In the Matter of an Arbitration
Pursuant to the *Labour Relations Code*,
R.S.B.C. 1996, c. 244

The Board of Education of School District No. 39 (Vancouver)

-and-

Canadian Union of Public Employees, Local 407

(Markus Linde - Discipline)

AWARD

Arbitrator:	Paul Love
Employer Counsel:	Peter Csiszar
Union Counsel:	Kirsten Daub
Dates of Hearing	January 11, 12, March 1, 2 and 8, 2021 (by video conference)
Date of Award:	May 10, 2021

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I. Background

[1] Mr. Markus Linde (the grievor) is employed by The Board of Education of School District No. 39 (Vancouver) (the employer) as an apprentice gardener. He is a member of Canadian Union of Public Employees, Local 407 (the union).

[2] On May 13, 2020, Ms. Stacey Alexander, Manager of Labour Relations and Employee Services, suspended the grievor for ten days for his actions in deliberately coughing into the vehicle of a co-worker, Mr. Mike Emeno, an incident which occurred on April 14, 2020, at McKechnie Elementary School

(the school). In the suspension letter she described the incident as follows:

> Specifically, it was reported that while you were working at the school your colleague arrived to make a delivery. It was reported you waived the driver down, went up to the vehicle and opened the passenger side door. You then leaned into the cab of the vehicle and coughed. You did not attempt to cover your cough or cough into your elbow. The driver said that was not funny and asked you to move back. You did back up and told the driver you had just been off for two (2) weeks and had all the symptoms of COVID-19, however, you were not tested. The driver asked why you would open the door, lean in and cough into the cab of the truck and proceeded to make his scheduled delivery. You then approached the driver and the swamper when they were unloading the delivery near the school. The driver asked you if you were indeed sick and you once again, responded you had all the symptoms of COVID-19 and was off a couple of weeks. You went on to say that you were not contagious anymore, that the driver could not be infected and if he were it would be like a "science experiment" and made reference to "biowarfare".
>
> During our meeting you confirmed the incident did occur, although, you stated you did not lean into the vehicle but rather opened the door, stood between the cab and the open door and put your arm on the open door. You indicated that your actions were intended to be a joke.
>
> COVID-19 is not an issue that should be taken lightly or joked about. COVID-19 can lead to death. The Vancouver Board of Education has taken measures to follow the protocols of the Provincial Health Officer and <u>you have violated the safety measures that were put in place</u>. Your actions were egregious, unnecessary, and showed a complete lack in judgement. You caused more anxiety and stress for your colleague at time when anxiety and stress are already heightened.
>
> (emphasis added)

[3] The suspension letter also provided that any further incidents would result in the termination of the grievor's employment.

[4] On May 25, 2020, the union filed a grievance claiming that the grievor received excessive discipline for the incident. [1] The union concedes that the grievor's

[1] Exhibit 2, page 7;

conduct merited some discipline. The union's position was that the discipline was excessive in the circumstances. During its opening statement, the union advised that, as relief, it seeks that I replace the suspension with a verbal warning and that the grievor be made whole for any loss of pay, benefits or seniority.

[5] This matter was commenced by an application under 104 of the *Code*, however, the parties agreed to remove this case from 104, and therefore I am not bound by the CAAB deadlines for award issuance or page limits.

[6] I heard testimony from Mr. Anthony Kwon, Material Services Supervisor, and Ms. Alexander, on behalf of the employer, as well as the grievor.

II. Facts

[7] Ms. Alexander has worked in labour relations for the Vancouver School District (the District) for 25 years. She testified that there are about 9000 employees at the District and about 101 permanent and 40 casual employees within the CUPE 407 bargaining unit. Those employees are largely characterized as outside workers and broken into three separate groups – grounds, maintenance and construction, and material services.

[8] Ms. Alexander testified that the grievor could be directed to work at any of the District sites – there were more than 100 such locations.

[9] This case involves admitted misconduct by the grievor that directly relates to COVID-19. It is important to situate the misconduct in the appropriate factual context related to the pandemic and the employer's response to the pandemic.

A. The COVID-19 Context

[10] By January 28, 2020, the Health Minister and Provincial Health Officer disclosed to the public that the first presumptive case of COVID-19 had been

identified in the Vancouver Coastal Health Region. [2]

[11] Ms. Alexander testified that anxieties were running high amongst employees during the March and April period and the employer put into place enhanced safety protocols. After March 31, 2020, no school based employees returned to work except for principals and vice-principals.

[12] On March 11, 2020, Mr. Kwon commenced holding meetings about COVID-19 with staff members to distribute information about COVID-19 and safety measures. He testified that the employer's approach was to distribute information as soon as it became available to the employer.

[13] On March 13, 2020, just before the spring break, the Ministry of Education published new information about COVID-19 and warned parents, guardians and staff against all non-essential travel and a voluntary self-isolating protocol of 14 days for those who did travel. The memorandum reminded parents to have children wash their hands, and informed of increased cleaning at schools.[3]

[14] On the same date, the employer called a meeting with the workshop/grounds departments. It published information to staff which included cancellation of all work related travel, disclosure of out of the country travel and a mandatory 14 day self-quarantine period. [4] Mr. Kwon testified that the meeting with the grounds staff was conducted by Mr. Pearmain.

[15] Mr. Kwon was involved with many meetings with employees so the messaging was consistent. He went through all the documents with the staff. Mr. Pearmain often conducted meetings with his employees at the same time Mr. Kwon also conducted his meetings.

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[2] Exhibit 1, page 49;
[3] Exhibit 1, page 80;
[4] Exhibit 1, page 83;

[16] On March 14, 2020, there was a follow-up meeting with smaller groups. Mr. Kwon advised that, due to a recent directive from the Provincial Health Officer, the number of persons who could attend a meeting was capped at 50.

[17] On March 16, 2020, the employer provided further follow-up information from questions raised at the meeting. [5]

[18] On March 17, 2020, the employer met with the Workshop and Grounds Staff. At that meeting the speaking notes indicate that hygiene was a matter covered including washing hands, and social distancing. [6]

[19] On the same day, the Education Minister suspended in-class instruction for all kindergarten to Grade 12 schools.[7] Mr. Kwon testified that in-class learning did not recommence in the Vancouver School District until June 1, 2020.

[20] The employer published its COVID-19 SAFE WORK PROCEDURES. This document informed employees that on March 11, 2020, the World Health Organization declared COVID-19 a pandemic. This procedure also advised employees on the nature of COVID-19 and how it was spread[8]:

> COVID-19 is spread from an infected person through
> - Respiratory droplets when a person coughs or sneezes;
> - Close personal contact such as touching or shaking hands;
> - Touching an object or surface, and then touching your face (eyes, nose, mouth)
> - Touching your face before washing your hands.
>
> Common symptoms for COVID-19 include fever, cough, difficulty breathing, sore throat and sneezing.
>
> The incubation period is the time from when a person is first exposed until symptoms appear. The symptoms may take up to 14 days to appear after exposure to COVID-19. This is the longest known infectious period for this disease.

[5] Exhibit 1, page 86;
[6] Exhibit 1, page 89;
[7] Exhibit 1, page 51;
[8] Exhibit 1, page 25;

[21] The District Health and Safety Committee developed an Influenza Exposure Control Plan, which also dealt with COVID-19. [9] This plan was shared with the entire District's staff by way of posting at the work sites and on-line. The plan was developed to prevent exposure of staff, students, contractors and visitors to COVID-19. The District put in measures to encourage physical distancing on its properties. Playgrounds were closed until further notice and grounds staff removed play equipment such as nets, hoops and portable soccer goals. A moratorium was imposed on rental of school facilities by community groups.[10]

[22] The plan also described respiratory etiquette as the best way to protect others from COVID-19. Respiratory etiquette involves four simple strategies[11]:

> • Sneeze/cough into a disposable tissue or your sleeve (flexed elbow);
> • Dispose used tissues in a plastic-lined waste container;
> • Direct the sneeze/cough away from those in the general area;
> • Follow with good hand hygiene.

[23] The very simple strategies communicated to employees were also communicated in a publication, "Protect Yourself and others from COVID-19." [12] This document clearly communicated that in order to stop the spread employees were to:

- Cover your mouth and nose with a tissue when you cough or sneeze;
- Throw tissues away immediately;
- No tissue? Cough or sneeze into your upper sleeve, not your hands;
- Wash your hands often with soap and water or an alcohol-based hand sanitizer;
- Stay at home if you are sick.

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[9] Exhibit 1, page 28;
[10] Exhibit 1, page 28;
[11] Exhibit 1, page31;
[12] Exhibit 1, page 15;

[24] The same document also instructed employees to maintain a two metre or six foot distance from others to "protect yourself and prevent others from getting sick." [13]

[25] At this point in time, the employer had cancelled some international field trips for students. Staff such as the grievor had been involved in removing basketball hoops, soccer nets and the like to prevent use of school facilities. There was no in school attendance by students.

[26] Mr. Kwon testified that the information was posted on line on the Board's web-site and hard copies were posted at the grounds and materials yard. The employer also published COVID-19 updates on its web-site. [14]

[27] Mr. Kwon testified about the changes implemented by the employer in relation to the COVID-19 pandemic. All employees had to maintain a two metre or six foot social distance from other employees. All employees were issued with a bottle of hand sanitizer and a bottle of cleaning fluid. Employees were expected to sanitize the surfaces they came in contact with twice per day. In a truck, for example, this would include all touchable surfaces including door handles and seats.

[28] Mr. Kwon testified that, in April of 2020 there was heightened concern with the District staff about COVID-19. Staff did not want to come to work, and staff wanted safety measure in place. As a supervisor, he held meetings with staff to give reassurance and to pass on information as quickly as the employer received it so that staff was part of the process and following safety procedures.

[29] Mr. Kwon testified that COVID-19 was a serious matter and it was the employer's expectation that all staff were to follow the preventative safety

[13] Exhibit 1, page 18;
[14] Exhibit 1, page 62 – an example from December 7, 2020;

measures implemented by the employer. Ms. Alexander testified that all employees were expected to abide by the health and safety protocols at all times. She testified that there was a district health and safety committee that included the employees covered by the CUPE 407 collective agreement.

[30] Mr. Kwon testified that as part of the grounds crew, the grievor was dispatched from grounds and maintenance work yard on Wales street. The grievor was supervised by Mr. Geoff Pearmain, Supervisor, Grounds Maintenance.

[31] In his examination in chief, the grievor admitted that he was aware of the employer's COVID-19 safety protocols.

[32] The Vancouver School District has a District Respectful Work Place Administrative Procedure. [15] The salient part of the procedure reads as follows:

> 1.4 Bullying and harassment includes any inappropriate conduct, comment, display, action or gesture directed at another that a reasonable person knows or ought to know would have the effect of creating an intimidating, humiliation, hostile, or offensive work environment. To constitute bullying and harassment there must be:
> 1.4.1 Repeated conduct, comments, displays, actions or gestures; or
> 1.4.2 A single serious occurrence that has a lasting, harmful effect on a person

[33] In summary, after COVID-19 struck, the employer made significant efforts to protect students as well as its employees. The employer provided repeated training to its staff. It published information on its web-site.

B. The Grievor contracted COVID-19

[34] The grievor developed COVID-19 symptoms and he remained at home from March 12, 2020 to April 8, 2020. He self-isolated in the basement of his mother's home. He described slow improvement in his condition and he began

[15] Exhibit 1, page 71;

to feel better around March 20, 2020.

[35] While he was self-isolating he was also conducting his own research on COVID-19 and appears to have kept abreast of developments.

[36] On March 25, 2020, the grievor emailed Ms. Donna Wong, Executive Assistant to the Superintendent of Schools indicating[16]:

> . . . I have most of the symptoms of the KV2.1 pandemic. I feel I am over the worst but I continue to self isolate.
> . . .
> I have not been to the hospital because I believe my symptoms are decreasing. I will not be back at work until Monday, at the earliest.

[37] On March 30, 2020, the grievor contacted the BC Centre for Disease Control, explained his symptoms and the advice he received was that he should wait for seven days before returning to work and that he did not need a test if he was symptom free. The grievor's cell phone records indicate that the grievor called 1-888-268-4319 at 9:22 on March 30, 2020 for 17 minutes.[17] This is the number of the BC Centre for Disease Control for information about COVID-19.[18] At that time the information related to ending isolation was:

> If you've been diagnosed with COVID-19, public health will tell you when you can end isolation.
> • You will need to self-isolate for a minimum of 10 days since your symptoms started , AND
> • Your fever is gone without the use of fever-reducing medications (e.g. Tylenol, Advil), AND
> • You are feeling better (e.g. improvement in runny nose, sore throat, nausea, vomiting, diarrhea, fatigue).
> It can be a bit tricky to figure out when your fever has disappeared. It's easier if you keep a note of your temperature and your symptoms every day, so you know when to stop isolating safely.
> Coughing may persist for several weeks, so coughing alone does

[16] Exhibit 1, page 144;
[17] Exhibit 1, page 117;
[18] Exhibit 1, page 119;

not require you to continue to isolate.

[38] As part of her investigation, Ms. Alexander called this number. She was told that this call line did not give medical advice it provided information about COVID19. The information Ms. Alexander received was that in March of 2020, it was a several hour wait to speak to someone. She noted that the grievor's phone records showed a 17 minute call. Ms. Alexander did not believe the grievor that he received medical information about his own situation from this call.

[39] The grievor testified that he believed on April 14, 2020, that he was no longer contagious; however, he had never been tested for COVID-19 and his belief is grounded only on the advice in the media, government publications and information from the BC Centre for Disease Control.

[40] I find that as of April 14, 2020, the grievor could not be certain that he was no longer contagious. In any event, whether he was contagious or not, he was required to follow the employer's safety rules to mitigate against the risk of spreading COVID-19 at work.

[41] While the grievor was off work for almost 4 weeks, in his dealings with Mr. Emeno, he told Mr. Emeno that he was off work for two weeks.

C. The Incident

[42] Mr. Emeno, a Truck Driver 2A, is dispatched for deliveries (runs) from the District's maintenance workshop on Clarke Avenue (the workshop). According to Mr. Kwon his shift runs from 7:21 to 3:30. Mr. Emeno is dispatched for a morning run between 7:00 a.m. to 10:30 a.m. and an afternoon run between 1:30 p.m. to 3:30 p.m.

[43] On April 14, 2020, Mr. Emeno, made deliveries to various District work sites,

including delivering an air compressor to the school, using a 5 ton truck. Pursuant to the COVID-19 protocol in place, Mr. Jessie Goring, his swamper, travelled in a separate vehicle to the school.

[44] Ms. Alexander testified that there would be no need for close interaction between a gardener apprentice and a truck driver. According to Mr. Kwon, Mr. Emeno and the grievor were dispatched from different morning reporting locations. The truck/delivery routing sheet[19] also confirms that the nature of Mr. Emeno's deliveries at the school did not require the grievor's involvement.

[45] I find that this incident occurred shortly before 11:55 a.m. on April 14, 2020. According to an email from Mr. Benjamin Baker, Outside Grounds Foreperson, to Mr. Pearmain this was the time when Mr. Emeno called and reported the incident to him. [20]

[46] Mr. Kwon has known Mr. Emeno for more than ten years. He described Mr. Emeno as a jovial, happy go-lucky person who was a good employee. Mr. Emeno contacted Mr. Kwon and informed him of the incident with the grievor. Mr. Kwon testified that Mr. Emeno was quite upset and asked if he could go home, shower and change his clothes. Mr. Kwon instructed him to go home.

[47] Mr. Kwon asked Mr. Emeno to come to his office and make a statement that he would be passing on to labour relations. When Mr. Emeno arrived at his office, Mr. Kwon noticed that the grievor was serious and appeared to be shaken by what had occurred. Mr. Emeno expressed concern about contacting COVID-19. Mr. Kwon noted that Mr. Emeno was pretty furious and mad about the grievor touching his truck and coughing.

[48] In between his first and second call with Mr. Emeno, Mr. Kwon contacted Mr. Pearmain, as he was not the grievor's supervisor and action about the grievor had to be taken by the grievor's supervisor, Mr. Pearmain. He also contacted

[19] Exhibit 1, page 11;
[20] Exhibit 1, page 100;

Ms. Alexander.

[49] Mr. Kwon stated that the employer was very disappointed that the incident occurred given the staff concerns about COVID-19, meetings with the staff and the consistent messaging about COVID-19 safety measures.

[50] In cross-examination Mr. Kwon stated that he did not suggest to Mr. Emeno that he should self- isolate or that he be tested for COVID-19.

[51] Neither Mr. Emeno nor Mr. Goring testified at this hearing, however, each of the employees provided statements and participated in an interview conducted by the employer.

[52] On April 16, 2020, Ms. Alexander interviewed Mr. Emeno.[21] He advised that the grievor opened the passenger side door of his van, leaned into his van and coughed. Mr. Emeno cleaned his van with a bottle of bleach that he carried in his truck. He called his supervisor, Mr. Kwon and he went home to shower.

[53] On the same day, Ms. Alexander interviewed Mr. Jesse Goring. Mr. Goring confirmed that he saw the grievor by the passenger side door talking to Mr. Emeno but he was too far away to hear anything. He stated that the grievor again approached the van and that Mr. Emeno looked upset after the grievor made a comment about biowarfare. Mr. Goring went home and showered following the incident.

[54] On April 20, 2020, Ms. Alexander interviewed the grievor.

[55] The union provided some helpful photographs depicting the scene, the truck and a re-enactment of the grievor leaning into the van.[22] The measurements depicted that the grievor was within six feet of Mr. Emeno when he leaned into the truck, and showed the grievor touching the interior of the van on the outside

[21] Exhibit 1 pages 104 to 106;
[22] Exhibit 2, pages 55 to 65;

edge of the passenger's seat.

D. The Employer's Disciplinary Decision

[56] Ms. Alexander accepted Mr. Emeno's version of the events, which were similar to what was reported in the suspension letter to the grievor.

1. Ms. Alexander's Factual Conclusions

[57] Counsel canvassed with Ms. Alexander her investigation findings. In summarizing her evidence Ms. Alexander concluded:

- that she disbelieved the grievor on the issue of who stopped the vehicle and why the grievor stopped Mr. Emeno's truck;
- that the grievor had no basis to conclude that he was not potentially contagious;
- there was an inconsistency between the grievor's statements to Mr. Emeno about how long he was off work and the severity of his symptoms;
- the grievor attempted to minimize his misconduct by characterizing what he did as "pretending to cough";
- the employer concluded that he intentionally coughed and whether, pretend or not, coughing would transmit droplets;
- the grievor did not accept responsibility for his misconduct and characterized it as a bad attempt at a joke;
- the grievor did not treat his conduct as serious;
- the grievor did not demonstrate any genuine remorse;
- there was no evidence of immediate regret following the incident;
- the apology given at the meeting was an empty apology since he did not deliver it to Mr. Emeno nor was the employer asked to deliver it to Mr. Emeno;

2. Admissibility of Research Materials Reviewed by Ms. Alexander

[58] Ms. Alexander testified that prior to her investigation meeting with the grievor she conducted some research as she wanted to know what was being done elsewhere about COVID-19.

[59] The union objected to Ms. Alexander referring to the sources of her research, which included media articles, as these documents were hearsay. The articles

did not disclose the outcomes and the prejudicial effect outweighed the probative value.

[60] The employer submitted that the materials were admissible as part of the narrative and for how deliberate coughing during the pandemic was viewed in the community.

[61] I determined that the documents were admissible for the purpose of establishing that deliberate coughing in a public place or workplace context was attracting media concern or public scrutiny in the time frame of the alleged incident.

[62] As a result of her research, Ms. Alexander learned that individuals had been charged with assault for coughing on other individuals, and as a result she took the alleged conduct seriously where the grievor stated that he had had the symptoms of COVID-19 and he was coughing on Mr. Emeno.

[63] Ms. Alexander decided to suspend the grievor for 10 days because his conduct was egregious, he did not take responsibility for his actions, and he was attempting to minimize his responsibility by saying it was a joke. Ms. Alexander also took into account the context that "we are in a global pandemic, people were still dying daily and coughing on someone can lead to the transmission of COVID-19." She said that she did not see any acknowledgement by the grievor that he put Mr. Emeno at risk. Further, Ms. Alexander stated that she did not see Mr. Emeno's conduct as having contributed to what happened, yet the grievor appeared to blame Mr. Emeno.

[64] Ms. Alexander testified that if the grievor had known he had the symptoms of COVID-19, he should have been extra careful in his dealings with Mr. Emeno.

[65] She said she decided on a 10 day suspension for him to reflect on his actions, to take some responsibility and to understand how his actions did and could

have impacted on a colleague. In assessing the penalty Ms. Alexander stated that she considered the grievor's length of service and discipline free record and stated, but for these factors, he would have been terminated.

[66] In cross-examination, Ms. Alexander admitted that the grievor did not cough directly on Mr. Emeno but coughed into an enclosed space in the vehicle. Initially Ms. Alexander believed that Mr. Emeno was driving a smaller truck.

[67] Ms. Alexander testified the District is subject to a lot of public scrutiny and, in the past, the behavior of employees has received media attention, including front page coverage in the local media. She testified that such coverage can have a negative impact on the District.

[68] In cross-examination, Ms. Alexander admitted that the issue of the District's reputation was not raised in her interview with the grievor, nor was it raised in the suspension letter.

E. The Grievor's version

[69] In assessing the testimony at the hearing, I have applied the test set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, at page 357 to assess the credibility of witnesses:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. <u>The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.</u>
>
> (emphasis added)

[70] It is hard to identify one single version of the grievor's testimony as to what happened between himself and Mr. Emeno. The employer's 54 page, written closing argument identified many internal inconsistencies in the grievor's story at the hearing, and inconsistencies across time with the grievor's written explanation of April 15, his information at the interview on April 20, 2020 and his testimony at the hearing.

[71] Many of these inconsistencies go to the credibility and reliability of the grievor's testimony. The employer also pointed out what appeared to be deliberate lies.

[72] During the grievor's testimony, he "fell repeatedly on his sword." Often, rather than focusing on the particular question framed in cross-examination, the grievor admitted that he was wrong, and that he shouldn't have done what he did. It might have been better had he simply answered the questions posed as, at times, his evidence came off as rehearsed and, at times, evasive.

[73] The grievor's version is not internally consistent on a number of issues. That is, he gave different stories at different times about the same issues. For example on the issue of how the contact initiated, he said:

- In his initial statement he said "Mike Emeno drove past and stopped his truck to chat with me"[23]
- In his interview statement he said "I saw Mike pull up and waved [demonstrated] I don't know how he interpreted that. He stopped. My intention was to find out what the restrictions were at the workshop since I'd been off."
- Initially, in his examination in chief, he testified that he recognized the driver of the vehicle, put his arm up to say hello and the driver stopped and the grievor opened up the passenger's side door;

[23] Exhibit 1, page 102, Email of April 15, 2020;

[74] He minimized his evidence about the coughing and his evidence on this issue was inconsistent:

- "I pretended to cough a couple of times, only making the faintest noise"[24]
- "I made a sound"[25]
- He demonstrated three distinct loud coughs at the hearing;

[75] When asked to explain inconsistencies he would say "I intended to say" or it was "my intention", rather than address the inconsistency of what he actually said and did. The grievor admitted that he understood the difference and he expected to be "judged" on what he said and did.

[76] There were examples of new inventive evidence at the hearing. For example, the grievor alleged that Mr. Emeno yelled at him and he said, "Sorry I was coughing into the ground." This conflicts with Mr. Emeno's written statement. These details were not provided in earlier emails provided to him or in questioning by Ms. Alexander during the investigation meeting.

[77] He attempted to blame Mr. Emeno for his misconduct. For example, he claimed that Mr. Emeno's reaction to his coughing might have been him having a bad day. He blamed Mr. Emeno for yelling at him and as a result he did not say what he intended to say. He took offence when Mr. Emeno said, "Why are you even at work," and that was what prompted his comments about biological weapons and Mr. Emeno being his science experiment.

[78] On the whole, I find, on a balance of probabilities, that when the grievor saw the truck was driven by Mr. Emeno, he immediately decided to play a practical joke on Mr. Emeno and he waved down the truck. He coughed deliberately three times into the cab of the truck. He was less than 2 metres away from Mr. Emeno at the time of coughing and he was leaning into the vehicle. He did not aim his cough at Mr. Emeno's face, but he coughed into a confined space. He

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[24] Exhibit 1, page 102, April 15, 2020 email;
[25] Exhibit 1, page 35 , interview of April 20, 2020;

knew that he was expelling droplets, which generally is a mechanism for transmitting COVID-19.

[79] In a second encounter on the same day, he said, “You will be my science experiment. Don’t make me use my biological weapons.” He said this because he became angry about Mr. Emeno asking him why he was even at work when he had COVID-19. I do not accept the grievor’s testimony that he was attempting to re-assure Mr. Emeno, as his actual words cannot be construed as reassuring in nature. He said these words because he was angry with Mr. Emeno. The words are more consistent with what someone would blurt out in anger, rather than blurting out in reassurance.

[80] The motive for the grievor’s conduct was not to infect Mr. Emeno with COVID-19. His motive was simply to play a joke on Mr. Emeno. For the reasons set out below, his motive is irrelevant as to whether he breached a safety rule or for the discipline for breaching that rule.

[81] The grievor also lied about some of the incidental matters to attempt to reduce his culpability. In particular, he was untruthful about his reasons for initiating contact with Mr. Emeno.

[82] In my view, the facts proven at the hearing concerning the grievor and his misconduct did not differ substantially from that contained in the employer’s suspension letter.

F. The Apology

[83] There is an issue in this case about whether or not the grievor tendered an apology and whether it was a sincere apology. In order to analyze whether the apology was a sincere apology it is important to understand when it was tendered in relation to the incident on April 14, 2020.

[84] It is apparent from an email chain that Mr. Pearmain, the grievor's supervisor, appears to have learned about the incident on April 14, 2020, at 1:44 p.m. by way of an email from Mr. Benjamin Baker, the Outside Grounds Foreperson. [26] Mr. Baker had been alerted to the incident by Mr. Emeno.

[85] Ms. Alexander testified that someone in the HR department [not her] attempted to contact the grievor on April 14, 2020 to tell him that they were holding him out of service with pay, pending the investigation. The employer did not call the person who made the call as a witness and therefore I have no evidence whether they in fact reached the grievor's telephone and left a message on the phone. The grievor denies receiving any telephone message.

[86] The HR department was able to get ahold of Mr. Pearmain and advised him that if the grievor showed up for work, he should be sent home and told to call Ms. Horsley, Director of Human Resources.

[87] On April 15, 2020 at 6:35 a.m., the grievor attended at work for the start of his shift. Mr. Pearmain sent the grievor home and instructed him to contact HR.[27] He also advised Ms. Horsley that he had sent the grievor home.

[88] I accept, on a balance of probabilities, that the grievor did not learn of the employer's investigation until the early morning of April 15, 2020.

[89] The same day at 8:42 a.m., the grievor sent an email message to Ms. Horsley, with an account of the April 14, 2020 incident.[28] Further in the email he wrote "… I will apologize to Mike when the time is right."

[90] On the same day at 10:14 a.m., the grievor sent a text message to Mr. Emeno

[26] Exhibit 1, page 100;
[27] Exhibit 1, page 96;
[28] Exhibit 1, page 9;

at 10:14 a.m. , which reads as follows[29]:

> Hi buddy.
> I am very sorry about my behavior yesterday. It was in bad taste.
> Have a good day. FYI I can almost guarantee you will be fine.

[91] In his evidence in chief, the grievor was asked the following question and gave the following answer:

> Q Why did you write the first text of April 15 to Mike?
>
> A. Because I was sorry. I had just realized that morning when I got sent home from work that this was how he felt um it was not my intention but I wanted for him to personally know that that I was sorry and that it was joke that was in terrible taste at a terrible point in time and yeah I have no excuses.

[92] Ms. Alexander testified that the grievor did not refer to this document during the investigation. She was not aware that the grievor made any attempt to apologize to Mr. Emeno until she received the union's documents related to the arbitration.

[93] During her investigation she did not question either Mr. Emeno or the grievor about an apology. The lack of disclosure by the grievor of the text apology, combined with the 8:15 a.m. email had a misleading effect on Ms. Alexander. In my view she likely did not follow up on the issue of an apology in the investigation meetings because of this.

[94] Ms. Alexander testified in chief that she not view this as a sincere apology as it was made at a time when the grievor knew he was being held out of service with pay and he knew he could not return to work until he met with labour relations.

[95] The union provided a text message from Mr. Emeno dated May 22, 2020,

[29] Exhibit 2, page 11;

which may be an acknowledgement of receipt by Mr. Emeno.[30] There is no proof of receipt of the grievor's text by Mr. Emeno; however, the burden rests with the employer and it was open to the employer to call Mr. Emeno as a witness if the employer did not accept that the grievor's record of his text messages accurately reflected receipt of it by Mr. Emeno.

[96] At the grievor's interview, Mr. Brent Boyd, President of the union, delivered two documents to the employer. In the employer's notes, at the interview, Mr. Boyd stated that these were drafted by the grievor. One was a letter or statement to the District Human Resources Staff, which reads as follows[31]:

> I tried to joke about the Covid-19 pandemic. It was in terrible taste and I regret my behavior. I am sorry my union brother and friend felt his health may be compromised doing his job. If I could redo the incident I would but I can't. I am genuinely sorry.
>
> I was very sick at the end of March. I was never tested. I do not even know for sure if I had Covid-19 or influenza. I read about the virus dialy (sic) for hours at a time as soon as I could sit upright. I called 811 to discuss my situation. They did not think I warranted a test. They assured me I should not be contagious.
>
> Even though I was better and showed very few symptoms on April 3 I did not return to work until April 8. I did not want to take a chance I could be contagious. For 4 weeks 1 had almost no contact with anyone except by phone and when I returned to work I was primarily working alone. To my knowledge I did not pass my illness to anyone.
>
> <u>I have no excuses for pretending to cough in my co-worker's direction</u>. I accept responsibility for my bad attempt at a joke. I plan on being much more professional at work in the future.
> I will be writing another personal letter to Mr. Michael Emeno to express my regret.
>
> (emphasis added)

[97] Ms. Alexander commented in her evidence that the grievor's statement was untruthful in a number of ways. The grievor contacted the Centre for Disease

[30] Exhibit 4;
[31] Exhibit 1, page 130;

Control not 811, as demonstrated by the grievor's phone records. She phoned that number herself and confirmed that the number provided generic information about COVID-19 and not personal advice about when to return to work.

[98] Mr. Boyd also provided Ms. Alexander with a letter of apology addressed to Mr. Emeno, dated April 20, 2020, which reads as follows:[32]

> I am sorry brother. I take full responsibility for my behaviour and attitude. I was very disrespectful and selfish.
> I had a momentary lapse in judgement. I will not make any excuses.
>
> I consider you a friend and I hope in time we can address this.
> I plan on being more professional in the workplace in the future.
> Once again, I am truly sorry.

[99] The grievor did not make a request for the employer to pass on the letter of apology to Mr. Emeno. The grievor did not deliver this document to Mr. Emeno. At the hearing he offered a variety of excuses including not knowing Mr. Emeno's email and not emailing it because staff often doesn't review emails. The employer submitted that the document was purely tactical and not a sincere apology.

III. Arguments of the Parties

[100] Both counsel provided helpful written arguments which I have read and considered. For concision, I have attempted to paraphrase the arguments.

A. The Employer's Argument

[101] The employer submits that it could have terminated the grievor, but it chose to suspend him, and his conduct more than amply justifies a 10 day suspension.

[102] The employer says that there is a substantial issue about the grievor's credibility and his testimony did not exhibit a ring of truth. At the hearing, he did

[32] Exhibit 1, page 132;

not answer the questions asked of him; he simply repeated statements that it was a mistake. His evidence was inconsistent in comparison with his answers during the employer's investigation and his written statement to the employer of April 15, 2020. Further, the grievor's testimony at the hearing was not internally consistent.

[103] The employer argues that the grievor's behavior with Mr. Emeno during the second encounter demonstrates that the grievor exhibited no true remorse or the taking of responsibility for his actions. The grievor minimized his own role in the incident. He attempted to deflect responsibility to Mr. Emeno.

[104] The employer submits that the grievor's actions were a deliberate and serious safety violation and the discipline should be maintained even when there is virtually no risk of injury: *Tolko Industries Ltd (Lakeview Division) v United Steelworkers, Local 1- 2017 Bandle Grievance)*, [2020] BCCAAA No 90. The usual arbitral approach, and a non-exhaustive list of principles for discipline for breaches of health and safety protocols is set out in *Coca-Cola Refreshments Canada Co., Brampton Plant v. Unifor Local 973 (Troisi Grievance)*, [2016] O.L.A.A. No. 328.

[105] The employer elaborated that violations of safety related rules, whether intentional or not, are deserving of discipline: *BC Hydro and Power Authority v International Brotherhood of Electrical Workers, Local 258 (Pereszlenyi Grievance)*, [2020] BCCAAA No 5; *Western Forest Products Inc. v United Steelworkers, Local 1-1937 (Stephan Grievance)*, [2019] BCCAAA No 67, 306 LAC (4th) 45, 2019 CarswellBC 197222.

[106] The employer argued that there is no requirement for it to establish a physical injury or harm in order to establish the seriousness of the incident: *Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 364T v Imperial Tobacco Canada Ltd (Lambert Grievance)*, [2001] OLAA No 565, 65 CLAS 100, 2001 CarswellOnt 10355.

[107] The employer cited a number of cases where dismissal was upheld for violation of safety rules: *Saputo Dairy Product Canada GP v Teamsters Local Union No 464 (Lundgren Grievance)*,[2020] BCCAAA No 130 ("Saputo"); *Richmond Steel Recycling Ltd. (Re)*, [2012] B.C.L.R.B.D. No. 38; *Con-Agra Ltd. – Lamb-Weston Division v. United Steelworkers of America, Local Union 6034 (Pierson Grievance)*, [2008] A.G.A.A. No. 1; *Southern Railway Vancouver Island Ltd. v. Council of Railway Unions (Boychuk Grievance)*, [2007] B.C.C.A.A.A. No. 206; *British Columbia Ferry Services Inc. v. British Columbia Ferry and Marine Workers' Union (Farquason Grievance)*, [2007] BCCAAA No. 167, 165 (LAC) 4th 28, 91 CLAS 128; *Southern Railway Vancouver Island Ltd. v. Council of Railway Unions (Boychuk Grievance)*, [2007] B.C.C.A.A.A. No. 206.

[108] The employer referred to other cases where arbitrators have held that nothing is more important than safety in the workplace: *Kingston Independent Nylon Workers' Union v Invista Canada Inc. (Walsh Grievance)*, [2006] OLAA No 329; *Huppmann and Ontario (Ministry of the Solicitor General), Re* 2019 CarswellOnt 13622,41 C.L.A.S. 176, 309 L.A.C. (4th) 357; *Re ITT Automotive Inc.* (1995), 51 L.A.C. (4th) 308 (Rose); *Re Woodbridge Foam Corp.*, 5 C.L.A.S. 23, 18 April 1987); *Re Firestone Steel Products of Canad*a (unreported, 25 February 1986); *Re Canada Packers Ltd.,* (unreported 14 January 1983); and *Re Reynolds Aluminum Company of Canada Ltd*, (unreported, 10 July 1979).

[109] The employer submits that an apology can mitigate the penalty for workplace misconduct; however, it must be timely, genuine and sincere. An insincere or untimely apology may work against the employee in the exercise of the arbitrator's discretion. The employer provided numerous authorities on this issue: Brown and Beatty, *Canadian Labour Arbitration (online)* at § 7:4422; *Canada Post Corp. and Canadian Union of Postal Workers*, [1996] BCDLA 500.15.40.35-02 ; *Saputo*, (supra); *Re Royal Towers Hotel Inc.*, [1992] B.C.C.A.A.A. No. 211; *Viceroy Homes Ltd. v. Retail Wholesale Union, Local*

580, [2006] B.C.C.A.A.A. No. 109; *7-Eleven Canada Inc. v. United Food and Commercial Workers International Union, Local 1518(Khan Grievance)*, [1999] BCCAAA No. 551; *International Forest Products Ltd. v. Industrial Wood and Allied Workers of Canada, Local 1-3567*, [2003] B.C.C.A.A.A. No. 408; *Toronto v. Canadian Union of Public Employees, Local 79*, [2015] O.L.A.A. No. 317*; BC Hydro and Power Authority v International Brotherhood of Electrical Workers, Local 258 (Pereszlenyi Grievance)*, [2020] BCCAAA No 53; *Western Forest Products Inc. v United Steelworkers, Local 1-1937 (Stephan Grievance)*, [2019] BCCAAA No 67, 306 LAC (4th) 45, 2019 CarswellBC 1972 52; *Calgary (City) v CUPE, Local 709*, [2017] A.W.L.D. 1552; *British Columbia Teachers' Federation v British Columbia Public School Employers' Assn (Gillespie Grievance)*, [2009] BCCAAA No 73, 185 LAC (4th) 129; British *Columbia Ferry Services Inc. v British Columbia Ferry and Marine Workers' Union (Farquharson Grievance)*, (supra*); Coca-Cola*, (supra); *Canada Post Corp.* (1988), 3 L.A.C. (4th) 162 (Bird); *X v. Y*, [2002] B.C.C.A.A.A. No. 292(QL); *Cannet Freight Cartage Ltd.* (1993), 35 L.A.C. (4th) 314; *Royal Towers Hotel Inc.* (1992), 32 L.A.C. (4th) 264; *Highland Valley Copper and USAW, Local 7619 (Marcus)* (1999), 82 L.A.C. (4th) 310; *Beaver Foods Ltd. And Local 40*, (1996), 57 L.A.C. (4th) 47; *Vernon Professional Firefighters' Assn (International Assn of Fire Fighters), Local 1517 v Vernon (City) (Bond Grievance)*, [2019] BCCAAA No 23, 301 LAC (4th) 234, 2019 CarswellBC 576.

[110] The employer submits that the grievor has not provided a true apology and therefore this cannot be considered to mitigate the discipline assessed by the employer. His testimony was rehearsed in order to avoid the consequences of his misconduct.

[111] The employer submits that a strong arbitral statement needs to be made admonishing the grievor for his misconduct at work. This is an act that could have been a violation of the *Criminal Code of Canada*. The impact on the victim was serious and profound. The grievor’s explanations of his behavior were inconsistent with his actual conduct.

B. The Union's Argument

[112] The union says that the grievor's discipline must be analyzed in the context of the framework set out in *William Scott & Co v. C.F.A.W., Local P-162* (1976) CarswellBC 518, which lays out the three-part test for assessing discipline.

[113] The union concedes that the employer had some cause for imposing discipline. The making of a joke does not render the conduct non-culpable. The union admits that the grievor was aware of the employer's COVID-19 safety protocols. The grievor has admitted that he should not have taken offence to Mr. Emeno questioning why he was at work and he should not have made the comments about science experiments and biological weapons.

[114] The union argued that one incident alone did not violate the District Respectful Workplace Administrative Procedure. The union argues that the employer did not follow the investigative process for the District Respectful Workplace Procedure and the employer's disciplinary letter did not reference this policy.

[115] The union pointed out that there is broad arbitral discretion to assess whether the employer's disciplinary sanction was appropriate in the circumstances. The union referred to D.J.M., Beatty, D.M., & Beatty, A.J. (Eds.), *Canadian Labour Arbitration*, 5th ed. Thomson Reuters, paragraphs 7:4100 Scope of Review.

[116] The union refers to the non-exhaustive list of considerations identified in *Steel Equipment Co. Ltd.* (1964), 14 L.A.C. 356, highlighted by the Board in *William Scott*.

[117] The union submits the relevant mitigating factors include the grievor's willingness to apologize, his good service record and lack of prior discipline.

[118] The union refers to some past awards where an arbitrator reduced a suspension where the grievor acknowledged his actions were inappropriate during an investigation: *Rheem Canada Ltd. v. U.S.W.* (2012) CarswellOnt

9107 (Newman.) An apology, even though it was offered several weeks after the incident, can still be considered mitigative by the arbitrator: *School District No. 71 (Comox Valley) and CUPE, Local 439* (2001) CarswellBC 3783 (Diebolt).

[119] The union argues that the employer assumes, but has not proven, that Mr. Emeno was adversely impacted by the grievor's conduct. This is a basis to reduce the discipline: *Toronto Electric Commissioners and CUPE, Local 1* (1998) CarswellOnt 7411.

[120] The union submits that employees can be terminated for COVID-19 related behaviours*: LIUNA, Ontario Provincial District Council and Aecon Industrial (Wynne)* (2020) CarswellOnt 17235 and *Garda Security Screening Inc. v. IAM, District 140 (Shoker Grievance)*, (2020) O.L.A.A. No 162. Here the facts are less egregious.

[121] The union provided a couple of discipline letters for other employees. [33] The union argues that this supports its view that the discipline was excessive in the circumstances.

[122] The union submits[34]:

> 77. However, the Employer erred when they assumed the Grievor had not apologized to Mr. Emeno at any time for his actions. Furthermore, their lack of action to mitigate the serious risk they stated they believed Mr. Emeno to be at contradicts the need to mete out a 10-day suspension, particularly given the fact that this was the first time the Grievor had ever given cause for discipline in his 16 years with the Employer, and that he apologized for his actions. Therefore, the Union asks that the 10-day suspension be replaced with a lesser penalty.

C. The Employer's Reply Argument

[123] The employer submits that the CA has a sunset clause and, therefore, the most

[33] Exhibit 2, pages 72 – 74 and pages 76- 77;
[34] The Union's written argument, paragraph 77;

the grievor can claim is that he was discipline free for a period of 49 months.

[124] The employer took exception to some of the factual characterizations of the grievor's behavior in its written closing, but it is not necessary to set out these matters.

[125] The employer also distinguished the cases supplied by the union.

IV. Analysis – Was the Discipline inordinate in all the circumstances?

[126] In analyzing whether an employer has just cause to discipline an employee, the arbitrator must consider three distinct questions: *William Scott & Company v. Canadian Food and Allied Workers Union*, Local P-162, BCLRB # 46/76, paragraph 13 (*William Scott*):

1. Has the employee given just and reasonable cause for some form of discipline?
2. Was the dismissal decision an excessive response in all of the circumstances of the case?
3. If the discharge was excessive, what alternative measure should be substituted as just and equitable?

[127] The employer has a burden of proving its case on a balance of probabilities. The balance of probabilities requires proof of facts with clear, cogent and convincing evidence and an arbitrator must scrutinize the evidence with care: *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 SCR 41, paragraphs 46 to 49.

[128] The employer largely proved the facts set out in its suspension letter of May 13, 2020.

[129] The union has conceded that the grievor's conduct merited some discipline

(*William Scott* #1).

[130] The main question for analysis is whether the discipline imposed by the employer was inordinate in all the circumstances of this case (*William Scott* #2). If I determine that the discipline was inordinate, I then go on to consider an alternative sanction (*William Scott* #3).

A. The True Substance of the Misconduct

[131] This incident is properly characterized as a breach of a safety rule by the grievor, which created a serious risk to other employees, particularly Mr. Emeno. Ms. Alexander testified that the grievor’s conduct was a violation of the harassment policy; however, that is not the way the discipline letter was framed, nor the way in which the case was argued and presented by the employer. In my view, the proper analysis is to determine this grievance on the basis of a breach of a safety rule.

[132] Employers have a duty to provide a safe workplace and the right to insist that all employees comply with safety rules.

[133] In *Coca-Cola Refreshments Canada Co.,* at paragraph 26, the arbitrator set out a non-exhaustive list of the pertinent principles to apply for considering the discipline or dismissal of an employee for a safety-related infraction:

> 1. Safety in the workplace is both a stringent statutory obligation and an important industrial relations concern that involves employers, unions and employees. Given the potential consequences, safety infractions are among the most serious workplace offences.
>
> 2. As the industrial relations party with the preeminent control over the workplace, the employer has a legal obligation to provide a safe and secure workplace for its employees. Hand in hand with this obligation is the employer's authority to insist that workers perform their duties in a safe and efficient manner.

> 3. Workplace misconduct arising from deliberate, reckless, or negligent behavior and which results in a potential safety threat or an actual injury is grounds for significant discipline, up to and including dismissal.
>
> 4. There does not have to be a physical injury or actual harm to establish the seriousness of the incident.

[134] This incident occurred near the start of the COVID-19 pandemic. This was a time of considerable uncertainty and a heightened degree of concern amongst District employees and the public at large. As of the time of this incident, Canadians were dying of COVID-19 and a vaccine had not yet been developed. In the District, students were not attending classes in person. Staff, such as the grievor, were involved in removing playground equipment to minimize the risk of children or others congregating and contacting COVID-19 on District property.

[135] I accept the employer's evidence that many of its employees were concerned and worried about COVID-19. I do not accept the grievor's evidence that employees dealt with COVID-19 and particularly social distancing in a cavalier manner.

[136] The employer took COVID-19 seriously and took significant steps to advise its employees of the risks of transmission, and the proper way to behave at work in order to minimize the risks to all employees. For example, the employer instructed drivers and swampers to travel to work locations in different vehicles in order to maintain a social distance. It provided drivers with bleach to sanitize their vehicles and hand disinfectant. The employer provided instructions with regard to staying at home if one was sick, and the proper way to sneeze and cough during a pandemic and maintaining social distance.

[137] The grievor was aware of the protocols in place and he chose to ignore them and make a practical joke.

[138] The employer gave serious consideration to terminating the grievor. In the end they decided on a 10 day suspension. The primary factors which tilted the matter from discharge to a 10 day suspension were the grievor's length of service and his previous discipline free record.

[139] At the time that the employer assessed the discipline, there was a dearth of arbitral jurisprudence about discipline for COVID-19 related misconduct. That is still the case. Ms. Alexander did some research – largely newspaper reports of outrageous COVID-19 incidents such as coughing or spitting on other persons. She found that these types of incidents were being treated seriously by the police in the criminal law context as an assault. She also considered the impact of such conduct on the employer's reputation, as the District is subject to public scrutiny.

B. Impact on Mr. Emeno

[140] Mr. Emeno did not testify at this hearing, however, there is sufficient evidence before me to infer that there was at least some impact on him from the grievor's misconduct. Even on the grievor's evidence, the grievor's actions had an immediate response on Mr. Emeno, as he told the grievor to back off, he told the grievor it was not a joke and he appeared angry. This evidence confirms what is contained in Mr. Emeno's statement. Further, on the grievor's evidence, he concedes that what he said in the second encounter would have made it worse.

[141] Clearly, Mr. Emeno was concerned enough that he communicated what happened to the employer and sought permission to go home and have a shower and change his clothes.

[142] Given the information given out by the employer about incubation periods, any reasonable person, who experienced what the grievor had done, would feel anger and have had some degree of worry for at least the 14 day incubation

period, wondering if he would catch COVID-19.

[143] It is clear that the grievor intended some sort of practical joke. Mr. Emeno did not take it as a joke. In assessing whether conduct is in fact humorous, it is usually viewed from the point of the reasonable recipient of such conduct: *Dartmouth Ambulance and CUPE, Local 3264* (1994), 39 L.A.C. (4th) 236. In my view, no reasonable recipient would have viewed this as humorous, in light of the grievor's statement that he had had COVID-19 and the context of COVID-19 in April of 2020.

[144] This would have been an objectively worse case if the grievor had intended to infect Mr. Emeno with COVID-19. However, in my view, the grievor's motive does not mitigate his misconduct.

[145] The union has asserted that an adverse inference should be drawn from the employer's failure to call Mr. Emeno as a witness. While it might have been helpful to hear from Mr. Emeno, there is sufficient evidence before me to find facts related to the impact on him of the grievor's misconduct. Further, there are admissions from the union around the issue of whether there is an event meriting some discipline. In order to assess the employer's disciplinary decision, it is not necessary that the employer prove that the damage anticipated by the safety rule materialized. In my view it is not necessary to prove, for example, that Mr. Emeno suffered a long lasting impact from the grievor's breach of safety rules and protocols that were in place to protect all employees.

C. Credibility Issues around the Grievor's Story

[146] The grievor's evidence was a curious combination of admitting what he did was wrong, but also attempting to minimize his misconduct.

[147] The story advanced by the grievor was one where he had waved Mr. Emeno

down to discuss what COVID-19 related restrictions were in place in the workshop, and then proceeded to cough as a joke. The grievor had previously worked at the workshop with Mr. Emeno many years earlier prior to his transfer to grounds, and they had a joking relationship. The grievor did not ask Mr. Emeno about the restrictions. He immediately just proceeded to cough in the truck and tell Mr. Emeno that he had been sick.

[148] In my view, the story about wanting to ask Mr. Emeno about restrictions in place at the workshop is an attempt by the grievor to minimize his misconduct by suggesting an innocent reason for unnecessary contract with Mr. Emeno. At the hearing he could not account for why he did not ask about the workshop and why he coughed instead of asking about the workshop.

[149] I do not accept this version offered by the grievor. I think it more probable that, seeing Mr. Emeno arrive in the truck, he immediately decided to play a practical joke on him. It is my view that the evidence about inquiring about the COVID-19 related restrictions at the workshop was untruthful testimony, and it was given by the grievor in an attempt to make his misconduct appear more spontaneous and less planned and deliberate.

[150] While I do not think the grievor thought much about the coughing before he coughed, in my view his story about wanting to ask about the COVID-19 restrictions at the workshop was just a story. It was a story intended, however, to make him look less blameworthy, or minimize his misconduct.

[151] The grievor's actions were deliberate. This is not a case of an involuntary act such as a coughing spasm. It is irrelevant whether he aimed his cough directly at Mr. Emeno's face; he knowingly coughed in an enclosed space within the two metres social distance he knew he was required to apply in contact with a co-worker. By coughing deliberately, he knew that he would expel respiratory droplets in the vicinity of Mr. Emeno. He knew that COVID-19 could be

transmitted by respiratory droplets. He knew that coughing or sneezing into his sleeve would have lessened any risk of transmission.

[152] Further, the grievor was aware of policies relating to sanitizing equipment, and he touched Mr. Emeno's vehicle, which was unnecessary and a further breach of the COVID1-9 safety rules. Viewing the grievor's conduct objectively, his conduct placed Mr. Emeno at the risk of harm.

[153] Further, there was a heightened risk of harm as the grievor had been sick with COVID-19 and the incident arose shortly after he returned to work. The grievor had never been tested for COVID-19 and therefore could not have been certain that he was not contagious. Further, he did not seek medical advice for his condition by calling 811 or seeing a doctor; he called the BC Centre for Disease Control which gave out more generic information about COVID-19. I also note that in his conversation with Mr. Emeno, the grievor minimized the period of his absence from work due to COVID-19; he said he was off for two weeks, when in fact it was closer to four weeks.

[154] The grievor's conduct was extraordinarily reckless – that is, he took a risk and did not care whether it would materialize or not.

[155] There is no evidence of much pre-meditation in the sense that he did not come to work with a plan in place to spread COVID-19 or to play a practical joke. Nor can this be characterized as an involuntary momentary lapse. The plan came into his mind to play a practical joke on Mr. Emeno after he saw Mr. Emeno arrive in his truck. It does not take much pre-meditation to play a practical joke.

[156] The grievor escalated his misconduct by approaching Mr. Emeno a second time. While he claims that he sought to re-assure Mr. Emeno that there was little risk of him catching COVID-19, he concedes now that his poorly chosen words likely exacerbated the situation. The grievor has given a number of different versions as to why he approached Mr. Emeno a second time – to

ascertain whether Mr. Emeno was upset or angry, to reassure Mr. Emeno. None of these particular explanations make any logical sense.

[157] His conduct at this time and place was inappropriate.

[158] I am satisfied that the grievor is now aware that what he did was wrong. He does not accept the punishment the employer imposed, however. I think it unlikely that the grievor will engage in this type of employment related misconduct in the future – he has had the embarrassment of having to attend the hearing and explain his conduct.

[159] The grievor's motivation was to joke with Mr. Emeno. I do not think that this was a case where the grievor's motive was to transmit COVID-19 to Mr. Emeno. In my view his motive was irrelevant. Objectively, his conduct was a deliberate, reckless and serious violation of safety rules which were known to him and existed for the protection of him and others. I do not view the grievor's motivation as a mitigating factor because his conduct was a clear violation of a safety rule which could have resulted in transmission of COVID-19 to Mr. Emeno.

[160] This is a "one-off incident" and not repetitive misconduct. The nature of the event as a "one-off incident" is not a significant factor in assessing whether the discipline was inordinate, in the circumstances of this case.

[161] The safety rule was one issued in the midst of a pandemic and was designed to prevent the spread of a dangerous virus to others. All employees have links outside their work bubble – whether it is friends, family or incidental contacts in the community, for example contact with others while shopping. The purpose of the COVID-19 protocols was risk mitigation. A single breach of the protocol increases the risk of transmission of COVID-19. Given the nature of the transgression, one breach of the COVID-19 related protocols might have been sufficient to infect Mr. Emeno and others. I note that Mr. Kwon knew Mr. Emeno and of his family circumstances, and particularly that Mr. Emeno had an elderly

father. It is well known that the elderly are at a higher level of risk of infection than other members of the population.

[162] Often, in assessing the issue of whether discipline was inordinate, in the circumstances, an arbitrator considers whether the conduct is repetitive. Repetition is not an important factor when during a pandemic an employee deliberately breaches a safety protocol designed to prevent any transmission. A single incident may be sufficient to cause the harm.

D. Mitigating Factors

[163] In analyzing this case in the context of *William Scott* and particularly the *Steel* factors case, I am able to identify some mitigating factors.

1. Seniority

[164] The grievor's substantive position is as a fence repair person; he is currently in an apprentice gardener position. He has some seniority with the employer as he started with the employer on July 3, 2004. At the time of the incident he was just short of 16 years' service.

2. Discipline Free Record

[165] The grievor has a discipline free record.

3. Remorse

[166] At the end of the day I find that the grievor did not give credible and reliable evidence about the facts of the incidents. What he was truthful about was that he admits what he did was senseless, and he claims that he is sorry for doing it.

4. Rehabilitative Potential

[167] I find it likely that the grievor will learn from:

- the deterrent effect of having his foolish and risky conduct exposed at a

hearing;

- having had to endure vigorous cross-examination which revealed him as a witness whose evidence lacked reliability and credibility;
- the publication of an award; and
- the significant possibility that the award will be reported in the media.

[168] Often a grievor's lack of candor during an investigation or hearing can be the kiss of death to a finding that a grievor has rehabilitation potential.

[169] Despite the grievor's lack of candor during the investigation and the hearing, I find that he has some rehabilitative potential because, at the time the discipline was imposed, he had an almost 16 year discipline free record and he repeatedly expressed contrition at the hearing. He has committed to do better in the future.

5. An Irrelevant Factor

[170] The union argued that the employer did not take steps to mitigate the risk they believed the grievor had presented to Mr. Emeno. In cross-examination, Ms. Alexander admitted that she did not call Mr. Emeno to tell him to get a COVID-19 test or to self-quarantine. She did not refer him to the employment assistance program for counselling. She could not recall if during the interview she asked Mr. Emeno how he was doing. It is unclear how the employer's failure to advise Mr. Emeno to monitor his health, obtain a COVID-19 test or advise him of the employment assistance program, bears on the level of discipline the employer assessed against the grievor. Further, these cannot be mitigating factors.

6. The Apology as a Contentious Factor

[171] The main point of contention on mitigation is whether the grievor had tendered an apology, and the effect of the apology.

[172] The grievor tendered a written apology at the investigation meeting with Ms. Alexander. He did not ask it to be passed on to Mr. Emeno. This type of apology tends towards being a tactical device, rather than a true apology. This is particularly the situation where the grievor did not ask that it be passed on to Mr. Emeno and he made no attempt himself to distribute it to Mr. Emeno.

[173] However, the grievor tendered an apology to Mr. Emeno by a text message on April 15, 2020, before his investigative interview. The employer was unaware of this apology until it received the union's reliance documents in this arbitration. It is surprising that during the disciplinary investigation the grievor did not communicate to the employer that he had apologized by text message, particularly where an earlier email indicated that he had not yet apologized to Mr. Emeno.

[174] Unfortunately, Ms. Alexander did not ask Mr. Emeno whether the grievor apologized to him [35] nor did she ask the grievor if he had tendered an apology to Mr. Emeno.[36] As outlined earlier, it is my view this occurred because of the misleading effect of an earlier April 15 email and the lack of disclosure about the April 15 text message.

[175] Ms. Alexander imposed the suspension at the April 20, 2020 meeting, without knowing of the earlier text apology. The question is whether this makes a difference to the outcome.

[176] The employer doubts the sincerity of it, but I accept he made some attempt. I accept that, these days, people often communicate by text message. The text itself expresses contrition for the events of that day, without setting out those events in detail. Some of the authorities suggest that an apology is important as an expression of remorse and therefore the hope that the employee will do better in the future and, further, that the apology contributes to a record of the

[35] Exhibit 1, pages 104 -106 Mike Emeno statement;
[36] Exhibit 1, pages 134 – 389, Markus Linde statement;

event.

[177] The modern trend in litigation (outside the labour relations context) is that one can tender an apology without it being an admission of fault or responsibility.[37] The apology tendered here, appears to do just that; it apologizes to Mr. Emeno without admitting the particulars of the misconduct. This type of apology makes it more difficult to infer the rehabilitative potential of an employee.

[178] The text apology was not a spontaneous apology, occurring at the time of the misconduct. When examining the timing, it occurred shortly after the grievor learned that he was being held out of service pending the employer's investigation. The grievor testified that he was prompted by the investigation to make an apology. Some people need time to process their conduct and conclude that their actions were wrong. The grievor has given inconsistent evidence at the hearing about when he realized that his conduct had an impact on Mr. Emeno. Given the rapidity of the employer's response to the misconduct allegation, I am not prepared to hold the timing against the grievor.

[179] In some cases, apologies tendered well after the event are self-serving, contrived and of little weight. Here the text apology appears genuine but clearly was not spontaneous, and was likely prompted by the grievor learning of the employer's investigation.

[180] I am satisfied that there are some mitigating factors present. In my view the apology does mitigate the misconduct. The question is how it fits into the mix and whether it renders the 10 day suspension inordinate.

E. Weighing the Factors

[181] In all the circumstances, however, I find that the discipline imposed was not inordinate. The grievor's conduct was a foolish, insensitive and deliberate

[37] Apology Act, SBC 2006, c. 19;

violation of safety rules the employer put into place to protect employees from the risk of COVID-19. In my view the employer made substantial effort to protect its employees from the spread of COVID-19. The seriousness of the discipline reflects the seriousness with which the employer sought to protect its employees from the impacts of the pandemic.

[182] This misconduct occurred during the first wave of COVID-19 where there was significant concern by District employees and concern of this employer to protect its employees. The grievor engaged in conduct which could have transmitted COVID-19 to a fellow employee. People have died from COVID-19. The grievor could not know for certain whether he was contagious, nor could he have any idea whether Mr. Emeno might have died as a result. The grievor did not apparently direct his mind to these risks. Fortunately, the risk did not materialize.

[183] Past arbitration awards, in particular *Coca-Cola*, demonstrate that in cases of discipline for a breach of a safety rule, it is not necessary for the targeted harm to materialize. In this context, it was not necessary for Mr. Emeno to develop COVID-19, in order for the employer to discipline the grievor. The harm arises from the prohibited conduct of approaching Mr. Emeno within the social distance, deliberately coughing and touching of the door handle and interior of the vehicle.

[184] This is a serious matter and the grievor is lucky that the employer did not terminate him. At the time of imposing discipline, the employer was not aware of an earlier text apology, but the union did not draw this to the employer's attention.

[185] While there are some mitigating factors, the grievor has not been candid in dealing with this matter. He was not candid during the investigation or at the hearing. I am not inclined to tinker with the amount of the suspension, given the seriousness of the grievor's misconduct and his lack of candor in the

investigative process and at the hearing.

[186] The employer's disciplinary response was not excessive in the circumstances. It is unnecessary to consider the third *William Scott* question about what alternative measure should be substituted as just and equitable.

V. Conclusion

[187] For all of the above reasons I dismiss the grievance.

Dated at Campbell River, British Columbia this 10th day of May, 2021

Paul Love,
Arbitrator