IN THE MATTER OF AN ARBITRATION PURSUANT TO SECTION 42 OF THE NOVA SCOTIA *TRADE UNION ACT*, R.S.N.S. 1989, c. 475 as amended

AND

IN THE MATTER OF: An Arbitration of the grievance of Gail McQuarrie

BETWEEN:

Amalgamated Transit Union, Local 508

(the "Union")

- and-

Halifax Regional Municipality

(the "Employer")

DECISION

Arbitrator:	Kathryn A. Raymond
Place of Hearing:	Dartmouth, Nova Scotia
Dates of Hearing:	June 22, 23, 24 and July 14, 15 and August 29, 30, 31 and September 1 and 29, 2016;
Appearances:	Randolph Kinghorne, Solicitor on behalf of the Employer Kimberley Turner, Q.C., Solicitor on behalf of the Union
Date of Decision:	February 17th, 2017

Introduction

1. Ms. McQuarrie (the "Grievor") worked as a "spare board" bus driver for the Employer ("Halifax Transit"). The Employer received an anonymous letter of complaint on May 6, 2015. The letter alleged racism and "blatant targeting" of the North Preston community on social media by employees of Halifax Transit. The letter enclosed three Facebook posts, the first two made by two other employees and the third by the Grievor.

2. The Employer concluded that the posts were inappropriate. The Employer was concerned that the posts had harmed Halifax Transit's reputation and could undermine its relationship with the North Preston community.

3. The Employer interviewed the employees who posted on Facebook. Two of the employees were counselled. The Employer concluded that the Grievor's post on its own would not warrant termination. However, the Grievor had a prior disciplinary record. The Employer was of the view that the Grievor's disciplinary record involved similar misconduct by the Grievor in the past. The Employer had also provided the Grievor with training to assist her in her interactions with customers in tandem with her prior discipline. The Employer concluded that further training would be ineffective. The Employer further concluded that the Grievor did not accept responsibility and lacked remorse for her actions based on its interview with her respecting her Facebook post. The Employer decided that the Grievor was not capable of changing her conduct and that her unacceptable behaviour would occur again, harming the Employer's interests. Accordingly, on June 4, 2015 the Employer terminated the Grievor's employment.

4. Ms. MacQuarrie grieved her termination. I was appointed pursuant to Section 42 of the *Trade Union Act* and the collective agreement between the parties to hear the grievance. No issue was taken with respect to my jurisdiction to determine this matter.

5. There is no dispute that the Grievor posted the comment in question. The Union claims that the post did not warrant discipline for several reasons. First, the Union objects to the Employer's decision to entertain the letter of complaint in the first place, as it was anonymous. It says that there was a practice in the workplace to not act upon anonymous complaints. Secondly, the Union states that the Grievor's Facebook post was off-duty conduct, unrelated to the Grievor's duties. The Union further asserts that the Employer has no policy on social media posts and does not monitor social media use by its employees. It alleges that other employees posted inappropriately on Facebook without reaction by the Employer. The Union submits that the Employer cannot assert that its business interests were engaged by the Grievor's off duty conduct in these circumstances and suddenly select the Grievor for termination. The Union further submits that the post does not warrant discipline because the two other employees, who had also made inappropriate posts on Facebook and were also the subject of the letter of complaint, were not disciplined. Lastly, the Union submits that the Employer conducted a biased, unfair investigation and rushed to judgment, reaching the wrong conclusion respecting the termination of the Grievor's employment.

6. The Union advanced several submissions in the alternative. The Union submits that, if the Grievor's conduct warranted discipline, termination was an excessive response. It says the Employer failed to follow its progressive discipline policy. The Union says that the Employer also

failed to consider that the Grievor had improved her conduct over a 23-month period since her last discipline. The Union points to a 24-month sunset clause in the collective agreement that would have come into effect in 22 days. Had the sunset clause come into effect, the Grievor's prior disciplinary incidents would have been taken off her record. The Union also asserts that the Facebook incident was of a different nature than the Grievor's previous discipline, such that the previous disciplinary record should not have been considered by the Employer. The Union submits that the Grievor's evidence at the hearing demonstrates that she does feel remorse for her actions, has learned from her mistakes and should be permitted to return to the workplace. The Union seeks the Grievor's reinstatement as a bus driver with full compensation for income loss caused to the Grievor because of her termination.

7. For the reasons which follow, I have determined that there was just cause to discipline the Grievor for her off-duty conduct. However, the discipline imposed by the Employer in these circumstances, termination of employment, was excessive.

Preliminary Issue

8. Several preliminary issues related to documentary evidence were raised at the outset but were resolved on agreement by the parties. In particular, the Union was concerned about the admission into evidence of the anonymous letter complaining about the Facebook posts on the basis that the letter is hearsay.

9. The Employer clarified that it is relying on the anonymous letter of complaint to show what led to its investigation and that it does not rely upon the letter for the truth of its contents. The Employer submits that the letter is also needed to understand the Grievor's evidence, particularly her reaction to the letter of complaint when it was put to her by the Employer during her interview.

10. Despite its concerns, the Union acknowledged that the letter formed the basis for significant aspects of the Grievor's testimony.

11. The document is admitted as evidence respecting what led to the investigation and as background to the Grievor's evidence about the letter of complaint and not for the truth of its contents. The key fact that the Grievor made the post on Facebook is not in dispute. The document is necessary context for the evidence.

The Evidence

12. Krista Nantau, Paula Brophy and Kerri Howells, all Employee Services Supervisors who supervised the Grievor, testified for the Employer. The Employer also called Calvin Simmons and Terry Thomas, both bus operators, as witnesses. As well, I heard testimony on behalf of the Employer from Laughlin Rutt, the Corporate Diversity Consultant for the Halifax Regional Municipality. The Grievor, Gail McQuarrie, Kenneth Wilson, the President of Local 508 and Susan Caldwell, the Coordinator for Bully Free Workplaces at NSGEU, testified for the Union.

The Employer's Policies

13. The Employer does not have a policy respecting social media use by its bus operators. Kenneth Wilson, Union President, testified that he had been advised in the past by Karen Holton-MacDonald, Manager of Resource and Development for the Employer, that she had no intention of policing Facebook posts by employees of Halifax Transit. He testified that Ms. Holton-MacDonald told him "not to worry about it" and stated, "I'm not going to police this membership."

14. This evidence was not challenged by the Employer. The Employer's position is that it does not have the necessary resources to monitor the social media posts of its numerous employees. The Employer's approach is to wait until it receives a complaint and to address issues on that basis. The Employer submits that it had a letter of complaint that involved the Grievor and that it was within its rights to investigate and to issue discipline as a result.

15. The Employer has a "Professionalism" policy and a "HRM Values and Ethics" policy in its Halifax Transit Operator's Handbook. The Handbook was given to the Grievor and its contents were generally known to her. The "Professionalism" policy requires that, while on duty, operators are expected to treat passengers, pedestrians and motorists with politeness and to keep their self-control under all circumstances. This policy includes a reference to off-duty conduct. It prohibits an employee from wearing a uniform while purchasing or consuming alcoholic beverages or gambling in public. It does not mention social media. The "HRM Values and Ethics" policy requires employees to adhere to "core values". These include acting with respect, valuing diversity and being accountable. This policy requires HRM employees to "respect the dignity, values, beliefs and feelings of the public and our co-workers, to treat the public and co-workers with respect, to work together in the spirit of tolerance and understanding and to support a positive work environment by addressing improper and disrespectful behavior in the workplace".

The Posts

16. In April, 2015, the Grievor was at home in her dining room. She visited the Facebook site of a co-worker, another bus operator, Graham Driscoll. The Grievor read the following comment that was posted by Mr. Driscoll on his Facebook page:

> Things seen on the road going up to North Preston:
> - 20 lbs. Propane cylinder
> - -24"-27" television
> - A toilet. An entire toilet
> - An old CRT computer monitor
> - Tires. Multiple. I lost track.
>
> That's the bigger stuff. The ditches are absolutely polluted with everything else.

17. There was a second post on Mr. Driscoll's Facebook page by Brett Balser, another bus operator. Mr. Balser had posted:

> The bigger stuff is at least 6-7 dilapidated, abandoned cars that have been there for years, parked right on the street as though they are being used. I'd post pics if I could from my phone :P.

18. The Grievor added this comment to Mr. Driscoll's Facebook page:

> Pride in self, Pride community... guess we know how some think of themselves. Personally I could not live like that. I'd either have to go clean it up or move out.

19. The Grievor testified that she responded without thinking. She acknowledged that she did not know who Mr. Driscoll's Facebook friends were and, therefore, did not know who would see her comments.

20. A fourth employee responded to the post but removed his post before the posts became subject to investigation. There is no evidence that there was any follow-up to identify this employee by the Employer or to ascertain the content of his post.

21. Mr. Driscoll's site does not identify the fact that he is a bus operator for Halifax Transit. There is nothing immediately obvious in any of the posts that identifies the authors as employees of Halifax Transit.

22. These posts were made on Mr. Driscoll's Facebook page, however, anyone visiting his page could have linked to the Grievor's Facebook page via her post. The Grievor's Facebook page does not make it obvious that she is a bus operator. However, if someone were to read through her prior posts, content in her posted history makes this evident.

23. The Facebook posts were eventually taken down, although it is not clear on the evidence when this occurred or how.

The Anonymous Complaint

24. Eddie Robar, the Director of Halifax Transit, received an anonymous letter of complaint dated May 3, 2015 about the Facebook posts. Copies of the Facebook posts were attached.

25. The anonymous letter of complaint stated that "a few employees" of Halifax Transit had brought an issue forward to the author. The anonymous writer alleged "blatant targeting of our community (North Preston) on social media by your employees under your direction". The letter threatened possible explosive media attention if this came to the attention of the public, the risk of all bus drivers being seen as racist, potential reprisals and bus service disruption in North Preston. The letter referenced the racial discrimination that North Preston has overcome in the past. The letter concluded that the identification of North Preston on Facebook in a derogatory manner was racist and hateful. The letter also emphasized that the employees posting such messages were working beside the very people they were targeting.

26. The Employer decided to proceed with an investigation into the complaint. The Employer's position at the hearing was that, in doing so, it based its investigation on the Facebook posts attached to the anonymous complaint, rather than on the letter of complaint itself.

27. Kerri Howells was the Grievor's supervisor and one of the people responsible for investigating complaints on behalf of the Employer. Ms. Howells testified that the Employer had investigated anonymous complaints in the past. She denied that there was any practice to not investigate anonymous complaints. However, she acknowledged that some anonymous complaints were not investigated and that it depended on the nature of the complaint. As an example, she offered that anonymous complaints could be so vague that they could not be investigated.

28. Mr. Wilson testified that usually there would be discussion between the Union and the Employer if an anonymous complaint was received. He testified that both parties usually agreed that there is no merit to an anonymous complaint, as an anonymous letter is much like rumour or gossip.

29. When Mr. Wilson received the letter from the Employer during the investigation that followed, it was his opinion that there was no merit to it. He expressed the view that, if you cannot talk to the author of the complaint, you cannot tell if the complaint reflects the actual feelings of those involved or is simply "smoke and mirrors".

30. The Employer did not investigate to determine the identity of the author of the letter. The Union submits that the Employer ought to have done so, as additional relevant information could have come to light.

31. This was, in part, because the Grievor challenged whether the letter of complaint was made in good faith. At the time, a new Union Executive was being elected. The Grievor was running for office as a new member of the Executive. When interviewed by the Employer about her Facebook posts, the Grievor questioned whether the person who wrote the anonymous letter was really upset about the posts. She testified that she was concerned that someone was trying to have her labelled a racist to sway votes against her in support of her competition in the election.

32. When she was interviewed by the Employer, the Grievor voiced her suspicion that the letter of complaint was written on behalf of her co-worker, Terry Thomas, possibly by his wife. Mr. Thomas lives in East Preston but has family in North Preston. Mr. Thomas was friends with the Grievor's opposition in the election and was actively supporting her re-election in the workplace. The Grievor had learned that Mr. Thomas was showing her Facebook post around the workplace to other employees.

Reaction of Co-Workers to the Grievor's Facebook Post

A) Evidence of Terry Thomas

33. Mr. Thomas was called as a witness by the Employer. Mr. Thomas testified that he ran across the posts on Mr. Driscoll's Facebook page. He testified that he was friends with Mr. Driscoll on Facebook. (This fact was subsequently denied by Mr. Driscoll, placing in issue how Mr. Thomas learned about the Facebook posts). Mr. Thomas testified that he was hurt and offended by the Grievor's post.

34. Mr. Thomas copied the Grievor's posts and brought copies to the workplace. He showed them to about 10 people. He testified that he did so because "it was such an insult to the North Preston community". Mr. Thomas did not go to management or to the Union with his concerns. He also did not speak to the Grievor about his concerns, although they had talked regularly as co-workers and had a good relationship. The Grievor had helped Mr. Thomas write a letter to apply to become a Human Rights Facilitator.

35. Notwithstanding the Grievor's suspicions that Mr. Thomas was behind the anonymous letter, Mr. Thomas was not asked on direct examination whether he wrote the anonymous letter or had someone write it for him. He volunteered on cross-examination that he had never seen the complaint and that he did not know who wrote it. His testimony on these facts was not challenged further during cross-examination nor expanded upon in reply.

36. Mr. Thomas declined to provide certain information during his evidence.

37. On cross-examination, Mr. Thomas acknowledged that, if he showed the posts around the workplace, other employees would become angry with the Grievor. Although he was actively involved in campaigning for the other candidate, Mr. Thomas testified that it never occurred to him that the Grievor's chance of being elected would be "messed up". He testified that, while he knew that showing the posts around the workplace would make the Grievor "look bad", he did not think that this would hurt her in the election. At the same time, he testified "I can read" and "we can see what she meant".

38. The Grievor did not apologize to Mr. Thomas. Mr. Thomas testified that if he received an apology from the Grievor now, it would not matter as there is no friendship left. When he was asked how he would feel about working with the Grievor if she was reinstated, he said, "We work at the same company. We don't work on the same bus".

39. Under cross-examination, Mr. Thomas said he was at the Union meeting when the membership decided whether they would support the Grievor's grievance going to arbitration. He acknowledged that he voted in favour of her case going to arbitration. He made the comment that, "I didn't think she would get fired". He clarified that he thought the Employer would reprimand the Grievor.

B) Evidence of Calvin Simmons

40. Another co-worker of the Grievor, Calvin Simmons, resides in North Preston and testified at the hearing. Mr. Simmons testified that he found out about the posts because another driver alerted him and left a copy of the posts in his mailbox at work. Mr. Simmons testified that he was extremely hurt by the attack on the North Preston community. As Mr. Simmons put it, "you attack my community, you attack my family". Mr. Simmons testified that the Grievor knew that he was from North Preston and that is why it hurt his feelings so badly.

41. Mr. Simmons testified that he keeps his property in North Preston in perfect condition. He said that he has expressed frustration at some of his neighbors who do not. He acknowledged that he and the Grievor may have had discussions about this issue during which he complained that

his neighbors were not maintaining their property. He testified that he had never had any concern that the Grievor was racist during those conversations.

42. Mr. Simmons was asked about working with the Grievor in the future. He answered, "I have no thoughts. I have no animosity or hatred". He also indicated that he and the Grievor "would not be having conversations like they used to" but that they would still be able to work together.

43. Under cross-examination, Mr. Simmons appeared open to a potential disciplinary outcome short of firing the Grievor. He is a regular bus operator, whereas the Grievor is a spare board operator. He said that, as a result, it could well be the case that he would not see the Grievor very often. He testified that he had a cousin working at Halifax Transit that he had seen once on the road in two years.

44. Mr. Simmons also testified that this was the first time that the Grievor had ever said anything negative about his community. In his discussions with her, he had never taken her to be racist. He commented, "it's just this one kind of little incident".

45. After reading the posts, Mr. Simmons approached the Grievor at work on May 29, 2015. They had an argument. Mr. Simmons testified that he approached the Grievor intending to not make the issue about racism, but rather about community. He testified that the Grievor thought that he was accusing her of being a racist and accused him of making it into a racist situation.

46. The Grievor testified that she was approached by Mr. Simmons in an aggressive way. She testified that he stood inches away from her face, yelling at her, and waved the Facebook posts in her face. She testified that she told him that she did not mean to make her post about North Preston, that she was sorry that she wrote it and sorry that he interpreted it that way. She testified that she was in tears resulting from this incident.

47. Ms. Howells heard about this incident and interviewed Mr. Simmons on June 1, 2015. She recorded in her notes that Mr. Simmons told her that the Grievor had told him to "grow up" during their argument. In his testimony, Mr. Simmons was not certain that the Grievor said this to him. The Grievor testified that she did not recall saying this, but she could see that she could have made a reference to Mr. Simmons' behaviour because of his aggressive approach.

48. By May 29th, 2015, Ms. Howells had completed her investigation into the Facebook posts. By June 1, 2015, when she interviewed Mr. Simmons, she had already decided that the Grievor should be terminated. Accordingly, the Employer's decision to terminate the Grievor was not based upon this incident. The Union objected to any consideration being given to this evidence, as the Grievor was not given notice that the incident with Mr. Simmons would be relied upon by the Employer. The Employer's position is that it is not relying on this incident but that this evidence should be considered in relation to the issue of remedy. I have only considered this evidence in determining whether the Grievor's off-duty Facebook post impacted the workplace because of its clear relevance to this issue. I have also considered the Grievor's reaction to Mr. Simmons in the context of remedy.

The Interview and Comparative Outcome for the Grievor's Co-Posters

49. The other employees who posted offensive comments on Facebook, Mr. Driscoll and Mr. Balsar, were interviewed by Ms. Howells. She determined that they should be given coaching rather than be disciplined. The Employer's position is that coaching was appropriate because they had no prior disciplinary record and because they showed remorse when they were interviewed.

50. In deciding that the circumstances warranted that the Grievor be terminated, the Employer placed significant emphasis on its assertion that the Grievor was defensive, deflected responsibility, lacked remorse and made no apology at her interview, as compared to her co-workers.

51. The Union asserts that the reaction of Mr. Driscoll and Mr. Balsar is not markedly different from that of the Grievor. Accordingly, the reaction of these other employees and their disciplinary treatment by the Employer, as compared to the Grievor, is at issue.

Graham Driscoll

52. Ms. Howells testified that she met with Mr. Driscoll on May 29, 2015 to review the complaint and that he was very remorseful. That, she says, is why she decided that he should receive coaching rather than discipline for his offensive post.

53. Notes were taken at Mr. Driscoll's interview by Greg Hersey, who acted as a note-taker for Ms. Howells. These and additional notes taken by a Union representative were in evidence. Mr. Wilson also attended Mr. Driscoll's interview and testified about what occurred. The parties provided an agreed upon statement of Mr. Driscoll's evidence.

54. Mr. Hersey's notes indicate that, when the interview began, Mr. Driscoll was asked whether his Facebook site was an open site. It appears from Mr. Hersey's notes that Mr. Driscoll explained that his Facebook site was a personal site and closed so that only his friends could see. The notes indicate that a break in the meeting was then taken by the participants. The Employer representatives returned. The notes indicate that Ms. Howells stated that Mr. Driscoll would receive coaching rather than be disciplined.

55. Ms. Howells testified that notes that she took at the meeting provide evidence that Mr. Driscoll made additional comments (of an apologetic nature) in response to the complaint before she advised him that he would not be disciplined. I reviewed Ms. Howell's notes. Many of the details reflected in Mr. Hersey's notes are not contained in Ms. Howell's notes. Ms. Howell's notes do reference Mr. Driscoll expressing remorse. However, this appears in Mr. Hersey's notes as having occurred after the decision was made to deal with his conduct through non-disciplinary means following the break in the meeting.

56. The notes taken on behalf of the Union are consistent with Mr. Driscoll being asked whether his site was open and then being advised that he would not be disciplined.

57. Ms. Howells' testimony about the extent of remorse expressed by Mr. Driscoll is based upon her recollection. In my view, the notes taken by Mr. Hersey and the Union are a more reliable

reflection of the chronology of events respecting when remorse was expressed by Mr. Driscoll during his interview. I place more weight upon them in drawing factual conclusions. Based on the totality of the evidence, I am persuaded that the Employer's primary and first concern in interviewing Mr. Driscoll was whether the posts would have been widely seen. This is consistent with the Employer's anticipated concern about its reputation and relationship with the public it serves. I find that Mr. Driscoll was coached and not disciplined once the Employer assessed the risk of further harm to its interests as being low or moderate. The Employer's assessment of whether Mr. Driscoll felt remorse was primarily made after the Employer's decision to proceed with coaching, as I find that Mr. Driscoll's apology and explanation of his conduct was offered subsequently. As a result, I am not persuaded that a demonstration of remorse was a factor in the Employer's decision to offer coaching rather than discipline to Mr. Driscoll.

58. Mr. Hersey's notes indicate that Ms. Howells subsequently stated to Mr. Driscoll, "I don't see anything here to put you into discipline but I think it is important that we note of (sic) the fact that someone was offended". Mr. Driscoll is reported as having responded, "Yes I can see it - could really have been any community - I don't have any issues with anyone there". Ms. Howells is noted as having replied that the "problem is community could take offence". Mr. Driscoll agreed and stated "it could that way for sure - no intent against the people of that area". Ms. Howells is noted to have responded, "caution you when posting-what you said - this person was really offended". Mr. Driscoll is reported as having offered the reassurance, "no intent against the community or people - I get it".

59. The notes taken on behalf of the Union also indicate that Mr. Driscoll was asked whether he understood that the posts were hurtful. Mr. Driscoll is recorded as having responded that he had no malicious intent and would have made the same comments about any other community such as "Windsor or Timberlea or anywhere".

60. As indicated, the Union submits that Mr. Driscoll's response to Ms. Howells respecting the merits of the complaint was not that much different from that of the Grievor. The Union submits that Mr. Driscoll's response was considered acceptable, while the Grievor's was not. The Union submits that this shows the Employer's bias towards the Grievor.

61. Based on the evidence related to Mr. Driscoll's interview, I conclude that Mr. Driscoll emphasized that he did not intend to offend the North Preston community and that he would have made the same comments about other communities. This response from Mr. Driscoll was accepted by the Employer and will be compared to the Grievor's response.

Brett Balsar

62. Ms. Howells interviewed Mr. Balsar on June 10, 2015, after the Grievor was terminated on June 4, 2015. Ms. Howells similarly testified that Mr. Balsar showed remorse and apologized. She testified that she considered the fact that he had no history of prior discipline in determining that discipline was not warranted.

63. Mr. Hersey also acted as a notetaker during Mr. Balsar's interview. The notes indicate that Mr. Balsar explained to Ms. Howells that he had read Mr. Driscoll's post on Facebook, that he promptly responded with his own post without thinking about it. He said that he did not mean

to be offensive. He acknowledged that obviously his post did offend people. He offered to apologize. A break was then taken in the meeting. Upon Ms. Howell's return, Mr. Balsar was advised that no discipline would be imposed. He was coached by Ms. Howells.

64. The Union submitted that Mr. Balsar's apology was given quickly at the beginning of his interview because, by the time Mr. Balsar was interviewed, he knew that the Grievor had been terminated.

65. In Mr. Balsar's case, the Employer's decision to not impose discipline was made after Mr. Balsar showed remorse and offered to apologize. However, Mr. Balsar was accompanied by Mr. Wilson who had been present at the interviews of Mr. Driscoll and the Grievor. Mr. Wilson was aware, from having read the letter of termination given to the Grievor, that the reasons the Employer gave for terminating the Grievor included how she responded during the interview. It was likely apparent to Mr. Wilson and Mr. Balsar that it was advisable for him to "fall upon his sword".

66. I am of the view that it is unfair to compare responses of the Grievor and Mr. Balsar in these circumstances to justify the Employer's decision to terminate the Grievor. Further, at the time the Employer determined to terminate the Grievor, Ms. Howells had not yet interviewed Mr. Balsar. Accordingly, Mr. Balsar's acceptance of responsibility and apology for his actions could have played no part in the Employer's decision to terminate the Grievor.

67. Ms. Howells testified that, if Mr. Balsar had not shown remorse, for example, in reference to the content of his Facebook post, had he asserted that he had a right to take pictures of the garbage along the roadway to North Preston, Ms. Howells likely would have issued a reprimand to Mr. Balsar.

The Grievor's Interview

68. The Employer held an investigation meeting on May 28, 2015 respecting the Facebook post incident with the Grievor. The Grievor was accompanied by Mr. Wilson and Paul MacDonald, Shop Steward of Local 508. The Employer was represented by Ms. Howells and Paula Brophy, another supervisor, at the meeting.

69. The Employer's position is that the investigation meeting was an opportunity for the Grievor to show that she understood how harmful her posts were and to communicate that she would change her conduct. The Employer says that, instead, the Grievor was defensive, failed to show remorse and demonstrated a lack of insight into how her post would be offensive and hurtful. The Employer says that the Grievor deflected attention from herself by blaming Terry Thomas and/or Troy Smith, another co-worker, for writing the letter of complaint and by questioning the sincerity of the complaint.

70. That the Grievor was defensive is not seriously in issue. Whether she showed remorse or had insight then, or has demonstrated this subsequently, is in issue.

71. Notes of the meeting were taken by Ms. Brophy and Paul MacDonald. Ms. Howells, Ms. Brophy and Mr. Wilson and the Grievor all gave evidence about what was said at the investigation meeting. In addition, the letter of termination dated June 4, 2015, which was given by Ms.

Howells to the Grievor, includes detailed statements (as alleged by the Employer) from the interview. I am recounting this evidence in some detail as there is a dispute about what was said at the meeting. I will also provide much of the description of the interview in the letter of termination, given the weight placed upon the Grievor's perceived response during her interview by the Employer, as is evident from both the letter of termination and the testimony of Ms. Howells.

Ms. Howell's Evidence Respecting the Interview

72. After being informed by Ms. Howells about the letter of complaint, the Grievor was asked by Ms. Howells if she could understand why people would be upset (i.e., that people who had ties to the North Preston Community would find her post offensive). The Grievor is reported in the letter of termination as having responded:

> "Not that person. That person is representing Terry Thomas maybe if they were representing themselves. I had heard from others that Terry and Troy and several others were playing pool and Terry and Troy Smith were quite pissed about the posts and there was quite a kerfuffle. I wasn't here."

73. Ms. Howells testified that she asked the Grievor if she knew who wrote the letter of complaint. The Grievor responded that she knew who instigated it but not who wrote it.

74. The Grievor was asked by Ms. Howells whether she had approached any of her co-workers about the posts. The Grievor is alleged to have responded that she thought it best not to, because if she did, and they wanted to blow something out of proportion, "they would and [would] call you a racist".

75. The Grievor is then alleged to have stated, "I would love to know who wrote the letter to Eddie [Robar] because it was pretty articulately written and only one or two could have written that letter."

76. It can fairly be said that the meeting took a turn for the worst at this point. Ms. Howells testified and the letter of termination records that she asked the Grievor what she meant by saying that only "one or two could have written that letter". She asked the Grievor whether she meant "black people, or people from that community". The letter of termination records that the Grievor responded "...of the black people that work here."

77. Ms. Howells testified that she thought that the Grievor meant that only one or two black workers at Halifax Transit were articulate enough to write the letter. She testified that the Grievor's response made her even more concerned about whether the Grievor would continue to make offensive comments in the workplace. Ms. Howells testified that she concluded that, if the Grievor would make such a comment in a meeting with her Employer, she would say that in front of other employees or in public. Ms. Howells testified that she did not want customers being a target or other employees being offended at work. She concluded that, "the impact on employees would be huge" and that "this was not something they wanted in the workplace".

78. Ms. Howells testified, as well, to a history of contentious issues between Halifax Transit and the North Preston community in the past. She testified that it was necessary for the Employer to work with that community in a positive manner.

79. Ms. Howells concluded that there was potential for the Grievor to cause further harm to the relationship with the North Preston community. Ms. Howells testified that the Greivor's comment that "only one or two black people" would be articulate enough to write the letter of complaint was a factor in the Employer's decision that termination was warranted.

80. The letter of termination indicates that Ms. Howells asked the Grievor again whether she could understand that some people could view her comments on Facebook and feel that the comments were hurtful. The letter of termination records the Grievor responding to the effect that it was not about that community and that she did not say "black people" or "people of North Preston" in her post. The letter further states:

> You stated that it was a general observation and that you had made similar comments to passengers on the route 16. You said that, "it is not a white issue but a person issue".

81. Ms. Howells recorded in the termination letter that she asked the Grievor if she could understand how someone could take the post to be about the North Preston Community. She recorded the Grievor's response as follows:

> Yeah, I can see people relating it to that, but note that I said it's how some people think, and some there don't care. A black employee said in the garage this morning that no one in that community cares and I said some care. People can interpret things to what they want.

82. Ms. Howells recorded in the letter that she asked the Grievor if, in hindsight, she would have posted the comments. She wrote that the Grievor's response was:

> ...could be red, black or green but if you are white you are a racist. Terry said it too, you can't be white and not be a racist. I guess I could be more specific in posts to be clearer so as not to be misinterpreted.

83. The letter of termination also reports that the Grievor allegedly stated that Mr. Thomas "is the biggest racist in the garage" and that he is "teaching that course Human Rights Facilitator".

84. Ms. Howells testified on direct examination that she felt the Grievor was not taking responsibility for her conduct and that she was instead blaming Terry Thomas or his wife for any upset over the posts. Ms. Howells concluded that the Grievor did not even attempt to understand how her posts could have been upsetting to Terry Thomas, Troy Smith or to others.

85. Ms. Howells testified that the Grievor's prior disciplinary record played a very significant part in her decision. She felt that, in all the previous instances of discipline, the Grievor had not taken responsibility for her actions. Ms. Howells noted that the Employer had provided the Grievor with training to assist her. Ms. Howells concluded that the training had not been effective. Ms.

Howells testified "she was right, we were wrong, and her behaviour just kept happening based on that... it was always someone else's fault".

86. Under cross-examination, Ms. Howells agreed that the Grievor's comments were not blatantly racist. Ms. Howells acknowledged that some people are defensive when they are faced with an accusation, particularly as a first reaction. She acknowledged, as well, that some people need more time to process "learning moments", to work through the implications of their conduct. Ms. Howells also acknowledged that she did not believe the Grievor was trying to be disrespectful to North Preston, nor did she think that the Grievor intended to offend anyone.

Ms. Brophy's Evidence

87. As indicated, Paula Brophy took handwritten notes at the Grievor's interview. Her notes appear to have formed the basis for much of the contents of the termination letter. However, there are differences between the content of Ms. Brophy's notes and the termination letter. I have taken these differences into consideration in assessing the Grievor's response to the complaint.

88. The letter of termination does not mention that the Grievor acknowledged that anyone was upset by her post. The letter implies and it was Ms. Howells' evidence that the Grievor failed to acknowledge that her post could be read as targeting the North Preston community. However, both Ms. Brophy's testimony and her notes indicate that, after Ms. Howells read the Grievor's post out loud, the Grievor said, "...when wrote that see it could be hurtful".

89. In Ms. Brophy's notes, the Grievor is recorded as having pointed out that she did not say black people or people of North Preston in her post, but rather made a general observation. Further, she had made this same observation respecting Route 16 and her own backyard. When Ms. Howells put it to the Grievor that her post was tied to the North Preston community based on the preceding Facebook posts, Ms. Brophy's notes indicate that the Grievor responded, "yeah, I can see people relating it to that".

90. Ms. Brophy's notes indicate that when Ms. Howells asked the Grievor whether, in hindsight, she would still have posted the comment, the Grievor responded that "obviously, you (Ms. Howells) are upset". The notes also indicate that the Grievor replied that she will be more specific in her posts to be more clear and to not be misinterpreted.

91. The termination letter focuses on the idea that the Grievor did not believe that Terry Thomas or others were legitimately upset. Based on Ms. Brophy's notes, the Grievor appears to have eventually recognized during her interview with Ms. Howells that her post upset Ms. Howells and that her post could be interpreted as being tied to the North Preston community.

92. Ms. Brophy's notes indicate that, when the Grievor stated that she would "love to know who wrote the letter", she first stated, "one person in the room...pretty articulately written, only one or two that could write that". The note about "one person in the room" seems most likely to be a reference to co-workers that the Grievor was friendly with in the Employer's waiting room for bus operators awaiting assignments. Mr. Brophy's notes indicate that it was Ms. Howells who asked, "like who, black people", "like from that community?"

93. I find as fact that it was Ms. Howells who introduced the idea that the anonymous letter could only have been written by a few African Nova Scotians in North Preston. The Grievor then said, "black people who work here", and suggested that Terry Thomas's wife could have written the anonymous letter.

94. Ms. Brophy's notes also indicate that the Grievor stated, "camps already developing". Ms. Howells testified that she did not know what that meant. From this I presume that she did not ask. From her oral evidence, it appears that Ms. Howells assumed that "camps" were forming in the workplace around the issue of the Facebook posts as opposed to over the election. I mention this as the Employer submits that the Grievor only raised her concerns about Mr. Thomas trying to influence the election at the hearing. Given that the Grievor's reference to "camps developing" was not clarified at the interview, it is not clear on the evidence that the election was not of concern to the Grievor at the time. It is more probable than not that it was, given the likelihood that this would have been of concern to the Grievor.

Mr. Wilson's Evidence

95. Mr. Wilson recalls that the Grievor was simply stating that there were not many people that could have written the letter within the group of people that she hung around with at work. He understood that her comment, "one or two could write like that," was a reference to the "spare board" group of bus operators. He did not recall the Grievor stating "of the black people who work here".

96. Mr. Wilson gave evidence about the general educational level of bus operators employed by Halifax Transit based on his years of experience being involved with the Union and working with the membership. He indicated that, historically, a number of the bus operators could not read or write. Today the educational level of the more junior workers is much higher. He testified that the Union still has some senior members who have great difficulty writing. Mr. Wilson testified that he did not believe that Mr. Thomas could have written the letter of complaint. He referenced the fact that the Grievor had helped Mr. Thomas write a letter in the past and that another employee had helped Mr. Thomas with his taxes.

The Grievor's Evidence

97. On direct examination, the Grievor testified that the winter of 2015 was marked by significant snowfall. In some places the snowbanks were 25 feet high. By April 2015, the snow was melting. The Grievor worked for two weeks on Route 16 where she could see the snow banks dropping five to six feet everyday.

98. The road referenced in the Facebook posts is Lake Major Road. The Grievor testified that she was aware that there were issues with Lake Major Road being used as a dumping ground for years. She knew, as well, that this was a concern for the North Preston community. In 2012, the Grievor had taken a leave of absence to run for Council and had campaigned in North Preston. The Grievor testified that when she campaigned door-to-door, people in that community directed concerns to her respecting the issue of trash in that area.

99. The Grievor testified that there was not a day at work where the bus operators were not talking about the amount of garbage on the streets. The Grievor testified that she had a conversation with a lady while she was working Route 16 who was questioning why people simply would not pick up their garbage. The Grievor testified that her post was not intended to be about North Preston, but rather was intended to be more of an overview of the condition of the streets in the Halifax Regional area.

100. The Grievor testified that she first learned there was a problem with her Facebook post when she was approached by another employee in the lobby of the workplace and was told that she would be having a meeting with management. This employee told the Grievor to be careful about what she posts on Facebook. This employee also told the Grievor that Terry Thomas had a copy of the post the Greivor had made and that he was spreading it around the workplace. (The Union expressed concern about a breach of confidentiality by management, given that another employee found out that the Grievor was having a meeting with management. However, that issue is not one that is possible to address on the evidence or that is directly relevant to the main issue in this arbitration).

101. The Grievor testified that she was angry with Mr. Thomas because of the way he was handling the situation. The Grievor testified that she thought that Mr. Thomas was behind the anonymous letter, but she did not think that Mr. Thomas wrote the letter. He had come to her in the past, given her background as a teacher, and sought her help with writing an application to become a Human Rights Facilitator.

102. The Grievor testified that she was frustrated, angry and scared when she was interviewed by the Employer. She believed that Mr. Thomas had gone to management with very serious threats. She felt that, even though the letter was anonymous, management did not have any choice but to act on the letter, given the seriousness of the threats it contained, including threats of reprisals against bus operators. The Grievor testified that she was concerned that the Employer might take the letter of complaint to the police. She felt there was no way that she could react to this letter without losing her job. She was very concerned that she would be labelled a racist.

103. The Grievor testified that, because she did not know who wrote the letter, she did not know whether the person who wrote the letter was genuinely upset. She testified that the reason she thought perhaps the letter was not genuine was because of the election and Mr. Thoma's support of her competition.

104. The Grievor testified that she also knew that the sunset clause in the collective agreement would soon have come into effect. She testified that "a thousand things go through your mind when your neck is in the noose". She acknowledged being defensive in the meeting. She testified that she believed that Ms. Howells would not listen to her because she had had issues with Ms. Howells in this regard in the past. The Grievor testified that she felt that every question Ms. Howells was asking was trying to lead her into saying something she should not say. She described the interview as having been conducted by Ms. Howells in an "in your face, aggressive style". The Grievor described her reaction as follows, "When you're in a corner, your reaction is either fight or flight. Where there is nowhere to fly to, you fight".

105. The Grievor testified that she acknowledged to Ms. Howells that Ms. Howells was upset during her interview. However, the Grievor also acknowledged during her testimony that she may not have made it clear to Ms. Howells that she understood that her statement was very hurtful.

106. The Grievor testified that, when she was asked by Ms. Howells who could the write the letter of complaint in such an articulate manner, her response referenced people she hangs out with in the lobby. She does not recall making any reference to black people in the lobby. She does recall referring to Terry Thomas, who is an African Nova Scotian, when she said that "not many people here could have written it".

107. She testified that as a former teacher, she was familiar with assessing writing skills and had opportunities to observe some of her co-workers' writing skills at work. She testified that the opinion she expressed in this regard was based upon this experience.

108. The Grievor acknowledged calling Mr. Thomas the biggest racist in the garage. She said that she accused Mr. Thomas of this because he makes comments and uses nicknames about white people on almost a daily basis.

109. She explained that, during her interview, she showed Ms. Howells photos that were on her phone of what another driver put on his Facebook page. She testified that she did this, not to justify what she did, but rather to point out that another employee was posting offensive content without being disciplined.

110. The Grievor testified that, after she was terminated, she took further training that was offered by the Union, called the "Empathetic Program". She testified that the point of this training was to help a person look at themselves through the eyes of a third person. The Grievor stated that she found this training to be extremely helpful and that she had learned from this experience.

The Lack of Apology

111. The Grievor testified that she offered to apologize in the interview on May 28, 2015, but that she was told by the Employer that it was better if she let management handle it, as they were investigating the matter. It is not contested that, during her interview, the Grievor was commended for not approaching Mr. Thomas out of concern that the situation would escalate. The Grievor testified that she subsequently wrote to Mr. Robar with an apology, but received no response from him.

112. Ms. Howells recalled that the Grievor had gone to Mr. Wilson and offered to apologize after her termination. She did not recall the Grievor offering to apologize during the interview.

113. The Grievor did not apologize to Mr. Simmons when Mr. Simmons approached her in the workplace. I believe that the Grievor instead reacted to Mr. Simmon's state of upset and told him to "grow up".

114. The Grievor gave an apology during her testimony at the hearing via a statement that she had written and read aloud. In part, the statement states:

> Although it was not my intent to hurt, disappoint or make anyone in North Preston feel questioned about their integrity, goodness or pride in themselves or their community, I take full responsibility for the comments I wrote on FB that did indeed upset to a large degree some people within the North Preston community and people who I worked with.
>
> ...
>
> I have spent a year in shame, knowing the words I have written have hurt union brothers and sisters and members of the North Preston community.
>
> ....
>
> I understand and appreciate the importance of the history of which the African Canadian population have endured, the injustices and still present day prejudices they live daily with. I have tried my entire life to live my life as an empathetic friend of many African Canadians. Now, knowing I made a horrible mistake which has been seen by some to be unacceptable and outright wrong, I will spend the rest of my life working very hard to ensure this same careless mistake will not ever happen again.
>
> ....
>
> I am honestly and truly sorry I have hurt people in the community of North Preston. I am so very sorry I hurt friends by my thoughtless words.
>
> ....
>
> I understand their disappointment, their anger and their hurt Ricky and Terry have felt in the past year. The shame of this incident I have spent over a year internalizing, I own and I need to live with that for the rest of my life. But I can also assure you I have disappointed and hurt myself too and I have and will continue to use this to better myself, speak better and live better as a result of this.

The Grievor's Prior Disciplinary Record

115. As indicated, Ms. Howells placed significant weight upon the Grievor's prior disciplinary record, as she believed that the Grievor was engaging in a continuum of poor behaviour. The Union challenged the relevance of the Grievor's prior record.

A) Disputes Respecting Content of the Prior Record

116. The Union took issue with the Employer's position respecting what should be included in the Grievor's disciplinary record. Several previous disciplinary incidents had resulted in a penalty that was later reduced through negotiation. The Union objected to the content of the letters of discipline because they referenced the initial discipline and the negotiated outcome, rather than only the result.

117. I am disregarding evidence respecting the initial discipline and only accepting the evidence respecting the discipline that was imposed. In my view, it raises many unnecessary issues to re-open prior disciplinary history by considering the Employer's initial position respecting appropriate discipline and it is entirely unfair to do so for only one party. It is the result that matters.

118. The letter of termination that was given to the Grievor by the Employer included a reference to the Grievor being coached on June 28, 2011. The Employer submits that the incident that led to coaching is an example of similar unacceptable behaviour by the Grievor. The Union objected to this being included as part of the Grievor's disciplinary record on the basis that coaching is not discipline.

119. I agree that coaching is not discipline and have not taken this prior incident into consideration.

B) Evidence Respecting Prior Record

120. At the time of these events, the Grievor had worked for the Employer for 11 years, since June 26, 2005. Her past record of discipline related to incidents that occurred over the period 2011-2013. She had not had any discipline since June 26, 2013.

121. The disciplinary record that I have taken into consideration in the letter of termination of June 4, 2015 is described as follows in the letter and is repeated verbatim below.

122. On October 13, 2011, the Grievor received a letter of reprimand for two separate complaints:

> Complaint #1 - The Grievor refused a transfer from a passenger. When the Grievor's supervisor was speaking directly to the passenger, the passenger questioned the Grievor's decision and thought that the Grievor was only refusing him service because he was black. When the Grievor heard this, she stated "don't pull that fucking black thing with me."
>
> Complaint #2 - The Grievor would not allow a sick passenger off the bus until the bus reached the next stop. We were told the passenger had to puke in a garbage bag and then she let the passenger off at a stop where she stumbled and laid in the wet grass. The Grievor closed the door and drove off.

123. On January 4, 2012, the Grievor received three one-day suspensions for four separate complaints:

> Complaint #1 - A young man with autism was running to catch the bus operated by the Grievor. When he boarded, the Grievor said to him, "you ran like a retarded person up the street to catch this bus."
>
> Complaints #2 and #3 - A passenger rang the bell to get off the bus and the Grievor passed the stop and rudely yelled to the passenger that they rang the bell too early. The Grievor then missed a senior passenger at another stop and rudely responded to that passenger that she should have gotten another bus.

> Complaint #4 - The Grievor took issue with a young girl who had music on and said loudly to the passengers, "Whoever has their music on, turn it off." The Grievor then proceeded to get out of the driver seat and speak directly to the girl. She exchanged words with the young woman and followed her off the bus, further escalating the incident.

124. In addition to the discipline related to these incidents, the Grievor was required to complete a "Diversity and Inclusion" course consisting of two training modules on January 9 and 11, 2013. She also was required to take "Quality Customer Service" training on February 14 and 15, 2013 and "Workplace Rights" training on February 21, 2013. These courses were provided to the Grievor by the Employer to assist her in improving her conduct and performance.

125. On March 27, 2013, the Grievor received a three-day suspension for the following complaint:

> A three-year old child stumbled on the bus and the Grievor loudly said to the mother, "Can you put the child in her seat and keep her there before she splits her head wide open on the fare box."

126. On June 26, 2013, the Grievor received a nine-working day suspension for the following complaint:

> The Grievor drove past the stop where it was clear that the clients wanted her bus. When the Grievor stopped, she told the passengers, "People if you want my bus, you need to step forward. That's how they do it in the big cities."

<u>The Grievor's Evidence Respecting Her Prior Disciplinary Record</u>

127. The Grievor testified that she experienced significant personal issues during the period of 2011-2013 that impacted her behaviour and, therefore, her performance at work.

128. The Grievor testified that she was awaiting hip replacement surgery and was in significant pain. She was taking medication for the pain.

129. The Grievor testified that she was also dealing with the fact that her mother-in-law was dying of cancer. The Grievor was the executor to her mother-in-law's estate. Her mother-in-law passed away in June of 2012.

130. The Grievor testified that she was experiencing significant conflict with her boyfriend over the relevant period. She and her boyfriend broke up in May of 2013.

131. The Grievor testified that in 2011 her mother developed breast cancer. It was not until April 2013 that the Grievor's mother was diagnosed as cancer-free.

132. In January of 2012, the Grievor had hip replacement surgery. She testified that she stopped taking pain medication, after going through a withdrawal process. The Grievor testified that, after she "got off" the pain medication, she started thinking more clearly. She testified that it was, "like looking at a mirror and seeing someone else's face," and "like being in someone else's

body and mind". In hindsight, she realized that she had "a short fuse for everything, everybody, every situation". She testified that she did not recognize the statements that she made that are referenced in her disciplinary record.

133. The Grievor testified that she took steps to try to manage her behaviour and performance at work. The Grievor saw her family doctor and was prescribed anti-depressants. She went to Mr. Wilson for help through EAP. She also made a point of talking to her supervisors to obtain their perspective on how to handle conflict and difficult issues with passengers, to try to avoid further issues.

134. On cross-examination, the Employer's counsel obtained an admission from the Grievor that she had not raised these issues with management when she was disciplined in 2011-2013. The Grievor responded that she was advised not to do so by Mr. Wilson. She also testified that Ms. Howells had knowledge of some of her personal issues during this period based on their conversations at work.

135. Ms. Howells acknowledged that she knew that the Grievor had hip pain and knew about the Grievor's surgery. She testified, "You could visibly see she was in pain from the way she walked".

136. After the Grievor was given a nine-working day suspension on June 26, 2013, there were no further incidents of discipline until the issue over the Facebook post arose. Ms. Howells acknowledged that the Grievor had no problems with her performance during this period. While there had been a few complaints from customers, they were investigated and determined by the Employer to be unfounded. Ms. Howells agreed that whatever the Grievor had done to improve her performance was working, as her performance was markedly better.

137. The sunset clause in the Collective Agreement provides that discipline is removed from an employee's record after two years without the same or a similar offence. At the time the Grievor was terminated, she was 22 days away from having her disciplinary record expunged.

Evidence of the Grievor Not Accepting Responsibility in Other Contexts

138. The Employer took the position that there are other instances, in addition to the Grievor's disciplinary record, when the Grievor failed to accept responsibility or deflected blame to others. The Employer submits that these other examples evidence a consistent pattern of the Grievor deflecting responsibility and of not taking ownership of her actions.

139. As indicated, the Grievor took "Workplace Rights" training in February of 2013. The Grievor testified that, after she learned from the training what harassment is, she came to believe that she was being harassed by Ms. Howells. This belief was based on her conclusion that Ms. Howells was treating her differently than other employees.

140. In this regard, the Grievor believed that Ms. Howells had investigated a complaint from a passenger in an unfair manner. The Grievor testified that a tape was available of an exchange between herself and the complaining passenger. She testified that there was a practice in the workplace that whomever was investigating a complaint would listen to the tape. The Grievor testified that Ms. Howells declined to do so. The Grievor felt that Ms. Howells concluded that

she had likely yelled at the passenger based on her previous disciplinary record, rather than exercising due diligence in her investigation. The Grievor clarified that she thought that Ms. Howells was violating the harassment policy by making "demeaning comments... which undermine me in this workplace".

141. The Grievor testified that, the next day, Ms. Howells observed her speaking with another employee in the workplace. Ms. Howells reported the Grievor to the Vice-President of the Union Executive. The Grievor testified that there was nothing in the circumstances to warrant this reaction, as employees often talk to one another in this area of the workplace.

142. The Grievor also believed that Ms. Howells had been unfair in imposing discipline previously. Ms. Howells had decided upon a five-day suspension on the basis that the Grievor had been previously suspended for three days. In fact, the Grievor had received three one-day suspensions. The Grievor testified that Ms. Brophy was present at the time that Ms. Howells decided to impose a five-day suspension. The Grievor testified that Ms. Brophy knew that Ms. Howells was in error about the length of her previous suspension. She believed that Ms. Brophy was unfair in remaining silent. The Grievor alleges that Ms. Howells "jumped ahead" in the imposition of progressive discipline and that Ms. Brophy did not correct Ms. Howells, although she knew better and was prompted by the Grievor to correct Ms. Howells' error.

143. The Grievor filed a harassment complaint against Ms. Howells and Ms. Brophy in April of 2012. Ms. Howells was the person designated by the Employer to receive harassment complaints. The Grievor testified that this made it awkward to be supervised by Ms. Howells, but that she made the best of the situation and continued to interact with Ms. Howells as she usually did.

144. The Grievor wrote a letter of complaint to Mr. Robar concerning Ms. Howells' investigation of a subsequent complaint. She did so after she learned from her Union representative that Ms. Howells was considering giving her a "last chance" letter. The Grievor testified that she was concerned about Ms. Howells investigating a complaint which involved her when she had filed a harassment complaint against Ms. Howells.

145. The Grievor was also suspicious of the fact that the complaint in question was received eight days after the incident allegedly occurred. The Grievor testified that, typically, complaints from the public are received very soon after any perceived incident. The Grievor wondered if Ms. Howells coached the person claiming to be upset to make a call to complain. However, the Grievor offered no evidence to this effect. (The Employer submits that this suspicion is unreasonable and is an example of the Grievor escalating conflict and failing to take responsibility for her own actions by raising concerns about other people.)

146. As indicated, when the Grievor was interviewed concerning her Facebook posts, she referenced examples of posts made by another employee of Halifax Transit that she considered to be offensive. The Grievor also found additional posts before the hearing and provided them to the Union as evidence that there were problems with supervisors and employees posting inappropriately. The Employer submits that this is a further example of the Grievor deflecting blame.

147. As indicated, the Grievor took training offered to her post-termination by the Union, called the Empathetic Program, which was intended to increase self-awareness and empathy for others. The program instructor conducted a psychological profile before the training and after its completion. The test showed that the Grievor had an elevated sense of injustice going into the program. The test showed that the Grievor still had a relatively high perception of injustice leaving the program. It was suggested by the Employer that this demonstrates that the Grievor believes her supervisors are out to get her and that she will not be able to work effectively with them in the future. In part, this is why the Employer submits that the Grievor should not be reinstated.

148. It is undisputed that when the Grievor attended the Empathetic Program, one of the first things that she said in discussions with the instructor was that she had almost been without discipline long enough for the sunset clause in the collective agreement to come into effect. Counsel for the Employer submits that the Grievor was focussed on her own sense of injustice rather than on the fact that what she did was wrong.

149. The Employer submits that these instances show that the Grievor consistently does not accept responsibility for her actions and that, because of this, it was reasonable for the Employer to conclude that her unacceptable behaviours will continue.

150. The Union asserts that there is nothing wrong with the Grievor finding other examples of inappropriate social media posts and using these to challenge her termination. The Union submits that the Grievor is entitled to defend herself in this arbitration. The Union submits that the Grievor was entitled to file a harassment complaint against her supervisors if she believed that she was being harassed or if she believed that complaints involving her were investigated in an unfair manner. The Union submits that the Grievor should be able to raise concerns respecting the fairness of the investigations and decisions of Ms. Howells and others in this arbitration without being accused of failing to take responsibility.

History of Disciplining for Social Media

151. The Union provided evidence of inappropriate social media posts made by employees of Halifax Transit, including by supervisors. I will not detail their content here, but will note that some of these posts are highly inappropriate. The Union's position is that the Grievor is being unfairly singled out for discipline and termination.

152. Mr. Wilson testified that he could not recall other employees being disciplined over social media posts. He did, however, testify that an employee had been disciplined for having posted on Facebook under a false identity. The employee had communicated with Ms. Brophy via Facebook to try to gain confidential information about a disciplinary case in which he was the Grievor. Mr. Wilson testified that this employee was given a suspension of 10 days, without prejudice and without precedent.

153. Ms. Brophy testified that she received coaching for her part in the incident, because she divulged confidential information. The Union points out that coaching is not disciplinary action. Ms. Brophy testified that she did not receive her normal pay increase that year because of what occurred.

Submissions on Behalf of the Employer

154. Employer's counsel submits that the Employer had a responsibility to investigate the Facebook posts that were brought to its attention via the written complaint. The Employer denies that there is any practice to not investigate anonymous complaints. In any event, the Employer states that it is not relying upon the letter of complaint for the truth of its contents, but rather, the Facebook posts that were attached.

155. The Employer acknowledges that the Grievor's Facebook post is not, as an isolated incident, just cause for the termination of her employment. However, the Employer submits that it did have just cause to terminate the Grievor's employment given her extensive disciplinary record, its use of progressive discipline and the training it provided to the Grievor without success.

156. The Employer submits that the Grievor's Facebook post is offensive and insulting. The Employer submits that it is very clear that her posts are in relation to North Preston and did not concern the greater Halifax Regional Municipality.

157. The Employer submits that the evidence of two of the Grievor's co-workers, Mr. Simmons and Mr. Thomas, demonstrates that they were personally hurt and had reservations about working with the Grievor again. The Employer submits that the Grievor did not demonstrate remorse but rather "threw stones at the persons hurt by the postings."

158. The Employer submits that the Grievor has a history of insensitive behaviour, of creating conflict and of then escalating that conflict. This has resulted in her having an extensive disciplinary record. Counsel submits that the Grievor's previous disciplinary incidents involved her making very hurtful statements to other people, including the occasion when the Grievor told the young autistic person that he ran "like a retarded person". Counsel for the Employer submits that a further example is when the Grievor told a female passenger who was sick to "puke in a bag."

159. Counsel for the Employer submits that the Grievor's previous record of unacceptable comments to passengers is indistinguishable from the way her posts on Facebook were received by her co-workers. While the communications occurred through a different medium and to a different audience, counsel submits that what is important is "what" is said and not "where" the message is conveyed.

160. Counsel for the Employer referenced the Grievor driving her bus past people waiting to catch the bus, creating safety issues. Her excuse was that she was trying to teach people how to signal the bus. Counsel submits that the Grievor effectively insulted the people she was rude to, by driving past them.

161. The Employer submits that the Grievor is attempting to avoid responsibility by insinuating that the previous disciplinary events happened because she had health issues, was on medication and was experiencing significant stress. The Employer submits that none of these issues were raised during the relevant disciplinary meetings at the time and that the Grievor is raising these issues now to save her job.

162. Employer's counsel submits that the Grievor had Workplace Rights training, and, instead of learning about herself, she concluded that she had been harassed by Ms. Howells and Ms. Brophy. Employer's counsel submits that Ms. Howells was simply trying to manage the Grievor. Counsel submits that there is no evidence of any conduct by Ms. Howells (beyond any possible context offered by a disciplinary meeting with the Grievor) that would constitute harassment. Counsel for the Employer points out that, when he cross-examined the Grievor respecting what the alleged harassment was, the Grievor gave an example of Ms. Howells joining individuals at lunch and not saying hello to her. Counsel submits that Ms. Howells' failure to say hello could have been inadvertence.

163. The Employer submits that it employed progressive discipline in reaction to the Grievor's behaviour. Employer's counsel submits that the Grievor was given ample warning of the possible consequences of her behaviour if it continued, including the fact that it could lead to her termination. Counsel highlights the disciplinary letter of June 26, 2013 and the following statement within it:

> You are advised that continuation of your employment with Halifax Transit is in serious jeopardy and you should treat this letter as your last chance for you to correct your behaviour. Consider yourself fully warned that failure to see improvements in your conduct will almost certainly result in the termination of your employment, and you should govern yourself accordingly.

Counsel submits that the Grievor's termination should have come as no surprise to her.

164. Counsel for the Employer submits that there are various other instances in the evidence that demonstrate that the Grievor has a pattern of behaviour where she does not take responsibility for her actions and deflects blame from herself.

165. Counsel submits that, despite the training given to the Grievor by both the Employer and the Union, there has been no actual change in the Grievor's attitude.

166. The Employer submits that the apology the Grievor gave at the hearing is not sincere. The Employer submits the Grievor is sorrier that she was caught than sorry for what she did. In support of this submission, the Employer compared the Grievor's evidence at the hearing with her apology. The Employer submits that, at first, the Grievor blamed the problem on her co-worker, Mr. Thomas, accusing him of being "the biggest racist going". The Employer submits that at the hearing, the Grievor tried to suggest that the problem was the election and that someone was trying to brand her as a racist to get her fired. The Employer submits that the evidence does not support the conclusion that it was Mr. Thomas trying to influence the outcome of the election. The Employer submits that Mr. Thomas was clearly hurt and the Grievor failed to accept his simple explanation that he was hurt by the attack on his community. Employer's counsel submits that the Grievor will state in her evidence that she takes ownership of her failings but that she still deflects responsibility to others.

167. Counsel for the Employer submits that the Grievor's post on Facebook continues to be a problem for the Employer because it is not possible to contain further publication of her post on the Internet. Counsel raised the spectre of future harm to the Employer's reputation on the

basis that the Grievor had run for Council in the past and could again. Counsel voiced concern that someone could resurrect the Facebook post to show that the Grievor should not be elected.

168. The Employer also suggests that the Grievor went online after her posts became an issue to find inappropriate posts made by other employees to deflect attention from herself. Counsel suggests that the Grievor is wrong to suggest that she did not do anything wrong relative to what these other employees did.

169. The Employer submits that there is a significant risk to the Employer that there will be further unacceptable incidents like the Facebook comments made by the Grievor, or further risks to passengers, for example, if the Grievor makes passengers run for the bus or makes another comment like the one she made to the autistic individual. The Employer submits that this risk is so significant that termination of the Grievor's employment is warranted.

170. In the alternative, the Employer submits that, if it did not have just cause to terminate the Grievor's employment, the employment relationship is irretrievably damaged, such that the Grievor should not be reinstated, but rather, should receive damages in lieu of reinstatement.

Submissions on Behalf of the Union

171. The Union disputes whether the Facebook post was cause for discipline at all. The Union submits that the Grievor's conduct occurred while she was off-duty. The Union submits that the Employer's interests are not actually engaged by the Grievor's off-duty conduct in this case and that she was free to post her own personal opinions as she wished.

172. In this regard, the Union submits that it was the Employer's practice to not investigate anonymous complaints. The Union submits that this complaint should not have been investigated and led to discipline. Secondly, the Union asserts that the Employer decided to not police its employees' communications on social media. The Employer also did not have a social media policy. The Union submits that this means that the Employer did not have standards or a "rule" respecting social media and that the Employer, in these circumstances, cannot claim that its business interests were engaged by the Grievor's off-duty conduct.

173. The Union also suggests that Ms. Howells terminated the Grievor because of the Grievor's alleged statement during her interview that not many "black people" could have written the letter of complaint and not just because of her Facebook comment. Counsel for the Union submits that Ms. Howells wrongly concluded that the Grievor would make further discriminating comments in the workplace. Union counsel submits that Ms. Howells, as a white middle-class person, has engaged in reverse discrimination by over-reacting in her own "rush to judgment" that the Grievor is racist. The Union further submits that the Employer was required to give notice pursuant to the Collective Agreement that it intended to rely on this additional comment to justify the Grievor's termination and failed to do so.

174. The Union sites the comparative treatment by the Employer of Mr. Driscoll and Mr. Balsar who were not disciplined. Counsel for the Union submits that a review of the substance of the interviews of the three employees involved in the Facebook posts demonstrates that their

responses to the Employer were very similar. Counsel submits that there was nothing about the Grievor's response in comparison that should have led to the termination of her employment.

175. The Union submits that, if the Grievor's conduct warrants discipline, termination is excessive. Counsel argues that the Grievor should have been reprimanded for her Facebook comment. Union counsel highlighted Ms. Howells' evidence that, had Mr. Balsar not shown remorse when he was interviewed by Ms. Howells, he would have been reprimanded.

176. The Union submits that the Employer is being unfair in the Grievor's case by singling her out for termination over a social media post when it has no social media policy and does not police the social media use of its employees.

177. The Union submits that the Employer did not apply progressive discipline fairly. The Union submits that, if the Grievor's Facebook post is cause for discipline, it is a first offence. The Union submits that the Facebook post is not of the same nature as the events that gave rise to the Grievor's disciplinary record. Union counsel submits that none of the prior discipline involved off-duty conduct or social media posts. Counsel submits that these factual differences categorize the Grievor's Facebook post as a fresh event for purposes of discipline such that the Grievor's prior disciplinary record is of no or limited relevance.

178. The Union submits that the last letter of discipline the Grievor received in June of 2013 did not state that, if there was one more incident, the Grievor would be fired. The Union submits that the letter states that, if the Employer did not "see improvement" in the Grievor's performance, she would be fired. The Union submits that, on the evidence, the Grievor satisfied the Employer's requirement that she show improvement.

179. The Union highlighted the evidence that the Grievor had 23 months of good performance prior to the Facebook post. The Union submits that her 23 months of good performance is relevant because the point of applying progressive discipline is to allow an employee an opportunity to demonstrate that they can improve. The Union emphasizes that the evidence, including that of Ms. Howells, clearly shows that the Grievor showed substantive improvement over this period.

180. The Union submits that it was appropriate for the Grievor to raise concerns about unfair treatment and to raise the issue of harassment by Ms. Howells. The Union asserts that the Grievor has a right to raise her concerns without having this being characterized as a refusal to accept responsibility. The Union submits that "accepting responsibility" does not preclude the Grievor from trying to get her job back or require that she accept every characterization of events offered by the Employer.

181. The Union submits that this case is an example of an employer rushing to judgment and that this Employer pre-determined that the Grievor had done something wrong based on her prior disciplinary record. The Union submits that the Grievor was defensive during the investigation because she quite correctly became concerned that she would not be given a fair chance by the Employer and that there would not be a fair investigation. The Union submits that the Employer has demonstrated an attitude that the Grievor must be terminated at all costs.

182. The Union seeks reinstatement of the Grievor with full back pay. It disputes the Employer's submission that this is a case where reinstatement should not be considered. The Union asked that I hear further submissions from the parties if I determine that reinstatement is not an appropriate remedy.

183. In the event that I find that the Grievor's conduct warrants discipline and that her prior disciplinary record is relevant, the Union submits that the Grievor should have received a 12-day or 30-day suspension rather than have been terminated from her position. The Union submits that such a suspension would have been in accordance with the Employer's practices respecting progressive discipline.

Analysis

Issue One: Does the Grievor's Conduct Warrant Discipline?

184. There is no issue that the Greivor posted as she did and no disagreement between the parties about the legal principles applicable to this case. We begin with the question of whether the Grievor has "given just and reasonable cause for some form of discipline by the employer": *William Scott Co. v C.F.A.W., Local P-162,* 1976 Carswell BC 518 ("William Scott"), at para 11.

185. I will turn first to the issues that touch upon the scope of the Employer's authority over the subject matter of the Grievor's conduct and whether the Facebook post is the kind of conduct that can be considered grounds for discipline.

Was it Appropriate for the Employer to Investigate the Anonymous Complaint?

186. The Union provided Mr. Wilson's testimony to support the existence of a practice in the workplace to not investigate anonymous complaints. This evidence is too general to prove that there is a consistent, established practice in this regard. I am more persuaded by Ms. Howells' evidence that "it depends" on the circumstances. There are anonymous complaints that could be capable of being investigated and which would be sufficiently serious to warrant investigation. While some anonymous complaints were disregarded, it seems more probable than not that this is because they lacked particulars. I am not persuaded on the evidence that there was a blanket agreement, tacit or otherwise, to not investigate any complaint that was anonymous.

187. In this case, it was reasonable for the Employer to investigate the anonymous complaint. The Facebook posts were attached to the anonymous letter. There is no dispute about whether the posts were made by the employees involved and the content is available to be assessed. The complaint was of a serious nature. While the letter of complaint was anonymous, the subject matter of the complaint was not conjecture or rumour. Even if the author of the letter was insincere in expressing upset and outrage over the posts, that people reading the posts, particularly residents of North Preston, could be offended or upset is a matter of common sense and may reasonably be assumed given the content of the Facebook posts.

Should the Employer Have Investigated Who Wrote the Letter of Complaint?

188. The Union submits that the handling of this complaint by the Employer was unfair as the Employer did not investigate who wrote the letter. The Union submits that additional evidence could have come to light that could, presumably, have been helpful to the Grievor's case. The Employer submits that this argument is a "red herring".

189. The identity of whomever wrote the letter of complaint and their motivations is not a determinative issue in this case for several reasons. The issue in this case is whether the post made by the Grievor is just cause for discipline. It is the Facebook posts themselves that are in issue and there is no dispute over their authorship.

190. The Employer is not relying on the letter of complaint for the truth of its contents. I am not accepting the letter as evidence that the author was truly upset or as direct proof that the North Preston community was upset and offended by these posts. For the benefit of the Grievor, it could even be assumed that this letter was written by someone deliberately trying to embarrass the Grievor during the election, who was insincere and not truly upset by the posts.

191. The Facebook posts were made in a public forum. They came to the attention of the Grievor's co-workers. These include Mr. Simmons, Mr. Thomas and those employees who were shown the posts by Mr. Thomas. Mr. Simmons approached the Grievor in the workplace. An argument ensued that was brought to Ms. Howell's attention by a third employee. Ms. Howells investigated what occurred. On the facts, the Facebook posts came to the Employer's attention through these events, as well as via the letter of complaint.

192. I also question whether, on a practical basis, the identity of the author could have been determined. Mr. Thomas was not a fully cooperative witness. He refused to identify the person from whom he obtained a copy of the Grievor's Facebook post during his testimony. Under cross-examination, Mr. Thomas gave agitated responses and denied trying to talk another employee out of coming to the hearing to give evidence in support of the Grievor. He then implicitly contradicted his testimony by testifying that he "did not recall getting mad at" this potential witness.

193. I also found that Mr. Thomas offered disingenuous evidence as a witness about his involvement in publishing the contents of the Facebook posts in the workplace. It is more probable than not that Mr. Thomas brought the posts to work and showed them to people to cause the Grievor difficulty in garnering support in the election.

194. Given these credibility issues, I doubt that Mr. Thomas would have acknowledged playing a part in the preparation of this letter during the hearing had he been questioned by the parties on this point. Notwithstanding the Grievor's belief that the anonymous letter was likely written on behalf of Mr. Thomas, there is insufficient evidence to permit a factual finding that Mr. Thomas or someone acting on his behalf was the author. The posts were seen by other employees, anyone of whom could have authored the letter. Notably, I was not asked to make such a finding by the Union.

195. Ultimately, in my view, given the limitations of the available evidence respecting authorship of the letter and the fact that the Grievor's Facebook post came to the attention of the Employer in any event, nothing turns on the Employer's decision to not investigate who wrote the complaint.

Did the Grievor Engage in Off-Duty Conduct That is Not Subject to Disciplinary Action by the Employer?

196. The Union submits that the Grievor admits that she was wrong to post the comment she made on Facebook, but that does not mean that the Grievor can or should be disciplined for her comment.

197. The Union submits that the Employer has no authority over the Grievor because the Facebook post constitutes off-duty conduct that does not engage the Employer's business interests. Counsel for the Union points out that employees can do all kinds of wrong things outside of work. That does not mean that their employer is entitled to delve into their behaviour off-duty. As stated in Brown & Beatty at para 7:3010:

> Arbitrators have always drawn a line between employees' working and private lives. They often make the point that employers are not custodians of the characters or reputations of their employees. The basic rule is that an employer has no jurisdiction or authority over what employees do...outside working hours, unless it can show that its legitimate business interests are effected in some way.

198. The Union submits that the Grievor was not holding herself out as an employee of Halifax Transit in her post and that she did not identify that she was a bus driver. The Union submits that there is no connection between the Grievor's post and the Employer's concern about its reputation. The Union submits that there is no evidence that the Employer's business interests were affected by the Facebook posts. The Union submits that the Employer is required to undertake a meaningful assessment of how their interests are effected and can "not rely on unsubstantiated supposition and speculation": Brown & Beatty, Canadian Labour Arbitration (4th) (Canada Law Book, 2007), at para 7:3010.

199. Both parties provided authorities that referenced the well-acceptable test to be applied in considering off-duty conduct set out in *Re Millhaven Fibres Ltd., Millhaven Works and Oil, Chemical and Atomic Workers Int'l Union, Local 9-670* [1967], O.L.A.A. 1 (A) Union-Management Arbitration Cases 328 ("*Millhaven*"), as follows:

> ...If the discharge is to be sustained on the basis of the justifiable reason arising out of conduct away from the place of work, there is an onus on the Company to show that:
>
> (1) the conduct of the grievor harms the Company's reputation or product
> (2) the grievor's behaviour renders the employee unable to perform his duties satisfactorily
> (3) the grievor's behavior leads to refusal, reluctance or inability of the other employees to work with him

> (4) the grievor has been guilty of a serious breach of the Criminal Code and thus rendering his conduct injurious to the general reputation of the Company and its employees
> (5) places difficulty in the way of the Company properly carrying out its function of efficiently managing its Works and efficiently directing its working forces.
>
> I would add that... that the general consensus among arbitrators is that it is not necessary for an employer to show all of the [above] criteria exists, but rather that, depending on the degree of impact of the offence, any one of the consequences may warrant discipline or discharge...

200. I will address only those criteria that were argued before me. The Employer relies primarily on the first component of the test in *Millhaven*. The Employer asserts that the Grievor's conduct in posting as she did on Facebook harms the reputation of Halifax Transit.

201. The Employer provided authority for the proposition that the Employer does not have to produce evidence of widespread reputational harm through direct evidence of public controversy or negative attention in the press. Rather, it need only establish that the Grievor's conduct has the potential for significant detriment to its business, reputation or ability to operate its business effectively. For example, in *Canada Post Corp. V. Canadian Union of Postal Workers* [2012] C.L.A.D. No. 85, Arbitrator Ponak held, at para 101:

> There is ample case law that supports the principle that what employees write in their Facebook postings, blogs, and e-mails, if publicly decimated and destructive of workplace relationships can result in discipline (*Naylor Publications; Chatham-Kent; Government of Alberta; Wasaya Airways; Lougheed Imports,* and *EV Logistics*).

And at para 108:

> The fact that the Grievor was under a misapprehension about who could access her Facebook site, however, does not relieve her from the responsibility for what she wrote. The Grievor demonstrated a degree of recklessness in not even considering how easily her postings could be spread, even if restricted to just her Facebook friends. (see *EV Logistics*, para 60 and *Wasaya Airways*, p 63). There is nothing, for example, to prevent friends from forwarding a posting to other friends.... The Grievor greatly increased the likelihood that her postings would be eventually discovered by management by having current and former postal workers among her friends. This brought her Facebook postings directly into the workplace, undermining any claim her site was intended as a private, non-work, forum.

202. Similarly, the Employer relies on the *Toronto District School Board v. CUPE, Local 4400* [2009] O.L.A.A.A. No.10, at para 65:

> Actual or potential reputational damage to a public school board as a result of an employee's off-duty misconduct need not be proven through direct evidence of negative press scrutiny and/or public controversy or similar substantiation.

203. The Employer further relies on *Tobin v. Canada (Attorney General)* 2009 FCA 254, at para 62, in support of its position that direct evidence of loss of reputation is not required:

> ... The question is one which calls for the application of common sense and measured judgment...

204. Other relevant authorities on the issue of the assessment of reputational harm offered by the Employer include *Wasaya Airways LP v. Air Line Pilots Assn., International* [2010] C.L.A.D. No. 297 ("*Wasaya Airways*") and *Ottawa-Carleton District School Board v. Ontario Secondary School Teachers' Federation, District 25 Plant Support Staff, 2006* CanLII 60956 (ON LA), ("*Ottawa-Carleton*"). In *Ottawa-Carleton*, the majority stressed that a reputational concern must have a real and material connection to the workplace and be both substantial and warranted, at para 17:

> In order for an employee's off-duty conduct to provide grounds for discipline and discharge, it must have a real and material connection to the workplace in the manner described above [*Re Millhaven Fibres, supra*]. And where the interest asserted by the employer, as it is here, is in its public reputation and its ability to be able to successfully carry out its works, the concern must be both substantial and warranted. The test, so far as possible, is an objective one: what would a reasonable and fair-minded member of the public (in this case, the school community), think if apprised of all the relevant facts. Would the continued employment of the grievor, in all of the circumstances, so damage the reputation of the employer as to render that employment impossible or untenable?

a) Does the Grievor's Conduct Have a Real and Material Connection to the Workplace?

205. The Employer submits that the Grievor's post has had an adverse impact on its workplace by creating conflict. The Employer submits that the conflict involving both Mr. Simmons and Mr. Thomas are examples. The Employer submits that it had two employees who were badly impacted in that they were very hurt by the Grievor's post. The Grievor's post resulted in a complaint that required investigation by the Employer. The Employer submits, as well, that it will have an on-going problem with Mr. Simmons and Mr. Thomas if the Grievor is reinstated, as the evidence is that they are reluctant to work with the Grievor.

206. In my view, the Grievor's post has a real and material connection to the workplace. Three co-workers were all posting about what they saw while driving for Halifax Transit. The Grievor's post was shared with friends on Mr. Driscoll's site who were co-workers. The post came to the attention of additional co-workers, such as Mr. Simmons and Mr. Thomas. I found Mr. Simmons to be a very credible witness and I accept his evidence that he was greatly upset by the Grievor's post. Notwithstanding my conclusions respecting Mr. Thomas' credibility, I accept Mr. Thomas' evidence that he was upset by the Grievor's post. The reaction of these co-workers led to disruptions at the workplace and conflict between employees. The incident with Mr. Simmons particularly illustrates the impact of the post in the workplace.

b) Is the Employer's Reputational Interest Substantial and Warranted?

207. Is the reputational interest asserted by the Employer "substantial and warranted" such that a fair-minded member of the community served by Halifax Transit, informed of all the facts, would conclude that the continued employment of the Grievor is untenable? In my view, this test requires two stages of analysis. The first is whether the reputational interest asserted by the Employer is substantial and warranted such that some form of discipline is warranted. This should be assessed in light of what "a fair-minded" member of the community served by Halifax Transit, who is informed of all the facts, would conclude. The further consideration is whether that "fair-minded person" would conclude that the reputational interest asserted by the Employer is substantial and warranted such that the Grievor's continued employment is untenable, when the Grievor's dismissal is the issue.

208. The Employer highlights that Halifax Transit exists to serve the public transportation needs of the Halifax Regional Municipality community. The Employer submits that I can find that its reputation has been harmed by applying "common sense and measured judgment" based on the offensiveness of the Griever's post: see *Tobin, supra,* at p.46. The Employer submits that it is at risk of suffering further reputational harm, particularly if more members of the North Preston community become aware of the Grievor's conduct. In short, the Employer submits that if the Grievor's post becomes more public, people in the North Preston community will have significant concerns about using Halifax Transit. The Employer submits that these members of the community are more than just customers, but rather are effectively shareholders of Halifax Transit as taxpayers and that they have a right to expect that they will be treated with respect. The Employer submits that the Grievor's conduct places the improvement in its relationship with the North Preston community at serious risk. The Employer submits that these concerns are substantial and warranted.

209. I find that the Grievor's post has a significant potential to harm the reputation of the Employer. I make this finding not based on any evidence of widespread harm in terms of existing outrage within the North Preston community, but simply because as a matter of common sense, it is reasonable to conclude that the Grievor's post would be upsetting to the residents of the North Preston area. The post was offensive to the Grievor's co-workers who live in this area. The potential for further community outrage is reasonable. The post targets a client community of an employer that serves the public and is obligated to maintain a good relationship with the public. The taxpayers in North Preston who help to pay for this service are entitled to expect that they will not be disrespected or be singled out for ridicule in a public forum by those who operate its transit service. It is also reasonable to conclude that residents of other communities would be offended, both in support of North Preston and/or due to concern that their community could likewise become the target of public ridicule by transit employees. These concerns are substantial and warranted. The concerns rightly engage the business interests of the Employer.

210. Given the above, I find that a fair-minded person, informed of all the facts, would conclude that the Grievor's conduct warrants discipline. The Employer has met the onus of proving that the Grievor's conduct harms or has the strong potential to harm the Employer's reputation as set out in the first criteria of the test for determining the relevance of off-duty conduct in *Millhaven*.

211. However, would a fair-minded member of the community served by Halifax Transit, informed of all the facts, conclude that the reputational harm to the Employer is so substantial and warranted that the continued employment of the Grievor is untenable? The analysis of whether there is just cause for termination based on reputational harm includes the consideration of mitigating circumstances: *Cape Breton-Victoria Regional School Board v Canadian Union of Public Employees, Local 5050* (2011) NSCA 9, at paras 45-49.

212. I am not persuaded that a fair-minded individual would conclude, even with knowledge of the Grievor's prior disciplinary history, that the reputational interests of the Employer are *so* substantial and warranted that she could not perform her job or ultimately that her continued employment is untenable. The Grievor's post is simply not sufficiently egregious to persuade me that this is the case. Further, in my view, the issue of whether the continued employment of the Grievor is untenable (given the Employer's reputational interests) should be considered in the broader context of whether termination is an excessive response to off-duty conduct that warrants discipline. This requires an analysis of all mitigating factors. I will address what I find to be the relevant mitigating factors in this case in the section of these reasons where I address the issue of whether termination was an excessive response.

Willingness to Work With the Grievor

213. In *Millhaven,* it was emphasized that not all the criteria that determine the relevance of off-duty conduct need to be met. Accordingly, it is not strictly necessary to address the further criteria relied upon by the Employer, given the finding above. However, several submissions made by the Employer are important and, therefore, will be addressed.

214. The Employer submitted that the Grievor's conduct meets the third criteria in the test in *Millhaven* respecting off-duty conduct, namely, that the Grievor's behaviour "leads to refusal, reluctance or inability of other employees to work with him". The Employer relies on *Wasaya Airways* as an example of where a grievor's misconduct led management personnel to be reluctant to work with the grievor and the grievor was not reinstated. Counsel for the Employer submits that the Grievor's co-workers, Mr. Simmons and Mr. Thomas, were clearly reluctant to work with the Grievor.

215. When Mr. Simmons was interviewed following the incident with the Grievor, Ms. Howells noted that Mr. Simmons stated, "People who think like that have no business working here. I don't feel it's a safe place with her comments". Notwithstanding this evidence, the testimony of Mr. Simmons is that he would not hold any animosity towards the Grievor. He testified that he did not believe that they would necessarily see each other at work.

216. Mr. Thomas appeared to be open to the prospect of the Grievor returning to work, as well, and supported her request to go to arbitration.

217. In reply, the Employer submitted that I should make a finding that these witnesses were unwilling or reluctant to work with the Grievor based on their demeanor at the hearing. Having observed the demeanor of these witnesses, I am not prepared to conclude that these witnesses down-played their true feelings about the Grievor's potential return.

218. These employees may have some understandable reluctance to work again with the Grievor. They no longer hold any interest in maintaining a friendship with her. However, some reluctance can be reasonably expected in the aftermath of any workplace conflict. The reluctance expressed by these witnesses is not sufficiently significant, hostile or unresolvable to meet the third criteria in *Millhaven*. I am also not convinced that there will be a practical problem if the Grievor returns to the workplace. The evidence of these witnesses is that they would be unlikely to see much of the Grievor if she returns to the workplace.

Breach of the *Human Rights Act*

219. The Employer also relied on the fourth criteria in *Millhaven* which recognizes that off-duty conduct may be grounds for discipline where a grievor has been guilty of a serious breach of the Criminal Code that impacts the Employer's reputation. By analogy, the Employer submits that the Grievor's post is contrary to the Nova Scotia *Human Rights Act,* and, as such, her conduct is injurious to the general reputation of the Employer. I agree that the fourth criteria in *Millhaven* should be read expansively to include a serious breach of the *Human Rights Act*. However, the facts of this case do not warrant such a finding.

220. There is no evidence of any concern or perception that the Grievor had a racist attitude or held racist beliefs from her co-workers. Even Mr. Simmons, who was greatly upset by the Grievor's posts and who pulled no punches about how offended and hurt he was, was very careful to not categorize the Grievor's comments in her post as racist, both when he confronted her in the workplace and during his testimony.

221. Ms. Howells acknowledged during her testimony that she did not believe that the Grievor intended to be racist.

222. I do not believe that the Grievor intended to make a racialized comment. The evidence is that the Grievor was on very friendly terms with co-workers who were African Nova Scotians including Mr. Simmons and Mr. Thomas. She had helped Mr. Thomas obtain his position as a Human Rights Facilitator. The Grievor testified that she had run for Council, in part, to represent the North Preston community. She offered testimony that she had objected to racism when confronted with it in a family situation. I accept the Grievor's evidence that she did not intend to say anything racist.

223. Counsel for the Union submits that the Grievor's intention to engage in misconduct is a relevant consideration in the context of an arbitration. Counsel submits that an arbitration is not the same as a complaint pursuant to the *Human Rights Act*, where intent to discriminate is not required for conduct to constitute a breach of the *Human Rights Act*. I am not making a finding respecting whether the Grievor's post would constitute a breach of the *Human Rights Act*. In the context of an arbitration, I agree that her intention is relevant.

224. In the absence of the contextual evidence presented in this case, the Grievor's post is capable of being interpreted as having racial overtones. However, I am considering her post in context. In my view, the Grievor's comment on Facebook is insulting. However, it was Mr. Driscoll who selected a road to the North Preston area for public comment. The Grievor's post is primarily offensive because it links the dumping and non-removal of garbage to the community's sense of

pride. That is what makes her post so offensive. I accept the Grievor's testimony that she had similar views about other areas in the Halifax Regional Municipality that had a similar garbage problem. If the initial post had been made about some other area in the Halifax Regional Municipality with the same garbage problem, I believe that the Grievor would have made the same post in reaction. In other words, I do not believe that the point of the Grievor's post was to seize an opportunity to denigrate North Preston. I believe that her intent was to seize the opportunity to complain, or to advertise her opinion to an audience, about the garbage she was seeing along the roadways in the Halifax Regional Municipality. In doing so, she was hurtful and grossly insensitive to the North Preston area, given its history.

225. In assessing the egregiousness of the Grievor's post, her intent and the context of her post, it is relevant to consider the Facebook posts made by her co-workers. The posts made by the other bus drivers are just as capable of being characterized as racist as the Grievor's offensive post about the community lacking pride. Mr. Driscoll, who initiated the criticism of the North Preston area, referenced details such as seeing "an entire toilet" on the side of the road on the way to North Preston. Given the history of the community, this goes beyond an innocuous reference to garbage. Identifying "an entire toilet" exposes the community to ridicule. Mr. Balsar went so far as to indicate his desire to take photos to post online. His post raised the spectre of the community being further ridiculed through pictures, given the visual impact of photographs. Mr. Balsar's post is inherently threatening, as it leaves the reader wondering what would have happened if he had added photos to his post.

226. The Employer did not label the posts of these co-workers as racist or advise them that their posts were contrary to the *Human Rights Act*. That the Employer did not do so undermines its suggestion now that the Grievor's post was considered at the time to be a serious breach of the *Human Rights Act* and injurious to the general reputation of the Employer, equivalent to a serious breach of the Criminal Code. I am not prepared to make such a finding now in these circumstances.

Was the Comment Worthy of Discipline?

227. The Grievor's post is an insensitive and disrespectful comment about a community that, because of its history, has a strong sense of pride and has endured decades of unfair criticism and prejudice. One of the community's known concerns is that Lake Major Road has been a dumping ground for garbage for years by people, many of whom are not residents of North Preston.

228. The Grievor had campaigned for Council office in that area and discussed this issue with residents, among other community concerns. Her insensitivity to how her post would be received, particularly if read by someone from that area, is difficult to comprehend. In my view, the Grievor's post is worthy of discipline.

Was the Grievor's Additional Comment at the Interview Grounds for Discipline?

229. As indicated, the Union submits that the "final straw" that led to the Grievor's termination was not the Facebook post, but rather the comment she made or was perceived to have made during her interview, namely, that there were only one or two black people articulate enough to write the anonymous letter (the "additional comment"). Ms. Howells acknowledged that the

Grievor's additional comment was a factor in her determination that termination was an appropriate disciplinary outcome.

230. The Union submits that, if the Grievor made the additional comment, the comment was made in a private meeting with the Employer such that the Grievor's comment cannot be said to impact the Employer's business interests and cannot result in discipline. The Union also submits that the Employer should not be able to rely upon the additional comment as a ground for the Grievor's termination, as it did not give notice to the Grievor that it considered her comment to be deserving of discipline. Article 8.01 of the Collective Agreement requires that the Employer give the employee notice of any complaint, policy or rule violations within 15 days of the Employer's knowledge.

231. The Employer submits that it ought not to be required to give additional notice of anything stated by a grievor in an interview respecting potential discipline. Counsel for the Employer points out that the additional comment was made when the Grievor had her union representative present. Counsel asserts that there is no need to have a further information meeting to discuss what was said at an earlier information meeting.

232. I find that Ms. Howells inadvertently put words into the Grievor's mouth by characterizing the options for the Grievor's response to her question about who wrote the letter on the basis of race. In my view, Ms. Howells then over-reacted to the Grievor's comment because she did not recognize how she contributed to the content of the discussion and the Grievor's response.

233. Having initiated the characterization, Ms. Howells did not identify that she had a difficulty with the Grievor adopting her characterization. The Grievor and Mr. Wilson cannot be faulted on these facts for failing to appreciate Ms. Howell's interpretation of the Grievor's statement during the meeting or the significance she ascribed to it subsequently.

234. For her part, the Grievor compounded the situation by agreeing with Ms. Howells and not articulately explaining what she meant. The Grievor should have clarified that her conclusion about authorship of the letter of complaint related to her assessment, as a former teacher, of the writing skills of her co-workers who were African Nova Scotians, who would presumably be the individuals most likely to be upset by the post, and, therefore, those most likely to have authored the anonymous complaint.

235. I accept Mr. Wilson's evidence that a number of the older bus operators possessed minimal writing skills. The co-workers involved in these incidents were older bus operators. It is clear on the evidence that, when the Grievor responded, she was thinking that Mr. Thomas or someone on his behalf wrote the letter. Mr. Thomas was known to have required assistance with writing letters. However, this is not what the Grievor said at that moment. The Grievor handled the situation poorly and compounded Ms. Howells' concerns.

236. The fact that the comment was made in an internal meeting with the Employer does not disengage the Employer's business interests. The Grievor was a vocal person who had recently advertised what can only minimally be described as an ill-considered opinion on Facebook. In theory, if the Grievor would express racist views to the Employer during an interview or information meeting, the purpose of which was to assess potential discipline, that is a matter

that should properly have concerned the Employer. It was reasonable for the Employer to consider the Grievor's response during that meeting as relevant to its business interests.

237. Because Ms. Howells did not voice her concern to the Grievor during their meeting, there was no opportunity for the Grievor to explain what she meant or to point out that she was reacting to what Ms. Howells said. In the result, the Grievor was not given notice that her comment was deserving or potentially deserving of discipline. After the information meeting, and prior to issuance of the letter of termination, Ms. Howells did not give any indication to the Grievor or to Mr. Wilson that the Grievor's additional comment was perceived as warranting the Grievor's termination in whole or in part.

238. Typically, comments made by a grievor responding to a complaint will not give rise to a separate ground for termination and require specific additional notice pursuant to the Collective Agreement. Usually a grievor's comments will be relevant to the issue of whether there are mitigating factors related to the grievor's attitude, insight and honesty with the Employer. Such comments will not constitute a policy or rule violation.

239. This is not a case where the Grievor is alleged to have made a further rude or defensive comment during an interview. I find that Ms. Howells considered the Grievor's comment to be a discriminatory comment, separate in content and independent of her Facebook post. The Employer took the position in the letter of termination that the Grievor had made additional discriminatory comments. If the Employer intends to rely upon a comment made by the Grievor in an interview about her Facebook post as constituting a "stand alone" breach of the *Human Rights Act*, that constitutes a serious allegation of a policy or rule violation. On these facts, the Grievor should have been given notice that the Employer considered her comment to be grounds for discipline, as required by the Collective Agreement.

240. To this I would add that, in part, notice was required because the Employer's reliance on the additional comment permitted the Employer to have a factual basis to conclude that the Grievor had engaged in repetitious discriminatory comments, that she would continue to make discriminatory comments and that this warranted her termination. The seriousness of the allegation and the extent that repetition is a significant factor in the context of discrimination cases requires that notice be given under the Collective Agreement.

241. Accordingly, I find that there was a substantive procedural defect related to the Employer's failure to provide the Grievor with notice pursuant to Article 8.01 of the Collective Agreement. Accordingly, the "additional comment" perceived to have been made by the Grievor cannot ground a finding that discipline was warranted.

242. However, in my assessment, the Employer would have terminated the Grievor in any event for her Facebook post. As indicated at a later point in these reasons, I conclude that the Employer believed that it had reached the point in progressive discipline that it could terminate the Grievor. While the additional comment is excluded from consideration of whether the Grievor's conduct was deserving of discipline, the Grievor's Facebook post nonetheless warranted discipline on its own.

Is the Employer Able to Discipline the Grievor Given its Policies and Practices?

243. The Union submits that this case is unique in that the Employer's business interests in the Grievor's off-duty conduct are not engaged because the Employer does not have a social media policy, does not monitor the social media posts of its employees and has not disciplined other employees who have posted inappropriate content via social media. I will address each of these submissions in turn.

a) Does the Absence of a Social Media Policy Mean That the Employer Cannot Discipline the Grievor for her Social Media Post?

244. The Employer had clearly communicated that respect for customers is a core value in its Operator's Handbook and Daily Planner. The Grievor was aware of the policies contained in the Handbook. She had been disciplined before over issues related to being respectful. It should have been driven home to her that she needed to be respectful to the public served by Halifax Transit. She should have reasonably anticipated that it would not be acceptable to be disrespectful about customers on the internet to a potentially world-wide audience.

245. On these facts, it is not necessary for the Employer to have a separate social media policy that gives its employees notice that disrespectful comments about its customers are specifically and equally wrong in the context of publishing comments worldwide on social media. If the Grievor's Facebook comment engages the Employer's business interests and it is contrary to the Employer's known policies, no further notice should be required. Notice to employees that posting a comment on Facebook is equivalent to a public announcement may have been required when Facebook was new and unknown to many people. Today, there is no basis for the Grievor to assume that her post could remain private. As stated by Arbitrator Newman in the *City of Toronto-Toronto Professional Fire Fighters' Association, Local 3888, supra*, at p. 10:

> There are three problems with the Association's position regarding the grievor's belief that his messages were private. First, the arbitral jurisprudence proposes that "where the internet is used to display commentary or opinion, the individual doing so must be assumed to have known that there is potential for virtually world-wide access to those statements". (Wasaya Airlines LP and A.L.P.A., (2010) 195 L.A.C. (4th) 1 (Marcotte)).
>
> I agree with that reasoning. We may all be guilty of using services and devices without thoroughly reviewing the lengthy terms, rules, and conditions of service. But when engaging in social media use, it is my view that the user must accept responsibility when the content of his or her communications is disseminated in exactly the manner promoted by the social media provider. This is what social media is intended to do. Once we use these devices, once we load that gun, it is potentially dangerous.

246. Further, employees should know that social media posts may be relevant off-duty conduct. This point is now well-established in the case law. An employer does not have to give its employees notice of every form of off-duty conduct that could engage its business interests, rather, policies that make the substance of the behaviour clearly unacceptable should suffice, barring some mitigating circumstance.

b) Does the Employer's Practice of Not Monitoring Social Media Posts Mean That the Employer Cannot Discipline the Grievor?

247. The Employer received a complaint, and, in accordance with its practice, initiated an investigation of that complaint. In my view, Mr. Wilson's evidence that the Employer advised him that it would not police the social media posts of its employees does not equate to an agreement by the Employer to not investigate social media posts if a complaint is received.

248. There is no legal obligation upon the Employer to monitor posts before it can discipline an employee for posting a disrespectful comment. I was referred to no legal authority to this effect. Accordingly, the Employer's practice of not monitoring social media posts by its employees does not preclude its ability to investigate and take disciplinary action in an appropriate case when it receives a complaint.

c) Does the Fact That Other Employees Posted Inappropriate Content Without Being Disciplined (Because of the Employer's Failure to Police Social Media) Lead to the Conclusion That the Grievor Should not be Disciplined?

249. In my view, the Grievor can be disciplined even though other employees posted inappropriate content on social media. The Grievor is responsible for her own conduct. The other employees who posted inappropriately had not been "caught" or did not become the subject of complaint at the time the Grievor was investigated. That circumstance does not relieve the Grievor of responsibility for her own actions.

250. If the evidence had been that the Employer had knowledge of the inappropriate posts by other employees and chose not to investigate and did not issue discipline for inappropriate posts, I would have found that the Employer singled out the Grievor for unfair treatment and held that the Employer cannot discipline the Grievor. However, the evidence is that when issues involving social media came to the Employer's attention, these issues were at least investigated and considered for discipline. I reference Mr. Wilson's testimony that another employee was disciplined for impersonating another person on Facebook to access confidential information and Ms. Brophy's evidence that she was investigated and given coaching for her role in that incident. Mr. Wilson also testified that he subsequently brought the inappropriate posts of supervisors to the attention of the Employer. The Employer's reaction was to agree to investigate. The evidence is consistent that the Employer initiated investigation and disciplinary action when it received complaints or had concerns brought to its attention.

d) Should the Fact That Two Other Employees Who Made Inappropriate Posts Were Not Disciplined Lead to the Conclusion That the Grievor Should Not be Disciplined?

251. While Mr. Driscoll and Mr. Balsar were not disciplined for their Facebook posts, I find that the posts made by the Grievor's co-workers were considered worthy of potential discipline by the Employer. I accept Ms. Howells' evidence that Mr. Balsar would have been reprimanded had he insisted on his ability to have taken photographs of the garbage along Lake Major Road. This was a first offence for these employees, each of whom had unblemished performance records.

252. On the other hand, the Grievor had what I have determined to be a relevant prior disciplinary record demonstrating repetitive conduct. I have no difficulty finding that it is fair to discipline the Grievor and not her co-workers given the comparative employment history of these employees.

ISSUE TWO: Was the Employer's Decision to Terminate the Grievor an Excessive Response in the Circumstances?

253. The parties are in general agreement respecting the factors to be considered in evaluating whether I should uphold the Grievor's dismissal or substitute a lesser disciplinary outcome. These factors are listed in *William Scott, supra* and *Steel Equipment Co. Ltd.* (1964), 14 L.A.C. 356, at pp 40-41:

> 1. The previous good record of the grievor.
> 2. The long service of the grievor.
> 3. Whether or not the offence was an isolated incident in the employment history of the grievor.
> 4. Provocation.
> 5. Whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses, or whether the offence was premeditated.
> 6. Whether the penalty imposed has created a special economic hardship for the grievor in the light of his particular circumstances.
> 7. Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination.
> 8. Circumstances negativing intent, e.g. likelihood that the grievor misunderstood the nature or intent of an order given to him, and as a result disobeyed it.
> 9. The seriousness of the offence in terms of company policy and company obligations.
> 10. Any other circumstances which the board should properly take into consideration, e.g., (a) failure of the grievor to apologize and settle the matter after being given an opportunity to do so; (b) where a grievor was discharged for improper driving of company equipment and the company, for the first time, issued rules governing the conduct of drivers after the discharge, this was held to be a mitigating circumstance; (c) failure of the company to permit the grievor to explain or deny the alleged offence.
>
> The board does not wish to be understood that the above catalogue of circumstances which it believes the board should take into consideration in determining whether disciplinary action taken by the company should be mitigated and varied, is either exhaustive or conclusive. Every case must be determined on its own merits and every case is different, bringing to light in its evidence differing considerations which a board of arbitration must consider.

254. At para 12, *William Scott, supra* further reframes the above-noted relevant considerations. Of these, the potential mitigating factors in issue in this case may be paraphrased from *William Scott, supra* as follows:

(a) The seriousness of the disciplinary offence of the Grievor in terms of company polices and obligations;

(b) Whether the Grievor intended the offence or misunderstood;

(c) The Grievor's work record, her employment history and the related considerations of whether the Grievor's offence is repetitive, demonstrates a pattern of poor judgment or is an isolated incident, momentary aberration or a "first offence" in her employment history;

(d) Has the employer tried to address the discipline of the Grievor through progressive discipline and training;

(e) Is the Grievor's termination in accordance with established policies of the Employer or does it single out the Grievor for arbitrary and harsh treatment;

(f) Whether the Grievor apologized and was remorseful.

In reference to subparagraph (c) above, I will address two related issues: (i) whether the Grievor's prior disciplinary record involves similar misconduct, and, (ii) the Employer's submission that the sunset clause in the Collective Agreement must be enforced. In addition to these factors, the Union submitted that the alleged unfairness of the Employer's investigation is a mitigating factor in assessing disciplinary penalty. I will address that issue in paragraph (g) below.

(a) How Serious is the Grievor's Offence?

255. In *Canada Post Corp. v Canadian Union of Postal Workers (Discharge for Facebook postings Grievance,* CUPW 730-07-01912, Arb. Ponak) [2012] C.L.A.D. No. 85, a clerk with Canada Post made postings on her Facebook account over a one-month period. I have reviewed the Facebook posts cited at para 32 of that decision. There were 26 postings on 14 separate dates, many of which contained threats and cruel comments about her supervisors and the employer. Two of the targets of these postings required significant time off work for emotional distress. The fact that the posts targeted one person and invited others to join in led Arbitrator Ponak to comment, "the current case is unprecedented in repeated mockery, threatening language, the vile insults, and the debasement of an identifiable manager". In reaching this conclusion, Arbitrator Ponak compared the posts in question with those reported in other social media cases. He upheld the grievor's termination.

256. I also considered *Toronto (City) v Toronto Professional Fire Fighters' Association, Local 3888,* 2014 CanLII 76886 (ON LA), where a grievor made a series of comments on Twitter which were found to be sexist, racist and misogynist. In deciding to uphold the Grievor's termination, Arbitrator Newman conducted a comparative analysis of the case law at p. 13 of her decision:

> The Association argues that the conduct is not in a serious range of off-duty conduct. There is no criminal act, such as there was in the case of *Toronto District School Board v CUPE Local 4400,* (2009) 1363 (Luborsky). There was no intentional

dissemination of hate or racism as there was in the case of *Ross v. Board of School Trustees, District No. 5,* 1996 CanLII 237 (SCC), [1996] 1 S.C.R. 825. There was no individual co-worker or management that was a target of internet harassment as there was in *Canada Post Corporation v CUPW,* (2010) 216 A.C. (4th) 207. There was no intention to disparage the employer, as there was in *Barrick Gold Corp. v Lopehandia* (2004), CanLII 12938. There was no intention to lash out against the entire community that the employer serves, such as was described in *Wasaya Airways and A.L.P.A.,* (2010) 195 L.A.C. (4th) 1. The Association's point is well made. The arbitral jurisprudence has been consistent in upholding discharge in cases of off-duty conduct only in situations in which that conduct has been very serious.

257. I have explained at an earlier point in these reasons why I consider the Grievor's offence to be serious from the perspective of the Employer's obligations to the public and given its policies. However, whether the Grievor's social media post, as an off-duty offence, warrants termination is a further issue, one that requires a comparative approach reflective of the case law.

258. *Wasaya Airways* is perhaps most akin to this case. In that case, the grievor's Facebook post was of a racial nature and was directed towards First Nations people who regularly fly on the employers' aircraft. The statements made by the grievor on Facebook were not repeated in the reasons for decision, given the employer's continued concerns about the potential impact of the statements upon the public it serves, thus, it is not possible to do a direct comparison of the content of the post in that case with the post in issue here. However, the Grievor's comments were characterized by Arbitrator Marcotte, at para 44, as "despicable and the denigration of the company's customers who are First Nations and owners of the company is crystal clear".

259. *Wasaya Airways* involved a single incident of comments being posted on Facebook. Nonetheless, the arbitrator concluded that the grievor's misconduct had the potential for significant detrimental effect on the company's reputation and ability to conduct its business. He also concluded that the grievor's misconduct had poisoned the work environment, therefore rendering the employment relationship untenable. A single post may, therefore, justify termination.

260. However, the Grievor's Facebook post is not as despicable as many of the examples in the case law cited above. It contains no threats, vile insults, or personalized attacks on individuals. There was no intention to be racist. The Grievor's post does not disparage the Employer. The post was made in reaction to other offensive posts that would likely have led to a reprimand had they resulted in disciplinary action. The Grievor's post is clearly offensive to customers in the North Preston community, but from my understanding, it is not as offensive as the comments in *Wasaya Airways, supra* in detail or content.

261. To be clear, the Employer acknowledged that the Grievor's post on its own would not warrant the Grievor's termination. However, the seriousness of the Grievor's misconduct is such an important issue in the overall context of this case, the issue warrants some analysis in these reasons based on an objective, comparative approach. Absent the Employer's acknowledgement, I would have found that the Grievor's post is serious misconduct but not serious enough misconduct to warrant her termination.

(b) Did the Grievor Intend the Offence or Misunderstand What was Expected?

262. The Employer submits that its policies require employees to be respectful to customers and that these policies were known to the Grievor. The Union submits that the Employer failed to have a rule or standard in the workplace respecting social media; accordingly, her termination cannot be justified: *Lumber & Sawmill Workers' Union, Local 2537 v KVP Co.,* 1965 CarswellOnt 618 (Ont. Arb).

263. As explained above, I am satisfied that the Grievor knew that she was expected to be respectful towards customers. She knew of the Employer's policies, she had been disciplined repeatedly before for being disrespectful to the public and she had received training on multiple occasions which should have increased her sensitivity and self-awareness of these principles of conduct towards the public. Even the Grievor testified that, upon reflecting on some of the comments that she had made that led to her prior discipline, it was as if someone else had made those comments. She expressed dismay at her own conduct.

264. It cannot reasonably be stated that the Grievor misunderstood what was expected of her by way of behaviour in this respect. She admits that what she posted was wrong. The lack of a specific social media policy (one that would presumably restate the requirement of respect for the public in the context of on-line activity) does not erase the fact that the Grievor on these facts should have known that it was wrong to post as she did.

(c) What is the Grievor's Employment History and Is the Offence a "First Offence" or Part of a Pattern?

265. The Grievor has 11 years of service. Her employment history is marred by a series of disciplinary incidents over the period 2011 to 2013, as described in the letter of termination.

(c)(i) Does the Grievor's Prior Disciplinary Record Involve Similar Misconduct?

266. The Union submits that the Grievor's offence was of a different nature than the Grievor's post-disciplinary record as it involved social media and off-duty conduct. The Union submits that her record should not have been considered in relation to penalty. With respect, I disagree.

267. The Grievor's prior conduct involved disrespect towards customers and the public served by Halifax Transit. Her Facebook post is disrespectful of a community of customers. In my view, it does not matter whether the Grievor's disrespectful comment was made behind the wheel of a bus to passengers or while seated at her computer at home. The Grievor published a comment in a public forum to a potentially unlimited audience. "Where" this occurred is not important. The Grievor's lack of judgement is the issue.

268. I have determined that it was reasonable for the Employer to take the Grievor's prior disciplinary record into account in determining an appropriate disciplinary outcome as her record involved similar misconduct. Accordingly, I find that the Grievor's misconduct is repetitive. A significant disciplinary penalty is warranted.

(c)(ii) Is the Grievor's Prior Disciplinary Record Subject to the Sunset Clause?

269. The Employer submits that sunset clauses negotiated as part of the Collective Agreement represent the agreement between the parties as to what is reasonable and are to be given effect: *Labatt Alberta Brewery v Local 250 Brewery Workers* (Cropley Grievance), [2004] A.G.A.A. No. 63; *Re American Barrick Corp. (Holt-McDermott) Mine and U.S.W.A. Local 6409* [1992] O.L.A.A. No. 192. Accordingly, the Employer submits that I must enforce the sunset clause and fully consider the Grievor's prior disciplinary record. The Union does not truly take issue with this, but rather highlights the Grievor's lengthy period of improvement within the sunset period.

270. I agree with the Employer's submission. The sunset clause should not be treated as if it came into effect early. That would be contrary to what the Collective Agreement provides. Accordingly, the Grievor's entire disciplinary record is to be considered. The Grievor's disciplinary record, as a pattern of behaviour, supports the Employer's conclusion that termination was warranted.

271. However, the timing of the application of the sunset clause provides only part of the factual context in this case. The time frame over which the disciplinary offences occurred and any extensive period of improvement is also relevant. All four prior disciplinary penalties, issued in relation to eight complaints, occurred between October of 2011 and June of 2013. What followed was 23 months of substantial improvement, as per the evidence of Ms. Howells.

272. In my view, the Employer had an obligation to be fair in assessing penalty. To be fair, the Employer was required to take all directly relevant circumstances into consideration, namely both the Grievor's prior disciplinary record and her 23 months of improvement. The Employer should have given some weight to the latter.

273. On the evidence presented to me, the Employer failed to consider that the Grievor had improved over the 23 months since her last discipline. The Employer only considered her prior record. To put it another way, the Employer only considered the fact that the sunset clause had not yet come into effect. The Employer's position is that it had provided the Greivor with sufficient warning that she would be terminated for a repeated offence. It had a repeat offence before it. There is no evidence that it considered the Grievor's extended period of improvement. In my view, a 23-month period of improved performance with no repeated disciplinary incident is a significant mitigating factor in determining whether termination is warranted. It ought to have led the Employer to consider whether termination was the only and correct option.

(c)(iii) Was the Conduct Premeditated or Repetitive, or Instead Was it a Momentary and Emotional Aberration?

274. The Grievor's conduct can fairly be characterized as pre-meditated, as she intended to post her opinion.

275. The Grievor's post was not an emotional aberration, as the Grievor was not provoked or upset at the time.

276. Was it a momentary aberration? The Grievor demonstrated that she can impose self-control and filtered her comments to customers during the 23-month period of her improved performance before this incident occurred. In my view, the Grievor had a momentary lapse in judgment likely because she was at home at the time and did not think about the implications for her workplace before she hit "send". This does not excuse her comment or her poor judgment for which she must take responsibility. However, given these facts, I conclude that the Grievor is at low risk of making further posts that would impact the workplace. It is more likely than not that the Greivor will be able to resume her methods of handling conflict with customers as she demonstrated prior to what I find was an "unthinking moment". Also, the Grievor has now gone through the experience of being terminated. She should well grasp the implications for her employment if she permits herself to further indulge in the public expression of negative opinions respecting customers of Halifax Transit.

(d) Has the Employer Attempted Training and Progressive Discipline Which did Not Prove Successful?

277. The Employer provided training to the Grievor to assist her in handling difficult situations at work. While the training was not exactly "on point" in terms of content relevant to the Grievor's misconduct, the training appears to have been effective to a notable extent given that the Grievor improved her performance for a 23-month period.

278. Primarily, the Employer submits that termination is warranted because it was following its progressive discipline policy and used corrective discipline. The Employer had advised the Grievor in writing at the time of her last discipline in 2013 that, if she did not improve, she would be terminated. In my view, the Grievor should have known that a further similar incident could be perceived as a failure to improve and lead to termination. However, some consideration should be given to the fact that the Grievor had improved for such a significant period. Both training and corrective discipline had been successful to a noteworthy extent.

(e) Is the Termination of the Grievor in Accord with the Consistent Policies of the Employer or Does it Appear to Single Out the Grievor for Arbitrary and Harsh Treatment?

279. The Union submits that both the Employer's failure to have a social media policy and the Employer's decision to not police social media means that the Employer has singled out the Grievor for arbitrary and harsh treatment in terminating her employment. The Union invites a comparison of the penalty of termination in the Grievor's case to the complete lack of disciplinary response to other employees who had similarly posted offensive comments on social media. The Union referenced *Metropolitan Authority and ATU, Local 508, Re* (1989), 15 C.L.A.S. 10, 1989 CarswellNS 692, at p 24 as authority for the principle that disciplinary responses need to be consistent in similar cases.

280. At the hearing there was clear evidence that other employees, including supervisors, published inappropriate social media posts. Some of their posts were more offensive than what the Grievor posted. However, these employees had not been caught at the time the Grievor was disciplined. It is not possible on the evidence presented to conduct a comparative analysis of disciplinary response.

281. The Grievor brought an example of an inappropriate post to the attention of the Employer at her interview. There was no evidence that the Employer turned its mind to the issue of whether this information was relevant to the issue of penalty and whether termination was the appropriate outcome. In my view, it has some relevance to that issue. The fact that the Employer did not turn its mind to this issue leaves the impression that the Grievor has been singled out for termination. This fact mitigates against the Grievor's termination.

(f) Whether the Grievor Apologized and was Remorseful

282. In my view, the Grievor has demonstrated a pattern of deflecting blame from herself and has been very slow to accept responsibility for her own actions. I believe that the Grievor's tendency to deflect blame was compounded at the time of her interview because she allowed her fear of being labelled a racist during the election to get the better of her. I also find that the Grievor failed to show remorse prior to her termination. Her failure to apologize to Mr. Simmons is telling.

283. However, after her termination, and, by the time of the hearing, the Grievor appears to have absorbed the message that she hurt her co-workers and was offensive to the North Preston community. I believe that her apology at the hearing was sincere. This is a factor that mitigates somewhat against her termination.

g) Was the Employer's Decision to Terminate the Grievor the Result of: a) Bias; or b) A Rush to Judgment?

a) Was the Employer's Decision to Terminate the Grievor Biased?

284. The Union submits that Ms. Howells was biased against the Grievor because the Grievor had filed a harassment complaint against Ms. Howells in the past. However, there was no direct evidence that the complaint formed part of Ms. Howells decision-making respecting the Grievor's termination.

285. Ms. Howells' evidence was that she did not recall the complaint. It was referred to an external investigator. There is an indication in the documentation that the investigator intended to call Ms. Howells. However, there is no evidence that the complaint was discussed with Ms. Howells and nothing came of the Grievor's complaint. It was left unaddressed for months. The Grievor herself did not require a resolution of her complaint.

286. I would require some evidence that Ms. Howells was aware of the Grievor's harassment complaint to form a foundation for determining whether Ms. Howells was biased by the existence of the complaint.

287. The interactions between Ms. Howells and the Grievor both during the events in issue and the hearing demonstrate that, despite their differences of opinion, they can act in a professional manner towards one another. In my view on these facts, there is no legal basis to determine that termination is excessive in this case due to bias arising from the Grievor's harassment complaint against Ms. Howells.

b) Was the Employer's Investigation and Decision to Terminate the Grievor a Rush to Judgment?

288. The Union submits that Ms. Howells had a predisposition to believe that the Grievor had been disrespectful and that she rushed to judgement in deciding that termination was warranted. The Union submits that *A.U.P.E. v Alberta Health Services* 2012 Carswell Alta 353, at para 68, is an example of a case where an employer failed to properly consider the seriousness of the Grievor's off-duty conduct and mitigating considerations in its investigation.

289. It is understandable that Ms. Howells would be quick to conclude that the Grievor's post was worthy of discipline. Ms. Howells had read the post. There was no issue about who authored the post or its content. It was offensive on its face. Ms. Howells had knowledge of the Grievor's prior disciplinary record. It was reasonable for her to consider the prior discipline to involve similar misconduct.

290. However, I conclude that Ms. Howells did have a predisposition to believe that any further "slip up" by the Grievor would justify termination. I reach this conclusion, in part, because there is no evidence that Ms. Howells actively considered both the Grievor's 23 months of good behaviour and her prior disciplinary record.

291. Ms. Howells also did not appear to recognize that the Grievor's response and the response of that of Mr. Driscoll did not differ substantively in terms of the explanation both offered for their posts. Both employees indicated that they did not intend to single out the North Preston community. Mr. Driscoll's explanation was accepted by the Employer, although his post began with the words, "Things seen on the side of the road going up to North Preston".

292. Ms. Howells testified that the fact Mr. Driscoll apologized and the Grievor did not made a significant difference in her mind. I have found that Ms. Howells is mistaken in her recollection of events. The evidence is that the decision to not discipline Mr. Driscoll was made before any apology was offered.

293. The above facts are inconsistent with an objective and accurate assessment. Had Ms. Howells considered these facts, she likely would and should have concluded that immediate termination of the Grievor was not warranted by the Grievor's Facebook post.

294. I am also left with a concern respecting the Employer's perception that the Grievor's post was worse than that of her co-workers. The Employer suggested that the fact that Mr. Thomas and Mr. Simmons complained about the Grievor's post and not about the posts made by Mr. Driscoll and Mr. Balsar validates its position that the Grievor's post was more hurtful. Mr. Thomas and Mr. Simmons did not offer evidence to this effect. There was no evidence that they were asked why they were expressing outrage over the Grievor's post and not those of her co-workers by the Employer during the investigation. There could be any number of reasons why Mr. Thomas and Mr. Simmons were vocal in their upset about the Grievor's post and not the posts by Mr. Driscoll and Mr. Balsar. Mr. Simmons volunteered during his testimony that the reason he was so hurt by the Grievor's post was because he and the Grievor were friends at work.

295. I have a concern that the Employer's assumption that the Grievor's post was the worst, because of the reaction of these two co-workers, too quickly accelerated the Employer's conclusion that termination of the Grievor was warranted.

Was Termination an Excessive Response?

296. Based on my findings that certain mitigating factors exist in this case, as described above, I conclude that termination of the Grievor was an excessive response in all the circumstances.

What Alternative Disciplinary Measure Should be Substituted in All the Circumstances?

297. I am required to determine what alternative disciplinary measure should be substituted in this case. I am mindful of the evidence of Ms. Howells to the effect that, had Mr. Balsar not been remorseful and had he insisted upon his right to post on Facebook as he wished, he would have received a reprimand.

298. The Grievor has a significant record of prior discipline for similar misconduct and had already reached the last stages of progressive discipline. She did not apologize until the hearing.

299. At the time the Grievor was last disciplined in June 2013, she received a nine-working day suspension. As noted above, while not an absolute rule, the typical disciplinary case progressed to a 12-day or 30-day suspension after a 10-day suspension, prior to termination.

300. In all the circumstances, I conclude that the Grievor should have received a 30-day suspension as an appropriate disciplinary penalty for her off-duty conduct. I reach this conclusion primarily because the content of her post is sufficiently offensive to warrant this result and because of her prior disciplinary record. I am also influenced by the lingering potential that this post will come to the attention of the North Preston community or to the public at large which would cause further harm to the Employer's legitimate business interests. It is true that the Grievor's post may never come to light again. However, the Grievor created a situation whereby she has exposed her Employer to an ongoing risk of significant embarrassment and reputational harm. A lengthy suspension is warranted.

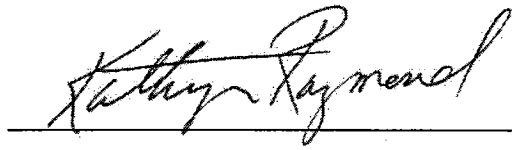
Order

301. For these reasons, I order that the Grievor's termination be rescinded and that the Grievor instead be suspended for a period of 30 days without pay. Otherwise, the Grievor is entitled to compensation to replace 75% of her loss of earnings from the date her suspension would have ended until the date of reinstatement to her employment. I am exercising my discretion to adjust the amount of lost earnings the Grievor receives in this case. In my view, the Grievor's highly defensive response to the Employer about the complaint was unnecessary on these facts and contributed to the Employer's conclusion that her continued employment was untenable. Further, any amounts received by the Grievor in mitigation of her loss of earnings over this period are to be first deducted from the total amount of compensation she would have received.

302. I will reserve jurisdiction to deal with any issues respecting implementation of this award for 60 days.

303. I would like to thank Mr. Kinghorne and Ms. Turner for the care they took in the presentation of the evidence and their submissions.

Dated at Halifax Regional Municipality, Nova Scotia, this 17th day of February, 2017.



Kathryn A. Raymond
Arbitrator