ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **0249-19-G**

Labourers' International Union of North America, Local 183, Applicant v **CTS (ASDE) Inc.**, Responding Party

OLRB Case No: **2580-19-G**

Labourers' International Union of North America, Local 183, Applicant v **CTS (ASDE) Inc.**, Responding Party

OLRB Case No: **2581-19-G**

Labourers' International Union of North America, Local 183, Applicant v **CTS (ASDE) Inc.**, Responding Party

BEFORE: Patrick Kelly, Vice-Chair

APPEARANCES: James Robbins, Michael McDonough, Evaristo Paisana, Patrick Sheridan and Alexis Williams for the Applicant; Walter Thornton, Colin Dougherty, Prateek Awasthi and David Galvin for the Responding Party

DECISION OF THE BOARD: February 23, 2022

1. These are referrals of grievances to arbitration under section 133 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act").

2. The grievances in Board Files No. 0249-19-G and 2580-19-G deal with layoffs (characterized by the applicant as unjust dismissals/ wrongful terminations) of the grievor, Alexis Williams ("the Grievor" or "Mr. Williams") in March and April 2019 respectively. The grievance in Board File No. 2581-19-G is in response to the discharge from

employment of Mr. Williams on August 28, 2019. All three grievances allege violations of the applicable collective agreement and the Ontario *Human Rights Code* (discrimination on the basis of disability and/or race and/or national origin). The parties agreed that these matters should be heard together.

3. The parties further agreed that the Board should first determine the merits of the grievances and, if warranted, remit any issues concerning remedial relief to the parties. This decision, therefore, deals only with whether the grievances should be upheld or dismissed.

The Evidence

Background

4. Mr. Williams is a Black man. He was born in St. Vincent and emigrated to Canada in 1985. He has extensive work experience in the construction industry.

5. Mr. Williams was employed as a Labourer-Journeyman by CTS (ASDE) Inc. ("the Company" or "the Employer") for a period of approximately two years (August 2017 until August 2019) on a major Toronto construction project known as the Eglinton Crosstown LRT Project ("the Project") which consists of a long stretch of underground transit stations and all-grade stops from just west of Keele Street to east of Warden Avenue. The Grievor worked at four different underground transit stations during his employment, first at Laird Station, then at Leaside (Bayview) Station, followed by Avenue Station, and finally at Forest Hill (Bathurst) Station where his employment was terminated.

6. Each of the underground transit stations has its own dedicated management headed by a Project Manager. However, the labour relations function is centralized for the entire Project under David Galvin ("Mr. Galvin"), the Company's Labour Relations Manager. Mr. Galvin deals with several unions on the Project, including the applicant and another union, Labourers' International Union of North America, Local 506 ("Local 506"). Mr. Galvin has extremely broad labour relations experience across several sectors. He personally handles all the grievances that arise under the collective agreement with the Heavy Construction Association of Toronto to which the applicant is bound, and he provides labour relations advice to the Project's management staff. Mr. Galvin reviews and approves requests for labour from each transit station's Superintendent and makes requests to each union for referrals

from the hiring hall. He also reviews any planned layoffs, and keeps the applicable union informed of layoffs as they occur. Mr. Galvin testified that typically a labourer facing layoff is not instead transferred to another station unless the individual has special skills that are required elsewhere on the Project.

7. Mr. Galvin was involved in the drafting of the termination letter to Mr. Williams, and he had direct communication with the Grievor on a few occasions concerning complaints of racist behaviour prior to the events that gave rise to the termination. These are discussed later in the decision.

8. As a Labourer-Journeyman, the Grievor's scope of work included, but was not limited to, flagging, shoveling, chipping concrete, sweeping, lifting and site clean-up. Mr. Williams has qualification as a welder, and thus he was also utilized from time to time to perform welding work in addition to his other duties.

9. The Company directly employs around 600 employees, including 200 to 300 labourers. The Company promotes diversity and inclusion with respect to its workforce. The Employer has hired a significant number of Apprentices and Journey Persons from historically disadvantaged groups (Black youth at risk, former prisoners, women in trades) in the communities and cultural pockets surrounding, and affected by construction of, the Project's line of transit stations. The Company has a Workplace Violence and Harassment Policy applicable to all of its employees, subcontractors and visitors that espouses "zero tolerance toward discrimination and violence in the workplace". The Company offers a variety of training programs to its employees, including a voluntary course on unconscious bias (for management). The Company acknowledges that "we all have bias – forces that shape our opinions and beliefs, which then in turn inform our behaviour".[1]

The Key Events During the Grievor's Employment

(i) Laird Station

10. Mr. Williams' first work assignment was at Laird Station, beginning on August 16, 2017. At one point during his employment there he was informed by the Project Manager that he was to be laid off. Mr. Williams called Mr. Galvin and complained that the layoff was racially motivated. (Mr. Williams also testified that he told Mr. Galvin

[1] From a memorandum dated June 14, 2019 authored by the President and Project Director and the Director People and Culture to all staff.

that he was the only worker at Laird Station who had not been offered training on the operation of small equipment, such as a Bobcat and mini-excavator, and that this unfairly left him more vulnerable to layoff than his co-workers. I note, however, that this claim of being deprived of training was not put to Mr. Galvin in cross-examination.) Mr. Galvin spoke to the Project Manager and asked him if the decision to lay off the Grievor had anything to do with him being Black. According to Mr. Galvin, the Project Manager denied that that was a factor, and informed Mr. Galvin that he preferred to keep on staff another individual of colour over Mr. Williams. Mr. Galvin advised the Project Manager, who Mr. Galvin judged not to be particularly conversant with the collective agreement, that he had to keep Mr. Williams employed.

11. The evidence about the resolution of the proposed layoff of the Grievor at Laird Station is not entirely clear. It was not readily apparent what the basis was for Mr. Galvin's conclusion that the layoff of Mr. Williams was somehow improper under the terms of the collective agreement. This may be due to the passage of time and its effect on Mr. Galvin's recollection of the circumstances of the proposed layoff. However, one thing is clear. Mr. Galvin did not share Mr. Williams' view that the layoff was racially motivated. Racial discrimination is not why Mr. Galvin effectively reversed the decision to lay the Grievor off. In any event, because of Mr. Galvin's intervention, the Grievor was not laid off. Nor apparently did Mr. Williams or the Union pursue a grievance alleging racial discrimination.

12. There are two other claims made in the testimony of the Grievor concerning allegedly racist conduct at Laird Station. Mr. Williams testified that someone reported to him overhearing an individual use the "N word". The Grievor also testified that at some point during his employment at Laird Station, some of the Company's cutting saws went missing. He testified that when things went missing, inevitably the Black workers were blamed or implicated. He testified that he heard an unnamed carpenter make that suggestion, and that Mr. Williams was asked by an unnamed person if he had moved the saws, although no one expressly accused him of carelessness or theft or cast suspicion on him personally. In any event, there was no evidence that Mr. Williams reported these incidents to the Company during his employment.

13. Mr. Williams did not bring either of the above (largely unparticularized) events to the attention of management at Laird. He may have provided some information to the Union, but the fact is no grievances were ever filed. Mr. Williams explained that he did not make

any official complaint out of a concern that he would be castigated as a chronic complainer and ultimately dismissed.

(ii) Leaside (Bayview) Station

14. Mr. Williams was transferred to Leaside (Bayview) Station ("Leaside") on April 23, 2018. It appears this was not the only transfer of an employee at around that time, and it further appears there were some layoffs occurring across the Project concurrently with the timing of the Grievor's transfer. In any event, the transfer itself was not grieved.

15. Leaside employed two foremen, Vitali Kolnik and Kirby Coady, both members of the same bargaining unit as the Grievor. They reported to Bill Pauli, Leaside's Superintendent, a management position reporting to the Project Manager.

16. Upon the Grievor's introduction to Mr. Pauli, it emerged during their conversation that Mr. Williams had welding skills. Mr. Pauli was interested in utilizing those skills and asked Mr. Williams what he required in terms of equipment, tools and so forth. Mr. Williams provided Mr. Pauli with the necessary information, and further requested that Mr. Pauli authorize the purchase of a tool storage box ("the toolbox") to secure the welding items, including Mr. Williams' own personal welding tools and protective wear that he preferred using on the job. Mr. Pauli agreed to this request, and at some point, the ordered materials, including the toolbox, arrived at the site. However, the toolbox had no lock, and when, in response to the Grievor's request for a lock, Mr. Pauli was unable to provide one, Mr. Williams took it upon himself to purchase a lock with two keys. He gave one of the keys to Mr. Coady (at Mr. Coady's request) and retained the other. During his cross-examination, Mr. Williams initially conceded that there was nothing untoward about Mr. Coady's request for a key in light of the fact that the toolbox contained Company-purchased materials. However, soon after he made that concession, he opined that Coady wanted the key in order to "belittle my character" and "to discredit me, because there was no need to get anything out of the box", or words to that effect. Mr. Williams' view was that Mr. Coady was engaged in "character assassination". Mr. Williams never explained the basis for this opinion, but it may have to do with subsequent events related to the toolbox, which are described below.

17. According to Mr. Williams, on a Saturday in early December 2018, he received a call at home from Amadou Diabeye, a union steward

for Local 506 engaged on the Project, in which Mr. Diabeye informed him that the toolbox was left open. Mr. Williams assumed that Mr. Coady had neglectfully left the toolbox open, because Mr. Coady had custody of one of the keys. And so, Mr. Williams made the decision to purchase a new lock for the toolbox and determined not to give Mr. Coady, or anyone else, a copy of the key. However, in anticipation of his upcoming trip to St. Vincent, he first removed from the toolbox some welding items (torches, flaps, clamps, and pliers) and placed them in another storage box that was under Mr. Coady's custody. Mr. Williams took this step because, by this point in time, torch cutting had been assigned to another employee, James Caster, a development that Mr. Williams viewed as an attempt by Mr. Coady to push him out of his job.

18. Mr. Williams departed for St. Vincent on December 10, 2018. He returned to work on January 2, 2019. Upon his arrival at work, Mr. Diabeye, the Local 506 union steward, informed the Grievor that the toolbox had been cut open by Mr. Coady. Mr. Williams went to look at the toolbox himself, and he observed that a rectangular cut had been made around the lock, essentially rendering the toolbox useless except for unsecured storage. Mr. Williams proceeded to a nearby construction trailer to confront Mr. Coady. Mr. Coady told the Grievor that he had obtained Mr. Pauli's authorization to cut the lock off the toolbox. According to Mr. Williams, Mr. Coady was "cocky" in addressing the Grievor. Mr. Williams testified that he made his point "strongly" to Mr. Coady about the inappropriateness of cutting the lock.

19. Amin Ali, a Senior Health & Safety Advisor employed by the Company, was on the site that morning. He testified that in the course of a safety meeting he was conducting, the Grievor raised the issue of the cut toolbox lock. One of the foremen – presumably Mr. Coady, although Mr. Ali did not specifically identify him – spoke up to say that the lock had to be cut because "it was incorrect", and the contents of the toolbox were needed. According to Mr. Ali, Mr. Williams became angry, and began "screaming" about the violation of his rights as a worker, which resulted in the termination of the safety meeting. Mr. Williams denied in his testimony that he acted inappropriately in any way.

20. Mr. Williams performed some work on January 2, 2019, but he experienced some discomfort because of a boil on his leg that apparently developed while he had been away in St. Vincent. After putting in about six hours of work, he booked off to seek medical attention. He did not return to work until January 28, 2019.

21. Mr. Galvin gave evidence that he learned of a decision taken by Mr. Kolnik, the other foreman at Leaside, and by Leaside's Project Manager, Eduardo Arnanz, to characterize the Grievor's absence due to medical reasons as a layoff. Mr. Galvin intervened and advised that Mr. Williams should be treated as being on a medical leave of absence, not on a layoff. For his part, Mr. Pauli was on vacation at the time, and he professed in his testimony to have been unaware of any attempt to lay off Mr. Williams.

22. At some point on or after January 2, 2019, Mr. Galvin received a phone call from the Grievor in which he complained about the cut toolbox, and that he believed it was racially motivated. Mr. Galvin advised Mr. Williams to raise the issue with his supervisor and the Union. As I have described in paragraphs 18 and 19 above, the Grievor confronted Mr. Coady and raised the issue about the cut lock in the subsequent safety meeting, but it is unclear whether he did this pursuant to his discussion with Mr. Galvin.

23. On February 1, 2019, Mr. Williams was summoned to a meeting with Mr. Pauli. Also present was Mr. Ali and a Union steward, Jeff Hummel. During the period from January 2, 2019, the date Mr. Williams reported to work from his trip to St. Vincent, to the end of the month, Mr. Pauli had been on an extended vacation. Apparently on his return from vacation he received information from unidentified persons that Mr. Williams had conducted himself inappropriately on January 2, 2019. Therefore, Mr. Pauli proceeded on February 1, 2019, to issue a written warning to Mr. Williams for his alleged outburst. The written warning, which Mr. Pauli dictated to Mr. Ali in advance of the meeting, states that Mr. Williams was "yelling and screaming" and threatening to call his lawyer to arrange the removal of certain workers from the site and to sue them. The written warning indicates that the consequence of future unacceptable conduct would be termination. It directs Mr. Williams to raise issues of concern with his Superintendent (i.e., Mr. Pauli) directly.

24. Mr. Pauli testified that, during the February 1, 2019 meeting, he explained to Mr. Williams that Mr. Coady had approached Mr. Pauli about needing welding "stuff" from the toolbox and being unable to access the lock. Mr. Pauli, who testified that he had no idea what was in the toolbox at the time (including whether it contained any items belonging to the Grievor), and that he was not aware that the Grievor had transferred some welding materials into the other storage box under Mr. Coady's custody, told Mr. Williams that he therefore authorized Mr. Coady to cut the lock on the toolbox. In his testimony, the Grievor

confirmed that Mr. Pauli told him that he had authorized the cutting of the lock. Mr. Williams also testified that he had always had a satisfactory relationship with Mr. Pauli, but he speculated that perhaps Mr. Pauli had been duped by Mr. Coady, or that there was some kind of cover-up to protect Mr. Coady.

25. Mr. Coady did not testify in this matter, nor did the applicant ask that I draw any negative inference as a result. Accordingly, there is no direct evidence about what precisely Mr. Coady wanted to obtain from the toolbox, and for what sort of welding work, if any, that he had in mind, or who, if anyone, he was thinking of to perform the work. (In this regard, it bears repeating that there was another worker with welding skills, Mr. Caster, on the site.) Nor is there any evidence to suggest one way or the other that Mr. Coady was aware that Mr. Williams had placed some welding items in Mr. Coady's tool storage box before leaving for St. Vincent. There is also no evidence before me to suggest that there was anything abnormal or fractious about the relationship between Mr. Coady and Mr. Williams, or that Mr. Coady bore any ill will towards Mr. Williams, or harboured racist views in relation to the Grievor or Black persons generally. Obviously, Mr. Williams seems to believe that Mr. Coady acted against him, with *mala fides*, but there simply is nothing in the evidence that was presented in this hearing to bear that out. All we know for certain is that the Grievor changed the lock on the toolbox, which was indisputably the property of the Company, without telling anyone; that, as of the day on which Mr. Williams changed the lock, Mr. Coady no longer had a functioning key to access the toolbox which Mr. Williams acknowledged in his testimony (at least initially) Mr. Coady, as a foreman, was entitled to access, which is why the Grievor initially provided him with one of the keys to the original lock. Furthermore, there is no direct evidence that Mr. Coady opened or left open the toolbox in early December 2018. It is possible he did, having been given possession of the only other key. Even if he did so, there is nothing to suggest that he sought to provoke the Grievor by leaving the toolbox open and unattended on a Saturday when the Grievor was not working or had some reason to believe someone would report the open toolbox to Mr. Williams. And when all is said and done, there was nothing to prevent the Grievor from making inquiries with respect to the circumstances of the unsecured toolbox, before taking the unilateral action of changing the lock and not disclosing that he had done so.

26. No grievance alleging unjust discipline or discrimination was filed in respect of the written warning of February 1, 2019, issued to the

Grievor for his outburst on January 2, 2019, concerning the cutting of the toolbox lock.

27. On March 8, 2019, Mr. Williams was laid off from Leaside. Mr. Pauli testified that the layoff was due to a reduction in the need for traffic control and a corresponding increase in the work of "digging down". According to Mr. Galvin, the decision to lay off the Grievor was that of Leaside's Project Manager, Mr. Arnanz. One member of Local 183 was transferred elsewhere, an operating engineer member was also laid off, and there were five other layoffs across the Project (most likely labourers according to Mr. Galvin, although he could not recall specifically) in addition to the staffing changes at Leaside. Mr. Galvin testified that apprentices were brought in at Leaside to do flag work at significantly lower rates of pay than the Grievor's classification. That work was not offered to Mr. Williams, and Mr. Galvin said he anticipated that such work would have been of no interest to the Grievor given the significant disparity in wages.

28. Mr. Williams testified that Vitali Kolnik advised him of the layoff and told him it was due to lack of work. The Grievor testified that, in fact, there was still lots of work to do. As I indicated earlier, a grievance was filed (Board File No. 0249-19-G) alleging that the layoff amounted to termination and constituted a violation of the collective agreement and the *Human Rights Code*.

29. Before leaving the discussion regarding the Grievor's work experience at Leaside Station, I should note that the Grievor also testified that, at some unspecified point in time, Foreman Tony Nina told Mr. Williams that the other Foreman, Vitali Kronik, "don't like you black guys". Furthermore, Mr. Williams testified that Mr. Kronik ensured that Black workers got fewer hours of work and less overtime opportunities, which Mr. Williams testified he brought to the attention of his union steward, Jeff Hummel. However, there is no evidence that the Grievor raised this with management, or that the Company was ever aware of these allegations.

(iii) Avenue Station

30. Mr. Williams returned to work at a different location, Avenue Station, commencing on April 11, 2019. Mr. Galvin explained in his testimony that a need arose at Avenue Station to chip out hardened concrete from the drums of transmixers being used at the site. Andrew Inouye, the Superintendent (or perhaps the Project Manager) put in a request for two labourers, which resulted in the referral of Mr. Williams

and another individual, Derrick Samms. However, upon reporting to Avenue Station they did no chipping work on the transmixers. According to Mr. Galvin, the problem of the hardening concrete was resolved by the time Mr. Williams and Mr. Samms arrived at the site, and both were utilized to perform other tasks until, in Mr. Inouye's estimation, there was no longer any further work for them to do. Both Mr. Williams and Mr. Samms were laid off on April 18, 2019. That prompted the Grievor's second grievance referral (Board File No. 2580-19-G) which, like the first, alleged violations of the collective agreement and discrimination contrary to the *Human Rights Code*.

(iv) Forest Hill (Bathurst) Station

31. On May 9, 2019, Mr. Williams arrived at Forest Hill (Bathurst) Station ("Forest Hill") as a result of a referral from the union's hiring hall. Spencer Cameron was the Project Manager at that location. Jesse Geldart was the Superintendent, with Nick Chiera in the role of Assistant Superintendent. There were two foremen, both in the Local 183 bargaining unit: Matt Heidi and Alex Kokyrtsa. Mr. Williams worked mainly under Mr. Heidi's supervision, on a crew of three other Local 183 labourers, Juan Mora, Iouri Kokyrtsa (Alex Kokyrtsa's father) and Eduardo Rosa.

32. The events that led directly to the Grievor's termination occurred on August 15 and 16, 2019. However, before describing those events, it may be useful at this stage to sketch out some background information. First, according to the Grievor near the end of his examination in chief, prior to August 15, 2019, he thought he had a good relationship with everyone at Forest Hill Station, including Iouri Kokyrtsa (who Mr. Williams says mistreated him on August 15). He described his relationship with Matt Heidi as "normal" (although in the same breath Mr. Williams also testified that he detected an "I'm the boss" attitude, a sense of superiority, on the part of Mr. Heidi and that the Grievor therefore did not attempt to become friends with him. He testified that Mr. Heidi's facial expressions signalled disapproval when he saw the Grievor taking breaks to which he says he was entitled.) Secondly, there is no dispute that at some point, probably in July 2019, Mr. Williams had reason to believe that a communications radio he was using on the job was not functioning properly. Every labourer on the Forest Hill crew was required to take a radio at the commencement of each shift for the purpose of communicating with others while working on the site. Mr. Williams brought the defective radio to the attention of Mr. Heidi, and Mr. Heidi dealt with it and provided Mr. Williams with another radio. From time to time the radios needed fixing, and

arrangements were made periodically for maintenance and repairs by the third-party provider of the radios.

33. Thirdly, there was a rather odd discrepancy in the evidence concerning whether Mr. Heidi ever spoke to Mr. Williams about taking longer-than-permitted work breaks. Mr. Heidi testified that he received some complaints from "a couple of my guys" that the Grievor had a habit of stretching out his breaks. He further testified that he and his co-foreman, Alex Kokyrtsa, spoke to Mr. Williams in the foreman's office, suggesting that he ought not take excessive liberties with his work breaks, and that this caused the Grievor to become upset and accuse the two foremen of racism. Mr. Heidi took no further action. He testified that, at some point, Alex Kokyrtsa disclosed to Mr. Williams that his wife is Black and that his daughter is mixed race, and that he was no racist. (For his part, Mr. Heidi testified earlier in his examination in chief, prior to describing this confrontation with Mr. Williams, that his stepfather and stepbrother are Black.) Mr. Williams, on the other hand, denied in his testimony that he was ever spoken to about lengthy breaks by Mr. Heidi or Alex Kokyrtsa. As far as he is concerned, no such conversation ever took place. Neither Mr. Mora nor Mr. Kokyrtsa, two of the Grievor's three co-workers, admitted that they complained to Mr. Heidi about Mr. Williams' work breaks. The third co-worker on the Grievor's crew, Eduardo Rosa, did not testify.

34. I return now to the events surrounding the Grievor's termination. A dispute arose on August 15, 2019, between Mr. Williams and his co-worker, Iouri Kokyrtsa, about a radio used by the Grievor that morning during a particular assignment involving Mr. Williams and his crew co-workers. The assignment involved the movement of a crane from one location on the site to another at around 6:00 a.m. The Grievor's crew were utilized to control traffic. Mr. Williams was stationed at the site's north gate keeping traffic back with a handheld stop sign as the crane merged onto Bathurst Street. The Grievor testified that when he activated his radio prior to the start of the move, he could see a green light and he pushed a button but did not speak. He thought the radio was working. However, after taking his position at the north gate, Mr. Williams tried to communicate with the others but realized the radio was not working. At around the same time, Iouri Kokyrtsa approached him and yelled at him that he did not know how to operate his radio, which Mr. Williams found offensive. The Grievor testified that Iouri Kokyrtsa must have realized the radio had malfunctioned when he heard nothing from Mr. Williams (although later in his cross-examination the Grievor conceded he did not know what Mr. Kokyrtsa was thinking). It

was therefore inappropriate for Mr. Kokyrtsa to shout at him about something that was not his fault.

35. Juan Mora was part of the crane move that day. He heard Iouri Kokyrtsa make three or four radio transmissions to Mr. Williams at the outset, but Mr. Mora heard no answer from the Grievor. Mr. Mora did not witness the confrontation between Iouri Kokyrtsa and Mr. Williams at the north gate.

36. Iouri Kokyrtsa testified that he did not hear any confirmation from Mr. Williams that he was in position. Mr. Kokyrtsa left his post to look for the Grievor. He testified he found him talking to a truck driver. (Mr. Williams agreed there was a truck driver near him, waiting while the crane move was to take place.) Mr. Kokyrtsa's evidence then became confusing to follow. In examination in chief, he claimed to have taken the Grievor's radio and discovered the volume was too low. Then he testified, inexplicably, that the Grievor turned the radio on, and Mr. Kokyrtsa left. In cross-examination, Mr. Kokyrtsa said that he did not actually take physical possession of the Grievor's radio but told Mr. Williams to check it, and that the Grievor then put his hand on the radio and "turned it". Mr. Kokyrtsa then transmitted an oral message on his radio and heard his own voice on the Grievor's radio. Mr. Kokyrtsa admitted he was frustrated seeing Mr. Williams talking to the truck driver, but that he did not yell at the Grievor, he simply "spoke loudly" as one would do on a construction site.

37. After the crane move, Mr. Heidi and the crew convened in his office for the usual morning briefing. Eduardo Rosa, one of the crew members, was apparently only present for part of the meeting, and could not have witnessed anything controversial. But there are discrepancies among the witnesses who were there for the entire meeting as to what happened, including discrepancies in their written witness statements.

38. I begin with Matt Heidi. In examination in chief, Mr. Heidi said that, at some unspecified point in the meeting, Mr. Williams complained about Iouri Kokyrtsa yelling at him during the crane move, and then claimed that his radio was not working. To which Mr. Heidi assured the Grievor that the radios had been serviced. Mr. Williams replied that Mr. Heidi had intentionally given him a bad radio, and with his voice rising, accused Mr. Heidi and the other foreman, Alex Kokyrtsa, of not taking his concerns seriously. According to Mr. Heidi, Mr. Williams then leapt from his chair and slammed his fists on Mr. Heidi's desk, where Mr. Heidi was sitting, and yelled in Mr. Heidi's face. Mr. Heidi testified

that he asked Mr. Williams to sit down, and Mr. Williams did so. Then, as Mr. Williams was preparing to leave the meeting to go to work, Mr. Heidi testified that he asked the Grievor to take a radio with him and Mr. Williams ignored him and left the meeting without a radio. Mr. Heidi claimed that the written statement he prepared about the meeting in his office (as well as a second written statement concerning events the following day, August 16, 2019) was not requested by anyone, that he simply prepared it on his own initiative.

39. In his cross-examination, Mr. Heidi's version of events changed somewhat. For one thing, he expressed the belief that his supervisor, Jesse Geldart, did in fact ask him to prepare a written statement (and that Mr. Heidi in turn directed Iouri Kokyrtsa and Mr. Mora, but not Mr. Williams, to prepare their written accounts). In addition, Mr. Heidi recalled that, at the meeting with the crew in the foreman's office, Iouri Kokyrtsa initiated discussion about what had happened earlier, and accused Mr. Williams of failing to answer the radio, which caused Mr. Williams to defend himself by claiming the radio had not been working, and to accuse Iouri Kokyrtsa of having yelled at him unjustly. Later in the cross examination, Mr. Heidi testified that, at the beginning of the meeting, Mr. Williams and Iouri Kokyrtsa got into a heated discussion about Mr. Kokyrtsa having yelled at the Grievor, an argument which Mr. Heidi says he cut off, and then from there proceeded to conduct a "Daily Safety Moment" session. After that, according to Mr. Heidi, Mr. Rosa left to take up his assignment, at which point Mr. Williams asked for a word with Mr. Heidi (with Iouri Kokyrtsa and Mr. Mora still present) and immediately became upset, shouting his displeasure about being yelled at by Mr. Kokyrtsa. Mr. Heidi stated he was not surprised by the Grievor's outburst. Mr. Heidi maintained that Mr. Williams slammed his fists on Mr. Heidi's desk and added that he also pointed his finger at Mr. Heidi. Mr. Heidi conceded the possibility that he did not, in fact, ask Mr. Williams to take a radio with him as the Grievor was leaving.

40. Mr. Heidi's written statement about what happened in his office is curiously devoid of some details. First, it begins, "This morning Alexis Williams ask [sic] to have a word with me. I said of course and asked him to have a seat. He sat down and voiced his concerns about our radios not working properly." This gives the impression that the Grievor arrived alone at Mr. Heidi's office and asked to speak to him. No mention is made anywhere in the statement that there was a staff meeting going on that immediately preceded Mr. Williams' alleged outburst, or that any particular individual was present in the office other than Mr. Williams and Mr. Heidi. The statement makes no mention of a

heated argument between the Grievor and Iouri Kokyrtsa at the outset of the meeting that Mr. Heidi put an end to. Nor does the statement allude to Mr. Williams complaining about Mr. Kokyrtsa's behaviour earlier on that day.

41. Iouri Kokyrtsa's evidence about the meeting was even more problematic. In his examination in chief, Mr. Kokyrtsa thought the crew met in Mr. Heidi's office immediately before the crane was to be moved. He seemed to think that the meeting in which Mr. Williams allegedly became aggressive with Mr. Heidi took place the day after the crane move, but later changed his mind upon further reflection. He could not recall if everyone from the crew was at that meeting. Later in his examination in chief, he described Mr. Williams complaining about the radio not working, Mr. Heidi's response that the radios were regularly serviced, followed by the Grievor becoming very upset, raising his voice, and standing up from his chair. Mr. Kokyrtsa did not mention during his examination in chief Mr. Williams approaching Mr. Heidi's desk, but did so in cross examination, and he further claimed that Mr. Williams put his fists on Mr. Heidi's desk.

42. With respect to his written statement, which is dated August 16, 2019, the day after the crane incident and the ensuing meeting in the foreman's office, Iouri Kokyrtsa could not recall that anyone asked him to prepare the statement. In cross examination he testified that he and others wrote their statements in the foreman's office while the foreman was present, but later testified that Mr. Heidi was not present. He also had no reasonable explanation for why his statement made no mention of Mr. Williams placing his fists on Mr. Heidi's desk (although it did describe the Grievor raising his voice). I also note that Mr. Kokyrtsa's written statement claims that Mr. Williams accused the foremen of doing nothing all day, and that he would fix that by complaining to the Union and the Ministry of Labour. That is not consistent with Mr. Kokyrtsa's oral evidence.

43. Mr. Mora was in attendance at the meeting after the crane was moved. He testified that he did not notice any argument between Mr. Williams and Mr. Kokyrtsa during the meeting. He testified in chief that, at some point, Mr. Williams raised the issue of replacing the radio because he had lost all contact with the crew during the crane move. According to Mr. Mora, Mr. Heidi responded that the Grievor could switch to another radio, to which Mr. Williams replied that he wanted a better radio service provider, and then spoke in a loud tone of voice and put his hands on Mr. Heidi's desk. In cross examination, Mr. Mora said, initially, that Mr. Williams pointed at Mr. Heidi, but later reversed himself

on that detail. He further testified in cross examination that Mr. Williams "put his hands down hard" on Mr. Heidi's desk, but that Mr. Mora only heard a "little sound" when that happened. Mr. Mora said that he then left the meeting.

44. Mr. Mora also prepared a written statement about the meeting (that bears no date). Mr. Mora testified that neither Mr. Heidi nor anyone else asked him to prepare the statement. The statement itself is fairly consistent with Mr. Mora's oral testimony, except that it does not claim that Mr. Williams put his hands down hard on Mr. Heidi's desk, just that the Grievor "headed to the table of our supervisor where he leaned with hands to start yelling at Matt." Mr. Mora's statement also claims that "Alexis never calmed down until we had to go back to work", which contradicts Mr. Heidi's statement, and seems at odds with Mr. Mora's testimony that he, Mr. Mora, left the meeting at the point Mr. Williams was allegedly hovering over Mr. Heidi's desk.

45. For his part, Mr. Williams testified that, following a short briefing by Mr. Heidi at the outset of the meeting, Eduardo Rosa, one of the crew members, departed to begin his work assignment, following which Iouri Kokyrtsa complained about the Grievor's use of his radio earlier that morning. Mr. Williams testified that he replied without any yelling or pounding of Mr. Heidi's desk and stated simply that he would take the matter up with the site superintendent, Jesse Geldart. In cross examination, the Grievor insisted he was never upset during the meeting, and then stated, somewhat inexplicably, "I'm not a person with a mental illness" and "I have a police report that says I have no problems with the police". Mr. Williams also conceded that, as the meeting ended, Mr. Heidi directed him to take a radio to his work location, and that Mr. Williams did not do so because there was no utility in taking a non-functioning radio.

46. Following the meeting between Mr. Heidi and the crew, Mr. Williams proceeded to his work assignment at the north gate. Meanwhile, Mr. Heidi spoke with his supervisor, Mr. Geldart, about Mr. Williams' alleged outburst, including banging his fists on the desk, and Mr. Geldart agreed to have a meeting with the Grievor. Mr. Williams was then called back to the main building and met with Mr. Geldart. Essentially what happened is that Mr. Geldart assured Mr. Williams that the radios had been recently serviced, and that there was no need for an aggressive confrontation, that Mr. Williams needed to work with Mr. Heidi. Mr. Geldart testified that he told Mr. Williams that "we'd reset and carry on." Mr. Williams' version of the meeting was that Mr. Geldart told him he understood that Mr. Williams had become upset during the

meeting about his malfunctioning radio, to which Mr. Williams stated that Iouri Kokyrtsa was the one who got upset and was the aggressor, not Mr. Williams. Mr. Geldart replied that Mr. Williams needed to get along (with who, exactly, was not clear). In any event, Mr. Williams testified that he was satisfied with the meeting with Mr. Geldart, that Mr. Geldart had been reasonable, and that Mr. Williams considered the matter closed.

47. Unfortunately, Mr. Heidi did not feel the same way. He was bothered by what had transpired in the foreman's office. Toward the end of the day, he went to Mr. Geldart and asked him for permission to speak to Mr. Williams the following day and clear the air between them. Mr. Geldart asked Mr. Heidi if he wanted Mr. Geldart to accompany him. Mr. Heidi declined the offer. Mr. Geldart, perhaps surprisingly considering his earlier comment to Mr. Williams that day about resetting and carrying on, agreed to Mr. Heidi's request.

48. Things did not go well between Mr. Heidi and Mr. Williams on August 16, 2019. The air was not cleared. Rather than meet with Mr. Williams first thing in the morning in private in the foreman's office, Mr. Heidi decided to approach the Grievor at his work location at the north gate where Mr. Williams was engaged in pedestrian control and sweeping. There were members of the public in the vicinity. Mr. Heidi asked if might speak with the Grievor, and Mr. Williams agreed. Mr. Heidi asked him if he wanted a Union representative present. Mr. Williams demurred. There may have been some discussion about the radio incident initially, but then Mr. Heidi turned to the issue of the Grievor's behaviour in the office meeting, which he characterized as "inappropriate". Mr. Heidi testified that this prompted Mr. Williams to become upset and loud and to puff up like an "alpha male". He testified that Mr. Williams swore, flailed his arms, and pointed his finger. Mr. Williams, on the other hand, says that he did not react in the manner described by Mr. Heidi. He testified that Mr. Heidi accused him of "coming up" on the foreman's desk, which Mr. Williams considered a false accusation. Mr. Williams claims that at this point he told Mr. Heidi that if he was going to lie, the conversation was over. Mr. Heidi did not recall that. Mr. Heidi recalled that Mr. Williams accused him of being a racist and entitled. Mr. Williams denied he made such an accusation. They agree, however, that Mr. Williams said he felt harassed by Mr. Heidi, at which point Mr. Heidi walked away and reported the incident to Mr. Geldart. Mr. Geldart indicated that he would speak to Mr. Williams, and he then proceeded, together with his Assistant Superintendent, Nick Chiera, to the north gate.

49. Again, things did not go well. Mr. Geldart testified that soon after he and Mr. Chiera arrived, Mr. Williams became increasingly agitated, complaining that Mr. Heidi was attempting to single him out, that there was no need to re-hash the event, and that he was being harassed. Mr. Geldart testified that he then tried to reach Mr. Williams' union representatives, to no avail, and then spoke to Mr. Galvin in Labour Relations, who also tried to reach the Union but was unsuccessful. Mr. Galvin then instructed Mr. Geldart to send Mr. Williams home with pay and obtain witness statements from Mr. Heidi and any others who observed the recent events. Mr. Williams denies that any such phone calls were made by Mr. Geldart in the Grievor's presence, but agrees that Mr. Geldart informed him that, on Mr. Galvin's instructions, he was to go home and that he had the option of making a written statement, which in fact Mr. Williams did produce a few days later.

50. On August 26, 2019, a meeting took place between Evaristo Paisana, Pat Sheridan (both Union officials), Mr. Williams, Mr. Galvin and Mr. Geldart. There was next to no evidence adduced by either party about what was discussed at that meeting, apart from Mr. Galvin's evidence that the purpose of the meeting was to get Mr. Williams' side of the story.

51. On August 28, 2019, Mr. Geldart, with Mr. Galvin on the telephone line, called Mr. Williams and informed him of his termination. Neither Mr. Galvin nor Mr. Geldart asked the Grievor if he wished to have union representation (although Mr. Galvin testified without contradiction that he had invited Mr. Paisana to listen in on the phone call, and Mr. Paisana declined to do so). The termination letter that followed was signed by Mr. Geldart, with assistance in its drafting from the legal department as well as from Mr. Galvin. The letter reads as follows:

[Address redacted]

August 28, 2019

Alexis Williams

[Address redacted]

Re: Termination of Employment

Alexis

Your employment with Crosslinx Transit Solutions is being terminated effective immediately.

As you're aware, Crosslinx has been conducting an investigation into your recent misconduct at Forest Hill Station. It has been determined that you have again engaged in inappropriate conduct, harassing and threatening in nature that has caused co-workers and supervision to be very concerned about their and other employees' safety and well-being.

You have been employed at Crosslinx several different times and have successfully completed the General Orientation and various site-specific training, in addition to participating in regular Tool Box talks where Crosslinx policies have been explained and reinforced. These sessions have included safety rules, policies, anti-harassment etc.

Not only is Crosslinx obligated to provide a safe and harassment free work place for all employees, but it is incumbent upon all employees to ensure they are compliant with such policies.

This is not the first time your behaviour has been an issue on the Project. At the Laird Station, when asked by your superintendent about the work you had been performing, responded [sic] in an extremely negative and threatening manner.

This was also the situation when working at the Leaside/Bayview Station where you were verbally abusive and threatening towards your superintendent and safety personnel. In fact, you were yelling and screaming at these people when management and safety attempted to address a work situation.

This continued even when a representative of LiUNA Local 183 attended and attempted to moderate the situation. You received a Letter of Discipline for this incident.

This continued pattern of behaviour occurs too often and even though Crosslinx personnel attempt to address the situation, you continue and become verbally abusive, yelling, accusatory to such an extent any attempt to resolve situations are left unsettled with both employees and

> supervision concerned about their safety and the uncertainty of any future incident/interaction with you.
>
> Crosslinx has given you ample opportunity to correct your behaviour. You have consistently refused to acknowledge your serious inappropriate conduct and have, instead, repeatedly and inappropriately accused Crosslinx management of being inappropriately motivated. This has forced Crosslinx to conclude that there is no reasonable prospect of improvement of behaviour and the employment relationship has become irreparable. As such, Crosslinx will no longer accept you as an employee or as a referral to the Eglinton Crosstown LRT Project.
>
> Your final pay will be made by Direct Deposit. Any other documents will be forwarded to your home address.
>
> Please contact your union representatives if you have any questions.
>
> Yours Sincerely,
>
> Jesse Geldart
> Superintendent – Forest Hill Station
>
> Cc
>
> LiUNA Local 183
> Crosslinx Labour Relations

The Evidence of Dr. Kerry Kawakami

52. Dr. Kawakami is a Professor of Psychology at York University. Her academic focus has been in the field of Social Psychology, which is the study of how human beings think, respond, learn and function in relation to other human beings. Dr. Kawakami specializes, and completed her Ph.D. about 30 years ago, in the subject of implicit (or unconscious) bias. She conducts research, through controlled experiments in mainly laboratory settings, in early automatic and attentional response to members of stigmatized (Black) and non-stigmatized (White) groups using several methodologies (neuroscience techniques, eye tracking, psychophysiological measures, reaction latency paradigms and behavioural measures). Dr. Kawakami produced a report and testified in this proceeding as an expert in implicit bias, without challenge to her expertise by the Company. (However, the Company argued that her evidence should not be relied upon to make

any findings of fact with respect to whether Mr. Williams was the victim of discrimination by the Employer.)

53. Implicit bias is the belief that members of "outgroups" are different from the self as a member of an "ingroup". Racial bias is one type of implicit bias.[2] Implicit bias operates outside of conscious awareness and is often automatically triggered by viewing a member or the image of a member of the outgroup. When we see a human face, we almost instantly categorize it by race, ethnicity, gender and age. Over time these categories become actuated, and we make associations and form perceptions about the emotions being felt by the outgroup members, which in turn has repercussions in terms of our ability to empathize with the outgroup members.

54. In her report filed with the Board, Dr. Kawakami cites research that in North America, a large majority of people (70 to 80 per cent) show an implicit anti-Black bias in which they associate negativity more with Black than White men and women. Moreover, common, unconscious views of negative traits associated with Black men are that they are loud, threatening, aggressive, hostile, formidable, criminal, and poor. Dr. Kawakami's own research shows, for example, that White people shown images of White and Black faces spontaneously look less at the eyes of the Black faces than at the eyes of the White faces, which diminishes their ability to decode emotions. Other studies have concluded that White persons tend to perceive Black faces as angrier than White faces with comparable expressions. They also see anger lingering longer and appearing earlier on Black faces relative to White faces and even misread neutral facial expressions of Blacks as conveying anger. The literature also indicates that Black aggression is seen by Whites as an ongoing, enduring personality trait (referred to as a "stable personality trait") as opposed to atypical, temporary misbehaviour.

55. If a Black person indicates that he or she has been subjected to discriminatory treatment, research suggests that the person accused of this bias may not believe the assertion because they perceive themselves to be acting in a fair and egalitarian manner in accordance with their explicit values. Furthermore, complaining about racism is often perceived negatively. When a visible minority raises issues related to racial discrimination, it may be assumed that they are defaulting to race as an "excuse" for whatever it is that transpired. Dr. Kawakami

[2] Explicit bias, as Dr. Kawakami explains in her expert opinion, "is related to how people evaluate and respond to members of a particular group in a conscious, deliberative way." Implicit and explicit bias are distinguishable from systemic discrimination which "refers to the ways in which racial hierarchies are built into history and culture and have a pervasive influence on many aspects of a society".

also points out that studies show people may not only be motivated to see themselves as fair and egalitarian but to also perceive society and their workplace as fair, just and merit-based, especially when an employer explicitly endorses strategies and creates policies to support diversity and inclusion, and stresses the importance of respecting everyone, regardless of culture and nationality.

56. With respect to the issue of empathy, Dr. Kawakami pointed to studies that suggest that although people may spontaneously respond at a neural level with empathy to the pain of others who belong to the same racial category, they do not demonstrate this same tendency for people who belong to other racial categories. Furthermore, her own research has shown that White participants are often apathetic to the negative treatment of Blacks and are not impacted emotionally, physiologically, or behaviourally when they perceive racial discrimination.

57. Dr. Kawakami did not speak to Mr. Williams or any other witness in order to inform the content of her expert report. She was not provided with any of the oral evidence that preceded her testimony as the last witness called in this proceeding. She was provided only with the pleadings of both parties and the book of documents that have been identified by the witnesses, as well as the applicable collective agreements. Dr. Kawakami offered possible explanations for the events described in the parties' pleadings through the lens of her expertise in implicit bias, which, for example, called into question whether management took seriously the Grievor's claims of discrimination, or even his assertions of being abused by Iouri Kokyrtsa or his radio not working properly.

The Positions of the Parties

The Position of the Company

58. The Company acknowledges that it bears the burden to prove just cause with respect to the termination of Mr. Williams. It argues that it has done so. The Company submits that the Grievor engaged in a pattern of aggressive conduct, beginning with his reaction to Kirby Coady's decision to cut open the lock on a toolbox owned by the Company (for which the Grievor received a written warning that was not grieved), continuing with his alleged outburst and confrontation with Mr. Heidi on August 15 and 16, 2019, and culminating with his response to Mr. Geldart's intervention on August 16, 2019. The Company argues that it is highly significant that Mr. Geldart, a Site Superintendent, took

time away from his many other duties to try to address a problem with a worker who essentially refused to engage with Mr. Geldart or acknowledge the appropriateness of Mr. Heidi wishing to discuss with him the previous day's encounter. The Company therefore reached the conclusion that Mr. Williams was unlikely to respond favourably to further discipline, and that the employment relationship was unsalvageable.

59. With respect to the allegations of discrimination in all three grievances, including the termination grievance, the Company submits that the Union bears the burden of proof. It contends that the Union has failed to meet its burden. The Employer concedes that Mr. Williams holds a sincere belief that he has been the target of racism in the workplace, but that does not make it so. The Employer submits that, notwithstanding the Grievor's insistence that race played a role in management decisions that detrimentally affected him, there was no cogent evidence of such presented by the Union. In fact, the Company submits, Mr. Williams' testimony amounted to little more than reckless, unsubstantiated and offensive claims of racism that can only be explained by Mr. Williams' life or work experiences that preceded his employment with the Company.

60. The Company further argues that the Union's case on the evidence, consisting only of the testimony of Mr. Williams and Dr. Kawakami, is entirely insufficient to warrant any finding of discrimination in this matter. Mr. Williams was not a credible witness, in the Company's submission, and the Board ought not to arrive at any findings of fact based on a theory that management decisions against Mr. Williams were the result of implicit bias. Counsel for the Company submits that other individuals representing the Union ought to have been called in support of the allegations of racism or to explain why the Union took no action (apart from the grievances) despite Mr. Williams' frequent claims during his testimony that he shared his concerns of discriminatory treatment with the Union. Although counsel did not specifically name names (apart, perhaps, from Jeff Hummel, a Union steward who was present during the February 1, 2019 meeting in which Mr. Pauli issued the written warning to Mr. Williams) I assume he meant to suggest that Evaristo Paisana and Pat Sheridan, two high-ranking officials with the Union who were involved in issues related to Mr. Williams, ought to have testified. However, the Company did not ask the Board to draw any negative inferences as a result of their failure to testify.

61. In support of its position, counsel for the Company referred me to the following authorities:

a. *Municipality of Metropolitan Toronto and CUPE, Local 79*, Re 1986 CarswellOnt 3873, 1 C.L.A.S. 75;

b. *CUPE, Local 3902 and CUPE, Local 1281 Williams Re 2015* CarswellOnt 20939, 129 C.L.A.S. 109;

c. *Toronto (City) and CUPE, Local 79 Farahani* Re 2013 CarswellOnt 12205, [2013] O.L.A.A. No.327, 116 C.L.A.S. 1;

d. *Ontario Public Service Employees Union v. Ontario (Ministry of Health) Damani Grievance* [2000] O.G.S.B.A. No. 40;

e. *Municipality of Metropolitan Toronto and CUPE Local 79 (1986)*, 1 C.L.A.S. 3;

f. *Dominion Castings Ltd. and United Steelworkers of America Local 9392*, 47 C.L.A.S. 413;

g. *Ontario New Democratic Party Caucus v Canadian Office And Professional Employees Union, Local 343*, 2018 CanLII 116837 (ON LA);

h. *Gohm v. Domtar Inc. 1992* CarswellOnt 890, 89 D.L.R. (4th) 305;

i. *Renaud v. Central Okanagan School District No. 23*, 1992 CarswellBC 257, [1992] 2 S.C.R. 970;

j. *O.P.S.E.U. v. Ontario (Ministry of Community Safety & Correctional Services)* 2006 CarswellOnt 9040, 157 L.A.C. (4th) 160, 88 C.L.A.S. 17.

The Union's Position

62. The Union begins by submitting that the Employer's policies and training materials fail to deal explicitly with issues of race, systemic racism or anti-black racism. For example, race is not mentioned as worthy of respect (although gender, culture, age, beliefs, nationality and identity are referred to) in the Employer's published "Daily Safety

Moment" of September 25, 2018, dealing with violence, harassment and respecting others. Furthermore, implicit bias training is voluntary and not offered by the Employer to foremen. The Union says these "gaps" contributed to distortions in Mr. Heidi's view of Williams as aggressive, lazy and insubordinate.

63. Counsel for the Union next argued that the Company was aware, through Mr. Gavin, of three occasions on which Mr. Williams claimed racial discrimination, and either (in the case of the toolbox incident at Leaside/Bayview Station and the Grievor's claim that he was denied training at Laird Station) did not investigate at all in the manner contemplated by Company protocols, that is, through the auspices of Health & Safety; or (in the case of the threatened layoff at Laird Station that was subsequently reversed) conducted a superficial and cursory inquiry by a person – Mr. Galvin – not authorized to investigate discrimination allegations. Counsel for the Union argues that this in itself demonstrates discrimination against Mr. Williams based on race. It reveals that, as a Black man, Mr. Williams' concerns were not believed or taken seriously, and that the actions and motivations of White staff were presumed to be beyond reproach. The Union argued that this attitude towards the Grievor leaked into subsequent events during his employment. For example, although he complained to both Mr. Heidi and Mr. Geldart about Iouri Kokyrtsa's allegedly belligerent treatment of Mr. Williams during the movement of the crane on August 15, 2019, that complaint was never looked into. In fact, Mr. Heidi just assumed, without any evidence to support the assumption, that Mr. Kokyrtsa was yelling in order to be heard on a construction site. No one, and certainly not Mr. Williams, the complainant, was asked to explain what had happened, or to complete a written statement concerning that event, although a good deal of effort was made by management to obtain written statements about the behaviour of Mr. Williams in the foreman's office later that same morning and regarding his interaction on the street with Mr. Heidi the next day. Furthermore, neither Mr. Heidi nor Mr. Geldart looked into the Grievor's claim that his radio malfunctioned during the crane move on August 15, 2019. They both in fact seemed quite convinced that Mr. Williams was wrong about that, based solely on the fact that the radios had been recently serviced. This, despite Mr. Heidi's agreement that workers are perfectly entitled to, and should, raise concerns about malfunctioning radios as a matter of health and safety, as well as his acknowledgement that the radios were not always treated particularly gently by the subcontractors who from time to time borrowed them.

64. The Union argues further that the Employer failed to resolve obvious discrepancies in the written accounts of Iouri Kokyrtsa, Mr. Mora and Mr. Heidi concerning Mr. Williams' behaviour in the foreman's office. These written statements were relied upon by the decision makers in terminating the Grievor's employment, but apparently no effort was made to get to the bottom of the inconsistencies. And in any event, the circumstances in which the written statements were ordered and obtained (apart from the Grievor's written statement) were not consistently described by the Company's witnesses, which the Union submits casts doubt on their credibility, and calls into question why the Grievor's concerns about the functionality of his radio and about Iouri Kokyrtsa's treatment of him were not investigated. On top of that, the Union submits that the oral testimony of the Employer's witnesses regarding the Grievor's conduct in the foreman's office is internally inconsistent and out of harmony, which suggests a cover-up to protect Iouri Kokyrtsa, the father of Foreman Alex Kokyrtsa, who in turn is a friend of Mr. Heidi, from any blame for his own misconduct.

65. With respect to the events of August 16, 2019 involving the interactions between Mr. Williams, on the one hand, and Mr. Heidi, followed by Mr. Geldart and Mr. Chiera, the Union contends (without contradiction) that there was no attempt by the Company to determine if there were any third-party witnesses to the exchanges between Mr. Williams and Mr. Geldart (the events took place in a public area accessible by pedestrians and persons having business on the work site). Mr. Chiera did not testify, and there was no evidence one way or the other whether he provided the Employer with a written statement of what he observed. In short, Mr. Williams' version of events as described in his written statement was subordinated by the Company to the versions offered by Mr. Heidi and Mr. Geldart, which the Union submits is further evidence of racial discrimination.

66. The Union submits further that the evidence discloses that the Company treated Mr. Williams as a person with a bad attitude. The written warning issued to the Grievor by Mr. Pauli was essentially discipline for displaying a hostile attitude, shouting at co-workers and threatening legal action. Although he was not disciplined for his alleged outburst at the February 1, 2019 meeting with Mr. Pauli and Mr. Ali, the Union points out that the Company in its pleadings relies upon his conduct there in its response to the termination grievance referral, again in an attempt to paint Mr. Williams as insolent and defiant. And when Mr. Williams complained about his radio not working on August 15, 2019, neither Mr. Heidi nor Mr. Geldart thought enough of his concern to even investigate it.

67. The Union submits that, to support the firing of Mr. Williams, the Company relied upon events for which no discipline was imposed against him. In the fifth paragraph of the termination letter, for example, there is a reference to the Grievor having responded to the Superintendent at Laird Station in an "extremely negative and threatening manner." No discipline was ever imposed for that incident, nor was any evidence led in the course of the hearing about that alleged confrontation. In addition, as Mr. Galvin confirmed near the end of his cross-examination, the termination letter's assertion to Mr. Williams having "repeatedly and inappropriately accused Crosslinx management of being inappropriately motivated" is a reference to the Grievor's accusations of racism that he raised with Mr. Galvin. The Union says that these examples, as well as other pieces of evidence tendered by Mr. Heidi critical of Mr. Williams' performance/conduct for which no discipline was imposed demonstrate a termination carried out in bad faith.

68. The Union submits further that Mr. Williams was subjected to provocation, principally by Mr. Heidi who on August 16, 2019 chose to express his disapproval with the Grievor in public concerning the previous day's events in the foreman's office. This was followed in short order by the appearance of Mr. Geldart and Mr. Chiera, also in public. The Union says it is little wonder that Mr. Williams expressed himself in the way he did, particularly given Mr. Geldart's assurances the day before that the matter had been resolved.

69. The Union further contends that the Company failed to comply with its own standards of progressive discipline. The normal procedure, as described in the Company's General Orientation Package – Onboarding, is a verbal warning for a first offence, a written warning for a second offence and either a suspension or a termination for a third offence. Instead, the Company issued a written warning for what it considered Mr. Williams' first offence and skipped to a termination for the alleged second offence. In addition, the written warning itself could not have been viewed by the Employer as particularly serious in light of the fact that Mr. Galvin saw no impediment (and communicated that view to the Union) to the Grievor's recall from his layoff at Leaside to Avenue Station. No discipline was issued to Mr. Williams for his actions in the foreman's office the day prior. Thus, the Union submits, there was no "continued pattern" of conduct, as stated in the termination letter, justifying the Grievor's discharge.

70. Finally, the Union submits that the Grievor was not offered Union representation when Mr. Geldart and Mr. Chiera visited him at his worksite on August 16, 2019. That may have deprived Mr. Williams from the benefit of the Union's advice regarding the content of the written statement Mr. Geldart invited him to, and which he did, provide to the Company a few days after being sent home.

71. In support of its position in this matter, the Union referred me to the following authorities:

1. *Jackson Roofing GTA Inc*. [2020] OLRD No. 3323

2. *United Brotherhood of Carpenters and Joiners of America, Local Union No 1985 v Aluma Systems Inc. (Johnson Grievance)*, [2014] SLAA No. 19

3. *Delorme v. Sakimav First Nation*, [2004] CLAD No 487

4. *Schindler Elevator Corp*. [2002] OLRD No. 334

5. *Schindler Elevator Corp*. [1996] OLRD No. 4082

6. *OTIS Canada Inc*. [2020] OLRD No. 3114, 322 LAC (4th) 407, 2020 CarswellOnt 18659

7. *Lee Manor Home for the Aged v Christian Labour Assn of Canada (Riddell Grievance)*, [1998] OLAA No 606, 74 LAC (4th) 201

8. *Canadian Broadcasting Corp v Canadian Media Guild (Khan Grievance)*, [2021] CLAD No 1

9. *University of Ottawa v. I.U.O.E. Local 796-B* (1994), 42 L.A.C. (4th) 300 (Ont. Arb.) (Bendel)

10. *O.P.S.E.U. v. Ontario Public Service Staff Union* 2011 CarswellOnt 5913

11. *Dominion Glass Co. v. U.G.C.W., Local 203* 1975 CarswellOnt 1469, [1975] O.L.A.A. No. 178, 11 L.A.C. (2d) 84

12. *Brampton (City) v Canadian Union of Public Employees, Local 831*, [2021] OJ No 243, 2021 ONSC 466

12(A) Re *Camco Inc. and UE, Local 550*, [1992] OLAA No 296, 26 CLAS 237

13. *Scarborough (Borough) v International Association of Fire Fighters, Local 626 (Cousins Grievance)*, [1972] OLAA No 11, 24 LAC 78

14. *Mill Dining Lounge Ltd v Hospitality and Service Trades Union, Local 261 (Swett Grievance)*, [2002] OLAA No 75

15. *Cape Breton Victoria Regional School Board v. Canadian Union of Public Employees (Donovan Grievance)*, [2000] N.S.L.A.A. No. 13

16. *Service Employees International Union, Local 210 v. Bruce Retirement Villa (Champeau Grievance)*, [1998] O.L.A.A. No. 793

17. *Windsor Detroit Borderlink Ltd. v. Unifor, Local 1959 (Lalonde Grievance)*, [2019] O.L.A.A. No. 285

18. *Canadian Pacific Airlines Ltd. v. International Assn. of Machinists and Aerospace Workers, Lodge 764 (Bobanovic Grievance)*, [1984] C.L.A.D. No. 27

19. *Larocque v. Louis Bull Tribe*, [2003] C.L.A.D. No. 536

20. *Communications, Energy and Paperworkers Union of Canada, Local 595 v. GATX Rail Canada*, [2013] C.L.A.D. No. 121

21. *Fender v. CSI Logistics*, [2009] C.L.A.D. No. 58

22. *Peel Law Association v. Pieters*, 2013 ONCA 396 (CanLII)

23. *8573123 Canada Inc. (Elias Restaurant) v. Keele Sheppard Plaza Inc.*, 2021 ONCA 371

24. *Naraine v. Ford Motor Co. of Canada*, 1996 CarswellOnt 5665

25. *Naraine v. Ford Motor Co. of Canada*, 2001 CarswellOnt 4441

26. *Smith v. Ontario (Human Rights Commission)*, 2005 CanLII 2811 (ON SCDC)

27. *Smith v. Ontario (Human Rights Commission)*, 2005 CanLII 19790 (ON SCDC)

28. *McDonald v. CAA South Central Ontario*, 2018 HRTO 163 (CanLII)

29. *JKB v. Regional Municipality of Peel Police Services Board*, 2019 HRTO 878 (CanLII)

30. *Association of Management, Administrative and Professional Crown Employees of Ontario v Ontario (Attorney General)*, 2021 CanLII 58440 (ON GSB).

72. In reply, the Company made the following points. There is no real issue concerning the application of implicit bias in this case, because the Grievor maintains that Mr. Heidi and the members of management engaged in overt and conscious acts of racism against him. The task of the Board, in the Company's submission, is to assess objectively the actual evidence (as opposed to the pleadings, which are what Dr. Kawakami was focussed on), bearing in mind that the Union has the burden to prove discrimination.

73. Counsel for the Company submits that the manner in which Mr. Williams conducted himself during the hearing – his lack of objectivity, his inability to avoid making subjective observations without the benefit of evidence – undermines his credibility. As an example, counsel cited Mr. Williams' insistence that everyone at Laird Station received training in the operation of certain equipment, the basis for which assertion was never explained by reference to specific facts.

74. The Company further submits that Jeff Hummel, Mr. Williams' steward who attended the February 1, 2019 disciplinary meeting in which Mr. Pauli issued the written warning to the Grievor, ought to have been called to corroborate the Grievor's testimony that, contrary to

Mr. Ali's assessment, Mr. Williams was never out of control emotionally during that meeting. Furthermore, in the Company's submission, the Union should have called witnesses to explain why, if Mr. Williams actually complained to the Union about being unlawfully deprived of training opportunities while at Laird Station, no action was taken. The Company contends that this calls into question whether Mr. Williams did in fact complain about discrimination to the Union (apart from the two layoff grievances), and it explains why the Employer's knowledge of the Grievor's claims was extremely limited.

75. Counsel for the Company contends that the Employer's witness statements, despite some inconsistencies, are generally harmonious about Mr. Williams' hostile reaction during the meeting of August 15, 2019 in the foreman's office.

76. The Company further contends that, despite the Union's ostensible acceptance of the Grievor's unchallenged written warning, nevertheless the Union attempted improperly to re-visit the events that led up to the written warning concerning the broken lock on the Company toolbox.

77. In addition, the Company submits that, contrary to the Union's characterization of the evidence, Mr. Galvin offered a clear explanation for why the anticipated reason for the Grievor's referral to the Avenue Station to chip out hardened concrete from the drums did not materialize.

78. Regarding the Grievor's March 8, 2019 layoff from Avenue Station, contrary to the Union's submission, counsel for the Company submits that Mr. Galvin gave clear evidence that there was nothing unusual about that layoff relative to other layoffs that were occurring throughout the Project. He explained further that neither Mr. Williams nor Mr. Samms, both of whom had been referred to that workplace at the same time, were needed beyond a week's worth of work there.

79. Counsel for the Company further submits that Mr. Williams' evidence about how he tested his radio on August 15, 2019 is inconsistent with the other witnesses' evidence concerning proper testing protocols. Furthermore, there is no reason to accept the Grievor's denial that he was upset or that put his hands on Mr. Heidi's desk at the August 15, 2019 meeting in the foremen's office, because such conduct is consistent with how Mr. Williams responded previously in the workplace (and on August 16, 2019) and consistent with his animated and hostile testimony throughout this hearing.

Analysis and Conclusions

80. The issues for determination are (i) whether the two layoffs (characterized by the applicant as unjust dismissals/wrongful terminations) of Mr. Williams in March and April 2019 respectively constituted violations of the collective agreement and/or the Code; and (ii) whether the Grievor's discharge was for just cause and free from discrimination under the Collective Agreement and the Ontario *Human Rights Code*.

The Layoffs

81. With respect to the grievance referrals in Board File Nos. 0249-19-G and 2580-19-G, the Union has not persuaded me on the evidence that the impugned layoffs of the Grievor were in fact disguised "unjust dismissals" or "wrongful terminations". The Union had the burden of proof in that regard. The Union presented little in the way of evidence and made no argument, apart from its allegation of discrimination, that these were not actual layoffs, but rather disguised terminations. Under Article 6.01(b) of the Collective Agreement, the Employer has the right to lay off employees. Article 6.01(d) states that the management rights set out in 6.01(b) (including layoffs and discharge) shall not be exercised in a manner which is inconsistent with the express provisions of the Collective Agreement or which is arbitrary, discriminatory or in bad faith.

82. The question is, were the layoffs of the Grievor at Leaside and at Avenue Station discriminatory? There was no dispute between the parties that the Union bears the burden of proof on this question. In my view, it has not met that burden, for the following reasons. Mr. Galvin offered explanations for the layoffs that were not seriously challenged in cross-examination, or by any compelling evidence from Mr. Williams. The Union had to prove on a balance of probabilities that the layoffs were the result of discrimination because of race or some other prohibited ground. Nothing in the Collective Agreement of which I am aware (and certainly neither party made any references to specific clauses in the Collective Agreement) appears to dictate how layoffs are to unfold (apart from the limitation that they not be arbitrary, discriminatory or motivated by bad faith). Accordingly, there are no other "markers" in the Collective Agreement by which the Board might conclude that the Grievor's layoffs were unusual or suspect or questionable which, in turn, might suggest discrimination based on race or some other prohibited ground as the true reason for the layoffs. The

Union questioned the evidence of the Employer concerning the explanation as to why Mr. Williams was not put to work on chipping out dried concrete on the transmixer drums at Avenue Station. But of note, even though that work did not materialize, both the Grievor and his co-worker, Samms, were put to other tasks for a week before they were let go due to lack of any further work. It strikes me as improbable in those circumstances that Williams was laid off as a result of unlawful discrimination. Nothing of note happened during that week to suggest that discrimination was a factor in the layoff. In any event, it was up to the Union to make that case, and it simply did not do so. Nor was I asked to arrive at a conclusion of discrimination by drawing negative inferences.

83. For these reasons, I find no violation of the Collective Agreement or the *Human Rights Code* in respect of the layoffs of Mr. Williams.

The Termination

84. Here, the burden of proof to demonstrate just cause lies with the Employer; but the burden to prove that the termination was discriminatory lies with the Union. Again, neither party took any issue with those principles.

85. In my view, the Employer has not established a case for just cause.[3] In fact, the Employer's position on cause suffers from a number of problems. For one thing, the letter of termination relies upon past conduct for which the Grievor was never disciplined. The most glaring of these is the reference in the fifth paragraph to an incident at Laird Station in which Mr. Williams was said to have responded to the Superintendent in "an extremely negative and threatening manner." Not only was the Grievor not disciplined for that alleged offence, apart from a very brief reference to it by Mr. Galvin, who had no firsthand knowledge of what happened, no evidence was adduced at the hearing to describe the incident.

86. The termination letter goes on in the sixth paragraph to refer to the letter of discipline issued to Mr. Williams by Mr. Pauli. That is fair enough. However, the seventh paragraph then refers to a "continued pattern of behaviour" in which the Grievor became "verbally abusive" and unresponsive to any attempts to resolve the underlying issues, to

[3] Typically, the first question in a just cause discharge case would be whether there was just cause for discipline, and if so, the next question would be whether discharge was too excessive a disciplinary response in all the circumstances. However, the arguments of the parties were not framed in this fashion.

the extent that other employees and supervisors became concerned about their safety and the possibility of future encounters of a similar kind. With respect, to the extent there was any such continued pattern of behaviour (none of which is particularized in the letter, apart from the one instance for which Mr. Williams was given the written warning - and even that behaviour is incorrectly described in the termination letter as having been directed toward "your superintendent", i.e., Mr. Pauli, who, it will be recalled, was away on vacation at the time of the incident on January 2, 2019), the Grievor was not disciplined or warned of termination for any of it.

87. The fact of the matter is that, at the point in time when the termination letter was developed, the Grievor had been disciplined exactly once, with a written warning for a single act of unruly behaviour.

88. A second problem with the Employer's assertion that it had cause to terminate Mr. Williams is that, having regard to the Grievor's slim disciplinary record, the Grievor's conduct on August 15 and 16, 2019, even on the Company's best case, did not warrant discharge. First, if what the Company alleges occurred in the foreman's office on August 15, 2019 is accepted at face value, Mr. Geldart gave Mr. Williams every reason later that day to believe that he had been forgiven, or at least that he and the Company should move forward and put the incident in the past. In those circumstances, Mr. Geldart's decision to permit Mr. Heidi to accost the Grievor on August 16, 2019 (and Mr. Heidi's decision to do so in a public place) was, in my view, a poor exercise of judgment. It is not surprising, then, that Mr. Williams did not take kindly to Mr. Heidi's visit or that he was dismissive of the subsequent intervention (again in public) by Mr. Geldart who only the day before had said the workplace parties should move on.

89. In addition, the termination letter by Mr. Geldart claims that the Grievor's conduct caused employees and supervisors to be concerned about their safety. There was no evidence adduced in the hearing to support that assertion (apart from Mr. Galvin recounting that in their telephone conversation on August 16, 2019, Mr. Geldart said he was extremely concerned on behalf of supervisors and employees). Neither Mr. Heidi nor Mr. Geldart claimed in their testimony any concern or fear for their own personal safety or that of others because of their interactions with the Grievor on August 15 or 16, 2019. Nor did the Grievor's co-workers, Ianou Kokyrtsa or Mr. Mora allude to any such concerns with respect to any of their dealings with Mr. Williams at any time at Forest Hill Station. The only person that I am aware of who complained of being bullied and harassed by Mr. Williams was

Mr. Coady, the foreman at Leaside (who did not testify), in a written report (hearsay, considering his failure to testify) that he completed on January 4, 2019. In any event, the tone of that report is not one of fear or concern for safety. Rather, the impression I take from Mr. Coady's report was that he was exasperated, irritated and made to feel resentful by the Grievor's conduct (for which, to repeat, Mr. Williams was disciplined with a written warning that was not grieved).

90. Finally, the termination letter claims that Mr. Williams failed to recognize the inappropriateness of his behaviour and "repeatedly and inappropriately accused Crosslinx management of being inappropriately motivated", causing the Company "to conclude that there is no reasonable prospect of improvement of behaviour and the employment relationship has become irreparable." In his cross-examination, Mr. Galvin acknowledged that the allusion in the letter to the Grievor's accusations of inappropriate motivation on the part of management refers to the Grievor's claims of racism that he expressed several times to Mr. Galvin. Again, none of the Grievor's claims of racism were investigated by the Health and Safety department, and to the extent they were investigated by Mr. Galvin, his inquiries were cursory and superficial. More importantly, the Company never previously informed the Grievor that his claims of racism were inappropriately motivated, or took any action against the Grievor for knowingly making false or reckless claims of racism. And so, the termination letter relies upon an irrelevant and unfair consideration – Mr. Williams' prior claims of discrimination – in arriving at the conclusion that the employment relationship was irreparably damaged.

91. Two of the authorities relied upon by the Company illustrate how far short the Employer fell in establishing just cause in this case. In *Ontario New Democratic Party Caucus v Canadian Office and Professional Employees Union, Local 343*, 2018 CanLII 116837 (ON LA) the grievor's employment as a Constituency Assistant to a Member of the Legislative Assembly was terminated due to continuing issues with her work performance, including failure to maintain organized files, failure to serve constituents in a timely manner, and failure to comply with directions from the Employer. In the six months prior to the discharge, the Grievor had been issued a letter of warning, a one-day suspension and a second letter of warning, all relating to work performance. In the incident that triggered the discharge, the grievor was assigned to compile a list of files that were more than six months old, along with the status of each file and next steps to be taken. The grievor was given plenty of time to complete the assignment, and with one or two minor exceptions, she was taken off all other duties for two

weeks. After two weeks of working on this, the grievor had a list of only 11 files that were more than six months old. This conflicted with what her co-worker found when he later spent a weekend at the office combing through about half of all the files and was able to compile a list of 47 that met the criteria that the grievor was given. The arbitrator concluded that progressive discipline had not been effective, and that there was no reason to expect that adding an extra suspension would change the grievor's behaviour. The grievor was unable or unwilling to perform constituency assistant's duties to reasonable standard.

92. In *Dominion Castings Ltd. v. U.S.W.A., Local 9392* 1997 CarswellOnt 1361, 47 C.L.A.S. 413, at the time of his termination, the grievor had worked for the employer for just under two years. He was terminated for insubordination towards a supervisor. His disciplinary record at that stage consisted of: threatening a security guard in October 1995; absenteeism in November 1995; insubordination and threats towards a supervisor in July 1996; poor job performance in October 1996; and absenteeism in November 1996. In the culminating incident on November 14, 1996, there was a heated exchange between the grievor and a foreman (instigated by the grievor's childish and insubordinate behaviour) the result of which the foreman told the grievor that he was suspended and ordered him to leave the premises. The grievor refused to do so, and made a rude gesture, until the intervention of union steward who persuaded the grievor to leave, which he appeared to do. However, within minutes, a security guard reported that the grievor was refusing to leave, at which point the union steward went to the change room where he found the grievor who then left the premises. There was also some evidence of swearing by the grievor, although some witnesses said they did not hear it. Given the state of the grievor's disciplinary record during his relatively short period of service, the arbitrator concluded that there was no basis on which to consider substitution of penalty. Progressive discipline had been clearly fruitless.

93. The situation with Mr. Williams was very different. He had a single written warning on his disciplinary record at the time of his termination. The Company jumped to the option of discharge without giving progressive discipline a reasonable chance following the events of August 15 and 16, 2019.

94. For these reasons, I find that the Company did not have cause to discharge Mr. Williams. The Company is therefore in violation of Article 6.01(b) of the Collective Agreement.

95. I turn to the more difficult issue, whether the discharge was discriminatory. In order for the Board to find that there was discrimination, race/colour need only be a factor in the decision to discipline and/or terminate the grievor. In this case, the Board must consider all of the evidence, including the Employer's explanation with respect to the reasons for the Grievor's termination from employment.

96. To begin with, I am cognizant that my assessment of the situation may well be influenced by the very implicit bias that Dr. Kawakami testified is so common among White people in their perceptions of Black people. As I pointed out earlier in this decision (at paragraph 9), the Company itself acknowledged in its communications with staff that "we all have bias – forces that shape our opinions and beliefs, which then in turn inform our behaviour", which is why the Employer encourages management to take the training it offers on implicit bias. We all need to guard against acting on the biases that we may not even be aware are operating subconsciously. However, my consideration of this issue is based solely on the evidence heard by the Board and the reasonable inferences that can be drawn from this evidence.

97. Throughout his testimony, the Grievor, though he was largely calm in demeanour, became very animated over the unfair treatment he feels he was subjected to by nearly everyone in authority over the course of his employment. I need not set out the details here. Suffice it to say that Mr. Williams had extremely strong views on the subject. There may be valid reasons why Mr. Williams feels the way he does due to his experience as a Black working man in Canada. I would be surprised if he has not endured at least some outright racism as well as racist micro aggressions over the span of his life in this country. But the evidence adduced in this hearing does not support the impression Mr. Williams gave that this particular workplace was a breeding ground for the vile racist attitudes, conspiracies and vendettas that the Grievor perceives. The facts in this case do not come anywhere close to the circumstances in *Naraine v. Ford Motor Co. of Canada (No. 4)*, 1996 CanLII 20059 (ON HRT), where a Board of Inquiry found that the complainant's work refusal, insubordination and physical altercation with a co-worker (which ultimately led to his termination) were the result of widespread racial taunting and slurs in the workplace that the employer did nothing to investigate and eradicate.

98. But just because I am not persuaded that there was an agenda prepared by Company supervisors and managers to target Mr. Williams on the basis of the colour of his skin or his race, that does not necessarily

mean that he was not subjected to a more nuanced form of discrimination. Although the notice of layoff at Laird Station was reversed by Mr. Galvin, and though the toolbox incident, which was brought to Mr. Galvin's attention, was never grieved, I am left to wonder why the Company did little, if anything, to investigate Mr. Williams' claims that these were racially motivated events. There is no dispute that Mr. Williams raised these concerns with Mr. Galvin. According to Company policy, claims of discrimination are properly the domain of the Employer's Health and Safety department, and yet those concerns were never referred to or investigated by that department.

99. I am also struck by the fact that Mr. Heidi and Mr. Geldart were made aware of the Grievor's concern about Iouri Kokyrtsa's confrontation with Mr. Williams during the movement of the crane on August 15, 2019, and yet no one looked into that matter at all. Mr. Heidi, in fact, concluded without supporting evidence that if Mr. Kokyrtsa raised his voice in that exchange, it was only to be heard above the din of a construction site. On the evidence I heard, it is probable that Mr. Kokyrtsa was in a state of frustration over the Grievor's radio silence, and that his voice was raised not to be heard over any construction noise (it was, after all, only shortly after 6:00 a.m.) but for the purpose of expressing angry disapproval and shaming Mr. Williams. There is also the issue of the radio that Mr. Williams says was not functioning properly. Mr. Heidi did not even examine the radio to determine whether there could be a problem (nor did Mr. Geldart follow up with Mr. Heidi once he learned that there had been an issue with the radio). He assumed Mr. Williams was wrong because the radios had recently been serviced. So did Mr. Geldart.

100. And yet, when it came to Mr. Williams' conduct on August 15 and 16, 2019, the Company ensured that his outbursts were investigated and fully documented with witness statements. The witness statements, in fact, played a significant part in the decision to fire Mr. Williams. And those witness statements, as the Union has demonstrated, contained enough inconsistencies to warrant further questions, none of which were asked. Furthermore, Mr. Williams' witness statement contained no information about what happened in the foreman's office on August 15, 2019 (apart from a brief reference to the meeting during the Grievor's description of the discussion with Mr. Heidi on August 16, 2019). Why did the Company not ask for further details from Mr. Williams about that, not to mention further details about the Grievor's confrontation with Iouri Kokyrtsa on August 15, 2019 (Mr. Galvin conceded in his cross-examination that, depending on the

circumstances, a worker shouting at another worker could be a matter worthy of investigation)?

101. I accept as fact that the Grievor behaved truculently during the meeting in the foreman's office (perhaps egged on by Iouri Kokyrtsa) on August 15, 2019. I do not accept the Grievor's claims that he was cool, calm and collected. And yet, it seems to me the Company reacted disproportionately from that point forward. Mr. Williams did not swear during his outburst and did not threaten or carry out any physical assault of Mr. Heidi. At most, he inappropriately closed in angrily on Mr. Heidi's personal space and undermined his authority as a foreman. Mr. Heidi did not express any fear of Mr. Williams. In my view, his reactions – reporting the incident to Mr. Geldart (which was appropriate), and then accosting Mr. Williams the following day (which was over the line) – were those of a not very experienced foreman upset that the Grievor had shown him disrespect. Mr. Heidi as much as admitted this during his cross-examination. Mr. Geldart should have denied Mr. Heidi's request to exert his authority over Mr. Williams on August 16, 2019, particularly after Mr. Geldart gave the Grievor every impression that the event in the foreman's office the day prior was not going to lead to any further action. Had Mr. Heidi been restrained on August 16, 2019 from escalating an incident on which Mr. Geldart had already provided some gentle counsel to Mr. Williams on August 15, 2019, it is unlikely in my view that Mr. Williams would have lost his job 12 days later.

102. Racial stereotyping does not usually announce itself loudly, clearly and unapologetically. Take the example of the decision in *Peel Law Association*, *supra*. In that matter, two Black lawyers in a lawyers' lounge operated by the Peel Law Association ("PLA") were approached by a PLA librarian and asked to show their credentials as lawyers to justify their presence in the lounge. She did not ask others in the lounge to produce their credentials, and she in fact falsely stated that she knew that all others in the lounge at the time were lawyers. Following a hearing on a complaint by the two lawyers, the Human Rights Tribunal of Ontario ("HRTO") found that the PLA and the librarian had failed to provide a credible and rational explanation for the librarian's intervention and the manner in which she questioned the complainants and drew the inference that the librarian took the action she did at least in part because of the complainants' race and colour. The matter was taken up on judicial review, and the Ontario Divisional Court quashed the HRTO decision.

103. On appeal, the Ontario Court of Appeal ("OCA") restored the HRTO decision. The OCA reasoned that the Divisional Court erred by:

i. applying a new test for discrimination;

ii. finding that the HRTO reversed the burden of proof from the complainants to the PLA;

iii. finding that the HRTO analyzed the evidence in a compartmental fashion;

iv. finding that the HRTO disregarded evidence; and

v. finding that the HRTO referred to social science not in evidence before the Tribunal.

104. The OCA made some pointed observations regarding subparagraph (v) above. In its decision, the HRTO had referred to human rights cases in which a number of propositions emerged about discrimination, including the proposition that racial stereotyping will usually be the result of subtle unconscious beliefs, biases and prejudices. The OCA stated that that proposition is a "sociological fact" recognized in previous decisions of the OCA. The OCA also stated that the HRTO in *Peel Law Association* had not erred in considering a previous decision of the HRTO[4] in which an expert in social science testified, because earlier in *Peel Law Association* the HRTO had already found as fact, based on the evidence, that the librarian's decision to question the Black lawyers was tainted by consideration of their race and colour. The OCA stated at paragraph 117:

> [120] I accept the respondents' contention that a tribunal needs to exercise care in taking judicial notice of social science [page105] not introduced in evidence before it. The parties do not have the opportunity to challenge the matter judicially noticed, and it may be wrong. At the same time, social science can deepen the understanding of interactions between individuals generally, thus assisting the adjudication of a particular case. Balance and judgment is necessary to ensure that judicial notice of social science not in evidence does not result in unfairness.

105. Of course, in the instant matter, the Board had largely unchallenged evidence from an expert in implicit bias. In my view, that evidence does what the OCA in *Peel Law Association* described – it deepens the Board's understanding of the individual interactions

[4] *Nassiah v Peel Regional Police Services Board*, 2007 HRTO 14 (CanLII)

between Mr. Williams and others, and it assists in the adjudication of this case. It explains how decent, fair-minded people who would eschew and denounce racist conduct might still act on unconscious biases to the detriment of a member of an "outgroup" and to the benefit of members of the "ingroup". That is what I believe occurred in this case. Iouri Kokyrtsa's conduct was not scrutinized (and in fact he was given the benefit of the doubt), whereas the Grievor's conduct in the foreman's meeting was closely documented. Mr. Williams' claims of abuse by Mr. Kokyrtsa and of a malfunctioning radio were not taken seriously or investigated. Mr. Williams' outbursts in the foreman's meeting and on August 16, 2019 appear not to have frightened anyone (and Mr. Geldart initially all but forgave the Grievor's flare-up on August 15, 2019), but ultimately came to be viewed by those who participated in the decision to terminate his employment as a threat to "employees' safety and well being". Mr. Williams was accosted twice in public on August 16, 2019, which itself suggests an over reaction by those in authority. Mr. Williams took great umbrage to Mr. Heidi's and Mr. Geldart's visits that day, but one wonders how any other person would react in similar circumstances. Finally, the termination letter itself clearly refers to the fact that the Grievor had made complaints of discrimination as a reason why the employment relationship is not salvageable ("You have consistently refused to acknowledge your serious inappropriate conduct and have, instead, repeatedly and inappropriately accused Crosslinx management of being inappropriately motivated. This has forced Crosslinx to conclude that there is no reasonable prospect of improvement of behaviour and the employment relationship has become irreparable."). He was accused essentially of "playing the race card". It may be that he was incorrect about those motivations, but very little was done by the Company to inquire into his complaints. A failure to investigate claims of discrimination may itself be discriminatory, and a breach of the *Human Rights Code*: see *McDonald v. CAA South Central Ontario*, 2018 HRTO 163 (CanLII).

106. As I have indicated, the Company argues that Mr. Williams was not a credible witness, and that Dr. Kawakami's evidence on implicit bias is not sufficient to conclude that the Grievor's termination was tainted by discrimination. It submits that, given the inadequacy of the testimony of the two Union witnesses, the Union ought to have arranged for its representatives to testify about what they discussed with Mr. Williams concerning his claims of discrimination and what they did about it.

107. While Mr. Williams occasionally assessed his own behaviour in a self-serving manner (for example, by underplaying the volatility of his

reactions to the perceived offence of others) and at times drew conclusions that lacked any air of reality, that is not a reason to discount the entirety of his evidence. The Grievor's shortcomings as a witness – his rectitude, his suspicions that others were obsessed with bringing him down, his tendency to overstate – belie a sense of self-importance, but do not give me cause to seriously doubt the overall reliability of his evidence. Much of what he said about what happened (as opposed to *why* it happened) was corroborated by the Employer's witnesses.

108. I also do not see why I should, as urged by counsel for the Company, ignore Dr. Kawakami's testimony. It is true that she did not have the benefit of considering the oral testimony of the witnesses, and that her observations about this particular case were only made in the context of the parties' pleadings and common book of documents. However, it is her evidence generally about Social Psychology and the well accepted phenomenon of implicit bias that is helpful here in interpreting the key facts surrounding the Grievor's termination. Her evidence casts a light on whether discrimination, albeit unintentional discrimination, played any role in his discharge. That being said, the facts as gleaned from the evidence of the witnesses who had firsthand knowledge of the events described in this decision speak for themselves.

109. Finally, I view the Company's argument that the Union bears responsibility for not explaining what it knew of Mr. Williams' claims of racism and how it dealt with such claims as the proverbial red herring. There is sufficient evidence before me of a discriminatory discharge without the need for any further information from Union witnesses. Furthermore, the cases cited by the Company (discussed below) for its proposition concerning the Union's role illustrate why this argument never gets off the ground.

110. In *Office and Professional Employees International Union, Local 267 v. Domtar Inc.*, 1992 CanLII 7512 (ON SC) the employee (Gohm) was unable to work on Saturdays for religious reasons. Gohm was, however, willing to work Sundays for straight time. The employer was prepared to allow her to do so, but the union refused to waive a requirement in the collective agreement that time-and-a-half be paid for Sunday work. Gohm was subsequently dismissed. She complained to the Ontario Human Rights Commission, and a Board of Inquiry upheld the complaint on the ground that the employer could have reasonably accommodated the complainant without undue hardship and failed to do so. The Board of Inquiry found that the union was jointly liable with the employer in that the union signed a collective agreement recognizing the discriminatory Saturday work requirement. The Board of Inquiry

also found that the union's expressed intention to enforce the premium pay provisions of the collective agreement constituted a *prima facie* violation of the *Human Rights Code*, because it directly contributed to the employer's action in terminating the complainant. The Board of Inquiry found the employer and the union jointly and severally liable to Gohm for lost wages over a 26-month period.

111. The union appealed the Board of Inquiry's finding of joint and several liability. The Division Court dismissed the appeal. It found that the union was guilty of adverse effect discrimination by refusing not to enforce the Sunday premium provision in the collective agreement. (And it further noted that nothing in the union's actions required the employer to schedule Gohm to work on Saturdays, or to refuse to accommodate her schedule or to fire her.)

112. A similar result obtained, for similar reasons (failure to accommodate religious beliefs), in a case originating in British Columbia*, Central Okanagan School District No. 23 v. Renaud*, 1992 CanLII 81 (SCC), [1992] 2 SCR 970. There, the complainant worked for a School Board. The work schedule, part of the collective agreement, mandated a shift on Friday evening. The complainant's religion, however, prevented his working from sundown Friday to sundown Saturday. Several alternatives to the complainant's work schedule were canvassed by the complainant and the School Board. The only practical accommodation was the creation of a Sunday-to-Thursday shift, but this involved an exception to the collective agreement and required union consent. The union demanded the employer rescind the proposal and threatened to launch a policy grievance. The School Board eventually terminated the complainant's employment when he refused to complete his Friday night shift. The complainant filed a complaint under the BC Human Rights Act against both the School Board and the union. The complainant filed a complaint under the British Columbia *Human Rights Act* and succeeded at first instance against both the employer and the union on the basis that they were equally responsible for the adverse effect discrimination suffered by the complainant. However, the employer and the union were successful in subsequent Court proceedings before the Supreme Court of British Columbia and in the British Columbia Court of Appeal. On appeal to the Supreme Court of Canada, the decision in favour of the complainant at first instance was restored. With respect to the union's liability, the Supreme Court of Canada stated that a union may become a party to discrimination in two ways. First, it may cause or contribute to the discrimination by participating in the formulation of the work rule that has the discriminatory effect on the complainant. Second, a union may be liable

if it impedes the reasonable efforts of an employer to accommodate. The union in the *Renaud* case did both.

113. It is readily clear that the instant matter, unlike the *Domtar Inc.* and the *Renaud* decisions, does not involve discrimination on the basis of religious belief, or adverse effect discrimination, or any aspect of the duty of accommodation. If the Company was suggesting in its argument that the Union should be held as responsible as the Company for any finding of racial discrimination against Mr. Williams, the *Domtar Inc.* and *Renaud* cases are no authority for that proposition. Nor has the Company provided any other authority to support such an argument. In any event, this proceeding has nothing to do with the Union's conduct. The Union bears the burden of proof only to demonstrate that the Company discriminated against the Grievor contrary to the Collective Agreement and the *Human Rights Code*. I find that, in respect of the Grievor's termination, it was tainted by discrimination based on race and colour, contrary to Article 6.01(d) of the Collective Agreement and subsection 5(1) of the *Human Rights Code*. In arriving at this conclusion, however, I am not implying that any of the Company's witnesses intentionally singled out Mr. Williams because of his race and colour during the events that led up to his termination, including the decision to discharge him.

114. The grievances with respect to the referrals in Board File Nos. 0249-19-G and 2580-19-G are dismissed. The discharge grievance with respect to the referral in Board File No. 2581-19-G is allowed.

115. The issues regarding remedy are remitted back to the parties. They are to advise the Board within 30 days of the date of this decision of the status of their discussions, failing which this decision will be deemed to be the final decision in these matters.

116. I remain seized to deal with the remedial issues in the event the parties cannot resolve them.

"Patrick Kelly"
for the Board