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**MINISTRY OF PUBLIC SAFETY AND SOLICITOR GENERAL
BC CORRECTIONS
BRIEFING NOTE**

PURPOSE: For INFORMATION for the Honourable Mike Farnworth, Minister of Public Safety and Solicitor General

ISSUE: Human Rights Tribunal Decision - Levan Francis vs North Fraser Pretrial Centre (NFPC)

SUMMARY:

- A 114-page Human Rights Tribunal (HRT) decision posted on July 5, 2019, has ruled that a former correctional officer at NFPC was discriminated against by co-workers and supervisors in eight race-related incidents.
- The scope of the complaint covers a period from 2008 until Levan Francis (the Complainant) left the workplace in 2013 on long-term disability and alleges that the Complainant had been subject to denigrating racial remarks about him, and to him, and therefore was subject to a "poisoned work environment."
- The HRT decision concludes that the Complainant was retaliated against by coworkers and supervisors for filing a human rights complaint.
- While decisions regarding remedy have yet to be determined by the HRT, ^{s.13; s.14} s.13; s.14
- On July 17, 2019, the BCGEU wrote to Minister Farnworth to conduct an independent inquiry into what they describe as "a damaged corporate culture" within the Adult Custody Division of BC Corrections.

SUGGESTED RESPONSE:

- The Human Rights Tribunal's findings are deeply troubling, and BC Corrections' legal counsel is currently reviewing them along with the BC Public Service Agency.
- Because this matter is before the Human Rights Tribunal pending the remedy phase, it would be inappropriate to comment further on the decision at this time.
- What I can say is, when these allegations came to light years ago, BC Corrections contracted outside experts to provide mandatory anti-bullying and harassment training to all staff at North Fraser Pretrial Centre.
- We do not tolerate racism, bullying and harassing behaviours and will continue to train and hold staff accountable at all levels.
- Independent of the recent Human Rights Tribunal decision, BC Corrections-Adult Custody Division, has embarked on several workplace environment reviews to help ensure we are fostering a positive and respectful place of employment.

BACKGROUND:

Timelines

- The HRT complaint was filed in October 2012. The scope of the complaint covers a period of 18 months, from January 2012 to July 2013. There were subsequent amendments filed by the Complainant that expanded the initial complaint. Due to this, s.22
s.22, and other delays the HRT hearings commenced in October 2014 and the decision issued July 2019.
- The HRT concluded that several racist comments occurred over 6-7 years ago between January 2012 to July 2013, as well as other forms of retaliation for filing the complaint.

s.22

Legal Input

s.14; s.22

PSA Input

s.13; s.14

Additional Background

- s.22 management brought in a consultant to train all staff on bullying, harassment and discrimination in accordance with Workers Compensation Board/WorkSafeBC rules.
- s.22
- Adult Custody Division's retention strategy includes two environmental scans that are currently underway:
 1. Environmental Retention Scan: Marli Rusen, leading expert in workplace dynamics has been contracted to conduct environmental retention scans at all ten correctional centres. This scan will provide direct input from staff regarding effective retention strategies. The environmental retention scan will review the following areas:
 - Unexplained staff turnover;
 - Challenges with retention;
 - Persistently low or significant, unexplained changes in internal engagement scores; and
 - Unusually high rates of absenteeism.
 2. Research Based Retention Framework: a research project in collaboration with a research team from University of Victoria. The primary objective is to enhance the retention and engagement of correctional staff at all correctional centers and to help them find more meaning in their work and in their work environment. Given the critical nature of the role of the correctional officer, it is important that they remain highly motivated and engaged. We also have an aspirational objective in this project, which is to inform, revise, and reinforce management approaches and practices at BC Corrections so as to make it "a great place to work." This review will result in recommendations based on data gathered and will assist BC Corrections to implement the recommendations.

OTHER MINISTRIES IMPACTED/CONSULTED:

- N/A

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Approved by:

Stephanie Macpherson
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Attachment(s)

Letter to MMF
s.14

Francis vs BC Ministry of Justice

**MINISTRY OF PUBLIC SAFETY AND SOLICITOR GENERAL
BC CORRECTIONS
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- The HRT decision concludes that the Complainant was retaliated against by coworkers and supervisors for filing a human rights complaint.
- While decisions regarding remedy have yet to be determined by the HRT, ^{s.13; s.14}
- On July 17, 2019, the BCGEU wrote to Minister Farnworth to conduct an independent inquiry into what they describe as "a damaged corporate culture" within the Adult Custody Division of BC Corrections.

SUGGESTED RESPONSE:

- Racism has no place in our province — or within the BC Public Service, which includes BC Corrections.
- All people deserve to feel safe and respected in their workplace and government encourages employees who experience or witness discrimination to speak up.
- Due to privacy concerns, we cannot comment on the details of the allegations while this matter remains before the tribunal in remedy phase.
- As government we recognize our duty to set an example and we know there is significant work to do to address broader issues of systemic racism.
- As we work together to build a better province, government will continue to stand up for the values shared by the vast majority of British Columbians — those of equality, inclusiveness, mutual respect and unity.

If asked what is the B.C. government doing to address racism?

- We recognize there's still significant work to do to address systemic racism.
- Our government is committed to building an inclusive society, including by:
- Re-instating the BC Human Right Commission

- Implementing the Resilience BC anti-racism network.
- Updating B.C.'s Police Act to address systemic racism within the outdated legislation
- Developing new on-line, multilingual resources on what to do if you are a victim or bystander of racism.
- We will continue to defend the values of diversity, equality and mutual respect as we work together to build a better province.

BACKGROUND:

Timelines

- The HRT complaint was filed in October 2012. The scope of the complaint covers a period of 18 months, from January 2012 to July 2013. There were subsequent amendments filed by the complainant that expanded the initial complaint. Due to this, s.22 and other delays the HRT hearings commenced in October 2014 and the decision issued July 2019.
- The HRT concluded that several racist comments occurred over 6-7 years ago between January 2012 to July 2013, as well as other forms of retaliation for filing the complaint.

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OTHER MINISTRIES IMPACTED/CONSULTED:

- Ministry of Attorney General

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Attachment(s)

s.14



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Ministry_of_Justice_



Letter to Minister
Farnworth_.pdf

Date Issued: July 4, 2019
File: 10996

Indexed as: Francis v. BC Ministry of Justice (No. 3), 2019 BCHRT 136

IN THE MATTER OF THE *HUMAN RIGHTS CODE*,
RSBC 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

BETWEEN:

Levan Francis

COMPLAINANT

AND:

Her Majesty the Queen in Right of the Province of British Columbia as represented by the
Ministry of Justice, North Fraser Pre-trial Centre

RESPONDENT

REASONS FOR DECISION

Tribunal Chair: Diana Juricevic

Counsel for the Complainant: Larry W.O. Smeets

Counsel for the Respondent: Peter A. Gall, Q.C., and Andrea L. Zwack

Dates of Hearing: October 20, 21, 22, 2014
January 10, 2018
November 13, 14, 16, 19, 21, 22, 23, 29, 30, 2018

Location of Hearing: Vancouver

Submissions Completed: January 22, 2019

I INTRODUCTION

[1] Levan Francis [Francis] alleges that Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Justice, North Fraser Pre-trial Centre [North Fraser or the Respondent] discriminated against him in his employment on the grounds of race and colour contrary to s. 13 of the *Human Rights Code* [Code]. Francis also alleges retaliation contrary to s. 43 of the *Code*. The Respondent denies these allegations.

[2] I find the complaint justified, in part, under s. 13 and s. 43 of the *Code*. These are the reasons for my decision.

II OVERVIEW

[3] This complaint is set in the context of a long employment relationship. Francis has been employed as a correctional officer in British Columbia since 2000. He began working in Vancouver, and after facility closures, was transferred to North Fraser in 2006. The issues that I have been asked to determine arose six years later, shortly after Francis took a position in Centre Control [Control]. At that time, Francis was also working in segregation.

[4] Francis identifies as “Black”. Francis reported incidents of racism to management. Francis filed his human rights complaint on October 25, 2012. Subsequent amendments expanded his complaint. The scope of this complaint covers a period of eighteen months, from January 2012 to Francis’ departure from the workplace in July 2013. During that time, Francis reported that colleagues and supervisors made racial remarks about him, to him, or about other coworkers. The Respondent conducted internal investigations into some of these reports. Francis alleges the Respondent did not take his reports seriously, and that colleagues and supervisors targeted him further after they became aware of his human rights complaint.

[5] The Respondent’s general position is that Francis used accusations of racism as a shield when his performance was criticized and fabricated allegations for his human rights complaint.

III PROCEDURAL HISTORY

[6] There have been various delays to this proceeding which has made the adjudication of this complaint challenging. Some of these delays are summarized below.

[7] The hearing proceeded for three days of evidence in October 2014. At the time, the parties were represented by different counsel, and the hearing was presided over by a different member. Francis testified. His examination-in-chief was completed, and it appears that the cross-examination completed as well. The hearing was then adjourned, and there were further delays. The hearing resumed for one day in January 2018, but no evidence was adduced. Rather, the parties discussed options for resolving the complaint. Francis was self-represented, and the Respondent was represented by different counsel. Since then, Francis has retained new counsel.

[8] I began presiding shortly thereafter. Pursuant to s. 27.3 of the *Code*, I issued decisions to facilitate the just and timely resolution of this complaint. First, I decided to continue the hearing from the record of evidence adduced to date. Second, I decided to bifurcate the hearing. Third, I decided to proceed with a hybrid hearing for most witnesses. Sworn affidavits with exhibited documents were tendered into evidence in lieu of direct examinations. All witnesses attended the hearing for further *viva voce* examination. The relevant decisions are attached.

IV PRELIMINARY MATTERS

[9] As a preliminary matter, the parties dispute the scope of admissible evidence. At issue are certain paragraphs in the affidavits of witnesses. I received written submissions from the parties prior to the start of the hearing. On the first day of the hearing, I heard additional oral submissions. These submissions were considered in the context of applications to strike. I issued a ruling on November 13, 2018 granting some of the applications with reasons to follow. By the end of the hearing, some of those applications became moot while others were resolved on consent. Below are the reasons for my decision on the remaining applications to strike.

[10] I begin with the principles that govern the admissibility of evidence in human rights proceedings. The scope of admissible evidence flows from the application of s. 27.2 of the *Code*, which gives the Tribunal discretion to receive evidence that is necessary and appropriate, regardless of whether it would be admissible in a court proceeding. It also flows from the *Rules of Practice and Procedure* [*Rules*]. Together, the *Code* and *Rules* establish what facts can be presented to the Tribunal and the procedure for introducing them into evidence. For example, the *Rules* set out what documents will be admitted into evidence, whether they must be served on the other party, and the time limits for doing so. The *Rules* ensure that any oral or documentary evidence is presented to the Tribunal in a predictable way.

[11] The Tribunal can only consider evidence that is admissible, which means that it is relevant to a material fact in the case and not excluded by any rules of evidence. Evidence is relevant if it is related to the facts of the case in some logical or important way. A material fact is one that is important or essential to the case. As a starting point, what is material is determined by the complaint, itself, because it sets out the dispute between the parties. For these reasons, the scope of admissible evidence in this proceeding flows from the scope of the complaint, as filed and amended on October 26, 2012, March 26, 2013, and October 29, 2014.

[12] The scope of admissible evidence also flows from previous rulings and decisions issued by this Tribunal in relation to this complaint. These include rulings made during the 2014 hearing and decisions dated January 29, 2013, April 11, 2013, February 14, 2014, and July 31, 2017. Since none of these decisions have been judicially reviewed, I am bound to follow them. As such, my ruling regarding the scope of admissible evidence in this proceeding is consistent with the pleadings, previous decisions, and the principles set out in s. 27.2 of the *Code* and the *Rules*.

[13] Applying these principles to the issues raised in the applications, I make the following decisions. First, any evidence that relates to events predating January 1, 2012 is precluded by the Tribunal's decision in *Francis v. BC (Ministry of Justice)* 2014 BCHRT 39 [the **Time Limit Decision**]. In that decision, Member Tyshinski dismissed the part of the complaint alleging discrimination before 2012. Whether those events occurred, as alleged, are not matters before

me in this proceeding. For this reason, various paragraphs of the affidavits filed by both parties were ruled inadmissible. Also, I have not considered any arguments advanced by the parties in closing submissions that address allegations precluded by the Time Limit Decision.

[14] Second, in his July 31, 2017 decision, Member Rilkoff clarified that evidence regarding events that occurred before 2012 will be admitted only to provide context to events that occurred in 2012 or later and which are the subject of the complaint [the **Ruling**]. Member Rilkoff gave notice that he would disallow attempts to admit such evidence where he concluded that it was not contextual but more of an attempt to litigate events that had already been dismissed in the Time Limit Decision. This issue arose largely in the context of investigation interviews regarding events that occurred years earlier. I decided that the interview documents were admissible and any objections to such documents goes to the weight of this evidence. My decision is consistent with the Ruling in that "evidence with regards to events that occurred before 2012 will be admitted only to provide context to events that occurred in 2012 or later or to refute, impeach or otherwise respond to the evidence that Mr. Francis gave with regard to those events that was admitted".

[15] Third, I struck some affidavit paragraphs because they were not relevant to the issues that I have to determine in this complaint. This issue arose largely in the context of the emotional responses of witnesses, and in some cases, in relation to remedy. As stated by the Tribunal in *Becker v. Cariboo Chevrolet Oldsmobile Pontiac Buick (No 2)* 2004 BCHRT 80 [Becker]:

There are issues in human rights cases, such as, for example, a complainant's testimony about the effects of a respondent's discriminatory conduct on her dignity, feelings and self-respect, where a witness' emotional responses are relevant. However, with the exception of those situations where such responses are relevant, witnesses' protestations of surprise, shock, disgust or other emotions are as much a waste of the Tribunal's time as they are of the courts'. [para. 44]

[16] For example, the emotional responses of Respondent witnesses to learning, after the fact, that they have been named in a human rights complaint are not relevant to the issues that I have to decide. Furthermore, evidence that goes to remedy was not admissible at this stage of the proceeding. Some evidence in the affidavits of witnesses was struck because it addressed the issue of remedy, and as such, was precluded by my decision to bifurcate this hearing which was issued on August 20, 2018.

[17] Fourth, I declined to strike any affidavit evidence that contained facts based on belief because it was premature to do so. I acknowledge that evidence based on belief must be treated with caution: *Becker*, para. 36. At this stage, however, such objections go to what weight, if any, I could accord to such evidence. I invited counsel to test the source of any such information during cross-examination.

[18] Fifth, I declined to strike any affidavit evidence that the Respondent characterized as "opinion". None of the parties are seeking to enlist expert opinion evidence at this stage of the hearing. At issue are the opinions of fact witnesses. Opinion evidence provided by a non-expert is generally inadmissible, and will seldom, if ever, be necessary or appropriate in affidavits because such opinions do not assist the Tribunal in its fact-finding process: *Chamberlain v. School District No. 36 (Surrey)*, 1998 6723 (BCSC), para. 28. As stated in *Creber v. Franklin*, [1993] B.C.J. No. 890:

The affidavits should state the facts only, without stopping to add the deponent's descriptive opinion of those facts. It should be left to argument to persuade the trier of fact what view he or she should take of them. For counsel to permit affidavits to be larded with adjectives expressing an opinion about the conduct of the other side contributes nothing to the fact finding process. On the contrary, it does a disservice. It exacerbates existing ill feeling. It pads the file with unnecessary material and it wastes the court's time. (para. 19)

[19] In this case, however, the affidavits were drafted in such a way that I was unable to strike out descriptive opinions without also striking out the facts. To ensure that all relevant facts are before the Tribunal, it was premature to strike portions of the affidavits that

contained non-expert opinion evidence: *Becker*, para. 21. In these circumstances, it was fair and just to deem such objections as going to weight not admissibility. I invited counsel to test such evidence during cross-examination to determine what weight, if any, such evidence could be accorded.

[20] Sixth, I declined to strike any affidavit evidence based on hearsay. The Tribunal can, and frequently does, take a more relaxed stance to the admission of hearsay evidence than do the courts: *Code*, s. 27.2. For the fact-finding process, hearsay evidence must be sufficiently reliable to be useful. Factors that I considered in determining the admissibility of hearsay evidence include, among other things, whether the source of the hearsay evidence testifies, and whether the other party has the opportunity to test hearsay information during cross-examination.

[21] This issue arose largely in the context of Michelle Gallant who provided hearsay evidence on what her husband, Francis, told her. Francis was the source of the hearsay and both witnesses testified. Since the Respondent had the opportunity to test the evidence of both witnesses in cross-examination, I find that objections to Gallant's hearsay evidence goes to weight, not admissibility. For other witnesses, I find that the hearsay evidence was admissible to the extent that it established the scope of their knowledge and understanding of what transpired. I determined on a case-by-case basis whether hearsay was admissible for the truth of its contents.

[22] Finally, I declined to strike portions of affidavits that referred to undated incidents because it was premature to do so. Rather, I invited the parties to cross-examine this information to determine whether those incidents fall outside the temporal scope of this complaint. I determined the admissibility of those incidents on a case-by-case basis.

V EVIDENCE

[23] My findings of fact are derived from the evidence submitted by the parties through 21 witnesses during 12 days of evidence. I have reviewed and considered all of the evidence and submissions presented by the parties at this hearing. I have not referred to all of the evidence

that I have reviewed. In these reasons, I set out only that evidence required to come to my decision.

A. Witnesses

[24] Five witnesses testified on behalf of the Complainant:

- i. **Levan Francis** is the Complainant. He testified on October 20, 21 and 22, 2014 and November 14 and 19, 2018.
- ii. **Tim Fass** is an assistant deputy warden at another facility. At material times to this complaint, he was a correctional officer at North Fraser. He testified on November 14, 2018.
- iii. **Victor Amarelo** is a correctional officer at North Fraser. He gave affidavit evidence and testified on November 16, 2018.
- iv. **Michelle Gallant** is Francis' common law partner. She gave affidavit evidence and testified on November 16, 2018.
- v. **Kenneth Low** is a correctional officer at North Fraser. He gave affidavit evidence and testified on November 16, 2018.

[25] Sixteen witnesses testified on behalf of the Respondent:

- i. **Benjamin Atkinson** is an assistant deputy warden at North Fraser. At material times to this complaint, he was a correctional officer and supervisor. He gave affidavit evidence and testified on November 21, 2018.
- ii. **Kaher Uppal** is an assistant deputy warden at North Fraser. At material times to this complaint, he was a correctional supervisor. He gave affidavit evidence and testified on November 21 and 22, 2018.

- iii. **Matt Waters** is an assistant deputy warden at North Fraser. At material times to this complaint, he was a correctional officer. He gave affidavit evidence and testified on November 21, 2018.
- iv. **Dean Manzer** is a correctional supervisor at North Fraser who trained Francis in Control. He gave affidavit evidence and testified on November 21, 2018.
- v. **Eric Torok** is a correctional officer at North Fraser. He gave affidavit evidence and testified on November 21, 2018.
- vi. **Craig Price** is a correctional officer at North Fraser. He gave affidavit evidence and testified on November 21, 2018.
- vii. **John Polonio** is assistant deputy warden at North Fraser. At material times to this complaint, he was a correctional supervisor. He gave affidavit evidence and testified on November 22, 2018.
- viii. **Rajan Bahia** is deputy warden at North Fraser. At material times to this complaint, he was a correctional supervisor and assistant deputy warden. He gave affidavit evidence and testified on November 22, 2018.
- ix. **Clayton Smith** is a correctional officer at North Fraser who was Francis' partner in Control. He gave affidavit evidence and testified on November 22, 2018.
- x. **Tara Heinrich** is employed elsewhere. At material times to this complaint, she was assistant deputy warden and worked under a different last name. She gave affidavit evidence and testified on November 23, 2018.
- xi. **Bob Chohan** is employed elsewhere. At material times to this complaint, he was a correctional officer and acting supervisor at North Fraser. He gave affidavit evidence and testified on November 23, 2018.

- xii. **Greg Firlotte** is employed at another correctional facility. At material times in this complaint, he was a correctional supervisor at North Fraser. He gave affidavit evidence and testified on November 23, 2018.
- xiii. **Richard Moore** is employed at another correctional facility. At material times to this complaint, he was a correctional officer at North Fraser. He gave affidavit evidence and testified by way of video conference on November 23, 2018.
- xiv. **James Peakman** is a correctional officer at North Fraser. He gave affidavit evidence and testified on November 23, 2018.
- xv. **Lisa Martin** is employed at another correctional facility. At material times in this complaint, she was deputy warden at North Fraser. She gave affidavit evidence and testified on November 29, 2018.
- xvi. **Elliott Smith** is warden of the Fraser Regional Correctional District. At material times in this complaint, he was deputy warden at North Fraser. He gave affidavit evidence and testified on November 29 and 30, 2018.

B. Credibility

[26] There were significant disagreements on the facts, how the facts are to be interpreted, and the legal consequences that may flow from them. To resolve these disagreements, I have made findings of credibility. I have applied the principles for assessing credibility established in *Faryna v. Chorny*, [1952] 2 DLR 354 (BCCA):

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carries conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the

probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. (p. 357)

[27] I have adopted the methodology set out in *Bradshaw v. Stenner* [2010] BCSC 1398

[Bradshaw]:

[...] first consider the testimony of a witness on a ‘stand alone’ basis, followed by an analysis of whether the witness’ story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the “preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions” (para. 187).

[28] The factors I have taken into account in my assessments include a witness’ ability and opportunity to observe events; motive to lie; bias or prejudice; ability to “resist the influence of interest” to modify recollection; appearance and manner while testifying; power of recollection; whether the testimony seems unreasonable, impossible, or unlikely; inconsistencies in evidence; whether the testimony harmonizes with independent evidence; how the evidence fits into the general picture revealed on a consideration of the whole of the case: *Van Hartevelt v. Grewal* [2012] BCSC 658, paras. 30-35; *Bradshaw*, paras. 185-187.

[29] In this case, the most helpful evidence is the documents created at the time of events. These provide the most accurate reflection of what occurred, rather than witness memories that have faded through the passage of time, hardened through this proceeding, or been reconstructed. I admitted these documents into evidence for the truth of their contents. These include text messages, emails, inmate logs, work schedules, and interview transcripts. For the most part, I was able to use contemporaneous documents as a reliable yardstick against which to compare and assess the credibility and reliability of evidence. I reject arguments advanced by both parties questioning the authenticity of some of those documents because there was no credible evidence that they were fabricated.

[30] My credibility findings are set out below. I have summarized my credibility findings for the two main witnesses at the outset.

1. Francis and Clayton Smith

[31] Francis and Clayton Smith worked together in Control, and at some point, they regarded each other as friends. The relationship between Francis and Clayton Smith has deteriorated over time, and this has coloured their testimony. They have both attributed motives to each other that were speculative. They had a propensity to cast each other in a negative light and minimize any information that may reflect negatively on them. This resulted in inconsistencies and exaggerations in their evidence. In some cases, changes in their testimony were ineffective attempts to rehabilitate their evidence when confronted with contrary evidence. For these reasons, I have been reluctant to consider their testimony on a stand-alone basis when not corroborated by independent evidence.

[32] The Respondent advances three main arguments that Francis is not a credible witness. First, the Respondent argues that Francis is not a “reasonably objective observer” and viewed almost everything that occurred in the workplace through a distorted lens, believing that he was being discriminated against and retaliated against in response to legitimate criticisms of his work performance. Second, the Respondent argues that Francis is manipulative and simply fabricated many allegations after-the-fact to support his human rights complaint. Third, the Respondent argues that Francis has an erroneous recollection of events that has become distorted over time by mental health issues.

[33] I accept that Francis had a propensity to question evidence that cast him in a negative light. This was evident in his knee jerk reactions challenging the authenticity of some documents that he authored. However, based on my findings of fact, I do not accept the Respondent’s argument that Francis had a distorted view of his own actions and performance in the workplace, pursuant to which his behaviour and performance was exemplary but not sufficiently appreciated. The evidence will show that Francis admitted to his mistakes, and

many interpersonal conflicts were due to his advocacy for human rights and equitable practices in the workplace.

[34] While Francis' subjective beliefs were not always objectively reasonable, I find that they were genuinely held. There is simply no credible evidence that Francis fabricated allegations or imagined them due to mental health issues. The Respondent primarily relies on the timing of the last amendment to Francis' human rights complaint to argue that he fabricated allegations. That argument, however, is not supported by the evidence. With one exception, all of the allegations in the October 2014 amendment occurred after the March 2013 amendment so there was no opportunity for Francis to raise them earlier. Furthermore, the last amendment was filed by his counsel who represented him during the October 2014 hearing. There is no evidence that counsel was not acting in good faith.

[35] The one exception is his allegation against Clayton Smith. Francis had multiple opportunities to raise this allegation earlier. However, that Francis did not raise this allegation earlier does not mean that the allegation is without merit. The evidence will show that Clayton Smith called Francis a racial slur over a period of time while they worked together. It is reasonable that Francis did not raise this allegation earlier in circumstances where he considered Clayton Smith to be a friend, and Clayton Smith asked him to be left out of his complaints. This is evident in their text messages where Francis reassured Clayton Smith that he would not be raising allegations against him.

[36] It is clear that Francis felt betrayed by Clayton Smith for testifying against him in this proceeding. This is evident in the text Francis sent to Clayton Smith around the 2014 hearing, "I can't believe you sold me out. I never want to hear my name come out of your mouth". Those feelings of betrayal were reasonable in circumstances where Francis confided in Clayton Smith over a period of years about his concerns about racism in the workplace. Clayton Smith, in turn, approached management with information to discredit him. The evidence will show that the information Clayton Smith reported to management was not accurate and cast Francis in a negative light.

[37] While Francis may have been motivated to retaliate against Clayton Smith, I do not accept the Respondent's argument that the allegations were fabricated. The evidence will show that the racial slur was unwelcome and not part of joking banter. Furthermore, Clayton Smith acknowledged that he was the subject of allegations a year earlier. In his interview with Lacroix in July 2013, Clayton Smith reported that Francis has "pretty much named everybody in the building as racist, myself included". In these circumstances, that no formal allegations were made against Clayton Smith prior to the October 2014 hearing does not mean that they are without merit.

[38] Overall, I find that Francis was a more credible witness than Clayton Smith. I find that, while not always reasonable, Francis' beliefs were genuinely held. I am unable to reach the same conclusion for Clayton Smith. I find that Clayton Smith was an evasive witness who exaggerated information and made bald assertions about Francis that he knew were untrue. When given an opportunity to correct his mistakes on the record, Clayton Smith was unable to resist the influence of his own self-interest. It is clear that Clayton Smith was concerned that his own standing in the workplace might be damaged as a result of his association with Francis, who by July 2013, was regarded as an unpopular colleague and trouble maker. At the urging of other supervisors, Clayton Smith went to management with information to discredit Francis' allegations of racism in the workplace. That information was not consistent, and at times, contradictory. For these reasons, where there is a discrepancy between the evidence of Clayton Smith and Francis, I prefer the evidence of Francis.

C. Background

[39] The parties dispute whether some events occurred, and for others, how they should be interpreted.

1. Stereotyped as "slow" when opening doors in Control

[40] I find that Francis was stereotyped as "slow" when opening doors in Control when there was no credible basis for his colleagues to conclude that he was.

[41] By January 2012, Francis was working in Control which was regarded as a promotion by many colleagues. Francis had recently completed his training with Manzer who firmly believed that trainees should only graduate when they performed to the required standard. As his former trainer, Manzer viewed it as his responsibility to help Francis succeed in his position. Over the next several months, Manzer quizzed Francis on Control procedures to ensure that he retained his training under the daily pressures of the job. Manzer observed Francis perform to the required standard, which he described as “the level at which I had seen him perform when I trained him”. Based on Manzer’s observations as his trainer, it is reasonable to infer that Francis was performing to the required standard in Control during this time period.

[42] Nevertheless, Francis was stereotyped as “slow” by some officers and supervisors who were of the view that Francis was slower than others in operating doors. Their views were communicated informally to Manzer over a period of time. Manzer heard from numerous staff, including correctional supervisor Debbie Grill [Grill] and assistant deputy warden Ben Penner [Ben Penner], that movement through the facility would slow down when Francis worked in Control. Out of more than fifteen officers in Control, Manzer only heard issues about Francis. These issues were not formally documented as performance concerns. Francis’ evidence, which is corroborated and uncontested, is that management had not expressed concerns about his work performance in Control. For over a decade, Francis had only received positive performance reviews.

[43] Amarelo did not share the view that Francis was slower than other Control officers in operating doors. Amarelo testified that, from his experience, the negative perceptions about Francis were unfounded. Amarelo worked alongside Francis for years and described him as having a good work ethic, but Amarelo was not in a supervisory position to assess his work performance on overall operations. I acknowledge the limits on Amarelo’s ability and opportunity to observe Francis operating doors.

[44] However, similar observation limits applied to those who complained about Francis. Amarelo vividly recalled an incident where he was waiting with a group of officers for the doors to be opened. One officer expressed frustration with the delay and attributed that delay to

Francis. Amarelo did not know whether Francis was working that day, and even if he was, which of the two officers in Control was controlling the board. On this point, Amarelo's evidence is corroborated by Chohan and Clayton Smith who both testified that, since the Control room has a two-way mirror it is not possible for a person outside of the pod to know who is in Control or operating the doors at any given time. For the incident witnessed by Amarelo, the officers were not even outside the control room, but rather, located in another area of the building.

[45] Although the view that Francis was slow in opening doors was shared by his Control partner, Clayton Smith, I do not find his evidence credible. Clayton Smith testified that Francis was often distracted from his job as a result of using the phone, and therefore, was not as attentive as he could have been to movements through the building and the need for doors to be opened or closed.

[46] I discount Clayton Smith's evidence for the following reasons. Although Clayton Smith had the opportunity to observe Francis in the Control room, the observations he reported to management in 2013 relate primarily to the spring of 2013 and not the year before which is at issue here. Furthermore, Clayton Smith was unable to resist the influence of interest in modifying his recollection. For the reasons set out below, I take the view that Clayton Smith was motivated to cast Francis in a negative light. My view is bolstered by the fact that Clayton Smith exaggerated his own evidence over the passage of time. This is evident in the discrepancies between his oral evidence, interview transcripts, and independent evidence.

2. Manzer "Step up your Game" Incident

[47] I find, as an undisputed fact, that Manzer pulled Francis aside in the lunch room on June 8, 2012 and told him that he needed to "step up his game". By this point, Francis had been working in Control for approximately six months. Francis felt cornered and criticized for his work performance. I find Francis sought the names of the people who had complained about his performance, not because he wished to confront these people, but because he wanted to address the complaints in a formal manner.

[48] Francis and Manzer have a consistent recollection of what was said. Francis recalls Manzer saying words to the effect, “you’re going to have to step up your game”, “people are waiting on doors”, and people do not think you will “cut it” in Control. Manzer acknowledges the gist of these comments. Manzer recalls telling Francis to “step up his game” because supervisors had reported that the building slows down when Francis was in Control. Manzer explained using a sports analogy to relate to Francis’ background in coaching.

[49] The incident between Manzer and Francis escalated. Manzer observed Francis become “incredibly defensive really quickly”. Francis recalls Manzer pointing his finger at him. Although Manzer denies pointing his finger, he recalled Francis getting into his “personal space” demanding to know who made the allegations. Francis acknowledges asking for names because he wanted any issues with his performance addressed formally. Manzer did not give him names, and instead, walked out of the lunch room. Francis followed him down the hall and said words to the effect, “no let’s go upstairs”, “let’s do this right now”, and “let’s make this formal”. Manzer explained that he did not give names because the feedback was “unofficial” and “did not get to that level”.

[50] Both reported the incident. A short time later, Manzer reported Francis to the acting deputy warden because of his purported concern that Francis lost his temper and “took it down the hall”. In his interview with Elliott Smith the following year, Manzer also reported that Francis’ temper “flared a little”, “this did spill out”, “there were other ears around”.

[51] Francis reported the incident to his union representative, Lou Penner, a few weeks later. His email is consistent with his oral evidence. Francis reported, among other things, that Manzer said “everyone on the floor” and “even the upper ups” are saying that he “was not going to cut it in control”. Francis also confided in Low, who told him that Manzer did not like him. Low told Francis that, years ago, he overheard Manzer announcing to trainees, “here comes the nigger”, when Francis was walking down the hall.

[52] The Respondent has made a number of arguments that I do not accept. First, the Respondent argues that Francis’ response was completely unreasonable and inappropriate, and

if raised by Manzer to management, might reasonably have resulted in discipline. I reject the Respondent's argument that Manzer did not pursue the matter and left it alone, because Manzer acknowledges reporting Francis' behaviour to management shortly after the incident occurred.

[53] Second, the Respondent argues that Francis demanded to know who complained about him so that he could confront these persons. I reject this argument because the evidence of Francis is that he requested names so that he could go upstairs to management and address any performance issues in a formal way. His evidence is corroborated by Manzer who reported to Francis that everyone, and not just management, complained about his performance. After Francis asked to make this formal and official, Manzer responded that his feedback was unofficial and did not get to that level.

[54] Third, the Respondent argues that when Manzer received feedback from managers and supervisors that Francis seemed to be performing slowly in Control, he viewed it as his responsibility as Francis' former trainer, and as a supervisor on the day in question, to pull Francis aside and advise him of the concerns that had been expressed so that he had an opportunity to address these performance concerns before they became a formal issue.

[55] However, the Respondent's argument is not supported by Manzer's evidence. Manzer was evasive about requesting a meeting with Francis. On the one hand, Manzer did not think Francis had a performance issue. Manzer described the meeting as a "casual conversation", "side bar chat", and "just the trainer talking to the trainee kind of thing". Manzer thought he was doing Francis a favour by giving him a heads up before it became a performance issue. On the other hand, Manzer did think Francis had a performance issue, and he was concerned that Francis' failure at his job would reflect negatively on him as his trainer. In an interview with Elliott Smith the following year, Manzer said "it had been brought to my attention from a number of different supervisors that he wasn't performing in there so as the individual who trained him, I had a vested interest in him succeeding because it reflects negatively upon me".

[56] Manzer was also evasive about the timing of that meeting. After it was suggested that Manzer did not respond in a timely manner to the reported concerns about Francis, Manzer testified to an event that precipitated his meeting with Francis on June 8, 2012. Manzer gave a first-hand account of an event where he was waiting on doors with a group of others, and Ben Penner looked at him and said the building slows down when Francis runs the board. The problem with Manzer's evidence, however, is that he attributed this event to June 11, 2012 which could not have precipitated a meeting that occurred three days earlier. Even if this was an honest mistake, and Manzer gave the wrong date, this incident that he purportedly eye-witnessed was not in his affidavit, nor was it reported to Francis at the time. I find that the changes in Manzer's evidence during cross-examination were ineffective attempts to rehabilitate his evidence when confronted with contrary evidence.

[57] In these circumstances, it is not reasonable to accept the Respondent's argument that Manzer's reasonable attempt to discuss this issue on June 8 was angrily and aggressively rebuffed by Francis who refused to accept that there could be any weakness in his job performance and demanded to know who made these statements so that he could confront these persons.

3. Chohan "Because You're Black" Incident

[58] I find, as an undisputed fact, that Chohan said to Francis words to the effect, "because you're Black" in the spring of 2012. At issue is the context in which this comment was made. Francis says Chohan made the comment in the context of saying Francis' help is of no value because he is Black. Chohan says he asked a rhetorical question. I find neither of these versions are likely, but that Chohan intended it as a sarcastic remark because he was aware that Francis had, in the past, alleged that he was being picked on because he is Black.

[59] Chohan made the comment when four officers – Fass, Atkinson, Roach, and himself – were trying to move an inmate who was refusing to walk. Fass described the inmate as "catatonic" and "playing dead". At some point, the group encountered Francis who was "on escorts" that day. Francis saw that the four officers were in a physical confrontation with an

inmate. Francis wondered what was going on. He remembers hearing “are you going to help us?”. Although Francis does not remember who made the request, he does not dispute the evidence of the other witnesses who confirmed that Roach made the request. Francis asked “help with what?” and an officer responded “this guy doesn’t want to walk”. Francis asked “well, what is wrong with his legs?”.

[60] Francis remembers he offered to talk to the inmate and persuade him to walk. None of the other witnesses heard this offer. On Francis’ version, his offer to help was rejected and Chohan made a comment “because you’re Black”. Francis believed Chohan was telling him that his help was of no value because he was Black.

[61] I reject this argument based on my findings of fact that none of the officers heard Francis make his offer to talk to the inmate. For the following reasons, I find on a balance of probabilities that while Francis did make an offer to talk to the inmate, none of the other officers heard him make that offer.

[62] First, I find that Francis did make the offer to talk to the inmate. Francis’ offer to talk to the inmate is consistent with what he did in past situations. Amarelo testified that Francis had a positive rapport with inmates and could effectively talk them out of physical confrontations. Francis testified getting an inmate to remove a razor from his mouth and go to health care by simply talking to him with respect and dignity. In such circumstances, Francis’ offer to speak to the inmate is inherently believable and consistent with past practice.

[63] Second, I find that none of the other witnesses heard Francis’ offer is reasonable given that the confrontation involved six adults. Where five officers are in a physical confrontation with one inmate, it is reasonable to expect overlapping speakers, and especially where two of them are in a supervisory capacity where seniority is not clear. That seniority lines were unclear is evident by the fact that Roach initially made a request that Chohan followed up on.

[64] Third, I find that Fass, Atkinson, and Chohan were credible in their evidence that they do not remember hearing Francis make the offer. What they remember is Francis questioning a supervisor’s directive to help with the inmate. That the recollections of Atkinson and Fass were

less detailed than Francis' recollection does not undermine the veracity of their evidence given the passage of time and their disinterest in an incident that was of little consequence to them.

[65] Fourth, the evidence that the officers did not hear Francis' offer is also consistent with Chohan's comment. It does not make sense that if Chohan heard Francis' offer to talk to the inmate, that he would respond with "because you are Black" in these circumstances.

[66] It is within this context of not hearing Francis' offer, that Chohan acknowledges saying to Francis words to the effect "because you are Black". Francis acknowledges saying in response, "you're a retard", and that his comment was not appropriate. Francis' oral evidence from 2014 and 2018 is consistent with his June 2012 interview with assistant deputy warden Lacroix. That Francis acknowledged information adverse to his interests bolsters his credibility.

[67] I disagree with both parties in their interpretation of the comment. I do not accept Francis' argument that Chohan rejected his offer to help because being Black meant his help was of no value. I have found Chohan did not hear Francis make the offer.

[68] On the Respondent's version, Chohan's comment was meant to be rhetorical and joking to demonstrate to Francis that he was unreasonably questioning the directive of a supervisor to help. I reject this argument based on my credibility findings regarding Atkinson and Chohan on this point.

[69] Atkinson testified that the comment was an attempt to joke with Francis, while at the same time, demonstrate that there was no basis for questioning the directive. I reject his evidence for the following reasons. Although Atkinson was a disinterested witness, his evidence was not consistent on this point. Atkinson described Chohan's comment as a joke, but at the same time, acknowledged that the comment fell flat and that he felt a little awkward. Atkinson testified that, although there was banter at North Fraser, no one made "playful digs" about Francis' skin colour, and that he personally would not have done that.

[70] Chohan testified that Francis questioned a directive with words to the effect, "why do I have to do this?". Chohan then responded with a rhetorical statement, "why do you think,

cause you're Black?" However, his testimony seems unreasonable, impossible, and unlikely. The use of rhetoric does not make sense in the context in which Chohan testified his comment was made. A response, "why do you think, cause you're Black?" cannot reasonably be interpreted as rhetorical in this context. Such an interpretation is not consistent with what other witnesses heard or understood Chohan's comment to mean. Fass described Chohan's comment as a stupid choice of words. Atkinson described the comment as an attempted joke that fell flat. Their reactions are consistent with Chohan's subsequent apologies to Francis.

[71] Based on Chohan's own evidence that Francis asked "why do I have to do this?" and his response was "why do you think, cause you're Black?", the most reasonable interpretation of Chohan's comment was that he was being sarcastic. Chohan testified making a sarcastic comment because he was aware that Francis had, in the past, alleged that he was being picked on because he is Black. Chohan chose to single out Francis' skin colour because Francis had over time seen everything through that lens and become "sensitive" to that issue. Chohan acknowledged targeting his remark on Francis' "sensitivity". It is the most reasonable interpretation based on Chohan's own evidence.

[72] I find, as an undisputed fact, that Chohan apologized to Francis. Chohan remembers apologizing twice. Francis remembers Chohan apologizing a short time later. I find that there were two apologies because the first apology was made in the presence of co-workers, Atkinson and Fass. The second apology was made to Francis a short time later, which is consistent with Francis' memory that Chohan apologized "a little while later". In his interview with Lacroix, Francis described Chohan saying words to the effect "sorry about the comment", and that he responded with words to the effect, "hey, alright, you need to think of your audience, that wasn't cool".

4. Francis Reports Incidents

[73] Francis reported incidents in June 2012 in three stages. First, Francis emailed a list of workplace incidents to the warden. Second, Francis raised additional incidents during his interview with the assistant deputy warden Lacroix [Lacroix]. Third, Francis raised an additional

incident with his union. Francis had personal knowledge of some of the allegations. For other allegations, Francis had no personal knowledge, was not present when the incident occurred, and was not the person to whom or about whom the comment was made.

[74] On June 12, 2012, Francis emailed a list of workplace incidents to warden Anderson under the heading “bad conduct”. Francis referred to an incident involving the slur “nigger” and the “because you’re Black” incident. Francis made allegations against Torok, Polonio, Wade, Molstad, and Chohan. He identified Amarelo and Low as witnesses. Prior to sending the email, Francis and Low spoke to Ben Penner. Francis understood that warden Anderson relayed the incidents to Lacroix and later to Elliott Smith for investigation. Francis expected these incidents to be investigated in a timely manner.

[75] On June 21, 2012, Francis was interviewed by Lacroix to discuss his concerns. During this interview, Francis also raised another incident involving Firlotte using the slur “nigger” during a recent graduation for recruits. Francis heard about the incident because it was “around the centre”. That Francis gave inconsistent testimony about the source of this information is not material. I attribute these discrepancies to his memory genuinely fading with time. Given Francis’ power of recollection, I prefer his interview over his testimony years later. In that interview, Francis confirms that Fass told him about the comments. Francis remembers Fass reporting that Firlotte was “spewing the nigger”. Fass corroborates his evidence in this regard. Francis notified Lacroix that the incident may have been videotaped.

[76] At some point, Francis also heard about an incident involving a supervisor Polonio making a derogatory comment about another officer who has the appearance of a Black-skinned person. It appears that Lacroix did not want to address the issue during the interview. At the outset of the interview, Lacroix stated, “like I said mentioned before, off tape, we can’t discuss anything to do with [Polonio] when we figure out what is going on officially, then we can take a look at doing that again, okay?”.

[77] Having also reported the “step up your game” incident to his union representative, by the end of June, Francis had given notice about incidents involving Manzer, Chohan, Firlotte, and Polonio.

a. Polonio “Turn on the Lights” Incident

[78] The Polonio incident occurred during a muster meeting in February 2012 and involved a comment made by one supervisor, Polonio, to another supervisor about an officer who has the appearance of a Black-skinned person. There is no dispute that Polonio said words to the effect, “maybe if you turn on the lights you can see him”, in response to the supervisor overlooking an officer sitting next to him when taking attendance. Polonio says he made the comment because of the supervisor’s vision problems. He denies he made the comment because of the officer’s skin colour. I find Polonio made the comment because of the officer’s skin colour and not in relation to the supervisor’s vision problems.

[79] A few days later, Polonio found a crumpled piece of paper in his mailbox. He did not have a consistent recollection of what was written on the note. Polonio attested to the phrase, “you are finished you racist pig” which is consistent with the exhibit. In his testimony, however, Polonio remembered reading, “we are going to get you, you racist pig” and then corrected himself, remembering only the phrase, “you racist pig”. Polonio reported the note to the deputy warden, and in an email, expressed the belief that the note was in response to his comment:

[...] In the days that followed it has become obvious that the staff at this centre have been made aware of this “racist comment” and that stories are now floating within the centre involving me and the racist comment I made towards [the officer]. Information has also surfaced that suggests that three staff were involved in hearing and reporting this alleged racist comment. [...]

[80] Shortly thereafter, Polonio met with the deputy warden. It appears that the purpose of that meeting was to discuss his concerns about the note. No findings of wrongdoing were made against him for making the comment. Polonio testified that there were no further ramifications,

no changes to his work situation, and no disciplinary proceedings against him. Rather, any investigation, to the extent that there was one, resulted in misinformation. Notwithstanding that Polonio acknowledged making the comment, the deputy warden erroneously reported to Elliott Smith that it was the supervisor, and not Polonio, who made the comment “turn on the lights and then I can see” because he has “vision problems”.

[81] I reject the Respondent’s argument that the “turn on the lights” comment had nothing to do with the fact that the officer appears Black, but rather was related only to the fact that the supervisor has poor eyesight. That management made an erroneous determination at the time does not support the argument. Furthermore, Polonio said he made the comment.

[82] Polonio’s explanation for making the comment is inconsistent and, quite frankly, unbelievable. First, Polonio denies that his comment had anything to do with the officer’s skin colour. However, his evidence is not consistent with the reaction of three coworkers who reported his comment as racist, the note which accused him of being racist, or the email he sent to management acknowledging that he was accused of making a “racist comment”.

[83] I reject the Respondent’s argument that no witnesses took this comment to be a reference to race, or that concerns were only raised by two people. This is not supported by Polonio’s evidence at the time. In his email to management, Polonio reports that concerns were raised by three employees. That several of them were shop stewards is immaterial. That Polonio perceived them as disliking him does not support ulterior motives given his acknowledgement that staff perceived his comment as racist.

[84] Second, Polonio testified that he was joking about the supervisor’s vision problems and that this was not the first time the supervisor was “picked on” for his poor eyesight. It is reasonable in such a circumstance that the supervisor would have trouble seeing many people in the room, and not just the Black-skinned officer. However, his affidavit is not consistent with his oral testimony. Although Polonio attests that the supervisor was struggling to identify “the people” in the room, he testified to only one person who was “overlooked” who happened to have the appearance of Black skin.

[85] Third, that the Black-skinned officer did not report the incident to management does not support Polonio's explanation. The officer did not say to Polonio that he did not consider the comment as racist. Rather, Polonio acknowledges speaking to the officer immediately after his meeting with the deputy warden because he was concerned that the officer, who he regarded as a friend, would perceive him as racist. It was in the context of that conversation that the officer told Polonio that he did not report the comment to management. Polonio, however, can't recall anything else the officer said.

b. Firlotte "Nigger" Incident

[86] The second incident occurred in March 2012 during a celebration for new recruits at a pub. I find, as an undisputed fact, that Firlotte told a story to the new recruits at the pub about an incident many years before in which a former fellow officer, who has the appearance of a Black-skinned person, came to the rescue of Firlotte when he was hassled outside a restaurant. The Respondent disputes whether Firlotte used the slur "nigger". I find that Firlotte used the slur "nigger" in the telling of the story.

[87] Fass' evidence is that Firlotte described the Black-skinned officer as a "big nigger" or "big fucking nigger" while Firlotte says that he used the term "big Black man". I prefer the evidence of Fass for the following reasons.

[88] First, Fass was sober when he heard the story at the pub. Fass arrived at the pub together with his colleague, Price, shortly after receiving a text from Waters asking them to join the party. Fass recalls arriving shortly before 11 pm. Although Price recalls arriving at 10:30 pm, his work schedule shows that he finished his shift at that time. Taking into account the commute, I prefer the evidence of Fass that they arrived shortly before 11 pm.

[89] Shortly after arriving, at around 11 pm, Fass observed Firlotte stand up in front of the recruits and tell a story that he had told many times before. His oral and documentary evidence consistently describes Firlotte's level of intoxication. Fass observed Firlotte as "fairly intoxicated", "quite intoxicated", "had a few too many drinks", and "obviously was having a few drinks". His evidence is also consistent with the evidence of the top new recruit, Mark Smith,

who in his interview with Elliott Smith the following year, reported that Firlotte “likely had quite a lot to drink”.

[90] As a supervisor, Firlotte was regarded as the leader of the new recruits. Celebrations lasted from the early afternoon to the early morning hours, and by all reasonable estimates, a lot of alcohol was consumed. Mark Smith recalls the pub event being festive and lasting over ten hours from 2:30 pm in the afternoon to 1:00 am. Firlotte acknowledges being at the pub the whole time. There were approximately fifteen people in attendance at any given time. The evidence of Fass, Waters, and Price is consistent in this regard. Although Firlotte estimated fewer attendees, his lack of sobriety and propensity to minimize his actions undermines his credibility.

[91] Second, Fass’ power of recollection was strong. Fass remembers the story. Fass was involved in the original incident and was often referenced by Firlotte when sharing the story years later. Firlotte acknowledges sharing the story about once a year. After Firlotte described the officer as a “nigger”, Fass felt uncomfortable and decided to “shut down” the speech. He observed the top new recruit, Mark Smith, pointing his cell phone at Firlotte in what appeared to be a recording. Fass got up, wrapped his arm around Firlotte’s shoulder, and guided him back to his seat. Fass did not think that Firlotte meant the comment in a racist way, he described it as a “poor choice of words”.

[92] Third, Fass was a credible witness who acknowledged information that was averse to his interests. When interviewed six months later, Fass remembers hearing the slur “a few times”. In his testimony six years later, Fass heard it once “for sure”. Since Fass acknowledges that his memory has faded with time, I find that the transcript of his interview with Elliott Smith to be the most accurate record of his recollection.

[93] That no other witnesses who testified about this incident recall hearing the slur is not definitive. That the slur would have stood out in their minds depends on their level of sobriety and where they were seated. Firlotte was described as being at one of the tables and speaking to people at that table. Fass was seated close to him at the time the story was told. Music was

playing and there were a number of separate conversations occurring. The most likely scenario is that only those persons at Firlotte's immediate table would have heard the story.

[94] The evidence of Waters and Price is less reliable than Fass' for the following reasons. Waters acknowledges arriving "much earlier" than Fass and drinking throughout the celebration. By his own admission, Waters does not remember much about the evening, including when it started or ended or even texting Fass to join the party (although he does not dispute that he sent such a text). Waters was sitting some distance away from Firlotte and not listening to everything he was saying. Although he remembers seeing Firlotte, he does not remember him telling a story.

[95] Price does not remember seeing Firlotte at the pub but does not dispute that he was there. (His oral testimony is not consistent with the transcript of his interview with Elliott Smith five years earlier when he did remember seeing Firlotte at the pub). Price acknowledges having five or six beers, but does not consider that a lot to drink. In his interview with Elliott Smith, Price described Firlotte as a "story teller" and holding court when telling stories. Although Price denied hearing any inappropriate language, he acknowledges that he might not have heard it happen.

[96] Firlotte's evidence is that he does not use the term "nigger". Although it may be out of character for him, I do not accept his denial given his lack of sobriety. Firlotte had a tendency to minimize any information that could reflect negatively on him. Firlotte confirms that a lot of alcohol was drunk that evening but was evasive when describing how much he drank. When asked whether he had a lot to drink, he responded "I drank yes" and "I was drinking throughout the evening". Although he would not say whether he became tipsy over the evening, he acknowledged that he did not drive to the pub or home. Firlotte acknowledges having difficulty remembering key moments of that evening. For example, Firlotte did not remember who drove him home and does not recall speaking to Fass.

[97] Firlotte modified his recollection in ways that did not harmonize with independent evidence. For example, Firlotte acknowledges telling the story and referring to the personal

attributes of the officer including his skin colour. His recollection of the story is consistent with Fass' recollection with one notable exception: he denies referring to the officer's skin colour in a derogatory way even though he was intoxicated at the time. Although Firlotte denies calling him a "nigger", he acknowledges that, if he did reference his skin colour, he would have described him as "Big Black Man" so that those listening to the story could picture him.

[98] Firlotte acknowledges being at the pub, celebrating with the new recruits, and telling one of his favourite stories to new recruits. He describes the story as a big guy helping him out. Firlotte acknowledges using the personal attributes of the big guy to add context to the story, because the new recruits would not have been familiar with the officer. Firlotte acknowledges that one of the personal attributes of the big guy was his big ears, for which he had been nicknamed "Rick Mo Big Ears". Although Firlotte does not remember whether he referred to his big ears that night, Firlotte acknowledges that, if he had, he would have described them as "Rick Mo Big Ears". In his investigation notes, Elliott Smith recorded that Firlotte was quick to remember the name "Rick", and that his previous nick name was "Rick Big Ears".

[99] In summary, I prefer the evidence of Fass given his power of recollection, ability and opportunity to observe events, that he was a disinterested witness, and that his evidence was in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

5. Start of Investigations

[100] Elliott Smith began investigating some of Francis' allegations. Lacroix conducted some of those interviews. I find that most of the investigations into Francis' allegations did not conclude before Francis left the workplace the following year.

a. Firlotte Investigation

[101] Elliott Smith started, but did not complete, his investigation into the Firlotte Incident for over one year. Elliott Smith was notified about the incident in June 2012 and started his investigation shortly thereafter. Elliott Smith interviewed Fass in August 2012 who reported that Firlotte used the slur "nigger" a few times.

[102] He then waited over one year to interview Price, Firlotte, and Mark Smith. All three were interviewed two months after Francis left the workplace on September 12, 2013. Given the amount of time that had elapsed, not surprisingly, they all had difficulty recalling the evening and could not corroborate Fass' evidence. None of them recalled Firlotte using the word "nigger".

[103] Elliott Smith also waited over one year to investigate whether there was video footage of the incident. In re-direct, Elliott Smith gave evidence that Mark Smith denied having a recording and he had no reason to believe otherwise. However, his recollection is not consistent with what Mark Smith actually said. In his interview, Mark Smith did not recall taking any video footage, but mentioned that there were some pictures taken. When Elliott Smith asked Mark Smith whether "any video footage" may have been taken, Mark Smith responded:

[...] if I did have video on my phone, I do not recall taking it that night, I was quite intoxicated that night as it was our graduation [...] but the phone is long gone, um it was damaged with water [...]

[104] Having interviewed three officers over a year after the incident took place, and notwithstanding the amount of alcohol consumption, Elliott Smith relied on their lack of recollection to make the following finding:

Mr. Fass claims the "n" word was used however other members of the function do not support the claim. It is possible the words were used or heard incorrectly from Mr. Fass.

[105] Elliott Smith determined that the "findings are inconclusive" and recommended no further action be taken.

[106] The Respondent relies on the inconclusive results of this investigation to argue that there was nothing more management could have or should have done in relation to this incident, and that in any event, Elliott Smith counselled the interviewees on appropriate language in the workplace. However, I do not accept the Respondent's argument that it would have been too late to take disciplinary measures on Firlotte even if he was found to have used

the term “nigger” in a derogatory fashion. How the incident was brought to the attention of management is not material to the conduct of the investigation thereafter.

b. Chohan “Because You’re Black” Investigation

[107] Elliott Smith interviewed Atkinson on September 10, 2012 about the Chohan Incident. The transcript of that interview was entered into evidence. In the interview transcript, Elliott Smith incorrectly attributed the incident to April 2011. Chohan attests, and the parties do not dispute, that the incident occurred the following year in 2012.

[108] In his interview with Elliott Smith, Atkinson did not consider the incident involving Chohan as something out of the ordinary and was surprised that he was being spoken to about it. Atkinson reported that his recollection of the incident was “pretty foggy”. He described it as a playful dig that was not meant in a hurtful way. Although Atkinson understands that an outsider could take offence to the comment, he did not consider Francis to be an outsider. They had worked together for over a decade, and he regarded Francis as someone who could give and receive playful digs. Atkinson was surprised that Francis was making a big deal out of what he considered to be a joke.

[109] It is not clear what further steps Elliott Smith took in relation to this investigation. The documentary evidence in relation to this incident is incomplete.

6. Francis Required to Attend Muster

[110] Francis argues that Grill singled him out to check-in the muster room before starting his morning shifts in segregation and this was contrary to common practice. The Respondent argues Francis refused to comply with the same rules that applied to everyone else. For the following reasons, I find Francis was singled out for muster and treated differently than other employees in and around August and September 2012.

a. Policy vs. Common Practice

[111] The Respondent argues that none of the witnesses testified that the expectation was different for them than it was for Francis. However, at issue is not a policy that had been in

place for over a decade, but rather compliance with this policy and common practice among officers.

[112] The policy was for both officers to report to muster before reporting to their station. However, it was common practice for only one officer to report to muster, and in some cases, for both officers to report directly to their stations. This depended on whether officers were working in segregation or Control. Officers usually decided amongst themselves who would go to muster.

[113] Amarelo, Francis, Clayton Smith, and Uppal gave consistent evidence that it was common practice for only one segregation officer to attend muster after relieving the night-shift officers.

[114] Elliott Smith testified that the purpose of muster is for a scheduler and supervisor to confirm the physical presence of officers prior to the start of their shift. There is a ten-minute window where staff are paid to receive information in muster before reporting to their station. For the morning shift, that window is from 6:20 am to 6:30 am. Elliott Smith testified that officers who do not attend this ten-minute window are docked pay. Although Elliott Smith testified that this requirement applied to everyone including Francis, he acknowledged that muster does not apply in the same way for segregation officers because the segregation area cannot be unmanned.

[115] Uppal explained that the policy of reporting to muster had not always been enforced by prior supervisors and schedulers. Uppal testified that there was even more flexibility for staff who worked all night and the muster requirement was loosened to let the "all nightery" go home early and well before the start of the morning muster meeting at 6:20 am.

[116] Clayton Smith acknowledged that the requirement to attend muster does not apply in the same way to officers in segregation or Control because those officers cannot both go up to muster. Clayton Smith testified that he goes to muster if he is working in segregation, but when he is in Control, he speaks directly to the shift they are relieving. As for other control staff, Clayton Smith says that they are required to attend muster sporadically when there is

important information, and that it all depends on the needs of the building. He understands sporadic to mean every one or two weeks, since they work four shifts on and four shifts off. This is consistent with Francis' evidence that, for years, segregation partners would decide who would attend muster and who would go directly to their work station. Francis testified that Control staff did not attend muster, but rather, exchanged information directly with other Control staff in between shifts.

b. Francis singled out to attend muster

[117] The Respondent argues that Grill began to enforce the policy when she became scheduler in the summer of 2012. However, the enforcement of this policy was not consistent. The effect of this inconsistency was to single Francis out for not complying with a policy that his colleagues were not complying with. When Francis sought clarification on why he was being treated differently, he was regarded as a trouble maker.

[118] Amarelo believed that Francis was being unfairly singled out because "some factions" resented him for getting a desirable position for which they did not consider him deserving. Amarelo testified that Grill was part of a group that had negative perceptions of Francis. He picked this up through visual cues. Amarelo observed Grill roll her eyes and sigh when Francis' name was mentioned in muster meetings. Amarelo observed these gestures between three to six occasions and noted that Francis was not present during these incidents. Amarelo's belief is corroborated in material respects by Manzer and Clayton Smith. Clayton Smith testified that Grill would call him to see if Francis had arrived for his shift. There is no evidence that similar inquiries were made about other officers, including Grill calling Francis to check up on Clayton Smith. Manzer testified that Grill reported concerns that Francis was slow in Control even though there is no evidence on the basis for her concerns.

[119] Francis and Grill spoke several times. In a meeting witnessed by Uppal, Francis heard Grill say words to the effect "it is not an issue just let someone know you are here". Francis understood this to mean that the issue had been resolved and he could return to common

practice. Uppal denies that Grill said these words, and in an email to Francis, Grill denied saying them as well. Their evidence is that Grill was enforcing policy not common practice.

[120] However, I prefer the evidence of Francis for several reasons. First, Francis' evidence is corroborated by text messages with Clayton Smith. In one exchange, Francis texted:

[...] so what I should allow someone to threaten me like that but say nothing so everyone can walk and continue to do what I was told not to do. What the fuck. Can you say discrimination. Has to be for everyone. Then grill saw I was pissed and said that is not the issue, just let someone know you are here. Uppal was a witness to that.

[121] In another text message, Clayton Smith acknowledged that Grill had requested that "one of you need to come up" to muster.

[122] Second, that Grill denied supporting common practice is consistent with a motive to save face given that her supervisor was copied on these email exchanges and he was clearly giving a directive to follow policy. My conclusion is bolstered by the fact that her email responses became increasingly defensive and combative in tone as more emails were exchanged and copied to her supervisors.

[123] The Respondent argues that Francis refused to accept Grill's requirement to follow policy and escalated the matter to Ben Penner in an unreasonable manner. However, that argument is not supported by the credible evidence. Francis observed other segregation officers not reporting to muster and wanted to know why he was still required to do so. Francis documented this observation in another contemporaneous text to Clayton Smith. Francis observed staff reporting directly to segregation in the morning, and he did not understand why he was not allowed to do the same. Francis testified feeling "isolated" and "singled out" and decided to seek clarification in writing from the assistant deputy warden because he was "fed up" and "not stupid".

[124] In September 2012, several emails were exchanged between Francis, Ben Penner, Lou Penner, Grill and Uppal. Francis reported his concerns that he was required to attend muster

when others were not. Francis documented the responses of other officers on the day shift who were not attending muster and puzzled by his inquiry. Like Francis, they had been reporting directly to relieve the night shift officers. After reporting this information, Francis asked Grill, "Can you see how this looks?" Grill responded, "No Levan, I cant see what it looks like ... why don't you tell me" [reproduced as written].

[125] The assistant deputy warden eventually wrote to Francis clarifying the longstanding policy requiring both segregation officers to report to muster first at 6:20 am, and then one officer remains in muster while the other returns to relieve the night-shift officers. In an email to over ten supervisors and managers, Ben Penner noted inconsistencies in their current practice and confirmed his expectation that schedulers and supervisors must ensure that all staff report to muster as per the policy. Heinrich, Uppal, and Polonio were among those copied on that email.

[126] Francis was upset that Ben Penner had forwarded his email to over ten supervisors and managers. He feared that he would be targeted and "thrown under the bus". Francis recalled two incidents in support of his belief. First, Francis was approached by Polonio who accused him of causing a lot of problems in the building. Francis' evidence is uncontested on this point and consistent with an email Polonio sent to management months earlier expressing his belief that the "turn out the lights" incident was reported to management as a means of supporting Francis' human rights complaint against him.

[127] Second, Uppal approached Francis in segregation. Francis and Uppal agree on the gist of the conversation. Francis recalled Uppal saying words to the effect, "you know what will happen if you take this forward anymore ... it would ruin it for everyone." Uppal acknowledges urging Francis to comply with the policy, and that if he did not do so, it jeopardized the flexibility of segregation officers to allow the night shift officers to depart early.

[128] Given this context, and my findings of fact, I do not accept the Respondent's argument that Francis was simply refusing to comply with the same rules that applied to everyone else. Francis was required to attend muster when others were not. It was reasonable that Francis

sought clarification on the muster requirement in circumstances where other officers were not attending muster.

[129] I acknowledge that Francis' text messages to Clayton Smith referred, at times, to Grill in derogatory and sexist terms. Although those texts were clearly inappropriate, they were private communications between two people who, at that time, regarded each other as friends. Clayton Smith attests that he and Francis "became friends". Those text messages were not reflected in any of Francis' work emails. Francis' emails to Grill remained professional both in tone and content.

7. "Toby" and "Lazy Black Man" Comments

a. Clayton Smith called Francis a "Toby"

[130] I find, as an undisputed fact, that Clayton Smith called Francis a "Toby" at work. At issue is what was meant by this comment and how often it was made. I find the term "Toby" is equivalent to "slave" or other words that carry the same connotation as "slave".

[131] The Respondent argues that Francis was motivated by revenge in adding the allegation that Clayton Smith called him a "Toby". I acknowledge that this allegation was first raised in the October 2014 amendment notwithstanding that the allegation dates back to 2012 and 2013. In these circumstances, Francis had multiple opportunities to raise this allegation against Clayton Smith. He did not do so, and this is a factor that I have taken into account in weighing the credibility of his evidence that this comment was unwelcome.

[132] Francis described the meaning of "Toby" as a "slave", "you work for me", and being "someone's bitch". Clayton Smith denies that his comment meant "slave" or "servant". He explained that he was simply referring to a "Black guy". In at least one exchange, however, I find that Clayton Smith said words to the effect "everyone needs a Toby" which makes sense in reference to serving someone else. There was a conflict in the evidence between Francis and Clayton Smith on this point. Based on my credibility findings, I prefer Francis' recollection which harmonized with undisputed parts of the conversation. Furthermore, that "Toby" is a generic slave name is consistent with the preponderance of probabilities which a practical and

informed person would readily recognize as reasonable in that place and in those conditions. It is common knowledge, on an objective standard, that the slur “Toby” is a reference to a rebellious slave who was eventually caught by his slave master who maimed his foot so that he would be easier to control. For all these reasons, I prefer the evidence of Francis as to what the term “Toby” means.

[133] Clayton Smith’s evidence is that he made the comment once. Francis’ evidence is that Clayton Smith made the comment “many times” and “more than twice”. Francis testified that being called a “Toby” was a “regular tone” of Clayton Smith at work. Although Francis’ evidence was not consistent in terms of frequency, that Francis asked Clayton Smith to stop “many times” supports a reasonable inference that the comment was made more than once. Clayton Smith acknowledges that he stopped calling Francis a “Toby” at some point.

[134] The Respondent argues that when Francis told Clayton Smith that this term bothered him, Clayton Smith stopped using it. These admissions contradict Clayton Smith’s evidence that he only made that comment once. There would simply be no reason to stop using a slur that was used only once. Clayton Smith’s evidence that this was casual banter also supports a reasonable inference that the comment was made more than once. I find on a balance of probabilities that Clayton Smith called Francis a “Toby” on more than one occasion.

[135] In that regard, I do not accept the Respondent’s argument that this comment was part of joking banter between friends for the following reasons. It is clear that Francis found the comment unwelcome. This was evident by Francis’ reactions to the slur and requests for it to stop. In response to being called a “Toby”, Francis told Clayton Smith “I am nobody’s Toby”, “shut the fuck up”, and “I don’t appreciate this”. Francis’ evidence in 2018 and 2014 is consistent in this regard. Gallant provided credible hearsay evidence that corroborates her husband’s recollection. She remembers Francis coming home over the years and reporting unpleasant interactions at North Fraser that involved him being called a “nigger” and “Toby”.

[136] I do not accept the Respondent’s argument that Gallant’s hearsay evidence was unreliable because she could not recall dates or being told about many of the incidents that

Francis included in his allegations. I find that Gallant was a credible witness. She acknowledged the limits of her memory. She testified that she had seven years of information in her head regarding “who said what”, “how”, and “when”. She acknowledged that she was only able to broadly explain what she was told at home. She had spent seven years listening to Francis describe what it was like to work there every day. There were a lot of comments. She did not work there so she did not hear or see it. As his partner, she is very close to him and heard him share this information when he came home.

[137] On the one hand, Clayton Smith said that it was part of a “negotiated relationship”. On the other hand, he regretted making the comment and acknowledged that it was in poor taste. Clayton Smith explained that in retrospect “I do not use that word now”. He also denied the connotation of servant or slave, while at the same time, gave evidence that he was unaware of such a connotation and did not intend for it to be used that way. That Clayton Smith denied that Francis ever told him the comment bothered him does not make sense in circumstances where the Respondent concedes that Francis told Clayton Smith that this term bothered him. That Francis may have laughed on a few occasions does not support a reasonable finding that he was a willing participant in this exchange.

[138] Clayton Smith made ineffective attempts to rehabilitate his evidence when confronted with contrary evidence. For example, Clayton Smith testified that calling Francis a “Toby” was simply in response to Francis calling him a “cracker”, “honkie”, and “redneck”. Although Francis denied calling Clayton Smith these slurs, I do not find his denial credible given his propensity to minimize evidence that reflected negatively on him. That they called each other slurs does not support casual banter in circumstances where it was clear that the comments were unwelcome.

b. Uppal called Francis a “Lazy Black Man”

[139] The parties dispute whether Uppal called Francis a “LBM” and whether “LBM” means “Lazy Black Man”. I find that Uppal called Francis an “LBM” at North Fraser. I find that Uppal meant it to refer to Francis as a “Lazy Black Man”. The reference to Francis as lazy is consistent with the stereotypical view that he was “slow” when working in the Control room.

[140] First, Uppal acknowledges calling Francis an “LBM” at their previous place of employment. Uppal was evasive when explaining what he meant by that phrase. He testified that the phrase could mean three different things “luscious Black man”, “lazy Black man”, or “lazy brown man”. For Francis, the phrase meant either that he was luscious or lazy. Francis explained that “LBM” was originally used by some women at Vancouver pre-trial to refer to him as a “luscious Black man” but that male colleagues turned the phrase into “lazy Black man”. In these circumstances, it is reasonable to infer that Uppal was referring to Francis as “lazy” when he called Francis an “LBM”.

[141] Second, Uppal’s evidence about his use of this phrase is not consistent. On the one hand, Uppal said he used “LBM” in a complementary context because he was referring to Francis as “luscious”. On the other hand, Uppal testified that he stopped using the phrase when they moved to North Fraser because of new regulations about harassment and bullying. Since Uppal suggests that “luscious Black man” complimentary and “lazy Black man” was derogatory, any decision to stop using the phrase in these circumstances makes sense in the derogatory context of referring to Francis as lazy.

[142] Third, I do not accept Uppal’s evidence that he stopped using the phrase when they moved to North Fraser because his evidence is not consistent with Francis’ requests for him to stop. Francis asked Uppal to stop in a text message at the end of September 2012:

From this day and onward I am asking you not to call me or refer to me as the LBM please. Thanks, Levan Francis.

[143] Uppal acknowledges receiving this text. I pause, here, to note a discrepancy in Francis’ evidence that is not material. Francis remembered sending the text “later on that evening” when it was actually sent in the afternoon. I attribute this discrepancy in Francis’ evidence to the passage of time.

[144] Uppal did not respond to this text. His explanation for not responding is not reasonable in the circumstances. On the one hand, Uppal said the text was completely out of the blue. He was “shocked” and “quite surprised”. On the other hand, Uppal did not raise this with Francis.

Uppal's version of events would require me to accept that a supervisor did not clear the record with a subordinate when that subordinate falsely accused the supervisor of doing something. The Respondent argues that Uppal raised it with management. However, that argument is not supported in the evidence. Uppal testified that he "might have" addressed this with a manager but that he "can't recall" which one. Even if Uppal did raise this text with a manager, his explanation for not raising it with Francis is simply incredible given his supervisory duties. For all these reasons, I find that Uppal received a text from Francis at North Fraser asking him to stop calling him an "LBM" supports a reasonable inference that Uppal was calling Francis an "LBM" during this time period.

[145] I reject the Respondent's argument that there is no reliable evidence that Uppal called Francis an "LBM" because it is not supported by the contemporaneous text messages which were entered into evidence for the truth of their contents. That Uppal call Francis an "LBM" is reasonably inferred from one of those text messages. In addition, Francis texted Clayton Smith that he just called Uppal who did not answer and "I am telling him don't call me the LBM period anymore. He's been doing it for negative reasons." Francis also texted Clayton Smith that "Krishna" has been calling him an LBM for years and he got it from Uppal, and that he was told by "Pino" that there is consensus that he was lazy and it now has reached the management level. Francis texted Clayton Smith that it "all stinks of discrimination".

[146] I also reject the Respondent's argument that Francis manufactured a text message in retaliation for not receiving support from Uppal on the muster issue. Uppal believed, upon reflection, that Francis may have sent him this text message at the end of September 2012 because he was angry with him for not supporting him during the muster issue a few weeks earlier. Uppal's belief is speculative, and while Clayton Smith expresses the same belief, I find their evidence on this allegation not credible. The conflict over muster was primarily between Francis and Grill as documented in candid text messages between Francis and Clayton Smith. While Uppal may not have supported Francis in challenging his superiors, Uppal clearly supported common practice and flexibility in policy application. In this way, his interests were aligned with those of Francis.

[147] That Clayton Smith denies ever hearing Uppal use the phrase “LBM” is simply not credible in these circumstances. Clayton Smith’s testimony is not consistent with contemporaneous texts which demonstrate his awareness that Francis was being called an “LBM” to mean “lazy Black man”. The similarities between the beliefs advanced by Uppal and Clayton Smith are notable. Like Uppal, Clayton Smith accuses Francis of trying to fabricate evidence. Clayton Smith also accuses Francis of asking him to corroborate his claim against Uppal by saying words to the effect, “help me out and I’ll help you”. Like Uppal, Clayton Smith testified that he only ever heard Francis use “LBM” in reference to himself as a “luscious Black man”. Uppal testified that Francis referred to himself as a “luscious Black man” at their previous place of employment. That Clayton Smith reported to management that Francis made up allegations at the urging of Uppal undermines the veracity of his evidence. For these reasons, I discount Clayton Smith’s evidence in its entirety.

[148] Finally, Francis argues that when he asked Uppal to refrain from calling him an “LBM”, Uppal spread a rumour around the workplace that Francis lodged a complaint against him. Francis testified that Clayton Smith told him that Uppal had spread the rumour. Uppal denies spreading a rumour, and Clayton Smith denies hearing the rumour. Uppal testified that he may have discussed Francis with management but denies that talking to management amounted to spreading a rumour. Francis’ evidence suggests that Uppal started the rumour at the end of September 2012, which predated the filing of his human rights complaint by about a month. In the absence of corroboration, I am unable to find that Uppal spread a rumour around the workplace that Francis lodged a human rights complaint against him.

c. “African Warlord” Picture

[149] I find, as an undisputed fact, that Peakman circulated a photo of an African warlord to Francis accompanied by a news article about killing inmates. Peakman testified that they had a “chuckle about it” and Francis never told him that he found the picture offensive. Peakman’s evidence is corroborated in material respects by Francis who, in 2014, testified that they were making funny jokes that this guy looked like him. Francis texted the photo to Clayton Smith, who was not at work that day, and asked him if he liked the photo. I have discounted Francis

2018 testimony denying that he joked because his recollection has hardened during this proceeding. Elliott Smith never investigated this incident, because he was only made aware of it after Francis left work.

8. Francis Files Human Rights Complaint

[150] Francis filed a human rights complaint on October 25, 2012.

a. Why did Francis file a human rights complaint?

[151] Francis was frustrated with what he perceived to be a lack of progress in the investigation into his complaints. Since meeting with Lacroix in June 2012, Francis had not received any updates.

[152] Seven months after he reported the incidents, and three months after he filed a human rights complaint, Francis received an email from Warden Anderson. On January 17, 2013, Anderson emailed Francis and asked to meet with him to follow up on his concerns and to “touch base on how things are at present”. The following day, Francis emailed Anderson and apologized for dropping this on her lap. He confirmed that he had received no updates since he brought his concerns forward last June. On January 25, 2013, Francis emailed Elliott Smith to follow up on the investigation into his concerns. They agreed to meet the following week.

[153] Francis did not feel that his internal reports were taken seriously. Francis testified that he wanted his colleagues to be accountable for their actions. From Francis’ perspective, managers were not dealing with racial slurs in the workplace and it kept happening. Francis testified that it was not up to him to decide what management should have done. Francis testified that “we are shitting on the bed on this one” and that they needed to “cut off the head of the snake and do something that needs to be done”. Francis believed that sexism in the workplace was being dealt with more seriously than racism. He testified to an example where an officer was suspended for over three weeks for using the slur “cunt”. His understanding was that no one had been reprimanded for using the slur “nigger”. As it related to the Firlotte pub incident, Francis found it humiliating that new recruits heard the slur “nigger” at their

graduation, and this was the first impression they got from a senior officer who just finished training them.

[154] Clayton Smith corroborates Francis' evidence in this regard. In his interview with Elliott Smith in September 2013, Clayton Smith said that after Francis reported the incidents to Elliott Smith, "he was upset about the time it was taking to look through it all and he thought that there would be, he was being blown off and pushed aside and nobody was taking him seriously and this is why the Human Rights thing is going on and so on".

b. Official notification

[155] By letter from the Tribunal, the Ministry was notified that the complaint was accepted for filing on January 30, 2013. On February 1, 2013, the Tribunal was notified that the Ministry was represented by counsel. The timing is important because the retaliation complaint is partly based on when Francis' colleagues and supervisors found out about his human rights complaint.

[156] Elliott Smith was evasive when describing when and how he learned of the human rights complaint. On the one hand, he was not entirely sure how he learned of the complaint, it may have been through the Ministry lawyer. He testified that the window would have been after Francis' incident reports in June 2012 and before he left the workplace in July 2013. I note that Elliott Smith being made aware by the Ministry's lawyer anytime before the complaint was filed in October 2012 would have been impossible. On the other hand, Elliott Smith acknowledged being notified of the human rights complaint in January 2013 in the context of explaining why it took so long to complete the Firlotte pub investigation.

[157] Elliott Smith does not know why Francis "took it to the next level". From his perspective, he was doing everything he could to respond to his allegations in a constructive and timely manner. When Francis filed the human rights complaint, Elliott Smith was surprised and was left with the impression that Francis' original intent had changed. Elliott Smith understood Francis' June 2012 incident reports as having concerns about some behaviours in the workplace and looking for opportunities to stop those behaviours from happening. He thought Francis was

looking for change and brought examples forward to be addressed to bring about change. Elliott Smith did not understand that Francis was alleging racial discrimination against himself, despite the fact that June 2012 reports clearly refers to Francis being called a “nigger”, his skin colour, and the Chohan Incident.

c. General awareness

[158] I find it was widely known in the workplace that Francis filed a human rights complaint. Some of this awareness came directly from Francis, some from the investigation interviews into his allegations, and some from gossip in the workplace.

[159] Francis disclosed his human rights complaint to Clayton Smith and others at North Fraser. In his interview with Elliott Smith, Clayton Smith said that Francis had “numerous times, dozens, countless times” referred to the human rights complaint that he filed against others at North Fraser. Clayton Smith reported:

And I know his list of names that he spirited off on there that he'd carry around so carelessly in his pocket, all of the people on there were on them. I remember when Mr. Smith was having to interview half those people because he'd be telling me “Oh yeah, I got this guy involved .. this guy's going up today ... this guy's going upstairs .. they're going to have to answer for themselves' and so on and so on...

[160] Clayton Smith described them as “serious allegations of racism” and said further:

[Francis] is pretty liberal with what he says and when he says it so to be a 100 percent honest with you, it goes on constantly whoever is in the room sometimes hears it and sometimes they don't. I can't tell you a specific incident when so and so is in the room and this was said, I mean it's been going on for a year and you gotta imagine that it's not just not one, we are not talking about one day that this stuff has happened

[...]

I've heard people say they know that he is targeting them and his comments, I know that. People have brought up their concerns to me about that ... well I know for instance, he's made allegations against

these people and they are like, Clay, what's this guy talking about, like what are these allegations he is bringing up about me.

[161] The union representative for Clayton Smith also reported:

I can go on record and saying that I haven't heard the whole diatribe that Mr. Smith has heard but I've heard ... blurbs bits of blurbs of conversations.

[162] Some officers became aware of Francis' allegations after they were interviewed by Elliott Smith. For example, Atkinson acknowledges that he became aware of Francis' allegations after being interviewed by Elliott Smith in September 2012. He talked to a couple of coworkers afterwards, does not remember who they were, but denies discussing what Francis was doing at the Human Rights Tribunal.

[163] When asked when he first became aware that Francis filed a human rights complaint, Torok sought clarification as to the actual complaint or "rumblings about him putting something in". Torok testified that he "heard rumblings" that Francis was "not happy" with certain situations, which included "name calling or something like that". Torok explained that there were rumblings "in the air" and he heard people talking in the locker room about Francis.

[164] Chohan attested that he and "others at North Fraser" knew that Francis had made complaints that he was being singled out or treated differently because he was Black. However, Chohan was evasive as to whether this amounted to allegations of racial discrimination. He did not hear Francis making these allegations, and Francis never complained to him. Chohan could not recall when he first became aware about racial discrimination. Chohan knew and was aware of "just the lens that everything was against him because he was Black".

[165] Craig Price attests that he did not hear that Francis had any problems in the workplace until after his human rights complaint "became known". Bahia initially had a discussion about Francis' complaints when "it was brought to my attention". He did not remember the allegations, who he spoke to or when. Although he denied discussing the allegations with coworkers, he acknowledges that "of course" he "had a discussion" with "management".

[166] Any arguments denying the existence of gossip at North Fraser, or a general awareness of Francis' human rights complaint, are without merit. Seven months before Francis filed his human rights complaint, Polonio wrote in an email, "I am suspicious that [a union representative] is directly involved in the reporting of this event and I believe he has done so as a means of supporting Mr. Francis' human rights complaint against me". In an email to all staff in October 2012, Lisa Anderson wrote "it's apparent that eliminating the gossip/rumour mill would have a extremely positive impact to the overall work environment".

9. Francis called a "Rat" and has a "Target on his back"

[167] The parties dispute whether Francis was called a "rat" and told he has a target on his back in retaliation for filing a human rights complaint. The Respondent argues that there is no reliable evidence whatsoever in support of these allegations and that this simply did not happen.

[168] I find, by reasonable inference, that Francis was called a "rat" and told that he had a "target on his back" at some point after he filed his complaints. This sentiment reflected a general reaction among colleagues who frowned upon Francis for reporting on his peers. It was not clear in the evidence whether this first occurred after Francis reports incidents in June 2012 or after his human rights complaint was filed in October 2012. I find, however, that the negative sentiment of Francis being regarded as a "rat" and "having a target on his back" continued after his human rights complaint became known.

[169] Francis heard from others that he was called a "rat". Francis' hearsay evidence is corroborated by independent evidence. That Low, Amarelo, or Fass did not witness or hear such comments or gestures is not material given the Respondent witnesses who did corroborate his evidence in this regard.

[170] As early as June 2012, Francis expressed fear that he would be retaliated against for coming forward. Francis reported to Lacroix that he "had a pretty rocky go the past few years". Lacroix told Francis that he has been involved in a lot of investigations and it is "definitely

apparent” and “almost alarming” the lack of respect that employees sometimes have for each other.

[171] Francis heard from Torok that coworkers were calling him a “rat”. Torok denies making this comment. I do not accept Torok’s evidence because Torok denies reporting on something that his colleagues acknowledge occurred. His denial is not consistent with the evidence of other witnesses who were either called “rats” or called others “rats” for reporting on their peers. This reflected the general reaction among colleagues who frowned upon reporting on peers. Clayton Smith testified that his concern was not with Francis’ dispute with management, but rather, with his dispute with his co-workers.

[172] Polonio testified that it was frowned upon to report on a peer group, and that it can cast you in a negative light: “unofficially it is frowned upon, simplest way to say”. Polonio testified that by reporting on a peer group, one could be regarded as trying to get someone in trouble, or in other words, “ratting someone out”. Polonio even referred to this phrase as a “crass corrections term” which underscored its common usage in the workplace.

[173] The Respondent argues that Polonio’s testimony must be weighed in the context of this being a unionized workplace and the persons he suspected of the threat were union shop stewards. However, that argument is not supported by Polonio’s evidence. Union shop stewards were involved in reporting his alleged “racist comment” to management, but Polonio did not suspect them of drafting the note. Polonio “had no answer” to the question of whether he knew who posted the note that said, “you r finished you racist pig” [reproduced as written].

[174] Francis even accused Clayton Smith of “ratting” on him in a text message after Grill found out he arrived late for work: “this [is] fucking bullshit and how did [Debbie Grill] know I wasn’t here? You must have ratted on me”.

[175] As it relates to the gesture, I reject the Respondent’s argument that Francis was relying on hearsay. Rather, Francis saw Peakman draw a circle with his finger and say, “you’ve got a huge target on your back”. Although Peakman denies making this gesture, he acknowledges speaking with Francis about his complaint and was evasive about what happened next.

Peakman attested that he would have remembered making the gesture, while at the same time, he testified that he does not recall making the gesture, does not think he ever said that or would have said that or drawn a circle. Management was aware of the potential for officers being targeted for raising allegations against their colleagues. Lacroix asked Francis in his June 2012 interview "since you brought things to the forefront has anyone targeted you?" In his interview with Elliott Smith in February 2013, Francis said:

... part of the culture too is that people, staff, peers, have always said, you know the culture here too is that people will put a bulls eye on your back or "you better watch yourself now" or you know "watch your step" or "pack of wolves" ...

[176] That Francis never specifically raised these incidents with Elliott Smith does not support a reasonable inference that they did not occur. Elliott Smith says that he had multiple meetings with Francis and specifically advised him to bring any complaints to him in a timely way so that they could be investigated and dealt with properly. It was reasonable for Francis not to come forward to Elliott Smith in circumstances where he was not informed of any conclusions of any investigations prior to his departure from the workplace.

[177] Elliott Smith and Torok had a propensity to minimize the reaction at North Fraser to Francis' allegations. Elliott Smith testified that it was not the case that people were unhappy that Francis made allegations against them, but rather, they expressed disappointment in having to answer to things that they did not believe were true. Torok testified that he was "quite surprised" that Francis filed a human rights complaint, and that the general reaction of his colleagues was one of "surprise". Torok had a propensity to minimize any information that reflected negatively on his colleagues at North Fraser. For example, Torok denied ever hearing or seeing racism in the workplace, despite the fact that other Respondent witnesses acknowledged that it occurred.

[178] Clayton Smith expressed a more realistic reaction to Francis' allegations of discrimination. Clayton Smith was concerned with having to swear an affidavit because "it's going to create a lot of turmoil at my workplace".

10. Francis Breaches Protocol and Receives Letter of Reprimand

a. Incident

[179] On February 24, 2013, Francis breached protocol in the feeding of an inmate in segregation. Chohan was his supervisor that day. Chohan reported the incident to Heinrich. The breach was investigated and resulted in Francis receiving a letter of reprimand on April 29, 2013. I find a main reason why Francis received a letter of reprimand was because Chohan reported Francis was not taking the protocol breach seriously.

[180] There is no dispute that Francis breached protocol. On February 24, 2013, service delivery to inmates was disrupted. When Francis arrived, the inmates had not been fed or released to use the shower or exercise. He described segregation as “a complete mess” and “inmates were banging on doors”. Francis described trying to feed inmates a late lunch and get them out before starting the dinner feeding.

[181] Francis breached protocol when he fed an inmate a “clamshell” meal instead of a “bagged lunch”. After observing the breach from her video monitor, Heinrich asked Chohan to find out what happened. Chohan went down to segregation. Francis told Chohan that he would remove the plastic immediately and did so without incident. Francis acknowledges breaching protocol, “it was just a mistake and I admitted to the mistake”.

[182] Chohan’s evidence about what happened next is inconsistent. His affidavit evidence is inconsistent with his recorded interview. Since Chohan testified that he does not remember what happened a month earlier, I prefer the evidence of an interview that took place one day after the incident over an affidavit that was attested to over five years later.

[183] Chohan’s affidavit indicates he made one report to Heinrich in her office that Francis breached protocol and was able to remove the items without incident. Chohan attests that she advised him to assign Francis an incident report.

[184] Chohan’s investigation interview indicates he reported back to Heinrich twice before she assigned Francis an incident report. Chohan first reported to Heinrich that Francis removed

the items but that he “wasn’t finished speaking” with him. Chohan then spoke to Francis again about the incident in more detail. He attests that, during this meeting, Francis continued to “defend his actions” and said it was “no big deal”. Chohan then reported back to Heinrich a second time that Francis was not taking the incident seriously. It was only after he relayed this additional information to Heinrich that she advised Chohan to assign Francis an incident report.

[185] I find Chohan made an additional report to Heinrich that Francis was not taking the incident seriously before she assigned Francis an incident report.

[186] Chohan then spoke to Francis on the phone and advised him that he had been assigned an incident report. Francis and Chohan have a consistent recollection of this conversation. They agree Francis chuckled or laughed and asked Chohan if he was serious. In his interview, Chohan acknowledges chuckling too. It was at this point that Francis sought the request in writing before he would complete the incident report.

[187] Chohan told Heinrich that Francis refused to complete the incident report without receiving the request in writing. Heinrich then met with Francis and removed him from his post. Chohan was present for this meeting. Heinrich advised Francis that he was being removed from his post pending further investigation. Heinrich explained that she had concerns that Francis was not taking the incident seriously, based on the reports she received from Chohan.

[188] At the end of this meeting, Francis made a comment. I find, as an undisputed fact, that Francis said words to the effect “harassment” in that comment. While Heinrich and Chohan gave evidence they both heard the comment, I find that Chohan heard Francis make this comment and reported what he heard to Heinrich. Chohan attests that as they were leaving the room, he heard Francis “mumble something along the lines of bullying and harassment”. Chohan’s affidavit is consistent with Heinrich’s contemporaneous notes which record that, on the way out the door, Chohan heard Francis “mumble something about harassment under his breath”. For this reason, I find Heinrich was simply mistaken when she testified that she heard Francis make this comment. I attribute her error to an honest mistake from the passage of

time. In my view, her contemporaneous notes are a more accurate record of what transpired than her recollection five years later.

[189] A short time later, there was a heated exchange between Francis and Chohan. I find that, during this exchange, Chohan leaned over to Francis and said, “hey, do you remember taking me upstairs? Payback”. I do not accept Chohan’s evidence that he did not make this comment. Chohan was an evasive and argumentative witness. He refused to answer several questions during the hearing without being directed to answer. He denied and did not recall the words attributed to him. He testified not remembering what happened a month ago yet testified this comment five years earlier “did not happen” and “is false”. He accused Francis of not telling the truth.

[190] Chohan reported some parts of this exchange to Heinrich. Chohan reported that Francis initiated the exchange and insinuated ulterior motives. Chohan reported that Francis approached him as he was leaving segregation and told him that this was personal and there was something bigger at play. Francis acknowledges making this comment. Chohan testified that he “accompanied” Francis to another area because he “took exception and confronted him on that”. Although Chohan acknowledges taking exception and confronting Francis, he does not acknowledge the words attributed to him by Francis.

[191] I find Chohan had reason to make such a comment about payback to Francis. I do not accept the Respondent’s argument that Chohan would have no reason to say this. It is material that Chohan was interviewed several months before in relation to the “because you’re Black” incident. There was gossip at North Fraser and a general awareness of the complaints that Francis had filed. Based on my findings of fact, Chohan clearly instigated Heinrich’s response to the breach. She relied on the observations reported to her, and that gave Chohan a considerable amount of discretion in terms of what he reported and how. I do not accept the Respondent’s argument regarding the significance of Chohan interacting with Heinrich in the days or weeks prior to the protocol breach in these circumstances.

[192] I do not accept the Respondent's argument that this scenario is entirely consistent with Francis' view that his work performance was beyond reproach and his resulting belief that any criticism of his work performance must therefore be discriminatory or retaliatory. In this scenario, Francis acknowledged that he made a mistake and corrected that mistake almost immediately. What troubled Francis was the escalation that occurred thereafter. It is simply not the case that Francis made allegations each and every time anyone criticized his job performance as evidenced by the fact that Francis made no allegations in the first half of 2012.

[193] I also do not accept the Respondent's argument that this scenario is consistent with Francis's ongoing attempts to target as racist anyone who he felt did not fully support him. It was reasonable in the circumstances for Francis to believe that Chohan was revengeful. For the reasons above, I find that Chohan had ulterior motives for escalating Heinrich's response to Francis' protocol breach and making his comment about getting payback.

b. Investigation

[194] The following day, both Francis and Chohan were interviewed about the incident. Heinrich and Martin conducted the interviews.

[195] Francis was interviewed first. A transcript of that interview was entered into evidence. In the interview, Francis acknowledges that he was aware of the protocol and that he made a mistake. Francis acknowledges that he wanted the request for the incident report in writing because he "did not like where this was going". He also acknowledges asking Chohan "what?", "what's going on", and "are you serious?" after being assigned an incident report. Francis testified to his surprise that the incident was escalating in this way.

[196] Heinrich told Francis during the interview that his subsequent conversation with Chohan caused her to remove him from his post:

Okay so Mr. Chohan is a supervisor of the area and he's communicating with me, the conversations that you've had through the shift after the incident occurred. And it wasn't the breach of protocols that had me remove you from Alpha West. It was the conversations that you had

with Mr. Chohan after that gave me cause for concern. I couldn't leave you in Alpha West because it wasn't simply just about the protocols, it was the conversation ... I had concerns that you did not understand the significance of the protocols as far as you were questioning Mr. Chohan, you were making comments.

[197] During his interview, Francis said, "I made a mistake. I apologize for it. I told Chohan and I apologized obviously I didn't know what he is telling you". A short time later, Heinrich reported to Francis that Chohan shared with her that at no time did Francis own his mistake.

[198] That night, Heinrich emailed Martin a contradiction in Francis' evidence. She noted that, on the day of the incident, Francis was "quite wound up by this time" when she explained why he was being removed from his post but nevertheless he wholeheartedly agreed with her that he refused to complete the incident report until the request was made in writing. She then noted that, during the interview, he denied saying that. I acknowledge that Francis had a propensity to show himself in a good light, and I have taken this into account when assessing his credibility. Francis ultimately acknowledged this fact, and this discrepancy is not material.

[199] Martin did not find Francis' explanation for breaching protocol acceptable. It was her impression that Francis did not accept full responsibility for his actions, notwithstanding that he acknowledged making a mistake and eventually apologized. Martin testified that Francis was attempting to deflect blame on Chohan by accusing him of an "attack" in response to an earlier incident.

[200] Heinrich testified that Chohan had no ulterior motives because she was the one who initiated all of the action in response to what she observed. Martin also testified that it did not make sense to her that Chohan was acting with ulterior motives because Heinrich was the one who noticed the issue, raised the issue, and requested the incident report. However, it is clear that neither Heinrich nor Martin witnessed the exchanges between Francis and Chohan earlier that day. They were clearly influenced by what Chohan reported to them about Francis in making their decision to issue a letter of reprimand.

[201] Chohan was the second to be interviewed by Heinrich and Martin. Francis took issue with the way this interview was conducted. It is undisputed that Martin asked four more questions after Heinrich concluded the interview. Martin's questions were of a general nature in relation to Francis' work performance. Among other things, she asked Chohan whether he had any concerns about Francis following safety procedures or whether there were any other performance issues. Chohan did not have concerns about Francis following safety procedures, but reported some performance concerns. Chohan questioned whether Francis did his duties at the highest level that segregation demands.

[202] Francis argues that Martin was trying to find evidence against him. I do not accept Francis' argument. Martin started working as Deputy Warden of North Fraser approximately one month earlier in January 2013. She described herself as "pretty new". She does not recall meeting Francis prior to the interview. I attribute any mistakes that she may have made to being new.

[203] I accept that these four additional questions were outside the scope of this particular investigation, and that had they discovered unrelated incidents of a similar nature, this could have resulted in yet another investigation and progressive discipline. Nevertheless, I do not accept that Martin was engaging in retaliatory behaviour. Heinrich explained that it is not a perfect process, and that although she was satisfied that Chohan had formally shared what he recalled about the incident, her boss had more questions.

[204] Martin provided a reasonable explanation for asking these questions. She wanted to know whether this was a "one-off" or whether it happens "all the time". Given that she had only recently arrived at North Fraser, this makes sense.

c. Letter of reprimand

[205] Francis received a letter of reprimand on April 29, 2013. Martin authored the letter. Martin knew that this was Francis' first letter of reprimand in all of his years of service. Martin's view was that although Francis acknowledged his mistake, Francis also thought that this was

more than a simple protocol breach. A factor that was cited in Martin's letter was that Francis questioned the motives of a supervisor, Chohan.

[206] In her letter, Martin wrote that Francis "did not seem to appreciate the seriousness of [his] actions and the risk [his] actions posed" demonstrated by some of his comments to supervisor Chohan, his statement that he follows special handling protocols the majority of the time, him wanting direction in writing to complete an incident report, and the poor quality of the report. Martin also wrote:

What is also concerning is that you attempted to mitigate your actions by accusing the Correctional Supervisor [Chohan] of ulterior motives in addressing you about your failure to comply with the special handling protocols. The Correctional Supervisor is obligated and compelled to correct and hold people accountable and to suggest that his actions were anything other than that aggravates the circumstances.

11. Uppal orders Francis to Breach Protocol

[207] I find that, on the same day that Francis received his first ever letter of reprimand for breaching protocol, Francis was ordered to breach protocol by another supervisor, Uppal. The incident occurred in the afternoon of April 29, 2013. The following day, Francis went on leave and remained off work until June 17, 2013. Uppal denies that this incident occurred, but I do not accept his evidence for the reasons set out below.

[208] I find, as an undisputed fact, that both Francis and Uppal were working in segregation that day. Uppal was a supervisor. Francis was working with a segregation partner named "Gill". I accept that they worked different shifts which overlapped for approximately three hours. Uppal was scheduled to work from 7:30 am to 17:35 and Francis worked from 14:30 to 22:30 that day. I accept Uppal's evidence that he did not work late that day, because it is corroborated by the work schedules of other supervisors.

[209] I find that Uppal directed Francis to move two inmates, the second of whom was under special handling procedures. Uppal does not recall moving two inmates with Francis, although he acknowledges that he might have.

[210] Francis has a clear recollection of what transpired, and I accept his evidence in this regard. Francis described he moved the first inmate from the shower to his cell without problem. Uppal, then, asked Francis to move the second inmate from his cell to the shower. Francis recalls Uppal saying to him, "oh come over here, we have to move this other guy". Francis knew that the other inmate was under special handling procedures, which required handling by three officers. Francis looked over to see if officer Gill was coming to assist them but he was sitting at the desk and did not come. Francis then cuffed the inmate through the hatch, opened the door, moved him across the hallway, and secured him in the shower.

[211] At some point during this move, Francis remembers Uppal saying, "you know, you just broke protocol". There is discrepancy in Francis' testimony from 2014 and 2018 as to when the comment was made, which is not material, other than to demonstrate that his memory has faded with the passage of time. On the one hand, Francis testified that the comment was made as the inmate was leaving his cell, and on the other hand, Francis testified that the comment was made as the inmate was being secured in the shower. I attribute this discrepancy to the passage of time. Whether the comment was made before or after the inmate was secured in the shower is not material. What is clear is that the evidence does not support the Respondent's argument that the comment was made "after the inmate move was completed".

[212] Francis responded with words to the effect, "you just made the call" and heard Uppal say in reply words to the effect "I don't much care about protocols" but "you better make sure you do your 45 minute perimeter checks".

[213] Francis' evidence from 2014 and 2018 is consistent in this regard and corroborated by the new requirement of perimeter checks. Francis testified that Peakman gave him a "heads up" that because of the "waves" he was causing "there's been a new thing about doing the perimeter check". On the day Francis returned from leave, around June 17, 2013, Torok issued a directive to do perimeter checks. In his interview with Elliott Smith, Clayton Smith also referenced the new requirement of perimeter checks and accused Francis of not complying with that requirement in a timely manner. Clayton Smith referred to Francis performing perimeter checks later than he thought necessary.

[214] The activity log for this inmate was entered into evidence for three separate dates including April 29, 2013. Uppal attested to the truth of its contents. The log for that day clearly records that “CS Uppal was present” and “time out granted on this day” in an entry made by “Levan Frances” on April 29, 2013 at 21:33 [the Entry]. The Entry corroborates Francis’ version of events in three material ways. First, Uppal was recorded as present when this inmate was moved. Second, no other officer was recorded as present contrary to the special handling protocol in place for this inmate. Third, the activity is recorded as an ablution, which Uppal acknowledged includes giving inmates time out of their cell to take a shower.

[215] Both parties question the authenticity of the Entry. The Respondent argues that Uppal was not working at 21:33, which is the time the Entry was made. Uppal believes the Entry was fabricated to suggest that he was there. Uppal testified that the entry should be recorded “very close to” the same time that the entry occurred. However, that the entry was made several hours after Uppal left work does not support a reasonable finding that Uppal was not present for this ablution. That Uppal was not at work at the time when Francis recorded the Entry does not mean that he was not present when the incident took place. There was uncontroverted evidence that officers made entries after they returned to their work stations. It is reasonable in such circumstances for there to be a time lag between officers moving from operational to administrative duties.

[216] Francis argues his named is misspelled as “Frances” on the Entry and that is because someone must have altered the time of the Entry to undermine his evidence that Uppal was there. For my reasons below, I find Francis made the Entry at 21:33 after Uppal had left, his name was misspelled due to a computer issues, and no one altered the time of the Entry.

[217] Although it may have been common practice for entries to be made shortly after activities occurred, there were variations in recording practices. Furthermore, Francis did not always complete tasks in a timely manner. For example, on the evening when Chohan requested an incident report, Francis testified that he was working through a backlog of administrative duties. There is independent evidence corroborating that Francis performed some tasks later than assigned. In his interview with Elliott Smith in September 2013, Clayton

Smith said that Francis “usually” got things done “but not necessarily when they are suppose to be done or how they are suppose to be done um as far as like night checks we have to do records checks and stuff like that and sometimes they are late” [reproduced as written]. Thus, I find the time the Entry was made does not detract from the contents of the Entry.

[218] I now turn to Francis’ argument that someone else changed the time in the Entry after-the-fact to undermine his evidence that Uppal was there. There is no credible evidence to support this argument. Francis’ name was misspelled as “Frances” in the Entry. I accept Elliott Smith’s explanation, which I consider reasonable, that Francis’ name was misspelled by someone who generated his online account. His explanation is corroborated by documentary evidence which shows that the misspelling of “Frances” populated automatically in the system and had done so on other occasions. The misspelling of Francis’ name due to computing error does not lead me to conclude that someone altered the Entry.

[219] Both parties advanced implausible arguments questioning the authenticity of this Entry, which I have summarily rejected. That Francis claimed that he did not make these entries because his name was misspelled in the computer system goes to his propensity to minimize any information that reflects negatively on him. I have taken that into account in assessing his evidence. It does not, however, take away from my finding of fact that the Entry clearly records that both Uppal and Francis were present when this inmate was moved. Notably absent from that entry was the presence of any third officer as required by the special handling protocols for this inmate.

[220] Uppal relies on his character and professionalism as evidence that he does not deviate from protocols. Uppal testified that special handling protocols are important, that he does not have the authority to deviate from special handling protocols, and that he would have needed permission from the assistant deputy warden. Uppal has no recollection of making any calls to the assistant deputy warden that day. Uppal testified that he would have completed an incident report if he had breached protocol that day.

[221] I find his testimony implausible. The evidence is clear that Uppal deviated from protocols. For example, Uppal acknowledges deviating from the protocol to attend muster notwithstanding that it had been in place for over a decade. Uppal also acted unprofessionally in relation to the creation and publication of a denigrating picture of another officer. Francis raised this incident in June 2012 about an officer making a poster of a skunk with an officer's head on it. That subject of the poster was Indo-Canadian, and Francis understood the meaning of the poster to be that the officer had bad body odour.

[222] Uppal was interviewed by Elliott Smith about this incident at the end of August 2012. The transcript of that interview was entered into evidence. Uppal acknowledges that a poster was circulated to staff, and that the officer whose face was on the poster, tore it up when he saw it. Uppal reported that the officer laughed when he saw the poster but then "ripped a few off the wall". Although Uppal did not create the poster, he was there when it was being made. On the one hand, Uppal says that "it was done in front of me" suggesting that he did not participate. On the other hand, Uppal acknowledges participating with at least two other officers. He reported that there were at least three of them by the computer creating the poster "because we were trying to put some colour on the poster".

[223] Uppal reported that "everyone was laughing" when the poster was being made. Uppal denied that the poster had anything to do with body odour but gave inconsistent evidence as to what was on the poster. On the one hand, Uppal said "there was no picture of a skunk" and "there was a picture of a goat ... sort of behind him". On the other hand, Uppal appears to acknowledge that there were two posters. Uppal said, "one was just the poster" and "one because he has a goatee" which he described as "more like a skunk type goatee". Notwithstanding that he described it as a "skunk type goatee", Uppal implausibly explained that the stripe was "kind of a goat looking". In the context of that investigation, Elliott Smith told Uppal that his behaviour "flies in the face of creating a healthy workplace".

[224] The Respondent has made three main arguments about this incident that I now address. First, the Respondent argues that the Uppal incident was fabricated because it was raised for the first time after the October 2014 hearing. I do not accept this argument because the Uppal

incident occurred in April 2013, after the February 2013 amendment was filed, so there was no opportunity to file it earlier. Francis was represented by different counsel in the October 2014 hearing who filed that amendment on this behalf. Francis should not be penalized for the timing of a decision that was ultimately made by his counsel.

[225] Second, the Respondent argues it is simply incredible that Francis did not question Uppal's directive to breach protocol. The Respondent relies on a partial summary of Francis' evidence that "you just don't question a supervisor's direction". However, that is not an accurate reflection of his evidence. Francis had a propensity to question the directives of supervisors when he disagreed with them, and he acknowledges doing so on many occasions. Francis' evidence was that if a supervisor told him that he had to do something, he had to obey "within reason and common sense". It is reasonable that he did not question Uppal on this day. Francis explains that he had just received his first ever letter of reprimand earlier that day, which was given to him in the context of questioning the directive of a supervisor, and he did not want to come across as insubordinate again. During cross-examination, Francis did not agree that he was entitled to challenge a supervisor who was directing him to breach protocol in these circumstances. Francis felt entrapped because he had just come downstairs from receiving his first letter or reprimand. Francis felt threatened and intimidated by Uppal. Francis acknowledges that he did not report this incident to management, and because Uppal did not report himself, there were no consequences to either of them in light of this breach. Francis did, however, report this incident to his union and went off work for the next six weeks.

[226] Third, the Respondent argues that Francis fabricated this allegation to get Uppal into trouble for not supporting him in relation to the muster issue. There is no credible evidence to support a finding that this incident was fabricated. To the contrary, my findings of fact indicate the following. Uppal directed Francis to move an inmate with only two officers present when the inmate's special handling protocols required that there be three officers present. When Uppal gave Francis the direction, Francis knew that it was in breach of special handling protocols and that there was another officer in the vicinity to assist. Francis did not question the directive at the time because he had just received his first ever letter of reprimand that day for

questioning the directions of another supervisor. After doing as he was told, Francis was told by Uppal that he had breached protocol. Francis' evidence is corroborated by the Entry, which clearly records that Uppal was there.

[227] I accept Francis' argument that Uppal was aware that Francis had received his letter of reprimand on the day that he ordered him to breach protocol. Although Uppal denies having any awareness that Francis had received a letter of reprimand, his evidence is not consistent with past practice and awareness through gossip among managers. Uppal testified that management staff are not told about discipline imposed on other employees. On the one hand, Uppal testified that he was not normally informed of such matters, that such information was usually at the manager level. On the other hand, Uppal testified to his awareness of Francis' complaints to management. Disinterested witnesses also testified having such awareness through gossip at North Fraser. Given the skunk incident, I do not accept Uppal's testimony that it would have been bizarre for him to direct Francis to engage in the same misconduct for which he had just been disciplined. Although Uppal testified that there was no motivation for him to risk his job in this manner, there is no evidence that supervisors were reprimanded for such behaviour.

12. Around July 2013 Incidents

[228] Around July 2013, three incidents took place that Francis perceived in a negative light. For two incidents, I find that Francis' belief was not that of a reasonably objective observer. I find that, while these two incidents occurred, they were misperceived by Francis. For one incident, I find that it is more probable than not that the incident occurred as recalled by Francis.

[229] Given my credibility findings, I have been reluctant to consider Francis' testimony on a stand-alone basis when not corroborated by independent evidence. I accept the Respondent's argument to the extent that, in the month leading up to his departure from the workplace, Francis was misperceiving some events because he had persuaded himself that everyone in the workplace was against him, and this belief magnified over time. I have taken this into account in

assessing Francis' evidence about all of the events that took place after he returned to work in June 2013 up to his departure from the workplace in July 2013.

[230] Francis acknowledges that he was emotionally unstable at this time. He gave detailed information adverse to his interests, and this supports his credibility. While Francis' beliefs were not always reasonable, I find that they were genuinely held. There is no basis in the evidence to conclude that Francis manufactured evidence in support of his human rights complaint.

[231] I reject the Respondent's argument that Francis fabricated these incidents after-the-fact to support his human rights complaint for the following reasons. First, it does not matter that these incidents were raised for the first time in the October 2014 amendment to his human rights complaint. All three incidents occurred after the March 2013 amendment, so there was no reasonable opportunity to file them earlier. Francis was represented by different counsel during the October 2014 hearing who filed that amendment on this behalf. Francis should not be penalized for the timing of a decision that was ultimately made by his counsel. Second, I am not persuaded that Francis was motivated to add allegations after the Time Limit Decision dismissed most of his human rights complaint. The Time Limit Decision was issued in February 2014, eight months prior to the October 2014 amendment. That is a lengthy gap in time that does not support a reasonable inference in these circumstances.

a. "Sorry you have to work with that Nigger" Incident

[232] I find, on a balance of probabilities, that Moore said to Clayton Smith words to the effect "sorry you have to work with that nigger".

[233] The only evidence in support of this allegation comes from Francis who claims to have heard Moore make this comment as part of a conversation with Clayton Smith through the small opening in the Control room window. Both Moore and Clayton Smith deny that this comment was made. I prefer the evidence of Francis because his testimony is inherently believable, corroborated in material respects by Respondent witnesses, and is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions": *Faryna*.

[234] Francis' recollection is unshaken and his testimony from 2014 and 2018 is consistent. Francis recalled the following. Francis and Clayton Smith were working as Control partners that day. Francis was sitting away from the window, and Clayton Smith was sitting closer to the window. The Control room window is small. It was open at the time, and Officers were approaching the window from the hallway to pick up their things from Clayton Smith. Clayton Smith was visible because he was next to the window, but officers sitting away from that window are often not visible. Moore was in the hallway and approached the window to pick up his things. Francis could see Moore and recognized Moore's voice. Moore could not see Francis from the hallway. Francis heard Moore and Clayton Smith engage in small-talk conversation. During that conversation, Francis heard Moore say words to the effect "you did not seem like yourself" and "I am sorry you have to work with that nigger". Francis yelled "hey" and Moore "bolted" down the hall.

[235] Francis' evidence is corroborated in material respects by a number of Respondent witnesses. First, Francis' description of the Control room is corroborated by Chohan, Bahja, and Clayton Smith. Clayton Smith testified that Control room has a two-way mirror so that it is not possible for a person outside of the pod to know who is in Control at any given time. Moore also acknowledged that whether anyone from the hall could see into the Control room window depended on the time of day, whether anyone was squatting, and how close to the window the officers were seated. It is reasonable for an officer in the Control room not to be visible by officers in the hallway in the circumstances described by Francis. Those circumstances were common.

[236] Second, Francis' recollection of the conversation is also corroborated in material respects by Clayton Smith and Moore. Clayton Smith acknowledged that small talk conversations occurred in the context of picking up keys or packs. Clayton Smith acknowledged engaging in small talk conversation with Moore through the Control window. Moore acknowledged the possibility of having a conversation with Clayton Smith through the Control window about equipment or to wish him a good day. It is more probable than not that Francis

overheard Clayton Smith and Moore engage in small talk conversation as Moore was picking up his equipment for the day.

[237] At issue is whether Moore used the slur “nigger” during one of these small-talk conversations. While Francis was misperceiving events in July 2013, I find that Francis did not mishear the words “sorry you have to work with that nigger”. In assessing his ability to observe events, I distinguish between Francis’ ability to hear and see from his ability to interpret what he heard and saw. There is no evidence that Francis was prone to auditory hallucinations. As evidenced by the Bahia incident, which I discuss below, Francis was credible in terms of what he saw but not credible in terms of how he perceived the gesture.

[238] Furthermore, Francis’ evidence is the most consistent with the general sentiment at North Fraser at that time. That Moore barely knew Francis, or that Moore and Clayton Smith were not close friends, does not detract from my finding. The comment, “sorry you have to work with this nigger”, was an accurate reflection of the general sentiment at North Fraser about Francis. By July 2013, word would have gotten around of Francis being a “rat” towards his colleagues, which is something that could easily elicit strong feelings even from a co-worker who barely knew him.

[239] It also accurately reflected the sentiment of Clayton Smith, who was the person to whom the comment was made. I find that Clayton Smith was feeling sorry for himself for having to work with Francis because this sentiment is reflected in his words and actions at that time. Clayton Smith approached management with information on Francis in July 2013. He was interviewed by Lacroix. During that interview, Clayton Smith acknowledges being concerned that his own standing in the workplace might be damaged as a result of Francis. Although Clayton Smith denied being concerned that his job might be at risk, his testimony is not consistent with his interview with Lacroix. Clayton Smith is recorded as saying “I don’t want to work with him because of this”, “I’m terrified for my job” and “I want to distance myself as far away from this man as possible”.

[240] I find that, by July 2013, Clayton Smith no longer wanted to work with Francis. Although Clayton Smith testified that he never refused to work with Francis, this is not consistent with his interview with Elliott Smith in September 2013. In that interview, Clayton Smith reported that he spoke with Lacroix and said, “I refuse to work with him” and “just give me my shifts somewhere in the building”. During cross-examination, Clayton Smith attempted to rehabilitate his evidence in a way that, quite frankly, did not make sense. Clayton Smith testified only requesting not to work with Francis “after he had brought all of that information” forward to Elliott Smith in September 2013. Presumably, Clayton Smith was referring to his text messages. However, such a request was unnecessary because Francis was off work in September 2013. Clayton Smith would have been aware that Francis was off work since they were Control partners. It makes more sense that Clayton Smith requested not to work with Francis in July 2013 when Francis was still working at North Fraser. That he made his request to Lacroix, and not Elliott Smith, bolsters my finding since Lacroix conducted the July 2013 interview. It is only in hindsight that one sees that Clayton Smith’s request was unnecessary since Francis left the workplace five days later.

[241] Given this context, I have discounted the evidence of both Moore and Clayton Smith who deny using or hearing the slur “nigger” in their conversations. They both had a motive to lie and their evidence was, at times, contradictory. Moore, like Firlotte, was motivated not to get in trouble for using a racist slur in the workplace. Clayton Smith was motivated to defend North Fraser from what he misperceived were unfounded allegations by Francis. Clayton Smith’s evidence is also contradictory on the use of this slur. On the one hand, Clayton Smith never heard the slur “nigger” used at all at North Fraser. On the other hand, Clayton Smith heard Francis refer to himself in that way. His evidence is also undermined by disinterested Respondent witnesses who acknowledge hearing the slur used at North Fraser.

[242] I do not accept the Respondent’s argument that Clayton Smith had no motive to lie about a comment made by Moore because they were not friends and Moore left the workplace over the next few months. Clayton Smith conceded in his interviews with management that he was motivated to defend his colleagues over what he perceived were unfounded accusations

about them. Clayton Smith acknowledged that Francis was regarded as a trouble maker by his colleagues, and that he was being prompted by other staff at North Fraser to report Francis' transgressions to management. When Clayton Smith approached Lacroix, Moore was still employed there. Given the quality of his investigations, that Elliott Smith investigated this allegation and found no support for it does not rebut my factual finding.

[243] The Respondent also points to a number of possibilities that are speculative and unsupported in the evidence. First, I do not accept the Respondent's argument that Francis likely picked Moore as the target of this allegation because he left the workplace given my finding that Francis' beliefs were genuinely held. Second, I do not accept the Respondent's argument that Francis did not tell anyone about this incident prior to the October 2014 hearing.

[244] Gallant testified that Francis told her about being called and referred to as a "nigger" at North Fraser. She was unable to be more specific because her experience of supporting Francis covered many more years than this human rights complaint, and in such circumstances, she was unable to pin point dates and times. However, her hearsay evidence bolsters my finding that it is more probable than not that Francis heard words to the effect "sorry you have to work with that nigger".

b. Late Incident

[245] I find that, while this incident occurred, it was misperceived by Francis.

[246] An incident arose when Francis was running late for his morning shift. Francis usually arrived at around 6 am, but that morning, Francis called Clayton Smith to let him know that he would be running a few minutes late. Francis arrived approximately twenty minutes later. When he arrived, Francis saw the night-shift officer leaving the parking lot. Clayton Smith explained that he allowed that officer to leave before Francis arrived because he wanted to go home and pick up his kids.

[247] There is some discrepancy in Francis' evidence, which was not material. In 2014, Francis testified that he arrived at about 6:25 am. In 2018, Francis testified arriving two minutes earlier at 6:23 am. In any event, that he arrived before 6:30 am is consistent with his other evidence.

[248] When Francis arrived at Control, he observed Clayton Smith on the phone speaking to Grill. Francis was angry at Clayton Smith for "whining" about him not being there. Francis arrived before the substitute officer, which is consistent with that officer asking, "why am I here". Francis' evidence is also consistent with Clayton Smith's evidence that he spoke with Grill twice. The first time he called Grill to ask for a substitute, and she then called him back to ask whether Francis had arrived. That second call coincided with Francis' arrival into the Control room. Clayton Smith's evidence about the two calls is not consistent with his other evidence that Francis had not arrived at work by 6:30 am and that he called Grill at that time to ask her to send someone down.

[249] Clayton Smith acknowledged that Francis was upset with him and "would not let it go all day". Later that day, Francis checked the revised schedule and found it "odd" that he had been marked "late". Francis genuinely believed that people were late all the time and they were not written up in the same way he was. That belief, and his perception of being targeted, is not corroborated. Francis referred to a colleague who was one hour and forty-five minutes late that day. Although that officer was not marked "late" on the schedule Francis saw, his absence was documented elsewhere in another report that was entered into evidence. The documents submitted through Elliott Smith show that several employees were marked "late" on work schedules around the same time frame as Francis was.

c. Bahia Incident

[250] I find that, while this incident occurred, it was misperceived by Francis. Bahia made a tapping gesture when walking by Control that Francis perceived in a negative light. However, Francis' perception was not that of a reasonably objective observer. I prefer the evidence of Clayton Smith over that of Francis. Bahia was a disinterested witness. Clayton Smith's evidence was consistent, corroborated by Bahia, and the most consistent with the "preponderance of

probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions”: *Faryna*.

[251] Bahia had no recollection of this incident but acknowledges that he may have tapped on the Control window, and squinted at that window, to open the door. Bahia recalled that it was common for him to tap on the Control window to open the door. Bahia testified that it was difficult to see who is working through the window without putting one’s face to the glass and squinting into the Control room. Bahia recalled that it was common for him to squint into the Control room because the window was tinted.

[252] Clayton Smith recalls that this incident occurred shortly before Francis went off work in July 2013. Clayton Smith testified that Francis overreacted to Bahia’s gesture. Clayton Smith was present when Bahia tapped on the glass to be let through the doors. He observed Francis became angry and say, “did you see that?” Clayton Smith responded with words to the effect, “relax, he’s just tapping on the window, everybody does that”. In his interview a few months later, Clayton Smith reported the incident to Elliott Smith. Clayton Smith said that somebody knocked on the window, and Bahia went through the door. Francis then asked Clayton Smith whether he saw that, and Francis said to him “he was doing that just to piss me off and he was telling me I was too fucking slow”.

[253] I find that Francis’ emotional state at the time led him to misperceive Bahia’s gesture. This incident occurred shortly before Francis left the workplace, and Francis acknowledges experiencing a range of negative emotions including feelings of anger, flight, or fight. He also had a tingling sensation in his body that he did not understand. While Francis’ powers of observation were accurate, and consistent with those of Clayton Smith, his perception of Bahia’s tapping gesture was not reasonable in the circumstances.

13. Francis Leaves Workplace

[254] Francis’ last day of work was July 28, 2013. It coincided with the unexpected death of an inmate in segregation. Peakman and Francis had a consistent recollection of what transpired. When Francis arrived at work, the inmate was on fifteen-minute checks. Although Francis

noticed that the inmate did not appear to look right, he did not intervene. A short time later, the inmate went into distress and died. After finding out that an inmate had died, Francis could not stop crying. He felt embarrassed that he was crying in front of colleagues and the emergency response team. Francis acknowledges that he was emotionally unstable. He left work that day and has not returned.

a. Clayton Smith offers information against Francis

[255] A few days before Francis left work, Clayton Smith came forward and requested an interview with management. Clayton Smith was interviewed by Lacroix on July 23, 2013 and a few months later by Elliott Smith on September 12, 2013. It was during that second interview that Clayton Smith provided a copy of his text messages with Francis.

[256] I find that Clayton Smith came forward at the urging of at least two supervisors, Uppal and Grill. Although Clayton Smith denied doing this, I base my finding of fact on what Clayton Smith actually told investigators. At the end of his interview with Lacroix, Clayton Smith was asked if there was anything else that he would like to say. His response:

Um no, I just, the only reason I'm doing this, like I say, is because I have had some advice from some people I really respect in the building and there, he has gone after them personally. Like Mr. Uppal, Ms. Grill, and even other people that aren't involved in this have come and spoken to me about it because unfortunately I kind of, I know more about it than most people because I'm in that situation and I hear what he says and what they say and it's just I feel that what he is doing is really wrong and he is putting me in a really bad spot. He's not doing his job and not performing his duties. And he's going to get me busted and he's going to get me in trouble. It's the only reason I'm doing it.

[257] I discount Clayton Smith's testimony that he approached management voluntarily because it is not consistent with what he told management five years earlier. When confronted with this discrepancy, Clayton Smith made an ineffective attempt to rehabilitate his evidence. Notwithstanding what he is recorded as saying five years earlier, Clayton Smith denies that he received "some advice". He testified that he came forward because anywhere from "a number"

to “a lot” of people were asking him questions about what he knew about Francis. He identified some of these people as Uppal and Grill, but he was unable to recall the names of anyone else because it was a long time ago.

[258] Clayton Smith was motivated to cast himself in a positive light at the expense of Francis, who was by July 2013, regarded as an unpopular colleague at North Fraser. Clayton Smith was motivated to clear the names of this colleagues at the expense of Francis. This was evident in his interviews with management. In his September 2013 interview with Elliott Smith, Clayton Smith said:

like I said I have the backing of the staff. Like a lot of senior staff and the junior staff don't even know what is going on but [laugh] the people he is going after are, I mean it's the majority of the staff in the building, it's not isolated one or two people, anyway.

[259] What Clayton Smith reported to management was an exaggeration of what actually happened. Take, for example, the incident when Francis was late for work. In his interview with Elliott Smith, Clayton Smith acknowledged that “these things happen” and being late for work “happened to me too”. Notwithstanding that Francis was approximately 20 minutes late for work, Clayton Smith reported to Elliott Smith that Francis was upwards of an hour late and the night shift officer had “already waited an extra half hour” for Francis to show up and “was into his time now”. This is not consistent with my finding that the night shift officer was observed in the parking lot leaving as Francis was arriving. Clayton Smith also reported that the relief officer helped him out for approximately 30 minutes until Francis was available, which is not consistent with my finding that the relief officer arrived to the Control room at around the same time as Francis and asked why he had been called. Clayton Smith also reported that Francis was phoning multiple times and getting mad at him when Francis only phoned him once at around 6 am to let him know that he was running late.

[260] Clayton Smith also exaggerated and speculated on Francis' poor performance at work. For example, in his September 2013 interview with Elliott Smith, Clayton Smith said about Francis, “I think his work ethic's gone down the tubes because he doesn't believe that he can be

touched". Clayton Smith acknowledges that Francis never said that to him but maintains that it was "pretty clear" to him that Francis was doing that.

[261] Although Francis was stereotyped as "slow" in Control, Clayton Smith reported to management that Francis was "unsafe" in Control and "out right denied doing the basic necessities of the job". In his interview with Lacroix, Clayton Smith said:

I believe [Francis] personally is way in over his head in control. I don't think he is safe in there. I've worked in control a long time, and I'm probably one of the more experienced control officers you have in the building. When I can leave the control room and people know when Levan is on the board, there is an issue in there.

[262] It is not clear how Clayton Smith could arrive at such a conclusion when they did not spend much time working together in 2013. Francis had been off work for significant periods of time that year, and most recently, for approximately six weeks. Elliott Smith gave evidence that he was unable to interview Francis due to shift patterns and the fact that Francis was on leave from March 20 to 23, 2013; April 12 to 14, 2013; April 30 to June 17, 2013; June 24 to July 4, 2013; and July 28, 2013 to present.

[263] Ultimately, Clayton Smith did not believe that there was any merit to Francis' allegations. Clayton Smith reported that "the only reason I am doing it is he's attacking people...for no reason". Clayton Smith attests that Francis was making serious allegations against his co-workers, which he did not believe were true, and he did not witness anything to support Francis' allegations. In his interview with Elliott Smith, Clayton Smith reported that about 90% of what Francis said was "just fabrication" and some of it was "out and out lies".

[264] Clayton Smith also speculated on Francis' motives. Clayton Smith reported that Francis had a "personal vendetta against management" and was trying to gather as much information as he could, and that if he left the workplace, he would be unable to gather that information. However, Clayton Smith's evidence is not consistent with the number of lengthy absences Francis had from work in 2013.

[265] Clayton Smith also speculated that Francis was seeking financial gain:

He's never said the only reason he's going on for this is for money but he has made financial references. He's made references to people getting fired, and they need to be held accountable for their actions ...

[...]

I think at the end of the day, he wants financial gain out of this. I think his main objective behind all this is financial gain. He is so focused on this that, like I said before, it has created an uncomfortable work environment for me. Every day, he walks in and that's all he talks about all day and every day about how people fuck him around and how people screw him around, who's going to screw him around next, how he's going to get back at them, and what he is going to do with his lawyer.

[266] However, what Clayton Smith reported is not consistent with contemporaneous text messages where Francis wrote to Clayton Smith that someone at North Fraser has a "hate" on him and that this is going to cost North Fraser some cash. It is also not consistent with Clayton Smith's own evidence where he agreed that this is something very personal for Francis and that he was not simply prepared to move on and start fresh. Francis testified that Clayton Smith was always asking him about the status of his case, and made comments like, "they're just going to cut you a cheque".

[267] I pause, here, to acknowledge that Francis questioned the authenticity of information that cast him in a negative light. Notwithstanding what he wrote, Francis denied referring to "cash" and questioned the authenticity of the texts because they were not downloaded or printed in a conventional way. Francis "maybe" wrote these words but would not confirm. There was no credible evidence to challenge the authenticity of these text messages. I admitted them into evidence for the truth of their contents. Francis' testimony on this point undermined the credibility of his evidence.

[268] Clayton Smith disagreed that management was not pleased with Francis and was trying to build a case against him. However, his belief is not consistent with the transcript of his first

interview with Lacroix where Clayton Smith was invited to comment on any off-colour jokes from Francis, whether Francis said anything about knowing that he is not being picked on because of his race, whether Francis feels that he does not have to perform his duties because of his complaints. Lacroix asked whether Francis sleeps on the job in Control. Clayton Smith responded that “we all” take a fifteen minute nap on the graveyard shift but what Francis does is “excessive”. Despite these questions, Clayton Smith disagrees that Lacroix was trying to build a case against Francis. Clayton Smith says that Lacroix was just seeking elaboration on issues that Clayton Smith brought up.

b. Video

[269] I find that this incident happened but is not material to this case. After Francis left the workplace, Low discovered that someone had saved a video of Francis walking through the back door of North Fraser wearing civilian clothes. Francis, understandably, was upset that anyone had saved a video of him walking into work. This incident clearly contributed to Francis’ belief of being targeted and that someone was trying to gather evidence of misconduct against him. Although videos were typically saved as part of inmate discipline or workplace accidents, there is no evidence about why this video was saved. Elliott Smith investigated the incident but was unable to locate the video. Francis acknowledges that nothing came of this incident.

14. Continuation of Investigations

[270] In August 2013, Elliott Smith continued investigating some of the alleged incidents after Francis left the workplace. Elliott Smith testified that he took the lead on Francis’ June 2012 incident reports and on some of the matters raised in the October 2012 human rights complaint.

[271] On August 26, 2013, Elliott Smith interviewed Manzer about the “Step up your Game” incident that occurred the previous year on June 8, 2012.

[272] On September 12, 2013, Elliott Smith conducted a number of interviews. That morning, Elliott Smith interviewed Clayton Smith for approximately two hours. Transcripts of those interviews were entered into evidence. That afternoon, Elliott Smith continued his

investigations into the Firlotte pub incident. He interviewed Price, Smith, and Firlotte. Transcripts of those interviews were entered into evidence.

[273] Elliott Smith did not provide reasonable explanations for the delay in the Firlotte Pub investigation. He attributed the delay to a number of factors. First, he attributed it to scheduling. Elliott Smith explains that he was unable to conduct the investigation earlier because "officers required for the investigation were on leave". Second, he was dealing with a challenging termination of another employee in the fall of 2012 "which likely delayed some of the interviews". Elliott Smith explained that there was another pressing and complex human resources matter occurring during the fall of 2012 which took much of his time and attention. Third, he attributed the delay to the human rights complaint.

[274] While I accept that scheduling interviews and terminating employees may have resulted in some delay, I am not persuaded that it resulted in a delay of over one year. I appreciate that, once notified of the human rights complaint, there may have been confusion about whether and how the respondent was to proceed with investigating Francis' allegations. However, Elliott Smith's evidence is not consistent in this regard.

[275] The collective agreement has two articles that deal with processes involving discrimination complaints (Article 1.9) and Human Rights Code (Article 1.7). On the one hand, Elliott Smith testified that once Francis filed his human rights complaint in October 2012, this ended the Article 1.9 process that Francis had commenced in June 2012. The problem with his evidence is that the Respondent was not notified of the human rights complaint until the end of January 2013. At some point, Elliott Smith recognized this discrepancy. On the other hand, Elliott Smith also testified that when he was notified of the human rights complaint in early 2013, he was able to engage in interviews again in early 2013, and it was at that point that the article 1.9 process effectively ended and the article 1.7 process began.

[276] I accept that some of the delay was due to circumstances outside of his control. For example, Francis filed an amended human rights complaint in March 2013, and the parties agreed to an early settlement meeting at the Human Rights Tribunal in late July 2013.

Notwithstanding, Elliott Smith investigated the Manzer incident in February 2013 and expressly advised Francis at that time that he was to raise any future incidents directly with him so that they could be investigated in a timely manner. If Elliott Smith was, in fact, unable to conduct any investigations after the human rights complaint was filed then it was disingenuous of him to make an offer to Francis that he was not able to follow through on.

[277] While I accept that the investigation was poor, I do not accept Francis' argument that Elliott Smith was in a conflict of interest in investigating the Firlotte pub incident. Elliott Smith regularly investigated and disciplined supervisors such as Firlotte. There is no credible evidence to suggest that Elliott Smith was implicated in an incident that he was investigating.

VI ANALYSIS AND DECISION

A. Discrimination

[278] Section 13 of the *Code* prohibits discrimination in the area of employment. At issue is whether Francis experienced discrimination in his employment based on his race and colour. For this decision, I will refer to Francis' "race and colour" as "race". To prove his case, Francis is required to establish three facts: (1) he is protected under race; (2) he experienced an adverse impact in his employment; and (3) his race was a factor in that adverse impact: *Moore v. BC (Education)*, 2012 SCC 61, para. 33. The onus is on Francis to establish his case on a balance of probabilities: *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Limited*, [1985] 2 S.C.R. 536, pg. 558. If he establishes his case, the burden shifts to the Respondent to establish a *bona fide* and reasonable justification for its conduct: *Moore* at para. 33.

[279] At the outset, I acknowledge that such *bona fides* are rarely established in cases involving racial discrimination and the Respondent did not seriously advance them in this case.

[280] The parties have raised several arguments which merit comment at this juncture. First, it is not necessary that Francis prove an intention to contravene this *Code*: s. 2. While racial stereotyping will usually be the result of subtle unconscious beliefs, biases, and prejudices, which one does not expect to be displayed openly, it is not necessary for Francis to prove that

any stereotyping was done intentionally: *Troy v. Kemmir Enterprises Inc.*, 2003 BCSC 1947, para. 25; *Radek v. Henderson Development and other (No. 3)*, 2005 BCHRT 302, para. 482.

[281] To the extent that proof of intention is being argued, I do not accept Francis' argument that the outcome of racial discrimination cases depends on the respondent's state of mind. I understand the Ontario Court of Appeal's decision in *Peel Law Assn. v. Pieters*, 2013 ONCA 396 not as requiring proof of intention, but rather, as affirming that direct evidence of racial discrimination is rarely available and must often be inferred by circumstantial evidence. As is clear from the *Moore* test, the discrimination inquiry is concerned with the impact on Francis, not the intention of the person who is said to be engaging in discriminatory conduct.

[282] Second, it is not necessary that Francis establish that his race was the only or main factor in the adverse impact. Rather, he needs only to show that his race was a factor in the adverse impact he experienced, and this may be drawn by inference from all of the circumstances: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)* 2015 SCC 39, para 52.

[283] However, that is not the end of the analysis. I accept the Respondent's argument that there must be objective evidence from which any such reasonable inferences can be drawn. It is not enough that Francis subjectively believed or perceived that he had been treated adversely because of his race. Rather, his belief must be that of a reasonably objective observer. In short, a finding that engages s. 13 of the *Code* must be based on objective evidence and established on a balance of probabilities.

1. Contextual Analysis

[284] Establishing what constitutes a reasonably objective observer in the context of race discrimination cases is challenging. There are "no bright lines" in cases where discrimination must be proven by circumstantial evidence, and these cases are often "difficult" and "nuanced": *Toronto (City) Police Service v. Phipps*, 2010 ONSC 3884, affirmed 2012 ONCA 155; cited with approval in *Brar*, para. 716. A contextual examination of all relevant circumstances is often required to identify the "subtle scent of discrimination": *Kennedy v. BC (Ministry of*

Energy and Mines) (No. 4), 2000 BCHRT 60, para. 168. For example, one such contextual circumstance is any historical disadvantage experienced by the group: *Mezghrani v. Canada Youth Orange Network Inc.* 2006 BCHRT 60, para. 28.

[285] As it relates to this case, several contextual factors inform my analysis of what reasonable inferences can be drawn from the proven facts. First, I am guided by the principles set out by the Supreme Court of Canada in *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62 [*Schrenk*]:

The protections afforded by human rights legislation are fundamental to our society. For this reason, human rights laws are given broad and liberal interpretations so as better to achieve their goals. As this Court has affirmed, “[t]he Code is quasi-constitutional legislation that attracts a generous interpretation to permit the achievement of its broad public purposes”. In light of this, courts must favour interpretations that align with the purposes of human rights laws like the Code rather than adopt narrow or technical constructions that would frustrate those purposes. (para. 31) [citations omitted]

[286] One of the purposes of s. 13 of the *Code* is to protect employees from the indignity of discriminatory conduct in the workplace: *Schrenk*, paras. 32, 53. As stated in *Schrenk*, a “contextual interpretation furthers the purposes of the *Code* by recognizing how employee vulnerability stems not only from economic subordination to their employers but also from being a captive audience to other perpetrators of discrimination, such as a harassing co-worker”: para. 67.

[287] Second, I am guided by the approach taken by this Tribunal in *Brar and others, v. BC Veterinary Medical Association and Osborne*, 2015 BCHRT 151 [*Brar*], paras. 709 to 724. In *Brar*, the Tribunal endorsed the *Policy and Guidelines on Racism and Racial Discrimination* [*Guidelines*], which were developed by the Ontario Human Rights Commission and applied by the Ontario Human Rights Tribunal, as a useful interpretive guide in assessing whether there is objective evidence to support a reasonable inference that the actions of the respondent had an adverse impact on a complainant based on race. To begin with:

Definitions of racism all agree that it is an ideology that either explicitly or implicitly asserts that one racialized group is inherently superior to others. Racist ideology can be openly manifested in racial slurs, jokes or hate crimes. However, it can be more deeply rooted in attitudes, values and stereotypical beliefs. In some cases, these beliefs are unconsciously maintained by individuals and have become deeply embedded in systems and institutions that have evolved over time. (*Guidelines*, p. 12-14, *Brar* para. 713)

[288] The following excerpts from the *Guidelines*, quoted with approval in *Brar*, are relevant to a contextual analysis:

- Racial discrimination can occur through stereotyping and overt prejudice or in more subconscious, subtle and subversive ways. (*Guidelines* p. 5; *Brar* para. 712)
- One of the most obvious ways in which people experience racial discrimination is through stereotyping. Stereotyping can be described as a process by which people use social categories such as race, colour, ethnic origin, place of origin, religion, etc. in acquiring, processing and recalling information about others. Stereotyping typically involves attributing the same characteristics to all members of a group, regardless of their individual differences. It is often based on misconceptions, incomplete information and/or false generalizations. Practical experience and psychology both confirm that anyone can stereotype, even those who are well meaning and not overtly biased. While it may be somewhat natural for humans to engage in racial stereotyping it is nevertheless unacceptable. (*Guidelines*, pg. 18; *Brar*, para. 720)
- At the individual level, racism may be expressed in an overt manner but also through everyday behaviour that involves many small events in the interaction between people. This is often described as “everyday racism” and is often very subtle in nature. Despite being plain to the person experiencing it, everyday racism by itself may be so subtle as to be difficult to address through human rights complaints. However, at other times, where it falls within a social area covered by the *Code*, there may be circumstances where everyday racism, as part of a broader context, may be sufficient to be considered racial discrimination... Either way, the cumulative effect of these everyday experiences is profound. (*Guidelines*, p. 12-14; *Brar*, para. 713)

- Individual acts themselves may be ambiguous or explained away, but when viewed as part of the larger picture and with an appropriate understanding of how racial discrimination takes place, may lead to an inference that racial discrimination was a factor in the treatment an individual received. [...] It is not necessary for language or comments related to race to be present in the interactions between the parties to demonstrate that racial discrimination has occurred. However, where such comments are made, they can be further evidence that race has been a factor in an individual's treatment. Similarly, negative comments made about an individual advocating for human rights or equitable practices will tend to support an inference that race is a factor in an individual's or organization's interaction with that individual. (*Guidelines*, p. 21, 23; *Brar*, para. 714)
- It is important to emphasize that racism in its more entrenched forms is often unconsciously applied and its operation is often unrecognized by even those practising it. In addition, as noted earlier in the Policy, while Canada has made much progress, racism remains a reality. It should not be treated as aberrant behaviour or a set of deviant attitudes on the part of a deviant individual - a so-called "rotten apple" within the system. Failing to recognize the complex, subtle and systemic nature of racism impedes effective action against it. (*Guidelines*, p. 12-14; *Brar* para. 713)

[289] The Ontario Human Rights Commission identified a number of myths and misconceptions that arise when race discrimination is alleged, which create a climate that prevents any kind of effective response to racial inequality. Of those, the following myths and misconceptions are relevant to this case:

- racialized people play the "race card" to manipulate people or systems to get what they want;
- racialized people are too sensitive, tend to overreact or have a "chip on their shoulder";
- racialized people themselves, and not racism or racial discrimination, are at fault for their disadvantage or state of "otherness," commonly known as "blaming it on the victim";

- if a racialized person has been treated acceptably in the past, then discriminatory treatment cannot take place in the future. (*Guidelines*, p. 17; *Brar*, para. 724)

[290] Given this context, I now proceed with my analysis and findings.

2. Protected Characteristics

[291] I find, as an undisputed fact, that Francis was born in Barbados and identifies as “Black”. Since his race is a protected characteristic under the *Code*, the first factor in *Moore* is satisfied. I now turn to the second and third factors in *Moore*.

3. Was race a factor in any employment-related adverse impacts?

[292] I find, as an undisputed fact, that Francis’ departure from the workplace in July 2013 is an adverse impact that satisfies the second factor in *Moore*. The parties dispute, however, whether Francis experienced any other employment-related adverse impacts in the eighteen months prior to his departure from the workplace. To the extent that there were any, the parties also dispute whether there is a nexus between Francis’ race and any adverse impacts related to his employment. The following objective evidence, when considered contextually, supports a reasonable inference that Francis’ race was a factor in the adverse impacts he experienced at North Fraser.

a. Racialized Stereotyping

[293] The Respondent concedes that Francis was perceived by some members of management and other employees as being slower to open doors when in Control. I find that those perceptions of Francis were based on misconceptions and incomplete information.

[294] I reject the Respondent’s argument that these were *bona fide* opinions based on Francis’ work performance. To the contrary, that Francis was perceived as slow did not reflect his actual performance. Francis had only recently completed his training. As his trainer, Manzer was in the best position to assess Francis’ actual performance. Manzer graduated Francis when he performed to standard and quizzed him over the next few months to ensure that he

retained his training under the daily pressures of his job. Manzer observed Francis perform to standard during this time period. His evidence is corroborated by Amarelo who did not observe Francis to be any slower than any other Control officers.

[295] I pause, here, to reject an argument advanced by Francis that Manzer's quizzing of him demonstrated differential treatment. Manzer's evidence was uncontested that he quizzed all recent graduates, and not just Francis, in accordance with what he understood was his obligation to help them succeed in that role. For this reason, I find that Manzer was treating Francis the same as other trainees. No differential treatment can be established on this basis in these circumstances.

[296] Rather than rely on his actual observation, Manzer acknowledges relying primarily on information that he received from others when he confronted Francis in the lunch room on June 8, 2012. However, those complaints were based on incidents in which Francis' actual performance could not be observed. For example, those waiting on doors singled Francis out for being slow even though it was not possible from that area to see which of the two officers was working the board in the Control room. In some cases, it was not even clear whether Francis was working that day.

[297] I have discounted the incident that Manzer purportedly witnessed for three reasons. First, the event that Manzer purportedly witnessed happened after his meeting. Second, even if Manzer honestly mistook the date, like the incident with Amarelo, it was not possible to observe which of the two Control officers was controlling the board from that location. Third, Manzer does not reference this incident in his affidavit. Rather, it arose during his cross-examination. The changes in his evidence were ineffective attempts to rehabilitate his evidence when confronted with contrary evidence.

[298] I discounted Clayton Smith's evidence because he gave it after Francis had several long absences from work, so he was not in a position to observe his performance in Control. Clayton Smith was also not his supervisor, and his comments coincided with a request from at least two supervisors to discredit Francis to management. Clayton Smith had a motive to exaggerate and

this is reflected in his 2013 interviews to management. In any event, Clayton Smith's criticisms about Francis' work performance stemmed primarily from what he purportedly witnessed in the lead up to Francis' departure from the workplace in 2013. At issue, here, are the stereotypes that emerged about Francis over one year earlier in 2012.

[299] That the June 2012 incident was not accompanied by any directive, corrective action, or discipline is not determinative. The incident between Francis and Manzer escalated after Manzer refused to provide the names of those who were accusing Francis of being slow. It was reasonable for Francis, who was the subject of complaints about his performance, to seek further information. Rather than provide that information, Manzer reported Francis to management for reacting in a way that may have been overheard by others. In my view, this amounts to a lack of due process when Manzer confronted Francis about possible performance issues but did not give him the necessary information to respond to those issues in any meaningful way. A lack of due process may be evidence of adverse treatment: *Brar*, para. 732.

[300] This kind of targeting and profiling are strong indicators of racial discrimination: *Torres and others v. Langtry Industries* (No. 5) 2009 BCHRT 3 [*Torres*]. As in *Torres*, Francis was singled out, more than other Control officers, for criticism that was not formally documented. The criticism was based largely on gossip, and when confronted, Francis' reaction was then reported to management.

[301] I accept that Manzer may have honestly believed that he was trying to help Francis succeed when he met him in the lunch room. However, it does not follow that his intervention cannot reasonably be tied to Francis' race in circumstances where such an intervention was based on a stereotypical view that did not reflect actual performance. That Manzer, who has the appearance of a white-skinned person, did not perceive his conduct was discriminatory is not determinative.

[302] In *Balikama obo others v. Khaira Enterprises and others*, 2014 BCHRT 107 [*Balikama*], the Tribunal accepted evidence of an expert on anti-Black racism who testified that some discriminatory beliefs held in respect to persons of African descent are stereotypes that Blacks

are inferior, stupid, lazy, and incompetent. The expert noted that “the everydayness of racism shows up in employment in that Blacks lack credibility in the workplace, are given the worst jobs and that their concerns are often not addressed”: paras. 585 to 6.

It is clear from the evidence of Dr. Bernard that the lot of many Black people in Canada is exceedingly difficult with significant difficulty encountered being accepted as equals in Canadian society. In particular, she pointed to discriminatory beliefs that whites hold with respect to persons of African descent, including stereotypes of Blacks being inferior, stupid, lazy, incompetent, and over-sexed.

Dr. Bernard pointed to the under-employment of Blacks, even highly educated Blacks, in Canada due to lack of recognition of qualifications. She pointed out that, for Blacks, constantly witnessing others experiencing racism was just as damaging to them as if they had experienced it themselves. She referred to this as the “everydayness of racism”. She pointed to the fact that the everydayness of racism shows up in employment in that Blacks lack credibility in the workplace, are given the worst jobs and that their concerns are often not addressed.

[303] I do not accept the Respondent’s argument that, other than Manzer speaking to Francis, there is no evidence of any one raising concerns about his speed in operating the doors, much less any corrective measures or discipline in relation to this issue. There is credible evidence that the stereotype of Francis being slow persisted until he left the workplace the following year. That stereotype was consistent with comments from Uppal that meant Francis was a “Lazy Black Man”. Francis expressed concerns to Clayton Smith that others were making similar comments as Uppal. Amarelo testified that Francis had a reputation for being “lazy”. By July 2013, both Clayton Smith and Chohan had raised performance issues with management about Francis being slow. Francis was also concerned about the perception that he was slow in text messages with Clayton Smith.

b. Francis was singled out for criticism and heightened scrutiny

[304] I find, as an undisputed fact, that Francis made mistakes on the job. However, his mistakes were treated differently than those of his colleagues. I find that Francis was singled

out for criticism, more than other employees, for behaviour that was condoned by supervisors. I rely on two incidents in support of this finding. First, Francis was required to attend muster contrary to common practice. Second, Francis was ordered to breach protocol by a supervisor, who himself did not adhere to protocol. Uppal then used Francis' breach to intimidate him to perform other duties. These proven facts support a reasonable inference that Francis was singled out for criticism and heightened scrutiny. Heightened scrutiny that is disproportionate to the conduct at issue might also illustrate differential adverse treatment: *Kalyn v. Vancouver Island Health Authority* (No. 3) 2008 BCHRT 377, paras. 428 to 470; *Brar*, para. 732.

c. Muster Requirement

[305] Francis was required to attend muster when this was contrary to common practice. When Francis sought clarification from management as to why he was being required to attend muster when his colleagues were not, Francis was regarded as a trouble maker. I accept Francis' argument that the debate between him and his supervisors over muster was conducted in an increasingly public fashion. The assistant deputy warden eventually emailed a large number of supervisors advising that the policy was not being enforced and they need to ensure that staff report to muster. Some of those supervisors, including Uppal, reprimanded Francis for ruining the flexibility that many of them had enjoyed.

d. Breaching Protocols

[306] Francis was ordered to breach protocol and then reprimanded for doing so by a supervisor who did not follow protocols. Uppal did not strictly follow the muster policy. Rather, he endorsed common practice and "flexibility" by letting the "all nightery" go home early. After the assistant deputy warden emailed supervisors to enforce the policy, Uppal then reprimanded Francis for ruining it for everyone. Uppal also ordered Francis to move an inmate in breach of protocol, and after Francis complied with that order, told him that he breached protocol. That Uppal did not report the breach, but rather warned him to do his perimeter checks was reasonably perceived by Francis as a threat in the circumstances.

[307] Francis worked in an environment where special handling protocols were breached by other officers and supervisors without incident. His evidence is corroborated by disinterested witnesses. Francis acknowledged that it was difficult for him to answer whether special handling protocols were mandatory or optional because there was a lot of “cutting corners in that job” and that “a lot of time everyone don’t stay to the protocol”. Francis testified that there was consensus around North Fraser that if they like you, you can do whatever you want, and if they don’t like you, “don’t even fart”.

[308] Given this context, it was reasonable for Francis to question why he was being singled out for behaviour that was being condoned by supervisors. Martin testified that her response to a protocol breach in circumstances where supervisors are condoning the behaviour would be different than in circumstances where supervisors are not condoning the behaviour. Martin testified that she cannot hold officers accountable for behaviour that is condoned by their supervisors. She testified that, in those circumstances, the problem is with management and not operations.

e. Everyday Racialized Comments and Slurs

[309] I find that Francis experienced “everyday behaviour” in the form of racialized comments and slurs. I pause, here, to acknowledge the workplace context at North Fraser.

[310] I accept that North Fraser is a racially and culturally diverse workplace, in which employees must work together closely to deal with complex and potentially dangerous situations involving inmates. Both Firlotte and Torok gave credible evidence about the challenges of working in this environment and the importance of humour in releasing tension. For example, Firlotte explained that sometimes there is dark humour, gallows humour, that is understood among staff as a way of releasing tension. Torok testified that working with colleagues who have a sense of humour, such as Francis, was important to him because they work in a very dismal and depressing environment. A number of witnesses, including Francis, shared this view.

[311] However, the work environment at North Fraser was not characterized by teamwork and mutual respect, contrary to the evidence of a number of witnesses. There were legitimate concerns by management that North Fraser was not a respectful workplace, and management was taking active steps to promote a healthy work environment. Lacroix acknowledged to Francis that he has been involved in a lot of investigations and it is “definitely apparent” and “almost alarming” the lack of respect that employees sometimes have for each other. Lacroix’s evidence is corroborated in material respects by the warden who notified staff that respectful workplace scores were lower than average for that branch of government. I discount Elliott Smith’s evidence that he did not share Lacroix’s view about the workplace at North Fraser because his testimony is not consistent with his actions at the time. At the end of his interviews, Elliott Smith counselled officers about appropriate workplace conduct as well as the employee’s obligations to refrain, confront, or report any and all inappropriate comments and conduct in the workplace.

[312] Francis understood the importance of humour in this workplace. Francis explained that he can handle jokes but took issue with racism in the workplace. Francis distinguished joking banter from unwelcome comments. In his interview with Elliott Smith in February 2013, Francis said:

I can’t stand racism I can handle a joke if it’s a joke ... small talk. But when its delivers in a malicious intent towards an individual that has just, unaware of it, but within sight, this was myself ... it, it’s totally appalling. I’m disgusted by it. ... And everyone else that’s joking around, making small jokes or whatever I mean, yeah, just shows that there’s a pattern that if people are knowing this persons doing it, that persons doing it, this guys doing it, and the last straw for me was, really was the control when I head it was about me ... when I am just trying to do my job. Like, if there’s going to be a problem because I’m Black. Like no one wants to listen to you because you’re Black. What? You gotta understand, that’s pretty disturbing.

[313] Discriminatory conduct in the workplace can occur in both obvious and less obvious ways. For example, decisions relating to hiring, promotion, discipline, and termination – should

they be based on a protected characteristic – are all obvious ways for discrimination to occur against employees. Less obvious ways include offensive comments, slurs, jokes, insults, or graffiti. It is not necessary for comments related to race to be present in the interactions between the parties to demonstrate that racial discrimination has occurred. However, where such comments are made, they can be further evidence that race has been a factor in an individual's treatment: *Hadzic v. Pizza Hut Canada*, 1999 BCHRT 44.

[314] I accept the Respondent's argument that isolated inappropriate or negative comments being directed at Francis, even where these are connected to his race, does not necessarily constitute discrimination for the purposes of the *Code*. Not every negative incident that is connected to race will be discriminatory harassment contrary to the *Code*: *Hadzic v. Pizza Hut Canada (c.o.b. Pizza Hut)*, [1999] BCHRTD No. 44 at para. 33. There has to be something more than simply showing that conduct was unwelcome and linked to race. In cases such as this one, the Tribunal will consider whether the single incident rises to a level of harassment contrary to the *Code*. Whether or not such comments will amount to discrimination depends on a number of factors, including the egregiousness or virulence of the comment, the nature of the relationship between the involved parties, the context in which the comment was made, whether an apology was offered, and whether or not the recipient of the comment was a member of a group historically discriminated against: *Pardo v. School District No. 43*, 2003 BCHRT 71 [*Pardo*], para. 12.

f. Chohan "because you're Black" incident

[315] Applying the *Pardo* factors, I find that the "because you're Black" incident rises to the level of discriminatory harassment under the *Code*. Francis' skin colour was singled out by Chohan in a public fashion in an incident involving five officers and one inmate. This is the stated reason why Chohan selected Francis from a group of co-workers to do a negatively perceived task. Chohan should not have made this remark to Francis about his race, and Chohan and everyone else involved in the incident now agrees. Notwithstanding that Chohan later apologized, Chohan chose to single out Francis' skin colour because Francis had over a period of time become "sensitive" to that issue. Chohan targeted his remark on Francis'

“sensitivity”. Francis was described as “sensitive” because he spoke to management and took issue with the use of the word “nigger” and associated racism in his workplace.

[316] Francis was publicly denigrated in front of other officers and an inmate. Of those officers, Francis was the only one who identifies as “Black”. As a supervisor, Chohan was in a position of power over Francis. Although Atkinson thought the comment was meant as a joke, he acknowledged that the comment fell flat, and no one made playful digs about Francis’ skin colour. Atkinson did not consider the incident involving Chohan as something out of the ordinary and was surprised that he was being spoken to about it. Atkinson thought Francis was making a big deal out of what he considered to be a joke. That Atkinson, who has the appearance of a white-skinned person, did not consider the comment out of the ordinary is not determinative: *Balikama*.

g. Clayton Smith “Toby” Comment

[317] Francis was also called a “Toby” by his Control partner Clayton Smith. Applying the *Pardo* factors, I find that this comment reaches the discriminatory threshold under the *Code*. Francis understood the comment to mean a slave in service to someone else. This was not casual banter or part of a negotiated relationship. Francis found the comment unwelcome. That Francis was friends with Clayton Smith and did not raise this allegation earlier are not determinative. Clayton Smith asked Francis to be left out of his complaint, and Francis reassured Clayton Smith that he would do so. Adding this allegation to his complaint coincided with the addition of a retaliation complaint and representation by new counsel. Even if Francis was motivated partly by revenge to add this allegation to his human rights complaint, this does not detract from my finding that on the objective evidence the comment was made and was unwelcome at the time.

h. Racial Slurs and Comments about other Black-skinned officers

[318] Other officers at North Fraser, who appeared “Black”, were called niggers and publicly denigrated for their skin colour by supervisors Firlotte and Polonio. It is not material that Francis had no personal knowledge of these incidents, was not present for them, and was not

the person about whom the comment was made. At the time, these comments were perceived by some officers as unwelcome and gossiped about in the workplace. That some supervisors and management did not consider them a big deal is not determinative in circumstances where none of them identify as “Black”: *Balikama*.

i. Incidents that do not reach the threshold of discriminatory harassment

[319] There were, however, a number of incidents that do not reach the threshold of discriminatory harassment under the *Code*. Applying the *Pardo* factors, I find that the African warlord incident does not amount to discrimination because it was friendly banter among colleagues. I find that the Bahia incident does not amount to discrimination because it was misperceived by Francis. I find that the video of Francis does not amount to discrimination because it is not material to this case.

j. Francis reported many incidents in a timely manner and requested that they be investigated. He was advocating for human rights or equitable practices in the workplace.

[320] Francis was advocating for human rights and equitable practices in the workplace. This is evident in the nature and frequency of allegations that he brought to the attention of management. His evidence is corroborated by Elliott Smith who understood Francis’ June 2012 internal reports as being concerned with some behaviours in the workplace and looking for opportunities to stop those behaviours.

[321] Francis testified that he wanted his colleagues to be accountable for their actions. From Francis’ perspective, managers were not dealing with racial slurs in the workplace and it kept happening over the years. By 2012, Francis had enough. Francis testified that it was not up to him to decide what management should have done. Francis testified that “we are shitting on the bed on this one” and that they needed to “cut off the head of the snake and do something that needs to be done”. Francis believed that sexism in the workplace was being dealt with more seriously than racism. He testified to an example where an officer was suspended for over three weeks for using the slur “cunt” but no one was reprimanded for using the slur “nigger”.

Francis' evidence is corroborated by his union representative who reported to Elliott Smith that the "other guy" who used the slur "nigger" got "promoted in no time". As it related to the Firlotte incident, Francis found it humiliating that a supervisor used the slur "nigger" in front of new recruits, and this was the first impression they got from a senior officer who just finished training them.

k. Myths and Misconceptions preventing effective responses to racial inequality

[322] There were a number of myths and misconceptions that arose when Francis alleged race discrimination which created a climate that prevented any kind of effective response to racial inequality.

[323] First, Francis was regarded as too sensitive and overreacting and having a chip on his shoulder. Chohan acknowledged that there was a general awareness at North Fraser that Francis just saw everything through the lens that everyone was against him because he was Black. Chohan singled out Francis' skin colour because Francis had over a period of time saw everything through the lens of skin colour and become "sensitive" to that issue. Torok had inconsistent impressions about Francis. On the one hand, Torok testified that Francis was a very sensitive person. On the other hand, Torok testified that Francis "did not seem like a person easily offended at anything to be honest". Torok explained that "everyone has their switch" and "we all have a history".

[324] Second, Francis was regarded as playing the "race card" to manipulate people to get what he wanted. This was evident in Clayton Smith's interview with management where he made bald assertions accusing Francis of fabricating allegations based on his race to get away with not doing his job. The Tribunal in *Brar* referred to findings made by the Ontario Human Rights Tribunal in *Correia v. York Catholic District School Board*, 2011 HRTO 1733:

[...] The Tribunal found that racial stereotypes operate subconsciously and become "part of the cultural fabric of society". The Tribunal referred to ... the allegation that a complainant was "playing the race card" and noted that it is "only individuals who are in a position to raise allegations of racial discrimination" are those who are themselves

“members of racialized groups.” Labelling a complainant’s allegation as that person “playing the race card” “not only de-legitimizes the experience of the individual but suggests that the individual is being manipulative and untruthful”. (paras. 61-70) (cited with approval in *Brar*, para. 726)

[325] Third, Francis was blamed for the disadvantage that he experienced in the workplace after bringing his allegations forward. This was evident in Clayton Smith’s interview with management where he reported that Francis has basically accused the entire workplace of racism and that he was merely coming forward to defend them against these unfounded allegations. Clayton Smith reported to Elliott Smith that Francis had made “serious allegations of racism” against individuals and “spirited off” a list of names that “he’d carry around so carelessly in his pocket”. In that interview, Clayton Smith’s union representative referred to Francis’ allegations as a “diatribe”. Clayton Smith reported that those accused of racism felt that Francis was targeting them.

[326] Finally, Francis was regarded as someone who had been treated acceptably in the past and thus should not be complaining. Elliott Smith does not know why Francis “took it to the next level” and filed a human rights complaint. From his perspective, he was doing everything he could to respond to his allegations in a constructive and timely manner. Elliott Smith described the process for dealing with discrimination allegations in the workplace. He said that one assesses the validity of the allegation, and if warranted, conducts an investigation. Elliott Smith did not investigate every allegation that Francis brought forward.

[327] From Elliott Smith’s perspective, Francis was not facilitating the investigations that he requested. Elliott Smith was frustrated by the lack of timely disclosure of some allegations. Some of that frustration was understandable. I accept the Respondent’s argument that some of the incidents were not brought to Elliott Smith’s attention until a year later after the hearing commenced in 2014. In these circumstances, it was not possible for Elliott Smith to conduct a proper investigation. However, Elliott Smith bears some responsibility for Francis not coming forward with more incidents. Those incidents that were brought to his attention in a timely manner in 2012 were not adequately investigated or addressed.

[328] Francis acknowledges that he did not come forward with more allegations after his meeting with Elliott Smith in February 2013. Francis acknowledged receiving several requests to meet with Elliott Smith that went unanswered and that there were times when he was difficult to get a hold of. By then, Francis believed that management was not taking his concerns seriously. Francis' belief is corroborated to some extent by Clayton Smith who texted Francis that he was called up for an investigation interview by management about some false allegations that "they know r false but had 2 ask me" [reproduced as written].

[329] Francis was criticized for not bringing allegations forward, even after investigations did not proceed in a timely way. This view was expressed by Elliott Smith who attributed blame to Francis for not raising allegations in a timely manner. Elliott Smith held this view notwithstanding that when Francis first reached out to management in June 2012, some of the incidents were only a few months old. The delays in those investigations cannot reasonably be attributed to Francis in the circumstances. The investigation into some of the incidents concluded only after Francis left the workplace. In these circumstances, it was reasonable for Francis to conclude that his complaint was not taken seriously.

1. Francis Regarded as a Troublemaker

[330] Francis was regarded as a trouble maker for advocating for human rights and equitable practices in the workplace. When Francis escalated the conflict by filing a human rights complaint, his actions were met with surprise by management and hostility by colleagues and supervisors. Francis was called a "rat" and informed that he has a target on his back.

[331] After Francis filed the human rights complaint, Elliott Smith was surprised and was left with the impression that Francis' original intent had changed. Elliott Smith did not think that Francis was alleging racial discrimination against himself. He understood Francis' original intent to be to advocate for human rights and equitable practices in the workplace. However, Elliott Smith's understanding was not consistent with Francis' June 2012 incident reports which show that Francis also alleged being called a "nigger" and being assigned certain work "because you're Black". Elliott Smith, in re-direct, then testified that his first impression in discussing

matters with Francis was that he was looking for change and brought examples forward to be addressed to bring about change.

[332] Elliott Smith testified that it was not the case that people were unhappy that Francis made allegations against them, but rather, they expressed disappointment in having to answer to things that they did not believe were true. Atkinson and Torok described being “shocked” and “surprised” that Francis made allegations of racism in the workplace. Torok dismissed the allegations as “name calling or something like that”. When Francis questioned the muster requirement, he was accused by some supervisors of ruining a common practice that benefited everyone. Clayton Smith was concerned with having to swear an affidavit in response to Francis’ allegations of discrimination because “it’s going to create a lot of turmoil at my workplace”.

[333] A view formed at North Fraser that Francis was an entitled employee who was not taking responsibility for his poor work performance. In relation to Francis’ breach of protocol in the feeding of an inmate, management held the view that Francis was not accountable for his actions despite the fact that Francis acknowledged his mistake and remedied his error that day without incident. Clayton Smith held the view that Francis would accuse anyone of being racist in response to an issue with his work performance despite the fact that the June 2012 incident reports not arise in response to a work performance issue.

[334] Elliott Smith testified that in interviews with Clayton Smith, it became apparent to him that Francis was unwilling to accept accountability for his own work performance and behaviour and had a tendency to allege discrimination and harassment whenever he was held accountable for performance deficiencies. Elliott Smith testified, “overall, through my investigation, this was a general theme that emerged with respect to a number of Mr. Francis’ discrimination allegations”. Elliott Smith found that the vast majority of Francis’ allegations were unfounded. It is not clear how Elliott Smith could arrive at this conclusion when most of the incidents raised by Francis were not investigated or the investigations concluded after Francis left the workplace.

[335] Elliott Smith maintained that other employees were cooperating in good faith and gave their version of events as they remembered them. However, Elliott Smith did not acknowledge the chilling effect that may have limited cooperation in the investigations. He did not answer the question of whether it occurred to him that a reason why coworkers might not want to support an unpopular colleague. It did not occur to Elliott Smith that, with Francis being called a rat for complaining about the workplace, other employees may have faced similar consequences for coming forward. Polonio expressed a similar sentiment when he explained his reluctance to approach management about receiving the "you racist pig" note. Amarelo testified to an incident where he did not report hearing the slur "nigger" used by a supervisor in the locker room because it would take more than one incident for an officer of his rank to report a supervisor to management. By July 2013, the "sorry you have to work with that nigger" comment reflected the general sentiment at North Fraser that slurred Francis. It also reflected the sentiment of Clayton Smith, who was the person to whom the comment was made. Clayton Smith no longer wanted to work with Francis and approached management with information to discredit Francis.

m. Cumulative effect was profound on Francis

[336] The cumulative effect of these comments and incidents were profound on Francis. Francis testified that it got to the point where he did not feel safe at work. His evidence was corroborated by Gallant who testified that it was essential that employees trust their coworkers because they can be attacked at any time by inmates. Gallant had previously worked in these facilities and was familiar with the workplace culture. She testified that there must be trust that coworkers have each other's back. Francis confided in Gallant to feeling vulnerable and that his coworkers did not have his back. Francis testified:

I'm from a place where we're a race that have a lot of pride in ourselves and respect people. And to me, I felt that anyone, you know, can make a mistake, but when it keeps happening over and over again and when you look to the people that's supposed to help you protect you from these kinds of things and it seems like they made it worse, ... it kind of plays on ... your psyche in the sense of, like, it was making me feel I was

not safe in the work environment. It's impacted my health in many, many ways. I mean, I have now suffered from depression. ... I have always been a fit individual. It's hindered ... a lot of my extracurricular activities. It's hindered and interfered with my sexual life. It's somewhat stagnated my relationship with my children.

[337] Regardless of whether racial slurs and comments were directed at Francis or others, they negatively impacted Francis' work environment: *Pillai v. Lafarge Canada*, 2003 BCHRT 26. This is a factor that supports a reasonable inference of racial discrimination. As in *Pillai*, Francis gave evidence of feeling hurt and angry after finding out that racial slurs were being used. Francis acknowledges that it influenced his perceptions of his treatment in the workplace and caused him to view work events with suspicion. As in *Pillai*, Francis perceived that he was the victim of a discriminatory plot, and this perception adversely affected his work environment. One of the adverse consequences experienced by Francis was having to take continuous steps to address the discrimination and going on sick leave, in part, because of the stresses caused by the actions in a workplace: *Algor v. Alcan and others (No. 2)* 2006 BCHRT 200, para. 272. This is apparent in the number of work absences in 2013. Francis left the workplace on July 28, 2013 and has not returned.

[338] The Respondent has advanced a number of cases in support of its position that the discriminatory threshold has not been reached under s. 13 of the *Code*.

[339] I distinguish *Pardo v. Coquitlam School District No. 43*, 2003 BCHRT 71, *Lobell v. University Women's Club of Vancouver*, 2014 BCHRT 185 [*Lobell*], *Banwait v. Forsyth (No. 2)*, 2008 BCHRT 81, on the grounds that these cases involve a single racial slur made in the heat of the moment. Francis experienced a pattern of conduct in the workplace over a period of time that does not amount to "reasonable social interaction" as described in *Lobell*. Francis was stereotyped, singled out, and subject to racial comments and slurs, some of which were not made in the heat of the moment. After objecting to this behaviour, Francis was regarded as a trouble maker and further targeted by supervisors.

[340] I distinguish *Akoury v. Aaronson's Pharmacy and others*, 2011 BCHRT 48 on the ground that a co-worker repeated "fucking Lebanese" in the context of a single running altercation with the complainant. I distinguish *Feleke v. Cox*, 2009 BCHRT 7 on the ground that the crux of the complaint involved one racial comment "don't you know you don't get paid – you are still a slave" made by a supervisor in the context of an employee getting paid. Francis was not engaging in banter with the supervisors who slurred him. Those comments were made in front of others, and in one case, during an incident when Francis was ordered to perform a less desirable task. That supervisor targeted his remark on Francis' "sensitivity" to skin colour.

[341] I distinguish *Khota v. Patka and Patka v. Khota*, 2006 BCHRT 611 on the grounds that what Francis experienced negatively impacted his working environment. I distinguish *Falou v. Royal City Taxi*, 2014 BCHRT 149 on the grounds that the slurs were not, by the complainant's own and repeated admission, part of a pattern of religious harassment or adverse treatment based on his religion. They were also uttered partially as a retort to the complainant's apparent persistent approaches regarding a long-standing financial dispute.

[342] I distinguish *Correia v. Salvation Army*, 2013 BCHRT No. 231 on that ground that the interpersonal conflict between Francis and others, which Francis reasonably perceived as discriminatory, did not stem from speculation and conjecture. I distinguish *Preddie v. Saint Elizabeth Health Care*, 2011 HRTD 2098 on the ground that Francis had some reasonable basis for making allegations of race discrimination. I distinguish *Pathak v. Siemens Milltronics Process Instruments*, 2012 OHRTD No. 1419 on the grounds that it was a preliminary decision and no findings of fact were made. I distinguish *Pathak and Gurney v. McDonalds Restaurants of Canada*, 2011 HRTD 984 on the grounds that the breadth of the interpersonal difficulties that Francis experienced arose in the context of raising human rights allegations, not in response to poor performance.

[343] The Respondent's arguments do not recognize the complex, subtle, and systemic nature of racism in any workplace. As set out in *Brar*, and the *Guidelines*, racism in its more entrenched forms is often unconsciously applied and its operation is often unrecognized by even those

practising it. In some cases, racist beliefs are unconsciously maintained by individuals and have become deeply embedded in institutions that have evolved over time.

B. Retaliation

[344] Section 43 of the *Code* establishes procedural protections for participants in the human rights process. Although this complaint was filed prior to the change in legislation, as it relates to this case, the test for establishing a complaint of retaliation remains unchanged. To establish a complaint of retaliation under s. 43 of the *Code*, a complainant must show on a balance of probabilities: (1) a previous complaint has been made under the *Code* for which the respondent was aware; (2) the respondent engaged in or threatened to engage in the impugned conduct; and (3) there is a sufficient connection between the impugned conduct and the previous complaint. Regarding the third factor, the Court of Appeal in *Gichuru v. Pallai*, 2018 BCCA 78 [*Gichuru*] clarified:

This connection may be established by proving that the respondent intended to retaliate, or may be inferred where the respondent can reasonably have been perceived to have engaged in that conduct in retaliation, with the element of reasonable perception being assessed from the point of view of a reasonable complainant, apprised of the facts, at the time of the impugned conduct.

Section 43 is different from other discrimination provisions in another way – it does not contain any sort of justification clause. However, the fact that respondents cannot justify retaliation under s. 43 of the *Code* does not mean that their evidence is unimportant. To the contrary, explanations offered by respondents must be considered together with all of the evidence in assessing whether the requisite connection has been established. In particular, in assessing the reasonableness of the perception that a respondent has engaged in retaliatory conduct, the respondent’s evidence, together with all of the evidence, informs the point of view of the reasonable complainant, who is taken to be apprised of the facts at the time of the impugned conduct. (paras. 58, 59)

1. A previous complaint has been made under the Code for which respondent was aware

[345] The Respondent argues that none of Francis' coworkers were even aware that he had filed a human rights complaint until well after he had left the workplace. I do not accept this argument for the following reasons.

[346] Francis filed a human rights complaint on October 25, 2012. The Tribunal notified the Respondent that the complaint was accepted for filing on January 30, 2013, and a few days later, the Respondent notified the Tribunal that it was represented by counsel. Officially, then, the Respondent was aware that a previous complaint has been made under the *Code* by February 1, 2013.

[347] Unofficially, there was general awareness among officers and supervisors at North Fraser that Francis had filed a human rights complaint. Some of this awareness came directly from Francis who publicly referred to his human rights complaint. Francis texted Clayton Smith that he filed a human rights complaint. In his interview with Elliott Smith, Clayton Smith reported that Francis spoke openly to others about his "serious allegations of racism". Clayton said that Francis publicly referred to his human rights complaint "numerous", "dozens", and "countless" times. Clayton said that Francis carried a list of names and there was an awareness of the "guy's going upstairs" to be interviewed by Elliott Smith in relation to his allegations.

[348] Some awareness also came through gossip. Clayton acknowledged that other people spoke to him about Francis' human rights complaint. Torok gave evidence that there was gossip around North Fraser and that he had heard "rumblings" about Francis "putting something in" in relation to the human rights complaint. He did not remember specifically when but remembers people talking in the locker room, and that the "rumblings" were "in the air". Bahia testified that Francis' complaints were "brought to my attention".

[349] For these reasons, I reject the Respondent's argument that there was no general knowledge in the workplace about the fact that Francis had filed a human rights complaint. While the interview transcripts demonstrate that Elliott Smith only told interviewees about

allegations which related specifically to them, the general awareness was borne from Francis and gossip.

[350] I also reject Francis' argument that being singled out to attend muster amounts to retaliation under s. 43 of the *Code*, because it arose prior to the filing of the human rights complaint.

2. The respondent engaged in or threatened to engage in the impugned conduct

[351] Francis subjectively believed that he was being retaliated against. Francis testified that he felt that his treatment by management changed as a result of his filing of a human rights complaint. Gallant provided hearsay testimony that Francis told her that his treatment got worse after he filed a human rights complaint, because he was reprimanded for not following protocols while many others who did not follow the same protocols were not reprimanded.

[352] I accept that Francis' belief was not always that of a reasonably objective observer and have rejected a number of allegations on that basis. These are Bahia grimacing at him, Chohan yelling at him for opening doors, Grill marking him late on the schedule, and a video of him out of uniform. These situations do not rise to the level of conduct coming within s. 43. They do not amount to any discipline, Francis was not deprived of any right or benefit, nor do they amount to intimidation or coercion or otherwise discriminatory conduct.

[353] Although I find that Moore said to Clayton Smith, "sorry you have to work with that nigger", I reject Francis' argument that this incident amounts to retaliation. There is no objective evidence that Moore was reasonably engaging in a retaliatory comment. In my view, his comment reflected the general sentiment at the time that people did not want to work with Francis and slurred him as a "nigger".

[354] Nevertheless, there is objective evidence that North Fraser employees engaged in or threatened to engage in retaliatory conduct against Francis. My conclusion is reasonably inferred from the following findings of fact.

[355] First, I find that Francis heard from others that he was called a “rat”, which was a term regularly used to describe employees in a negative light for raising concerns about other employees. That Polonio expressed concerns about being perceived as ratting out colleagues, and that Francis even accused Clayton Smith of ratting him out bolsters my finding.

[356] Second, I find that Francis was told that he had a “target on his back” by Peakman who acknowledges discussing his human rights complaint with him. That comment reflected a general sentiment that colleagues were targeted for getting other colleagues into trouble.

[357] Third, I find that Grill and Uppal advised Clayton Smith to approach management to raise concerns about Francis in late spring 2013. It is clear from the transcripts of Clayton Smith’s interviews that he was motivated to cast Francis in a negative light based on his perception that Francis was making unfounded allegations against colleagues who he regarded in high esteem, such as Uppal and Grill. I prefer the transcripts of Clayton Smith’s interviews at that time over his unsuccessful attempts to rehabilitate his evidence during cross-examination.

[358] I depart from a number of the Respondent’s arguments on the basis of my findings of fact. For example, I disagree with the Respondents that calling Francis a “rat” simply did not occur. I disagree with the Respondent that Uppal did not direct Francis to breach special handling protocols and then criticize him for the breach.

3. There is a sufficient connection between impugned conduct and previous complaint

[359] I find that two incidents, involving supervisors Uppal and Chohan, amount to retaliation under s. 43 of the *Code*.

a. Chohan Retaliates against Francis

[360] I find that Chohan retaliated against Francis during the incident where he breached protocol in February 2013. It is undisputed that Francis breached protocol and Heinrich observed the breach on camera. What Chohan reported to Heinrich was not accurate and cast

Francis in a negative light. In this way, Chohan contributed to the removal of Francis from his post and the issuance of his first letter of reprimand in over a decade of service.

[361] Chohan was generally aware at the time that he had been named in the human rights complaint. This was evident in his comment to Francis when he told him that this was payback for taking him upstairs months earlier. Although Chohan was referring to an incident that was first raised by Francis in his internal report in June 2012, it formed part of his original human rights complaint in October 2012. Chohan acknowledges being aware of the human rights complaint but was evasive about the timing of his awareness. By February 2013, there was general awareness at North Fraser that Francis had filed a human rights complaint, and as a supervisor, Chohan would have had the ability and opportunity to become aware. Although the transcript of his investigation interview was not in evidence, Atkinson was interviewed about that incident in 2012, and it is reasonable to infer from Chohan's admission and Elliott Smith's evidence that Chohan's interview had taken place by February 2013.

[362] What Chohan reported to Heinrich was not accurate and cast Francis in a negative light. He misrepresented Francis' reactions to Heinrich which led her to conclude that Francis was not taking the protocol breach seriously. Chohan barely mentioned that Francis apologized and remedied the breach almost immediately. Instead, Chohan reported to Heinrich that Francis thought the situation was funny, "seemed to make light of the situation", and repeatedly made comments like "what is the big deal" and "why can't this guy have it" and "how far as you going to take this". Chohan also reported to Heinrich that Francis expressed that it was no big deal and laughed and asked if he was serious when he assigned an incident report. Chohan reported to Heinrich that Francis refused to complete the incident report without receiving the request in writing.

[363] Francis acknowledges the reactions attributed to him by Chohan. However, Chohan did not report the context. Francis was protesting the way in which the incident was being escalated by Chohan. In a work environment where supervisors breached protocols and condoned protocol breaches, Francis did not understand why this protocol breach was escalating in such a manner. In these circumstances it was reasonable for Francis to believe that

Chohan had ulterior motives. When Francis accused Chohan of ulterior motives, both Heinrich and Martin interpreted his protests as not accepting full responsibility for his actions. In her reprimand letter, Martin wrote, "what is also concerning is that you attempted to mitigate your actions by accusing [Chohan] of ulterior motives in addressing you about your failure to comply with the special handling protocols."

[364] Heinrich removed Francis from his post because she believed that Francis was not taking the incident seriously based on reports that she had received from Chohan. During his interview, Heinrich recalls that Chohan shared with her that at no time the day before did Francis own his mistake. Heinrich told Francis during his interview that it was his conversation with Chohan afterwards that caused her to remove him from his post:

Okay so Mr. Chohan is a supervisor of the area and he's communicating with me, the conversations that you've had through the shift after the incident occurred. And it wasn't the breach of protocols that had me remove you from Alpha West. It was the conversations that you had with Mr. Chohan after that gave me cause for concern. I couldn't leave you in Alpha West because it wasn't simply just about the protocols, it was the conversation ... I had concerns that you did not understand the significance of the protocols as far as you were questioning Mr. Chohan, you were making comments.

[365] Martin issued the letter of reprimand. Martin knows that this was Francis' first letter of reprimand in all of his years of service. Martin was aware that, while acknowledging his mistake, Francis opined that this was more than a simple protocol breach. Martin testified that Francis attempted to deflect blame on Chohan. Both Heinrich and Martin discounted Francis' explanation that there was a history with Chohan and he experienced Chohan as revengeful. In her letter, Martin wrote that Francis "did not seem to appreciate the seriousness of [his] actions and the risk [his] actions posed" demonstrated by some of his comments to supervisor Chohan, his statement that he follows special handling protocols the majority of the time, him wanting direction in writing to complete an incident report, and the poor quality of the report. Martin also wrote:

What is also concerning is that you attempted to mitigate your actions by accusing the Correctional Supervisor [Chohan] of ulterior motives in addressing you about your failure to comply with the special handling protocols. The Correctional Supervisor is obligated and compelled to correct and hold people accountable and to suggest that his actions were anything other than that aggravates the circumstances.

[366] In 2014, Francis disputed that the letter was justified. Francis grieved the letter of reprimand and lost that grievance in an arbitration. An arbitrator heard the matter on June 20, 2017 and confirmed that the letter was justified in the circumstances. Heinrich testified that the arbitrator ultimately upheld the letter and agreed with the discipline. By 2018, Francis conceded that the letter of reprimand was justified, and that it was not in itself discriminatory or retaliatory. The Respondent relies on these facts to argue that the letter of reprimand was not discriminatory or retaliatory. I do not accept the Respondent's argument. The arbitrator was tasked with answering a different set of legal questions than I have been. I rely on my evidentiary and legal findings to distinguish that decision from my own.

[367] Francis testified that two aspects of the letter of reprimand were discriminatory or retaliatory – the reference to his accusing Chohan of ulterior motives and the statement at the end of the letter that further incidents of misconduct could lead to discipline, including termination. I accept the Respondent's argument, and Martin's evidence, that the statement at the end of the letter is common in such letters and not discriminatory or retaliatory in the circumstances. However, I find that the reference to Francis accusing Chohan of ulterior motives is discriminatory because it is based on Chohan misreporting Francis' behaviour to management. In this way, Chohan contributed to the removal of Francis from his post and the issuance of his first letter of reprimand in over a decade of service.

b. Uppal Retaliates against Francis

[368] Francis received the letter of reprimand on April 29, 2013. That same day, I find that Uppal retaliated against Francis by ordering him to breach protocol and then reprimanded him for doing so. That Uppal did not report the breach, but rather warned him to do his perimeter checks was reasonably perceived by Francis as a threat in the circumstances.

[369] Uppal was aware that Francis had made internal complaints against him as early as August 31, 2012 when he was interviewed by Elliott Smith about a poster that was made to mock an officer with a goatee. That incident was reported by Francis in June 2012. I find that it is reasonable to infer in these circumstances that Uppal was generally aware that Francis had filed a human rights complaint before April 2013.

[370] In his interview with management, Clayton Smith acknowledges receiving advice from “some people I really respect in the building and ... he has gone after them personally”. Clayton references Uppal as one of those people who advised him to come forward. That Uppal advised Clayton Smith to come forward with information discrediting Francis bolsters my finding that Uppal retaliated against Francis under s. 43 of the *Code*.

C. Summary of Findings

[371] Taken together, my findings of discrimination and retaliation lead to the inescapable conclusion that Francis was subject to a poisoned work environment by July 2013.

[372] An employer is required to provide a respectful work environment that is free from discrimination: *Robichaud v. Canada (Treasury Board)* [1987] 2 SCR 84. The primary, but not exclusive, responsibility for ensuring a discrimination-free workplace rests with the person in control of the employee’s employment, a responsibility that is recognized in s. 44(2) of the *Code*: *Schrenk*, para. 56. Preventing employment discrimination is a shared responsibility among those who share a workplace, including both supervisor and colleagues. This is especially so where the employer’s best efforts are inadequate to resolve the issue: *Schrenk*.

[373] I accept the Respondent’s argument that the allegation of a poisoned workplace is not a stand-alone allegation in this case. As I understand the submissions, Francis is alleging that the outcome of incidents of discrimination and retaliation that he experienced over eighteen months created a poisoned work environment. For that to be the case, it must first be found that the individual incidents did in fact occur as alleged by Francis and they did contravene the *Code*. The test is an objective one: “there must be evidence that, to the objective reasonable bystander, would support a conclusion that a poisoned workplace environment had been

created”: *General Motors of Canada Limited v. Johnson*, 2013 ONCA 502 [*Johnson*], para. 66. In *Brar*, the Tribunal identified a number of factors that might constitute a poisoned work environment, including:

- Even a single statement or incident, if sufficiently serious or substantial, can have an impact on a racialized person by creating a poisoned environment.
- A poisoned environment is based on the nature of the comments or conduct and the impact of these on an individual rather than on the number of times the behaviour occurs. As mentioned earlier, even a single egregious incident can be sufficient to create a poisoned environment.
- A poisoned environment can be created by the comments or actions of any person, regardless of his or her position of authority or status in a given environment.
- Behaviour need not be directed at any one individual in order to create a poisoned environment. Moreover, a person can experience a poisoned environment even if he or she is not a member of the racialized group that is the target. (at para. 741)

[374] The following factual findings support a reasonable inference of a poisoned work environment. Francis was stereotyped as slow and lazy. He was perceived by some supervisors and officers as being slower to open doors in Control, and those perceptions were based on misconceptions and incomplete information. He was then confronted by his trainer in the “step up your game” incident. He was also referred to as a “Lazy Black Man” by another supervisor during his time at North Fraser that supported the stereotype that he was both slow and lazy. Francis made mistakes on the job and those mistakes were treated differently than his colleagues. Francis was singled out to attend muster by a supervisor contrary to common practice. Francis was ordered to breach protocol by another supervisor, who then reprimanded him for doing so. That the supervisor did not report the breach, but rather warned him to perform other duties was reasonably perceived by Francis as a threat in those circumstances. Francis also experienced every day racism in the form of denigrating comments and racial slurs. Francis was publicly denigrated as “because you’re Black” by a supervisor in front of other officers and an inmate. Francis was called a “Toby” by his Control partner. Francis also heard

about other black-skinned officers being called racial slurs by supervisors. This included the Firlotte "nigger" incident and Polonio "turn on the lights" incident.

[375] Francis reported many of these incidents in a timely manner and requested that they be investigated. Francis was advocating for human rights and equitable practices in the workplace. Some of those incidents were not investigated in a timely manner. There were a number of myths and misconceptions that arose when Francis alleged race discrimination which created a climate that prevented any kind of effective response to racial inequality. Francis was regarded as too sensitive and overreacting and having a chip on his shoulder. Francis was regarded as playing the "race card" to manipulate people to get what he wanted. Francis was blamed for the disadvantage he experienced in the workplace in bringing allegations forward. Francis was also criticized for not bringing allegations forward even after investigations did not proceed in a timely way. Francis was also regarded as someone who had been treated acceptably in the past and thus should not be complaining.

[376] When Francis escalated the conflict by filing a human rights complaint, his actions were met with surprise by management and hostility by colleagues and supervisors. He was subject to retaliation by two supervisors. One supervisor retaliated against Francis by misreporting his behaviour to management, in response to a protocol breach, which led him to receive his first letter of reprimand in all of his years of service. On the same day that he received this letter of reprimand, another supervisor ordered Francis to breach protocol and then reprimanded him for doing so. That these two supervisors appear as visible minorities is not determinative in circumstances where, aside from Francis, no other witnesses in this case identified as "Black": *Balikama*. By July 2013, Francis was regarded as a trouble maker. The "sorry you have to work with that nigger" comment reflected the general sentiment at North Fraser of not wanting to work with Francis and denigrating him as a "nigger". His Control partner no longer wanted to work with him. His Control partner approached management at the behest of some supervisors, including a retaliatory supervisor, to provide information to discredit Francis' allegations and cast him in a negative light.

[377] I do not accept the Respondent's argument that there could not have been a poisoned workplace created for Francis as a result of the employer's investigation into the allegations into his human rights complaint when he was not actually present in the workplace when the investigation occurred. Investigations started earlier. Francis was subject to racially discriminatory commentary and treatment in the workplace that management at North Fraser failed to address adequately or prevent, and this failure contributed to a poisoned work environment for Francis.

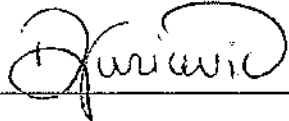
[378] Most Respondent witnesses gave evidence that they never experienced or witnessed any racism at North Fraser. Of those witnesses, many of them acknowledged that racial slurs and jokes were prevalent in the workplace. This was indicative of a workplace culture that downplayed the very incidents that Francis raised as discriminatory.

[379] Where there is a poisoned work environment, there may be no reasonable option but for the employee to depart: *Morgan-Hung v. Provincial Health Services and others (No. 4)*, 2009 BCHRT 371, paras. 463 – 470 (rev on other grounds, *Morgan-Hung v. British Columbia (Human Rights Tribunal)* 2011 BCCA 122. There is no requirement for complainants to continue to subject themselves to discriminatory practices: *McCreath v. Victoria International Running Society*, 2013 BCHRT 53, para. 276.

VII CONCLUSION

[380] I find the complaint justified, in part, under s. 13 and 43 of the *Code*.

[381] I remain seized and retain jurisdiction on the issue of remedy.



Diana Juricevic, Tribunal Chair

Appendix:



British Columbia Human Rights Tribunal

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August 13, 2018

Via email

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Dear Parties:

Re: **Levan Francis v. Her Majesty the Queen in Right of the Province of BC as represented by the Ministry of Justice, North Fraser Pretrial (Case Number: 10996)**

A telephone case conference was held on Tuesday August 7, 2018 at 10 am. Mr. Smeets and Ms. Tran attended on behalf of the Complainant, Levan Francis, who was also present on the call. Ms. Vipond attended on behalf of the Respondent. The following matters were addressed.

1. Third Party Disclosure

The Respondent's application for third party disclosure dated June 14, 2018 was withdrawn. As such, no oral submissions were required.

2. Independent Medical Examination

The Respondent's application for an independent medical examination dated March 1, 2018 is being held in abeyance to allow for the disclosure and review of additional medical documents. The parties filed written submissions dated March 1, 2018, April 24, 2018, and May 1, 2018, respectively. The parties will be given another opportunity to make any further oral submissions in regards to this application at the next telephone case conference, which is scheduled to proceed on **Friday August 17 at 2 pm.**

3. Resumption of Hearing

The parties have not agreed on how to resume the hearing. On April 23, 2018, the Respondent recommended proceeding with a determination of the complaint, as filed, based on transcripts of the hearing to date and further in-person hearing dates. On April 30, 2018, the Complainant

recommended proceeding with a determination of the complaint, as filed, by restarting the hearing from the beginning. In these circumstances, a decision from the Tribunal would be necessary. I requested oral submissions from the parties in support of their positions. I have considered all of the parties' submissions and only refer to those that are necessary for my decision. My decision is as follows:

The hearing in this matter will proceed with a determination of the complaint, as filed, based on transcripts of the hearing to date and further in-person hearing dates.

I acknowledge the unusual circumstances at the outset. This complaint was filed six years ago in 2012. Four years ago, the hearing in this matter proceeded for three days of evidence on October 20, 21, and 22, 2014. At the time, the parties were represented by different counsel, and the hearing was presided over by a different member. Mr. Francis testified. His examination-in-chief was completed, and it appears that the cross-examination completed as well. There have been various delays that have caused this matter to proceed at a pace that is unacceptable. While Mr. Francis was self-represented when the hearing resumed for one day on January 10, 2018, no evidence was adduced. Rather the parties discussed options for resolving the issues in Mr. Francis' complaint. Since then, Mr. Francis has retained new counsel.

Although the conventional process is to continue a hearing from the record of evidence adduced to date, I have the discretion to continue a hearing *de novo* if the interests of justice would be better served. The party requesting a *de novo* hearing bears the onus of establishing why the Tribunal should exercise its discretion to make such an order, and in this case, the Complainant has not met that onus. There is no precedent at the Tribunal, and no case law has been provided by the parties, that support a hearing *de novo* in these unusual circumstances.

An analogous circumstance in the criminal law context may be where a court has exercised its discretion to hear an appeal by *de novo* trial rather than by appeal record: *R v. Louie* 2014 BCSC 1029 [*Louie*], upheld 2014 BCCA 436. I have found the principles set out in such cases helpful in determining whether to exercise my discretion to continue this proceeding by way of a hearing *de novo*. The exercise of such discretion requires a balancing of individual as well as broader administration of justice principles: *R v. R.N.-Z.M.*, [2005] O.J. No. 5497, para. 14. There can be no exhaustive list of factors to be taken into account. Rather, factors that strongly support a hearing *de novo* are where there is "a defect in the record of the trial, relating to completeness or intelligibility, or a breach of the principles of natural justice": *Louie*, para. 9.

I am not persuaded that there is any defect in the hearing record, or breach of the principles of natural justice, that support a hearing *de novo* in the unusual circumstances of this complaint. The central issue is the evidence of Mr. Francis, and whether a fair hearing can be conducted in circumstances where he testified before another member four years ago.

I accept the concerns raised by the Complainant about the lack of continuity, the four-year delay, the interruption in the evidence of Mr. Francis, and the fact that I was not present during any of his prior testimony. It is far preferable for hearings to proceed on consecutive days,

rather than on days separated by long breaks: *Alpha Manufacturing Inc. v. HMTQ*, 2005 BCSC 773 [*Alpha*], para. 121. It is also far preferable for the same member to hear the evidence of all witnesses at the same time.

Notwithstanding, the hearing was audio recorded. The audio recording of this hearing has been provided to Mr. Francis and his new counsel. Both parties have also been provided with official hearing transcripts. I have read those transcripts in their entirety. Both parties were represented by capable counsel, and there is nothing in the submissions or record to suggest otherwise. The parties have not raised any concerns regarding the state of the record, or the conduct of the previous presiding member. For example, there are no allegations of bias against the previous member, and there is nothing to suggest that portions of the transcript are indecipherable: *Alpha*, para. 106. Also, the parties do not take issue with any preliminary decisions that were issued by the previous member, including the anonymization ruling. To this extent, the state of the record is adequate for consideration of the issues that arise in this complaint.

The main risk for a breach of the principles of natural justice is the possible prejudice that may arise from credibility findings. I may be hampered in my assessment of Mr. Francis' credibility from his prior testimony if the assessment relies on demeanour and other visual cues that I was not privy to and would not appear in the audio recording or transcript of the hearing. This argument, however, is premature. Such matters are properly addressed in the reasons for my decision after a hearing on the merits of this complaint.

A hearing *de novo* runs the additional risk of creating further delay and inconsistent evidence in circumstances where one witness testifies about the same events four years later. Witness memories fade with the passage of time. Even if there was a *de novo* hearing, Mr. Francis has already testified under oath, and his prior testimony would form part of the record. The Complainant conceded as such when counsel offered to use parts of that transcript to expedite the examination-in-chief of Mr. Francis. The Respondent would inevitably put any other relevant portions of that transcript to Mr. Francis during cross-examination to challenge his evidence for the purposes of impeachment.

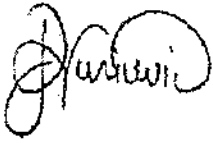
In these circumstances, a hearing *de novo* would not facilitate the most timely and just resolution of this complaint. The concerns raised by counsel about being hamstrung by the case presented by previous counsel can be ameliorated through a broad re-direct of Mr. Francis. The Tribunal has the power to do so under s. 27.2 of the *Human Rights Code* in order to ensure that the hearing proceeds fairly.

Since March 20, 2018, the parties have been on notice that the Tribunal will make every effort to ensure that this matter proceeds as expeditiously as possible. The hearing is currently scheduled to proceed for eleven additional hearing days on November 12 to 16, 19, 21 to 23, and 29 to 30, 2018. These hearing dates were set seven months in advance to accommodate counsel's schedule notwithstanding the Tribunal's request that the hearing concludes before the end of August. I accept the Respondent's argument, which was largely uncontested, that

this proceeding will not conclude within the time scheduled if the hearing resumes *de novo*. Given counsel and witness schedules, new hearing dates would inevitably be set into 2019. This is consistent with scheduling to date.

Overall, even if some of these factors standing alone militate in favour of a hearing *de novo*, the cumulative consideration of all of these factors does not lead to a new hearing. A review of all of the information before me demonstrates that the interests of justice do not require a hearing *de novo*. The hearing proceeded fairly four years ago, and the only appropriate and fair solution at this stage is to continue the hearing where the parties left off.

Yours truly,

A handwritten signature in black ink, appearing to read 'D. Juricevic', with a large, stylized loop at the end.

Diana Juricevic
Chair



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August 20, 2018

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Dear Parties:

Re: **Levan Francis v. Her Majesty the Queen in Right of the Province of BC as represented by the Ministry of Justice, North Fraser Pretrial (Case Number: 10996)**

The purpose of this letter is to provide guidance to the parties on the hearing in light of my decisions dated August 13, 2018 and August 20, 2018, respectively.

Bifurcated Hearing

The parties have been on notice since March 20, 2018 that the Tribunal will make every effort to ensure that this matter proceeds as expeditiously as possible. Notwithstanding earlier representations, the parties have made it clear during the case conference on August 17, 2018 that they will be unable to complete the hearing on the dates that have been scheduled in November.

In all of the circumstances, I have decided to bifurcate this hearing.

To facilitate that just and timely resolution of this complaint, and pursuant to s. 27.3 of the *Code*, the parties are on notice that the November hearing dates will be reserved for completing the evidence on whether there is discrimination.

If I decide that the Respondent discriminated against Mr. Frances, then I will schedule another hearing to address the appropriate remedy. By that time, I expect that disclosure of medical information will be complete and the parties will be better positioned to address the need for an IME as it relates to the cause of Mr. Frances developing a psychiatric condition that has precluded him from working. I will allow the Respondent to apply again for an IME at that stage. This does not mean that the application will be successful but, in my view, the parties

and the Tribunal will be better positioned at that stage to properly weigh the *Hakansson* factors and determine whether an IME is appropriate.

Hybrid Hearing

In all of the circumstances, I have also decided to proceed with a hybrid hearing in which sworn affidavits with exhibited documents are tendered into evidence *in lieu of* examinations-in-chief of witnesses. *Viva voce* cross-examinations will take place during the hearing.

To facilitate the just and timely resolution of this complaint, and pursuant to s. 27.3 of the *Code*, **the parties are on notice that the direct evidence of each witness will be submitted by way of affidavit and any document to be entered into evidence through the witness' direct evidence must be appended as an exhibit to the affidavit. On request of the opposing party, the witness will be required to attend the hearing for *viva voce* cross-examination.**

My decision to conduct the hearing in this manner ensures that the process of adjudication is fair and just in the circumstances of this complaint: s. 27.3 of the *Code*. Such an approach was envisioned by the *Administrative Tribunals Act* which empowers the Tribunal to maintain order at a hearing and control the manner in which evidence is entered at a hearing so as to avoid surprise, repetition, and undue time commitment. This approach is also consistent with the principles set out by the Supreme Court of Canada to ensure the just and timely determination of analogous summary judgment proceedings: *Hryniak v. Mauldin*, 2014 SCC 7 [*Hryniak*].

This approach to the hearing will enable me to reach a fair and just determination on the merits of the complaint, as filed, and is a proportionate, more expeditious, and less expensive means to achieve a just result: *Hryniak*, paras. 29 and 49. It has the benefit of providing the parties and Tribunal with advance notice of sworn evidence so that any objections to the admissibility of evidence can be resolved prior to the hearing.

Witnesses

To facilitate the just and timely resolution of this complaint, as it relates to the issue of whether there is discrimination, I make the following orders:

- I order the parties to exchange and file a witness list in advance of the hearing.
 - The Complainant's witness list is **due September 4, 2018**
 - The Respondent's witness list is **due September 18, 2018**
- I order the parties to exchange and file affidavits for each witness on their witness list *in lieu of* examinations-in-chief.
 - The Complainant's witness affidavits and any exhibited documents are **due October 2, 2018**
 - The Respondent's witness affidavits and any exhibited documents are **due on October 16, 2018**

- I order the parties to provide notice of which of the adverse witnesses are required for cross-examination and to exchange and file time estimates for cross-examinations of these witnesses by **October 30, 2018**

If a party objects to any information that is received by way of these orders, the party must apply in writing to the Tribunal by **no later than October 31, 2018**. The parties are also on notice that the Tribunal can, on its own motion, make an order to address any deficiency in the witness information filed by a party.

The evidence of Mr. Francis

These orders do not apply to the evidence of Mr. Francis. The parties are reminded that, as set out in my decision dated August 13, 2018, the hearing will continue from the record of evidence adduced to date. Based on the hearing transcript dated October 22, 2014, it appears that the hearing will continue with the re-direct of Mr. Francis.

If counsel seeks to re-direct Mr. Francis on issues that are outside the scope of the cross-examination, the Complainant must apply in writing to the Tribunal by **October 2, 2018**. Any response submission from the Respondent is due **by October 16, 2018**. Any reply submission from the Complainant is due **by October 23, 2018**.

Yours truly,



Diana Juricevic
Chair

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s.14



July 17, 2019

VIA EMAIL ONLY

Hon. Mike Farnworth
Minister of Public Safety and Solicitor General
Room 128 Parliament Buildings
Victoria, BC V8V 1X4

Dear Minister & Solicitor General Farnworth

Re Call for Independent Inquiry into B.C. Corrections – Adult Custody Division

The BCGEU is very concerned about the BC Human Rights Tribunal's recent findings of racial discrimination against Levan Francis, one of our member Correctional Officers at the North Fraser Pre-Trial Centre ("NFPC"). Our concern is deepened by the fact that some of those who discriminated against Francis, or abetted their discriminatory behaviour, have since either been promoted into or within management ranks in the Adult Custody Division ("ACD").

The Tribunal found that John Polonio, at the time a Correctional Supervisor, but since promoted to Assistant Deputy Warden at NFPC, made a racist comment at a meeting attended by several staff but was never investigated or disciplined for doing so. Kaher Uppal, then a Correctional Supervisor, but now also an Assistant Deputy Warden at NFPC, referred to Francis as a "LBM" (Lazy Black Man) and acted unprofessionally in denigrating another officer. Uppal was also found to have retaliated against Francis for filing a human rights complaint by ordering him to breach protocols, and by encouraging another officer to discredit him.

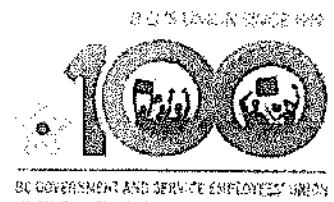
Most concerning, however, are the Tribunal's findings that Elliott Smith, now Deputy Provincial Director of Corrections-ACD: unreasonably delayed investigation of Francis' discrimination complaints, which resulted in the erosion of evidence; discouraged Francis from bringing other complaints through his inaction; minimized the reaction at NFPC to Francis' allegations in his testimony to the Tribunal; and, was "evasive" under oath. The Tribunal also suggested Smith had been "disingenuous" in his dealings with Francis, and it disparaged his investigation of Francis' complaints generally.

It is the BCGEU's view that the Tribunal's findings, particularly its findings of a "poisoned workplace" at NFPC, and management inaction in the face of numerous credible complaints of racial discrimination, are symptomatic of not only of a serious problem at NFPC, but also a broader dysfunction within the ACD that

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604-291-6030 (Fax)
1-800-946-0244 (T-F)



must be addressed. To that end, the BCGEU calls upon the Ministry of Public Safety & Solicitor General to institute an independent inquiry into the findings of the BC Human Rights Tribunal and the damaged corporate culture of the ACD.

It is the BCGEU's position that the damning findings and scathing assessment of the Tribunal cannot, and ought not to be, ignored. Only an independent inquiry with the authority to make recommendations can adequately ascertain why the disturbing events at NFPC occurred, how the ACD's culture of dysfunction continues to exist and, most importantly, how to fix it. We trust the Ministry of Public Safety & Solicitor General shares the BCGEU's concerns regarding these matters, and urgently requests a meeting to discuss them further.

Yours truly

A handwritten signature in cursive script that reads "Stephanie Smith".

Stephanie Smith
President

SS/QMD/II
MoveUP
Fairworth call for Inquiry

Enclosure

cc: Mr. Okenge Yuma Morisho, Deputy Minister, BC Public Service Agency

Morrison, Tessa PSSG:EX

From: s.22
Sent:
To: Minister, PSSG PSSG:EX; Minister, AG AG:EX
Subject: Former correctional officer Levan Francis

Categories: Direct Reply

[EXTERNAL] This email came from an external source. Only open attachments or links that you are expecting from a known sender.

Dear ministers,

I find the case of Mr. Francis an appalling violation of his human rights. Given the many years it took for BC to get to the point of deciding the case in his favour, you as my representatives have an obligation to ensure that he does not wait longer for compensation and that he and not lawyers receives a reasonable financial settlement.

Sincerely,

s.22



C575851

September 11, 2020

s.22

Dear ^{s.22}

Thank you for your email of ^{s.22} to the Honourable Mike Farnworth, Minister of Public Safety and Solicitor General, which has been forwarded to me for response. You wrote about a recent news article concerning a human rights case involving a former BC Corrections officer.

With respect to your comments regarding timing of the hearing and compensation, due to privacy concerns, I am unable to comment on the details of this matter while it remains before the Human Rights Tribunal.

I fully support the Minister's view that, as government, we have a duty to set an example and we need to do more to address broader issues of systemic racism. All people deserve to feel safe and respected in their workplace and BC Corrections encourages employees who experience or witness discrimination to speak up. Our organization continues to invest in training for all staff on bullying, harassment, and discrimination; diversity and inclusion; and, respectful workplaces.

Racism has no place in our province – or within BC Corrections. As we work together to build a better province, government will continue to stand up for the values shared by the vast majority of British Columbians – those of equality, inclusiveness, mutual respect, and unity.

Thank you for taking the time to share your perspective on this important matter.

Sincerely,

Stephanie Macpherson
Provincial Director

Protect communities, reduce reoffending

Ministry of Public Safety and Solicitor General	Corrections Branch Adult Custody Division	Mailing Address: PO Box 9278 STN PROV GOVT Victoria BC V8W 9J7	Location Address: 7th Floor, 1001 Douglas St Telephone: (250) 387-5098 Facsimile: (250) 952-6883
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Morrison, Tessa PSSG:EX

From: s.22
Sent:
To: Minister, PSSG PSSG:EX; justin.trudeau@parl.gc.ca
Subject: A human rights battle cost this jail guard his home and health. After 8 years, it's still not over

Categories: DM/ADM Reply

This email came from an external source. Only open attachments or links that you are expecting from a known sender.

Good morning Minister Mike Farnsworth

I read a disturbing article about a former B.C. corrections officer Levan Francis who's been fighting a human rights complaint over workplace discrimination in 2012. That's is shameful for a country like ours, which is supposed to be than this.

What is even more disturbing is your comment "The public safety ministry, which is headed by Mike Farnsworth, said there is "no place for racism within the provincial public service ... we recognize our duty to set an example and we know there is significant work to do to address broader issues of systemic racism."

What have you done do set an example for Levan Francis after 8 years?

If you recognize your duty, and that you have significant work to address and broader issues of systemic racism.

What's your framework?

What's your timeline?

Why does Levan Francis have to wait for 8 years !?

Do you find that's an acceptable time-line to have an issue like his to be resolved?

Why wasn't he given the opportunity to work elsewhere?

Why is the office the Human rights commission discriminating against Levan Francis with own discrimination complaint?

Have you not thought that maybe there needs to be an overhaul within the office of the Human rights commission?

I would greatly appreciate an answer to my questions Minister Farnsworth.

Thank you, and your advisors and all who may be reading this email!

s.22



C575889

September 3, 2020

s.22

Dear s.22

Thank you for your email of s.22 regarding a recent news article concerning a human rights case involving a former BC Corrections officer. I am responding on behalf of the Honourable Mike Farnworth, Minister of Public Safety and Solicitor General.

Due to privacy concerns, I am unable to comment on the details of the allegations while this matter remains before the Human Rights Tribunal, or matters relating to his employment. I fully support the Minister's view that as government, we have a duty to set an example and we need to do more to address broader issues of systemic racism. All people deserve to feel safe and respected in their workplace and BC Corrections encourages employees who experience or witness discrimination to speak up. Our organization continues to invest in training for all staff on bullying, harassment, and discrimination; diversity and inclusion; and respectful workplaces.

Our government is committed to building an inclusive society, including by:

- re-instating the BC Human Right Commission
- implementing the Resilience BC anti-racism network
- updating B.C.'s Police Act to address systemic racism within the outdated legislation
- developing new on-line, multilingual resources on what to do if you are a victim or bystander of racism

Racism has no place in our province – or within BC Corrections. As we work together to build a better province, government will continue to stand up for the values shared by the vast majority of British Columbians – those of equality, inclusiveness, mutual respect, and unity.

Thank you for taking the time to share your perspective on this important matter.

Sincerely,

Stephanie Macpherson
Provincial Director Adult Custody Division

Protect communities, reduce reoffending

Ministry of Public Safety and Solicitor General	Corrections Branch Adult Custody Division	Mailing Address: PO Box 9278 STN PROV GOVT Victoria BC V8W 9J7	Location Address: 7 th Floor, 1001 Douglas St Telephone: (250) 387-5098 Facsimile: (250) 952-6883
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Morrison, Tessa PSSG:EX

From: Farnworth.MLA, Mike <Mike.Farnworth.MLA@leg.bc.ca>
Sent: Monday, August 31, 2020 9:21 AM
To: Minister, PSSG PSSG:EX
Subject: FW: Systemic Racism in North Fraser Pretrial Centre

Categories: DM/ADM Reply

This email came from an external source. Only open attachments or links that you are expecting from a known sender.

Will share with MMF.
G.

From: s.22
Sent:
To: Farnworth.MLA, Mike
Subject: Systemic Racism in North Fraser Pretrial Centre

Dear Honourable Mike Farnsworth,

I was disappointed and angered to hear of the racist actions of Levan Francis' former coworkers at the North Fraser Pretrial Centre. Even more so to hear that since he left his position at the centre that those involved have been promoted, giving them even more power and opportunity to do harm.

How will you, as the Public Safety Minister, ensure this does not happen again and that those responsible for the inhumane attacks on Mr. Francis' race and physical being will be adequately dealt with?

I look forward to hearing your response.

Best wishes,

s.22



C576087

September 3, 2020

s.22

Dear s.22

Thank you for your email of s.22 regarding a recent news article concerning a human rights case involving a former BC Corrections officer. I am responding on behalf of the Honourable Mike Farnworth, Minister of Public Safety and Solicitor General.

Due to privacy concerns, I am unable to comment on the details of the allegations while this matter remains before the Human Rights Tribunal. I fully support the Minister's view that as government, we have a duty to set an example and we need to do more to address broader issues of systemic racism. All people deserve to feel safe and respected in their workplace and BC Corrections encourages employees who experience or witness discrimination to speak up. Our organization continues to invest in training for all staff on bullying, harassment, and discrimination; diversity and inclusion; and respectful workplaces.

Racism has no place in our province – or within BC Corrections. As we work together to build a better province, our government will continue to stand up for the values shared by the vast majority of British Columbians – those of equality, inclusiveness, mutual respect, and unity.

Thank you for taking the time to share your perspective on this important matter.

Sincerely,

Stephanie Macpherson
Provincial Director Adult Custody Division

Protect communities, reduce reoffending

Ministry of Public Safety and Solicitor General	Corrections Branch Adult Custody Division	Mailing Address: PO Box 9278 STN PROV GOVT Victoria BC V8W 9J7	Location Address: 7 th Floor, 1001 Douglas St Telephone: (250) 387-5098 Facsimile: (250) 952-6883
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Morrison, Tessa PSSG:EX

From: Farnworth.MLA, Mike <Mike.Farnworth.MLA@leg.bc.ca>
Sent: Monday, August 31, 2020 11:37 AM
To: Minister, PSSG PSSG:EX
Subject: FW: What are you doing to help Levan Francis?

Categories: DM/ADM Reply

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Here is the other one.

From: s.22
Sent:
To: Farnworth.MLA, Mike
Subject: What are you doing to help Levan Francis?

Hi Mike,

As my elected official, I'd like to know how you're supporting Levan Francis and making changes to ensure no one should be treated or put through this—here, or anywhere in BC. In Canada?

You're quoted as saying there's "no room for racism in the provincial public service ... we recognize our duty to lead by example and we know there is important work to be done to address the broader issues of systemic racism." That's great, but what are you doing to help Levan and others like him?

s.22



C576118

September 11, 2020

s.22

Dear^{s.22}

Thank you for your email of ^{s.22} regarding a recent news article concerning a human rights case involving a former BC Corrections officer. I am responding on behalf of the Honourable Mike Farnworth, Minister of Public Safety and Solicitor General.

Due to privacy concerns, I am unable to comment on the details of the allegations while this matter remains before the Human Rights Tribunal. I fully support the Minister's view that as government, we have a duty to set an example and we need to do more to address broader issues of systemic racism. All people deserve to feel safe and respected in their workplace and BC Corrections encourages employees who experience or witness discrimination to speak up. Our organization continues to invest in training for all staff on bullying, harassment, and discrimination; diversity and inclusion; and respectful workplaces.

Our government is committed to building an inclusive society, including by:

- o re-instating the BC Human Right Commission
- o implementing the Resilience BC anti-racism network
- o updating B.C.'s Police Act to address systemic racism within the outdated legislation
- o developing new on-line, multilingual resources on what to do if you are a victim or bystander of racism

Racism has no place in our province – or within BC Corrections. As we work together to build a better province, government will continue to stand up for the values shared by the vast majority of British Columbians – those of equality, inclusiveness, mutual respect, and unity.

Thank you for taking the time to share your perspective on this important matter.

Sincerely,

Stephanie Macpherson
Provincial Director

Protect communities, reduce reoffending

Ministry of
Public Safety and
Solicitor General

Corrections Branch
Adult Custody Division

Mailing Address:
PO Box 9278 STN PROV GOVT
Victoria BC V8W 9J7

Location Address:
7th Floor, 1001 Douglas St
Telephone: (250) 387-5098
Facsimile: (250) 952-6883

Reporter: CBC Vancouver
Due: 25AUG20

Request: Francis Levy's claims regarding staff promotions regarding staff named in his HRT ruling and systemic racism

Approved response on behalf of government – (PSA/legal/AG/GCPE/MO approved bullets

- Racism has no place in our province — or within the BC Public Service, which includes BC Corrections.
- All people deserve to feel safe and respected in their workplace and government encourages employees who experience or witness discrimination to speak up.
- Due to privacy concerns, we cannot comment while this matter remains before the tribunal in remedy phase.
- As government we recognize our duty to set an example and we know there is significant work to do to address broader issues of systemic racism.
- As we work together to build a better province, government will continue to stand up for the values shared by the vast majority of British Columbians — those of equality, inclusiveness, mutual respect and unity.

What is the B.C. government doing to address racism?

- We recognize there's still significant work to do to address systemic racism.
- Our government is committed to building an inclusive society, including by:
 - Re-instating the BC Human Right Commission
 - Implementing the Resilience BC anti-racism network
 - Updating B.C.'s *Police Act* to address systemic racism within the outdated legislation
 - Developing new on-line, multilingual resources on what to do if you are a victim or bystander of racism
- We will continue to defend the values of diversity, equality and mutual respect as we work together to build a better province.

Follow up _____

Request: provincial legal costs

Response on background:

Legal costs are privileged and as such cannot be disclosed while litigation is ongoing.

Coverage:

A human rights battle cost this jail guard his home and health. After 8 years, it's still not over

<https://www.cbc.ca/news/canada/british-columbia/levan-francis-bc-corrections-discrimination-legal-case-cost-1.5690819>

- I can confirm that BC Corrections is aware of the complaint Mr. Francis has filed with the B.C. Human Rights Tribunal.
- As Attorney General, it would be inappropriate for me to comment on any aspect of the case while the matter is before the Tribunal.
- However, I assure you BC Corrections takes the health and wellbeing of its correctional officers very seriously and works to promote a respectful work environment that is free of any form of discrimination.
- Correctional officers are peace officers under the law and are accountable for their behavior under the Professional Standards of Conduct for Corrections Branch Employees.
- BC Corrections' hiring standards are stringent, and are very similar to the hiring process for other law enforcement agencies.
- If an officer's actions are not consistent with the professional standards of conduct, there are a range of disciplinary options available including verbal and written reprimands, suspensions, retraining and dismissal.