that on September 19, 2018, Nicole Brunet, Contract Manager, Charron Human Resources Inc., invited him by email to an interview. He stated that on September 25, 2018, Camille Cloutier-McNicoll also emailed him. She was the harassment coordinator in Workplace Programs within the CBSA's Labour Relations and Compensation group. She informed him that an official harassment investigation had started and that the investigator would investigate the three harassment

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complaints he made against Mr. Desbiens, his harassment complaint against E.C., as well as a harassment complaint made by another employee (P.H.) against him. The grievor stated that before then, no one had contacted him about his harassment complaints.

[144] The grievor stated that Ms. Jelly was retained to conduct the investigations. He could not recall when he was interviewed but believed that it could have been in October 2018. The grievor confirmed that on August 13, 2019, he received a redacted copy of Ms. Jelly's final investigation reports. It communicated the result of the investigation into his complaints against Mr. Desbiens and concluded that they were unfounded and no harassment had occurred. Also provided was a copy of the final investigation report about E.C. that also concluded that the grievor's allegations against him were unfounded and no harassment had occurred.

[145] Both reports stated that the grievor participated in the interviews with Ms. Jelly but did not respond to her subsequent requests to confirm the accuracy of his statements.

I. Mitigation efforts

[146] The grievor stated that he has made no attempts to find other employment, as he felt that his termination was so grotesque and unfair that he thought that he would be reinstated. He testified that he currently receives his pension and that his benefits were retroactive to the date of his termination.

J. The expert witness's testimony

[147] Dr. Kawakami has a PhD in psychology that she obtained in 1995. She has been studying implicit racial and gender biases since the early 1990s. I recognized her as an expert witness, which the respondent did not contest. Dr. Kawakami spoke to different research that she has conducted specifically about implicit anti-Black racial biases. She explained that anti-Black bias is essentially a response to Black individuals that differs from that to other racial groups. She stated that implicit bias operates at the unconscious level, which makes it difficult for people to control, even if they mean well.

[148] A report authored by Dr. Kawakami was entered into evidence. Before she wrote the report, she was provided with a copy of grievor's harassment complaints (i.e., the

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emails to Mr. Doan), the suspension and termination letters, the grievances and grievance replies, the August 16, 2018, investigation report looking into the February 22, 2018, incidents, and the two investigation reports authored by Ms. Jelly looking into the grievor's harassment complaints against Mr. Desbiens and E.C.

[149] Dr. Kawakami was asked to deepen my understanding of the individual interactions between the grievor and others by offering possible explanations for the other parties' descriptions of the events through the lens of her expertise in implicit bias.

[150] Dr. Kawakami stated that the impressions made of the grievor by those involved in these grievances might have been driven by expectations that interactions with the grievor would be conflictual. In support, she referred to research demonstrating that innocuous behaviours, such as a bump when passing in a stairwell, may be seen as more contentious when a Black man is involved versus a white man.

[151] Dr. Kawakami stated that based on the automatic activation of stereotypes in the brain, the grievor's actions might have been perceived as aggressive, loud, angry, agitated, and threatening. She pointed to some research that demonstrated that race could play a role in whether a shove is interpreted as aggressive or playful.

[152] Dr. Kawakami stated that research has provided extensive evidence that implicit racial biases can influence evaluations and terminations in the employment context. She spoke to research that indicated that aggressive behaviour by Black individuals is more likely to be attributed to their personalities and considered enduring, while the same behaviour by white individuals may be deemed caused by temporary circumstances or a situation.

[153] On cross-examination, Dr. Kawakami was asked how she would be able to determine if someone exhibited implicit bias toward another person. She replied that without an experiment, it would be very hard since a comparator is required to measure it.

III. Analysis and reasons

[154] I am seized of two grievances. The first is against the grievor's indefinite suspension, and the second is against his termination, retroactive to the date of the indefinite suspension.

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[155] It is worth emphasizing at the outset that I am not seized of the grievor's sexual harassment complaints as detailed in his testimony. However, these allegations are nonetheless relevant as they provide the context within which the incidents occurred on February 22, 2018, and the grievor's frame of mind on that day. I revisit the weight to be given to this evidence later in the reasons for my decision.

[156] I also wish to comment at the outset that the allegations raised by the grievor are uncommon and objectively viewed could suggest the presence of some form of mental health impairment potentially being at play. However, as adjudicator, I can only rule based on the evidence that is presented to me. No evidence regarding the grievor's mental heath was presented, nor were any arguments made to this effect. To the contrary, the grievor presented well throughout the hearing and appeared competent to participate in the hearing and instruct his representatives. He also testified to his high level of competence at work and the absence of any work performance issues. In terms of representation, he was well represented by his bargaining agent who thoroughly and competently presented his case.

[157] As a result, I must render my decision based on the evidence that was provided which did not include any evidence regarding the grievor's mental health, and more specifically his ability or inability to control his actions on the day of the incidents.

[158] The respondent argued that it had just cause to suspend and subsequently terminate the grievor's employment. The grievor, on the other hand, denied any wrongdoing. He argued that the events did not occur as the respondent described, that its decisions were made without accounting for all the mitigating circumstances, and that its actions amounted to discrimination on the basis of race and colour. He further argued that the respondent's decisions breached the collective agreement and its discipline policies and that it failed to observe the rules of procedural fairness.

[159] As the termination was made retroactive to the date of the indefinite suspension, I will address it first.

A. The termination grievance

[160] When analyzing whether an employer had just cause to terminate an employee, the Board considers the following three distinct questions, commonly known as the

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"*William Scott*" test (see *William Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 C.L.R.B.R. 1):

> 1) Was there just and reasonable cause for some form of discipline?
> 2) If so, was the decision to terminate excessive in all the circumstances?
> 3) If so, what alternative disciplinary measure should be substituted as just and equitable?

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1. Was there just and reasonable cause for some form of discipline?

[161] The respondent relied on two incidents as just and reasonable cause to impose disciplinary action on the grievor. Both are alleged to have occurred on February 22, 2018.

[162] Determining whether the two incidents occurred as alleged revolved on findings of credibility, as I was provided with two entirely conflicting versions of the events. When I assessed the witnesses' credibility, I relied on the following oft-cited approach in *Faryna v. Chorny*, 1951 CanLII 252 (BC CA) at page 357:

> …
>
> *The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried 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.…*
>
> …

[163] The respondent had the burden of proving its case on a balance of probabilities, which required proof of facts with clear, cogent, and convincing evidence (see *F.H. v. McDougall*, 2008 SCC 53 at paras. 46 to 49).

a. The first incident

[164] The first incident is alleged to have occurred at the entrance of the workplace and involved the grievor and another employee, Mr. Desbiens. The respondent claimed that the incident involved a physical altercation, specifically, that the grievor pushed Mr. Desbiens twice in the chest.

[165] In his grievance dated March 23, 2018, the grievor stated as follows:

> …
>
> *The grievor entered the … Vanier Towers on the morning of February 22, 2018, via an exterior access door without encountering any person, exiting or otherwise. The interior access door adjacent to the aforementioned exterior access door was entered without encountering any person, exiting or otherwise.…*
>
> …

[166] However, during the hearing, the grievor testified that he encountered Mr. Desbiens while entering the building that morning but denied the respondent's version of events. He did not provide any explanation for the statements made in his grievance, or why these had changed.

[167] I carefully considered the testimonies of the grievor and Mr. Desbiens and the totality of the evidence presented. I find that on a balance of probabilities, Mr. Desbiens's version of the events is to be favoured, for the following reasons.

[168] Mr. Desbiens testified that he was becoming quite tired of the grievor's aggressive behaviour toward him and that he wanted to know why the grievor was so angry with him. He stated that he decided to approach the grievor when he saw him in the entrance that morning. He asked the grievor, "What is going on? Why are you mad at me?" He said that the grievor then pushed him in the chest. He stated that the grievor began to yell at him, something like, "F*** you!" Mr. Desbiens stated that he stepped back and raised his hands in front of his chest in a position of surrender and told the grievor, "Calm down; calm down."

[169] Mr. Desbiens stated that he immediately reported the incident to his managers after it occurred. This was corroborated by Mr. Tremblay and Ms. Gingras who both testified that they were informed of the incident by Mr. Desbiens's manager shortly after it occurred.

[170] Mr. Desbiens's account of the incident was recorded in a security incident report contemporaneously, shortly after the incident occurred on February 22, 2018. The security incident report stated that when he saw the grievor enter the building, he tried again to ask him why he was so mad at him and that the grievor started yelling loudly at him to get out of his way and then pushed him physically.

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[171] Mr. Desbiens was also interviewed by Mr. Torosian as part of an investigation into the matter. The investigation report states that, after seeing the grievor approach the entrance, Mr. Desbiens decided to confront him on the three previous incidents and inquire why the grievor was so angry at him. It states that Mr. Desbiens opened the interior door quickly and stopped in front of the grievor. He then proceeded to ask the grievor what he did to make the grievor so mad at him. The report then describes the video and states that the grievor is seen pushing Mr. Desbiens in the chest twice with both hands and that Mr. Desbiens has both his hands raised in a surrendering position. It states that the grievor yelled words to the effect of, "Get the hell out of my way!"

[172] Mr. Desbiens's testimony, the statements made in his security incident report, and Mr. Torosian's investigation report, are all consistent with what is seen in the video of the incident that was captured on the respondent's security camera.

[173] On the other hand, the grievor's testimony was not supported by the video in any manner and was in stark contrast to the description of the events that he provided both before and during the hearing.

[174] The grievor testified that Mr. Desbiens approached him from behind while yelling at him. He stated that it startled him and that he completely froze. He stated that after turning around to face Mr. Desbiens, he stumbled forward. He denied intentionally pushing Mr. Desbiens. Rather, he claimed that his movement of stumbling forward might have been perceived as a push. He stated that he then moved forward and that perhaps this was perceived as the second push. All that is contrary to what is seen on the video.

[175] The video clearly shows Mr. Desbiens approaching the grievor from the front, not the back. The grievor is not seen frozen or stumbling. His two pushes appear very deliberate.

[176] The grievor asserted that the video should not be relied on because it is a deepfake. He relied on two arguments in support, which I will now review in turn.

i. The claim that the incident took place at 9:05 a.m., not at 9:48 a.m., as shown in the video

[177] The video indicates that the altercation occurred at 9:48 a.m. The grievor claimed that the video could not be relied on since the incident took place at 9:05 a.m.

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In support, he stated that the incident was recounted in his email to Mr. Doan at 9:39 a.m., which therefore makes it impossible for it to have occurred at 9:48 a.m.

[178] I reviewed the evidence on this point, and I have determined that on a balance of probabilities, the 9:39 a.m. email was not about the occurrence with Mr. Desbiens at the building's entrance. Rather, it was about another incident that occurred earlier that morning.

[179] Indeed, Mr. Desbiens testified that earlier on the morning of February 22, 2018, the grievor gave him the finger while Mr. Desbiens was parking his car. The grievor's email to Mr. Doan at 9:39 a.m. refers to Mr. Desbiens following him in his car that morning. This supports that a prior incident occurred that morning and that the grievor's email to Mr. Doan at 9:39 a.m. was about the earlier incident.

[180] Further, the email sent at 9:39 a.m. does not refer to any of the details of the incident described during the grievor's testimony. It refers to him being followed in his car that morning by Mr. Desbiens and to a "henchman" of Mr. Desbiens lying in wait for him at the building's entrance. Given those details, and the multiple previous detailed emails that the grievor sent to Mr. Doan about Mr. Desbiens and others, it seems implausible that he would not have mentioned the altercation that occurred with Mr. Desbiens at the front entrance, as he described in his testimony.

[181] Moreover, it is noteworthy that an independent investigator, Ms. Jelly, investigated the grievor's allegations against Mr. Desbiens, yet no mention was made during that investigation of the events described in the grievor's testimony. Indeed Ms. Jelly interviewed him about all of his allegations against Mr. Desbiens. The investigation specifically included the allegations in the grievor's email to Mr. Doan sent at 9:39 a.m. However, the grievor made no mention during his interview with Ms. Jelly of the altercation with Mr. Desbiens at the building's entrance, as described during his testimony.

[182] All this supports my finding that the grievor's email to Mr. Doan at 9:39 a.m. was not about the incident that occurred with Mr. Desbiens at the building's entrance at 9:48 a.m. on February 22, 2018.

ii. The claim that it was not possible to have been at the building's entrance at 9:48 a.m.

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[183] As a second ground for claiming that the respondent's video is a deepfake and that it should not be relied on, the grievor claimed that it was simply not possible that he was at the building's entrance at 9:48 a.m., as indicated in the video. In support, he claimed that the email to Mr. Doan was sent from his office computer at 9:39 a.m., and therefore, he could not have had time to leave the building and come back by 9:48 a.m., as indicated in the video.

[184] I reviewed the evidence on this point, and I disagree.

[185] Although it represented a short time, it is not impossible. Indeed, it was possible that the grievor left the office building immediately after emailing Mr. Doan and that he returned at 9:48 a.m. It was also possible that he sent that email from his phone before entering the building and not from his office computer, as he testified. Indeed, he could have sent it from his car, as he testified that he had parked close to the office that day. Either scenario seems more plausible than the suggestion that the video that was recorded in February 2018, and that was consistent with Mr. Desbiens's contemporaneous account, is a deepfake.

[186] Therefore, on a balance of probabilities, I conclude that the first incident on February 22, 2018, occurred as seen on the video (and as described earlier in this decision). The video has no sound, however, it is obvious from the video that the parties communicated with each other. I find that Mr. Desbiens said to the grievor something along the lines of this: "What is going on? Why are you mad at me?", and that the grievor shouted something along the lines of this: "Get the hell out of my way" and "F*** you!" I find that the grievor pushed Mr. Desbiens twice in the chest with sufficient force to make him stumble backwards, that Mr. Desbiens had his arms in a surrendering position and that Mr. Desbiens repeated to the grievor to calm down.

[187] In terms of provocation, the video clearly shows that Mr. Desbiens first approached the grievor after swinging the door from the lobby open to address him. Mr. Desbiens also acknowledged that he had decided to approach the grievor since he had started to feel "a bit pissed off" at the grievor's unexplained behaviour toward him. As such, I find that an element of provocation preceded the physical altercation and that Mr. Desbiens approached the grievor aggressively. However, I also note from the video that Mr. Desbiens quickly assumed a submissive stance by placing his hands by his sides in a position of surrender.

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b. The second incident

[188] The second incident is alleged to have occurred in one of the workplace elevators and involved the grievor and two other employees, Mr. Alqarra and Mr. Walker. The respondent claimed that the incident involved an altercation, specifically, that the grievor engaged in threatening behaviour against both of these individuals.

[189] In his March 23, 2018, grievance, the grievor stated that he "… entered CBSA premises on the morning of February 22, 2018, namely, the 4th floor of Tower B, Vanier Towers, without encountering any person, exiting or otherwise." However, during the hearing, the grievor testified that he was in the elevator with Mr. Alqarra and Mr. Walker on the morning of February 22, 2018, but denied the respondent's version of events. He did not provide any explanation for the statements made in his grievance, or why these had changed.

[190] The incident was not captured on a security camera, and no other witness saw it. As such, my determination is based solely on the credibility of the witnesses.

[191] After carefully considering the testimonies of the grievor, Mr. Alqarra, and Mr. Walker, along with all the documentary evidence presented, I find that on a balance of probabilities, the versions of the events of Mr. Alqarra and Mr. Walker are to be favoured. The following are my reasons.

[192] For ease of understanding, I have broken the events into separate parts.

i. The grievor's claim that Mr. Alqarra and Mr. Walker were chit-chatting and looking at him prior to entering the elevator

[193] The grievor testified that Mr. Alqarra and Mr. Walker knew each other and were seen chit-chatting prior to entering the elevator. Having reviewed the evidence on this point, I find the grievor's claim lacks credibility.

[194] Both Mr. Alqarra and Mr. Walker testified that they were unknown to each other before the incident. This is supported by the contemporaneous account of the events recorded in Mr. Walker's security incident report, where he stated that, "[a]nother CBSA employee (later identified as one Rami Alqarra) was on the elevator." The fact that Mr. Alqarra and Mr. Walker were not previously known to each other is also supported by the fact that they worked in different sections and were located on different floors (the 2nd and the 14th).

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[195] Conversely, the grievor offered no evidence that could support his allegation other than speculation that they were part of a network of men controlled by Mr. Desbiens. Based on a balance of probabilities, I find that Mr. Alqarra and Mr. Walker were not previously known to each other. As such, I find that they entered the elevator separately and did not chit-chat beforehand.

[196] I also find that on a balance of probabilities, Mr. Alqarra and Mr. Walker individually looked at the grievor before entering the elevator and that likewise, the grievor looked at them. This is consistent with the grievor's testimony that he saw, hence looked at, Mr. Alqarra and Mr. Walker before entering the elevator. He also testified that he felt very exasperated at that time. Mr. Walker testified that he recognized the grievor when he saw him since he had previously noticed the grievor in or around the workplace displaying what he believed were odd behaviours. Therefore, it appears plausible that Mr. Alqarra and Mr. Walker would have looked at the grievor since he was also looking at them and likely displaying some level of agitation which would have caught their attention.

[197] However, I do not find that the action of looking as described above can in any way be held as an element of provocation. I found Mr. Alqarra and Mr. Walker to be credible witnesses. Their testimonies were supported by detailed contemporaneous notes recorded shortly after the event on the same day it occurred. They both independently reported the incident to management immediately afterward. The fact that neither recalled seeing the grievor before entering the elevator supports that they only casually looked at him before entering.

ii. The grievor's decision to enter the elevator

[198] Mr. Alqarra and Mr. Walker both testified that after they entered the elevator, and as the doors were closing, the grievor forced them open. Mr. Walker also stated that he saw the grievor run across from the opposing elevator bank. These versions of events were recorded contemporaneously shortly after the incident in security incident reports dated February 22, 2018. Mr. Alqarra's report states that, "… all of a sudden a black 5'6'', bald and wearing glasses- entered the elevator and jumped in it and forced [*sic*] door to open …". Mr. Walker's report states that, "As the doors began to close a man raced across from an elevator on the opposite row, thrust his arm into the elevator to stop the doors from closing and entered the elevator when the doors opened."

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[199] The grievor testified that he saw Mr. Alqarra and Mr. Walker enter the elevator and that he debated whether to enter it. He stated that he decided to enter because he felt so exasperated. He denied running from the opposite elevator; however, he agreed that he used the security bars to open the doors. He stated that they are used to open elevator doors once they begin to close.

[200] I considered all the evidence on this point, and I find that the grievor entered the elevator with Mr. Alqarra and Mr. Walker after rushing to it and forcing the doors to reopen as they started to close. This is consistent with the grievor's testimony that he debated whether to enter the elevator and that it was necessary for him to use the security bars to reopen the doors. This supports that it was a last-second decision that required him to rush toward the elevator doors. Whether or not he ran from the opposing elevator is of no real consequence. Therefore, I make no finding in that respect. However, importantly, I find that the grievor's decision to enter the elevator was intentional and that he did so because he knew that Mr. Alqarra and Mr. Walker were in it.

iii. The incident involving Mr. Alqarra

[201] Mr. Alqarra testified that once he was on the elevator, the grievor came up to him and shouted at him. He stated that the grievor said, "What is your f***ing problem? Why are you looking at me? You are going to be in [*sic*] f***ing problem." He stated that the grievor was approximately six inches from him. He stated that he stayed calm and repeated, "Do you know me? Do I know you? I don't know you", and that the grievor replied, "Yes, you know me and you're going to be in [*sic*] big f***ing problem." Mr. Alqarra stated that when the doors opened on the second floor, he said, "Excuse me", went around the grievor, and exited the elevator.

[202] Mr. Alqarra testified that he immediately reported the incident to management and was told to report it in a security incident report. This report, which contemporaneously recorded the incident, states that the grievor got extremely close to Mr. Alqarra and shouted, "What is your f*** problem? Stop looking at me. Yes, I know you. You are going to be in trouble. You keep looking at me. Look away. Look away." The report states that Mr. Alqarra kept quiet and calm and told the grievor, "Do you know me? Do I know you? Please stay away and back from me." It states that the grievor yelled, "Yes, I know you. You will have a problem." Finally, the report states

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that Mr. Alqarra then said, “Excuse me, I don’t know you” and that he got off the elevator on the second floor where his office was.

[203] Mr. Walker’s testimony corroborates Mr. Alqarra’s testimony. Mr. Walker testified that as soon as the doors to the elevator closed, the grievor went up to Mr. Alqarra and began shouting, “Stop looking at me! You got a problem? You are going to have a problem!”, and that Mr. Alqarra remained calm and repeated, “Do you know me? I don’t know you.” He stated that Mr. Alqarra had his hands up in a position of surrender and that he said, “Please let me by”, and then exited on the second floor. Mr. Walker testified that he was located on the middle side of the elevator and that Mr. Alqarra and the grievor were located in the back corner on the opposite side, with the grievor having his back to him. Mr. Walker stated that from his perspective and based on what he saw, the grievor “pushed into” Mr. Alqarra, implying that physical contact occurred.

[204] Mr. Walker testified that he immediately reported the incident to management and was told to report it in a security incident report. This report, which contemporaneously recorded the incident, states that after entering the elevator, the grievor cornered Mr. Alqarra and shouted, “Why are you looking at me? You got a problem with me? What is your f***ing problem? Stop looking at me. Look away. Look away. You are going to be in trouble. You are going to have a f***ing problem. Look away. Stop looking at me.” The report states that the grievor pressed himself up against Mr. Alqarra. It states that Mr. Alqarra calmly and clearly asked the grievor, “Do you know me? I don’t know you. Please stand back.” The report states that when the elevator stopped at the second floor, Mr. Alqarra said, “Excuse me, I don’t know you.” It states that he put his hands up in front of him in a non-threating manner, moved around the grievor and quickly exited the elevator.

[205] The grievor denied it. According to him, he was exasperated, so he wanted to ask Mr. Alqarra and Mr. Walker what was going on. He stated that once he was on the elevator, Mr. Alqarra and Mr. Walker stared at him, and that he told them, “What are you looking at?” He did not comment on his tone of voice when he said that. He stated that nothing else happened and that Mr. Alqarra and Mr. Walker were just intent on staring at him. He stated that he stood with his back against the elevator wall and that he did not impede anyone.

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[206] I find that on a balance of probabilities, the versions of events of Mr. Alqarra and Mr. Walker are to be favoured. Their versions were consistent with each other and with the statements provided in their separate security incident reports, made shortly after the incident occurred. Both reported the incident to management immediately afterwards which speaks to the severity of what transpired. Mr. Tremblay's and Ms. Gingras's testimonies corroborated that they were made aware of the incident shortly after it occurred.

[207] The inconsistency between Mr. Alqarra's and Mr. Walker's testimonies as to whether physical contact occurred can be explained by Mr. Walker's location, as he did not have a clear line of sight as to whether they actually touched. However, the fact that Mr. Walker believed that they touched speaks to the close proximity within which the grievor approached Mr. Alqarra.

[208] Mr. Alqarra's and Mr. Walker's testimonies regarding the grievor's statements are also consistent with the grievor's testimony that he was feeling exasperated and that he decided to enter the elevator because he wanted to ask them what was going on. It is simply not credible that the only statement made by the grievor was, "What are you looking at?", as he suggests.

[209] Based on the above, I find that on a balance of probabilities, the events occurred as described by Mr. Alqarra in his security incident report. The report provides a detailed account of what transpired, was recounted contemporaneously after the incident, and is consistent with his testimony during the hearing.

[210] Therefore, it is my finding that after entering the elevator, the grievor came within very close proximity (approximately six inches) of Mr. Alqarra and that he shouted something to the effect of this: "What is your f*** problem? Stop looking at me. Yes, I know you. You are going to be in trouble. You keep looking at me. Look away. Look away." I find that Mr. Alqarra remained calm and said this: "Do you know me? Do I know you? Please stay away and back from me." I find that the grievor replied something to the effect of this: "Yes, I know you. You will have a problem." I find that Mr. Alqarra then said this: "Excuse me, I don't know you" and that he got off the elevator.

iv. The incident involving Mr. Walker

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[211] Mr. Walker testified that after Mr. Alqarra left the elevator, the grievor turned to him and yelled, “You got a problem? You are going to have a problem!”

[212] Mr. Walker stated that he felt that he was in danger and that he had to defend himself, so he said, “No, YOU are going to have a problem!”, which seemed to shock the grievor, who backed away. Mr. Walker stated that when the doors opened on the fourth floor, he decided to follow the grievor out of concern that the grievor could be a danger to others.

[213] The grievor denied Mr. Walker’s version of events; however, he agreed that Mr. Walker also exited the elevator on the fourth floor.

[214] As noted in the previous section, Mr. Walker testified that he immediately reported the incident to management and filled a security incident report that day which contemporaneously recorded the incident. The report is largely consistent with his testimony, other than the report indicates that the grievor used profane language. It states that the grievor had said, “You got f***ing problem? You are going to have a f***ing problem.”

[215] I find that on a balance of probabilities, Mr. Walker’s version of events is to be favoured. Mr. Walker reported the incident to Mr. Tremblay immediately after it occurred, which Mr. Tremblay corroborated. The fact that Mr. Walker decided to exit the elevator on the fourth floor and to follow the grievor speaks to the severity of the incident. The grievor’s claim that nothing happened other than him asking, “What are you looking at?”, is simply not credible. If nothing happened, there would have been no reason for Mr. Walker to follow the grievor onto the fourth floor.

[216] Based on the above, I find that on a balance of probabilities, the events occurred as described by Mr. Walker in his security incident report. The report provides a detailed account of what transpired, was recounted contemporaneously after the incident, and is consistent with his testimony during the hearing.

[217] Therefore, I find that after Mr. Alqarra left the elevator, the grievor turned to Mr. Walker and shouted this: “You got a f***ing problem? You are going to have a f***ing problem!”, and that Mr. Walker replied this: “No, YOU are going to have a problem!”, which seemed to shock the grievor, who backed away.

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c. Conclusion on whether there was just and reasonable cause for some form of discipline

[218] Based on all this, I find that the two incidents occurred on February 22, 2018, as the respondent claimed.

[219] I find that the grievor engaged in a physical altercation with Mr. Desbiens at the building's entrance on February 22, 2018, by pushing him twice in the chest while shouting profane language at him. Clearly, such behaviour is unsuitable in a workplace.

[220] Although there was an element of provocation since Mr. Desbiens initiated the events when he aggressively approached the grievor, the grievor's response was inappropriate in the circumstances. Indeed, in a provocation, nevertheless, the response must be reasonably proportional. In this instance, I find that the grievor's response was greatly disproportional to the provocation.

[221] I find further that later that same morning, the grievor deliberately and aggressively approached Mr. Alqarra and Mr. Walker in a workplace elevator, shouted language unsuitable for the workplace, and uttered threats against each of them. Contrary to the incident with Mr. Desbiens, which involved an element of provocation, I find that the grievor's conduct toward Mr. Alqarra and Mr. Walker was unprovoked. Once again, such behaviour is clearly unsuitable in a workplace.

[222] The grievor's representatives argued that racial bias might have played a role in the respondent's assessment that it had just and reasonable cause to discipline the grievor. They called Dr. Kawakami as an expert witness to support their case. She holds a PhD in psychology and studies in the field of implicit racial and gender biases. The respondent did not object to her qualifications as an expert in her field. However, it argued that her evidence was not relevant to this case.

[223] The respondent relied on *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, where the Supreme Court of Canada framed the test for the admissibility of expert evidence as follows:

> …
>
> *[23] At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four* Mohan *factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for*

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> *a novel purpose, the reliability of the underlying science for that purpose:* J.-L.J., *at paras. 33, 35-36 and 47;* Trochym, *at para. 27; Lederman, Bryant and Fuerst, at pp. 788-89 and 800-801. Relevance at this threshold stage refers to logical relevance:* Abbey *(ONCA), at para. 82;* J.-L.J., *at para. 47. Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement:* D.D., *at para. 57; see D. M. Paciocco and L. Stuesser,* The Law of Evidence *(7th ed. 2015), at pp. 209-10;* R. v. Boswell, *2011 ONCA 283, 85 C.R. (6th) 290, at para. 13;* R. v. C. (M.), *2014 ONCA 611, 13 C.R. (7th) 396, at para. 72.*
>
> *[24] At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In* Mohan, *Sopinka J. spoke of the "reliability versus effect factor" (p. 21), while in* J.-L.J., *Binnie J. spoke about "relevance, reliability and necessity" being "measured against the counterweights of consumption of time, prejudice and confusion": para. 47. Doherty J.A. summed it up well in* Abbey, *stating that the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence": para. 76.*
>
> …

[224] The grievor's representatives argued that Dr. Kawakami presented leading-edge understanding on how racial bias presents itself by well-meaning individuals in the workplace. They stated that their objective for presenting that evidence was to provide a potential explanation for the events that the witnesses described, through the lens of her expertise in unconscious bias.

[225] In that respect, Dr. Kawakami testified to studies on unconscious bias that demonstrated that white individuals perceive actions taken by Black individuals as more aggressive than the same actions taken by other white individuals.

[226] Having considered the evidence presented by Dr. Kawakami, I do not find it relevant or necessary for me to make a finding of culpable behaviour in this case.

[227] Indeed, the grievor is not challenging how his actions were perceived by Mr. Desbiens, Mr. Alqarra, and Mr. Walker. Rather, he is offering a completely different version of the facts, which I have found improbable. While I accept that race might have played a role in how aggressive his actions were perceived by Mr. Desbiens, Mr.

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Alqarra, and Mr. Walker, there is no disputing that his conduct was inappropriate, regardless of that perception.

[228] The authorities are clear that threats and physical aggression in the workplace are unacceptable. See Brown and Beatty, *Canadian Labour Arbitration*, Chapter 7 - Discipline, 5th ed. ("*Brown and Beatty*") at paragraph 7:32:

> *Physically and/or verbally abusing, and acting aggressively towards others, is as deviant and unacceptable behaviour in the workplace as it is in society at large. Assaults, bullying, harassment, racially insulting remarks and threats made in the course of a person's employment, are universally regarded as being fundamentally at odds with an employer's interest in creating a positive and productive working environment, and with the health, safety, and general well-being of its employees. The law is clear that employers have a duty to take whatever action is necessary to protect the welfare of its workforce and can be held accountable if they do not.*

[229] Therefore, I conclude on the first question in the *William Scott* test by finding that the grievor's conduct was clearly contrary to conduct that should be tolerated in the workplace and that it contravened section 11 of the respondent's *Code of Conduct*. I find that his actions on February 22, 2018, constituted serious misconduct and provided just and reasonable cause for disciplinary action.

2. Was the decision to terminate excessive in all the circumstances?

[230] Since I have determined that the respondent had just cause for disciplinary action, I must now determine whether the decision to terminate the grievor's employment was excessive. In doing so, I must consider the nature of the misconduct as well as the mitigating and aggravating factors.

[231] In this case, the respondent stated that when it rendered its decision, it took into account all the mitigating and aggravating factors. As for mitigating factors, it referred to the grievor's discipline-free record. For aggravating factors, it referred to his lack of remorse and unwillingness to recognize the seriousness of his actions. It argued that that resulted in an irreparable breach of trust.

[232] On the other hand, the grievor's representatives raised a number of factors that they argued should have been considered as mitigating circumstances. The following list of factors was raised:

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- the grievor's extensive years of service;
- his positive work performance history; and
- the context of the events and his state of distress.

[233] The grievor's representatives also alleged the following issues that they viewed as deficiencies in the decision-making process:

- the flaws in the investigation process;
- the breach of the collective agreement and the rules of procedural fairness by failing to notify the grievor of all the reasons for the disciplinary actions;
- the failure to provide him with the opportunity to address all the allegations against him before making the decision to terminate his employment;
- the mischaracterization of the nature of the misconduct, which led to an improper application of the respondent's "Disciplinary Measures Framework"; and
- the failure to properly assess his rehabilitative potential.

[234] The grievor's representatives argued that all those factors should be considered to conclude that the disciplinary actions were excessive.

[235] I will now review each of those issues, although not in the same order as they were listed.

a. The nature of the misconduct

[236] The grievor's representatives argued that if I find that inappropriate conduct occurred, it did not merit termination. It referred to *William Scott* and argued that lesser measures should be applied first, given the mitigating circumstances in this case. Page 9 of *William Scott* states the following in that respect:

> …
>
> *… the standard collective agreement also provides the employer with a broad management right to discipline its employees. If an individual employee has caused problems in the work place, the employer is not legally limited to the one, irreversible response of discharge. Instead, a broad spectrum of lesser sanctions are available: verbal or written warnings, brief or lengthy suspensions, even demotion on occasion … Because the employer is now entitled to escalate progressively its response to employee misconduct, there is a natural inclination to require that these lesser measures be tried out before the employer takes the ultimate step of dismissing the employee ….*
>
> …

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[237] The grievor's representatives also referred to *Dominion Glass Co. v. United Glass & Ceramic Workers, Local 203*, 1975 CanLII 2106 (ON LA), as standing for the proposition that not all cases of violence will justify terminating an employee. At page 85, the following is stated:

> *There is no doubt that violence and insubordination by employees are unacceptable in an industrial undertaking and that employers have the power, in proper circumstances, to discharge employees on the basis of such conduct. However, it is not every case of violence or insubordination that will justify the discharge of an employee, a sanction that has been called "industrial capital punishment". There are many factors which may mitigate the severity of the offence and these must be considered in each individual case. It is clear that an employee, who repeatedly cannot or will not submit to the instructions of his employer, need not be kept. Nor is a worker of a dangerous and violent temperament entitled to remain as part of the work force in a plant. An employer has the right — indeed the duty — to keep peace within its operation. Anyone who threatens the safety of other employees may be removed permanently. It is, however, in my view incumbent upon the company to demonstrate that the insubordinate or violent conduct of the employee was such as to make it improbable that he would be able to function effectively in the plant again. Discharge is a harsh penalty, and should be utilized only sparingly. It should be used only where it is clear that no other method of discipline will be of any avail.*
>
> …

[238] The respondent argued that the grievor's representatives relied on outdated jurisprudence and that the law had since evolved with respect to workplace safety. It referred to *Kingston (City) v. C.U.P.E., Local 109*, 2011 CanLII 50313 (ON LA), in which the arbitration board stated that when in the presence of a threat being uttered, the respondent must act immediately and assess the presence of a real danger. It referred to paragraph 249 of *Kingston (City)*, which states the following: "The utterance of a threat in the workplace requires that the workplace parties stop cold. They must report. They must investigate. They must assess the existence of real danger. They must act."

[239] The respondent argued that that supports its position that threats no longer have a place in the workplace, that such behaviour cannot be brushed off, and that employers must act and take threats seriously. It also relied on *Wepruk v. Deputy Head (Department of Health)*, 2021 FPSLREB 75, in which a termination was upheld after a single act of workplace violence.

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[240] I agree with the respondent that acts of violence have no place in the modern workplace. Employers must act promptly and take seriously all acts of violence when they occur. However, I also agree with the grievor's representatives that not all acts of violence should necessarily result in a termination. Whether a termination is warranted will depend on the facts of each case.

[241] In this case, I have found that the grievor physically pushed Mr. Desbiens twice while shouting profane language at him. I am mindful that this incident would not have occurred had the grievor not been approached by Mr. Desbiens in the first place. However, as previously stated, the level of response must be reasonably proportional to the provocation. In this instance, the act of physically pushing Mr. Desbiens far exceeded the provocation, particularly since Mr. Desbiens was asking the grievor, "What is going on? Why are you mad at me?"

[242] I have also found that later that same morning, the grievor shouted to and threatened Mr. Alqarra and Mr. Walker while in an elevator with them. He did so without any provocation after intentionally entering the elevator with the intention to confront them. The grievor's threatening behaviour was significantly aggravated by the close proximity within which he came to Mr. Alqarra — a mere six inches from his face.

[243] It is clear that both events constituted workplace violence, regardless of the presence of provocation in the first incident. This is simply not acceptable behaviour in the workplace. The nature of the misconduct was serious and as such deserved a serious consequence.

[244] Despite this, I am not convinced that **on its own**, the nature of the misconduct justified the termination of the grievor's employment. As will be explained below, it is a consideration of all the circumstances that has led me to conclude that the termination should be upheld.

b. Extensive years of service

[245] As of his termination, the grievor had almost 33 years with the federal public service. His representatives argued that his lengthy years of service should weigh heavily when considering mitigating circumstances. Conversely, the respondent's representative argued that the grievor's lengthy years of service meant that he should have known better.

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[246] I find that the grievor was a long-term employee and that this is a strong mitigating factor.

c. Positive work performance history

[247] The grievor provided some examples of the work that he had performed over the years. He referred to being recognized by the respondent, including receiving a special award. However, I noted that no mention was made of his performance appraisals, and none were entered into evidence. Conversely, I also noted that the respondent did not challenge his account of his work performance history.

[248] The grievor's representatives argued that his positive work history should be considered a strong mitigating factor. The respondent's representative did not address that point.

[249] I find that that is a moderate mitigating factor as the grievor only spoke to this issue but did not provide any corroborating evidence that should have been easily accessible.

d. The absence of discipline on the grievor's file

[250] This was acknowledged in the respondent's termination letter. I agree with the grievor's representatives that it is a strong mitigating factor.

e. The context of the events, and the state of distress

[251] The grievor's representatives argued that the respondent failed to take into account the context in which the events occurred. Specifically, they argued that the grievor was in a state of distress on February 22, 2018, because of his ongoing and unresolved sexual harassment complaints against a number of employees. His representatives acknowledged that I am not seized of those complaints. They argued that nevertheless, they are relevant to understanding the grievor's actions and how he felt on the day of the incidents.

[252] The grievor's representatives argued that the events of February 22, 2018, were the result of the respondent's inaction with respect to a number of extremely serious complaints that the grievor had made. They stated that he was an employee in crisis. In support, they referenced his testimony that he felt terrified, would deliberately park blocks away from the office, took different routes to get to his office, installed security

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cameras around his home, and eventually almost entirely stopped leaving his desk out of fear of encountering Mr. Desbiens and others. They added that he did as he was directed and that he sought help through the proper channels but that the help never materialized, despite his requests. They stated that the grievor heard from the respondent about his complaints only in September of 2018. They stated that clearly, he was struggling, and that no one cared.

[253] The grievor's representatives argued that the grievor's state of mind and emotional turmoil should have been factored into the decision as to whether to terminate him. They argued that his state of mind toward Mr. Desbiens, coupled with the fact that he was caught off guard when Mr. Desbiens approached him, should be considered mitigating circumstances.

[254] The respondent's representative viewed it very differently. They argued that the fact that the grievor felt followed or under surveillance was not a ground on which to commit acts of workplace violence. They relied on *Wepruk* (which the Federal Court of Appeal upheld in *Wepruk v. Canada (Attorney General)*, 2024 FCA 55) and argued that the grievor's harassment complaints could not be used to excuse his inappropriate conduct. They referred to paragraph 295 of the Board's decision in *Wepruk*, which found the following:

> *[295] I find that the employer was aware of a certain level of discord and unhappiness within the section with respect to a number of management practices and perceived attitudes and that it took only the minimal action it felt necessary to deal with the situation. However, the mere fact that the grievor found herself in a stressful and toxic work environment does not, of itself, absolve her of all responsibility for her conduct. Furthermore, the fact that she believed that she was the specific victim of harassment is not, in and of itself, sufficient to absolve her of her misconduct.*

[255] The respondent's representative argued that the same conclusion should be drawn in this case. I agree, for the following reasons.

[256] Similarly to *Wepruk*, I find that the evidence supports that the grievor was feeling some distress and frustration at the time of the incidents and that these feelings were related, at least in part, to his sexual harassment complaints against Mr. Desbiens and other employees in the workplace. However, I also agree with the Board

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in *Wepruk* that his beliefs were not, in and of themselves, sufficient to absolve him of his misconduct.

[257] I find on point the following additional comments by the Board in *Wepruk*:

> …
>
> *[302] The grievor relied on her state of mind when she made the threat as a mitigating factor. In* Rahmani v. Deputy Head (Department of Transport)*, 2016 PSLREB 10, a grievance involving workplace violence, the Board considered as a factor the state of health of the grievor in that case when it reduced the disciplinary penalty.* ***However, in that case, the Board accepted extensive evidence from the grievor's treating physician as a partial explanation for his behaviour. In this case, there is no such evidence.***
>
> *[303] I accept that the grievor was frustrated and felt harassed. However, without more, her state of mind was not a justification for a threat of violence; nor did it mitigate the seriousness of the misconduct sufficiently to warrant overturning the employer's decision.*
>
> …
>
> [Emphasis added]

[258] I find that the same conclusion should be drawn in this case. Given the gravity of the grievor's actions toward three other employees in the workplace, I am unable to give significant weight to his mental state at the time when the actions took place, without any medical evidence that could explain his behaviour and his inability to control his actions. It is worth noting that many individuals have deeply held beliefs about conspiracies, whether true or imagined. However, this does not in any way mean that they are not fully capable of functioning or that they are not in control of their actions.

[259] The grievor's representatives argued that rather than terminate the grievor, the respondent should have recognized his level of distress and sent him for a fitness to work assessment (FTWA). In support, they pointed to Ms. Gingras's testimony that an FTWA was considered before February 22, 2018. However, I question the soundness of that argument, given that the grievor adduced no evidence as to his ability or inability to work or to control his actions at work. Indeed, he has not admitted to wrongdoing or claimed that he should be forgiven due to his state of mental distress. Rather, he has denied taking the actions of which he is accused and has denied any wrongdoing.

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[260] Had the grievor led medical evidence that he was in fact incapable of working or controlling his actions on February 22, 2018, then the argument that he should have been sent for an FTWA might have held water. However, in the absence of any such evidence, I fail to see how I could conclude that the respondent should have done so when no evidence was adduced to support that one was necessary or that it could have led to a different outcome.

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f. The investigation process

[261] The grievor's representatives argued that the investigation into the events of February 22, 2018, was seriously flawed.

[262] They argued that the investigation failed to look into his sexual harassment and stalking complaints. In support, they referred to the following provisions of the respondent's "Discipline Guidelines", which they argued should have been followed:

> …
>
> ***Steps governing investigations and interviews:***
>
> *a. An investigation into the alleged wrongdoing should be conducted as soon as possible after the alleged relevant incident.*
>
> *b. The investigation should be conducted fairly and objectively. It should also consider and provide the following:*
>
> - ***background information leading to the relevant incident;***
> - *input from the witness(es);*
> - *the employee's response to the allegation(s); and*
> - *analysis of the facts.*
>
> …
>
> [Emphasis added]

[263] They argued that the grievor's state of mind was very relevant to the incidents that unfolded that day and that the respondent's failure to take it into account resulted in a flawed and one-sided investigation.

[264] The grievor's representatives also argued that the respondent's decision to hold the investigation at a police office was inappropriate and that it resulted in the grievor not participating. They argued that the respondent treated him like an inherently violent person. They stated that the decision to hold it there not only offended the grievor but also terrified him.

[265] The grievor's representatives also referred to the respondent's decision to use the investigator, Mr. Bonnell, to help with the investigation. They argued that that was inappropriate, given the grievor's grievance against Mr. Bonnell two years earlier. But I noted that the grievor was unaware of Mr. Bonnell's participation when he refused to participate in the investigation. I also noted that the grievor did not ask to change the interview's location.

[266] The respondent's representative argued that any alleged defect in the investigation was cured by the adjudication process. It referred to *Aujla v. Deputy Head (Correctional Service of Canada)*, 2020 FPSLREB 38 at para. 165, where the following was stated:

> *[165] … It is trite law that hearings before an adjudicator are* de novo *hearings and that any prejudice or unfairness that a procedural defect might have caused is cured by the adjudication of the grievance (see* Maas v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 123 at para. 118;* Pajic v. Statistical Survey Operations*, 2012 PSLRB 70;* Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (C.A.)(QL)); and* Patanguli v. Canada (Citizenship and Immigration)*, 2015 FCA 291).*

[267] I agree with that statement. During the course of the adjudication, the grievor was provided with a full and complete opportunity to lead evidence about the events of February 22, 2018, and about any mitigating factors that he believed that the respondent should have considered when it decided to terminate his employment. As such, any potential defects in the investigation process were cured by allowing him to present his case before the Board during the adjudication of his grievances.

g. The procedural requirements in the collective agreement

[268] The grievor's representatives argued that the respondent failed to comply with clauses 36.05 and 36.06 of the collective agreement, which required the respondent to notify the grievor of the reasons for his suspension and termination and prevented the respondent from introducing certain evidence at adjudication. Those clauses read as follows:

36.05 *When an employee is suspended from duty or terminated for disciplinary reason* [*sic*]*, in accordance with paragraph 12(1)(c) of the Financial Administration Act,*	***36.05*** *Lorsqu'un employé est suspendu de ses fonctions ou est licencié pour raisons disciplinaires, aux termes de l'alinéa 12(1)c) de la Loi sur la gestion des finances*

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the Employer undertakes to notify the employee in writing of the reason for such suspension or termination. The Employer shall endeavour to give such notification at the time of suspension or termination.	*publiques, l'employeur s'engage à lui indiquer, par écrit, la raison de cette suspension ou de ce licenciement. L'employeur s'efforce de signifier cette notification au moment de la suspension ou du licenciement.*
36.06 *The Employer agrees not to introduce as evidence in a hearing related to disciplinary action any document or written statement concerning the conduct of an employee unless that employee has been provided with a copy of that document or statement within a reasonable period before that hearing.*	***36.06*** *L'employeur accepte de ne pas présenter, à titre de preuve à une audience relative à une mesure disciplinaire, tout document ou toute déclaration écrite concernant la conduite d'un employé, à moins que ce dernier n'en ait reçu une copie dans une période de temps raisonnable avant l'audience.*

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[269] The grievor's representatives relied on Ms. Gingras's evidence. She testified that after the investigation was completed, she met with Mr. Tremblay and labour relations representatives to determine the next steps and that the representatives recommended terminating the grievor. She testified that their recommendation was based on the two February 22, 2018, incidents as well as other previous incidents involving the grievor. His representatives argued that he was never provided with the opportunity to know of this and that he was not made aware of the other complaints against him before the adjudication process.

[270] I note that the termination letter was based only on the February 22, 2018, incidents and that it does not mention prior incidents involving the grievor. Mr. Tremblay also testified to that effect. Moreover, at the hearing, the respondent's representative confirmed that the respondent would not rely on any of the incidents that occurred before February 22, 2018. As a result, I find that there was no violation of clauses 36.05 and 36.06 of the collective agreement.

h. The opportunity to address all the allegations

[271] The grievor's representatives argued that the respondent failed to follow its *Discipline Policy* and the rules of natural justice by failing to act fairly and reasonably. They argued that the grievor had the right to be provided sufficient information to understand the allegations made against him. They argued that before deciding to terminate him, the respondent provided him the opportunity to speak only to the

allegations related to the incidents involving Mr. Alqarra and Mr. Walker. They argued that the grievor was not provided the opportunity to respond to the allegations related to the incident involving Mr. Desbiens. They argued that that was not fair or reasonable or in line with the rules of natural justice.

[272] In support, they referred to the August 31, 2018, letter, which invited the grievor to attend the pre-disciplinary meeting on September 6, 2018. It stated that it was to "… discuss the founded allegations as mentioned in the Professional Standards Investigation report …", which was attached. The report concluded that Mr. Desbiens's allegations were unfounded, as there was an element of provocation and to give the grievor "the benefit of the doubt". However, Mr. Tremblay testified that the incident involving Mr. Desbiens was part of his decision to terminate the grievor, as he did not believe that the grievor's response to the provocation was appropriate.

[273] Once again, as stated in *Aujla*, the adjudication process before the Board provides for a *de novo* hearing. As such, any prejudice or unfairness that a procedural defect might have caused was cured by the adjudication of the grievances.

i. The application of the Disciplinary Measures Framework

[274] The grievor's representatives argued that the respondent failed to apply its Disciplinary Measures Framework by mischaracterizing the nature of the misconduct. They argued that by adopting the framework, the CBSA explicitly created a distinction between threatening behaviour and an actual threat of physical violence, which the representatives argued are categorized as distinct conduct, to distinguish that each should attract a different level of discipline. They argued that a threat of violence requires a specific threat of a specific act. They argued that none of the witnesses' evidence indicated that the grievor explicitly threatened violence. Rather, they argued that the only alleged statement was, "You are going to have a problem", which they argued was not an explicit threat of physical violence but rather a warning to stay away from a man who felt that a group had ganged up on him.

[275] I reviewed the Disciplinary Measures Framework. It recommends a range of a 10- to 20-day suspension for "Aggressive, abusive, threatening, behaviour or bullying comment" and a range of a 20-day suspension to termination for a "Threat or act of physical violence".

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[276] I also noted the following general provision in the Disciplinary Measures Framework:

> …
>
> *The recommended ranges of discipline are for a single incident of misconduct, in the absence of current discipline on file, without considering relevant aggravating or mitigating factors.* ***Each incident must be considered on its own facts, including any relevant mitigating or aggravating factors****.…*
>
> …
>
> [Emphasis in the original]

[277] Since I have found that the grievor physically pushed Mr. Desbiens twice and that he uttered threats against both Mr. Alqarra and Mr. Walker, I am unable to agree with his representatives that the respondent misapplied its policy.

j. The grievor's lack of acknowledgment of wrongdoing or expression of remorse

[278] The respondent's representative argued that the grievor's lack of acknowledgment of his actions and his absence of remorse are significant aggravating factors.

[279] The following comments in *Brown and Beatty* speak to the importance of that type of acknowledgment (at paragraph 7:32):

> …[W]*here the employee has apologized and/or shown real remorse, arbitrators tend to favour a suspension without pay for varying periods of time, rather than concluding that the grievor must lose his or her job. The converse of this principle is that, in the absence of exceptional circumstances, arbitrators usually do not reinstate employees who continue to deny they did anything wrong, or who refuse to take responsibility for the harm they caused.*

[280] In his grievance dated March 23, 2018, the grievor denied encountering anyone when he entered the building on February 22, 2018, or when he arrived on the fourth floor, where his office was located. At the hearing, he changed his story and admitted that he interacted with Mr. Desbiens, Mr. Alqarra, and Mr. Walker that morning. As such, his first instinct was to be untruthful to his employer. During the hearing, he did not explain why he did so or indicate any remorse from doing it.

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[281] The grievor was provided several opportunities to participate in the investigation into the February 22, 2018, incidents and to clarify his version of them. He testified that he did not participate in the interview because it was held at a police office. However, he could have informed the respondent that he felt threatened by its location and requested a different one. He was also offered the opportunity to have an observer of his choice attend the interview with him. He chose to do neither.

[282] The grievor then participated in a pre-disciplinary hearing held on September 6, 2018. However, he did not speak to the incidents that occurred on February 22, 2018; nor did he indicate any remorse or regret for his actions. The only references to the incidents were made by his union representative, who stated that the events did not happen as described.

[283] Only at the hearing did the grievor acknowledge that he encountered Mr. Desbiens, Mr. Alqarra, and Mr. Walker on the morning of February 22, 2018. However, he provided a vastly different account of what occurred. As previously stated in this decision, I have found his testimony on the events not credible.

[284] As such, I find that the grievor has repeatedly and continuously refused to acknowledge any wrongdoing or to show any form of remorse despite having been provided with multiple opportunities to do so. I find that this is a significant aggravating factor.

k. The grievor's rehabilitative potential

[285] The grievor's representatives argued that the respondent failed to properly assess the grievor's rehabilitative potential. They relied on Dr. Kawakami's evidence on unconscious bias to the effect that a single incident of wrongdoing perpetrated by a Black individual is more likely to be considered as a character trait than is an isolated incident based on a set of circumstances for a white individual. They argued that this information helps one understand why the respondent was so quick to determine that a single incident was enough to conclude that the grievor posed a threat, despite his 33 years of service and no disciplinary record.

[286] The grievor's representatives argued that the respondent treated the grievor as a security threat who could be prone to attack at random. In support, they referred to its decisions to request police assistance on February 22, 2018, and to hold the

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investigation interview at a police office. On those two points, I noted that no evidence was adduced on whether they were common or uncommon practices when a workplace violence allegation is reported. As a result, I am not able to conclude whether it constituted harsher treatment of the grievor.

[287] The respondent argued that Dr. Kawakami's evidence was very general and speculative. It pointed to her testimony, at the point when asked how she could tell if someone had an implicit bias. Her response was that a comparator would be required and that it was a question of observation. The respondent relied on *Brooks v. Department of Fisheries and Oceans*, 2004 CHRT 20 at paras. 8 to 14, and argued that if an adjudicator could reach a conclusion without help, then the expert opinion was not necessary.

[288] I agree. This evidence is neither relevant nor required for me to make a finding on the grievor's rehabilitative potential.

[289] The respondent did not base its decision only on a single incident (even if the incidents of February 22, 2018, were to be viewed as such). Rather, it was based on those actions coupled with the grievor's lack of remorse and failure to recognize the seriousness of his actions. It argued that all this resulted in the definite breach of trust.

[290] The grievor testified that he gave his account of what occurred in the elevator during his pre-disciplinary interview. Mr. Tremblay testified to the contrary. He stated that the grievor did not specifically address the February 22, 2018, incidents. Rather, the grievor referred to those involved as requiring help. I find that on a balance of probabilities, Mr. Tremblay's evidence is to be favoured. His testimony was supported by his meeting notes. It is also consistent with the grievor's testimony where no acknowledgement of wrongdoing or show of remorse was provided.

[291] It is trite to say that the relationship of trust is fundamental to the employee-employer relationship. When faced with a situation such as this one, which involves an ongoing refusal to acknowledge any wrongdoing or to show any degree of remorse, it is difficult to see how the necessary bond of trust can be repaired.

[292] To support their arguments, both parties referred to the case law. The grievor's representatives referred to *William Scott*; *Touchette v. Deputy Head (Canada Border*

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Services Agency), 2019 FPSLREB 72; *Dominion Glass Co.*; *Larson v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2002 PSSRB 9; and *Galco Food Products Ltd. v. Butchers Workmen of North America, Local P-1105*, 1974 CanLII 2284 (ON LA). The respondent referred to *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62; *Kingston (City)*; *Robillard v. Treasury Board (Department of Finance)*, 2007 PSLRB 41; *Way v. Canada Revenue Agency*, 2008 PSLRB 39; and *Wepruk* (2021 FPSLREB 75).

[293] Those decisions overwhelmingly stand for the proposition that the employment relationship will usually be viewed as irreparably broken in a situation of a failure to recognize or acknowledge any wrongdoing or to show any remorse.

[294] In *Brazeau*, the adjudicator made the following comments, which I find applicable to this case:

> …
>
> *[190] The grievor's lack of forthrightness during the respondent's investigation constitutes, from my perspective, a determinant factor with regard to the rehabilitation of the grievor and the necessary bond of trust. On two occasions, the grievor made inaccurate and misleading statements with respect to his family relationship with Mr. Smith. He made those statements knowing that they were inaccurate. Despite the fact that I can understand the grievor's frustration and exasperation over the length of the investigation and the presumed leak to the press, I find it insufficient to justify his lack of forthrightness with the ARC. He held a position of trust, and he had the responsibility to cooperate in a forthright manner with the ARC.*
>
> *[191] I find the principles outlined in the following passage in* Oliver *to be relevant and applicable to this case:*
>
> …
>
> The recognition of culpability or some responsibility for his or her actions is a critical factor in assessing the appropriateness of the discipline. This is because the rehabilitative potential of the grievor is built on a foundation of trust, and trust starts with the truth. If a grievor has misled his employer, failed to cooperate with the legitimate investigation of allegations on conflict of interest, and refuses to admit any responsibility in the face of evidence showing wrongdoing, then re-establishing the trust necessary for an employment relationship is impossible.
>
> …

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[295] *Way* also underscored this point. At paragraph 109, it states the following:

> *109 In* Royal Columbian Hospital v. Hospital Employees' Union (Saligumba Grievance), *[2001] B.C.C.A.A.A. No. 39 (QL), the arbitrator writes, at paragraph 119:*
>
> …
>
> *A critical issue in assessing whether the employment relationship has been irreparably severed is whether the grievor has truly recognized and acknowledged her wrongdoing such that it can be concluded she would not continue to engage in such misconduct in the future if she were reinstated… .*
>
> …
>
> *I agree without reservation. Ms. Way fails to recognize or acknowledge any wrongdoing. I have no confidence that Ms. Way has learned anything from this whole process. Her prognosis for a successful reinstatement is negligible, and her grievance must be, and is, dismissed.*

[296] In this case, the grievor failed to acknowledge any wrongdoing at the time of the incidents, was untruthful in his grievance statement, failed to participate in the investigation into the matter, failed to acknowledge any wrongdoing during the subsequent pre-disciplinary hearing, and failed to acknowledge any wrongdoing or to show remorse during the hearing when he testified. As a result, I have very little faith that the bond of trust could be repaired were the grievor reinstated.

[297] Moreover, as evidenced by his testimony, the grievor continues to believe that Mr. Desbiens (whom he described as a mafia crime boss) was the leader of an organized group of men with prurient interests in him, and that Mr. Alqarra (whom he described as a henchman) and Mr. Walker were agents of Mr. Desbiens. He believes this even though an independent investigation was conducted into his allegations against Mr. Desbiens, which concluded that there were no grounds to substantiate his claims. Further, his testimony demonstrated that he believed that his actions against those individuals were justified as a result of his beliefs.

[298] As a result, nothing has changed, and he provided no assurances that if he were reinstated, the actions that he exhibited on February 22, 2018, would not be repeated.

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l. Conclusion on whether the decision to terminate was excessive in all of the circumstances

[299] I considered the nature of the misconduct and the mitigating and aggravating factors in this case, and I find that the respondent's decision to terminate the grievor's employment was not excessive in the circumstances. I have found that the grievor's actions on February 22, 2018, constituted workplace violence worthy of severe disciplinary action. Unfortunately, his continued refusal to admit to any wrongdoing, in the face of clear and compelling evidence to the contrary, leaves little room to believe that the employee-employer relationship can be salvaged or that the same conduct would not reoccur.

B. The indefinite-suspension grievance

[300] Having determined that the respondent had just and reasonable cause to terminate the grievor, the suspension grievance has become moot, as the termination was retroactive to the date of the indefinite suspension (see *Brazeau*, at para. 154; and *Canada (Attorney General) v. Bétournay*, 2018 FCA 230).

C. The discrimination claim

[301] The grievor's termination grievance provided the following: "This decision was made without just cause and was in violation of the CS Collective Agreement, the Treasury Board of Canada Secretariat's guidelines on Discipline and the Canadian Human Rights Act."

[302] In support of the grievor's claim that the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6) was violated, his representatives led evidence from Dr. Kawakami. They stated that the objective of presenting it was to provide a potential explanation for the events that the witnesses described, through the lens of Dr. Kawakami's expertise in implicit bias. They stated that the sad reality is that each time an employee grieves systemic discrimination, the burden falls on the employee alone to prove it, which is an extremely difficult and sometimes impossible task. As such, they hoped that Dr. Kawakami's testimony would provide support so that the grievor would receive the opportunity to be fully heard.

[303] However, the grievor's representatives acknowledged that Dr. Kawakami was not able to speak to whether racial bias played a role in this case and that she was only able to educate the Board on the role it plays in Canada and what to look for.

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[304] The respondent relied on *Ont. Human Rights Comm. v. Simpsons-Sears*, 1985 CanLII 18 (SCC), and argued that when claiming discrimination, the grievor must first establish a *prima facie* case of discrimination before the respondent must respond to it. It argued that the grievor did not meet the test of establishing a *prima facie* case of discrimination, as he adduced no evidence that race was a factor in his termination. As such, it argued that he did not make out his case. I agree.

[305] The test for discrimination was set out as follows in *Moore v. British Columbia (Education)*, 2012 SCC 61:

> …
>
> *[33] As the Tribunal properly recognized, to demonstrate* prima facie *discrimination, complainants are required to show that they have a characteristic protected from discrimination under the Code; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a prima facie case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.*
>
> …

[306] In the present case, there is no dispute that the grievor has a characteristic protected from discrimination (he is Black) or that he suffered an adverse impact (he was suspended and then terminated). However, the grievor has not provided any evidence that his race was a factor in the adverse impact.

[307] The only evidence that the grievor adduced to support a discrimination claim was the evidence of Dr. Kawakami which was entirely speculative. Conversely, the respondent led clear, convincing, and compelling evidence to support its decision to suspend him pending an investigation into the events of February 22, 2018, and its subsequent decision to terminate his employment.

[308] As such, I find that the grievor did not meet his burden of establishing a *prima facie* case of discrimination.

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

(The Order appears on the next page)

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IV. Order

[310] The grievances are denied.

August 19, 2024.

Audrey Lizotte,
a panel of the Federal Public Sector
Labour Relations and Employment Board

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