Arbitration Award

IN THE MATTER of an Arbitration re: a grievance dated November 24, 2021 (NLTA-068) alleging that the Employer has breached articles 29.07, 39.01 and 58.01 of the Collective Agreement, as well as a Memorandum of Settlement, Harassment and Violence Prevention Policies brought under Occupational Health and Safety legislation and the regulations thereunder (re Third Party social media posts)

BETWEEN:

Newfoundland and Labrador Teachers' Association
The "union"

and

Newfoundland and Labrador English School District
The "employer"

Arbitration Board:

Sheilagh M. Murphy, Q.C. – Chair
Janet Vivian-Walsh - Member
Donald Ash – Member

St. John's, NL

Appearances:

Kyle Rees – Counsel for the Union
Bernadette Cole Gendron – Counsel for the Employer

Hearing Dates: April 27-28, 2022

Date of Decision: August 15, 2022

AWARD

Summary

1. The union represents a bargaining unit of teachers employed by the Newfoundland and Labrador English School District ("the employer" or "the District"). On November 24, 2021, the union filed a grievance on behalf of a teacher ("the grievor" or "the teacher" herein) alleging several breaches of the Collective Agreement (articles 29.07, 39.01, and 58.01), a breach of the *Safe and Caring Schools Policy,* a breach of District Policies on harassment, a breach of a Memorandum of Settlement (the "MOS") and a breach of the *Occupational Health and Safety Act* RSNL 1990 c. O-3. In essence, the complaint is that the employer failed to adequately and appropriately respond to abusive online commentary by Third Parties against the grievor, thereby breaching the Collective Agreement, a Memorandum of Settlement concerning third party harassment, and the policies written pursuant to the *OHSA*.

2. The abusive posts published comments about the teacher, and others posted the teacher's name and photograph and identified the teacher's spouse. The abuse happened on more than one Facebook site. The teacher and their spouse and family lived and worked in a small community in the province of Newfoundland and Labrador. The total of the efforts conducted by the employer to stop the online abuse by the Third Parties against the teacher was that the employer's legal counsel went to a single Facebook site on which the abusive conduct was occurring and clicked a box to request that the posting be taken down and "report" the abusive conduct.

3. The Arbitration Board has found that the grievor was harassed and abused by the Third Parties, as defined in the policies and the Memorandum of Settlement; that the District's response to the harassment was to ask a single moderator of a single Facebook group to take down an offensive post about the Grievor; and that the District's response did not fulfil all the criteria set out in the Memorandum of Settlement. The Majority of the Arbitration Board has found that the District therefore failed to fulfil its obligations under the collective agreement, the harassment policy and Memorandum of Settlement; and that the grievor suffered damages as a result of the District's failure to seek removal of the online posts. The majority of the arbitration board has awarded damages to the Grievor in the amount of $2,500.00 The minority has provided a dissent.

Preliminaries

4. At the beginning of the hearing, the parties confirmed the following:

   i) The Arbitration Board is acceptable to the parties.

   ii) The grievance procedure has been properly followed or requirements have been waived.

iii) There are no preliminary objections with respect to jurisdiction.

iv) There are no preliminary issues.

v) In the event that the parties cannot agree on the interpretation of the award, or in the event that there is a question on compensation arising from the award, the Arbitration Board will remain seized of the matter for a period of 60 days once the Arbitration Board has been given notice by the parties following the release of the award that there is such disagreement or question arising.

vi) The time limits for filing the award are waived.

vii) Witnesses were not excluded from the hearing.

viii) The "record" shall consist of the Arbitration Award and any exhibits entered at the Arbitration. Exhibits AS #1 and AS #2 have been admitted only for the limited purpose of showing the time and date on which the documents were received by the employer. Their contents are otherwise not part of the record.

5. The Union called one witness – the grievor. The employer called two witnesses: Ms. Alicia Sainsbury, Director of Human Resources with NLESD, and Mr. Ed Walsh, the Associate Director of Education - Programs and Human Resources.

Exhibits

6. The following exhibits were entered and form part of the record:

Consent Exhibits

C#1 The Agreed Statement of Facts – with Schedules (plus addition to tab 8)
C#2 Original Grievance November 24, 2021
C#3 Stage 1 denial, December 14, 2021
C#4 Stage 2 Grievance, December 16, 2021
C#5 Stage 2 denial, December 21, 2021
C#6 Referral to arbitration January 11, 2022
C#7 Memorandum of Settlement ("MOS") (with prejudice) June 27, 2019
C#8 NLESD Harassment Policy
C#9 NLESD Harassment Policy Regulations
C#10 NLESD Harassment Guidelines
C#11 NLESD Workplace Violence Policy
C#12 NLESD Workplace Violence Procedures
C#13 NLESD Safe and Caring Schools Policy

Grievor

[Grievor] #1 Copy of the Grievance

Alicia Sainsbury

AS#1 Email from MB to Sainsbury, dated November 10, 2021; Response from Sainsbury dated November 15, 2021 acknowledging receipt and requesting further information (9:45 a.m.)

AS#2 Email from CH to Sainsbury dated November 15, 2021 at 11:51 p.m.; Sainsbury's response of November 24, 2021 3:17 p.m.

Edward Walsh

EW#1 Copy of Template cease-and desist letter (inappropriate behaviour on school property)

EW#2 Copy of template cease-and-desist letter – recent behaviour while in attendance at school or in relation to communication with school / District staff. [statements, verbal abuse, commentary]

EW #3 Copy of template cease-and-desist letter re posting / commenting on someone else's Facebook page [threat]

EW 2.01 July 2, 2020 Memo to all District employees re updated regulations and policies

Evidence

7. The union and employer provided an agreed statement of facts for those facts that were not in dispute. They are below and have been redacted where indicated to protect the privacy of the grievor and their family:

Agreed Statement of Facts

(i) This is an Agreed Statement of Facts between the Parties to be used in the above-noted arbitration. The Parties may choose to call evidence in addition to the facts contained herein, but will not lead evidence or argument to contradict or dispute the facts herein.

(ii) The Grievor, [Teacher] (hereinafter 'the Grievor') is a permanent teacher with the Newfoundland and Labrador English School District (hereinafter 'the District'). From 2011 to 2020, the Grievor was in a permanent teaching position at [School Name Redacted] Middle School. In 2020, the Grievor was awarded a permanent administrative teaching position (department head) at [School Name Redacted], in [community name redacted], to commence in September 2020.

(iii) In the 2021 Census of *Population* conducted by Statistics Canada, *[community name redacted]* had a *population* of [redacted – less than 10,000] people.

(iv) On August 19, 2020, the Grievor was placed on leave with pay in accordance with Article 10.06 of the Provincial Teachers' Collective Agreement (hereinafter 'the Collective Agreement', attached hereto as **Schedule 1**) because the District had received notification from the RCMP that an investigation had been commenced into an allegation made against the Grievor by a student, 'AE'.

(v) On March 19, 2021, the RCMP advised the Grievor and the District that they had concluded their investigation arising from AE's complaint and that no charges were being laid.

(vi) From the date that the RCMP closed its investigation, i.e., March 19th, 2021, until November 4th, 2021 the District conducted its own investigation into the Complaint of AE. That investigation eventually resulted in a finding that the complaint of AE could not be substantiated. The Grievor was notified in the afternoon of November 4, 2021 that the investigation was over and [the grievor] would be returning to the workplace. The investigation was closed.

(vii) The duration of the District's investigation was the subject of a previous grievance and arbitration held February 17th and 18th, 2022 (hereinafter the 'Delay Arbitration'). The Decision from the Delay Arbitration is attached hereto as **Schedule 2.** The majority of the panel found that the investigation into the Complaint was unreasonably delayed by the District, and that the delay resulted in prejudice to the Grievor.

(viii) On or about November 2, 2021, [the Grievor's] NLTA representative, Ms. Miriam Sheppard, contacted Ms. Alicia Sainsbury, Director of HR with the

NLESD, to advise that there were “rumblings” that the family of AE had said that they were going to do whatever they can to keep the Grievor out of school. Ms. Sainsbury responded that same day to clarify the source of the “rumblings”. Ms. Sheppard also expressed concern about the possibility that the complainant’s family was discussing the investigation publicly and/or with parties who were not involved. [Email of November 2 attached as **Schedule 3**.]

(ix) On or about November 5, Ms. Alicia Sainsbury spoke to Lynn Moore, counsel for AE and their family.

(x) Following the conclusion of the investigation discussed in the Delay Arbitration on November 4th, 2021, the Grievor was scheduled to return to work. [The Greivor’s] first day back at [School Name Redacted] was November 15th, 2021.

(xi) On or about 6:46 am, November 16, 2021, the Grievor emailed Ms. Sheppard various Facebook postings that [they] had been made aware of. [attached as **Schedule 4**].

(xii) Before attending school on November 16, the Grievor contacted Ms. Sheppard, who immediately reached out to Ms. Sainsbury by email and text. Ms. Sheppard asked for an opportunity to discuss matters that morning. She forwarded to Ms. Sainsbury a screenshot of a Facebook post that had been posted on the Concerning [community name redacted] Facebook Group by [SH], whose children attend [community name redacted] schools. This is a “private” group, which has over [a number of members equating to 75% of the population of the community’s population] members. The posts stated: “*Why do the school board think it’s ok to send a teacher back to school when[they] has inappropriately touched students on different occasions and made them feel uncomfortable. Why is it that the student/ students is being denied their education because of this and nothing is done to protect our kids and students from this happening again. We as a community need to stand together and get people like this out of our school system. If anyone has had this encounter, now is the time to speak up and get the necessary changes made for our kids. If you are not comfortable doing this publicly you can reach out in private. WE NEED TO BE THE VOICE FOR OUR CHILDREN!!*” [email and screenshot of post attached as **Schedule 4**].

(xiii) Approximately an hour later, Ms. Sheppard advised both Ms. Sainsbury and Mr. Ed Walsh, the AD responsible for Human Resources and Programming, that there were "at least three posts slandering [the Grievor], and that [their] spouse, the principal at [School Name Redacted], "has now been brought into it as well." Ms. Sheppard advised that she looked forward to discussing the Board's actions. 10 minutes later, Ms. Sheppard again emailed Mr. Walsh and Ms. Sainsbury, advising that there were more than three posts and that there was a whole thread of posts calling for people to go to the police, contact government representatives, calling for a public shaming and saying that the Board should do something. [Those emails and posts are attached as **Schedule 5. The third attachment is the email of 6:58 am in Schedule 4**].

(xiv) At 10:27 am, Ms. Sheppard forwarded more posts to Ms. Sainsbury and Mr. Walsh. The email and posts are attached as **Schedule 6.** Ms. Sainsbury texted Ms. Sheppard advising that she would "touch base in a bit" as Janet [Wiseman] had more information. At 11:45 am Ms. Sainsbury advised Ms. Sheppard that Mr. Walsh would be contacting her.

(xv) The Grievor attended work that morning on November 16th, 2021 and continued to perform [their] duties. Meanwhile, the social media postings continued, including publication of [their] name and photograph without consent.

(xvi) Ms. Sheppard contacted Ms. Sainsbury and Mr. Walsh at 11:09 am advising that "Now they have posted [Grievor]'s name and picture. This needs to stop." One minute later, Ms. Sheppard forwarded another post, and advised, "Another one, attacking [grievor's spouse]." "[name redacted]" is the Grievor's spouse and is a principal with the District. Both of these emails are attached as **Schedule 7.**

(xvii) In the morning of November 16th, 2021, Ms. Sheppard was contacted by Mr. Walsh. Mr. Walsh advised that there had been another complaint and the police were investigating. Ms. Sheppard advised that she would advise the Grievor of this development, to be followed by a call from the District. She asked that Mr. Walsh contact the police regarding the postings, that Facebook and individual site administrators be contacted, and that the District contact individuals who had posted. Mr. Walsh stated that he would get back to Ms. Sheppard.

(xviii) At 2:31 pm on November 16, Ms. Sheppard advised Mr. Walsh that the Grievor wants to be considered for positions outside of [community name redacted]. Mr. Walsh replied "As indicated yesterday, when the investigation has concluded and findings determined the District will consider [Grievor's] request." These emails are attached as **Schedule 8**.

(xix) Midafternoon on November 16, Mr. Walsh advised Ms. Sheppard that the District had contacted Facebook as well as the specific site. Ms. Sheppard thanked him for letting her know and asked if any other action had been taken.

(xx) In the afternoon of November 16th, 2021, the Grievor was contacted at work by Ms. Sainsbury, who advised [them] that the District had received notice from the RCMP that [the Grievor] was under investigation for allegedly assaulting a former student (later determined to be [KH]) and that [they] would be placed on 10.06 leave pending the conclusion of the police investigation and any eventual investigation by the District.

(xxi) [They have] remained on 10.06 paid leave ever since. To the best of the Parties knowledge, the RCMP investigation has not concluded, although they also understand that the RCMP have yet to interview any witnesses.

(xxii) Sometime on November 16, the original abusive social media posts were removed from Concerning [community name redacted] by the moderator (a private citizen of [community name redacted], HD). By that time, the posts had been shared at least 40 times. Other posts, including [SC]'s requests soliciting other individual complaints about the Grievor, remained. At the time of removal, [H.D] posted, "After many inboxes and many, many reports I was left with no option to delete a particular post. And a new rule has been created. I will not be liable for allowing certain post on this site I'm also not here 24/7 to monitor." The "new rule" he referenced was "Multiple Reports: If the admin gets multiple inboxes and multiple reports about a particular post they will be deleted." Those excerpts from the Facebook page are attached hereto as **Schedule 9.**

(xxiii) A complaint on November 16 to [School Name Redacted] administration and District staff stated: I am writing to you concerning, your current principal and [their spouse] to immediately be removed [sic] on the schools grounds [sic] [Teacher] needs to be removed from the premises immediately. There are children that do not feel comfortable around [them]

and has been touch [sic] students inappropriately. I hope you will read all the reports that are flooding your email. And voice mails. Please keep our children safe. This post is attached as **Schedule 10**.

(xxiv) On November 16, at 12:38 pm, Ms. Sheppard emailed Ms. Sainsbury and Mr. Walsh a copy of a posting in which a commentator states, in response to Ms. Howell's original post, "Need to post a picture of the pervert so everyone will know what [they] looks like." Email and post is attached as **Schedule 11**. The Grievor's photo was subsequently posted.

(xxv) In the afternoon of November 16, the Grievor became aware that abusive posts, in which [they were] identifiable, had started on a different, public Facebook page, [community name redacted]'s Public Information. These posts were sent to Ms. Sainsbury and Mr. Walsh at 2:35 pm. The post attached to that email is a repost by [S.C.] who is understood to be a friend of AE's mother, of [H's] post detailed above. Other concerning posts were forwarded to Mr. Walsh and Ms. Sainsbury on November 16. This post is attached hereto as **Schedule 12.**

(xxvi) At 6:03 am on November 17, Ms. Sheppard emailed Ms. Sainsbury and Mr. Walsh, and attached a social media post from [SC] (understood to be a friend of AE's mother), which stated: I have a question: How many people got a response from the school or District when they reached out about the incident posted on this group last night. A child right now is not able to attend school, (might I add it's the only school available to her.) How is that fair? Please community, they need your support. This is not only to protect one child it's to protect every child. *Please do not post names or pictures. I want to get a response to the question above. If you do that it will be deleted." Ms. Sheppard wrote: "I suggest that the Board needs to speak to this woman. See below." Ms. [C] had also previously reposted Ms. [H]'s original post in the public forum. Both this post and Ms. Sheppard's emails advising of same are attached as **Schedule 13**.

(xxvii) On November 17, at 11:45 am, Ms. Sheppard asked Ms. Sainsbury if they could book a time to speak about this matter. When Ms. Sheppard spoke with Ms. Sainsbury, Ms. Sainsbury advised that a parent of a former student [[MiB] was the parent, KH the student] had contacted her the day before to make a complaint about the Grievor, specifically an allegation that the Grievor had assaulted her daughter several years before. Ms. Sainsbury advised Ms. [B] that as her daughter was over eighteen, she would need to

make her own complaint. [At the time of this contact, Ms. H would have been 21 years old.] Ms. Sainsbury committed to speak to Mr. Walsh about whether there would be any further District action with respect to the social media posts.

(xxviii) Following the dismissal of the original complaint on November 4th, 2021, the District spoke with the lawyer for AE and her family, Lynn Moore and advised that they are not permitted to disclose the information from the concluded investigation and cautioned them as to the potential consequences of same. GE expressed concerns with the District that her daughter was going to have to attend the same school as the Grievor following the dismissal of the complaint.

(xxix) On November 18, Ms. Sheppard wrote Mr. Walsh and Ms. Sainsbury, forwarding posts and stating: "*Pls see attached. [SC] seems to be leading her own investigation. Pls advise of your intention in this regard. I am not sure who the other postings relate to, but one is not very complimentary with respect to the admin. This needs to end. The teachers remaining at [school name redacted] are already very stressed by the whole situation, as reported to us. As I mentioned to Alicia, I do not expect Board officials to contact every poster. However, I do think it would be appropriate for you, in the interests of protecting your teachers from abuse and harassment, and the integrity of your own investigation, to contact the individuals who are leading this mob (SC at this time.) The recent posts could also be reported to the admin/ FB. I have also asked previously that the posts in question (over the last few days) be brought to the police by the employer, as it might be argued that these individuals are interfering with a police investigation and engaging in defamatory conduct in cases where the individuals complained about are identifiable. Alicia advised me today that the Board did not intend to take further action at this time. Please advise if the above and the continuation of the concerns has caused you to reconsider*.' Ms. Sheppard forwarded posts again, of which one was a post from Ms. [C], asking people if there were "any responses today" [from the District] and to "inbox her". A copy of that post, and Ms. Sheppard's email regarding same is attached as **Schedule 14**.

(xxx) There were several different posts across two different Facebook groups. One Facebook Group, Concerning [community name redacted] is a "private" group, which has [a number of members equivalent to 75% of the population of the community]. The other group, [community name

redacted]'s Public Information, is a public group. Those posts, made over the course of November 15th-18th, 2021 are attached hereto as **Schedule 15** to supplement the post already provided to show additional comments. Posts stated, without limitation, that the Grievor had "inappropriately touched students on different occasions, that students were being denied their education and that the community needed to act to get "people like this", i.e. the Grievor, out of the school system. The Grievor was soon further identified as the principal's [spouse]. There were calls for [the Grievor's] picture to be posted, so that "everyone would know what [they] looks like." Later, the Grievor's name and photo were posted. The Grievor was referred to as a "sicko", "predator", "pervert", "scumbag" and "dirtbag". [Their] picture was subsequently published in the post.

(xxxi) The Facebook postings were 'reported' to Facebook by the District using the prompts located on the Facebook website to report such content. This 'reporting' was done by the District, as well as many community members who viewed the content.

(xxxii) It is the understanding of the parties that G.E.is friends with MB, who is the mother of TS, who also filed a dismissed complaint against the Grievor.

Addendum to Agreed Statement of Facts

(xxxiii) Sometime in the morning of November 16, 2021, Bernadette Cole Gendron, counsel for the District reported the site "Concerning [community name redacted]". While the posts could not be accessed without joining the group, the group itself could be reported from the main page that is presented upon searching for the group. This was done by clicking on the 'report group' option which brings up a list of issues you can flag under "I'm concerned about this group", one option, which was the option chosen was 'harassment or bullying'.

Additional facts

8. Ms. Alicia Sainsbury testified on behalf of the Board. She confirmed that she received the complaint from MiB on November 10, 2021, but was off work and it was in her junk folder and she did not see it until November 15, 2021. She responded to MiB's email and asked the status of the complaint with the RCMP and asked for the name of the investigating officer. She also asked for MiB's daughter KH to provide a complaint. On November 24, 2022 Sainsbury received

KH's complaint. She says she did not see it until then because it had gone to her "spam" folder or "junk" folder at work. Until this matter, she rarely, if ever, checked her "spam" and / or "junk" email folders.

9. The allegations in MiB and KB's complaint referred to matters from 2013. Neither Sainsbury nor anyone else at the Board provided a copy of MiB's complaint or her daughter KB's allegations to the Grievor, his union, or his legal counsel. Sainsbury forwarded the complaints to the RCMP. She does not, on behalf of the District, begin any investigation into allegations until the RCMP has completed its investigations. Therefore, she did not provide a copy of the complaint to the Respondent teacher, because he was not yet the subject of a District investigation. She said, "the school board's investigation had not commenced, so I didn't send it to [the Grievor]."

10. If the District had started an investigation, she would have first interviewed the complainant to obtain a "more fulsome statement" and then that statement would have been provided to the grievor. Because the District had not yet started an investigation, the grievor was not provided with a copy of the complaint, in spite of the District having been given a copy of the complaint and having forwarded the complaint to the RCMP.

11. With respect to the interactions concerning the Facebook posts, Ms. Sainsbury confirmed the following:

- She was aware that the violence prevention policy does not require there to be actual violence in order for the violence prevention policy to be triggered.
- She has sent cease-and-desist letters to parents and others in the past when there has been abuse or bullying or harassment or threats against a teacher.
- She didn't send a cease-and-desist letter to SC or SH in this case because (i) Mr. Walsh said he was going to follow up with Ms. Sheppard himself directly and (ii) because she was not directed to do so by Mr. Walsh. She does not send these letters without direction from Mr. Walsh after consultation with District administration and counsel. Ms. Sainsbury added that, in any event, in her opinion, there was no way to send a letter to every single person who was posting on the two sites.
- Ms. Sainsbury admitted that Ms. Sheppard, on behalf of the grievor, identified the ringleaders of the online bullying and harassment to the District. She admits that she and the District did not contact the ringleaders.

Ms. Sainsbury made no attempt to determine whether those ringleaders were parents of children who attended the school.

- Ms. Sainsbury testified that her focus was only on removing the grievor from the workplace once she had been notified that the RCMP had opened another investigation.

12. Ms. Sainsbury also testified that the District does not have a presence on Facebook or any other online social media, except Twitter. She has no ability to monitor online discussion about the grievor or other teachers on Facebook. She does not have a separate Facebook account for work. She was able to "creep" the sites brought to her attention by Ms. Sheppard through her own personal Facebook account, but she did not want to join the Facebook groups where the comments were being made. She made no attempt to join the groups, post in them, or to see if the District could join the groups, or post in them, or intervene in the online discussion.

The harassment policy and the MOS

13. Ms. Sainsbury confirmed that as a director of HR, she helped draft the workplace harassment policy. She confirmed that spreading rumours about someone or making statements damaging to a person's reputation is considered harassment under the policy. She would agree that based on what she saw posted online, it "certainly could have constituted harassment." Had she investigated it, she thinks that based on the information she had, "it's plausible that I would have said this was harassment." She was unwilling to categorize it as harassment or abusive commentary without conducting a formal investigation.

14. Ms. Sainsbury says that it would not have been her job in isolation to activate the workplace violence policy after viewing the online posts. It would have been in conjunction with Mr. Walsh. She admits that it was only after the second or third email from Ms. Sheppard on November 16, 2021 that she sent the emails from Ms. Sheppard to Mr. Walsh for input.

15. Ms. Sainsbury is aware that there were changes to the workplace harassment policy due to other teachers having been harassed on social media. Ms. Sainsbury confirmed that she is a director of HR, that she was aware of the Memorandum of Settlement outlining the District's obligations with respect to harassment of teachers on social media insofar as she is aware there was a case that led to the settlement, but she also admitted that she is not familiar with the MOS itself and admits that she had not read the MOS prior to this arbitration.

16. Ms. Sainsbury and her supervisor Mr. Walsh did not contact the RCMP to ask them to advise the people doing the online abuse, bullying and harassment of the grievor to cease doing so. During her evidence, she said that she "didn't think this was a situation that warranted contacting the police." Later, she testified that it was because the NLTA had already advised the District that the grievor had contacted the RCMP about the online commentary that she didn't contact the RCMP to ask them to contact the individuals who were conducting the online harassment and abuse of the grievor. Her evidence on this point was inconsistent.

17. Ms. Sainsbury acknowledged that in her nine years in the job, teachers have been attacked more and more frequently on social media by parents in recent years. She agreed that it is important to teachers and the NLTA (per the memorandum of settlement) that the employer be seen to be going to bat for employees when they are harassed. She qualified this by saying this needs to be balanced with the District's ultimate responsibility to students.

18. Problematic in her testimony was that Ms. Sainsbury said, "the harassment could be founded in legitimate allegations." She clarified later, when asked whether she meant that if the harassment were founded in legitimate allegations against a teacher that would make harassment and online abuse of the teacher acceptable, she admitted that it had been a "poor choice of words" on her behalf. Nevertheless, this sentiment – that perhaps the District personnel may have felt harassment could be founded in legitimate allegations and that such harassment in those circumstances might be acceptable or somehow justified– was at the core of the union's argument. Ms. Sainsbury clarified her comment by saying that sometimes people assume something is harassing behaviour when it isn't. She reiterated that the definition of harassment is "repetitive behaviour, unless its egregious behaviour."

19. When asked whether there is a difference between inappropriate behaviour in email versus a social media post, and how it will be dealt with by the District, Ms. Sainsbury was clear that there is no difference. Some parents have been sent correspondence by the District because of things that were initiated through social media - it depends on the information. No correspondence was sent by the District in this case.

20. Ms. Sainsbury's evidence was that the Respectful Workplace Policy does not apply to parents or third-party members of the public because the board cannot enforce the policy against them. She said that the District may investigate and find there is harassment, but what they can do to the offending parent or third party is limited – they can't, for example, discipline the third party. The District has no ability to require the participation of a third party in an investigation under the policy. Ms. Sainsbury admitted that she is familiar with the policy and agrees that the policy

states specifically that the employer can request that the third party remove harassing materials or posts from social media sites. She also admitted that the District did not, in this case, contact any of the third parties who were making the harassing posts and ask them to remove the posts from the sites.

21. Overall, Ms. Sainsbury's evidence painted a picture of an individual who had not reviewed the policies or the MOS that had a direct bearing on how they were performing their duties. Ms. Sainsbury would not make admissions, which lessened her credibility. Even in the face of the District admitting that the online commentary constituted abuse and harassment of the grievor, she would not agree with the characterization that the online commentary was bulling or harassing or abusive in accordance with the definitions of same under the policy without first conducting a formal investigation into whether the statements were harassing or abusive. Overall, her evidence was essentially that she could do nothing without Mr. Walsh's express say-so, that she did not seek out his input until she had received several requests from Ms. Sheppard, and that she was aware there had been changes to policy while she was on leave but had not taken the time, in the intervening two years, to read them.

Mr. Walsh's evidence

22. Mr. Walsh also provided *viva voce* evidence in addition to the agreed statement of facts. Much of his evidence accorded with that of Ms. Sainsbury and with what was in the agreed facts. Any further evidence is included below in the analysis.

Grievor's evidence

23. The grievor testified on their own behalf, in addition to the information provided in the agreed statement of facts. Their evidence was clear, cogent, and transparent. The arbitration panel found them to be a credible and forthright witness. The evidence was, understandably, fraught with emotion at times, but it did not give the impression of being exaggerated or untruthful. The grievor's evidence as to what happened in the days leading to the date in question and the steps taken following the online post accorded with that of the other witnesses as articulated in the agreed statement of facts.

24. The grievor provided specific evidence on the effect of the social media posts on them as well as the effect of the District's response, or lack thereof, on them and their family, including their decision at 2:31 on November 16, 2021 to request to be considered for positions outside their community. That evidence is included in the analysis below.

Arguments and analysis

25. The parties agreed as to the issues to be determined. Each is discussed below

I. The online statements about the grievor were harassment under the MOS, the Collective agreement, and the Violence and Harassment Prevention policies.

26. The parties agreed in their arguments that the postings by the Third Parties constituted online harassment of the grievor. In particular, the posters, led by SC and SH posted the grievor's name, photo, home town, spouse's name and occupation, and accused them of being a "sicko", "predator", "pervert", "scumbag" and "dirtbag," among other things, and commented that they should not be permitted in the school and that they should be run out of the community.

27. Ms. Sainsbury's evidence was that she had helped draft the workplace harassment policy. She confirmed that spreading rumours about someone or making statements damaging to a person's reputation is considered harassment. She would agree that based on what she saw posted online, what was said about the Grievor "certainly could have constituted harassment." All other witnesses agreed that accusing someone of being a "sicko", "predator", "pervert", "scumbag" and "dirtbag" would constitute harassment.

28. Apart from Ms. Sainsbury's equivocation on whether harassing commentary can be considered harassment until a full investigation has been undertaken, all parties at the hearing agreed that the third-party comments in and of themselves constituted harassment, pursuant to the definition in the Policy and in the MOS. Mr. Walsh agreed that the comments were "abusive" towards the Grievor.

29. The Safe and Caring Schools Policy defines abuse as:

> Abuse means to ill-use, to misuse, or to insult, in a manner that endangers an employee's job or reputation, undermines performance, or threatens the economic livelihood of an employee. Abuse includes, but may not be limited to, verbal or psychological abuse. (Physical abuse would be considered "violence" in accordance with the provisions of this policy.)
>
> - Verbal abuse is any use of language to undermine someone's dignity or security through insults or humiliation.

- Psychological abuse is a form of mistreatment that causes mental or emotional pain or injury and includes, but is not limited to: statements or actions that humiliate or belittle; insults; and isolation.

30. The Collective Agreement articulates that the School Boards will develop and implement policies pertaining to workplace harassment and violence. The District had a Respectful Workplace / Harassment Policy and a Safe and Caring Schools Policy which predates the current collective agreement. Specifically, article 29.07 states:

> 29.07 The School Boards shall, prior to the expiration of this agreement undertake a review of and/ or develop and implement policies regarding school violence and dealing with students and parents who have exhibited violent and abusive behaviour. In reviewing and / or developing these policies, the School Boards will seek input from the Association, school administrators and other personnel who are deemed to have a legitimate role in prevention, intervention, and assessment activities.

31. From there, the Prevention of Workplace Violence policy (policy 811), was born.

32. The Collective Agreement discusses and defines harassment. In particular, it states:

> 58.01 The Boards and the Association recognize the right of all teachers to work in an environment free from harassment **and shall work together to ensure that harassment is actively discouraged. All reported incidents of harassment shall be thoroughly investigated as quickly and as confidentially as possible. The Employer agrees to take reasonable steps to ensure that the harassment stops and that individuals who engage in such behaviour are dealt with appropriately and / or disciplined.** The Employer and the Association agree that the victims of harassment shall be supported, and protected, where possible, from the repercussions which may result from a complaint. (Emphasis added)
>
> 58.02 For the purpose of this Article, harassment shall be defined as follows:

> Harassment of a personal nature is any behaviour or activity that endangers and employee's job, undermines performance, or threatens the economic livelihood of the employee, and may be based on race, colour, nationality, ethnic origin, social origin, religious creed, religion, age, disability, disfigurement, sex, sexual orientation, gender identity, gender expression, marital status, family status, source of income and political opinion or Association status.

33. The MOS arose as a result of grievances filed by other teachers as a result of the online harassment they faced at the hands of Third Parties (parents) and the District's response to their allegations of harassment. The settlement, as confirmed by Mr. Walsh, was a settlement of the interpretation of the District's responsibilities under the collective agreement and the policies in the event of teachers facing online harassment by parents.

34. The parties agreed, and the panel unanimously confirms, that the online posts against the grievor in this case constituted abuse and harassment of the grievor under the Policies, the MOS, and the Collective Agreement.

II. The employer's response to the harassment was limited and fell short of the response required under the MOS

35. The parties agreed that the employer's response to the harassment of the grievor by the Third parties was articulated in the agreed facts. This bears repeating:

> Sometime in the morning of November 16, 2021, Bernadette Cole Gendron, counsel for the District reported the site "Concerning [community name redacted]". While the posts could not be accessed without joining the group, the group itself could be reported from the main page that is presented upon searching for the group. This was done by clicking on the 'report group' option which brings up a list of issues you can flag under "I'm concerned about this group", one option, which was the option chosen was 'harassment or bullying'.

36. As confirmed by all witnesses, what the employer did, following the repeated phone calls and emails from union counsel, was that the employer's legal counsel went to one of the two offending Facebook sites through her personal Facebook account and clicked a button to report the group and flag that they are concerned about the group because of "harassment or bullying." The employer did not contact the RCMP about the posts. The employer did not make any effort to confirm whether the online harassers were parents of children in the school. The employer did not make any effort to contact the harassers.

37. The MOS arose out of a grievance filed by two teachers who were being harassed online by Third parties – parents. The circumstances, as articulated by Mr. Walsh, were that the teachers were being bullied and harassed online and they had filed grievances as a result of what they felt was the school board's failure to act in the face of the online harassment. The grievances were settled in the MOS. The MOS articulates *inter alia,* the following:

…

AND WHEREAS the District and the Association have agreed that paragraphs one (1) and two (2) of the within Settlement Agreement shall be **with prejudice** and shall govern the interpretation of Clause 29.06 (now 29.07) of the Collective Agreement, and its successor clauses as it pertains to District Policy HR-811:

…

THEREFORE the District, the Association, and the Grievors agree as follows:

1. The District agrees:

   (a) That **violence is not a necessary precondition to a finding of abuse under the Policy HR-811;**

   (b) That **an appropriate response to a violation of the Policy is a *timely* response; and that the District agrees to make every effort to respond within two (2) working days for first District contact with a complainant**; (emphasis added)

   (c) That specific and detailed communications with targeted employees, with regard to steps taken by the District in furtherance of Policy objectives is an important part of demonstrating "support" for employees in providing a harassment and abuse free workplace; (emphasis added)

   (d) That **abuse under the Policy includes, but is not limited to, a public attack by an employee of NLESD, parent/ guardian, student or volunteer that threatens the livelihood or professional reputation of employees**; (emphasis added)

   (e) That **the District will make every effort to take available steps** (i.e., make a request to site administrators) to have offending communications removed from public access; (emphasis added)

   (f) That **the District will commit to written correspondence and, when possible, in person meetings with complainants when confronted**

with communications that run afoul of the Policy HR-811. Such communications must identify the inappropriateness of the abusive behaviour and draw relevant policy to the recipient's attention, with a copy to be provided to the Union in cases where the union is representing the teacher. (Emphasis added)

(g) That **this is a baseline,** not a complete protocol, and **other steps may be required** depending on the circumstances of a particular case. (Emphasis added)

…

3. The District, the Association, and the Grievors collectively agree:

….

(c) This Agreement is binding on each of their respective successors, members, and assigns…

38. The parties agree that the MOS applied to the District in the within case. The purpose of the MOS was to provide clarity with respect to the responsibilities of the School Board under the Collective Agreement with respect to harassment and violence, including a public attack by a parent that threatens the livelihood or professional reputation of an employee. Mr. Walsh, in his evidence, at first said that he didn't think that the MOS applied to any situations other than the specific fact scenario contained in the MOS. He later agreed that the MOS applied to other scenarios. Respectfully, the MOS is written "WITH PREJUDICE" and the employer agreed in its argument that the MOS was written prospectively, with a view to being used for future incidents of third-party harassment.

39. Ms. Sainsbury's evidence was that she was vaguely aware of the MOS at the time of this incident and throughout. She was aware that the MOS had come into effect when she had been on leave years before. The effective date of the MOS was October 3, 2018, three years before this incident occurred. Ms. Sainsbury denied ever seeing or reading the MOS prior to this hearing. To be clear: the director of Human Resources was aware for three years that there was a new memorandum of settlement in place that affected human resources, and she had not read it.

40. Mr. Walsh confirmed (exhibit E.W. #2.002) that on July 2, 2020 a memorandum was sent to all employees of NLESD from Susan Tobin, Manager of Policy and Planning, notifying employees of updated regulations. In particular, the memorandum noted the following:

1. **Respectful Workplace/harassment prevention and Resolution (HR-800)- Regulations**
https://www.nlesd.ca/includes/files/policies/doc/1593699512199.pdf
These Administrative Regulations were updated to reflect amendments in the Regulations of the Occupational Health and Safety Act. **The changes address prevention of workplace harassment as well as the issue of harassment of employees by third parties.** (Emphasis added) The District is currently updating its training on harassment prevention and reporting. Further information on training will be forthcoming.

2. **Prevention of Workplace Violence (HR-811) – Regulation**
https://nlesd.ca/includes/files/policies/doc/1593699568622.pdf
These regulations were updated to reflect amendments in the Regulations of the Occupational Health and Safety Act that address family violence that may expose a work to injury in the workplace.

Supplementary Information
Updated Regulations

1. The regulations of the **Respectful Workplace/Harassment Prevention and Resolution (HR-800)** were updated to include:

   - **Recognition:** that workplace harassment is now defined in the Regulations under the Occupational Health and Safety Act.
   - **Duty to Report:** includes obligations of employees, supervisors and the District when they witness, or are subject to harassment.
   - **Third Party Harassment in the Workplace:** includes remedies available to the District if employees are subject to harassment by a third party (student, parent/guardian or outside contractor).

41. Mr. Walsh testified that he was involved with the development of the MOS and his signature is on the MOS, which was written as a result of the fact that two other teachers had been the targets of inappropriate parental Facebook posts against the teachers. Those two teachers had grieved the District's failure to follow the collective agreement and the relevant workplace policies dealing with harassment by third parties (in that case, parents harassing teachers online) and the MOS was the settlement agreement reached in those grievances.

42. Ms. Sainsbury and Mr. Walsh's evidence agreed that there were three precedent letters kept on hand to deal with matters of bullying and harassment toward teachers and staff. They were referred to in the hearing as "cease-and-desist" letters. One of the letter templates deals with parents posting about the school or a teacher on an outside website or social media account. These sample letters were also part of Mr. Walsh's evidence, and are found at exhibit E.W #2. The sample letter reads as follows:

> Dear X,
>
> The District has been made aware of [issue of concern].
>
> While we appreciate that this [post/comment etc.] was made as a comment on someone else's Facebook's page, and people often use social media as a way of drawing attention to concerns. As a parent of the school that was the subject of the post, your comments were concerning as they were suggesting the use of violence against a teacher at the school.
>
> The District strives to create and promote a safe and caring learning environment for all students and staff in our schools and all stakeholders in the school play a role in achieving that goal. In that regard, the Department of Education and Early Childhood Development's Safe and Caring Schools Policy, which governs all schools in the District, sets out parent responsibilities in maintaining a safe and caring school environment. Specifically, the Policy reads:
>
> 4.1.5. Parent responsibilities:
>
> 4.1.5.1. Support the efforts of the school in creating and maintaining a safe, caring and inclusive learning environment.
>
> 4.1.5.2. Participate in the implementation of the provincial Safe & Caring Schools Policy and the school's Code of Conduct.
>
> 4.1.5.3. Model positive social behaviours both in person and online.

4.1.5.4. Be familiar with the provincial Safe and Caring Schools Policy and the school's Code of Conduct.

4.1.5.5. Encourage and assist their children to abide by the school's Code of Conduct.

4.1.5.6. Practice positive social interactions both in person and online.

4.1.5.7. Engage in positive, nonviolent conflict resolution.

The statements made [to staff on social media, etc.] referring to (teaching staff at [school]] were not in line with the parent responsibilities set out in the Safe and Caring Schools Policy, and is not behaviour that we want to have modelled for our student. Furthermore, such statements are in contravention of the District's Prevention of Workplace Violence Policy, which applies to, among others, parents and guardians of student. A copy of this Policy can be found at https://www.nlesd.ca/includes/flles/policies/doc/1518109983960.pdf. Yourcommentsmeetthedefinitionofthreatinthatpolicywhichisdefinedasfollows:

Threat
A threat indicates the potential for harm or for someone to act out violently against someone or something. Threats may be verbal, written, drawn, posted on the Internet, sent electronically or by information/communication technology of any type, made by gesture or reasonably inferred from the surrounding circumstances of events. Threats may be direct, indirect, conditional or veiled.

We would, therefore, ask that you remove the post in question as it is contrary to the Safe and Caring Schools Policy as well as the Prevention of Workplace Violence Policy.

We would encourage any parents who have concerns with respect to their children and the programs and/or services they are receiving, or with their child's teacher or other District staff, to bring them forward for possible resolution. Such issues should always be brought forward and addressed in a respectful manner,

and in a way that models the appropriate social behaviours and interactions we encourage for the children, our students.

Should comments of this nature suggesting possible violence against a school employee continue to be made, we will have no choice but to engage local police authorities.

Sincerely,

Assistant Director of Education (Programs)

43. Another sample letter defined the term “abuse” as follows:

Abuse means to ill-use, to misuse, or to insult, in a manner that endangers an employee’s job or reputation, undermines performance, or threatens the economic livelihood of an employee. Abuse includes, but may not be limited to, verbal or psychological abuse. (Physical abuse would be considered “violence” in accordance with the provisions of this policy.)

- Verbal abuse is any use of language to undermine someone’s dignity or security through insults or humiliation.

- Psychological abuse is a form of mistreatment that causes mental or emotional pain or injury and includes, but is not limited to: statements or actions that humiliate or belittle; insults; and isolation.

44. During her evidence, Ms. Sainsbury confirmed the following:

- She was aware that the violence prevention policy does not require there to be actual violence in order for the violence prevention policy to be triggered.

- She has sent cease and desist letters to parents and others in the past when there has been bullying or harassment or threats against a teacher.

- Ms. Sainsbury didn’t send a cease-and-desist letter to SC or SH (the identified “ringleaders” in this case) because (i) she was not directed to do so and because (ii) Mr. Walsh said he was going to follow up with counsel for the union himself. She does not send cease-and-desist letters without direction from Mr. Walsh, after consultation with administration and legal counsel.

- Ms. Sainsbury added that, in any event, there was “no way” to send a letter to every single person who was posting on the two Facebook sites that day.

- Ms. Sainsbury admitted that Ms. Sheppard, on behalf of the grievor, identified the ringleaders of the online bullying and harassment to the District. Ms. Sainsbury admitted that she and the District did not contact those individuals.

- The District has the name and address of all parents of children attending the school.

- Ms. Sainsbury admits that she made no attempt to determine whether those identified ringleaders were parents of children who attended the school. She understands from the grievor’s evidence that they are parents of children who attended the school at the time the online comments were posted.

- Ms. Sainsbury testified that her focus was only on removing the Grievor from the workplace once she had been notified that the RCMP had opened another investigation.

45. The Grievor’s evidence, which was not refuted, was that SC and SH, who were the two “ringleaders” of the online harassment, were not merely anonymous online Third Parties; rather, they were parents of children who attended the school where the Grievor was employed. Further, it was the Grievor’s unrefuted evidence that SC and SH were known in the community to be friends with GE, the mother of the complainant whose allegations against the Grievor had been determined by both the RCMP and the District to have been unsubstantiated. Ms. Sainsbury testified that she did not know who the individuals were, or whether they were friends of the original complainant’s mother. She took no steps to very or refute the information provided by the grievor through their counsel.

46. Mr. Walsh testified that Ms. Sheppard had wanted him, on behalf of the District, to contact the police about the online postings. His recollection was that “I would have said that’s not an appropriate action for the district to take. What would the purpose of us contacting the police about [the online abuse]?”

Did the employer’s response fulfill all the criteria of the MOS?

47. Ms. Sainsbury was the person responsible for writing the report and doing the action under the direction of Mr. Walsh. Ms. Sainsbury admitted that she was not aware of the MOS contents and had not read it prior to the day in question. Therefore, even if the district fulfilled its criteria under the MOS, at best it would have been accidental or coincidental because Ms. Sainsbury had never seen the MOS and didn't know what her obligations were thereunder. The MOS outlines the district's obligation to protect employees, but that had not been read by the person in the workplace who was admittedly responsible for ensuring that it was followed.

48. In this case, under the MOS and the Safe and Caring Schools Policy, the arbitration panel finds as a fact that the posts were harassing and abusive. There was online abuse against the grievor, a teacher employed by the District. To date, there has been no response as yet from the District to the grievor outlining what the district intends to do about the abuse. There was no specific or detailed communication with the targeted employee [the grievor] to demonstrate support for the employee / grievor. There were no steps taken by the District other than contacting Facebook with respect to one site. Based on the criteria set out above in the MOS, the District failed, on the face of the document, to fulfil its responsibilities thereunder.

49. Part 1(e) of the MOS states that "every effort" would be made by the District to remove the comments from public access. The District admitted through Ms. Sainsbury's and Mr. Walsh's evidence that there are increasing numbers of instances of online bullying / harassment / abuse of teachers and staff online. The District also admits, through their evidence, that there is no one tasked with monitoring online abuse of teachers / staff. There is no communications staff or technical staff in place to monitor or respond to online abuse of District staff. The District made no effort to contact the ringleaders of the posting, and made one single effort to contact one Facebook site to ask that the posts be removed.

50. Part 1(f) of the MOS states that:

> (f) the District will commit to written correspondence and, when possible, in person meetings with complainants when confronted with communications that run afoul of the Policy HR-811. Such communications must identify the inappropriateness of the abusive behaviour and draw relevant policy to the recipient's attention, with a copy to be provided to the Union in cases where the union is representing the teacher.

51. The District in this case made no attempt to contact the perpetrators of the abusive communications, in spite of being provided with the names of the individuals by the grievor's union. The District did not contact the school principal or vice principal (which in this particular case would have been more appropriate) or the director of schools for the area in which the school is located, or make any inquiries

whatsoever to determine whether the perpetrators were parents of children in the school. As testified to by Ms. Sainsbury and Mr. Walsh, there was zero effort made by the District to determine whether the individuals posting the online commentary were parents of children in the school – in spite of the fact that they had been notified of such by the grievor and Ms. Sheppard.

52. The District took no steps to stop the online commentary or point out that the behaviour by the posters was inappropriate, except to report one post as inappropriate to Facebook. The District took no steps to reassure the grievor that it was doing anything in response to the commentary.

53. Both Ms. Sainsbury and Mr. Walsh's evidence was that the teacher was under police investigation and they wanted to take no steps to undermine or interfere with the police investigation. The employer reiterated that it did not want to interfere in an RCMP investigation. This appeared to be proffered as the reason why the District took no further steps in accordance with the MOS. The arbitration board notes that article 1(g) of the MOS is clear that **the MOS "is a baseline, not a complete protocol, and other steps may be required depending on the circumstances of a particular case."** The District did not meet the steps required of the baseline, much less take any other steps. The District brought no evidence or witnesses to provide any insight into how following the MOS and supporting the teacher who was being harassed and abused online was going to interfere with the police investigation into the allegations against that teacher. The District took no "other steps."

54. The arbitration board recognizes that the employer was trying to protect the ongoing RCMP investigation by "standing down" i.e., by holding its own investigation in abeyance until such time as the police completed their investigation. The employer's evidence was that in the face of a police investigation, the Board is always requested to hold its investigation in abeyance until the police investigation has been completed, so as not to interfere with the police investigation. However, the employer provided no witness, document or other evidence to specifically show how following the duties and responsibilities the employer agreed to in the MOS would interfere with a police investigation into other allegations.

55. The board accepts that the District did partially comply with the MOS in that their employee contacted Facebook once and reported one comment as inappropriate. However, the Arbitration Board notes that the District could easily have a fourth template letter, given that they already have three, and such a letter could be given in cases of an ongoing investigation in cases of online abuse of a teacher. The letter could bring forward the inappropriateness of the type of post and online discussion and indicate that there is a proper channel in which to bring complaints

forward. The key piece is to tell the individuals that what they are doing is harassment and abuse under the school District's authority, ask them to stop, and show them the appropriate procedure in which to file a complaint, as is shown in the current template letters. This is the purpose and intent of the MOS and it was not met by the District in this case.

56. Mr. Walsh admitted that if a parent of a school student arrived on school property saying "x is a pervert" and waving signs, then the District would have sent a letter to that parent telling them to cease and desist, and explaining that the behaviour was inappropriate and contrary to the school's policies. The District did not do the same thing for a parent who was waving the same sign in this case, albeit online.

57. While the employer argues that there was no written communication with the posters and there was no written communication with the grievor and that nothing further could have been done so as to not interfere with the police investigation, this arbitration board disagrees.

58. Nothing in the MOS states that the employer's duty to protect the employees from harassment and abuse ends when a teacher is under investigation by the police during the same time they are being harassed online. While sending the letter to the online posters may not have made the posts stop, it would at very least have been a sign of support to the teacher so that the teacher would have known that they were being supported by their employer. This sign of support is part of the spirit and intention of the MOS, as articulated within it. The District failed to communicate with the grievor and failed to advise the ringleaders that what they were doing was harassment and abuse of a teacher at their school and therefore a breach of the policy. The grievor said that they felt "abandoned" by the District throughout this online harassment. When they realized that the District was abandoning them, the grievor testified that they then decided they needed to leave their home and community and seek out employment and a home elsewhere.

III. The School District did not fulfil its obligations to the teacher under the Respectful Workplace / Harassment Prevention and Resolution Policy (HR-800)

59. HR Policy HR-800 "Respectful Workplace / Harassment Prevention and Resolution" dated November 2020 sets out as a Policy Directive some of the following:

> 2. … When a supervisor/ manager / school administrator of the District becomes aware of situations involving alleged harassment or discrimination, they are obligated to intervene, even in the absence of a complaint. …..

4. … Third party harassment (by contractor, student, parent/guardian) in the workplace will not be tolerated and employees who experience harassment will bring the issue to their immediate supervisor or school administrator. (Exhibit C-8)

60. In this case, the administrator of the District (Mr. Walsh and Ms. Sainsbury) became aware of a situation of alleged harassment of a teacher and they did not intervene. On its face, this is a breach of HR Policy HR-800 – Respectful Workplace / Harassment Prevention and Resolution.

61. In particular, the District did not take immediate steps to bring the complaint of harassment to the Third Parties' attention. They sent nothing to the Third Parties, nothing to the teacher, and nothing to the community at large to advise that the online harassment and abuse is a breach of the policy and is not tolerated. The policy states that sufficient steps will be taken to stop the harassment. Regardless of Ms. Sainsbury and Mr. Walsh's comments that they were trying to promptly resolve the harassment, sufficient steps were not taken, the harassment was not stopped. and the policy was not followed.

62. The District admitted that it was "concerning" to the District that parents voiced opinions in the manner done on the day in question, but the District argued that it felt limited from a legal perspective in how it could respond. When police notified the District that they had opened a new investigation, the District argues that this changed the situation that morning as to what the District was able to do. The Arbitration Board disagrees. As articulated above, there is nothing in the Policy or in the MOS to articulate that the District's response ought to have been different if there is an ongoing police investigation into the allegations. The fact that a parent had brought a fresh complaint [now know to be about the same matter] to the RCMP did not change the fact that there were parents abusing and harassing this teacher online, posting their name and photograph, calling them a "pervert" and inciting others to run the grievor and their family out of town.

63. The District did not address the Union's arguments of why the District didn't make an online posting to remind parents that people are innocent until proven guilty in Canada, or articulating that the District does not condone online bullying and abuse and provide a copy of the violence prevention or harassment policy online. The Employer's answer was simply that this was not technically a public Facebook site and therefore they couldn't post on it. The employer did not consider posting the reminder on Twitter to educate the parents and public of its policies on harassment and online abuse.

64. The District reiterated that its legitimate legal position is to provide a safe workplace for employees, but qualified the statement by stating that their primary mandate is to provide education and that the District has significant legal liabilities with respect to students in their care. The District says that in spite of dealing with the online threats, the District has to be mindful that it has an ongoing relationship with the parents. The Arbitration board notes that this may be true, but the District, as an employer, also has an ongoing relationship with its employees, such as teachers, and the grievor in this case. The employer continued to argue that there is a vulnerability of the student and the employer has a legal obligation to protect the student.

65. The Board accepts that the District has a legal obligation to protect the student. No one argued to the contrary. By putting the teacher on leave while the investigation was going on, the District was protecting the student from potential harm. The arbitration panel notes that there is no harm done to the student by the District also attempting to protect the teacher from online abuse by parents. By putting the teacher on leave, the District protects the student. By telling the Third Party parent that their online abuse is not tolerated in accordance with District policies, the District would show support for all teachers without harming the student.

66. Overall, the District argues that it took the action that was appropriate in the circumstances of this case. The District argued that on the day of the online posts, events happened very quickly – over a few hours – and the District cannot be faulted for its reaction in the moment. Respectfully, the Arbitration board disagrees. Based on the evidence, the District was notified via email on November 2, 2021 of the grievor's concerns about returning to work and AE's mother being potentially disgruntled and unsatisfied with the results of the two investigations. A full two weeks before the online posts, the grievor, through their union, asked the District to have a plan in place to deal with any potential breaches of confidentiality by AE's mother. In particular, Ms. Sheppard's November 2, 2021 email to Ms. Sainsbury states:

> Hi Alicia,
>
> FYI:
>
> Tina told [grievor's wife] yesterday that she's heard rumblings that the family has said they're going to do whatever they can to keep [grievor] out of school.

Two concerns:

1. The message itself.
2. The family appear to be discussing this complaint publicly and / or with parties who are not involved if this is accurate.
(Exhibit C-3)

67. This email exchange had no relevance to the assessment of the complaint, but it is relevant to the assessment of the family's continued inappropriate conduct as well as potential stressors for [grievor] with returning. The District had at least two weeks' notice that the mother had breached the confidentiality provisions, was upset with the outcome of the investigation, and was going to do everything in her power to get this teacher run out of the school (Ms. Sheppard's email of November 2). They made no preparation for the online attack.

68. The actual online comments and abuse occurred over a period of eight hours on November 16, 2021 before the grievor then requested to be relocated to another community. However, it is clear from the chain of correspondence from Ms. Sheppard to Ms. Sainsbury and Mr. Walsh that the District had more than two weeks to prepare a potential action plan to be implemented in the event that there was a breach of confidentiality by AE's mother, and that it failed to implement a plan other than to contact AE's mother's solicitor to remind her of the confidentiality requirements. There was no evidence of any plan put in place in case AE's mother breached the confidentiality requirement. Based on Ms. Sainsbury's evidence, and based on the MOS and the changes to the Harassment Policy, we know that the District was aware of increased online harassment of teachers in recent years and we know that the District recognized it had a duty to the employees to intervene when such online abuse and harassment occurred by third parties.

69. The District argued that it had no idea that the posts online originated with parents of students at the school. This argument is not supported by the evidence. The Grievor's email to Ms. Sheppard of 6:46 am (Consent 4) states specifically, "Hi Miriam, The online attack has started already, though it's not the family that has started, but the mother of another student…" The email had screen shots of the posts attached. Ms. Sheppard emailed Mr. Walsh and Ms. Sainsbury at 8:02 am, notifying them that the grievor's spouse had been referenced, at 8:11 am, attaching the thread calling for a public shaming and calling on the District to do something. One of the posts attached included the school board's phone number. By 11:09, the posters had posted the grievor's name and Ms. Sheppard again emailed Ms. Sainsbury and Mr. Walsh and said "Now they have posted [grievor's] name and picture. This needs to stop…" The District admits it took no steps to stop the abuse:

It did not contact the RCMP to report it because the grievor had apparently reported it. It did not contact the posters because there was a new RCMP investigation starting. It did not contact the owner of the Facebook site to ask for the posts to be taken down because the District didn't have a Facebook account with which to access the site as an entity. It was the district's repeated position, through witnesses and argument, that it "did everything it could" about the online abuse, but it was also the District's clear evidence that the sole thing the District did to stop the online abuse of this teacher was to have its legal counsel, in her capacity of having a private Facebook account, click a button to report the post as "inappropriate". The Board finds that the District's response to the Third Party harassment and abuse of the teacher did not meet its obligations under the Policy, the Collective Agreement, and the MOS and was therefore a breach of each.

IV. What is the impact on the grievor?

70. In addition to the agreed statement of facts and exhibits, the grievor provided *viva voce* evidence of the impact of the online abuse and bullying on their life.

71. In spite of the challenges faced by the grievor and their family during the initial complaint and investigations [*inter alia,* the grievor was on leave for 15 months and couldn't explain why to those who asked, they couldn't attend school grounds with their own family members, they weren't permitted to talk about the nature of the complaint or who was bringing it or the results of the investigations], when the grievor returned to work in November 2021 they were excited and looking forward to returning. Both the grievor and their spouse were happy to remain in the community and looked forward to putting the matter of the investigations into the first complaint behind them.

72. The grievor expressed that they were "really, really nervous and apprehensive" about returning to work, but excited and hopeful nonetheless. The District had worked out a plan with the grievor and the union about their return to work. For example, the schedule was organized to ensure the grievor didn't teach the initial complainant or her siblings or supervise them, the duty schedule was revised, etc. The grievor attended the school in the evenings before the return to work to prepare for the return to teaching.

73. The grievor was concerned that the complainant's mother, GE, would bring her complaint public, in the wake of two investigations that failed to support the allegations. The grievor knew that the mother was likely unhappy that the complaint to the RCMP and to the District had been investigated separately by each, that the complaints were not made out, and that the grievor was returning to

work. The grievor specifically wanted to be sure that the message was given to GE that there would be consequences if she breached confidentiality. Ms. Sheppard notified the District of these concerns. The agreed fact is that the District contacted the parent's solicitor and reminded them of their client's confidentiality requirements.

74. On the first day of school, November 15 2021, the grievor described walking to work with their spouse. They were finally allowed to go on the school grounds. They were excited and happy. They had been more than a year unable to go on school grounds – unable to take their child to school or visit their spouse or their co-workers.

75. The grievor described how welcoming the staff were that day, the return- to- work meeting with the staff, and staff hugging them to welcome them back. The grievor saw students in the hallway and they welcomed the grievor back. Their spouse had bought them a new planner and clothing for the big return to work. The grievor did hallway duty that day. They were happy and looking forward to returning to teaching. They were relived and hopeful to put everything behind them and return to work and a sense of normalcy.

76. The second day of the grievor's return to work, November 16, 2021, started with their spouse waking them early. Their spouse was in tears and showed their phone. The grievor remembered that a colleague of their spouse was a member a group "concerning [name of community]" Facebook group and had sent their spouse a screen shot of SH's post. The grievor knew the mother of the original complainant and SH are known to be best friends. Their children are in the same class. They are part of a very close group of people attacking the grievor. The grievor was sure that SH was well aware of the findings of the investigation of RCMP and the board investigation by virtue of her friendship with the complainant's mother. The grievor knows this because she was AE's mother's very close friend and had made previous online posts about the child and mother about other health issues.

77. The grievor said they then realized that the online attack was a deliberate attempt by SH and her friends – the parent of the original complainant was bound by the confidentiality requirements, so her friends were posting online instead.

78. The grievor took this as a deliberate online attack of the grievor by a parent of a student at the school and immediately notified the union of such. The grievor was unable to do anything to defend themselves online and wanted the District to make

the online harassment stop. The grievor couldn't sign up to the Facebook site and defend themselves. They were not permitted, by district policy, to talk about the investigation, who made the allegations, what they were, or what the outcome was.

79. The grievor described being "gutted" by the comment and responses to it online. Their spouse was in tears. The grievor "didn't want to shy away from a fight" and didn't want to be bullied out of that school by the online posters. The grievor admitted that several times in the fourteen months waiting for the results of the investigations, they had wondered whether they should move away. The grievor and their spouse didn't want to give up on their home and cabin and life, and didn't want to be pushed out of it. Their town is a small town and this is a small province. The grievor wanted the air cleared and to return to work because they were concerned that people would talk and they thought they would never get away from the gossip until they returned to work after being cleared in the investigations. Their opinion was and their family decision was to stay and fight. So, in spite of the online posts, the grievor and their spouse went to school on November 16, 2021, hopeful that the online abuse would stop.

80. When the grievor arrived at school that day, they describe the other teachers as being in shock, asking the grievor and their spouse how they were doing. Many said they had reported the posts to Facebook. The overall sentiment was disgust that the posts were allowed to happen. "Dozens" of teachers at the school and at the grievor's previous school contacted the grievor and advised they had reported the posts. They offered reassurance. They expressed anger and upset that this was allowed to happen to the grievor.

81. The grievor described that the situation evolved throughout the day. The grievor wanted the posts removed and wanted consequences for the parent who started it. The grievor and their spouse understood that online attack is illegal and they were told it would not be permitted. The grievor phoned the RCMP that morning. The policeman who answered first told them the posts weren't illegal. The Grievor called Ms. Sheppard and she provided the name of the relevant statute. The Grievor again telephoned the RCMP, cited the statute, and the officer told the grievor that they would look at it. The grievor heard nothing further from the RCMP.

82. The grievor, while not a member of the two Facebook groups in which the posts were made and is not a member of the groups, is aware that not all members of the group exclusively live in the community. For example, the grievor's child was in another province and saw the original post. People who no longer live in the community were contacting the grievor about the posts. Teachers from across the

province were reaching out to the grievor and their spouse to ask about the posts. Friends called. The grievor said the Facebook posting "put my name literally out there for all the public to see."

83. As admitted in the agreed statement of facts, SH, the initial poster, put out enough information to identify the grievor without posting their name. Subsequent comments on her post identified the grievor by name and identified the grievor's spouse's occupation and position: these made the grievor readily identifiable in the community and arguably throughout the province. Others added comments on SH's original post and follow up posts by SC, including the grievor's name and photograph.

84. Prior to lunch on the grievor's second day back to work, Ms. Sheppard received a call from the District to notify her that the District received a complaint from the mother of a student the grievor had taught in 2013 – 8 years earlier. The mother is another of the close friends of SH and SC and her daughter was known to be a close friend of the initial complainant, whose complaints had just been dismissed. Based on a cursory view of the complaint filed, the grievor believes that the complaint is concerning the same allegation as was brought by the first complainant.

85. The panel notes that Ms. Sainsbury actually received the fresh allegation (involving what appears to the grievor to be the same allegation that had been investigated by the RCMP and the District in the first complaint), on November 10, 2021 but did not see it until November 15. Ms. Sainsbury testified that she did not notify Ms. Sheppard or the grievor of this fresh complaint on November 15 because she wanted more details. Until Ms. Sainsbury's evidence at the hearing, during which she provided a copy of the fresh allegation, her response, and then the follow up correspondence from CH dated November 15, 2021 giving her the further details, the grievor had no idea who had filed a complaint against them or what the nature of the complaint was. They had not been provided with a copy of or any details pertinent to the fresh complaint (and the reason they were therefore put on leave again on November 16, 2021) until mid-hearing – five months after the "fresh" complaint had been filed.

86. Ms. Sheppard wrote Mr. Walsh and Ms. Sainsbury, forwarding the online posts. In particular, Ms. Sheppard stated in her email:

> *Pls see attached. Sheryl C seems to be leading her own investigation. Pls advise of your intention in this regard. I am not sure*

> *who the other postings relate to, but one is not very complimentary with respect to the admin. This needs to end. The teachers remaining at [school] are already very stressed by the whole situation, as reported to us. As I mentioned to Alicia [Sainsbury], I do not expect Board officials to contact every poster. However, I do think it would be appropriate for you, in the interests of protecting your teachers from abuse and harassment, and the integrity of your own investigation, to contact the individuals who are leading this mob (SC at this time.) The recent posts could also be reported to the admin/ FB. I have also asked previously that the posts in question (over the last few days) be brought to the police by the employer, as it might be argued that these individuals are interfering with a police investigation and engaging in defamatory conduct in cases where the individuals complained about are identifiable.* ***Alicia advised me today that the Board did not intend to take further action at this time. Please advise if the above and the continuation of the concerns has caused you to reconsider*****. (Emphasis added)**

87. It is clear that by then the District intended to take no further action and the union was continuing to ask the District to reconsider that lack of action.

88. Instead of returning to class, the grievor was put on leave again as a result of the newly-lodged complaint. From the grievor's perspective, given that the RCMP took 7 months to investigate the previous unfounded complaint, and the District took an additional nine months, the grievor was under no misconception that they would be placed on leave for a short period of time. As of the date of the arbitration hearing (5 months after being placed on leave the second time), the grievor remained on leave awaiting the results of the RCMP investigation. They understand that the RCMP has not started the investigation yet. The District has confirmed it will not commence its investigation until the RCMP have completed theirs.

89. The grievor was emotional throughout their testimony. They described feeling "abandoned" by the District when the district failed to address the online comments. The grievor's spouse is now on stress leave. SH's initial post was eventually removed, but SC continued to solicit comments and re-posted it on a public community Facebook page. Despite the original post being taken down by the administrator, she re-posted it in a public site.

90. Because of the District's lack of support for the grievor and its refusal, in spite of the MOS and the policy, to do anything to stop the online abuse of the grievor by parents at the school, the grievor then felt that they could not continue to live and work in that community and requested, on the afternoon of November 16, 2021, to be considered for positions outside that community.

91. The grievor admits that they wanted the District to contact SH and SC and tell them they were breaking the law and there would be ramifications if they didn't cease doing so. The grievor wanted a cease-and-desist letter or call sent to SC and SH. From the Grievor's perspective, there was no pushback against SC and SH for the online abuse. The grievor realized, when the District did nothing in response to the posts, that there was nothing to stop those parents from continuing with the abuse then and in the future.

92. Since date of the online posts, the grievor says they have continued to live in fear that if SC, SH and GE find out where the grievor and their spouse are now and living and hoping to work when the fresh complaint investigation has concluded, there is nothing to stop them or discourage them from going after the grievor and their spouse again when they return to a new school.

93. The grievor testified that in spite of having made it through 15 months of leave waiting for the conclusions of the first allegation, it was the public nature of the attack by the parents on November 16, 2021 with no consequences to the attackers and no support for the grievor from the employer that ultimately made the grievor decide to leave the community. From the grievor's perspective, it was clear that AE's mother was not going to accept whatever findings of investigations would take place. The grievor couldn't publicly defend themselves without running afoul of policies that applied to them as a teacher. They had no way to fight back.

94. The matter was so stressful for the grievor's spouse that they were offered a medical accommodation. After six months, the grievor's spouse is now out of paid sick leave, causing further financial strain on the family, in spite of having months accumulated in their bank. The family had to move because the posts identifying them personally and calling to action all members of the community to kick them out of the school and the community. None of this evidence was contradicted by the District.

95. The family has moved to another community. It has taken an emotional and financial toll. Because of the public commentary, the grievor couldn't sell off items of furniture or belongings online to mitigate their moving costs - they were afraid of

SC and SH and their friends following them online and making further commentary. They hired a moving company. They sold items like motorized vehicles and outdoor equipment at a significant loss because the cost of relocating the items in a hurry was so high. They have not been able to sell their house in the community, so they are carrying two mortgages and two sets of utility bills, in addition to the stress of having to uproot their family and move.

96. The grievor is trying to avoid running into anyone in their new community who might reveal their new location for fear there will be more posts by SH and SC and other friends of the original complainant's mother about them online. The grievor feels isolated and cut off from friends in the community and elsewhere.

97. The grievor testified that level of stress that has come from the lack of support from the District and there being nothing to stop the online abuse has caused the grievor to contemplate suicide, to the point that they cannot attend their cabin alone because they are afraid that they may harm themselves when they are there. There was no evidence brought by any other witness to refute this, and the grievor's testimony was sincere and credible.

98. The grievor admits that many of the stressors existed while the first complaint was being investigated. However, it is the public harassment and abuse sustained by the grievor at the hands of these parents during their return to school and the lack of support by the District and the feeling of abandonment by the employer that has tipped the scale for this grievor and their family.

99. Based on the grievor's evidence, which has not been refuted, this arbitration panel finds that the impact on the grievor of the District's failure to provide support for the grievor during a campaign of online abuse and harassment by a Third Party, and the District's failure to take adequate steps in accordance with the Policy and the MOS, has been significant and irreversible. This grievor has suffered public humiliation, stress, mental anguish, financial losses and harm to their reputation. The grievor felt "abandoned" by their employer.

V. What is the remedy in this case?

100. As a result of the impact of the District's inaction and lack of support for the grievor, the grievor has sought general damages for the additional mental anguish and distress caused by District's failure to respond to the online abuse.

101. The parties have agreed that the arbitration panel has the jurisdiction to award damages in this case.

Union arguments

102. The union relied on the following jurisprudence:

1. *Goodyear Canada Inc. v. U.S.W.A., Local 189*2002 CarswellOnt 4148, [2002] O.L.A.A. No. 407, 107 L.A.C. (4th) 289, 69 C.L.A.S. 133

2. *Canada Safeway Ltd. and UFCW, Local 401 (M. (D.)), Re*2012 CarswellAlta 2355, [2012] A.G.A.A. No. 69, [2013] A.W.L.D. 1839, [2013] A.W.L.D. 1840, [2013] A.W.L.D. 1841, 113 C.L.A.S. 312

3. *Toronto Transit Commission and ATU, Local 113 (Use of Social Media), Re*2016 CarswellOnt 10550, [2016] O.L.A.A. No. 267, 127 C.L.A.S. 306, 270 L.A.C. (4th) 341

4. *Ciulla v. The Toronto Catholic District School Board*2021 CarswellOnt 6248, 2021 ONSC 3110, 331 A.C.W.S. (3d) 287, 70 C.C.E.L. (4th) 191

5. *OPSEU and Ontario (Ministry of Community Safety and Correctional Services) (Foley) 2018 CarswellOnt 19823, [2018] O.G.S.B.A. No. 144, 138 C.L.A.S. 29*

103. In this case, the union is seeking a nominal amount of general damages at this time, but argues that the appropriate range is between $5,000 - $10,000 to reflect the degree of suffering that the grievor has suffered and to act as a deterrent so that the District does not treat other teachers in the same manner in future.

104. The Union recognized that requesting that the arbitration panel issue an order to defend the grievor against the online statements of November 2021 would not serve a purpose now – it is too late now. Therefore, a symbolic award of damages is a way to address the employer's failure to act at the appropriate time.

105. The union argued that the arbitration panel has the jurisdiction to make an award for general damages, including emotional distress (*Ciulla, para 36-38).*

106. The union noted that in *Safeway* an arbitration panel was about to grant damages in an instance where an employer had failed to intervene in a poisoned workplace environment, but it refrained from doing so because the grievor in that case had been the one creating the toxic workplace. (*Safeway*, *supra* at para 166). In another case, an employer was ordered by an arbitration panel to reinstate a grievor who had resigned in the face of workplace bullying and harassment. The

panel in that case held that the grievor had resigned as a result of bullying and harassment, and the company had every reason to question the resignation. The grievor there was entitled to full compensation and back pay. There, the panel rejected the request for $70,000 general damages, but did award $2,500 in general damages for the mental distress suffered by the grievor (*Goodyear, Supra*, at paras 137-140). This, the union argues, is similar to many human rights decisions wherein tribunals have made damage awards for damage or injury to dignity.

107. The union argued that there is no way to compensate this grievor with monetary damages to make them whole. The purpose of a damage award from the panel, it argued, is to ensure that the rights and the agreements between the parties – the union and the employer – are respected. Included in these agreements are the Collective agreement, as well as the relevant policies and the MOS, as discussed throughout.

108. The union argued that one way to respond is for the panel to make a compliance order – stating specifically that the MOS applies to the district and the union and to therefore issue a compliance order to order the District to comply with the provisions of the MOS. The panel agrees and declares that the Employer and the Union are bound by the MOS – it is a "with prejudice" agreement.

109. The union also argued that the panel ought to make an award of nominal financial damages, to deter the district from shirking its responsibilities under the policies and MOS in future, and as a symbolic gesture to the grievor and the union as an acknowledgement that the District needs to do better in supporting its teachers when they are bullied and abused online by parents of students in the school. The majority of the panel agrees.

110. The union further argued that there should be consequences for the individuals who posted online, but the union recognized that it is not within this arbitration panel's jurisdiction or power to order that correspondence be sent to those specific parents at this time, or that they be investigated for criminal harassment.

111. The union was clear that had the District written SH and SC, the conduct of those aggressive individuals could have been stopped, the online mob could have been shut down, and more importantly, the grievor would have felt supported by the employer. The reason behind the grievor's decision to seek positions outside the community was because in not sending any correspondence or taking steps to stand up against online bullying and abuse, and in failing to further communicate with the grievor about steps they were taking to protect them or stop the online

abuse, the District showed that it would not help the grievor, would not provide support to that teacher and would not provide support to other teachers in future. In saying nothing when being made aware of the abuse and bullying, the District was providing tacit endorsement of what the parents were saying about the grievor online and that was what ultimately made the grievor realize there would be no future in that community, regardless of the outcome of any further RCMP or District investigation of the unproved allegations.

112. It wasn't until the grievor was harassed and abused online and put on leave and then saw that the District would do nothing to stand up to the online abuse and bullying of a teacher by parents, that the grievor requested to leave the community.

Employer's arguments

113. The employer cited and relied on the following jurisprudence and scholarly works:

(i) *Canadian Labour Arbitration*, 5th Edition Donald J.M. Brown Q.C., David M. Beatty, Adam J. Beatty § 2:9 Jurisdiction of the Arbitration – Submission to Arbitration

(ii) *Bracken v. Fort Erie (Town)* 2017 CarswellOnt 13874, 2017 ONCA 668, 137 O.R. (3d) 161, 282 A.C.W.S. (3d) 752, 393 C.R.R. (2d) 292, 42 C.C.L.T. (4th) 311, 67 M.P.L.R. (5th) 1

(iii) *Rainy River (Town) v. Olsen* 2016 CarswellOnt 21052, 2016 ONSC 8009, 275 A.C.W.S. (3rd) 377, 64 M.P.L.R. (5th) 63

(iv) *Carswell Education Law,* 5th Edition, Anthony F. Brown, LL.B., LL.M., M.Ed., Marvin A. Zuker, B.A., LL.B., M.Ed., Nicola Simmons, B.A. (HONS), LL.B, Robert G. Keel, B.A., LL.B.

(v) *Canadian Labour Arbitration*, 5th Edition, Donald J.M. Brown Q.C., David M. Beatty, Adam J. Beatty, § 2:72. Res Judicata as Result of a Prior Award.

(vi) *Canadian Labour Arbitration*, 5th Edition, Donald J.M. Brown Q.C., David M. Beatty, Adam J. Beatty, § 2:73. Res Issue Estoppel.

114. The District argued that it understands and accepts its duty to provide a harassment free workplace for employees under the violence prevention policy. The employer argues that the MOS operationalized the steps involved in following the policy, but didn't create a further obligation on the employer.

115. The District does not disagree that there has been significant harm to the grievor in this situation and characterized it as “the worst situation a teacher could have found themselves in.” The District admits that the online abuse happened and it admits that it felt the online postings were inappropriate, which is why the employer reported it to the Facebook site administrator. The arbitration panel notes that while the reporting happened, the reporting was to the Facebook site moderator by an individual who was an employee of the District in their personal capacity, not as a report by the District School Board as an official entity.

116. The District argued that if, in the event the arbitration board found that there was harm and the harm suffered by the grievor was caused by the district, we cannot distinguish the harm from the District’s alleged lack of adequate response to the posts from all the other harm the grievor suffered in the process of the 17-month-long wait for the RCMP and District investigations to have concluded that the allegations in the first complaint were unfounded, and therefore no damages follow.

117. The District reminded the parties that there has already been an arbitration hearing and decision on the delay in the investigations (the “Delay” arbitration). In that case, the parties agreed there would be no determination of damages with respect to the delay. In submitting this matter to arbitration following the delay arbitration, the harm considered by the adjudication panel here must be established to have been the harm caused by the purported inadequacy of the response to the online posts of November 16, 2021 and not the subject of the delay grievance, as that would be considered to be *res judicata* and issue estoppel (*Brown & Beatty, Supra, at* 2.9, 2.77 and 2.9). The sole subject of this grievance is the harm caused by the November 16, 2021 online posts, and the grievor’s need to move from the community. The employer was clear that the issue in this arbitration is specifically about the posts made and the alleged lack of action by the District. That Is the issue before the arbitrator for assessment of damages. The union agreed.

118. The District acknowledges that the MOS is a “with prejudice agreement” – meaning, it will be bound by the terms of the agreement in cases going forward, not just in the single case in which the agreement was reached. The District argued, in spite of the initial evidence proffered in Mr. Walsh’s *viva voce* testimony, that the MOS applies to all teachers and the District, with prejudice. However, the District argued that, like any agreement, the District entered into that MOS in the circumstances of that specific set of facts. The District appears to be arguing that the only circumstances in which the MOS would apply would be circumstances just like the ones which led to that agreement. That particular matter did not occur in

the context of a simultaneous investigation by the RCMP of alleged criminal activity by the grievor. The element of the police investigation is a distinguishing factor that the District argues makes this matter distinguishable from the MOS matter on its facts and therefore, the District was justified in having not sent the letter to the parents posting online. The majority of the panel disagrees with this distinction, as discussed above.

119. Mr. Walsh testified that it wasn't appropriate to follow the MOS. According to the District's argument, it wasn't that the district ignored the MOS; rather, Mr. Walsh chose not to follow it because of the circumstances at the time: namely, that there was a new RCMP investigation. Respectfully, the arbitration panel disagrees. There is nothing in the MOS or any the policies under consideration to state that in the event there is an ongoing police investigation, the MOS would not apply, or would apply only to a certain degree, or would only be partially applied, or that the District would only be bound by parts of the MOS.

120. The District argued that what the grievor was seeking at the time was a cease-and-desist letter threatening litigation over defamation allegations and that it could not send such a letter. The District argued that it cannot bring a claim of defamation on behalf of a teacher because that is a personal tort – the teacher can bring the defamation claim against the third parties, but the school cannot do so on their behalf. (See *Education Law*, *supra*, at pages 189-190). The District argued it is a public body. The teacher could bring a personal action privately against the parent for defamation but the District argued it cannot be expected to immediately threaten legal action for defamation on behalf of the teacher. The arbitration panel agrees that the District could not threaten defamation on the teacher's behalf. However, the panel disagrees with the District's assertion that it couldn't send a cease-and-desist letter to the ringleaders identified by the grievor.

121. The District agreed that it updated the harassment policy in 2020 to include Third Party harassment. The district argued that the list of items in the MOS were examples of things the District <u>could</u> do, not a list of things it was <u>required</u> to do in the event of third-party harassment. The district agreed that the violence prevention policy has been triggered and that the online commentary constituted "abuse" of the teacher. The District agreed that the "Safe and Caring Schools" policy (consent 13) lists Parent Responsibilities as including:

> 4.1.5.6.1. Model positive social behaviours both in person and online
> Practice positive social interactions both in person and online.
> 4.1.5.7. Engage in positive, nonviolent conflict resolution

122. The District argued that, contrary to the grievor's request to threaten action for defamation, none of the District's sample letters threatens legal action. The District reiterated that threatening action for defamation is not a required course of action under the policy or the MOS. The arbitration panel agrees. However, the arbitration panel notes that the District didn't send any correspondence to the offending parents.

123. The District reiterated that there are limits on employers and their ability to deal with third party violence (*Bracken, supra)*. The arbitration board notes that *Bracken* dealt with a loud protester in a town and the Town issued a trespass order. The protesting resident of the town brought a successful constitutional challenge to uphold their right to freedom of expression. Respectfully, that decision is not helpful in the within case.

124. The employer also relied on *Rainy River Town v Olson, supra.* There, the Ontario Court of Appeal upheld the trial judge's decision to not grant a permanent injunction against a citizen of the Town of Rainy River who was sending abusive and defamatory emails and posting online about the mayor and councilors. The court reiterated that there was nothing precluding the individual councilors and the mayor for suing the citizen for defamation. In that case, the court also concluded that the workplace violence policy did not apply to the citizen's comments and emails because the citizen was not a co-worker of the mayor and there was no violence occurring at the workplace itself. The within case can be distinguished because the policy clearly articulates that it applies to third party harassment.

125. The District argued that while the cases it cited may not be on all fours with the within facts, they are examples of the complexity of factors to be taken into consideration when making these types of decisions. The District was careful to state that it was not making the argument that a person has a *Charter*-protected right to harass and abuse a District employee online.

126. The District further argued that the school had no ability to make a connection that the online posts were contrived by AE's mother (GE) and her friends. The evidence in this case is clear: the union specifically informed the District, in its emails seeking to have the online abuse stopped, of exactly that. The arbitration panel notes that through Ms. Sainsbury's evidence it was clear that the school and the District did have the ability to determine whether the individual making the post was a parent of a child in the school, but they did not attempt to do so. They were informed by the union that AE's mother was a friend of the individual posting the

comments. The District made no effort to seek confirmation of the information or contact AE's counsel about the obvious breach of the confidentiality surrounding the District's investigation.

127. The District agreed that if the arbitration panel finds that there were things the District could have done but didn't, then this panel has the jurisdiction to award damages.

128. The District argued that with respect to any damages award contemplated by the arbitration panel, the panel should exercise caution when reviewing jurisprudence related to human rights tribunals. Human rights legislation, the District argued, is given a broad and purposive interpretation to protect people who are to be protected under the respective Human Rights Acts of each province. The employer argued that the within case does not involve a teacher who is being discriminated against under a protected ground of discrimination. The teacher was abused and bullied online, but there was no discrimination based on a protected heading of the Human Rights Act and therefore, the panel should be mindful of this.

129. The panel agrees that the *Human Rights Act* is to be given a broad and purposive interpretation; however, it is a well-known tenet of statutory interpretation that all legislation ought to be given broad and purposive interpretation and that regulations thereunder ought to also be given a broad and purposive interpretation in accordance with the purpose of the enabling legislation. (See generally, *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810 (at para 25-26); for a discussion on interpretation of Occupational Health and Safety legislation and regulations thereunder, see *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal*), 2016 BCCA 473 (CanLII); [2016] BCJ No 2486 (QL); [2016] CarswellBC 3290; 12 Admin LR (6th) 189; 405 DLR (4th) 621).

130. The *Interpretation Act* RSNL 1990 c I-19 states as a general rule of construction the following, which applies to every *Act* in the Province, not solely the *Human Rights Act*:

> **16.** Every Act and every regulation and every provision of an Act or regulation shall be considered remedial and shall receive the liberal construction and interpretation that best ensures the attainment of the objects of the Act, regulation, or provision according to its true meaning.

131. At issue in this decision is the policies enacted pursuant to the regulations under the *Occupational Health and Safety Act*. The OHSA specifically states:

> **4.** An employer shall ensure, where it is reasonably practicable, the health, safety and welfare of his or her workers

132. Regulations under the *Act* articulate that the regulations apply to all employers and self-employed persons and workers and other persons to whom the Act applies. (*OHSA* Regulations, s. 3). To the extent that the employer's concerns with statutory interpretation were raised [this panel's jurisdiction under the collective agreement and its jurisdiction to hear the within complaint, including making a determination of a damage award has been agreed to by the parties] this panel finds that the rules of statutory interpretation that apply to human rights legislation are the same rules of statutory interpretation that apply to occupational health and safety legislation: all legislation and regulations thereunder are to be given a broad and purposive interpretation.

133. The District argued that any damages awarded in this matter ought to be assessed on the whole of the events, and given that in the first grievance (the delay grievance) the parties agreed that damages would not be at issue, the matter of damages up to then is now *res judicata.* The harm caused, the District argued, occurred prior to the online posting and the District's reaction to it, and not as a result of the online posting.

134. The majority notes that the grievor's evidence with respect to the damage caused by the online posting and the District's failure to do anything to stop it was clear and unequivocal. It was not contradicted by the employer. From the grievor's perspective, until the point that it became obvious that the employer was not going to take any steps to stop the online abuse and harassment, the grievor had hope that they could return to teaching in that community. When the online abuse and harassment began, and the school board didn't contact the perpetrators or post anything online to remind them of the District's policies that applied to them, the grievor then realized there was no hope of remaining in the community or that they would be supported by their employer. It was at that point that they felt "abandoned" by the employer, unable to defend themselves or educate the public or explain what was happening. It is this loss of hope and feeling of abandonment for which the grievor seeks damages.

135. The majority also notes that in addition to the employer's failure to act, there has been an undercurrent of attitude toward the grievor in the evidence. Ms.

Sainsbury's "poor choice of words" displayed an attitude that perhaps online abuse might be ok if the abuse was founded in fact. Mr. Walsh and Ms. Sainsbury's attitude toward the online abuse left the impression that the District was throwing its hands in the air to let the RCMP deal with the new investigation, as though the RCMP's investigation absolved the District of its own obligations under the regulations, policies, and the MOS.

136. The majority was particularly troubled by the employer's treatment of the fresh complaint documents. Five months had passed between the online abuse of November 16, 2021, the grievor being put on leave as a result of the fresh complaint, and the date of this arbitration hearing. The employer did not provide the grievor or their counsel with a copy of the fresh complaint, with notification of the contents of the complaint, or any correspondence outlining the subject matter of the complaint prior to the grievor giving their testimony or being cross examined at this hearing.

137. The grievor provided evidence on their stress, feelings of abandonment, and fallout from the online commentary. It was emotional testimony and the grievor said that retelling the story itself was traumatic to them. On multiple occasions the grievor articulated that they were traumatized by the previous complaint, two investigations, the online abuse, and being put on leave again. The employer chose to cross examine the grievor on their statements, and on their opinion that perhaps if the online abuse had been stopped – if there had been a cease-and-desist letter sent – then perhaps the fresh complaint (which the grievor alleges is spurious) would never have been filed. The grievor believed that the new complaint came about because of the call to action put forward online. It was here that the employer decided to produce, for the first time, the emails sent by MB on November 10, 2021 and by MB and her daughter on November 15, 2021 – the fresh complaint.

138. This treatment of the grievor on cross examination was unnecessary and showed callousness and disrespect for the grievor. It was calculated: the employer had a copy of the fresh complaint and had been sitting on it for five months without disclosing it to the union or the grievor until midway through the arbitration hearing while cross examining the grievor. Having just heard direct evidence on how traumatized the grievor was by the original complaint and by the online abuse, and having heard the emotional distress of the grievor and their testimony about having contemplated suicide and ultimately deciding, in the face of the online abuse, to move their family from the community, the surprise use of the fresh complaint documents at the hearing was shocking to the grievor, union counsel, and to the

arbitration panel. The production at that time served no purpose except to further traumatize the grievor in a failed attempt to cast doubt on their credibility.

139. The documents themselves have very little probative value at this arbitration, except to show the dates and times at which the fresh complaint was brought forward, and when the District responded to it. They do show that the fresh complaint was sent to the District on November 10 and not November 16. It does show that the fresh complaint did not arise as a result of the posts online. It does not show that the fresh complaint did not arise as a result of a breach of confidentiality by GE as to the results of the previous District and RCMP investigations. The contents of the emails themselves are highly prejudicial and are confidential. For that reason, the documents were only entered into evidence for the limited purpose of providing dates and times at which the District received and responded to the fresh complaint. The contents of the fresh complaint itself is not part of the evidentiary record in this hearing.

140. In spite of the shock of seeing the complaint for the first time during cross-examination, the grievor's evidence when provided with the fresh complaint was clear and straightforward: they denied the complaint, noted that it appeared to be about the same matter that had just been investigated, and noted that had they been made aware that the fresh complaint had been filed with the District at the time (November 10 – five days before their return to work), they would have had second thoughts about returning to school and would have at minimum sought further assurances from the District about their return to school before doing so. This could have potentially avoided the public humiliation and abuse suffered by the grievor as a result of the online postings on November 16, 2021.

Damages Award

141. The majority of the Arbitration panel finds that regardless of what the grievor was accused of in the fresh complaint, they were entitled to have received support from their employer in response to the online abuse, in accordance with the terms of the MOS and the relevant workplace policies in place at that time. The employer failed in its duty, as articulated by the MOS and the policies, to take the steps it was required to take to stop the harassment of a teacher by a third party, and failed to provide support to the teacher through communication.

142. The union argued that the appropriate range of damages for the mental distress caused by the failure in this case was $5,000 - $10,000 based on the jurisprudence presented. The employer agreed that if it failed to uphold its duty under the policy,

then this arbitration panel had the jurisdiction to make an award of damages. The employer did not provide any argument as to what an appropriate range of damages would be, should they be awarded.

143. A review of the jurisprudence provided shows that where a panel would have awarded damages but for the grievor not approaching the matter with clean hands (*Safeway)*, the panel was considering an award of $5,000 as appropriate damages for mental distress where an employee had been bullied and harassed at work for two years. In a case where an employee had been subjected to harassment at work and, after repeated requests for help the employee eventually resigned (*Goodyear, supra)*, the arbitration panel declined to award the $70,000 sought and awarded $2,500.00 for the mental anguish and distress suffered by the grievor. *Goodyear* awarded this in the absence of any medical evidence being put forward for mental distress.

144. In this matter, the grievor, who has been found to be a credible and reliable witness, gave uncontroverted evidence as to their mental distress and anguish caused by the employer's failure to provide them with the support required under the MOS and the workplace policies under the OHSA in the face of the online abuse and harassment. They did not provide medical evidence, but did provide detailed evidence of the effect the lack of support from the District affected them and influenced their decision to move from the community and their state of "living in fear" that these parents will feel free to continue to harass and abuse them online in future without any consequences.

145. Having determined that the employer breached its duty to the grievor, and having heard and seen the grievor's mental distress as a consequence of the employer's near total lack of response to the abuse of the grievor by third parties online, and in the absence of medical evidence to quantify the claim, the majority therefore awards $2,500.00 to the grievor in general damages for the mental distress and anguish caused by the District's failure to take the steps it was required by the MOS to take to stop the harassment of the teacher by the third party and its failure to provide support to the grievor through communication with them.

Conclusion

146. The majority of the arbitration panel determined the following:

(i) The online statements about the grievor were harassment and abuse under the MOS, the Collective Agreement, and the Violence and Harassment Prevention policy;

(ii) The employer's response to the harassment and abuse was limited and fell short of the response required under the Collective agreement and the policies and the Memorandum of Settlement thereunder;

(iii) The District did not fulfil its obligations to the teacher under the Collective Agreement, the Safe and Caring Schools Policy, the Respectful Workplace / Harassment Prevention and Resolution Policy (HR-800), Prevention of Workplace Violence policy (policy 811), and Memorandum of Settlement dated June 27, 2019;

(iv) The impact on the grievor of the employer's failure to fulfil its obligations was that they suffered public humiliation, abuse, and feeling of abandonment by the employer to a degree that the grievor sought relocation of their employment to another community. As a result of the public humiliation, abuse, and feeling of abandonment by the employer, the grievor suffered mental anguish, stress, and fear that the third parties who engaged in the online abuse would continue to do so without any intervention by the District.

147. The majority concluded that the proper remedy in this case is threefold:

(1)the panel declares that Memorandum of Settlement of June 27, 2019 applies to the employer and the union in relation to all cases of Third-Party harassment and abuse as defined in the MOS;

(2) the panel declares that the employer has breached its duty under article 58.01 of the Collective Agreement, breached its duty under the workplace policies implemented pursuant to article 29.07 of the Collective Agreement, as articulated and clarified in the MOS, by failing to take reasonable steps to ensure that the harassment stopped and that the individuals who engaged in such behaviour were dealt with appropriately; and

(3) the grievor is hereby awarded damages in the amount of $2,500 for their mental anguish, stress and feelings of abandonment by their employer while facing online abuse by third party parents as a result of the employer's failure to meet its obligations under articles 29.07 and 58.01the Collective Agreement, and the policies and Memorandum of Settlement of June 27, 2019 brought thereunder.

On behalf of the majority of the arbitration panel, dated at St John's this 15th day of August 2022.

Sheilagh M. Murphy Q.C.
Chair

Don Ash
Member

A DISSENT

FROM

FINDINGS AND DECISION OF THE ARBITRATION BOARD

IN THE DISPUTE

BETWEEN:	NEWFOUNDLAND AND LABRADOR TEACHERS' ASSOCIATION (the "NLTA" or the "Union")
AND:	NEWFOUNDLAND AND LABRADOR ENGLISH SCHOOL DISTRICT (the "District" or the "Employer")
Arbitration Board:	Sheilagh M. Murphy, Q.C. - Chair Don Ash - Member Janet Vivian-Walsh - Member
Appearances:	Kyle Rees – Counsel for the Union Bernadette Cole Gendron – Counsel for the Employer
Hearing Dates:	April 27-28, 2022

Dissent from Majority Decision
By Janet Vivian-Walsh

1. I respectfully dissent, in part, with the majority decision with respect to this grievance.

2. Both parties agreed that there were six questions to be answered in the Arbitration Decision:
   i. Was the Grievor harassed?
   ii. What was the District's response?
   iii. Did the District fulfill all factors in the MOS (C#7)
   iv. Did the District fulfill its responsibilities under the District's Harassment Policy (C#8 & C#9), Workplace Violence Policy (C#11 & C#12) and Safe and Caring Schools Policy (C#13)?
   v. What is the impact on the Grievor?
   vi. What is the correct remedy?

3. **I agree with the majority decision of my panel colleagues with respect to the following:**

   a) Question (i) – in that the "online statements about the Grievor were harassment and abuse under the MOS, the Collective Agreement, and the Respectful Workplace/Harassment Prevention and Resolution policy and Prevention of Workplace Violence policy".
   b) Question (ii)
      - in that "the employer's response to the harassment and abuse was limited" and
      - in that the employer's response was to report a concern about the group for "harassing or bullying behaviour" to the moderator of a single Facebook group and

- that the District could not threaten parents or posters with defamation on the teacher's behalf.

c) Question (iii) that the employer's response to the online harassment and abuse did not include all actions outlined in the MOS.

d) Question (iv)
   - in that the employer has responsibilities under the Collective Agreement, the Safe and Caring Schools Policy, the Respectful Workplace/Harassment Prevention and Resolution Policy (HR-800), and Prevention of Workplace Violence Policy (policy 811) with respect to fostering a respectful workplace and
   - in that the employer's response did not include all actions outlined in the relevant District policies

e) Question (v) – in that the Grievor was impacted, that the Grievor "suffered public humiliation and abuse and that the Grievor suffered mental anguish, stress, and fear" from the online abuse from the third parties.

4. **I disagree with the majority decision of my panel colleagues with respect to the following**:

a) With respect to Question (iii), I find that there was a distinguishing factor that made this matter different from the MOS on its facts; i.e. that it was reasonable to apply a 'different lens' when interpreting and implementing the MOS given the complicating circumstance that the Grievor was involved in an ongoing investigation.

b) With respect to Questions (iii) and (iv), I find that it was reasonable to respond cautiously and not implement all actions outlined in the MOS and relevant District policies (i.e. partial implementation).

c) With respect to Question (v), I disagree with the weighing of the District's role among the contributing factors causing the impact on the Grievor.
d) With respect to Question (vi), I find that there is no causal relationship between the online posts and the District in order for the panel to consider damages against the District. I also disagree with how the decision quantified such damages.
e) I find that the decision of the majority does not appropriately weigh the overriding responsibility of the employer for custodial care of children in the expected response from the employer.

5. The main issue of dispute in this case concerns the reasonableness of the District's response to 3rd party harassment when the employee, who is being harassed online, has been placed on Article 10.06 paid leave due to a criminal investigation.

District Response and Commentary with respect to Questions ii, iii and iv

6. Mr. Ed Walsh's testimony indicated that the District takes advice from the police on criminal investigations and that the historical and ongoing advice, to the District from policing authorities, is to "stand down" and to refrain from doing their own investigation until the police investigation is complete.

7. The District, through Mr. Walsh's testimony, revealed that the MOS (C#7) was developed in 2019 to resolve grievances by two teachers where 3rd party harassment by parents had occurred. However, he outlined that it was not contemplated at the time of the MOS that the person being harassed may be involved in an ongoing criminal investigation. Mr. Walsh did not feel the MOS could be appropriately applied in full in this case given this distinguishing factor.

8. All testimony from Mr. Walsh showed that the District responded in a manner that was consistent with advice from policing authorities and done so as to not compromise the ongoing police investigation.

9. Testimony from Ms. Sainsbury confirmed that "she does not, on behalf of the District, begin any investigation into allegations until the RCMP has completed its investigations." (p.12, paragraph 9 of the majority decision)

10. The abusive posts were posted on two Facebook sites: The Concerning 'Community' Facebook Group (private group) and a "Community' Public Information site. Ms. Cole Gendron reported the harassing behaviour to the Concerning 'Community' Facebook group by reporting the behaviour online through the main page. This is the normal process of reporting such behaviour. The majority decision makes a point that the report was not made in the employer's capacity and not to the Facebook administrator. The report, expressing concern about the harassing/bullying posts on the Concerning 'Community' Facebook page, was made by Ms. Cole Gendron. The site is monitored by a private citizen moderator. I do not see this distinction of capacity or how it was reported as making any notable difference nor would it achieve a different outcome.

11. Mr. Walsh also stated that he "felt that the District should not have done anything differently". He also indicated that in conversations with Ms. Miriam Sheppard of the NLTA that she had agreed that there were not a significant number of things the District could do given the extent of the 3rd party inappropriate online posts. Based on the Agreed Statement of Facts (paragraph xxii), sometime on November 16th the original social media posts were removed from the Concerning 'Community' Facebook page by the moderator. The moderator is a private citizen and he enacted a new rule that if the administrator receives multiple reports about any particular post, the post will be deleted (Schedule 9).

12. One of the actions that the NLTA wanted the District to do was to contact the police regarding the abusive online posts on behalf of the employer. It is important to note that contact was made twice with the police by the Grievor. The first call resulted in the police officer indicating that the online posts were not 'illegal'. After consulting with Ms. Sheppard, the Grievor made a second call to the police about the abusive posts, in which they indicated the relevant statute. The officer told the Grievor that they would look into it. No response was received back from the officer. Given this information was already relayed by the Grievor to the police, I find that it was reasonable that the District did not contact the police in this regard.

13. The NLTA also wanted the District to make contact with SH and SC, the leaders of the abusive posts, (e.g. by sending a cease-and-desist letter). Mr. Walsh stated that no correspondence was sent to SH or SC and that he had indicated such to Ms. Sheppard. He stated that the District had significant concerns about sending correspondence in the middle of a police investigation which could possibly impact evidence or have broader implications for the police investigation. He said that the District needed to err on the side of caution.

14. I find that it was logical to assume that the people involved in the online harassment could be witnesses in the ongoing investigation and that contact from the District to SH or SC may be inappropriate and could be problematic during the police investigation.

15. The majority decision did suggest that a fourth cease-and-desist letter template be developed to be used in cases of an ongoing investigation and online abuse of a teacher (p. 27, paragraph 55 of majority decision). I am in agreement with this suggestion with the letter being developed in consultation with policing authorities/legal experts to explore what may be possible while ensuring the integrity of the investigation.

16. The NLTA counsel suggested that the District could have made posts to Facebook or used Twitter posting the District Policies on Harassment and Workplace violence and indicating the inappropriateness of posted content, to remind parents that people in Canada are innocent until proven guilty, etc. This was not done by the District. I agree with the District's decision. Though people had to join the group in order to post, approximately 75% of the community were members of the Concerning 'Community' Facebook group. Engaging in a highly charged conversation in an online format is not an effective or appropriate way to engage with parents.

17. Parents are a key stakeholder in education. It is important to maintain the integrity and public trust in public education. In most cases, discussions with parents regarding inappropriate online behaviour could be addressed at the school level in conversation with parents but this was not an option in this case given the administrative role of the Grievor's spouse within the school.

18. The Grievor wanted to see consequences for the online inappropriate postings. As indicated, not all the postings were done by parents of students and the ability for the district to implement consequences upon parents and the community is limited at best. Defamation would be a private tort. The District could not threaten defamation on the teacher's behalf. If the conduct of the online posters was 'illegal', this should be handled by the police.

19. The position of the District would have been strengthened had the District provided written proof of the advice from policing authorities or had led expert evidence to support the advice given from policing authorities that would explain the legal concerns involved in fully implementing the MOS and relevant policies.

20. The District's response, or lack of response, was based on historical advice from policing authorities. It was not a deliberate uncaring response which has been viewed as "abandoning" an employee by the NLTA and the Grievor. The District has shown support for the Grievor's request for transfer. In good faith,

and pending the outcome of the police investigation, the District has arranged new positions for both the Grievor and their spouse.

21. It is important to note that the abusive posts by the 3rd parties spanned a four-day period (November 15-18) beginning with a late-night post on November 15th sent by SH on the Concerning 'Community' Facebook page. Though the response from the District was limited, the report by Ms. Cole Gendron to the Concerning Facebook Group page was done on the morning of November 16th. It was a timely report of 'harassment/bullying' on the same morning that the abusive posts were reported to the District.

22. Once the abusive posts started, the goal was to get the posts to stop/ be taken down. As noted in the Agreed Statement of Facts (paragraph xxii), "Sometime on November 16, the original abusive social media posts were removed from the Concerning Facebook page by the moderator". Concerning posts did continue over the four-day period including on the Public Information 'Community' page.

23. The NLTA, and the majority decision, made the point that the District "did nothing" despite being aware, before the start of school, that there were rumblings that the family involved in the original complaint was going to do whatever they could to keep the Grievor out of school. I disagree with this comment. I find that it would be difficult and unreasonable for the District to act on "rumblings" unless these "rumblings" could be substantiated as accurate intentions of the family. Otherwise, the District would be speculating without hard evidence of what was likely to occur.

24. I find that the District was proactive and prudent in that the District, after receiving the November 2nd email from Ms. Sheppard concerning the "rumblings" referenced above, and after the dismissal of the original 2020 complaint that was dismissed on November 4th 2021, that Ms. Sainsbury followed up with Ms. Lynn Moore, legal counsel for the complainant (AE) in the first investigation.

25. On of about Nov. 5, 2021, the family involved in the first investigation was "advised that they are not permitted to disclose the information from the concluded investigation and cautioned of potential consequences of same" (Agreed Statement of Facts, paragraph xxviii). I find that contacting Ms. Moore to relay this message to the family was an appropriate and effective way to bring the gravity of this message to the attention of the family given the extensive role Ms. Moore played as counsel to the family throughout the AE complaint.

What is the impact on the Grievor?

26. Regarding the impact on the Grievor, the employer has acknowledged that the Grievor was impacted by the first RCMP and District investigation, the abusive posts, and the ongoing current RCMP investigation. The District posited that any damages awarded in this matter should be assessed on the whole of the events (15 months) and "given that in the (delay grievance) the parties agreed that damages would not be at issue, that the matter of damages is now res judicata". (p. 46, paragraph 133 of majority decision)

27. I find that there are many factors that have contributed to the Grievor's overall impact and there is no evidence to show that the District's reactions to the postings, compared to other factors, was a significant factor in this overall impact. To determine causation from all factors such as community pressures, the online abusive posts, the new complaint and the 2nd police investigation, etc. would be a very difficult and tedious task. It is the position of the District that the harm caused to the Grievor occurred prior to the online postings of November 2021 and the District's reaction to it, and was not as a result of the online posting. (p. 46, paragraph 133 of majority decision)

28. I find that it is important to note that the new complaint to the District did not arise as a result of the posts online. The email from MiB was sent on November 10, 2021 though it was opened by Ms. Sainsbury on November 15th (AS#1) and

the email complaint from her daughter CH was sent on November 15, 2021 and opened by Ms. Sainsbury on November 24th (AS#2).

29. The Grievor and their family moved from their community to a new location. The idea of moving had been discussed long before the November 2021 abusive posts. This was revealed by the Grievor in the evidence of the delay arbitration (C#2, page 27, paragraph 33). It was also revealed in that testimony that the Grievor was "filled with dread about returning to school given that the original complainant and friends persisted in talking about it" prior to their return to school in 2021 (C# 2, page 27, paragraph 29). The Grievor stated that the "public nature of the attack by the parents" and the "lack of support by the District" tipped the scales about the move. I find the evidence, prior to the November 15th-18th postings, indicates that the move was highly likely much before the timeframe involved in this arbitration. Thus, though the postings and public humiliation of the parental attacks during Nov. 15th-18th may definitely contribute to the final decision, I find that the District's response to the November 15-18 postings would not have had any further impact on the Grievor's decision to move.

What is the correct remedy?

30. The NLTA indicated, as outlined in paragraph 111 of the majority decision, that "had the District written SH and SC, the conduct of those aggressive individuals could have been stopped, the online mob could have been shut down". The online posts included in the Consent documents show 20 plus different named people and multiple postings from some, in addition to SH and SC, who made posts on the Facebook sites. This included people in the community not known to be parents. It is highly speculative, and I would say highly unlikely, that any correspondence would have shut down the mob behaviour of the community that had unfortunately occurred during this period. The NLTA's position here is more hopeful than realistic.

31. Two of the reported decisions provided by the NLTA and referenced in the majority decision (p. 49, paragraph 143) were (*Safeway*) and (*Goodyear,* supra). In *Safeway*, though compensation of $5000 was considered by the panel for harassment and bullying endured by an employee at work, no monetary award was granted given that the Grievor (an employee) "had not approached the matter with clean hands" (*Safeway*). In *Goodyear*, supra, an employee was harassed at work (i.e. pornography posted in various places in the workplace) and after requests for help, the employee eventually resigned. The panel did not award the $70,000 sought but awarded $2500 to compensate for mental anguish. It is important to note that both of these cases involve employee against employee harassment.

32. I find that none of the cases presented in this arbitration reflect any close similarity to the facts of this case. The vast majority of cases reference harassment between employees. In those cases presented that reference 3rd party harassment, damages were rarely awarded. None of the cases reflect an employer that has the custodial responsibility to children as does the School District and heightened scrutiny of the public.

33. The circumstances of this case could occur again (i.e., an employee, who is being harassed by a 3rd party, is also the subject of an ongoing investigation). Given the majority decision of the panel, I suggest that the District will need to work with policing authorities and legal experts in the area of harassment/criminal law to determine a path forward in dealing with such matters.

34. The following questions remain to be addressed:
    a. Would full implementation of the MOS compromise the investigation?
    b. Would full implementation of the District's relevant policies compromise the investigation?

c. Are there particular actions that the District could undertake that would not jeopardize the integrity of the investigation?

35. In conclusion, I find that:

- The online statements over the period November 15 -18, 2021 about the Grievor were harassment as outlined in the MOS, the Collective Agreement, and relevant District policies
- The District's response was limited. The District did not fully implement the actions outlined in the MOS or in the relevant policies due to the distinguishing factor that of the Grievor was involved in an ongoing police investigation. This distinguishing factor and the fact that the District partially implemented the MOS and relevant District policies, places the question of breach(es) of the MOS and relevant District policies in debate.
- The District's response was done in good faith, and grounded in direction provided by the policing authorities, which has been long-established District practice. The fact that the victim of the 3rd party harassment could be the subject of an ongoing criminal investigation was not contemplated at the time of writing of the MOS or the relevant District policies. One is left with an unanswered question as to how the District should respond to ensure the integrity of an investigation.
- Damages are not warranted and, at this point, are premature. I also question how the majority decision quantified damaged of $2500 for the District's conduct given all of the other contributing factors. The causal relationship of harm caused by the District (if any), within the timeframe of this arbitration, has not been established.
- I find that a more appropriate remedy would be to declare that the Grievor was harassed, reiterate that the District has a responsibility to its employees to provide a safe, harassment-free environment and to issue an order to the District to determine an appropriate response to 3rd party harassment - as in the spirit of the MOS and relative policies - that responds to harassment/abusive behaviour by 3rd parties, informs of the

proper channels to make a formal complaint, yet respects the integrity of an ongoing criminal investigation.

- The grievance should be allowed in part, as outlined above.

36. Given the findings of the majority decision, the District would be well served to consult policing authorities and or expert legal authorities in the area of criminal law as to how the District could implement (partially or in full) the spirit of the MOS and relevant District policies without compromising ongoing investigations.

DATED at St. John's, in the Province of Newfoundland and Labrador, this

___15th__ day of __August_____, A.D., 2022.

Janet Vivian - Walsh

JANET VIVIAN-WALSH

District Representative