

SUPREME COURT OF NOVA SCOTIA

Citation: *Marine Atlantic Inc. v. Canadian Merchant Service Guild*, 2026 NSSC
283

Date: 2026-09-03
Docket: Hfx, No. 542988
Registry: Halifax

Between:

Marine Atlantic Inc.

Applicant

v.

Canadian Merchant Service Guild and Christopher Peddigrew, K.C.

Respondents

DECISION

Judge: The Honourable Justice Ann E. Smith
Heard: February 4, 2026, in Halifax, Nova Scotia
Counsel: Jack Graham, K.C. and Alex Warshick, for the Applicant
Andrew Nielsen and Grace Levy, for the Respondents

By the Court:

Introduction:

[1] The Applicant, Marine Atlantic Inc. (“MAI” or the “Employer”) seeks judicial review of an Arbitrator’s Award (the “Decision”) made under its collective agreement (the “Collective Agreement”) with the union, Canadian Merchant Service Guild (the “Union” or the “Guild”).

[2] The Arbitrator substituted an approximately 17 month unpaid suspension following the Employer’s decision to terminate an employee, (the “Grievor” or “Mr. Whyte”) because he was intoxicated by alcohol while onboard a MAI vessel on August 17, 2023, thereby breaching the Collective Agreement between the Parties.

[3] The Collective Agreement covers licenced officers and deck hands. The Grievor was a licenced Junior Engineer covered by the Collective Agreement. Another Collective Agreement between the Employer and the Union covers Captains, Chief Engineers and Chief Electrical Engineers.

[4] MAI’s Notice for Judicial Review identifies four grounds for review. It claims that the Decision is unreasonable for the following reasons:

1. “Its reasoning is internally in-coherent, irrational and illogical and the Decision is not transparent or intelligible”;

2. “It is not justified in relation to the facts and law that constrained the decision-maker”;
3. “The written reasons provided for in the analysis on critical points in the Decision are inadequate and are not responsive to the submissions and authorities on these points”; and
4. “The Arbitrator erred by committing such other reviewable grounds that may appear upon review of the Record, upon the hearing of the Application, or as may be raised by Marine Atlantic in its submissions, to which the Respondents will have the opportunity to reply in the course of this proceeding”

[5] In its submissions, MAI organizes these grounds into two main issues for judicial review:

1. The analysis and findings on rehabilitative potential, dishonesty, and premeditation are incoherent and illogical and are not justified; and
2. The Arbitrator’s application of the *William Scott* factors was logically inconsistent, not justified in relation to accepted legal principles, the facts, and submissions, and inadequately explained.

[6] The Guild responds that the Arbitrator’s Decision is reasonable. It submits that the Decision is grounded in an internally coherent and rational chain of analysis, justified in light of the factual and legal constraints governing the Arbitrator’s mandate, and supported by sufficient written reasons to sustain the outcome of the Decision.

[7] The Guild requests that MAI’s application for judicial review be dismissed and the Decision of the Arbitrator upheld.

Issues:

[8]The Court identifies the following overall issue:

Does the Arbitrator’s award meet the Canada (*Minister of Citizenship and Immigration*) v. *Vavilov*, 2019 SCC 65 (“*Vavilov*”) threshold; namely, does it contain the requisite degree of justification, transparency and intelligibility?

The Legal Principles Governing this Judicial Review

[9] The Parties agree that the Decision is to be assessed using the standard of reasonableness. The principles governing a reasonableness review are summarized by Fichaud, J.A. in *Paladin Security Group Limited v. Canadian Union of Public Employees, Local 5479*, 2023 NSCA 86:

- [39] In *Vavilov*, the majority’s judgment set out the principles of reasonableness review. In *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, Justice Jamal for the majority reiterated *Vavilov*’s ruling. I will summarize the principles from *Vavilov* and *Mason*.
- [40] Reasonableness is a “reasons first” approach. The reviewing court “must begin its inquiry into the reasonableness of the decision by examining the reasons provided with ‘respectful attention’ and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion”. “Reasons first” means the reviewing court does not start with its view, *i.e.* it does not fashion its “own yardstick ... to measure what the administrator did”, and then proceed with “disguised correctness review”. (*Vavilov*, paras. 83-84. *Mason*, paras. 8, 58, 60 and 62-63).
- [41] Both the administrative decision’s outcome and its reasoning matter. The outcome must be justifiable and, where reasons for the decision were required, the outcome must be “justified” by the reasons. The reviewing court “must consider only whether the decision made by the administrative decision maker – including both the rationale for the decision and the outcome to which it led – was reasonable”. (*Vavilov*, paras 86-87. *Mason*, paras. 58-59).
- [42] Reasonableness is “a single standard that accounts for context”. Reviewing courts are to analyze the administrative decisions “in light of the history and context of the proceedings in which they were rendered”. The history and context may show that, after examination, an apparent shortcoming is not a

failure of justification. History and context include the evidence, submissions, record, the policies and guidelines that informed the decision-maker's work and past decisions. Context also includes the administrative regime, the decision maker's institutional expertise, the degree of flexibility assigned to the decision maker by the governing statute and the extent to which the statute expects the decision maker to apply the purpose and policy underlying the legislation. (*Vavilov*, paras. 88-94, 97, 110; *Mason*, para. 61, 67, 70. See, for instance, *Labourers' International Union, Local 615 v. Grafton Developments Inc.*, 2023 NSCA 25, paras. 104-108, for how these factors affect the Nova Scotia Labour Board.).

- [43] The “hallmarks of reasonableness” are “justification, transparency and intelligibility”. Consequently, a decision will be unreasonable where “the reasons read in conjunction with the record do not make it possible to understand the decision maker’s reasoning on a critical point”. (*Vavilov*, paras. 99 and 103; *Mason*, para. 60).
- [44] More specifically, the reviewing court “must be able to trace the decision maker’s reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that ‘there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived’ [citation omitted]”. A question-begging gap on a critical point may impair intelligibility. Mere repetition of the statutory language, followed by a peremptory conclusion “will rarely assist a reviewing court” and is “no substitute for statements of fact, analysis, inference and judgment”. (*Vavilov*, para. 102; *Mason*, para. 65).
- [45] A “minor misstep” or a “merely superficial or peripheral” shortcoming will not suffice to overturn an administrative decision. Rather, the flaw must be “sufficiently central or significant to render the decision unreasonable”. To determine whether there is a sufficiently central or significant flaw, the reviewing court asks whether the administrative decision “is based on an internally coherent and rational chain of analysis and ... is justified in relation to the facts and law that constrain the decision maker”. If yes, “[t]he reasonableness standard requires that a reviewing court defer to such a decision”. If no, the decision “fails to provide a transparent and intelligible justification for the result” and is unreasonable. (*Vavilov*, para. 84-85, 99, 100-107; *Mason*, paras. 8, 59, 64).
- [46] *Vavilov*, paras. 105-135, and *Mason*, paras. 65-76 elaborated on the factors that “constrain the decision maker”, under this test, and their utility in a particular case: the governing statutory scheme, other statutory or common law, principles of statutory interpretation, evidence before the decision maker, submissions of the parties, past practices and decisions, and the impact of the decision on the affected individuals. The factors are “not a checklist” and will vary in application and significance from case to case (*Vavilov*, para. 106; *Mason*, para. 66).

[10] With these principles in mind, I will review the Decision.

[11] Pursuant to *Vavilov*, the focus of a reasonableness review is on the administrative decision. It should consider the internal reasoning and assess the outcome in light of the context. I will start, therefore, with a detailed review of the Arbitrator's Decision.

[12] The Court also notes that as stated in *Vavilov* at paragraphs 125 to 126, the fact-finding process is the preserve of the decision-maker; as such, the reviewing court must not re-weigh the evidence.

Arbitration Hearing and Decision

[13] The arbitration took place on August 21 and 22, 2024 before Arbitrator Christopher Peddigrew, K.C. The Guild was represented by Andy Nielsen and the Employer by Jack Graham, K.C.

[14] The Arbitrator introduced the Decision by setting forth the Guild's overall position:

2. The Grievance arises from the for-cause termination of the Grievor's employment on November 3, 2023, following an investigation into the Grievor's intoxication by alcohol on a Marine Atlantic vessel on August 17, 2023. The Union does not dispute that the Grievor was intoxicated and that he violated Marine Atlantic's Drug & Alcohol in the Workplace Policy (the "Policy"), but submits that termination of employment was an excessive penalty and the Grievor should be reinstated with a lengthy suspension substituted as the penalty.

[15] The Arbitrator then set out the following excerpt from MAI's November 3, 2023 termination letter:

Following the conclusion of our investigation it has been determined that you violated Marine Atlantic Inc.'s Alcohol & Drug Policy 1-65 in multiple ways on 17 August 2023 which included consuming alcohol during your tour of duty, bringing alcohol onboard the vessel, and refusal of a breath alcohol test.

One of MAI's core values is safety – the protection of people, property and the environment is the Company's ultimate priority. Your misconduct is extremely serious and dangerous given you hold a safety sensitive position in the workplace. Your actions placed your safety, the safety of other employees, passengers and the Company's assets and operations at risk. Your behaviour is not representative of Marine Atlantic's corporate values and is contrary to the Company's interest in and responsibility for safety.

This decision takes into consideration the severity of your actions, the violations of the Marine Atlantic Drug & Alcohol Policy 1-65 and your demonstrated disregard for safety, Company policies and procedures. The integrity and reputation of Marine Atlantic would be seriously jeopardized if employees were permitted to conduct themselves in this manner. Your actions are not representative of Marine Atlantic's corporate values and constitute a breach of trust in the employment relationship that is irreparable

[16] The Arbitrator then set forth the Grievance. The November 8, 2023

Grievance states, in part:

...On August 11, 2023, Fabian attended a medical appointment with his Urologist, Dr. Organ. During this appointment, he learned that he had an elevated Prostate Specific Antigen (PSA) level which was identified in the blood work done in advance of this appointment. His doctor ordered additional blood work in advance of the next appointment scheduled for November 16, 2023. Fabian's doctor said that if the PSA level is still elevated, they will discuss next steps, including the possibility of treatment.

This unexpected bad news, after years of fighting cancer and receiving good news in recent months, including low or normal PSA level results since his surgery, had a sudden and very detrimental effect on Fabian's mental health.

As he explained during the investigation, he is a private person who did not talk about issues he was dealing with. As stated during the investigation, since August 17, 2023, he has started talking to professionals and others about his mental and physical health which he has found helpful.

On August 16, 2023, Fabian reported to work for crew change. The serious psychological stress that Fabian was under affected his decision making, and he brought alcohol onboard which culminated in the events of August 17, 2023, and resulted in the termination of Fabian's employment.

Fabian Whyte has been employed at Marine Atlantic since October of 2005. Throughout his 18 years of service, he has exemplified the Core Values of Marine Atlantic. August 17, 2023, was an isolated event in his history, and he has taken ownership and repeatedly expressed remorse for his actions on and around that date.

Due to Mr. Whyte's long service, his positive past performance, the remorse expressed, and the circumstances resulting in Fabian being under serious psychological stress at the time of the occurrence, the Guild asserts that termination of employment is too severe a penalty. Further, termination is not in line with corrective action that the employer has applied previously in relation to other employees in similar circumstances.

Mr. Whyte's actions on/around August 17, 2023 were a one-time occurrence due to serious psychological stress. Mr. Whyte has since taken steps to cope with stress and its contributing factors.

[17] The Arbitrator states that the Grievance requests that termination of employment be rescinded and that the Grievor be returned to work with no loss of pay, service or seniority.

[18] The Arbitrator states in the Decision that the Parties agreed to the following at the commencement of the hearing:

- His appointment as arbitrator;
- That he had jurisdiction to deal with the issues arising;
- That all prior steps in the grievance procedure were followed or waived;
- That witnesses would be excluded prior to giving evidence;
- That his notes and the exhibits would constitute the record of the proceedings;
- That there were no interested parties who had not been notified of the hearing;
- That he would remain seized with jurisdiction for a period of 60 days following receipt of the award by the parties to deal with matters of interpretation, application or compensation, provided written notice was given by one party to the other within 60 days; and

- That there were no preliminary issues to be addressed.

[19] The Arbitrator states in the Decision that MAI called two witnesses: Travis Stone and Darrell Gallant. He identifies Travis Stone as being employed with MAI for approximately 15 years and that Mr. Stone has worked in a human resources/labour relations capacity for nine of those years, including his current position as Labour Manager. The Arbitrator notes that two Human Resources Business Partners report to Mr. Stone as well as one Labour Relations Advisor. The Arbitrator states that Mr. Stone and his team have responsibility for the administration of several collective agreements as well as various policies, grievance administration, collective bargaining, disciplinary investigations and all other labour relations aspects of the organization.

[20] The Arbitrator then refers to MAI's second witness, Darrell Gallant who he states is Vice President Operations with MAI, a position he had occupied for five years. The Arbitrator states that Mr. Gallant is responsible for MAI's fleet operations, vessel schedules, passenger services and marine terminal operation. Mr. Gallant reports to MAI's President and CEO.

[21] The Arbitrator states that the Guild called two witnesses: Fabian Whyte (the Grievor) and Thomas Spindler, the Guild's Secretary-Treasurer.

[22] The Arbitrator states that the hearing exhibits entered by consent were as follows:

- Collective Agreement;
- Drug & Alcohol in the Workplace Policy – Section 1-65;
- Job Description – Junior Engineer;
- Reasonable Cause Checklist (Aug 17, 2023);
- Letter to Mr. Whyte – Held Out of Service (Aug 17, 2023);
- Email Regarding BAT Test Refusal (Aug 17, 2023);
- Statement of Captain Dan Strickland (Aug 18, 2023);
- Statement of Chief Engineer Dan Strickland (Aug 18, 2023) (*sic*, Dean Kettle)
- Security Report (Aug 19, 2023);
- Letter to Mr. Whyte - Notice to Appear for Investigation (Aug 30, 2023);
- Termination Letter (Nov 3, 2023);
- Step II Grievance (Nov 8, 2023);
- Step II Response (Dec 9, 2023);
- Statement of Agreed Medical Facts with Appendix (Undated);
- Notes of interviews with Fabian Whyte (Aug 31, 2023 & Oct 12, 2023).

[23] The Arbitrator also refers to additional exhibits entered into evidence at the hearing:

- Letter to RG (December 12, 2009);
- Photograph (undated);
- MAI Alcohol and Drug Policy (10/05/01, Revised 10 June 2008);
- August 2023 blank calendar; and
- Text message from Fabian Whyte to Chief (August 15, 2023).

[24] The Arbitrator then described MAI and its operations, including stating that employees working on its vessels must remain fit for duty even when they are off work on board a vessel:

Marine Atlantic is a constitutionally mandated ferry service between Nova Scotia and Newfoundland and Labrador. It operates four vessels, including the Leif Ericson, which is the vessel the Grievor was on when the events giving rise to the Grievance occurred. Marine Atlantic has approximately 1500 employees, about 60-65% of whom are vessel-based and about 35-40% of whom are shore-based. Vessel-based employees generally work a 15 day-on-15 day-off schedule. Shifts are typically 12 hours (day or night). Even during their 12 hours off work on board a vessel, employees must remain fit for duty because they could be required to report for duty in the event of an accident or emergency.

[25] The Arbitrator then stated that all employees of MAI are subject to its Drug & Alcohol in the Workplace Policy and that this Policy was last revised on October 17, 2018. He then set out what he describes as the parts of the Policy that are relevant to the Grievance:

Policy Statement

...

The possession, use, or distribution of alcohol, cannabis, illicit drugs, other mood altering substances, or drug paraphernalia by employees or contractors on company property, in company vehicles, or while performing company business is strictly prohibited.

...

Policy Standards

A) Fitness for Duty

- Every employee and contractor is expected to come to work fit for duty, and to remain fit throughout their work day, shift, and/or tour of duty.
- There will be no use of alcohol, cannabis, illicit drugs, or other mood altering substances, including the improper use of medications, during the work day, shift and/or tour of duty.

- Employees must remain fit for duty while deadheading at the beginning, during, or end of a vessel rotation, and when travelling on MAI vessels on a work pass.
- Vessel employees working on board MAI vessels are considered to have 24/7 emergency duties and are therefore in a safety sensitive position for the duration of their tour of duty;

...

- Fitness for duty is being able to safely and acceptably perform assigned duties without impairment, limitation, or incapacity due to the use or after affects of alcohol, cannabis, illicit drugs, unauthorized medication, or mood altering substances.

- ...

- No presence of alcohol

Safety sensitive positions;

A confirmation testing results of .000

All other positions:

A confirmation testing results of .04

A result of 0.02-0.039 will result in removal from the workplace until .000 is reached.

- Failure to meet any fitness for duty standard will result in termination.

(C) Possession or Distribution

- Employees must not possess or distribute alcohol, cannabis, illicit drugs, mood altering substances...while on MAI premises.
- Alcohol and cannabis can be stored in a personal vehicle parked on company premises, provided storage is in an unopened factory sealed container and in accordance with applicable laws.
- Failure to adhere to the possession or distribution standards will result in termination.

[26] The Arbitrator summarizes the submissions of counsel for MAI over approximately 5 pages of the Decision. Here the Court summarizes what it understands to be the most important aspects of the Arbitrator's summary, highlighting a number of MAI's central arguments:

Marine Atlantic takes no pleasure in the Grievor's termination. **It is a serious matter with serious consequences – among the most significant Marine Atlantic can face.** There is no dispute about the underlying facts, but there is a dispute about how to interpret those facts. **The totality of the evidence in its appropriate context leads to the conclusion that Marine Atlantic had just cause to terminate the Grievor's employment.**

The Policy was well known to the Grievor. He was trained in it, understood his obligations under it, and understood the consequences of violating it. **He violated the Policy when he brought alcohol on board the vessel, when he consumed large quantities of alcohol on board the vessel to the point of intoxication and incoherence, and when he refused the breath alcohol test.** There is no question the Grievor knew the difference between right and wrong when he chose to violate the Policy. **The Grievor also knew that the consequence of these violations would be termination of this employment.**

The Grievor knew he worked in a safety sensitive position. Had there been an accident or emergency on board the vessel while he was intoxicated, he would not have been fit for duty and would not have been able to assist. Marine Atlantic's vessels operate in the North Atlantic Ocean, a very dangerous workplace. **The Policy must be strict, particularly when random testing for alcohol is not permitted and when many employees have privacy in their own cabins. Marine Atlantic must be able to trust its employees. Deterrence is critical.**

The Grievor's actions were clearly premeditated. He purchased alcohol in advance and brought it on board intending to consume it. **On this point, the Grievor's testimony contains several inconsistencies.** He testified that he purchased the alcohol in Deer Lake on August 16, 2023, intending to bring it with him to Halifax on August 31 while visiting his daughter. If this is true, he could have left the alcohol in his truck at the Marine Atlantic terminal during his tour. Instead, he brought the alcohol on board the vessel on August 17. **Inconsistent with his other testimony, bringing the alcohol on board shows he was intending to drink it.**

The uncontroverted evidence shows that the Grievor has been untruthful in many respects. First, he lied to Mr. Kettle and Captain Strickland when they asked him several times on August 17 if he had been drinking. He denied it each time. **He also lied to them when he answered "yes" when they asked him if his intoxicated condition on board was caused by his cancer medication.** The Grievor knew he was not allowed to drink on board and that is why he lied. He only admitted to drinking when security personnel showed up to administer a BAT and he knew he was caught. Truthfulness and candour were required when Mr. Kettle and Captain Strickland asked him questions, not just when he knew he was caught. **Second, the Grievor attempted to use cancer as an excuse for his actions on August 17, even though the evidence shows that his cancer had not returned and that he was not receiving treatment as of August 17.** Third, the Grievor was instructed by Ms. Angione at the beginning of the August 31

interview to provide a complete and truthful account of what happened. His account was far from complete. When pressed on cross-examination about why he did not provide certain information on August 31, the Grievor's excuse was "well she [Ms. Angione] did not ask". When one is instructed to tell the complete story, it is not sufficient to wait to be asked before doing so. **During the investigation meetings, the Grievor disclosed nothing about the reasons he was under stress, the number of drinks he had on board the vessel, the fact that he brought two bottles of vodka on board the vessel, which he took with him to the hotel and consumed on August 18.** When one's job is on the line, and when one has been told to provide a complete and truthful account, one cannot hold back such details. During the August 31 interview, the Grievor was given the opportunity to give a complete and truthful account. Ms. Angione asked him if there was anything he would like to add, and all he could say was that he "screwed up" and let stress get to him too much.

Marine Atlantic even gave the Grievor the opportunity to explain how cancer may have played a role in the events of August 17, yet he provided no evidence to support such an argument. It is important to carefully compare the wording of the Grievance and contrast it with the original explanations given by the Grievor approximately 8 weeks earlier on August 31 and the Grievor's testimony at the hearing. In the Grievance, it alleges that on August 11, 2023 the Grievor received "...unexpected bad news" which "...after years of fighting cancer and receiving good news in recent months, including low or normal PSA level results since his surgery had a sudden and very detrimental effect on Fabian's mental health". The Grievance further alleges that the "serious psychological stress" that the Grievor "...was under on August 16 affected his decision-making, and he brought alcohol onboard which culminated in the events of August 17, 2023...". The Grievance suggests a cause and effect, but this suggestion does not hold up based on consideration of the evidence. The Grievor's own testimony did not establish the statements in the Grievance and the Union called no other evidence to support these statements. Arbitrator Christie's Award in *Canada Postmasters & Canada Post, infra* (and the authorities cited therein) illustrates that the mere existence of psychological stress does not automatically justify someone's serious misconduct. **When a grievor puts forward that an illness or condition caused his serious misconduct, a link or nexus between the serious misconduct (i.e. such as theft or intoxication) and the illness or condition must be established. The onus is on the grievor/union to establish that link/nexus. Typically, expert medical evidence is required to persuade an arbitrator that a link/nexus exists and that the link/nexus sufficiently displaces a degree of responsibility rendering the grievor's misconduct less culpable. The union presented no evidence to establish such a link/nexus.**

Despite the Union's assertions to the contrary, **the Grievor has not fully accepted responsibility for his actions. He has failed to show true remorse.** The only remorse expressed by the Grievor – which is not true remorse because it was

communicated when he knew he was caught – is when the Grievor said “sorry” to Captain Strickland. As well, while the Grievor acknowledge certain details when testifying at the hearing, he failed to disclose them to Ms. Angione during his interview. Why did the Grievor not disclose to Ms. Angione on August 31 that he continued to conceal a second bottle of vodka in his suit case on August 17, which he then brought with him to the hotel on August 18 and consumed? **When giving direct testimony, why did the Grievor not tell the truth about how much alcohol he consumed on August 17?** For him to suggest he consumed only nine ounces of alcohol that day – including only 2 ounces between 10:30 am and 1:30 pm – is improbable at best and perhaps impossible given the condition he was in. Moreover, the Grievor’s testimony about the reason he purchased the vodka in Deer Lake (i.e. to bring with him to Halifax two weeks later when visiting his daughter) does not add up. **The Grievor has lied about these matters. The Grievor lacks credibility. This makes it difficult to believe anything he said, including his testimony about no drinking prior to doing the ramp job upon arrival in Port aux Basques.**

A lack of credibility equates to no true remorse [case citations omitted]. An expression of remorse that only comes once an individual knows he is caught is not true remorse [case citations omitted]. An expression of remorse while attempting to blame the actions on other factors (i.e. cancer, stress, etc.) is not true remorse [case citations omitted]. By lying, denying and blaming his misconduct on stress and cancer, the Grievor failed to show real remorse. **Most disturbing of all is the Grievor’s admissions during his direct testimony that “I don’t drink a lot at work, and I don’t drink a lot at home”. The effect of this statement is an admission by the Grievor that August 17, 2023 was not the first time he consumed alcohol on board a vessel. The Union did not clarify this admission.**

The evidence shows that Marine Atlantic has consistently applied the Policy with respect to violations. The Union was able to provide only one example from the past 15 years of an employee who consumed alcohol on board but was not terminated. This example is easily differentiated on the facts. The employee involved (RG) was truthful about his drinking and his BAT result was negative. The policy in place at that time had a 0.040 cutoff level for a positive alcohol test, versus the 0.000 cutoff level in the Policy applicable in this Grievance and unlike the current Policy, the policy in place at that time did not call for automatic termination as a result of possession or consumption on board. Moreover, there was no evidence RG planned and brought alcohol on board with the intention of consuming it, in contrast to the Grievor.

The type of mitigating factors that sometimes lead to reinstatement are absent with respect to the Grievor. In *United Steelworks, Local 9342* and *Securitas Transport Aviation Security Ltd.*, *infra*, Arbitrator Oakley referred to the *William Scott* factors to assess whether the penalty of discharge was reasonable. **Applying these same factors to the Grievor, we see that the only mitigating factor in the**

Grievor's favour is his lengthy service (18 years). With respect to the other factors, while the Grievor had no prior disciplinary record, he also said "I do not drink a lot at work", thereby admitting to drinking at work before, thereby negating any suggestion of a good record. For this same reason, the events of August 17, 2023 were not an isolated incident. The Grievor's actions were not provoked. Everyone has stress in their lives. The stress in the Grievor's life does not excuse his actions. His drinking on board the vessel was planned and premeditated. There is no evidence of special economic hardship beyond that faced by any terminated employee. The Grievor admitted there are jobs available in the marine industry....There are no circumstances which would negate finding that termination was the appropriate penalty. This is a clear case where termination should be upheld, and the Grievance dismissed.

[27] The Arbitrator cites the numerous authorities relied on by MAI, the first of which he lists as *William Scott & Co. (Re)*, [1976] B.C.L.R.B.D. No. 98 ("William Scott").

[28] The Arbitrator then set forth a summary of the Union's submissions over approximately 5 ½ pages of the Decision. The Court highlights certain of the Union's key arguments:

The onus is on Martine Atlantic to establish just cause. If this was a clear case where termination was the appropriate penalty, as Marine Atlantic submits, the Union would not have pursued the matter to arbitration. **The Union acknowledges that the Grievor committed serious misconduct in violation of the Policy and that he deserved to be disciplined. What is not clear, however, is that termination was the appropriate penalty. The decision to terminate the Grievor's employment violated principles of progressive discipline and ignored mitigating factors in the Grievor's favour. The authorities show that a lengthy suspension would have been the appropriate penalty in this case. The Grievor should be reinstated. The authorities also show that conditions can be imposed to address Marine Atlantic's concerns. For example, the Grievor has consistently said he is willing to be subject to random testing if he is reinstated.**

The Grievor is a long-service employee (18 years) with a clean disciplinary record. Despite Marine Atlantic's assertions to the contrary, from very early on the Grievor acknowledged his wrongdoing, accepted responsibility and

showed remorse. His initial denials to Mr. Kettle and Captain Strickland was a reflexive response when he was first approached. Since that time, the Grievor has consistently acknowledged his misconduct and his Policy violations. A review of several arbitral authorities shows that in situations of serious misconduct, there is often initial denial, but this does not preclude reinstatement.

The Union is not suggesting the Grievor did not know right from wrong. It is not seeking to excuse his misconduct. The Grievor and the Union both acknowledge that the Grievor made a series of very bad decisions and that he should have been disciplined as a result. Yet despite the Policy wording stating that termination will result for possession of alcohol or failure to be fit for duty, an employer cannot exempt itself from the legal requirement to establish just cause by simply stating in a policy that certain actions will automatically result in termination. The Union's purpose for entering evidence about employee RG – who was disciplined but not terminated in 2010 for consuming alcohol on board a vessel – is to illustrate that a violation of the Policy is only one consideration when determining appropriate discipline. **Marine Atlantic alleges it has consistently enforced its Policy in terms of the discipline that will result from a violation of the Policy, but the only evidence at the hearing about Policy violations was with respect to the Grievor and RG. This falls far short of establishing some sort of consistent practice or requirement that termination has always been the result for certain Policy violations.**

Marine Atlantic alleges that the Grievor lied by omission because he failed to tell a true and complete story during the investigation, changed his story several times, and failed to show true remorse. The Union disagrees on all points. The Grievor testified that he is a quiet person who does not “talk a lot”. This would have been evident by observing him during his testimony. Even during direct testimony, the Grievor needed to be prompted with follow-up questions. The Grievor's communication style is to not say much, but the information he provided during the investigation was consistent with his testimony at the hearing. **Although more details came out at the hearing, his story has not changed. It is normal for more details to come out during a hearing. The additional information that came out at the hearing is not evidence of deception. Rather it came out because particular questions were put to him at the hearing that were not put to him during the investigation.**

Marine Atlantic alleges the Grievor was dishonest about the amount of alcohol he consumed on board because his initial estimates totaled about 9 ounces and the empty bottle was 26 ounces. The half full glass of vodka on the table in his cabin would have accounted for some of the difference. **Also, while the Grievor's initial math differed from Marine Atlantic's, the Grievor readily acknowledged that he consumed too much alcohol, that he was intoxicated, and that he could have consumed more than his estimate of nine ounces. Overall, the Grievor's testimony does not illustrate minimization or deception as alleged by Marine Atlantic. Finally, despite Marine Atlantic's**

suggestion to the contrary, the Grievor convincingly denied he had a drink before doing the stern ramp job on the evening of August 17, which makes sense because he had not retrieved his suitcase (which contained the vodka) until after the stern ramp job.

Marine Atlantic alleges the Grievor's decision to drink on board the vessel was premeditated. The Union disagrees. The Grievor explained the reason he had alcohol on board the vessel and explained that stress led to his impulsive decision – albeit a bad one – to have a drink, which unfortunately led to more drinks. The personal stressors being experienced by the Grievor include cancer, which Marine Atlantic described as an “excuse”. **While it may have been an excuse at the moment of initial confrontation by Mr. Kettle and Captain Strickland, cancer was very much on his mind on August 17, 2023. Despite Marine Atlantic's attempts to downplay the Grievor's health status, the fact is the Grievor had been diagnosed with cancer in April 2022 and had a prostatectomy in December 2022, followed by a four-month leave of absence from work. Then, on August 11, 2023 – six days prior to the series of bad decisions that led to his termination – he attended a medical appointment where he learned his PSA levels were rising. Even though the August 11 appointment did not result in a diagnosis that his cancer had returned, the news was concerning to the Grievor and his spouse and it caused them stress. In addition to stress about his health issues, the Grievor was also experiencing stress in mid-August 2023 because he was in the process of moving from an apartment into a house. The Grievor testified that by August 16 he was “mentally exhausted” on his drive to Port aux Basques. The evidence of stress the Grievor was experiencing is not put forward to excuse his conduct. It does not mean – contrary to Marine Atlantic's submissions – that the Grievor is attempting to establish some sort of cause-and-effect argument between the drinking and his misconduct (similar to the argument put forward by the union in the *Canadian Postmasters & Canada Post, supra* award of Arbitrator Christie). However, the stress the Grievor was experiencing at the time of his misconduct is nevertheless a mitigating factor to be weighed with all other factors.**

The Union disagrees with Marine Atlantic's submission that the Grievor admitted to consuming alcohol on board on previous occasions when he said, “I do not drink much at work”. This was not an admission. It is just the way the Grievor speaks. The statement is not consistent with the Grievor's other testimony when he clearly stated that this was the first time he consumed alcohol on board. There is no support in the evidence that he consumed alcohol on board on other occasions.

The arbitral authorities identify a number of mitigating factors to be considered when assessing whether termination was an appropriate penalty. A non-exhaustive list of such factors is contained in the oft-cited case of

William Scott [full citation omitted]. Another non-exhaustive list is contained in paragraph 58 of *Canada Post Corp. v. C.U.P.W.*, *infra*.

In the case of the Grievor, several of these mitigating factors point towards reinstatement with a lengthy suspension as being the appropriate penalty. First, the Grievor was a long-service employee (18 years) with a clean disciplinary record. Mr. Kettle and Captain Strickland both reported that the Grievor's actions were out of character. **While his conduct was no doubt serious, it was an isolated incident in his employment history.** In contrast, in a number of the authorities submitted by the Employer, the grievor did not have long service with the employer and/or did not have a clean disciplinary record.

While the Grievor was not provoked into misconduct, the evidence shows he was experiencing a constellation of life stressors and was emotionally exhausted when the misconduct occurred. He admits he made stupid decisions, but his misconduct was not premeditated or planned as alleged. The Grievor and the union are not arguing lack of volition in the medical or legal sense as was argued by the union with respect to the grievor's theft in the *Canadian Postmasters & Canada Post*, *supra* decision of Arbitrator Christie. **The Union is arguing, however, that the stress the Grievor was experiencing – because of his health situation and other factors – is a mitigating factor to be considered.**

With respect to remorse, the Grievor has expressed it in his own way. He is not a demonstrative speaker. The evidence shows, however, that he expressed remorse to Captain Strickland on August 17 (contrast this with the grievor in *USW and Securitas*, *supra*). While the Grievor is a man of few words based on the August 21 interview transcript and his testimony at the hearing, **it is clear that the Grievor is remorseful and is aware of the wrongness of his actions and the need to rebuild trust with Marine Atlantic. Trust can be rebuilt. The Union acknowledges that deterrence is necessary, but it submits that deterrence can be achieved by a lengthy suspension with conditions, including random testing.**

[29] The Arbitrator then summarized the Employer's Rebuttal over approximately two pages of the Decision, including the following points:

- The evidence is overwhelmingly clear that the Grievor's actions were premeditated.
- The Grievor also lied about his cancer.
- The Grievor was not provoked. Everyone experiences stress. Stress alone cannot provide a free pass to drink to the point of intoxication on board a vessel.
- In any event, stress is not one of the mitigating factors identified in the *William Scott* case.

- Reinstating the Grievor will send a message to Marine Atlantic employees that you can drink to the point of intoxication on board a vessel and still get your job back by claiming stress.
- About 65% of Marine Atlantic's 1500 employees work on board vessels in safety sensitive positions. Deterrence will not be achieved if the Grievor is reinstated, even with random testing.
- The principle of progressive discipline does not apply to a case like this when the misconduct is so egregious.
- The Union argues that the Grievor has expressed remorse in his own way, but remorse cannot be implied. It must be forthright, sincere, heartfelt and clear. It was not.
- The Union claims the Grievor did not admit to drinking at work on prior occasions, but his statement, "I do not drink a lot at work" was exactly that – an admission against his own interests. The Union could have clarified this point on re-direct examination, but it did not. It cannot simply sweep the comment under the rug and ignore it.

[30] Before reviewing the Decision, the Court notes that the two main issues MAI raises on judicial review which it says shows the unreasonableness of the Decision are:

- (1) The analysis and findings on **rehabilitative potential, dishonesty, and premeditation** are incoherent and illogical and are not justified; and
- (2) **The Arbitrator's application of the *William Scott* factors** was logically inconsistent not justified in relation to accepted legal principles, the facts and submissions, and inadequately explained.

[Emphasis added]

[31] The Arbitrator's "Analysis and Considerations" is set forth over approximately 16 and one half pages in the Decision.

[32] The Arbitrator sets forth his decision in brief at the start of this part of the Decision, as follows:

In discharge cases, an arbitrator is first required to determine whether the grievor's conduct provides just and reasonable cause for some form of discipline. If that is established, the arbitrator is then required to assess whether the employer's decision to dismiss the grievor was an excessive response in all the circumstances of the case, and if so, whether an alternative measure of discipline would be just and equitable taking into consideration mitigating factors (see *William Scott* [citation omitted]).

There is no doubt the Grievor's conduct in this case provided Marine Atlantic with just and reasonable cause for discipline. Having considered all the evidence, the submissions of the parties and the legal authorities, I conclude that termination of employment was an excessive penalty in all the circumstances. I substitute a suspension from the date of termination up to the date of this Award, with conditions.

[Emphasis added]

[33] The Arbitrator then provided a brief summary of key evidence relating to the Grievor's conduct:

- On August 16, 2023 the Grievor purchased two bottles of vodka in Deer Lake while driving to Port aux Basques from his home in Marystown.
- On August 17, 2023, he brought these two bottles of vodka on board the Leif Ericson in his suitcase.
- The Grievor failed to report for work at 8:00 am on August 17.
- Between about 2:00 am and 1:30 pm on August 17, 2023, the Grievor consumed almost an entire 26-ounce bottle of vodka in his cabin and was visibly intoxicated and incoherent at about 1:30 pm when Marine Atlantic personnel entered his cabin after he failed to report as instructed.
- The Grievor was aware of the Policy and was aware he was violating it by his actions.
- The Grievor was also aware of the dangers associated with his workplace. His misconduct put not only his own life in danger, but also the lives of passengers and fellow crew members.
- When asked on August 17 whether he had been drinking, the Grievor denied it several times, until admitting to it when paramedics and security personnel arrived at his cabin.

[34] The Arbitrator notes that while the parties agreed to many of the facts and the conclusions to be drawn from the evidence, certain facts and conclusions were in

dispute. He first addressed the dispute between the Parties as to whether the Grievor's misconduct was premeditated:

...Marine Atlantic alleges the Grievor's misconduct was premeditated, but the Union submits it was not.

[35] The Arbitrator resolved that dispute by stating that he did not fully accept either the Union's or MAI's submission. He explains why:

I do not fully accept either party's position on this point. **First, I do not believe that the Grievor intended or planned to drink to the point of intoxication on board the vessel on August 17, 2023.** Mr. Kettle and Captain Strickland both reported that the Grievor's actions were out of character and there is no evidence to suggest he had ever engaged in similar behaviour during his 18-year career (except for the alleged admission made by the Grievor during cross-examination which I will address later in this Award). There is no evidence of a substance abuse issue. The Grievor testified that he was a "social drinker". In (*sic*) strikes me as unlikely that the Grievor would have intended that evening to drink to the point of intoxication. **Overall, I find it more likely than not that the Grievor did not plan or intend to drink to the point of intoxication on August 17, 2023.**

That said, I do not accept that the Grievor had no intention to consume alcohol during his August 2023 tour on board the Leif Ericson. I find it more likely than not that he purchased the two bottles of vodka in Deer Lake intending to consume them during his tour. The Grievor's explanation for why he purchased the two bottles of vodka in Deer Lake (i.e. that it was more "convenient" and that he intended to bring them to Halifax to drink with his daughter and her boyfriend) lacks plausibility....If he truly had no intention to consume the vodka on board, it would have been more "convenient" and also rational to have left the vodka in his truck on the terminal parking lot, or to have purchased it at a liquor store – any liquor store – in Nova Scotia on the drive from North Sydney to Halifax...The act of purchasing two bottles of vodka in advance and bringing them on board the vessel on August 17 illustrates a plan to consume them during his tour. **I find it was premeditated and intentional. Again, however, I do not believe he intended to drink to the point of intoxication.** I believe that his intention on the evening of August 17 was to have a couple of drinks after his shift and go to sleep. Likely, his intentions were similar to other evenings during his tour – to have a couple of drinks after his shift before going to sleep. Hence the reason for bringing two bottles on board. Unfortunately, things did not transpire as planned on the evening of August 17. As the Grievor stated, "one drink led to another" and he drank to the point of significant intoxication.

[Emphasis added]

[36] The Arbitrator then addressed the Parties' conflicting positions as to the Grievor's truthfulness or lack thereof:

Marine Atlantic submits that the Grievor has been untruthful in other respects, both on August 17 and during Marine Atlantic's investigation. It points to the Grievor lying to Mr. Kettle and Captain Strickland on August 17.

...the Union's description of these lies is as "reflexive response" to "being caught".

[37] The Arbitrator resolved these conflicting positions as follows:

I agree that the Grievor initially lied to them about drinking and about cancer and/or medication being the cause of his condition, but I also agree with the Union's description of these lies as a "reflexive response" to being caught. While it is true that his August 17 admission to drinking occurred once security arrived to administer a BAT (and the Grievor knew he had been caught), this does not significantly detract from the value of his admission. The Union rightfully points out that on August 17, the Grievor admitted he had been drinking to the point he would fail the BAT. The Grievor confirmed this admission during the August 31 interview. He made no attempts during the August 31 interview to downplay his level of intoxication on August 17 or to excuse it, other than referring to the personal stress he was experiencing. In addition, the Grievor was forthright about the status of his cancer during the October 12 interview. In neither of these interviews did he deny blameworthiness. He answered all questions put to him truthfully – about drinking and about his cancer.

[Emphasis added]

[38] The Arbitrator addresses MAI's argument that by the time of the interviews on August 31 and October 12 it was too late to repair the damage caused by his initial lies on August 17 because truthfulness and candour were required when the Grievor was approached by Mr. Kettle and Captain Strickland:

While truth in those initial moments would have been preferable, his initial denials are not at all surprising given his significantly intoxicated and incoherent state. In addition, the authorities recognize the tendency of many

people to deny wrongdoing when first confronted. In *Ivaco Rolling Mills*, *supra*, Arbitrator Baxter refers to a couple of relevant authorities [quote omitted].

[Emphasis added]

[39] The Arbitrator then addressed MAI's argument that the Grievor was dishonest about the amount of alcohol he consumed on August 17, 2023, stating:

There is a difference between being wrong and being dishonest. During the hearing, the Grievor's initial estimate as the quantity of vodka he consumed on August 17 was shown to be wrong, but I do not find that he was attempting to be dishonest. **He readily acknowledged on cross-examination that his quantity estimates could be wrong and were in fact likely wrong. He also readily acknowledged – during the August 31 interview and again when testifying at the hearing – that he consumed too much alcohol and was intoxicated.**

[Emphasis added]

[40] The Arbitrator then dealt with MAI's argument that the Grievor failed to tell a complete story to Ms. Angione on August 31. The Arbitrator notes that MAI was critical of the Grievor for not explaining why he was stressed (i.e. by volunteering information about the move from the apartment to the house, the brakes on his truck, and his August 11 medical appointment). The Arbitrator notes that MAI also criticized the Grievor for not disclosing to Ms. Angione that he had a second bottle of vodka in his suitcase, which continued to be concealed after his intoxication was discovered on August 17, or that he consumed this second bottle of vodka at the hotel on August 18 and 19.

[41] The Arbitrator fully considered these arguments and stated:

I agree that there are details about the events between August 16 – 19, 2023 that the Grievor did not voluntarily or proactively disclose on August 31, but

I disagree with Marine Atlantic’s depiction of these omissions as evidence of dishonesty. I do not attribute these omissions to any intention on his part to deceive or withhold information. In this regard, I find there is merit in the Grievor’s explanation that the reason he did not disclose certain details to Ms. Angione is because she did not ask. I accept that Ms. Angione told the Grievor he had “an obligation to cooperate and provide a complete and truthful account in relation to this investigation as well as an obligation to report and disclose any knowledge or wrongdoing...”. I also accept that she posed open-ended questions to the Grievor at a few points throughout the interview (i.e. asking him to provide a statement detailing his day on August 17 starting with where he thought it was important and ending when he had provided all relevant information, asking if there was “anything else” he could remember about August 17, asking “can you explain a little bit about what happened there” in relation to the morning of August 19 when he attempted to access his vehicle, asking whether there was “anything else” he wanted to add “right now”). Nevertheless, I also find that Ms. Angione’s manner of questioning and interview style was not sufficiently inquisitive and investigatory.

[Emphasis added]

[42] Based on the Arbitrator’s review of the transcript of the August 31 interview, the Arbitrator stated that it struck him that there were several points where Ms. Angione should have asked follow-up questions, and had she done so, “I believe the Grievor would have answered them truthfully”:

- When the Grievor told Ms. Angione he had “a lot of personal issues that I [sic] shouldn’t have a hold of me. But it got the better of me obviously...”, Ms. Angione did not ask him to elaborate or explain his personal issues. Had she done so, it might have led the Grievor to discuss his apartment/house move, the brakes on his truck and/or his wife’s concerns following from the August 11 medical appointment.
- Another example is Ms. Angione’s question about whether there was “anything else” the Grievor could remember from the day of August 17th. The Grievor gave a short reply about speaking to certain individuals, but Ms. Angione asked no follow-up questions before moving on to ask for a timeline of events *following* August 17 [emphasis added by Arbitrator]. She did not take the opportunity to pursue a line of questioning about what was discussed between the Grievor and the individuals he referenced.
- Ms. Angione asked the Grievor two questions at the same time – where he obtained the vodka and how he got it on board the vessel. The Grievor gave a partial answer, stating that he brought it on board in his bag. He did not

indicate where he purchased it. Ms. Angione could have followed up by asking something like, “okay you brought it on board in your bag, but where did you purchase it”, which should have led to further questions about when the purchase occurred and why. **The Grievor’s partial response about bringing the alcohol on board in his suitcase does not strike me as an attempt to conceal or hide his misconduct. Rather, it is an example of the Grievor’s manner of speaking, which is to be very brief and to say as little as he feels is necessary.**

- Ms. Angione asked (relative to the events of August 19 when the Grievor attempted to get into his vehicle) “Can you explain a little bit what happened there?”. The Grievor gave a brief response, indicating that stress got to him, that he had too much to drink and asked if he could sleep in his vehicle, but Ms. Angione asked no follow-up questions before switching topics by asking the Grievor if he acknowledged he worked in a safety sensitive position. As the interview progressed, the Grievor made a few references to letting stress get to him and keeping things “bottled up”, but no follow up questions were asked to explore why he was feeling stressed.

[Emphasis Added]

[43] The Arbitrator stated that, overall, he found that the August 31 interview was not sufficiently investigatory or inquisitory. He then stated that he disagreed with MAI’s description of the Grievor “holding back details” during the August 31 interview, stating:

I do not accept Marine Atlantic’s assertion that the reason certain information did not come out during the August 31 interview was because of some failure on the Grievor’s part to comply with his obligation to be truthful and/or provide a complete account. My assessment of the Grievor, based on observing him at the hearing and reviewing the August 31 transcript, is that he was feeling sheepish and embarrassed about his actions and that he is not naturally verbose or effusive. I feel confident in saying that more exploratory questioning during the August 31 interview would have elicited more information.

[Emphasis Added]

[44] The Arbitrator then found that except for his initial denials on August 17, 2023 and his testimony about his intention to consume the alcohol two weeks after his tour, the Grievor had been honest and forthright:

Ultimately, I conclude that on August 17, 2023, the Grievor admitted that he drank alcohol. During the August 31 interview, he reiterated this admission and acknowledged he drank to the point of intoxication. On October 12, he truthfully explained the status of his cancer. He reiterated these admissions and explanations when he testified during the hearing. **During a very thorough cross-examination, the Grievor admitted to virtually everything that was put to him about misconduct. Except for the initial denials on August 17 (and his testimony about purchasing the vodka in Deer Lake with the intention to consume it in Halifax two weeks later), the Grievor has been honest.**

[45] The Arbitrator goes on to state that he agreed with MAI in terms of the impact of the news the Grievor received from his doctor on August 11, 2023, stating that “the Union has not established the link or nexus alleged in the Grievance. There is no medical evidence of a “sudden and very detrimental effect on Fabian’s mental health”, nor is there any medical evidence of “serious psychological stress” that affected the Grievor’s decision making. However, the Arbitrator clarified that he disagreed with MAI in that:

To the extent Marine Atlantic seems to be saying that the news the Grievor received on August 11 had no impact on his actions and/or that the Grievor was under no more stress than the average person and/or that the Grievor’s state of mind was not impacted to an extent that stress could reasonably be a mitigating factor, I disagree with Marine Atlantic.

[46] The Arbitrator then considered arbitral authorities where the elements that must be established before an arbitrator may consider reinstatement in a case where there has been serious wrongdoing attributed to an illness or condition are

outlined. The Arbitrator stated that he disagreed with MAI's assertions that these elements had not been established. He explained why:

First, while the Grievor was not told on August 11 that his cancer had returned, he was told that his PSA levels were rising slowly.

Second, while a link or nexus between a medical condition and aberrant conduct is normally established by expert evidence, I do not read Arbitrator Christie to be saying that expert medical evidence is mandatory. Rather, he refers to the link or nexus "most commonly" being established with expert evidence. On cross-examination it was put to the Grievor that if the news on August 11 had been serious, his doctor would not have waited there months to see him. The Grievor replied, "I guess not, no". I am not prepared to conclude that the three-month time period between appointments indicates any lack of concern on Dr. Organ's part, nor am I prepared to conclude that it is evidence that the Grievor's condition was not serious.

...I do not need to hear expert medical evidence to conclude that the August 11 appointment did not completely put the Grievor's mind at ease or to accept the Grievor's testimony about the appointment causing stress for him and his spouse. When the news of August 11 is considered in its full context (i.e. that he had a family history of prostate cancer, that he had been diagnosed "at a young age" with intermediate risk prostate cancer in April 2022, and that he had a prostatectomy in December 2022, followed by a four-month leave of absence from work, it is not at all surprising that the Grievor and his spouse were concerned and upset after the August 11 appointment.

...Expert medical evidence is not required for me to conclude that there was still lingering uncertainty about the Grievor's future and there was still at least some risk that cancer could return. In my view, any reasonable person in the Grievor's situation would have been concerned to some degree. Uncertainty about one's health when cancer is involved would be stress-inducing for most people.

[Emphasis Added]

[47] The Arbitrator then discussed the third element in the *Canada Safeway* and *RWDSU* case cited by Arbitrator Christie in *Canadian Postmasters & Canada Post*, i.e. that an arbitrator be persuaded that there was a sufficient displacement of responsibility from the Grievor's conduct to render his conduct less culpable:

I accept that for there to be a finding of non-culpability would likely require expert medical evidence (i.e. if a grievor were to argue that the misconduct was entirely involuntary). Again, however, expert medical testimony is not required to persuade me that there could be some level of displacement of culpability. For example, in *NAV Canada, supra* – absent expert testimony from a physician or another medical professional – the arbitrator held that there was little to no evidence that the employer knew or took into account the grievor’s distress caused by his cousin’s suicide, which the arbitrator held was a “significant mitigating factor”....**Overall I am satisfied that on August 16 and 17, 2023, the Grievor was experiencing heightened stress that contributed to his poor decision making.** The stress was mainly the result of the August 11 medical appointment, but was exacerbated by the upcoming move from the apartment to a house and the brake issues with his truck. While these other issues might have been routine or normal stressors in the lives of most people on most days, they would likely be heightened for someone in the Grievor’s situation.

[Emphasis Added]

[48] The Arbitrator next addressed MAI’s argument that the Grievor admitted during cross-examination that August 17, 2023 was not the first time he consumed alcohol on board a MAI vessel – an admission which MAI said the Union failed to clarify on re-direct and thus must accept:

First, as explained in my summary of the facts, Marine Atlantic’s record of the Grievor’s testimony on this point differs from my record of the evidence. My record prevails as agreed by the parties at the outset of the hearing. My record indicates the Grievor stated as follows: “I do not drink a lot at home, and I do not drink at work”. Combined with the Grievor’s other evidence and the reports of Captain Strickland and Mr. Kettle (i.e. that the events of August 17 were out of character for the Grievor, Marine Atlantic failed to establish on a balance of probabilities that August 17, 2023 was not the first time the Grievor had consumed alcohol on board a vessel. Even if my record of the evidence on this point was in alignment with Marine Atlantic’s record (i.e. that the Grievor did say, “I do not drink a lot at home and I do not drink a lot at work”), would this statement be sufficient for me to reject the Grievor’s other testimony and his statements during the August 31 interview that August 17, 2023 was the first time he consumed alcohol on board a vessel? When combined with the other evidence (notably the reports of Captain Strickland and Mr. Kettle that the behaviour was out of character for the Grievor as well as the Grievor’s denials), the purported words would not have been sufficient for me to

conclude on a balance of probabilities that the Grievor had consumed alcohol on board a Marine Atlantic vessel prior to August 17, 2023.

[Emphasis added]

[49] The Arbitrator further states that he rejected MAI's suggestion that the Grievor consumed alcohol before doing the stern ramp job on the evening of August 16, 2023. He states that MAI offered no basis for him to conclude that the Grievor had consumed alcohol before doing the ramp job, adding that "in fact, the evidence indicated otherwise (i.e. that the alcohol did not get brought on board by the Grievor until after he completed the stern ramp job).

[50] The Arbitrator also addressed, and rejected, MAI's argument that the Grievor failed to express true remorse and failed to acknowledge the wrongdoing of his actions:

Overall, on this point, I reject Marine Atlantic's submissions, and I accept the submissions of the Union. Despite his initial denials to Captain Strickland on August 17, the Grievor ultimately admitted to Captain Strickland that he had been drinking that day. He reiterated this admission during his August 31 interview, and again at the hearing. **The Grievor has admitted wrongdoing and accepted responsibility for his actions. While he has attributed his poor decision making to the stress that he was experiencing at the time, he has not denied that he is blameworthy, nor has he attempted to entirely excuse his misconduct or absolve himself of responsibility.**

[51] The Arbitrator states that the Grievor's testimony at the hearing was "largely credible and forthright..". He explains this statement:

I say that the Grievor's testimony at the hearing was "largely" credible, as opposed to entirely credible because of the Grievor's testimony regarding his intentions in purchasing two bottles of vodka in Deer Lake and his purported plan not to consume them until two weeks later in Halifax. For the reasons

already stated, I reject the Grievor's evidence in this regard. It is not plausible or credible.

[Emphasis added]

[52] After stating that MAI did not lead evidence of other applications of the Policy in support of its argument that it has consistently applied the Policy in the manner applied to the Grievor – i.e. termination for the violations, the Arbitrator stated that, in any event, MAI's failure to provide examples of its consistent application of the Policy played no role in his decision to reinstate the Grievor.

[53] In terms of the application of the mitigating factors listed in the *William Scott* case, the Arbitrator stated:

Considering all the circumstances of this case – including application of the mitigating factors listed in the *William Scott* case – I have decided that termination of the Grievor's employment was an excessive penalty and that a lengthy suspension with conditions is more appropriate.

[54] The Arbitrator then applied the following elements or factors from *William Scott*:

- The Grievor was a long-service employee with a clean disciplinary record.
- While the Grievor's behaviour on August 17 was an isolated incident in his employment history, it was not a spur-of-the-moment decision. There was a degree of premeditation in his misconduct.
- I do not find that he intended to consume it for purposes of becoming intoxicated, but any consumption of alcohol on board a vessel – even a drink or two after a day shift before going to sleep – is prohibited by the Policy.
- This prohibition is for valid and legitimate reasons given the safety sensitive nature of the workplace and the Grievor's position.

- His misconduct constitutes an extremely serious Policy violation, worthy of strong rebuke.

[55] The Arbitrator then considered the *William Scott* factor of “provocation”:

While the Grievor was not provoked in the sense that something triggering occurred immediately before his misconduct, I accept that he was experiencing significant life stressors at the time of his misconduct...In my view, the news on August 11 would have caused most reasonable people to experience a type and level of stress not generally experienced because of typical life stressors. **I accept that on August 16 and 17, 2023, the Grievor was experiencing a heightened level of stress which contributed to his poor decision making.**

[Emphasis Added]

[56] The Arbitrator then addressed MAI’s submission that stress alone cannot provide someone with a free pass to do what the Grievor did:

I agree...The stress he was experiencing does not excuse his misconduct, but it does partially explain what led to it and it is a mitigating factor I have considered.

[57] The Arbitrator responded to MAI’s argument that stress is not one of the mitigating factors in the *William Scott* case, stating that “the list of factors in that case is not exhaustive”.

[58] The Arbitrator also found that the Grievor’s termination created a special economic hardship for him:

I find that the penalty imposed – termination- has created special economic hardship for the Grievor. The Grievor’s partner is not employed. Although she has Greenshield Insurance benefits, these benefits are capped at a relatively low threshold for prescription medications...The Grievor testified that because of the loss of his health benefits with Marine Atlantic, he has had to pay for cancer medications out of pocket, often using credit cards...The risk that the Grievor will

incur further medical expenses is higher than that of someone who has never been diagnosed with cancer and who has not been referred for radiation treatment.

[59] The Arbitrator then reiterated his earlier finding that there was no evidence that MAI's Policy had not been uniformly enforced or applied, "thus discriminating against or causing unfairness to the Grievor". However, the Arbitrator also stated that "[N]either is there sufficient evidence to establish a long-standing and consistent application of the Policy as alleged by MAI. "This mitigating factor is essentially a non-issue in this case".

[60] The Arbitrator acknowledged the seriousness of the Grievor's misconduct, stating that "[i]t put Marine Atlantic's assets at risk, but more importantly it put the lives of passengers and crew at risk in a highly safety sensitive work environment.

[61] In addressing whether reinstatement as an alternate penalty to termination was appropriate, the Arbitrator returned to the themes of remorse, ownership of responsibility as well as the Grievor's initial denials, stating:

The Grievor, has, however, acknowledged his wrongdoing, accepted responsibility, and shown remorse. His initial denials do not preclude reinstatement as an appropriate penalty. While Marine Atlantic criticized the Grievor's expression of remorse as falling short of what is required for reinstatement, I believe that the Grievor is sincerely remorseful. His participation in counselling through the Employee Assistance Program and his offer to participate in random alcohol testing if he is reinstated illustrate a level of remorse, an acknowledgement of wrongdoing, an awareness that he needs to reestablish trust and a willingness to do so

[62] The Arbitrator then considered the evidence against reinstatement as a penalty and his serious concerns that reinstatement was inappropriate:

Working against the Grievor in terms of reinstatement is his testimony about purchasing the two bottles of vodka in Deer Lake – not for consumption during his tour – but for consumption in Halifax two weeks later. **This testimony is neither believable nor credible. It concerned me and it caused me to seriously consider whether reinstatement would be appropriate. In writing this Award I wrestled seriously with this point.**

[Emphasis Added]

[63] The Arbitrator ultimately resolved those serious concerns, stating:

That said, the Grievor's dishonesty does not rise to the level of dishonesty seen in many authorities in which dishonesty was a key reason why reinstatement was not ordered (see for example *McNulty v. Canada Revenue Agency*, *supra*, where the dishonesty spanned a long period). **The Grievor's dishonesty on this point does not alter the fact that he admitted to the material aspects of his misconduct, not only during the hearing, but also during the August 31 interview when first given an opportunity to do so. Ultimately, I have decided that the employment relationship has not been irreparably damaged, and that trust can be reestablished.**

[Emphasis Added]

[64] The Arbitrator concludes his lengthy reasons by setting forth his ultimate decision, including the importance of deterrence in the high-risk and safety sensitive environment in which MAI's vessels operate in the North Atlantic:

Ultimately, considering all the mitigating factors in the Grievor's favour and the authorities referred to in this Award, I have decided to reinstate the Grievor. Deciding to reinstate him was not a decision I arrived at easily or without trepidation. I acknowledge that arbitrators should not easily interfere with, or second guess, disciplinary decisions made by employers. I recognize that Marine Atlantic operates its vessels in the North Atlantic Ocean – a high-risk and safety sensitive work environment. Accidents and emergencies can result in catastrophe given the harsh environment and potential for system failures, human error and overwhelming natural events. Every vessel crossing carries with it a risk for loss of life. Employees must be fit for duty. Safety must be paramount. Deterrence is important. Marine Atlantic has described what happened in this case as among the

most serious matters it can face. **I acknowledge the seriousness of the Grievor's misconduct, and I agree that it is important to send a strong message of deterrence to other employees. But I do not believe that deterrence cannot or will not be achieved by a lengthy suspension with conditions as set forth below.**

[Emphasis Added]

[65] As noted earlier in this decision, the Arbitrator replaced the penalty of termination with a 17-month suspension from the date of termination to the date of his award. He also stated that the Grievor would be subject to periodic random testing for alcohol, as well as periodic random searches of his suitcase/baggage and his cabin for a period of 24 months beginning on the date of his first shift back to work. The Arbitrator also stated that his view was that if there was another incident of possession and/or a positive test and/or another material violation of the Policy, "it should result in the immediate for-cause termination of the Grievor's employment without compensation".

Analysis and Findings

[66] Despite this Court's detailed review of the Arbitrator's decision, this Court is alive to the clear direction in *Vavilov*, that a reviewing judge must read the decision as a whole, and not parse it to look for error. Nor must this Court re-weigh the evidence or substitute its own decision for that of the Arbitrator.

Issue 1: Are the Arbitrator's findings on rehabilitative potential, dishonesty, and premeditation incoherent and illogical and thus not justified?

[67] Under this overall issue, MAI argues that the Arbitrator failed to consider and provide a clear and justified line of reasoning as to whether the employment relationship could be rehabilitated and failed to reconcile a central finding that the Grievor had been dishonest in his testimony with his conclusions.

[68] MAI also argues that the Arbitrator's analysis of premeditation is logically flawed, and the Decision is untenable given the finding that the Grievor's misconduct was premeditated.

[69] MAI refers to the *William Scott* case, which was considered by the Arbitrator, where the Board in that case described the analysis required on the issue of whether termination was an excessive response to confirmed misconduct (para. 14):

...However, it is usually in connection with the second question – is the misconduct of the employee serious enough to justify the heavy penalty of discharge? – that the arbitrator's evaluation of management's decision must be especially searching:

- (i) How serious is the immediate offence of the employee which precipitated the discharge (for example, the contrast between theft and absenteeism)?
- (ii) Was the employee's conduct premeditated, or repetitive; or instead, was it a momentary and emotional aberration, perhaps provoked by someone else (for example, in a fight between two employees)?
- (iii) Does the employee have a record of long service with the employer in which he proved an able worker and enjoyed a relatively free disciplinary history?
- (iv) Has the employer attempted earlier and more moderate forms of corrective discipline of this employee which did not prove successful in solving the problem (for example, of persistent lateness or absenteeism)?
- (v) Is the discharge of this individual employee in accord with the consistent policies of the employer or does it appear to single out this person for arbitrary and harsh treatment (an issue which seems to arise particularly in cases of discipline for wildcat strikes)?

- (vi) The point of that overall inquiry is that arbitrators no longer assume that certain conduct taken in the abstract, even quite serious employee offences, are automatically legal cause for discharge. [citations omitted]. Instead, it is the statutory responsibility of the arbitrator, having found just cause for some employer action, to probe beneath the surface of the immediate events and reach a broad judgment about whether this employee, especially one with a significant investment of service with the employer, should actually lose his job for the offence in question. Within that framework, the point of the third question is quite different than it might otherwise appear. Suppose that an arbitrator finds that discharge and the penalty imposed by the employer is excessive and must be quashed. It would be both unfair to the employer and harmful to the morale of other employees in the operation to allow the grievor off scot-free simply because the employer over-reacted in the first instance. **It is for that reason that arbitrators may exercise the remedial authority to substitute a new penalty, properly tailored to the circumstances of the case, perhaps even utilizing some measures which would not be open to the employer in the first instance under the agreement [citation omitted]**

[Emphasis Added]

[70] In its submissions to this Court, MAI also referred to another oft-cited arbitral list of mitigating or aggravating factors to be considered at the second question as quoted in paragraph 11 of *William Scott* from *U.S.W.A., Local 3257 v. Steel Equipment Co.*, [1964] O.L.A.A. No. 5 (“*Steel Equipment*”):

1. The previous good character of the grievor.
2. The long service of the grievor.
3. Whether or not the offence was an isolated incident in the employment history of the grievor.
4. Provocation.
5. Whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses, or whether the offence was premeditated.
6. Whether the penalty imposed has created a special economic hardship for the grievor in the light of his particular circumstances.

7. Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination.
8. Circumstances negating intent, e.g. likelihood that the grievor misunderstood the nature or intent of an order given to him, and as a result disobeyed it.
9. The seriousness of the offence in terms of company policy and company obligations.
10. Any other circumstances which the board should properly take into consideration, e.g. (a) failure of the grievor to apologize and settle the matter after being given an opportunity to do so; (b) where a grievor was discharged for improper driving of company equipment and the company, for the first time, issued rules governing the conduct of drivers after the discharge, this was held to be a mitigating circumstances; (c) failure of the company to permit the grievor to explain or deny the alleged offence.

[71] MAI refers to *Canadian Labour Arbitration*, 5th Ed., at s. 7:72 where authors Brown and Beatty discuss the importance of “rehabilitative potential” to an arbitrator’s analysis of these factors:

The critical question for arbitrators using a corrective approach is the grievor’s capacity to conform to acceptable standards of behaviour in the future. To answer this question requires an assessment of the grievor’s ability and willingness to reform and rehabilitate himself or herself so that a satisfactory employment relationship can be re-established. In a word, an arbitrator must decide whether the person is “redeemable”. On this view, as one arbitrator pointed out, the checklists of mitigating factors “are but special circumstances of general considerations which bear upon the employee’s future prospects for acceptable behaviour, which is the essence of the whole corrective approach to discipline

[72] This Court notes that the Arbitrator explained that the Grievor had participated in counselling through the Employee Assistance Program and had offered to participate in random alcohol testing if he was reinstated which the Arbitrator said illustrated a level of remorse as well as awareness that he needed to re-establish

trust and a willingness to do so substantially. The Arbitrator addressed the importance of “rehabilitative potential” although not using that exact phrase.

[73] MAI faults the Arbitrator for not including a discussion of aggravating factors in the same paragraph of the Decision where he considers “whether an alternative measure of discipline would be just and equitable taking into consideration mitigating factors”. MAI says that here the Arbitrator did not note that the factors to be considered in determining if the termination was excessive or some other penalty was merited are both mitigating and aggravating. MAI states, “The Arbitrator mistakenly drops aggravating factors from his statement of the analysis to be undertaken”. MAI admits that while this is not “fatal in itself, his methodology as demonstrated in his final analysis and conclusions shows that the aggravating factors in this case – including dishonesty on the witness stand, premeditation, and the seriousness of the misconduct and the need for deterrence - received only cursory consideration”. MAI refers to the Arbitrator’s approach as “minimizing or ignoring critical aggravating factors” and “elevating certain mitigating factors (two of which, stress and special economic hardship, MAI says were wrongly determined).

[74] In this Court’s view, for it to follow the approach suggested by MAI would result in exactly what *Vavilov* warns a reviewing court must not do – parse the

Decision for error, rather than taking a holistic approach to its review. It is abundantly clear to this Court, that in considering the Decision as a whole, the Arbitrator carefully considered the “aggravating factors” and did not either minimize or ignore them. This is the case whether he explicitly called them “aggravating factors” or not. When the Decision is read as a whole, it is clear that the Arbitrator grappled fully with the factors in favour of reinstating the Grievor and those against doing so. He repeatedly emphasized the seriousness of the conduct in the context of an employee working in a safety-sensitive high-risk environment. One need only review the Decision at paragraphs 148 and 149 to ascertain that the Arbitrator was very alive to the factors weighing against reinstatement.

[75] MAI points to paragraphs 142 and 151 of the Decision, saying that these paragraphs “are telling”. In its submissions, MAI states:

In paragraph 151, the conclusion to the Arbitrator’s analysis, the Arbitrator acknowledges the safety sensitivity and seriousness of the misconduct, but, “considering all the mitigating factors” decides to reinstate. **Nowhere in this paragraph** does the Arbitrator consider the effect of the Grievor having planned to bring and drink alcohol aboard nor his finding of dishonesty on the witness stand. **The Arbitrator had to consider and weigh the aggravating factors** he found – particularly central findings of premeditation and dishonesty – against mitigating factors in order to determine whether the employment relationship could be rehabilitated.

[Emphasis Added]

[76] It is of note to this Court, that MAI focuses on particular paragraphs in the Decision as not evidencing the Arbitrator weighing both mitigating and

aggravating factors. Yet, it is clear to this Court that he did so. Paragraph 149 is an example of the Arbitrator fully considering the circumstances, in his words, “working against the Grievor in terms of reinstatement”. The Arbitrator outlined at paragraph 125 his reasons for finding that the Grievor’s conduct in bringing alcohol on board was premediated. The Arbitrator rejected the Grievor’s evidence at the hearing that his intention in purchasing the vodka was to drink it later in Halifax, stating that the Grievor’s testimony was “largely” credible, as opposed to entirely credible.

[77] In its written submissions, MAI refers to paragraph 151 of the Decision and states that [N]owhere in this paragraph does the Arbitrator consider the effect of the Grievor having planned to bring and drink alcohol aboard nor his finding of dishonesty on the witness stand. “The Arbitrator had to consider and weigh the aggravating factors he found – particularly central findings on premeditation and dishonesty – against any mitigating factors in order to determine whether the employment relationship could be rehabilitated”.

[78] This Court agrees that in such a case an arbitrator should weigh both mitigating and aggravating factors. However, he does not have to do so all in one paragraph. Reading the reasons as a whole, it is clear that the Arbitrator simply did not accept many of the arguments advanced by MAI at the hearing. However, he

did accept that the Grievor's misconduct was premeditated. He did accept that the Grievor's evidence about the reason he purchased alcohol was not credible.

[79] MAI submits that the Arbitrator's conclusion that the employment relationship could be restored is "fundamentally irreconcilable with those central findings", i.e. that the misconduct was premeditated, that the Grievor knew right from wrong and the fact that he was not credible about the reason that he brought alcohol on board the vessel.

[80] MAI describes these as "central findings" and in essence is suggesting that the Arbitrator failed to give them sufficient weight. But that argument is belied by a fulsome reading of the Decision. The Arbitrator did give those factors weight, as he gave weight to mitigating factors. MAI does not accept that his weighing resulted in the correct result. However, it is not the role of this Court to reweigh evidence. That is the purview of the Arbitrator. He was fully alive to all of these factors and discussed them in his Decision, perhaps not in one paragraph, but overall the Decision shows that the Arbitrator knew his job was to consider all the factors – for and against – reinstatement, and he did so.

[81] MAI says that the Arbitrator found "in one sentence in paragraph 148 that the Grievor "has shown remorse". Further, MAI submits that lying on the witness stand is incompatible with a finding of genuine remorse.

[82] When this Court reviews the Decision in its entirety, I see that the Arbitrator discusses and engages with the principle of “remorse” fully in paragraph 139. The Arbitrator made a finding that the Grievor showed remorse, specifically rejecting MAI’s argument that the Grievor failed to show true remorse. That finding is entitled to deference by this Court.

[83] MAI argues that the Arbitrator’s conclusion to reinstate the Grievor was grounded in the Arbitrator’s finding that the employment relationship was not irreparably damaged and trust could be reestablished (para 149). MAI says that those findings are fundamentally irreconcilable with what MAI describes as the central findings of premeditation and the Grievor holding on to his story about why he bought the alcohol during his hearing testimony.

[84] While MAI refers to these as “central findings”, it is clear to this Court, that reading the Decision as a whole, one can easily discern the Arbitrator’s path of reasoning leading to his conclusion.

[85] At paragraph 149 the Arbitrator says that he “wrestled seriously with this point” (i.e., the Grievor’s testimony about why he purchased the vodka, which the Arbitrator found not believable or credible) and whether reinstatement was appropriate. The Arbitrator then made a finding that the Grievor’s misconduct did not rise to the level of dishonesty seen in many of the authorities where dishonesty

was a key reason why reinstatement was not ordered. Further, the Arbitrator specifically found that the Grievor's dishonesty on the point of premeditation "does not alter the fact that he admitted to the material aspects of his misconduct, not only during the hearing, but also during the August 31 review when first given the opportunity to do so". The Arbitrator once again explained what he decided (reinstatement) and why (the dishonesty did not rise to the level seen in many authorities where reinstatement was not ordered and that the Grievor admitted to the material aspects of his misconduct).

[86] MAI argues that these "errors" are analogous those found by the New Brunswick Court of King's Bench in *Irving Paper Ltd. v. Unifor, Local 907 (Irving Paper)* which was upheld on appeal (2023 NBCA 52).

[87] This Court accepts, however, as accurate, the Union's submission that that case is readily distinguishable. As set forth in the Union's submission to this Court:

Irving Paper involved the termination of an employee for egregious time theft. On more than 20 occasions over a period of several months, the employee undertook personal trips during working hours. Despite these findings that the employee repeatedly claimed not to know that his conduct was wrong and was untruthful during both the investigation and the hearing, the arbitrator ordered reinstatement. On judicial review, the Court concluded that reinstatement was unreasonable, finding that a fundamental failure to understand right from wrong was incompatible with the genuine remorse required to establish rehabilitative potential.

[88] In this case, the Arbitrator specifically rejected MAI's argument that the Grievor failed to acknowledge the wrongness of his actions. Rather, the Arbitrator

accepted the Union's submissions on this point finding that "...the Grievor has admitted wrongdoing and accepted responsibility for his actions (para. 139). Further, and as noted above, the Arbitrator found that the Grievor demonstrated real remorse. The Arbitrator was entitled to make these findings and make conclusions based upon them. It is not the task of a reviewing Court to reweigh the evidence and come to its own conclusions on that evidence.

[89] MAI refers to several arbitral authorities which it did not advance at the arbitration hearing to support its position that the Arbitrator's decision represents "a significant departure from the arbitral consensus that dishonesty is incompatible with remorse and rehabilitative potential".

[90] There is no need for this Court to review these cases in this decision. They were not before the Arbitrator. In any event, it is trite to say that cases turn on their own facts. In the view of this Court, MAI is attempting to re-argue the case that was before the Arbitrator before this Court. It is clearly concerned with the outcome of the arbitration in that it resulted in the Grievor being reinstated. That said, in the view of this Court, the Arbitrator fully, rationally and intelligibly dealt with the very able arguments of counsel for MAI at the hearing. He rejected the contention that the Grievor had not shown remorse and that his dishonesty on the witness stand concerning premeditation meant that reinstatement was off the table

as a remedy. The Arbitrator could not have been clearer that he grappled with that aspect of his decision. Overall, having fully considered the arguments for and against reinstatement, he determined that reinstatement was appropriate, with conditions. This Court owes deference to this finding by the Arbitrator. He heard the evidence. He made findings of credibility. He determined facts. All such matters lie at the heart of what an arbitrator is tasked to do.

[91] In conclusion on the first main issue raised on judicial review, this Court finds that the Arbitrator's analysis and findings on rehabilitative potential, dishonesty and premeditation are coherent, logical and justified. This ground of review is dismissed.

Issue 2: Whether the Arbitrator's application of the *William Scott* factors was logically consistent, justified in relation to accepted legal principles, the facts, the submissions and adequately explained.

[92] MAI organizes its submissions on review for issue 2 in the following three categories:

- (1) The Arbitrator's analysis and findings on *the seriousness of the misconduct, the need for deterrence, and deference to the employer* are cursory, not justified or responsive, and *these aggravating factors ought only to have been displaced by compelling mitigating factors, which were not present*
- (2) *Stress is not a relevant mitigating factor* and the Arbitrator's analysis is flawed and untenable. Using stress as a mitigating factor is also logically incoherent with the finding that the Grievor's misconduct was premeditated; and
- (3) The Arbitrator's findings and analysis on special economic hardship are not justified in light of the authorities and the evidenced.

Seriousness of the Misconduct and the Need for Deterrence

[93] In its submission, the Employer criticizes the Arbitrator for only providing what it refers to as “unreasonably limited analysis” on “the critical issues of the importance of safety and the seriousness of the misconduct.”

[94] However, this Court’s reading of the Decision as a whole demonstrates that the Arbitrator was very attuned to the safety sensitive environment in which the Grievor worked as well as how seriously MAI took the Grievor’s misconduct.

[95] Throughout the Decision the Arbitrator states that the Grievor’s misconduct was serious, that the Employer had just cause to impose discipline as well as the need for deterrence. I will refer here to a few such passages:

- There is no doubt the Grievor’s conduct in this case provided Marine Atlantic with just and reasonable cause for discipline (para. 121);
- The Grievor was aware of the Policy and was aware he was violating it by his actions. The Grievor was also aware of the dangers associated with his workplace. His misconduct put not only his own life in danger, but also the lives of passengers and fellow crew members (para. 123).
- The Grievor’s misconduct constitutes an extremely serious Policy violation, worthy of strong rebuke (para. 143).
- There is no evidence the Grievor misunderstood the Policy or the expectations under it. He knew he was violating the Policy when he committed misconduct, and he knew his continued employment would be in jeopardy if he were caught (para. 147).
- The Grievor’s misconduct was very serious. It put Marine Atlantic’s assets at risk, but more importantly it put the lives of passengers and crew at risk in a highly safety sensitive work environment (para. 148).
- Mr. Gallant testified that the Policy is strict in terms of certain Policy violations resulting in termination of employment because of the nature of

Marine Atlantic's operations. Marine Atlantic needs to ensure that employees are fit for duty when operating in a safety sensitive and harsh marine environment. A strong message that the use of alcohol or drugs at work will not be tolerated must be sent to employees. Deterrence is critical (para. 16).

- It is clear that the Grievor is remorseful and is aware of the wrongness of his actions and the need to rebuild trust with Marine Atlantic (Union submission). Trust can be rebuilt. The Union acknowledges that deterrence is necessary, but submits that deterrence can be achieved by a lengthy suspension with conditions, including random testing (para. 111).
- I acknowledge that arbitrators should not easily interfere with, or second guess, disciplinary decisions made by employers. I recognize that Marine Atlantic operates its vessels in the North Atlantic Ocean – a high-risk and safety sensitive work environment. Accidents and emergencies can result in catastrophe given the harsh environment and potential for system failures, human error and overwhelming natural events. Every vessel crossing carries with it a risk for loss of life. Deterrence is important. Marine Atlantic has described what happened in this case as among the most serious matters it can face. I acknowledge the seriousness of the Grievor's misconduct, and I agree that it is important to send a strong message of deterrence to other employees. But I do not believe that deterrence cannot or will not be achieved by a lengthy suspension with conditions as set forth below (para. 151).

[96] This Court's review of the Arbitrator's decision through the *Vavilov* lens, amply shows that the Arbitrator was acutely aware of the high-risk and safety sensitive nature of MAI's operations and the role of the Grievor as an employee working in such an environment. He was aware of the need to send a strong message of deterrence. He was also well aware of the need for deference.

[97] The Arbitrator's conclusion that deterrence could be achieved by a lengthy (17 month) suspension falls squarely within the range of acceptable, reasonable outcomes contemplated by the arbitral jurisprudence before him, including that provided by the Union. Here I note that the Arbitrator in his Decision referred to a decision which was not before him at the hearing. While it might have been

preferable for the Arbitrator to have shared this decision with counsel before including it in his Decision, the failure to do so cannot be said to be the kind of “fundamental flaw” which strikes at the reasonableness of a decision. The Arbitrator’s analytical path is evident even without the inclusion of this one decision. As the Arbitrator notes at para. 150, “In addition to the authorities submitted by the parties, I also considered..”. It is clear that the Arbitrator considered all of the authorities before him, in support of, and against reinstatement and not just the one case which was not raised by the parties.

The Arbitrator’s Consideration of Stress

[98] MAI argues that the Arbitrator erred in using stress as a mitigating factor in the *William Scott* analysis. MAI says that the Arbitrator “elevated stress to a mitigating factor, despite that the relevant authorities speak of illness or psychological strain akin to illness impacting decision-making and intent, usually in the context of an acute reaction negating intent”. MAI also says that the finding and use of stress as a mitigating factor “is logically inconsistent with his finding of premeditation” and the Grievor’s admission that he knew right from wrong.

[99] This Court notes that the Arbitrator agreed with MAI that the evidence did not establish a link or nexus between the news received from his doctor that his PSA

levels were up on August 11 created the “sudden and very detrimental effect on Fabian’s mental health” alleged by the Union in the Grievance. The Arbitrator acknowledged that there was no medical evidence of “serious psychological stress” that affected the Grievor’s decision-making. However, the Arbitrator specifically disagreed with MAI’s contention that the news the Grievor received on August 11 had no impact on his actions or that the Grievor was under no more stress than the average person or that the Grievor’s mind was not impacted to an extent that stress could reasonably be a mitigating factor. The Arbitrator carefully considered the elements from the *Canada Safeway* case and found that they were established on the evidence. He stated that “while a link or nexus between a medical condition and aberrant conduct is normally established by expert evidence, I do not read Arbitrator Christie to be saying (in *Canada Safeway*) that expert medical evidence is mandatory”.

[100] I agree with the Union’s submissions that in substance the Employer’s argument, while clothed in terms of “unreasonableness” is really a criticism of how the Arbitrator weighed the evidence. The Arbitrator did not accept that the Grievor’s stress level negated intent or rendered his conduct non-culpable. Indeed, he made a finding that the Grievor’s stress did not rise to the level of a psychological condition displacing responsibility. He did conclude that the

Grievor was experiencing heightened stress and that this was a contextual factor contributing to his poor decision-making. The Arbitrator also considered other mitigating factors, including the Grievor's long service and clean disciplinary record.

[101] The Arbitrator was entitled to find, in weighing the evidence, that the Grievor's heightened stress contributed to his decision, premeditated as it was, to bring alcohol aboard the vessel. Nor is the Arbitrator's finding that the Grievor intended to only have a few drinks and go to sleep mean that the Arbitrator accepted that that behaviour would have been acceptable, and the behaviour only became unacceptable once the Grievor became intoxicated. The Arbitrator clearly explains that any consumption of alcohol while on a vessel is prohibited by the Policy.

Special Economic Hardship

[102] MAI says that the Arbitrator's analysis and finding that special economic hardship weighed as a mitigating factor in favour of a lesser penalty was not justified on the facts or authorities.

[103] However, I find that the Arbitrator's finding in this regard was in fact justified on the facts as he found them. Here, the Arbitrator notes that the Grievor's termination of employment meant that he lost health benefits and had to pay for

these out-of-pocket at a time when he was undergoing treatment for the return of cancer. The Arbitrator took into account that the Grievor's spouse was not working at the time. Clearly, economic hardship was but one factor which the Arbitrator considered when assessing all of the evidence, applying it to what he said was not an exhaustive list of *William Scott* factors, and reaching the conclusion that reinstatement was appropriate.

[104] The Employer's second ground of review is dismissed.

Overall Conclusions

[105] I am not persuaded that the Arbitrator's Decision is unreasonable in light of the record before him. I see no fundamental flaws in his analysis.

[106] When I assess the Decision in light of *Vavilov*, I am led to the conclusion that this Decision has all the hallmarks of reasonableness – justification, transparency and intelligibility. It is justified in relation to the factual and legal constraints that bear on it.

[107] When the Decision is read as a whole, this Court can see a clear path of reasoning. The Court can understand what the Arbitrator concluded and why. His reasons are thorough. The Decision is intelligible and the decision to reinstate the Grievor is fully explained in light of the facts found by the Arbitrator and guided

by the arbitral jurisdiction. Reinstatement was a penalty that the Arbitrator had the jurisdiction to award and he did so. It was a reasonable outcome for him to find.

[108] With great respect to the very able arguments of counsel for MAI, at its core, this application for judicial review is fundamentally a request by MAI that I reconsider the Arbitrator's Decision, re-weigh the circumstances and substitute my own conclusion for his. *Vavilov* is very clear that I should and must not do so.

[109] The Application for judicial review is dismissed with costs to the Union.

Order and Costs

[110] I ask that the Union produce a draft order reflecting this disposition.

[111] If the matter of costs cannot be resolved by agreement, I ask that the parties provide their written positions to the Court within 30 calendar days of this decision.

Smith, J.