This decision was the subject of a BC Court of Appeal decision. See 2011 BCCA 476.
This decision was the subject of a BC Supreme Court decision. See 2011 BCSC 409.

WCAT Decision Number: WCAT-2010-00733
WCAT Decision Date: March 11, 2010
Panel: Heather McDonald, Vice Chair
Lesley A. Christensen, Vice Chair
Warren Hoole, Vice Chair

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Workers' Compensation Appeal Tribunal
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Introduction

[1] The employer operates a ferry service. It is appealing a decision dated July 21, 2008 by a case officer in the Compliance Section, Investigations Division of the Workers' Compensation Board (Board)[1]. In that decision the case officer found in favour of the worker's complaint that the employer had discriminated against the worker in violation of section 151 of the *Workers Compensation Act* (Act). The worker's complaint was that the employer had terminated his employment at least in part for the reason that he had raised safety issues to the employer. Thus the worker's complaint fell within section 151(c)(i) of the Act, alleging retaliation by the employer for the reason that the worker had given information "regarding conditions affecting the occupational health or safety or occupational environment".

[2] The worker had commenced employment with the employer in June 1987, starting on a casual basis as a seaman. Subsequently he moved into the position of Second Officer and by the year 2000 he was in the position of a bargaining unit Master on the employer's northern ferry route. The worker was not a member of the employer's management team at that time.

[3] On February 7, 2006 the employer offered the worker a promotion to the position of exempt[2] Master (also known as Captain). After a long series of discussions with the marine superintendent and the vice-president, Fleet Operations, in which they encouraged him to move from the bargaining unit into management, the worker accepted the promotion. As an exempt Master the worker was no longer in the bargaining unit but instead a member of the employer's management team reporting directly to the North Coast marine superintendent and ultimately to the vice-president of Fleet Operations.

[4] In his new position as exempt Master the worker was assigned to a ship on the northern route. That ship was crewed by two crews: A watch and B watch, each of which served alternating two-week live aboard rotations. The Senior Master of the ship, Captain F, was usually scheduled on the B watch. The worker was one of the Masters of the A watch but for scheduling reasons he had been dispatched on March 15, 2006 to serve a rotation as Master of the B watch. Between March 15 and March 22, 2006 the worker had made four round trips with the B watch on the ship's northern route. Therefore Captain F was not on the B watch duty nor was he on board the ship during that period. Captain F was also a member of the employer's management team.

[1] Operating as WorkSafeBC

[2] "Exempt" or "Excluded" status refers to those Masters who are part of the employer's management staff, that is, they are not members of the bargaining unit represented by the trade union certified under the *Labour Relations Code* as the bargaining agent representing the employer's non-management employees. We understand that exempt Masters sail the larger ships on the fleet.

[5] On March 22, 2006 the ship struck an island and sunk. The worker was the Master on duty for that voyage although a few hours before the ship grounded he had retired to his quarters for the evening and was asleep. There is no dispute that it was appropriate for the worker to have retired to his quarters at that time to obtain the necessary hours of rest. As standard practice before retiring he had given night orders to the bridge crew who knew to call him if necessary. After the ship struck the island a crew member woke the worker who responded immediately and acted with great courage. Subsequent to the grounding of the ship the heroic actions of the worker, the ship's crew, as well as rescuers from the Canadian Coast Guard, nearby vessels, and residents resulted in the evacuation of 99 out of 101 persons from the ship before it sunk. Tragically two passengers have never been accounted for and are presumed dead.

[6] At the time of the ship's accident the worker had been in his management position as exempt Master for less than two months, after numerous years as a member of the bargaining unit.

[7] Shortly after the disaster, the employer informed the worker and all other bridge team members of the ship on duty at the time of the accident that they would be removed from service, on full pay and benefits, until the Transportation Safety Board of Canada (TSB) issued its report. The employer also convened its own Divisional Inquiry (DI) to investigate the accident. The worker was one of the witnesses who testified during the DI proceedings in April and May 2006. It was during the DI proceedings that the worker raised safety issues. The employer's DI report was issued on March 26, 2007 and the TSB report was issued in March 2008.

[8] The DI report concluded that the navigational watch - the fourth officer (4/O) and the quartermaster (QM1) - of the ship at the time of the grounding, failed to maintain a proper lookout, failed to make the required or any course changes at Sainty Point, and that therefore for over 14 minutes the ship proceeded straight on an incorrect course for four nautical miles until striking Gil Island. The DI report also observed that a casual watchkeeping behaviour was practiced at times when operating the ship, based on evidence at the DI proceedings and further demonstrated by music playing on the bridge as overheard on radio calls. The DI report made 31 recommendations regarding equipment, bridge team procedures, and evacuation.

[9] The TSB[3] concluded that the cause of the accident was the failure to make a routine course change at Sainty Point and that the failure likely resulted from interruptions that were taking place simultaneously including that:

- the 4/O and QM1 were engaged in a conversation of a personal nature;
- the ship was encountering a rapidly moving squall, causing reduced visibility; and

[3] See TSB Marine Report 2006 – M06W0052, available on the TSB website www.tsb.gc.ca

- there was a visual alarm indicating a loss of target (a fishing vessel that had been in the area).

[10] The TSB noted that a number of basic principles of safe navigation were not observed by the bridge team such as:

- verifying the course after Sainty Point;
- reducing speed when the vessel encountered an area of reduced visibility;
- failing to properly respond when visibility became reduced and the radar target (a fishing vessel) was lost;
- maintaining an effective lookout;
- posting a dedicated lookout during a time of restricted visibility;
- communicating with the target vessel;
- locating and identifying the navigational lights at Point Cumming, Cape Farewell, and Sainty Point;
- monitoring the vessel's progress visually, via radar and with the electronic chart system (ECS);
- frequent plotting to determine the vessel's position; and
- maintaining appropriate bridge team composition.

[11] The TSB report stated that many of the foregoing practices would have assisted in keeping the ship on course or provided the cues necessary to determine that the ship was not on course. The TSB examined a number of plausible scenarios but could not explain why the 4/O and the QM1 did not follow basic watchkeeping practices so as to keep the ship on course, or why the 4/O failed to detect the ship's improper course for up to 14 minutes.

[12] The TSB report also noted that the setup of the navigational equipment hampered effective monitoring, including that the brightness on the ECS monitor had been turned down such that the display could not be read; the ECS cross-track alarm (which would have alerted the crew to any substantial deviation) was turned off; the navigation-danger alarm on the ECS, (which could have indicated the close proximity of the island) was unavailable because a raster chart was loaded; and alarms available with other electronic equipment (e.g. radars) were not set up or enabled.

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[13] The DI report did not have any concerns with the experience of the bridge crew on duty on the ship at the time of the accident. The TSB concluded, however, that the QM1 ought to have been supervised at all times, given that she was not fully certified. At item 2.3.1 (Bridge Watch Composition) the TSB report noted that full consideration was not given to the maintenance of an adequate bridge complement at critical locations and times, and in poor weather conditions.

[14] At item 3.1 (Findings as to Causes and Contributing Factors) the TSB report concluded as follows:

> 1. The fourth officer (4/O) did not order the required course change at the Sainty Point waypoint.
>
> 2. Various distractions likely contributed to the 4/O's failure to order the course change. Furthermore, believing that the course change had been made, the next course change was not expected for approximately 27 minutes.
>
> 3. For the 14 minutes after the missed course change, the 4/O did not adhere to sound watchkeeping practices and failed to detect the vessel's improper course.
>
> 4. When the 4/O became aware that the vessel was off course, the action taken was too little too late to prevent the vessel from striking Gil Island.
>
> 5. The navigation equipment was not set up to take full advantage of the available safety features and was therefore ineffective in providing a warning of the developing dangerous situation.
>
> 6. The composition of the bridge watch lacked an appropriately certified third person. This reduced the defences and made it more likely that the missed course change would go undetected.
>
> 7. The working environment on the bridge of the ship was less than formal, and the accepted principles of navigation safety were not consistently or rigorously applied. Unsafe navigation practices persisted which, in this occurrence, contributed to the loss of situational awareness by the bridge team.
>
> 8. No accurate head count of passengers and crew was taken before abandoning the vessel, thus precluding a focused search for missing persons at that time.

[15] By letter dated January 15, 2007, the employer's executive vice-president of Human Resources wrote to the worker to advise that after a review of operational and staff requirements, the employer had concluded it would no longer require his services. The letter requested the worker to have his legal counsel contact the employer's legal counsel to discuss separation arrangements. This letter was sent three days after the employer had sent an e-mail to staff advising there were openings for exempt Masters in various locations. Subsequently the employer confirmed that a need to reduce staff was not the reason for terminating the worker's employment. In July 2007 the employer's legal counsel also confirmed that the employer did not take the position that cause existed for terminating the worker's employment. The employer proposed retaining the worker on full payroll and benefits from January 15, 2007 through to April 15, 2008, along with providing a letter of reference verifying his competency and record of accomplishments with the employer.

[16] On January 10, 2008 the worker filed a section 151 complaint with the Board. The parties participated in a mediation of the complaint but were unable to resolve the matter. In her July 21, 2008 decision the case officer found that the worker had demonstrated a *prima facie* or basic case of discriminatory action and that the employer had failed to discharge its burden under section 152(3) of the Act to prove that in no part was it motivated to terminate the worker for reasons prohibited under section 151. Simply put, the case officer found that the worker's raising safety concerns (he spoke about them and also provided a written list of his safety concerns at the request of the DI chair) during the DI proceedings played a role in the employer deciding he was not a management team player and thus terminating his employment. Thus the worker's complaint was successful under section 151(c)(i) of the Act.

[17] The case officer did not decide the issue of remedy in her July 21, 2008 decision. She issued a decision dated February 23, 2009 which ordered the employer, among other things, to reinstate the worker to his former position as exempt Master no later than May 25, 2009, and to attempt to reach an agreement on the amount of past wage loss, lost benefits, and interest owing to the worker between April 15, 2008 and the date of reinstatement, and pay the worker no later than May 25, 2009. In the February 23, 2009 decision the case officer decided not to order the employer to reimburse the worker for the legal fees and disbursements he incurred as a result of the employer's discriminatory action.

[18] The employer filed an appeal with the Workers' Compensation Appeal Tribunal (WCAT) of the case officer's July 21, 2008 finding of illegal discriminatory action. The worker filed an appeal with WCAT of the case officer's February 23, 2009 decision, seeking a variation of that portion of the remedy that denied the worker reimbursement of legal fees/disbursements; subsequently the worker amended his appeal to also challenge the remedy of reinstatement, seeking monetary damages instead. The parties agreed that the two appeals should be dealt with separately, with WCAT first deciding the

employer's appeal of the Board case officer's July 21, 2008 decision. Therefore this decision deals only with the employer's appeal of the July 21, 2008 decision.

Issue(s)

[19] In terminating the worker's employment, was the employer motivated in any part because the worker raised safety concerns? Did the employer violate section 151(c)(i) of the Act in terminating the worker's employment?

[20] We emphasize that this is not a case deciding whether there was just cause for the worker's employment termination nor is it a case under the *Labour Relations Code* deciding whether the employer committed an unfair labour practice in terminating the worker's employment. WCAT's jurisdiction in this case arises as an appeal of the case officer's decision under section 151 of the Act and our mandate is to determine whether the worker's complaint is valid that the employer violated section 151(c)(i) of the Act in terminating the worker's employment.

Jurisdiction and Procedural Matters

Jurisdiction – General

[21] The employer's appeal is brought pursuant to section 240 of the Act, which provides that a determination under section 153 may be appealed to WCAT. The case officer's July 21, 2008 decision was a determination under section 153 that the employer contravened section 151(c)(i) of the Act in terminating the worker's employment.

[22] Pursuant to section 238(5) of the Act, the chair of WCAT appointed a three member panel to decide the employer's appeal. Under section 238(5)(a), this panel is comprised of three WCAT vice chairs with one of us acting as presiding member of the panel.

[23] WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (section 250(1) of the Act). WCAT has exclusive jurisdiction to inquire into, hear, and determine all those matters and questions of fact, law, and discretion arising or required to be determined in an appeal before it (section 254 of the Act).

[24] This appeal does not involve a compensation issue but rather an issue under Part 3 of the Act which deals with occupational health and safety matters. Therefore section 250(4) of the Act does not apply in this appeal. The standard of proof is the balance of probabilities. As earlier noted, under section 152(3) of the Act, the burden of proving there has been no contravention of section 151(c)(i) is on the employer.

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Procedure – The worker's application to dismiss the employer's appeal

[25] At the outset of the oral hearing on June 2, 2009 the worker applied to dismiss the employer's appeal on the ground that the employer had failed to comply with the Board case officer's remedy decision with respect to past wage loss, benefits, and interest owing to the worker. The worker's position was that the employer had "unclean hands" in appealing to WCAT when it was in wilful and continuing breach of the Board's order, and committing an offence under section 213 of the Act. The worker submitted that WCAT should dismiss the employer's appeal because the employer should not be permitted to use the workers' compensation appeal system without complying with the Act's requirements. The worker submitted that the employer had not attempted to reach an agreement with the worker on the amount of past wage loss and benefits, and that the deadline of May 25, 2009 for doing so (specified in the case officer's February 23, 2009 decision) had passed. The worker noted that the employer had not appealed the Board's remedy nor had it requested a stay of the decision. The worker submitted that the employer was in deliberate violation of the Board's remedy order and therefore should not be permitted to proceed with its appeal to WCAT on the merits of the section 151 issue.

[26] After considering the parties' arguments we dismissed the worker's application, giving an oral ruling. We noted that in her remedy decision the Board case officer expressly stated that she would remain seized of the matter of a remedy for wage loss, lost benefits, out-of-pocket expenses, and interest should the parties not be able to reach an agreement on those matters. It was clear that the parties had not been able to reach such an agreement by the deadline the Board case officer had specified. In our view the tribunal with the jurisdiction to deal with the worker's allegation of a violation of the Board case officer's order was the Board, not WCAT. WCAT is an appeal tribunal that deals with appeals of Board decisions, not a decision-maker at first instance.

[27] We also referred the parties to *Review Division Reference #27955* (July 15, 2005)[4] which dealt with a Board finding that an employer had violated section 2.4 of the *Occupational Health and Safety Regulation* for failure to promptly comply with a Board order to pay a monetary remedy to a worker because of the employer's unlawful discrimination under section 151 of the Act. In that case the Board levied an administrative penalty against the employer in the amount of $32,097, an amount more than triple the amount of the payment ordered by the Board case officer as the remedy for the finding of unlawful discrimination. The decision was consistent with our ruling that it would be within the Board's jurisdiction to determine whether or not the employer in this case had violated the case officer's remedy decision, not within WCAT's jurisdiction.

[4] Review Division decisions are available on the Board's website www.worksafebc.com

[28] We noted that the employer had offered to immediately pay the worker the wage loss and other monies that the employer believed was the correct quantum owed to him under the case officer's remedy. We merely commented that this would appear to be the appropriate step for the employer to take, pending resolution of the parties' disagreement about quantum.

[29] After our ruling, some days later, the employer requested WCAT to stay the Board case officer's February 23, 2009 remedy decision, pending the outcome of these appeal proceedings. In a decision dated July 6, 2009 we denied the employer's request for a stay.

Procedure - Decision to convene an oral hearing

[30] The worker and the employer participated in these appeal proceedings. Each was represented by legal counsel. With its notice of appeal the employer requested an oral hearing. One of its challenges to the case officer's decision was that it was based only on written submissions and documentary evidence without an oral hearing.

[31] The worker objected to the employer's request for an oral hearing, providing comprehensive written submissions to support his position that WCAT should not convene an oral hearing but instead decide the employer's appeal on the basis of written submissions and documentary evidence. We considered both parties' written submissions on this procedural matter and decided to convene an oral hearing to decide the employer's appeal. By letter dated March 10, 2009 we communicated this procedural decision and advised that we would provide written reasons in our final decision on appeal.

[32] In reaching our decision to convene an oral hearing we considered and applied the version of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) then in existence.[5] MRPP item #8.90 (Method of Hearing) provided that WCAT might conduct an appeal in the manner it considers necessary, including conducting hearings in writing or orally. Item #8.90 also contained the following procedural rule:

> RULE: WCAT will normally grant a request for an oral hearing where the appeal involves a significant issue of credibility. An oral hearing may also be granted where there are:
>
> (a) significant factual issues to be determined;
> (b) multiple appeals of a complex nature;
> (c) complex issues with important implications for the compensation system;

[5] The MRPP was revised effective November 3, 2009

> (d) other compelling reasons for convening an oral hearing (e.g. where an unrepresented appellant has difficulty communicating in writing).
>
> **WCAT will normally conduct an appeal on a read and review basis where the issues are largely medical, legal, or policy based and credibility is not at issue.**
>
> [bold emphasis in original]

[33] The employer submitted that the appeal involved significant credibility issues and that the only way to resolve such issues would be through testimony of the persons who made the decision to terminate the worker's employment. The employer said that witnesses would give *viva voce* testimony about the worker's attitude and demeanour before the DI and those witnesses would be subject to cross-examination to test their evidence. The employer also submitted that the appeal raised difficult factual questions including whether the employer's decision to terminate the worker's employment was tainted by consideration of the worker's list of safety concerns for the DI, whether the DI report completely exonerated the worker with respect to the cause of the sinking of the ship, and whether the employer blamed the worker for the sinking of the ship.

[34] The worker submitted that it would be an abuse of process to grant the employer's request for an oral hearing of its appeal because the employer had opposed an oral hearing in the proceedings before the Board case officer. The worker had requested the case officer to convene an oral hearing and the employer responded by requesting that she dismiss the worker's complaint without an oral hearing. The worker said that having lost the case at first instance, the employer should not be allowed to change its position before WCAT and complain that the case officer's decision is flawed because she failed to hold an oral hearing.

[35] The worker referred to numerous WCAT decisions[6] including *WCAT-2008-03172* (October 28, 2008) and *WCAT-2008-03840* (December 19, 2008) to illustrate that WCAT often decides discriminatory action appeals without convening an oral hearing but instead relies on written submissions and documentary evidence. The worker submitted that in this appeal WCAT could adequately determine the facts and assess credibility by applying the British Columbia Court of Appeal test in *Faryna v. Chorny* [1951] B.C.J. No. 128, (1952) 2 D.L.R. 354 to comprehensive written submissions and documentary evidence. The worker also argued that the employer had set forth no significant issues of credibility, let alone credibility issues that could not be decided by way of written submissions and documentary evidence. The worker further said that the parties did not dispute the key facts in this case, which were that the worker raised safety issues at the DI and subsequently the employer terminated him as a result of his DI testimony. The worker submitted that if oral hearings were required whenever

[6] WCAT decisions are published on the WCAT website www.wcat.bc.ca

credibility or factual issues arose, WCAT would always have to proceed by way of oral hearing in discriminatory action appeals, and yet this is clearly not the WCAT practice.

[36] We decided to conduct an oral hearing in this appeal primarily because we concluded it would be helpful to us in understanding the employer's motivation for terminating the worker's employment, particularly given the circumstances that the employer was not alleging just cause for dismissal. We noted that the procedural rule in MRPP item #8.90 provided that WCAT would generally grant an appellant's request for an oral hearing when the appeal involved a significant issue of credibility. In this appeal the parties did not dispute that the worker had raised a *prima facie* (basic) case of unlawful discrimination. This is because the evidence gave rise to the basic elements of section 151 of the Act: (a) the worker had raised safety issues to the employer during the DI, which brought him within the scope of section 151(c)(i); and (b) subsequently the employer terminated the worker's employment which termination fell within the definition of "discriminatory action" in section 150(2)(a). Therefore the key issue in the appeal was the employer's motivation for terminating the worker's employment, and in that regard we would be required to assess the credibility of the employer's stated reasons for the termination.

[37] Although sometimes the *Faryna v. Chorny* test is more than adequate to assess credibility solely on the basis of written submissions and documentary evidence, we were not satisfied that it would be adequate in this case. The parties' respective positions before the Board case officer were presented in submissions written in the voices of the legal counsel representing each party. Further, the employer's submissions referred to a perception of the worker's attitude and its assessment of his suitability as a member of the management team. We wanted to listen to and observe the employer's witnesses testify regarding the employer's reasons for terminating the worker. Specifically, we wanted to hear and observe the employer's witnesses describe their impressions of the worker's attitude and explain why they considered he should not return to his position as exempt Master with the employer.

[38] There was also the possibility that the worker might testify. We considered it likely that as a panel we would have important questions to pose to both the worker and the employer's witnesses arising from their testimony, and that the parties might then have further questions to pose to the witnesses arising from our inquiries. In our view, this process could be dealt with more quickly, efficiently, and fairly through an oral hearing rather than by way of written interrogatories from the panel followed by further written questions from the parties.

[39] We disagreed with the worker's submission that it would be an abuse of process to grant the employer's request for an oral hearing given the employer's request, in the Board proceedings, that the Board dismiss the worker's complaint without an oral hearing. We note that the worker also reversed his position in these proceedings regarding the need for an oral hearing; he had requested one before the Board case

officer and now on appeal disputed the need for one. Our decision to convene an oral hearing was not based on assessing the strategy of each party in prior proceedings with a view that it is necessary or desirable to hold either of them to an earlier position about the need for an oral hearing. Rather, our decision to hold an oral hearing was based on what we considered to be the most efficient and fair way to decide the appeal, keeping in mind our need to assess the credibility of the employer's witnesses regarding the employer's motivation for terminating the worker's employment.

[40] The oral hearing took place at WCAT's Richmond premises over a period of ten days: June 2, 3, and 4, 2009; August 31, 2009; September 1, 2, 3, and 4, 2009; and November 12 and 13, 2009. Two witnesses gave evidence on behalf of the employer and were cross-examined. As well, the panel posed questions to both witnesses. At the close of the employer's case, the worker chose not to testify or provide further evidence. Both parties provided final arguments at the hearing.

Procedure - Use of initials in this decision

[41] Given the context of the worker's dismissal and the amount of media attention the ship's accident has received, it is neither practical nor possible for us to write this decision in a way that will protect the privacy of the worker, the witnesses, or individuals referred to in the proceedings. With reference to MRPP item #19.1 (Public Access to WCAT Decisions), in this decision we use initials to refer to witnesses and other individuals.

Procedure - Admissibility of TSB report and findings

[42] Under section 246.1(1) of the Act, WCAT may receive and accept information that it considers relevant, necessary, and appropriate, whether or not the information would be admissible in a court of law. However, under section 246.1(4) of the Act, nothing in subsection (1) overrides the provisions of any statute expressly limiting the extent to or purposes for which any oral testimony, documents, or things may be admitted or used in evidence. Pursuant to section 246.1(2), nothing is admissible before WCAT that is inadmissible in a court because of a privilege under the law of evidence.

[43] During the fifth day of oral hearing, September 1, 2009, the employer objected to the worker introducing an excerpt from the TSB report to put before one of the employer's witnesses for the purpose of proving through that witness that the worker had raised a serious safety concern at the DI about the state of the ship's evacuation plan. In support of its objection the employer referred to sections 7, 32, and 33 of the *Canadian Transportation Accident Investigation and Safety Board Act* (TSB Act).

[44] Section 7(1) of the TSB Act describes the object of the TSB as advancing transportation safety by, among other things, conducting independent investigations including public inquiries into selected transportation occurrences in order to make findings as to their causes and contributing factors; identifying safety deficiencies as evidenced by transportation occurrences; making recommendations designed to eliminate or reduce any such safety deficiencies; and reporting publicly on its investigations and on the findings in relation thereto.

[45] Section 7(3) of the TSB Act states as follows:

> No finding of the [TSB] shall be construed as assigning fault or determining civil or criminal liability.

[46] Section 7(4) of the TSB Act states:

> The findings of the [TSB] are not binding on the parties to any legal, disciplinary or other proceedings.

[47] Sections 32 and 33 of the TSB Act state as follows:

> EVIDENCE OF INVESTIGATORS
>
> Appearance of investigator
>
> 32. Except for proceedings before and investigations by a coroner, an investigator is not competent or compellable to appear as a witness in any proceedings unless the court or other person or body before whom the proceedings are conducted so orders for special cause.
>
> Opinions inadmissible
>
> 33. An opinion of a member or an investigator is not admissible in evidence in any legal, disciplinary or other proceedings.

[48] The employer submitted that the TSB report constituted the opinions of the TSB members and their investigators. The employer argued that under section 32 of the TSB Act, WCAT would not be able to compel a TSB investigator to give evidence and under section 33 of the TSB Act no opinion of a TSB member or investigator is admissible in any legal proceeding, therefore an excerpt from a TSB report is also not admissible in these WCAT appeal proceedings. The employer concluded that because no part of the TSB report can be in evidence, exhibits #6, #11, and #13 (all excerpts from the TSB report) in the WCAT proceeding should be excluded from evidence. The employer had no case law to support its position.

[49] We noted the definitions of "member" and "investigator" in section 2 of the TSB Act. "Investigator" is defined as a person referred to in paragraph 10(1)(a) or (b) which means an employee of the TSB appointed as either a Director of Investigations (Air), a Director of Investigations (Marine), and a Director of Investigations (Rail and Pipelines) or other investigators. "Member" is defined as "a member of the" TSB.

[50] We were not satisfied that a final TSB report constitutes an "opinion" of a TSB "member" or "investigator". In our view, there was a distinction to be drawn between the words "finding(s) of the Board" in section 7 of the TSB Act and the reference to an "opinion" of a "member" or "investigator" in section 33 of the TSB Act. Accordingly, we ruled that the excerpts from the TSB report were admissible in evidence and allowed the question regarding an excerpt to be put to the employer's witness in cross-examination. In so doing we emphasized, however, that in compliance with section 7 of the TSB Act, we would not construe the findings of the TSB in its report as assigning fault or determining civil or criminal liability; nor would we construe the findings of the TSB report as binding on us or the parties.

[51] We now provide the following additional reasons in support of our oral ruling that a TSB report may be admitted into evidence in a WCAT appeal proceeding.

[52] Section 24(1) of the TSB Act states:

> 24. (1) On completion of any investigation, the Board shall prepare and make available to the public a report on its findings, including any safety deficiencies that it has identified and any recommendations that it considers appropriate in the interests of transportation safety.

[53] We note that in this case, pursuant to section 24(1) of the TSB Act, the TSB report about the grounding and sinking of the employer's ship was made public and is available on the TSB website. We also note that the Board case officer referred to the TSB report in her decision, relying substantially on its findings to summarize the events and contributory causes of the grounding and sinking. In our view a final TSB report has a status different than an opinion of a TSB investigator or member which suggests a confidential opinion either pre-dating a final report or otherwise not part of a final public TSB report.

[54] Further legal research in the matter also revealed the following court decisions which indicate that courts have admitted final TSB reports into evidence in court proceedings. See *Heli Dynamics Ltd. v. Allison Gas Turbine Division, a division of General Motors Corp.*, [1999] B.C.J. No. 511 (B.C.S.C.); *Skyward Resources Ltd. v. The Cessna Aircraft Co.*, [2005] M.J. No. 265 (Man QB); and *Western Aerial Applications Ltd. v Turbomeca USA, Inc.*, [2009] B.C.J. No. 249 B.C.S.C.). Again, we emphasize that where we refer to TSB findings we are referring to them as background and have not viewed them as binding on us or the parties. We have also kept in mind that TSB

findings should not be construed as assigning fault or determining civil or criminal liability.

Relevant Law and Policy

[55] Section 151 of the Act has a summary title "Discrimination against workers prohibited" and states as follows:

> An employer or union, or a person acting on behalf of an employer or union, must not take or threaten discriminatory action against a worker
>
> (a) for exercising any right or carrying out any duty in accordance with this Part, the regulations or an applicable order,
>
> (b) for the reason that the worker has testified or is about to testify in any matter, inquiry or proceeding under this Act or the *Coroners Act* on an issue related to occupational health and safety or occupational environment, or
>
> (c) *for the reason that the worker has given any information regarding conditions affecting the occupational health or safety or occupational environment of that worker or any other worker to*
>
> (i) *an employer or person acting on behalf of an employer*,
>
> (ii) another worker or a union representing a worker, or
>
> (iii) an officer or any other person concerned with the administration of this Part.
>
> [italic emphasis added]

[56] A complainant worker must establish a basic case (a *prima facie* case) under section 151 of the Act. To do so, the worker must establish that a respondent took action that could fall within the meaning of discriminatory action in section 150 of the Act. Section 150 defines "discriminatory action" as follows:

> (1) For the purposes of this Division, "discriminatory action" includes any act or omission by an employer or union, or a person acting on behalf of an employer or union, that adversely affects a worker with respect to any term or condition of employment, or of membership in a union.

(2) Without restricting subsection (1), discriminatory action includes

(a) suspension, lay-off or dismissal,

(b) demotion or loss of opportunity for promotion,

(c) transfer of duties, change of location of workplace, reduction in wages or change in working hours,

(d) coercion or intimidation,

(e) imposition of any discipline, reprimand or other penalty, and

(f) the discontinuation or elimination of the job of the worker.

[57] The worker must also provide sufficient evidence to establish a *prima facie* case that the discriminatory action was causally linked to the worker's conduct under section 151 of the Act.

[58] If a worker has provided sufficient evidence to establish a *prima facie* case against the respondent, then the respondent bears the burden of showing that their actions were not motivated in any part by unlawful reasons as alleged by the worker and specified in section 151 of the Act. This is because section 152(3) provides that the burden of proving that there has been a violation of section 151 is on the employer or the union, as applicable. Section 153 gives the Board's procedure for dealing with a complaint.

[59] Board policy regarding discriminatory action is found in items D6-150/151/152-1, D6-153-1, and D6-153-2 of the *Prevention Manual*.

[60] Like the former Appeal Division, WCAT has applied the "taint" principle in appeals involving section 151 complaints. As we earlier indicated, a complainant will establish a case of illegal discrimination even if anti-safety attitude provides only a partial motivation for the employer or union action. The "taint" principle requires that in order to discharge the burden of proof under section 152(3) of the Act, a respondent must prove that in no part were its actions tainted by anti-safety motivation prohibited under section 151. The determination of motive or motives for taking negative action against a worker is critical in these types of appeals, and it can be a difficult task. As described by the panel in *Appeal Division Decision #2002-0458* (February 21, 2002):

> Neither I nor anyone else can accurately discern the "true motives" of the employer. The best I can do is assess the reasonableness and credibility of the employer's explanation by considering the evidence as a whole in the context of the requirements of the legislation.

[61] In this case the worker has challenged the credibility of the employer's witnesses who testified about the employer's motivation in terminating the worker's employment. In assessing the credibility of those witnesses and the employer's position we have not only observed the demeanour of the witnesses in giving their testimony, but we have also kept in mind the comments of the B.C. Court of Appeal in *Faryna v. Chorny* (earlier cited) that the test of the credibility of a witness with an interest in the outcome of the case cannot be gauged solely by whether the personal demeanour of the particular witness carried conviction of truth, but that "… the real test of the truth of the story of a witness…must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions." We have applied that test in analyzing and assessing all the evidence in this appeal.

[62] In this case there is no dispute that the worker has raised a basic (*prima facie*) case of unlawful discrimination under section 151(c)(i) of the Act, because the evidence is clear that he raised safety concerns at the DI inquiry and that some months later the employer terminated his employment. Indeed the evidence from the employer's witnesses is that they had made up their minds after the worker's first DI interview that the employer should terminate his employment. Thus there is sufficient evidence of a link between the worker acting as referred to in section 151(c)(i) and the termination of his employment. The focus in this case is whether the employer has rebutted the statutory presumption that it acted unlawfully in terminating the worker's employment.

Background and Evidence, Reasons and Findings

[63] The background to this case is described in the Board case officer's decision and is familiar to the parties. The TSB and DI reports are also familiar to the parties. Therefore we will not repeat details except as necessary to address evidence in order to explain our reasons. In this decision we are going to provide a general overview of our conclusion and reasons, and then proceed to address the major challenges raised by the worker in his final written and oral arguments.

[64] After considering all the evidence we have decided that in no part was the employer's decision to terminate the worker's employment because the worker raised safety concerns at the DI proceedings, that is, that the employer did not violate section 151(c)(i) of the Act in terminating the worker's employment. The employer's position is that the event of the sinking of the ship in and of itself made future command of a passenger ship highly unlikely for the worker and further that the worker's subsequent behaviour entrenched the employer's loss of confidence in the worker's suitability in the role of exempt Master, part of the employer's management team: these were the sole reasons for terminating his employment. After reviewing the evidence as a whole and considering the parties' submissions, we accept the employer's position and we find that the employer has successfully rebutted the presumption in section 152(3) of the Act.

[65] We heard from two employer witnesses, Captain C and Captain T. They are both no longer employed by the employer. Captain C was the employer's vice-president of Fleet Operations at all times relevant to the events involved in this decision. Captain C left in early 2009 to take a senior management position at another ferry system in the United States. Captain T was the employer's executive vice-president of Operations at the outset of the DI and within a month after that he was appointed executive vice-president of New Vessel Construction and Industry Affairs. Captain T retired in June 2009. The direct and cross-examination of those witnesses took the better part of seven days of oral hearing.

[66] Captain C's testimony was that he made the decision that it was necessary to terminate the worker's employment and that he discussed his opinion with Captain T who agreed with him. Subsequently Captain C made this recommendation to the employer's Executive Management Committee, composed of the employer's senior vice-presidents and the president. They all adopted Captain C's recommendation that the employer should terminate the worker's employment. There were no e-mails or other documentation involved in that process.

Duties of a Master – The concept of accountability

[67] In explaining its motivation for terminating the worker's employment, the employer referred to various incidents and events that it says illustrates why it lost confidence in the worker's suitability to work as an exempt Master on the employer's ferry system. Therefore we begin by referring to the responsibility and authority of the Master of a ship, and the concept of the accountability of a ship's Master.

[68] Section 5.01 of the employer's Fleet Regulations[7] is entitled "Master's Responsibility and Authority", and states in part as follows:

> POLICY — The Master has the **overriding authority and responsibility** on matters affecting the safety of the vessel, passengers, crew, cargo and the environment…
>
> MASTER'S RESPONSIBILITY — The Master's responsibility includes:
>
> - implementing the safety and environmental protection policy of the company;

[7] In this decision we refer to the employer's Fleet Regulations effective April 9, 2003 prior to their revision effective January 28, 2009. The April 9, 2003 version is applicable to the time period involved in the grounding of the ship, the employer's DI and the subsequent termination of the worker's employment. Section 5.01 of this version of the Fleet Regulations is exhibit #3, Tab 4a in the WCAT appeal proceedings.

- motivating the crew in the observation of that policy;
- issuing appropriate orders and instructions in a clear and simple manner;
- verifying that specified requirements are observed; and
- reviewing the SMS [Safety Management System] and reporting any deficiencies to the shore-based management.

SAFETY MANAGEMENT SYSTEM

The methods used by the Master to ensure that all crew members on board are kept aware of the Safety Management System on board, include, but are not limited to:

- shipboard management meetings of the ship's senior officers;
- inspections of the ship carried out by the Master and Chief Engineer in accordance with vessel specific manuals. A record of these inspections is to be included in the Senior Master's/Captain's month end report, a copy of which is to be retained onboard…

OVERRIDING AUTHORITY

Nothing in this manual supersedes the Master's authority to take any actions and issue any orders which s/he considers necessary for the safety of the vessel, passengers, crew, cargo and the prevention of pollution to the environment.

The Master shall formally relieve the outgoing Master as described in section 7.1 of this manual. **The Master has overall command of the vessel.** Under no circumstances shall the Master take any unnecessary risks which may compromise the safety of the vessel, passengers, crew, cargo or the environment.

[The employer] fully supports the sound judgment and decisions of all Masters who undertake any operation or manoeuvre carried out in the interests of safety….

MASTER – ALL VESSELS

General Accountability

In support of the Company Mission Statement and the goals of the organization**, this position is accountable for the safe, *e*fficient, economical, scheduled operation of the vessel for the purpose of transportation of passengers and vehicles in accordance with all regulatory requirements, Acts, Statutes, company policies, and the Collective Agreement.**

Serves as the commander of the vessel with the overall responsibility of ensuring the safety of the vessels, passengers, and crew.

Task Description

- **The Master has the overriding authority and responsibility to make decisions and implement policies with respect to safety and pollution prevention.**
- **Ensures that the vessel is navigated between ports safely** and efficiency [*sic*] and that it is berthed and unberthed in a safe efficient manner.
- Clearing, handling and navigating the vessel in all types of weather and traffic.
- Supervises and trains the crew to carry out routine tasks and to deal with any possible emergencies and ensures that their conduct meets established standards and that they work as an effective, cohesive team.
- Handling emergencies or unusual occurrences; taking responsibility for making on-the-spot decisions which safeguard the best interests of the vessel, passengers, crew and [the employer].
- Adheres to all pertinent regulations, administrative orders, and contracts and maintains effective.

- communication between senior management, shore staff, the public, and the ship's crew for the overall purpose of developing safe, effective, fast systems for the movement of vehicles and passengers on and off the vessel.
- Reviewing, noting and updating new information pertaining to Statutory Regulations and company policies and procedures.
- Completing logbooks, approving timesheets and various other forms, reports and correspondence associated with the administration of the vessel, and conducting vessel inspections.
- Leading, directing, and training crew in fire, safety and boat drills; and responding to emergency situations.
- Ensuring a proper level of customer service for passengers.
- **Supervising and ensuring that crewmembers conduct their duties in a safe and efficient manner in accordance with policies, procedures and regulations.**
- **Taking action to ensure the competence of crewmembers, including initiating training or discipline as appropriate.**

[bold emphasis added]

[69] The foregoing excerpts from the employer's Fleet Regulations illustrate that the position of Master is one of great responsibility, power, and trust. They reflect the provisions of the *Canada Shipping Act* which in part define a "master" as the person in command and charge of a vessel. We heard testimony that any privileges that may accord to a Master are also accompanied by the great burden of command. Captain C testified that the responsibilities of a Master (Captain) at sea are akin to that of a "benevolent dictator". Captain C spoke of the need for a Master to be compassionate for his crew and to understand the mission but with the knowledge that ultimately "the buck stops with the Master." He testified that a Master has no one to turn to but himself and is responsible for all manner of things that take place on his ship, such as (just to name a few) activities in the engineering, catering, or deck departments and issues of passenger service and safety.

[70] Under cross-examination Captain T also testified that the ultimate responsibility of the conduct of a vessel lies with the Master. He stated that "It doesn't matter what happens on a ship…the safe navigation of a ship, it's all the responsibility of the Master." When

asked under cross-examination if it would not be a rather harsh determination to hold a ship Master responsible for proper watchkeeping even when he does not know that a crew member is engaged in inappropriate "casual" watchkeeping practice, Captain T responded: "It is the responsibility of the Master, unfortunately, to ensure there is discipline on the bridge…Unfair? Harsh? The Master bears responsibility under the *Shipping Act* and anyone realizes that if there is an incident, the Master bears the ultimate responsibility for the ship." Again, in that vein, Captain T responded "No question!" and "Absolutely" when asked if the heroic evacuation, including the heroic efforts of the crew, reflected positively on the worker as the Master who set the tone for the ship, but Captain T also immediately added that conversely, "and anything that goes wrong is attributable to" the worker as Master as well.

[71] Under cross-examination Captain C was asked whether there are circumstances when a Master is not held responsible for something that happens under his direct control and Captain C's response was that a "captain is responsible for what happens on his vessel because he is there."

[72] That the event of a ship sinking may seriously impact the career of the Master and other officers involved is reflected in section 9.09 of the employer's Fleet Regulations. This states that the employer has authority to place on paid leave of absence any officer or supervisor "who held direct responsibility at the time of the incident, together with any other employees who they deem appropriate. Such leave of absence is without prejudice and does not imply culpability."

[73] Keeping in mind the overriding authority and responsibility of the Master of a vessel and section 9.09 of the Fleet Regulations, we find that it was understandable why shortly after the March 22, 2006 tragic event the employer placed the worker on paid leave (until the TSB issued its report) as well as all of the bridge team crew members on duty at the time of the ship's grounding. Captain C testified that they were all under investigation. The worker was the Master of the ship at the time of the voyage and under section 9.09 of the Fleet Regulations, was the officer "who held direct responsibility at the time of the incident." This is so despite the fact that the worker had retired to his cabin hours before the ship grounded and despite the fact that no one has ever indicated that it was inappropriate for the worker to have made the decision at that time to get the requisite hours of sleep. The employer did not terminate the worker's employment shortly after the ship accident but it did promptly place him on a paid leave of absence. This was well before the DI proceedings and the worker's raising of safety concerns at the DI proceedings. But the ship sank and the worker was the Master of that ship at the time of its last voyage; immediately the employer removed the worker from active duty as a Master.

[74] We find that according to the ethos and principles of marine command, as evidenced in the *Canada Shipping Act*, the employer's Fleet Regulations, and the testimony earlier referred to of Captains C and T, the simple fact that the worker was the Master on duty

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of a ship that sunk made him responsible and accountable for the sinking of that ship. This is not a matter of blame in the way a layperson understands the word, namely, a reference to personal fault for specific acts of wrongdoing. Rather, it is a statement reflecting the terrible burden of a Master's command within the culture of the mariner's world: in that world the "buck" does indeed "stop" with the Master of a ship.

[75] We further find that when a ship sinks, the career of the on-duty exempt Master of that ship is on the line, that is, his or her future employment as a Master is at serious risk. Such a situation may seem unfair where there was no misconduct sufficient to support a just cause termination. Nevertheless the evidence satisfies us that this is a well-known consequence, even an expectation, in the maritime culture where responsibility is absolute regardless of fault. Captain C testified about his experience in his career knowing Masters who had lost their ships. He referred to some of his U.S. Coast Guard classmates who had grounded vessels and are no longer working at sea, as well as a Master who ran a ship aground in Alaska whose employment was subsequently terminated as a result. Captain C noted that the Captain of the *Exxon Valdez* is no longer working at sea. Captain C testified that it is a maritime tradition that having lost a vessel, the Master of such a vessel would be "looking to move on" to another place of employment in the maritime world. He indicated that it would be his expectation if he were in that situation. Captain C said that if he had captained a ship that sunk he would expect to be relieved of his command and he "would move inland with an oar over my shoulder."

[76] We also note that during cross-examination of Captain C the worker's legal counsel several times posed questions in a rhetorical tone[8], asking: "What realistic hope for employment in the maritime world is there for the worker as Master of a ship that is at the bottom of the sea?", "Who is going to hire the Master of [the ship that sunk] in the maritime community?", and "Do you honestly think there is a reasonable expectation that someone will hire a Master of a ship which has run aground and sunk?" Captain C's responses were that while he was not aware of the human resources policies of all the shipping companies in the world, he was aware of former Masters who after having had their ships run aground did find employment elsewhere as mates, that is, positions of much lower seniority in the maritime community.

[77] Captain C also testified that it would depend on the type of marine incident and how an individual Master accounted for himself after a marine incident whether or not he might retain employment in a management role of some kind, in a role such as drafting regulations and policies for a shipping company. There was evidence about another ship of the employer's that had grounded, sustaining only minor damage, where the cause of the grounding was a mechanical problem in the Engineering Department. Captain C testified that the Master of that ship cooperated fully with the employer's

[8] By this we mean that legal counsel posed the questions in a way that suggested that the answer to the questions was so obvious no reply was really necessary.

investigation into the incident, gave helpful suggestions for improvement, and expressed full responsibility for something that took place in the engine room of his ship and that the engineering watch had not noticed in a timely way that a cotter pin was missing. The employer did not terminate the employment of that Master who, according to Captain C, "assumed his rightful place as part of the management team."

[78] To us it was clear from the evidence that no exempt Master of a ship that ran aground and sunk while he was in command could reasonably expect to work again as a Master of a passenger vessel but rather, given the culture of the maritime world, the reasonable expectation would be that one's future employment as a Master was in serious jeopardy.

[79] We also find that the worker himself understood, at some level, this maritime tradition. The worker did not testify at the oral hearing. The only evidence "in the worker's voice" is the list of safety concerns that he wrote and presented to the employer. We have reviewed that list and from that list have formulated our own opinion of at least part of his attitude and state of mind.

[80] At this point we note that in the written list of safety concerns presented by the worker at the employer's DI in April 2006, one concern referred to a lack of a gangway net at a certain operating location. In that regard the worker said that he had voiced his concern about the problem to the senior Master who said that "there were many safety problems, you just hope that when the accident happens it doesn't happen on your watch." The worker went on to write: "I guess he played that one right." In our view this last sentence reflects some awareness by the worker months before he received the employer's termination letter that he was in career trouble simply because of the fact that he was the Master during the final voyage of the ship that sunk; the tragedy occurred "on his watch" even though he was not on the bridge at the time. The reference to the other Master, not on watch during the ship's last voyage, playing "that one right" suggests the worker's awareness that his sheer bad luck of being in the wrong place at the wrong time involved negative consequences to him. While we acknowledge that this is a small piece of evidence, we find that it supports the other pieces of evidence that overall point to a maritime tradition of total accountability and responsibility for the sinking of a ship being attributable directly and ultimately to the Master of that ship at the time it sunk, no matter that there may have been no personal, specific act of wrongdoing by the Master that was a direct or primary cause of the loss of the ship.

Lack of contrition, remorse, accountability, responsibility

[81] With the concept of a Master's ultimate accountability in mind, we next examine the employer's position that an important element of its loss of confidence in the worker as a Master was his apparent lack of remorse or contrition, or to put it another way, a failure to accept responsibility and be accountable for the loss of the ship.

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[82] Although we will discuss this in more detail later, we find that the DI suspected that poor watchkeeping may have been a primary cause of the ship's accident and expected to hear something from the worker about this issue in particular. Indeed, in the result both the DI report and the TSB report did find that a primary and direct cause of the ship striking the island was the failure of the bridge crew to make a navigational course change at Sainty Point. For approximately 14 minutes after the missed course change, for precise reasons unknown, the 4/O and the QM1 did not follow sound watchkeeping practices and so failed to detect the ship's improper course. The investigations found that another contributing factor to the disaster was the fact that the working environment on the bridge of the ship had been sometimes less than formal; in other words, sometimes a "casual watchkeeping" practice had been followed. As the TSB report[9] noted at item 2.3 (On Board Navigational Practices and Safety) of item 3.1 "Findings as to Causes and Contributing Factors":

> …the working environment on the bridge was less than formal, and accepted principles of navigation safety were not consistently or rigorously applied. As such, unsafe navigation practices persisted that, in this occurrence, contributed to the loss of situational awareness by the bridge team.

[83] And as the DI report stated at page 24 under its "Conclusions":

> - The evidence obtained from the retrieved ECS [Electronic Chart System] hard drive clearly demonstrates that the [ship] neither changed course nor speed from leaving Sainty Point until the grounding on Gil Island.
>
> …
>
> - Based on the ECS data the 4/O failed to make a necessary course alteration or verify such alteration was made in accordance with pre-established Fleet Routing Directives and good seamanship.
>
> - The 4/O…and QM…lost situational awareness sometime after Sainty Point and failed to appreciate the vessel's impending peril prior to the grounding on Gil Island.
>
> - Navigational aids and resources were available to the deck (navigational) watch to enable them to recognize the lack of a course change and to act in a manner to permit safe navigation and prevent the grounding.

[9] TSB Marine Report 2006 – M06W0052, available on the TSB website www.tsb.gc.ca

- The deck (navigational) watch failed to maintain a "proper lookout" by "all available means" as required by Rule 5 of the *International Regulations for the Prevention of Collisions at Sea (*COLREGS) which states "*Every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.*"

- A casual watchstanding behaviour was practiced at times when operating the [ship], based on the evidence given by the Senior Master and further demonstrated by music playing on the bridge as overheard on radio calls…

[italics added]

[84] Captain C testified that he was notified about the loss of the ship in the early morning hours of March 22, 2006 by a satellite phone call from Captain D, the marine superintendent for the employer's northern region who had been on board the ship as a passenger during the voyage. Captain D advised that the ship had run aground and was mortally wounded and he feared the ship would be lost. Shortly afterward Captain D phoned again and advised they were abandoning the ship. Captain D told Captain C: "It has been nice working for you."

[85] Captain C testified that he immediately went to work establishing a corporate Operations Centre to coordinate the employer's response to the marine disaster. One of the first things he did, as calls were coming in about the incident, was to grab a nautical chart of the general area to try to understand where the ship was located. Captain C testified that he drew a track line of the ship through Grenville Channel to the site where the ship had reportedly grounded. He testified that his heart sunk as he realized that it was a direct extension – it looked to him like the ship had failed to make the necessary course change at Sainty Point. Captain C testified that he asked himself how this could have happened – if this worst thought of a failure to make a course change was true how could there have been a complete breakdown in a watch organization? Captain C testified that as a mariner his next thought was that the "Captain's career was over – it was a fatal event. I didn't voice this gut reaction because I held out hope that there might have been some mechanical or some other explanation for it."

[86] Captain C also testified that in his view, casual watchkeeping behaviour is a direct and dramatic representation of a Master's performance of his duties. The navigational watch is the direct responsibility of the ship's Master. Captain C testified that he could not emphasize enough that a Master is responsible to ensure that watchkeeping is on target and that a proper lookout is maintained, and that casual watchkeeping directly reflects on the Master of the vessel. Because of our findings about the ultimate overall responsibility that a Master bears for the safe conduct of a ship, we accept as credible

Captain C's testimony that his decision that it was necessary to terminate the worker's employment was first "driven home by the vessel on the bottom" of the ocean but that he held out hope that he might hear something at the DI that would soften his position on that point.

[87] Captain C testified that during the period immediately after he received the news about the ship in peril he felt that the ship was under his command and that he was responsible for the safety of everyone on board. Captain C testified that later in the morning after the ship had sunk, at approximately 4 or 5 a.m. on March 22, 2006 he spoke with the employer's president and offered his resignation.[10] The employer's president responded by saying that it was the wrong thing to do because it was a tough time and the employer needed his leadership as a Master mariner to run the Operations Centre and move the employer forward as a company. The employer's president advised him that they needed to be strong and do everything they could to handle the tragedy. Captain C testified that in his position as vice-president for Fleet Operations he felt responsible for the situation and he took the loss of the ship and two lives very personally.

[88] During cross-examination Captain C testified that "We're all responsible" for the casual watch behaviour that sometimes took place on the ship. When the worker's counsel subsequently asked Captain C how he accepted responsibility given that he had not in fact resigned his position, Captain C became visibly distressed. We do not recite this fact to embarrass Captain C nor to engender sympathy for him. Rather, we found it was a telling portrayal of the weight of responsibility, even guilt, he still personally feels for the tragic incident.

[89] After regaining his composure, Captain C went on to testify that there has not been a day since March 22, 2006 that he has not thought about what happened that night including "the terror we put the passengers and our shipmates through" and the impact on the employer's public image with the doubt in travelling people's minds. He testified that he has personally asked himself what he could have done to prevent the accident: "Did I do everything I could have done?" Captain C testified that it is a tough challenge to get people to understand that their jobs are critical – every voyage is critical and vital even if the employer does 500 sailings a day. He testified that there are serious implications in travelling by ship: watchkeepers and Masters are entrusted with great responsibility to ensure that ships are operated safely.

[90] As we earlier described, the ship was crewed by two crews: the A watch and the B watch. The crews served alternating two-week live-aboard rotations. The Senior Master of the ship, Captain F, was not on board the ship during its final voyage because he was not scheduled to work that particular two-week live-aboard rotation. On March 15, 2006 Captain F had completed a rotation on the A watch and handed over

[10] See testimony combined from both hearing days 1 and 3

the ship to the B watch under the worker's command as Master. The evidence is that usually Captain F was the Master on the B watch and that he had been Master of the B watch for approximately five years. The worker was usually Master on the A watch but had been dispatched on March 15, 2006 to serve a rotation as Master of the B watch. Between March 15, 2006 and March 21, 2006 the worker and the B watch crew had sailed together for about seven days, three round trips from Prince Rupert to Skidegate, and one round trip from Prince Rupert to Port Hardy.

[91] The evidence is that within a week of the sinking of the ship, Captain F offered his resignation to Captain C. Captain C and Captain F knew each other reasonably well; Captain C testified that he had a "pretty good" relationship with Captain F. On March 3, 2006 Captain C and his wife had travelled on the ship with Captain F as Master on the 18-hour voyage. The ship had just been through its annual inspection and had some structural and other improvements including paint and new radar. At that time Captain C's understanding from conversations with Captain F was that the ship had been in the best condition it had been in for many years and that it had handled very well in tricky waterways.

[92] Captain C testified that after the March 22, 2006 incident he had spoken with Captain F to "pick his mind to see if he could understand what happened." Captain C's impression was that Captain F was very upset and stressed about the incident. Captain C heard Captain F say that he could not sleep, that he "could not live with it", and in that same conversation said he wanted to resign. Captain C advised him not to resign at that time, telling him that it would not be the best thing to do at that time because the employer needed his expertise and experience. Captain C requested Captain F to hold his resignation in abeyance until some time had passed and the employer could consider his position within the company. After that conversation the evidence was that there were further discussions between Captain C and Captain F about what happened. Captain C testified that Captain F second-guessed himself and kept wondering what else he could have done to prevent the tragedy.

[93] We note that even though Captain F was not on duty and in command of the ship at the time of the accident, he had been Senior Master of the B watch for five years and the employer did not return him to his regular duties after the accident. The evidence is that Captain F was nearing retirement; as Captain C testified, Captain F "was ready to go." The evidence is that a little more than a year later, Captain F left the employer's employ by way of retirement. After the ship accident Captain F did not return to his former duties as a sailing Master on one of the employer's passenger ships. The employer changed his duties so that he acted as part of a team of managers who conducted a world-wide search for a vessel to replace the lost ship. Captain C testified that he thought it would be a good opportunity for Captain F because he knew the berths up and down the coast. Captain F retained his position as exempt Master with the employer but did not sail again as a Master on any of the employer's passenger routes. He did sail the replacement ship from its European location back to British

Columbia; this was not a public passenger service but rather a private sailing with only the employer's crew and contractors on board. After the new ship was put into service in the summer of 2007, Captain F retired from employment and was honoured by the employer for his decades of service.

[94] As earlier indicated, Captain C testified: "We're all responsible" for the fact that sometimes there were casual or unsafe watchkeeping practices on the ship. The employer's view is that as Master of the ship on March 21/22, 2006, the worker was ultimately responsible to ensure that the bridge crew kept a proper watch. One of the reasons given by Captain C for losing confidence in the worker as a management team Master is Captain C's perception that at no time after the loss of the ship did the worker show any introspection or self-questioning about his role in the accident and whether he could have done anything differently to prevent the tragedy.

[95] Captain C acknowledged in cross-examination that the worker may indeed have felt remorse and may have accepted his responsibility as Master for the tragedy but that the employer's management members did not hear those words or perceive that attitude from him. Captain C referred to several other marine incidents, not of the same magnitude as the case at hand, in which the Masters of the ships expressed contrition for the incidents and engaged in a process of self-questioning about how they might have done things in a better way. In response to a question in cross-examination about whether he believed the worker should have offered to resign, Captain C responded "Yes". Moreover the failure to hear from the worker any words of remorse or introspection about what he might have done to improve watchkeeping or other ways to avoid the incident was one reason for Captain C's perception (shared by Captain T) that the worker failed to appreciate his responsibilities as a ship Master and member of the employer's management team. Thus the employer's perception was that the worker was not taking any responsibility or accountability for the grounding and sinking of the ship.

[96] Captain T testified that he spoke with the worker in Hartley Bay shortly after the sinking of the ship and he found the worker to be calm and quite detached. Captain T testified that he expected a Captain who had just lost his ship to be distant in his deportment. But Captain T also testified that the worker did not display the type of reaction that Captain T was expecting, which was some remorse for the loss of the ship and accountability for that loss. Captain T testified that he was surprised at the lack of that kind of sadness displayed by the worker and that this triggered a response in Captain T. Captain T referred to the worker saying words to the effect that "it appears that they did not alter course" but without expressing any personal responsibility for the incident. Captain T perceived that the worker was referring to the accident as being solely the bridge crew's fault. Captain T testified that: "It's been my experience that when a captain has an incident, not to mention losing people, a captain is always thinking of what he could have done better, and [the worker] never indicated to me that he bore any responsibility at all for the ship that was under his command. That's when I lost

confidence in him." Captain T's evidence corroborates that of Captain C that in their view it is important for a Master to express full responsibility and take full accountability for what happens on his ship, even if the direct action (or inaction) that caused an incident might be blamed on other crewmembers, even if the B watch was not the worker's usual watch.

[97] Captain T acknowledged in cross-examination that in front of other persons, shortly after the sinking of the ship, he had complimented the worker on his diligence in enforcing watchkeeping standards, referring to him as "the bridge Nazi" and wondering aloud how watchkeeping could have failed with the worker as Master of the voyage. But Captain T testified: "I lost faith in [the worker] as a Master for failing to accept responsibility. I respected [the worker] and I still do in a number of areas. He's an exceptional ship handler, very diligent, but my problem is that he fails to accept any responsibility for the incident and for that reason I would not have him sail as a Master at a company that I work for or with. That being said, I respect him in many ways but I wouldn't have him as a Master."

[98] In final argument the worker's position was that there was no evidentiary foundation whatsoever for the employer's perception that the worker did not seem to appreciate his responsibilities as Master. We disagree. It is true that nowhere in the evidence is there any reference to a verbal or written statement by the worker expressly communicating that he was not sorry about the loss of the ship and two lives or that he refused to take any responsibility for the incident or that he did not wonder what he could have done differently that might have prevented the accident. But the evidence also reveals that at no time did the worker ever verbally or in writing express those sentiments to Captain C or Captain T or for that matter, to anyone in the employer's management. We will have more to say later about the perception of Captain C and Captain T about the worker's demeanour at the DI. At this point it is sufficient to state that the worker did not offer to resign, nor did he express to the employer's management any words that they expected or would like to have heard from him about his role as Master of the ship and his acceptance of personal accountability for the tragedy. This is so despite the fact that on and after March 22, 2006 and before his DI interview, there were some conversations between the worker and respectively, Captains T and C.

[99] At this point we emphasize that we are not making any findings about what the worker actually felt or feels about the loss of the ship and two lives. Nor do we find that the worker ought to have expressed remorse or accountability in the circumstances. There may well have been reasons why the worker did not say the words that the employer expected and wanted to hear from him. The evidence satisfies us, however, that the worker did not express any words to the employer to show that as Master of the ship on its final voyage he accepted ultimate responsibility for the tragedy. Having listened to Captain C and Captain T and assessed their testimony in light of all the evidence, we are satisfied that they are credible in testifying that they believed the worker did not understand his role as Master to accept that overall responsibility and to be ultimately

accountable for the grounding and sinking of the ship. Rightly or wrongly, fairly or unfairly, they did not perceive the worker as feeling remorse and sadness about the loss of the ship and two lives or that he questioned the part he may have had to play in the cause of the accident. In that regard, he did not act in the way the employer expected and wanted an exempt Master, a member of the management team, to behave. We are also satisfied that Captain C's and Captain T's beliefs and perceptions in this regard substantially confirmed their loss of confidence in the worker as exempt Master and why the employer terminated his employment. We emphasize that we are not making any judgments about their beliefs and perceptions of the worker apart from finding that in fact they held them. We will now go on to discuss the other reasons why the employer lost confidence in the worker as a member of its management team.

Legal counsel accompanying worker to the DI

[100] From Captain C's testimony we have found that in the early morning hours of March 22, 2006 when he heard the news about the loss of the ship, it was already in his mind that the worker's career as Master for the employer was over simply because of the tragic event. But at various points in his testimony Captain C indicated that things might have gone differently for the worker, that is, it may have been just possible that the worker could have retained employment with the employer were it not for how the employer perceived the worker's attitude and behaviour after the accident. Our assessment of the evidence is that with the sinking of the ship the worker's career as a Master was likely over just from that fact of that event but that there was a small chance of retaining some continued employment with the employer, just as Captain F was able to stay on in other duties for a little over a year.

[101] Captain C has testified and we have determined that by the end of the first of the worker's two DI interviews, Captain C had definitely made up his mind that the employer needed to terminate the worker's employment. We have just discussed one of the reasons for Captain C's mindset, which was his perception that the worker failed to accept responsibility for the tragedy. This was part of the employer's perception that the worker lacked a proper appreciation of the role on the management team of exempt Master.

[102] Another event that solidified Captain C's decision that the worker did not appreciate his role as part of the management team was the fact that at his first DI interview the worker was accompanied by J, a lawyer. This was referred to in a submission dated April 8, 2008 from the employer to the Board in the section 151 complaint proceedings before the case officer. That submission stated in part as follows:

> In short, [the employer] found [the worker] to lack a proper appreciation of his own role as part of the management team. Moreover, he demonstrated no contrition or remorse, he failed to accept any personal responsibility and appeared far more concerned with self-preservation

> than with recognizing or appreciating his role as Master of the vessel. *Frankly, the perceptions and concerns of senior personnel in this regard were not alleviated by the [worker's] arrival at the Divisional Inquiry with the Union's legal representative in tow.*
>
> [italic emphasis added]

[103] Captain C provided some background on this matter. The employer had promoted the worker to the position of exempt Master in February 2006, less than two months before the ship sunk. The evidence was that it was a "hard sell" for the employer to persuade the worker to accept the position of exempt Master. Captain C testified that both he and Captain D, the marine superintendent, met with the worker and had a long series of discussions trying to convince him that as an exempt Master, part of the management team, he would have a greater say in matters such as safety, operations, and navigation.

[104] Captain C testified that it was unusual to have to work to convince someone to take the exempt Master position and that it took a lot of Captain C's "time and emotion" to successfully convince the worker to accept the promotion. One of the successful means of persuasion was Captain C's advice to the worker that as an exempt Master he could affect change by way of direct communication with both Captains C and D. Captain C also told the worker that he expected to have an open line of communication from the worker as exempt Master through the marine superintendent, Captain D: it was a standing order to exempt Masters that if they could not contact Captain D they should contact Captain C directly. Captain C further told the worker that as an exempt Master he would be part of the management team and therefore Captain C would be his "union representative".

[105] While exempt Masters are not part of the bargaining unit certified by the trade union, nevertheless they may be members of the Canadian Merchant Service Guild (Guild), an association of marine officers which is not certified under the *Labour Relations Code* to be a bargaining agent with the employer. The Guild provides services to its members including legal representation. Captain C's statement to the worker that he should view Captain C as his union representative suggests Captain C's view that the employer's management team is a very close group who are expected to turn to each other for help and advice, not to outsiders such as unions or similar associations. We make no comment on this attitude other than to say that it helps to explain Captain C's subsequent reaction when the worker appeared at the first DI interview in April 2006 accompanied by a lawyer (and someone at least initially perceived to be a "union" lawyer) as his representative.

[106] By letter dated February 7, 2006 the employer offered the worker the position of exempt Master. Captain T was signatory to the letter on the employer's behalf. At the end of the letter the worker signed (on February 20, 2006) a statement agreeing to the employment terms and conditions noted in the letter. The letter indicated that the

worker's performance had been "more than satisfactory", offered him the position of exempt Master, and referred to a variety of job responsibilities such as "managing and supporting the Shipboard Management Team", "establishing and maintaining a professional work environment", and "personal characteristics/expectations". The letter referred to the employer's core values of "Safety", "Quality", "Integrity", "Partnerships", "Environment", and "Employees" and prefaced the list of core values with the following paragraph:

> Within [the employer's corporation] we place considerable weight on 'core values', 'personal accountability' and a 'management style' which must be both highly participative and results orientated. It is critical that you develop and commit to a set of values based on a high degree of candor, dialogue and mutual respect consistent with [the employer's] way of managing.

[107] Before the worker's first interview with the DI on April 21, 2006 the DI panel had already interviewed three members of the ship's bridge crew, including the 4/O and the QM1. They were bargaining unit members and had been accompanied by J who acted as legal counsel for their trade union. During their interviews, they refused to give any evidence about the critical 14-minute period when the ship sailed straight into Gil Island without making a course change. It is undisputed that their refusal to testify in that regard frustrated the purpose of the DI. Under section 9.09 of the Fleet Regulations, the whole purpose of the DI was to produce a report which contained a determination of the cause or contributing factors of the ship incident and to make recommendations for corrective action to prevent a reoccurrence. The DI panel members were frustrated by these witnesses' refusal to testify on key issues at the inquiry proceedings.

[108] The worker appeared at his first DI interview with the same legal counsel, J, who had earlier represented the witnesses who refused to testify at the DI proceedings about key events before the ship grounded. Captain C was blunt in his testimony that he was insulted when he saw the worker walk in with a "union lawyer." Captain C testified:

> "..it was representative of [the worker's] failure to accept his management responsibility – [the worker] was management and he didn't in my mind need representatives – I was his representative – I was looking out for his best interests and to make sure that we got to the facts…I expected him to fully participate in the DI to find out what happened."

[109] There was a lot of evidence at our oral hearing about whether or not at the time of the first DI interview the DI panel members understood that when J appeared with the worker, J was in fact acting on behalf of the Guild rather than the trade union certified as agent for the bargaining unit members. The handwritten notes of the DI panel members are either non-existent or very sketchy on what happened at the outset of the April 21, 2006 interview with the worker. The most thorough notes about the worker's

first DI interview are from Captain M who was then the certified trade union's observer/member on the DI panel.

[110] From Captain M's notes and the oral hearing testimony of Captains C and T we find that there was some confusion at the beginning of the interview about why J was there and whether or not the worker, like some of the previous witnesses represented by J, was going to refuse to testify on key issues. From the notes about Captain T's remarks at the worker's interview, we find that Captain T was irritated that J's presence might be a signal that the worker, another key witness, was also going to refuse to testify on important matters. We do not find it important to decide whether or not Captain C clearly understood at the time that J was acting on behalf of the Guild rather than the certified trade union. We note that almost two years later the employer's submission to the Board case officer still referred to J as the "Union's legal representative" so this indicates that the employer continued to attribute to J the persona of "the union lawyer" whatever his actual role in acting on the worker's behalf.

[111] The matter of Guild or trade union aside, we find that Captain C felt angry and betrayed that the worker, a member of his management team, was accompanied by *any* person acting as his legal representative at the DI proceedings. The fact that J had recently represented witnesses who refused to testify before the DI likely made for an unfortunate association and heightened the negative view that Captain C held of the worker. But damage was done merely by the worker walking into the DI interview with a lawyer.

[112] We find that in Captain C's view, part of the employer's management style is that members of management take care of each other and that there is a high degree of candour with frank and open dialogue between management team members. Thus Captain C perceived that by bringing a lawyer to the DI interview, the worker was betraying one of the employer's core management values and also going against the employer's management style Captain C had told him about a couple of months earlier when he was convincing him to accept the position of exempt Master. Captain C made the recommendation to terminate the worker's employment so Captain C's views are key in this regard.

[113] We are aware that the employer's Fleet Regulations acknowledge the right of DI witnesses including exempt and non-exempt Masters to have representation at DI proceedings. We also note that the written notice/request (see exhibit #15) to the worker to attend the DI stated that he was entitled to bring "Union or other representation" to the DI proceedings if he wished. Further, from other testimony of Captain C we find that the employer ought to have known that after serious marine events ship officers may find themselves involved in civil litigation and therefore may seek legal representation in related proceedings. Our mandate in this appeal, however, is not to judge the fairness of the employer's view that by bringing a lawyer with him to the DI interview the worker lacked a proper appreciation of his role of exempt Master as

part of the employer's management team. Some may view Captain C's attitude on this matter to be unreasonable and unfair but we merely find as a fact that he took it as a personal insult when the worker appeared at the April 21, 2006 DI interview accompanied by a legal representative. Captain C expected to be the representative of the exempt Masters on his management team and the worker's action flew in the face of that expectation. We find that this contributed to Captain C's decision and hence the employer's decision that the worker did not understand his role as exempt Master on the employer's management team and that the employer should terminate the worker's employment. The worker's first DI interview was off to a very bad start.

The worker's appearances at the two DI interviews – comparison with Captain F's interview

[114] Captain F was Senior Master of the ship and the usual Master on B watch. Although Captain F was not on board at the time of the ship's last voyage Captain C testified that Captain F was also responsible and accountable for the sinking of the ship. Yet the employer did not even discipline Captain F, although we have earlier noted that he did not ever again sail as Master of a passenger route for the employer and he retired from the employer's employ a little more than a year after the sinking of the ship. Thus Captain F stayed in employment with the employer for a little over a year after the ship accident. By contrast the employer first placed the worker on paid leave of absence until January 15, 2007 and then terminated his employment.

[115] With that background, when asked in cross-examination why the employer had not lost confidence in Captain F, Captain C responded that Captain F had embraced the employer's core values, had embraced his management position on the ship, and was a trusted member of the employer's management team. The employer recognized that there was work to be done and so continued to employ Captain F in tasks related to the work required to find a replacement ship. The next statement put to Captain C in cross-examination for comment was that the worker was not part of the "in" group, and Captain C responded in the affirmative. Captain C stated in part that:

> Yes, [the worker] did not embrace the executive exempt status. In light of events and aftermath, he had not embraced our core values and his exempt position by his conduct and demeanour afterwards, and his lack of any assumption of any responsibility...

[116] It was clear that even after the ship accident the employer continued to consider Captain F as a valuable member of its management team, or the "in group". The evidence is that Captain F had been an exempt Master for years whereas the worker had less than two months' experience on the management team. In trying to determine why Captain F remained a trusted and valued member of the employer's management team while the worker did not, as a panel we wanted to understand how Captain F and the worker responded to questions at their respective DI interviews. In the Board file

material were notes that DI panel members had taken of the two interviews with the worker, but there were no notes of the one interview (held on April 21, 2006) the DI had with Captain F. Accordingly, pursuant to WCAT's authority under section 247(1)(b) of the Act and in furtherance of WCAT's inquiry system of appeal we requested that the employer provide us copies of the DI panel members' notes of the interview with Captain F. The employer provided the notes which were marked as exhibit #8 in the proceedings.

[117] We found Captain M's notes to be the most complete notes of all the panel members, although we considered all the panel members' handwritten notes in reaching our conclusions about what happened at the DI. With respect to the worker's second DI interview, there were no notes of Captain M in our proceeding so we depended on a consideration of all the other panel members' handwritten notes of that interview. It is important to emphasize that the DI was an investigation into what caused the ship's grounding and sinking, with the purpose of making recommendations to prevent another tragedy. Thus the issue of safety was a backdrop to the DI, forming the general context in which all questions were posed by panel members and questions were answered by witnesses.

[118] We found that the DI panel followed the same general line of questioning when interviewing both Captain F and the worker. In relating the interviews we have focused on only discussions we found to be important for this appeal and thus we have not provided every detail of the notes.

Captain F's DI interview – April 21, 2006

[119] At the DI interview when questioned about the general safety of the ship, Captain F responded that he had no concerns about the safety and seaworthiness of the ship nor did he have any problems with the bridge navigation equipment. He said that he had never been turned down by management if he had requested safety equipment.

[120] When asked by the DI panel to think about what could have happened to cause the grounding of the ship, Captain F stated that if, as he believed, the navigational course was not changed there had to have been some big distraction and perhaps the 4/O had been overwhelmed. Then Captain F immediately gave his view that conduct in the wheelhouse on the northern ships was not good enough – in his ten years experience, with five years as Senior Master of B watch, he was not comfortable with the casual practices of the bridge crew. With respect to casual practices Captain F described longstanding habits of some crew with 20 years on the northern route including lots of talking, heated arguments, shouting political arguments, and music on the bridge. Captain F indicated that after five years music was now finally off the bridge.

[121] Captain T then commented that Captain F was indicating he was fighting to stop the casual watch practices and asked Captain F if he had support from the employer's

management in that regard. Captain F responded that while some of the marine superintendents were supportive, one of them was supportive but too busy to do anything; not everyone else, including some Masters, agreed with Captain F or was "on-side" so that he felt characterized as the "bad guy" with the reputation for hating music.

[122] There was a discussion about confusion caused by multiple standing orders on the bridge and changes in the orders with different watches, that is, different Masters had different standing orders on the bridge. Captain F said that Masters coming up needed to understand teamwork and that it was too confusing if everyone did things differently. Captain F said that he did not feel he was really in control as Senior Master unless he put out a directive; all he could really do was to tell other Masters to follow the *Canada Shipping Act*. He said that it would help if marine superintendents and Masters were on the same page. Captain T asked if the employer was still at risk. Captain F responded that the employer still had the same people and that his fear was that after a short time "we will fall back into the same routine and practices" of a relaxed wheelhouse. Captain F also suggested that the marine superintendents get more involved with Masters. Captain F also gave his view, although he said he felt like he was "ratting out my people", that B watch was a worry.

[123] There was a discussion about the staffing of the ships with Captain F indicating that sometimes he did not have people long enough or did not have sufficient familiarization time for the crew. Captain F said that he had been quite impressed with the 4/O, who was diligent. Captain F did not know the QM1. Captain T asked about the worker and Captain F responded that he was very impressed with the worker's evacuation of the ship. But Captain F stated that he and the worker did not get along although he did not sail often with the worker. Captain F said that the worker was one of the persons he had a problem with regarding music on the bridge.

[124] There was a disagreement between Captain C and Captain F about how Senior Masters should get subordinate Masters to comply with standing orders/bridge procedures. Captain C indicated that the Senior Master should ensure consistency by getting Masters to comply, but Captain F indicated that he could not see issuing directives for every action on the job site.

[125] Subsequently Captain C asked if Captain F had ever had a situation where the bridge crew did not know where they were. Captain F responded that a couple of times on a specific ship (not the ship that grounded and sunk) the bridge crew had doubled back on a route – they had not followed standing orders, became lost, and he had caught them when he came up to the bridge. Captain F said that "we have to clean up our act."

[126] Captain T asked Captain F if he could think of anything that would prevent such a tragedy from ever happening again. Captain F responded that he did not know what

had happened, he could not understand it, that he was angry, and that it should not have happened. Captain F said there was an indication that a squall had come through and perhaps the 4/O had been distracted or had the radar set too low. But he did not know what had happened.

[127] When asked if he knew of any history of a relationship between the 4/O and the QM1 or if he knew anything about their personalities, Captain F responded that purely on hearsay he heard "they were an item at one point." When asked if it would help to split up crews Captain F said that this would not address the problem of the bridge crew developing bad habits from a northern route in the summertime with nice days and no traffic. Captain T responded that it was disturbing to him because he had sent out three notices after some near misses and had asked to have "it stepped up a notch" but obviously putting things down on paper was not good enough.

[128] As earlier stated, the DI interviewed Captain F only the one time, on April 21, 2006.

The worker's first DI interview – April 21, 2006

[129] The worker's first DI interview was also held on April 21, 2006. As earlier stated, there was some confusion when the worker appeared with legal counsel J at his side. Captain T advised the worker that as an exempt employee he did not have the same rights as a bargaining unit employee and that if the worker declined to answer questions Captain T was going to have more to say about it. We find that Captain T, because of lawyer J's presence with the worker, was very concerned that the worker might not fully respond to the DI panel's questions.

[130] As with Captain F, the panel questioned the worker about the general safety and seaworthiness of the ship and asked him if there were any defects in the bridge equipment. The worker responded that he thought the ship was seaworthy and the bridge equipment was fine. Captain T asked the worker if he had ever requested safety equipment from the employer or marine superintendent. At this point the lawyer J gave a warning of some sort and the worker requested Captain T to clarify the question. Captain T asked if there was anything that affected the safety of the ship that the worker had ever requested to be fixed. The worker responded in the affirmative indicating that he had made such requests more than once. Captain T asked him what those things were, to give examples. The worker said that he did not want to get the employer into trouble and he did not want to get himself into trouble. Captain T responded that he did not want to hide anything but in the interests of safety it was important to "get it out". Captain T said that he was asking a very significant question about whether the worker had ever requested safety equipment that had been refused.

[131] The worker then referred to a problem with McGregor doors resulting in only one means of evacuation from the midship (car deck) section. Captain T appeared not to understand the problem and asked what the problem would be because there are no

passengers on the car deck. The worker responded that regulations required there be two means of evacuation and there is only one. Captain T asked if the worker had asked for this to be fixed, if he had been refused and who had refused him. The worker said that he had requested the installation of another means of evacuation from both the operations manager and the Senior Master. Captain T then asked him if he got along well with the Senior Master and the worker replied "not very well."

[132] Captain T then asked for another example of when the worker had been refused his request for safety equipment. The worker referred to a problem with insufficient barriers on platform decks with gaps that a child could fall through. Captain T wanted to know if there had been any incidents or accidents in that regard since the worker had been on the ship. The worker responded that he had been on the ship since 1989 and there had been no incidents. Captain T asked him if he considered that a major problem, and J, the worker's lawyer, responded to Captain T indicating that was not the question Captain T had earlier posed to the worker.

[133] Captain T asked the worker for other examples of when the worker had been refused requests for safety equipment. The worker referred to it taking five years to get guard rails. Captain T asked if there had been any incidents resulting from a lack of guard rails and the worker replied in the negative. Captain C interjected to say that it took years but now the problem was corrected, and the worker agreed with him.

[134] There was a brief discussion between the worker and Captain T about several other matters such as the pitch control system and clutches. Captain T asked the worker if he had put in written defect notices about all the problems he had mentioned and the worker responded in the affirmative.

[135] Captain T then indicated that they had not even talked about the ship incident (that is, the grounding/sinking) and yet that was something Captain T wanted to know from the worker, that is, what the worker had done to prevent it. The worker then responded about pass counts and the need to get an accurate count from the people on board. Captain T said: "I am prepared to be here all day." The worker then continued to discuss the problem of no established procedure to ensure an accurate total of the number of people on the ship, referring to passengers such as entertainers, artists, lecturers, and tourist counsellors. Captain T asked if the stewards were not adding such people to the list and the worker replied that there was no formal procedure to take care of the matter. Captain T and the worker then had a discussion about whose responsibility it was to maintain an accurate passenger count, concluding with Captain T asking the worker if he had brought the matter to the attention of the marine superintendent. The worker indicated that he had done so.

[136] The worker then stated that there were a lot of other issues that were more minor. Captain T then told him that they would look into the minor things but that he wanted to hear from the worker, as Master, about serious safety concerns that would cause the

ship to hit the beach or cause pollution – things that would keep the worker as Master awake at night and "piss you off that we are not doing." The worker began to discuss a retrofit module on the ship's autopilot that he had asked to be removed because it caused confusion to the bridge crew, and that it took several years to have the matter resolved. Captain T asked if the matter had been corrected and the worker responded in the affirmative.

[137] The worker went on to mention several other matters including a problem with a rescue boat davit. Captain T asked if they launched the rescue boat often and the worker responded approximately every week. Captain T asked if there had been any injuries and the worker did not know of any. There was a discussion between Captain T and another DI panel member about whether the system was approved and about who knew of the problem. Eventually Captain T asked the worker, in the interests of time, to make a list of the safety concerns he had where the employer had not responded to the worker's concerns. Although none of the notes clearly indicate this, the implication from the notes is that Captain T's request was for the worker to prepare the list after the DI interview and present it later to the employer.

[138] Captain C then asked the worker if the employer had ever responded to his safety concerns and the worker said, "Yes, definitely." Captain T wanted to know if employer response was getting better or worse. The worker responded that it seemed to be based on personality. Captain T asked if there was an appreciable trend. The worker asked for a second to give a decent answer when Captain T cut him off to say that the worker must have had some serious concerns when taking the job as an exempt Master. The worker responded that yes, he did have serious concerns. Captain T asked him why he took the job then, and the worker said that before he took the job he had a two-hour discussion with Captain C in his office who assured him that the employer would listen to him. Captain T again interrupted to ask the worker why he took the job and the worker responded that he saw an opportunity to affect change rather than wait for it. He said that he considered the levels of safety, the levels of seaworthiness, and the levels of risk and was satisfied that the levels of risk were acceptable. Captain T asked the worker if he had been satisfied about acceptable levels of risk regarding machinery space, the bridge, and navigational equipment, and the worker responded that he had been satisfied.

[139] The rest of the DI interview moved into the worker's description of the events on the night of March 21 and 22, 2006. It was a lengthy recounting of what he did after he was awoken; we need not repeat all the details in this decision. The worker was asked if he had had any concerns with the bridge crew and he responded that he had had no concerns. The bridge crew was staffed according to regulations and he had been confident in his overnight watches. He had left standing orders when he retired and there were no problems with bridge navigational equipment. Captain T asked if illumination on the navigational equipment was a problem and the worker referred to a glow even after the brilliance was turned down.

[140] In relating the course of the events after the ship grounded, there was a discussion between the DI panel and the worker about the problem in getting an accurate passenger count, the problem about cabin sweeps and while there was an evacuation plan for fire scenarios, there was no established procedure for other types of disasters.

[141] Near the end of the interview Captain T asked the worker if he had any idea about what happened to cause the grounding of the ship. The worker said he did have an idea, but it was just conjecture and speculation. Captain T asked if he would share it with the panel. The worker asked his lawyer J if he could do so. The lawyer J responded that he could answer as long as it was understood it was just conjecture. The worker then explained that the theory was that the ship struck from a straight extension from Sainty Point which means the ship did not change course. The worker said there could have been a problem with the autopilot; the ship had come out of refit with a new wheel and a new switch so that might have been a problem with switching back from autopilot to manual operation, but otherwise he did not know what had happened.

[142] Captain T indicated that the DI panel had heard testimony about different watches using different ways to operate the autopilot, and the worker responded that he allowed the bridge crew to operate it the way they were used to. Captain T asked the worker if he had been comfortable that his officers knew how to use the autopilot and the worker responded in the affirmative, that they were adequately trained but it did not take away the possibility of an error. Captain T then stated that he would be very disturbed and distressed if there was a serious safety concern of which he had not been made aware.

[143] Subsequently Captain C asked the worker if there were any more safety concerns he could suggest. The worker indicated that he had had a problem finding a grease pencil and that the check-off lists were a problem. Captain C asked the worker to give him a list of those problems. The worker then indicated that there needed to be better evacuation plans and drill protocol procedures, and that there had been a problem with his designate failing to bring the log book off the ship. A DI panel member, the employer's vice-president of Engineering, asked if there was any room for improvement in engine room communication and the worker said yes, there was poor cooperation and communication but it varied with personality. Captain T commented: "It goes both ways, doesn't it?" and the worker indicated that the problem came from the engine room. The employer's vice-president of Engineering then asked if there was anything in that regard that could have contributed to the ship's grounding and sinking, but the worker said no. The employer's vice-president of Engineering asked if there was anything that could be done for the future, from an engineering perspective. The worker referred to ambiguities in the autopilot system and that switching (from autopilot to manual) could be unfamiliar and complicated.

[144] The vice-president of Engineering then asked if the worker was aware of any relationship or interpersonal issues between the 4/O and the QM1, and the worker said that there was nothing he knew about. There is also an indication in some DI panel

members' notes that a DI panel member asked the worker if generally the bridge watch relaxed after Sainty Point and he responded in the negative.

The worker's written list of safety concerns

[145] The worker's second DI interview took place over a month later, on May 25, 2006. In the meantime the worker provided the DI panel with a written list of safety issues that he had raised with the employer prior to March 2006, when he was still a bargaining unit member.

[146] The worker's list is 11 typewritten single-spaced pages, describing 58 safety issues. All of these items were issues the worker had raised with the employer before March 2006, many of them raised and resolved years earlier, although some were still outstanding. We are not going to relate the details of each item on the list. We note that we would not characterize any of the items as trivial or unimportant because they were all in some way safety related. We note, however, that the worker and both Captains C and T all testified that none of the concerns on the list were causative of the grounding/sinking of the ship.

[147] The worker's list opens with a general overview of his views on safety in the employer's workplace noting that chronic problems have two things in common: first, they are created by someone who does not have to cope with them and second, the person who does have to cope with them does not have the means to solve them.

[148] On the list of 58 items are included such matters as problems with guardrails on outer decks; a problem with pitch control systems; the need for accurate passenger counts and accurate E.D.N. lists (lists of crew members responsible for specific safety issues in an emergency); a problem module and magnetic compass on the ship's autopilot; the need to replace davit winch motors on the rescue boats; problem handles on searchlights; a sink draining into a ship car deck; dangerous inner bow doors; problems with passengers plugging appliances into a ship's electrical mains; a problem with an outer-deck wheelchair accessible device; an unsatisfactory echo sounder; no secondary means of evacuation/escape on car deck midships; the need for violence in the workplace training; hydraulic leaks on deck winches and windlasses; the need for fire-proof lockers for flammable fluids; the lack of a gangway net for a certain location; insufficient deck locker space for lifejackets; the need for updated bomb threat training; the need for brakes for baggage carts; and the desirability for navigators to be consulted before the purchase of new navigation equipment. There were also nine references to items the worker had placed on another ship's refit list from the year 2000 through to the year 2003.

[149] As earlier stated, many of the items mentioned on the list were old concerns that the employer had dealt with, and the worker acknowledged that in his list; however, some of the items he had earlier raised were still outstanding.

[150] In reviewing the list we observed that for the most part the list was written in a neutral and objective tone, but there are notable exceptions when the worker made comments which we find could reasonably be perceived to be sarcastic in tone. One example is the reference we earlier discussed about the lack of a gangway net at a certain operating location and the worker's statement that he guessed the Senior Master "played that one right" in that the accident did not happen on the Senior Master's watch. Another example is the worker's concern about the lack of railings on the ship's platform decks. On that point the worker stated as follows:

> Given the success rate above [referring to earlier items that were either outstanding or had taken months to resolve], I decided to try the suggestion awards program for this item and I offered a practical solution. The Vice-President of Corporate Safety and Standards sent me [a] nice letter to praise me for my interest in safety and to explain that "the cost was estimated to exceed the benefit." He also sent me a nice, big, red T-shirt with the Dogwood logo on it. The T-shirt and its Dogwood logo went to the bottom with the [ship] and I hope that the symbolism of that will not be lost.

[151] A final example involves the worker's reference to a problem with a water fountain on one of the ships and the worker's interaction with the chief engineer who the worker wrote "had not yet appointed himself to the position of Senior Chief Engineer". The worker described the chief engineer swearing at him for bringing the matter up at a safety meeting instead of another meeting. The worker asked the chief engineer if because it was raised at the wrong meeting that it was not going to be corrected, and the response was "yes". The worker wrote that "As I was still relatively new to the Dogwood Fleet, I had not yet encountered anything quite that stupid."

[152] None of the employer's witnesses referred to the foregoing examples in their testimony. Nor are they mentioned in the employer's submissions to the Board case officer or to us in these appeal proceedings. However, the list was in evidence as part of the worker's case in the proceedings before the Board case officer and was also referred to in these appeal proceedings. The worker's written list was prepared after his first DI interview and the evidence satisfies us that Captain C had made up his mind right after that interview that the employer would be terminating the worker's employment. In that sense the worker's written comments could not have played a part in Captain C's or Captain T's initial views that the employer should terminate the worker's employment. But they and other DI panel members had reviewed the worker's list and would have observed the examples which we have identified. We are referring to those selected examples because their tone stood out as being inconsistent as coming from a person who viewed himself as a member of any employer's management team. Our finding on this point supports the employer's perception, as described by Captain C, that the worker did not appreciate his role as an exempt member of the employer's management team and that he acted in a way that was inconsistent with the employer's

stated core values of mutual respect and working as a partner with other members of management. It is one thing to be open and frank about safety issues; it is another matter to be sarcastic when addressing one's employer in the context of an investigation into a tragedy that resulted in the loss of a ship and the lives of two persons.

The worker's second DI interview – May 25, 2006

[153] The second interview opened with the DI panel acknowledging receipt of the worker's safety list but noting that it was undated and there seemed to be a page with several paragraphs missing. The DI panel asked the worker to date the list. (After the second interview the worker provided a revised list that included the missing paragraphs.) The DI panel indicated that it would be responding to each concern and advised that DI panel members had not been aware of many of the problems identified by the worker.

[154] The first question for the worker was whether any of the safety concerns he had raised on the list had led to the grounding of the ship. He responded that he did not know why the ship had grounded and that he only had theories. He did not think that any of the concerns he raised were causes of the tragedy. The worker's theory about the cause was that the bridge crew did not get the course set right and when they realized it they had trouble getting the control back. He also noted that they may have had trouble with the brilliance from the radar. The worker thought they could not get off autopilot.

[155] The DI panel told the worker that they had evidence the crew had made three course changes. The worker said he had not known that. The DI panel mentioned that there had been 14 minutes, a tremendous gap in time from when the course change should have been made and the time of impact, and asked if the worker had any speculations about what happened. The worker said no, he had never seen anything like it. He could not imagine what had happened.

[156] The DI panel questioned the worker about B watch not following the A watch autopilot procedures that had been posted on the bulkhead. The worker responded that he remembered discussing it with the officers and agreeing that the posted procedures were confusing and so they made a change but did not write it out and post the new procedures on the bulkhead. The DI panel asked the worker if he had talked to the Senior Master about it and he responded no. The DI panel asked the worker if he was confident that everyone knew the change he put in and he responded in the affirmative. The DI panel asked the worker about his relationship with the Senior Master (Captain F) and he answered that they did not like each other.

[157] The DI panel then asked the worker if the worker's standing orders were in conflict with those of the Senior Master and he replied that he did not think so. There was a discussion about night orders and the crew's knowledge to call the worker if an issue

arose. The DI panel asked the worker what he could have done about the autopilot confusion such as going to hand steering. The worker responded that he did not expect it to be done in a challenging way when there is lots of room and time. He said that he would expect that the crew check it each time and that it is almost comical in its redundancy. Captain C responded that it was not comical but rather the price of safety.

[158] After brief interchanges on other issues such as the "faming process[11]" the DI panel asked the worker if he had any suggestions for improvement. The worker mentioned the need for better recordkeeping and the need to have more information about crew members. He also mentioned that it was a major problem, challenging for the crew, to only have them for a block of time that is interrupted when they are needed elsewhere. Further, the worker mentioned that the crew should be "famed on another watch" due to personal relationships.

[159] Subsequently the DI panel said that the 4/O had a number of concerns regarding the equipment such as the sounder and the radar, and asked the worker if the 4/O had brought these concerns to the worker or put in a correction order. The worker responded that there were no correction orders but everyone complained about defects over the years and were just told to phone someone else. Further, some equipment such as the sounder had built-in defects that could not be fixed with a correction order.

[160] The notes indicate that the vice-president of Engineering then gave a "small speech" about the deck and engineering not communicating well, particularly on safety-related issues.

[161] Captain T then referred to safety as having a risk factor, with low risk considered differently than ones that put a ship in peril. Captain T asked the worker if he would take an issue to the marine superintendent. The worker responded that he had done that before and it almost cost him his career. The worker indicated that the employer needed to establish risk assessment principles that guide "all our thinking on safety procedures and changes." He suggested a plain English, common language approach with all modifications listed. The worker suggested following safety protocols like the airlines, giving the example that one would not suddenly find a new switch in a cockpit of an airplane. He also referred to a lack of discipline on board the ships. He also made a reference to the introduction of McGregor doors and the switches not having a lock-out procedure. The worker indicated he asked the Senior Master to put a lock-out procedure in the ship's standing orders and the worker put it in his standing orders.

[162] Captain T then commented to the worker, "You are not happy, do you still want to work with this company?" Captain C's notes indicate that the worker responded "Yes" but other panel notes refer to an enigmatic response of "Shirt with sayings of the old company are buried at sea."

[11] The familiarization process

Our conclusions regarding the employer's different treatment of the worker and Captain F

[163] Although the DI panel suspected poor watchkeeping, it lacked concrete evidence about any cause of the accident and therefore Captain C described the DI panel as "starving for information" about what caused the accident. In this context, we find that DI panel members expected to hear helpful information from the worker in his role as the ship's Master on the voyage, particularly in relation to watchkeeping and navigation practices. Captain T testified that he was emotionally upset and angry about the loss of the ship and death of two people, stressed by the media attention, and impatient to get to the truth of what had caused the tragedy. We find that the DI panel was very concerned about discovering what had caused or contributed to the ship's accident, and developing recommendations to ensure such a tragedy would never happen again. Further, not having heard any expression of remorse or accountability from the worker earlier, they were expecting to hear some expressions of that kind at his DI interviews.

[164] Both Captain F and the worker responded to the DI panel's first questions in the same way: both indicated their views that the ship had been in a seaworthy condition, safe to sail, before its final voyage. Both Captain F and the worker also indicated that they did not have any problems with the bridge equipment. From that point in the questioning, however, their DI interviews were very different.

[165] Captain F responded in the negative to the DI panel's question about whether or not he had ever been turned down by management when he had requested safety equipment. The DI panel then immediately moved into the focus of its inquiry, that is, what happened to cause the marine accident and what could be done to prevent it in the future. In that regard Captain F did refer to the possibility of the 4/O being distracted and/or overwhelmed but then promptly focused on a general problem with watchkeeping and casual bridge crew practices.

[166] It is clear that in Captain F's opinion, one of the main causes of the ship's failure to make the course change was a failure with the navigational watch. In our view his opinion was a common-sense reaction from the information about the accident available at the time. Simply put, the ship had failed to make a course change and for approximately 14 minutes it sailed directly on autopilot into Gil Island. It was obvious that something had gone wrong with the navigational watch because even if there had been a distraction to prevent the course change or even if some bridge equipment had failed, the bridge watch had failed to notice in time to either change course or stop the ship from colliding with the island.

[167] In reviewing Captain F's testimony we find it noteworthy in that the safety issue he raised, namely, the problem with unsafe watch practices and the employer's response to same, was a very serious safety concern that (a) was a common-sense response

from the evidence available about the course of the ship, and (b) led straight to what both the TSB and the DI subsequently found to be a primary cause of the accident. As the TSB noted:

> …the working environment on the bridge was less than formal, and accepted principles of navigation safety were not consistently or rigorously applied. As such, unsafe navigation practices persisted that, in this occurrence, contributed to the loss of situational awareness by the bridge team.

[168] We further find that this safety concern was also the type of concern that was so serious that it reflected very poorly on both the employer and Captain F as the usual Master of B watch. If ever there was a safety concern that might embarrass an employer in this type of situation and cause retaliatory action, Captain F's references to longstanding practices of shouting political arguments, heated arguments, and music on the bridge would be that type of concern. Although Captain F indicated he had tried to stop such practices it was also clear that in five years as Master of B watch he had failed in that regard. Captain F noted that B watch was a "worry". In that sense, in raising these safety concerns, he did not make himself look good. Further, when the DI panel asked him if he had support from management to stop casual bridge watch practices, Captain F's response was not an unequivocal "yes". Instead, he referred to some support from marine superintendents but indicated one was too busy to do anything and that not everyone (such as other Masters) agreed with his views. We find that Captain F's responses did not make the employer look very good either.

[169] Captain F also went on to describe another problem with multiple standing orders on the bridge and different Masters not complying with the bridge standing orders. There was some disagreement between Captain F and the DI panel about how, as Senior Master, Captain F could get other Masters to comply with his orders. While ultimately neither the TSB nor the DI found that this problem was a contributory cause of the ship's accident, we find (see Captain T's testimony) that it was one of the issues that at least the DI investigated seriously, spending a lot of time on the matter to determine if it had played a causative role in the accident.

[170] Later on Captain F was frank in responding to the DI panel about the problems with a relaxed wheelhouse and failure to follow standing bridge orders, and describing a situation with one of his ships in which he caught the bridge crew on two different occasions after they became lost and had to double back with the ship. Again, we find that this type of example of a breakdown in proper navigational practices is noteworthy in the degree of its seriousness and the fact that it pointed to poor navigation practices on the employer's ships. As the TSB subsequently found, poor navigation practices were a primary cause of the grounding and sinking of the employer's ship on March 22, 2006. Again, we find that from a safety perspective these examples did not make either

Captain F or the employer look good. As Captain F indicated, they needed to "clean up their act."

[171] Captain F's response that purely on hearsay, he had heard that the 4/O and the QM1 had a personal relationship (referring to them being an "item at one point") also brought into question his judgment in ever allowing them to sail together as members of a navigational watch.

[172] There is one other matter we find noteworthy about the DI interview with Captain F. The two safety problems he raised regarding navigation practices were matters in which the worker was implicated, either expressly or implicitly. The first matter concerned music on the bridge. Captain F expressly referred to the worker as one of the persons who disagreed with him about playing music on the bridge. Thus he implicated the worker as one of the Masters who permitted a casual watch. This was inconsistent with Captain T's earlier view of the worker as a Master who was severe in bridge discipline. Thus on the same day as the worker's first DI interview, Captain F raised a different picture of the worker for the DI panel to consider. Captain C testified that one of the contributing factors that led the employer to lose confidence in the worker as a Master was that according to Captain F, the worker permitted a radio to play music in the wheelhouse when the ship was underway, disagreeing with Captain F's view on the practice.

[173] The second matter concerned standing orders on the bridge. Captain F also indicated that he and the worker did not get along although he complimented the worker on his evacuation of the ship after it grounded. Captain F then spent some time at the DI interview telling the DI panel about the problem when Masters changed Senior Masters' standing orders on the bridge and how it was too confusing if everyone did things differently. In Captain F's view, he did not feel he was in control as Senior Master if his orders were changed by the next watch Master and in his view, Masters needed to understand teamwork and the importance of a Senior Master's standing orders. While he did not expressly name the worker in this regard, we note that this was an area about which the DI panel subsequently questioned the worker in his second DI interview. We find that this was a second safety problem implicating the worker that arose from Captain F's DI interview.

[174] Captains C and T understood that when the worker took over the ship from Captain F on March 15, 2006, the worker had agreed with the bridge crew that the autopilot procedures posted by Captain F on the bulkhead could be done in a simpler way. The worker approved the bridge crew's different procedures although he did not discuss the matter with Captain F, consult with the marine superintendent about the matter, or post his new written autopilot procedures on the bulkhead. Although ultimately the DI did not find this change in procedure to be have contributed to the grounding of the ship, at the time of the DI interview the DI panel was concerned that this may have been a causative factor. Further, we are satisfied from the testimony of Captains C and T that

although they believed the worker as a Master was entitled to change the Senior Master's orders, he should have posted new written autopilot procedures on the bulkhead to avoid confusion as well as consulted with the Senior Master as a courtesy to advise him of the change in procedures. In their view, the worker's failure to do these things was an example of his failure to behave in the way expected of a member of the employer's management team.

[175] Next we turn to an analysis of the worker's DI interviews. Both Captains C and T referred to the worker as being cold and distant during the interviews. At one point in his testimony Captain C described the worker during the DI interviews as having a cold and hard attitude of no remorse, no self-questioning, and no expression of any concern about losing a vessel that was entrusted to him. Captains C and T perceived the worker as being generally unhappy although they could only refer to subjective perceptions of his tone and body language to support their opinions on this point. Whether the worker appeared to be cold, distant, happy, or unhappy at the DI interviews is something that we could not assess from written notes. We note that it would not be reasonable to expect any interviewee at a DI inquiry to appear happy, let alone the Master of a vessel that had grounded and sunk. In any event, we have accepted the testimony of Captains C and T about their perception of his attitude because there was insufficient evidence to contradict their opinions on that point and as well they were unshaken on the matter in cross-examination. We emphasize that we are not finding that they were accurate in their perceptions but rather that they genuinely held these perceptions.

[176] We have earlier related that the worker's first DI interview was difficult from the start because he was accompanied by a lawyer; this was taken as an insult by Captain C and was a concern to Captain T who took it as a possible signal that the worker might not be fully cooperative with the DI panel. Captain C described the atmosphere at the worker's DI interviews as "frosty" with the worker not participating in a facilitative discussion or working with the DI panel to figure out what happened to the ship. We note at this point that J, the Guild's lawyer, became involved three times during the first DI interview with the worker. Near the beginning of the interview J interjected to give some type of warning or request a clarification of one of Captain T's questions. Some time later J pointed out to Captain T that he had not in fact posed the question he thought he had. Finally, near the end of the interview when Captain T asked the worker if he had any idea about what caused the grounding of the ship, the worker asked J for permission to respond to the DI panel and was given advice by J that he could do so as long as it was understood to be only conjecture. With the attitudes of Captain C and T to the lawyer accompanying the worker to the interview, we find that J's involvement at the first interview contributed to the employer's perception that the worker was not being fully cooperative and candid with the DI panel in its mission to determine the causes of the ship accident and to give preventive recommendations. We find that J's involvement contributed to the employer's perception that the worker was not suitable as a member of the employer's management team.

[177] With respect to both of the worker's DI interviews, the evidence also satisfies us that Captains C and T believed the worker was not telling them the full story about what he knew or believed may have caused or contributed to the grounding and sinking of the ship. Captain C testified that the worker gave "short answers" and no substantive factors or causes, not even speculation, about what might have caused the accident. Captain C testified although the worker speculated that the bridge crew may have had a problem switching from autopilot to manual steering, this was not a substantive response because what the DI panel really wanted to know was why the bridge crew had not recognized in time that the ship had failed to make a course change – in 14 minutes why the lookout did not see the island straight ahead? Captain C testified: "I knew the what, I needed the why." He explained that even if there was a latent defect that caused the ship to fail to make a course change, the DI panel needed the reasons why the watchkeepers did not bring the ship to a stop in time or in timely fashion call the engineers or the worker to deal with the matter. Captain C testified that he walked away from the first interview feeling that the DI panel was no further along in trying to get to the truth because the worker could not offer any ideas or insightful comments regarding how the accident could have happened.

[178] We find that Captain C and Captain T were expecting the worker to raise and discuss poor navigation practices such as watchkeeping problems, as Captain F had done. This is because the obvious safety problem, no matter what other problems there may have been that caused the ship to fail to make the course change, was that for 14 minutes the bridge crew did not notice a problem and so the ship sailed at full speed on autopilot directly into Gil island. In his interview Captain F promptly raised the problem of casual watchkeeping and referred to the worker as one of the persons who disagreed with Captain F about music being played on the bridge. By contrast, in two DI interviews, the worker never spoke about poor navigation practices despite the DI panel's repeated questions to him to give his opinions on possible causes of the ship accident.

[179] Captain F gave helpful information to the DI panel, information that was directly focused on a probable cause of the ship accident, even if it meant telling them about poor navigation practices on his regular B watch. But the worker did not speak to the DI panel about the issue of poor navigation practices such as casual watchkeeping. We find that this was one fact that led the employer to believe that the worker was trying to protect his job (being more concerned with self-preservation) rather than helping the DI panel get to the root of the ship tragedy. Again, we are not making findings that the worker was trying to hide anything or that the employer was correct in its perception, merely that the employer in fact held a perception that the worker was deliberately not being helpful to the DI panel's investigation.

[180] We note that during the first DI interview, Captain T told the worker that he would be very disturbed and distressed if there was a serious safety concern of which he had not been made aware. This statement is consistent with our finding that the DI panel

members believed the worker knew more than he was saying to them. We also find from Captain C's evidence that the employer was expecting the worker to have some insight into what the bridge crew were doing during the 14 minutes after the ship failed to make the course change and sailed directly into the island. Captain C testified that without testimony from the bridge crew, all the DI panel had was the electronic data. Captain C testified about his view that the worker knew the bridge crew and their personalities because he had sailed with them, and because the worker was with them during the recovery phase after the ship sunk and had "talked to his shipmates to some degree" because they had evacuated together.

[181] Captain C testified that if he had been a Master who had watched his ship sink he would have asked the 2/O or 4/O "what the hell happened – what did you do to my ship?" Captain C testified that he had not heard any evidence from the worker in that regard but that the DI panel was seeking that type of information – in the heat of the moment, what had happened? The worker's counsel suggested in posing cross-examination questions to Captain C that Captain C may well have been wrong in what he believed about the worker's opportunity to speak to the bridge crew and what the worker knew. Nevertheless, whether they were right or wrong, we find that both Captains C and T believed that the worker was not being candid with the DI panel. This directly contributed to their opinion that the worker did not appreciate his role as an exempt Master, part of the management team.

[182] The worker's first interview with the DI was also different from that of Captain F in that when asked, Captain F did not refer to any safety equipment he needed that the employer failed to supply him. The worker responded that he had made more than one request for things to be fixed. Rather than avoid the issue, Captain T asked the worker to give examples. Even when the worker hesitated, indicating that he did not want to get himself or the employer in trouble, Captain T was forceful in stating that he did not want to hide anything but in the interests of safety it was important to get things out. We find that the DI panel genuinely wanted to hear about the worker's safety concerns particularly with respect to matters that may have led to the grounding of the ship. We also found that the DI panel was likely surprised when the worker began to mention safety concerns that were either years old and already resolved, and/or did not seem to be related to why the ship had grounded and sunk.

[183] In reviewing the notes we find that there was clearly miscommunication between the DI panel and the worker, with the worker persisting to discuss safety concerns irrelevant to the causes of the ship grounding and with Captain T trying to get the worker to focus on safety concerns related to the grounding of the ship. For example, immediately after Captain T told the worker that he wanted to talk about the ship accident and what the worker had done to prevent it, the worker began to discuss the issue of pass counts and the need to get an accurate count of the number of people on board. While this issue related to post-collision events such as the evacuation, the worker's answer was

not responsive to Captain T's question that asked the worker to focus on what he could have done to prevent the accident.

[184] There was another discussion with Captain T advising the worker that the DI panel would look into the safety issues the worker was raising but that he wanted to hear about major safety issues that would cause the ship to beach or cause pollution, things that would "piss you off that we are not doing." The worker responded to that direction by discussing an old safety concern about a retrofit module on autopilot that had been resolved well before March 2006 – again, this was not a major safety issue and had nothing to do with reasons for the ship's collision. We find that these exchanges support testimony from Captains C and T that the worker and the DI panel seemed to be having a "different conversation."

[185] We note that the DI panel did discuss some of the worker's safety concerns during the first DI interview and were not dismissive of the worker's concerns. In fact, Captain T asked the worker to provide them with a written list at a later date and that the DI panel would look into the issues. The evidence was that Captain T reviewed the worker's written list and could not find anything that had causative significance to the ship's collision. However, Captain T gave a copy of the list to Captain C and the employer's vice-president of Engineering for them to take action on any issues they felt appropriate. The evidence is that in fact subsequently the employer did act on some of the worker's recommendations.

[186] Captains C and T testified that they expect Masters to raise safety issues and that they were not uninterested in the worker's safety concerns. Further we note that the worker was raising safety concerns that he had raised earlier, sometimes years earlier, with the employer; these concerns had not stopped the employer from promoting the worker to the position of exempt Master. Indeed, the evidence is that through Captain C and the marine superintendent Captain D, the employer had worked hard to persuade the worker to accept the promotion to the exempt Master position.

[187] In our view the safety concerns raised by the worker at the DI proceedings, both verbally and in writing, were not of a nature that would reasonably cause the employer to be embarrassed, angry or upset, particularly during the DI proceedings when at the time, the employer found itself the subject of TSB, R.C.M.P, and other investigatory scrutiny, as well as attention from the media regarding the grounding and sinking of the ship. By contrast, we find that the safety concern about poor navigational practices raised by Captain F would be much more embarrassing to the employer in that context. Yet the employer did not retaliate against Captain F for expressing his safety concern. We conclude that the employer was genuinely interested in seeking the truth to what happened on March 21/22, 2006, in the interests of furthering safety in its fleet.

[188] After considering all the evidence we find that the DI panel was not upset or irritated about the worker's safety concerns in and of themselves or the fact that the worker had

raised them. However, we find that at the time of the DI interviews the DI panel was irritated that the worker was not addressing his mind to safety concerns causative of the ship's accident. Captain T testified that in his view the worker was making a "negative" contribution to the DI inquiry when he persisted in discussing his safety concerns and failed to address himself to safety issues that were causative of the ship's grounding. We find that ironically, the DI panel was not perturbed because the worker had raised the safety concerns he did raise, but rather the DI panel was upset that the worker *was not raising important safety issues that were the focus of the DI inquiry*, namely, safety problems that contributed to the grounding of the ship.

[189] This brings us to Captain C's testimony that while he was not upset that the worker brought up his safety issues at the DI proceedings, he found that they were made in the context of the worker's "larger, defensive attitude" that undermined the relationship the employer wanted to have with the worker as its exempt Master and member of the management team. Captain C testified that the worker's attitude was an attempt to deflect focus from his own responsibility as the ship's Master by referring to old safety concerns that the employer had not dealt well with in the past yet failing to provide useful information about what caused the marine accident. Captain C testified that in failing to focus on matters such as navigational issues, watchkeeping practices, or crew assignment, the worker was essentially implying that the loss of the ship was not his fault or responsibility. In other words, the employer perceived that the worker, in raising the old safety concerns while at the same time failing to focus on safety concerns that led to the grounding and sinking of the ship, was avoiding his responsibility as Master of the ship at the time of its final voyage. Captain C emphasized that he wanted to hear from all of the Masters about safety issues and that he was not upset that the worker had raised his particular safety concerns or even that he had raised them during the DI proceedings. However, Captain C's view was that when combined with the fact that the worker had failed to address substantive causes for the grounding of the ship, the worker's continued focus on safety issues irrelevant to the cause of the accident was a sign that he blamed others for the accident but refused to take any responsibility himself in the chain of events.

[190] The worker submits that the criteria are met for a section 151 violation by the evidence from Captains C and T that they viewed his raising of safety concerns during the DI inquiry at least in part as a diversion from the focus of the DI inquiry and an example of his avoidance of responsibility for the marine accident. We do not agree. We are satisfied that the worker raising his safety concerns, in and of itself, was not the problem for the DI panel or the employer.

[191] The DI panel listened to the safety concerns the worker raised at the first DI interview and there was even discussion during the interview about some of those concerns. Rather than dismissing the worker's safety concerns, the DI panel expressly requested that the worker put all his concerns in writing, and the evidence is that subsequently the employer reviewed his list and even acted on some of his recommendations. We are

satisfied that if the worker had also provided the DI panel with even more safety issues that could reasonably be interpreted as helpful in discovering why the ship grounded, there would have been no concern by anyone on the DI panel that the worker was being evasive or unhelpful to the inquiry.

[192] We find that it is not fair or reasonable to isolate a few sentences from the testimony of Captains C and T from the overall context of the DI panel's message to the worker and the employer's response to his concerns. Viewing the evidence about the DI interviews as a whole and considering the testimony from the employer's witnesses as a whole, we find it clear that it was not the raising of the worker's safety concerns that was the problem for the employer. Rather, it was the worker's failure to address himself to the focus of the DI and, as requested by the DI panel, turn his mind to providing them with helpful information about the sinking of the ship.

[193] The purpose of section 151(c)(i) of the Act is to prevent employers[12] from disciplining or taking other discriminatory action against workers because they have raised occupational health or safety issues. The statutory provision is intended to protect workers who raise such issues from reprisal. It is not, however, intended to be used as a shield by workers against employer actions that are not directed at discouraging workers from raising occupational health and safety issues. In other words, simply because a worker raised safety concerns before experiencing adverse employment consequences does not necessarily lead to a successful section 151 complaint (although it may raise a *prima facie* case and the section 152(3) presumption for an employer to rebut). See *WCAT-2007-03653* (November 26, 2007). If this were not the case then any worker could protect himself or herself from disciplinary action simply by making sure to raise a safety issue at a critical time, for example, when knowing that they are the subject of a personnel or human resources investigation. As noted in *WCAT-2009-03326* (December 24, 2009):

> The worker relies on the contextual link that his employment termination has with his raising of safety issues with the employer. I find that in this case, that contextual link is merely a coincidence. Indeed, because the worker's role as a CSO involved a requirement that he report safety issues on a daily basis to the employer, whatever reason the employer gave for terminating his employment would necessarily be embedded in the context of the worker raising safety issues. This does not mean, however, that an employer in such a situation can never rebut the section 152(3) presumption that will likely arise when an employer's action against a worker takes place within an occupational health and safety environment. The task to decide whether the evidence establishes the good faith (the *bona fides*) of an employer's stated motivation for taking action against a worker.

[12] And trade unions

[194] Similarly, in this case, the focus of the DI was to investigate safety concerns and the worker was expected, indeed he was asked, to address his mind to safety issues and speak about them to the DI panel. The employer's perception was that the worker was not helpful to the DI and that at the DI hearing he did not behave as the employer expected and wanted a management team member to behave. Occupational safety issues were the context for the DI inquiry and thus the employer's reasons for terminating the worker's employment are of necessity embedded in that overall context which again of necessity includes the worker raising safety concerns to the DI panel.

[195] We are satisfied that whether the worker had raised his safety concerns or instead had proceeded to discuss some other matter, for example, such as the state of the weather on the day of the DI interviews, the ultimate response of the DI panel would have been the same, namely, to try to focus his attention on reasons for the ship's grounding. If he had continued to discuss the weather but failed to address critical issues such as the state of the navigational watch, watchkeeping practices, or crew assignment, we are satisfied the DI panel would similarly have concluded that the worker was evading responsibility for the marine incident and not acting like a management team member. In other words, it was not the topic or content of the worker's concerns in and of itself that bothered the employer but rather the fact that the worker was not talking about critical safety concerns that they expected him, as an exempt Master and member of the management team, to address.

[196] We next turn to assess specific questions posed by Captain T to the worker during the DI interviews. The worker refers to the fact that twice during his first DI interview Captain T asked him why, given the worker's answer that he had serious concerns before he accepted the promotion to exempt Master, he had decided to take the job. In his testimony Captain T explained that he asked the worker the question because he was curious for several reasons. First, he knew that years earlier the worker had been above him on the seniority list for promotion to exempt Master and he understood that the worker did not take the opportunity for promotion until very recently. Captain T said he wanted to know why the worker had a sudden change of heart and accepted the promotion to exempt Master, given that he had just told the DI panel that he did not get along with the senior Master (Captain F) and the employer had not always been responsive to his safety concerns. Further, Captain T indicated that he wanted to know if the worker, as exempt Master, believed that the safety concerns he had raised were manageable risks that did not impact on the seaworthiness of the ship.

[197] In cross-examination Captain T disagreed with the suggestion that he did not believe the worker was a good candidate for the exempt Master position because he had raised safety concerns in the years prior to his appointment. Captain T responded that he thought the worker was a very good candidate and had sailed well as a Master[13] prior to his promotion. (We note that Captain T signed the employer's letter offering the worker

[13] The worker was a bargaining unit Master at that time

the promotion.) Captain T also testified that his curiosity had been satisfied by the worker's answer to his question, namely, that the worker had spoken to Captain C and had been assured that the employer would listen to him and that he would have a "voice at the table".

[198] The worker submits that the effect of Captain T's question, posed twice, to the worker as well has his explanation in oral hearing testimony is that Captain T was saying that the worker should not be a Master of a ship if he has safety concerns. Therefore the employer terminated the worker's employment because of Captain T's opinion that a Master with safety concerns has no place on the employer's ships. We disagree with that assessment. It is inconsistent with what we have found to be credible testimony from both Captains C and T that they wanted to hear safety concerns from Masters and that indeed it was an important part of the job of an exempt Master to be open and frank about safety concerns with other members of the employer's management. It is inconsistent with the fact that the DI panel had asked the worker to provide a written list of all his safety concerns that did not relate to causes of the marine accident and that in fact, the employer acted to deal with at least some of the outstanding matters. It is inconsistent with the fact that Captain F discussed very serious safety concerns at his DI interview (which were subsequently directly attributed by the DI report and the TSB report as causative of the ship's grounding) yet did not experience reprisal from the employer. It is inconsistent with the fact that the worker had raised the same types of safety concerns in the years before he was promoted by the employer to the position of exempt Master. The employer was aware that the worker had actively promoted safety issues over the years but still asked him to accept the promotion, encouraging him that it would provide him with an opportunity to be more effective in operational matters including safety matters.

[199] We find that given the circumstances, Captain T's question was not unfair or inappropriate. We find it logical that he would be curious, for the reasons stated, regarding why the worker had accepted the promotion to exempt Master. We also find it logical that Captain T, in the context of the inquiry into the marine accident, was trying to assess the seaworthiness of the ship before its final sailing. As Captain C had testified, a Master (exempt or not) should not sail a ship he or she does not believe to be safe in the sense of seaworthy. Therefore it was important to establish that the worker did believe the ship to be seaworthy when he accepted the position of exempt Master and despite the safety concerns he had mentioned to the DI panel. We do not find that Captain T's comments establish that the employer was angry even in part about the worker raising safety concerns and was motivated to terminate the worker's employment because he did so.

[200] Next, we turn to Captain T's question to the worker at the end of the worker's second DI interview. Captain T commented that the worker was not happy and immediately asked him if he still wanted to work for the employer. As we earlier indicated, the DI panel notes are unclear as to the worker's response – Captain C's notes indicate

that he said yes but other notes refer to a comment about a shirt with company sayings at the bottom of the sea. Captain T indicated that while he remembered the latter response from the worker at the DI interview, he did not understand what it meant at the time and he still did not know what it means.

[201] We have found that after the worker's first DI interview Captains C and T had already made up their minds that the employer should terminate the worker's employment. We note that at the outset of the second interview, after acknowledging the worker's written list and asking for the missing page, the DI panel gave the worker another opportunity to provide his speculation or theories about why the bridge crew, for 14 minutes, did not notice the ship's failure to make the necessary course change. The worker had nothing substantial to say on the matter and for reasons we have earlier given, we find that Captains C and T were not pleased with his lack of response, still believing that he knew or suspected more and that he was not sharing information with them. We also note that the DI panel raised Captain F's safety issue about the problem with the watch following different procedures than the Senior Master's procedures posted on the bulkhead, but this time the issue was directed at the worker specifically in the context of his approving different autopilot procedures than the procedures Captain F had posted on the bulkhead. Given the testimony from Captains C and T on this point, we find that they believed the worker was at fault for not posting the new procedures on the bulkhead as well as not consulting with the Senior Master on the matter, and that to them, this was another indication of the worker's failure to appreciate his role as a member of the management team.

[202] Thus Captain T posed the final interview question to the worker in the context of Captain T already having made up his mind well before the second interview took place that the employer needed to terminate the worker's employment. Captain T's evidence was that he had discussed the matter with Captain C and in Captain T's view "if you lose a ship and you won't take responsibility, you won't be sailing anymore."

[203] In cross-examination Captain C was asked if he believed Captain T's question was a "proper question". Captain C answered in the affirmative, explaining that while Captain T should be the one to explain what he meant when he asked the question, if Captain C had asked the question he would have meant that if a person wanted to work for the employer, Captain C would expect insightful comments from that person about what happened to the ship. Captain C testified that because it is a marine tradition that having lost a vessel, the Master of the vessel would be looking to move on to another place of employment, it was also an appropriate question to explore what the worker's views were on that matter. Captain C testified that he inferred from the worker's response that the employer was not in bad shape, that there were a lot of good things going on, and that despite the marine accident, the worker still wanted to work for the employer.

[204] Under cross-examination Captain T testified that his impression was that the worker was unhappy throughout both interviews and that is why he made the comment that the worker was unhappy. In describing what he meant by "unhappy" Captain T testified that it was the worker's deportment, the way he answered the questions in a very off-handed, detached way. Captain T said the worker's demeanour was different than Captain T had experienced with other witnesses at DI inquiries. Captain T said sometimes he felt like he and the other DI panel members were wasting the worker's time. Captain T agreed under cross-examination that the worker was "forthright" in responding to questions but said that in his tone the worker was "almost dismissive" in responding. We interpret Captain T's evidence on this point as meaning that the worker did not hesitate in answering questions and answered promptly, although in doing so appeared brief, distant, and dismissive in his responses. With the worker's unhappy demeanour, the evidence that he did not get along with the Senior Master and the worker's indication that no one was listening to his safety concerns for 17 years, Captain T wanted to know if the worker still wanted to work for the employer.

[205] We are satisfied that Captain T did recognize that the worker was unhappy about the employer's failure over the years to respond to his safety concerns the way in which the worker would have liked to have seen. Captain T acknowledged that he understood the worker was unhappy in that regard. We find that it would be obvious to any reasonable person by reading the worker's list of safety concerns and the notes of his two DI interviews, that the worker was unhappy with the employer's responses (or lack of them) to many of his concerns. But in any organization reasonable persons may disagree about how to resolve safety issues; it is clear that Captain F was also not entirely happy with management's response to his safety concerns. The evidence is that the DI panel wanted to know about these Masters' experiences, especially the negative ones, in dealing with fleet safety issues. The evidence of Captains C and T satisfies us that the worker's demeanour at the DI proceedings went well beyond a person who was dissatisfied or unhappy about the employer's response to his safety concerns. Their evidence illustrates that they perceived the worker as uncooperative in assisting the employer's DI panel to uncover the safety issues that led to the marine accident and his overall unhappy demeanour reflected his rejection of the DI's purpose. With that in mind, we find that it was reasonable for Captain T to comment on the worker's unhappy demeanour and ask the worker if he still wanted to work for the employer.

[206] The worker submits that because Captain T perceived that the worker was unhappy about how the employer had dealt with his safety concerns and asked if he still wanted to work for the employer, the link is established between the employer's motivation to terminate the worker and the worker's raising safety concerns. In other words, the employer's perception that the worker had a bad attitude, not in keeping with the employer's management style and expectation of its managers, was because the worker appeared unhappy about how the employer failed to adequately respond to the

safety concerns he had raised over the years. The Board case officer found that at least part of the employer's motivation for terminating the worker's employment was because the employer was displeased about the worker voicing his list of safety concerns. With the benefit of the oral hearing evidence, we disagree with that assessment of the employer's motivation.

[207] In *WCAT-2004-05922* (November 10, 2004) WCAT denied a worker's appeal of a Board decision dismissing his section 151 discriminatory action complaint. The worker had complained about the employer's message that the worker was spending too much time on safety issues and that his approach in raising safety issues was confrontational and aggressive rather than assertive and productive. In that decision WCAT found that the employer had encouraged the worker to take an active leadership role on a safety committee and told him it was not trying to discourage him from raising safety issues. WCAT concluded that it was not reasonable to take some of the employer's comments out of context and at face value; instead it was important to assess the overall evidence which revealed that the employer's message was that the worker needed to re-evaluate his communication style and overall approach, not to prevent the worker from raising safety issues.

[208] Similarly, with the purposes of section 151 of the Act in mind, we find that in this case that Captain T's question cannot be viewed in isolation from the entire evidence. For the reasons we earlier gave, in promoting the worker the employer knew that the worker had a history of raising safety concerns yet encouraged him to take a leadership role as a member of the management team and this included an expectation that as a senior Master he would raise safety concerns. We find that the worker's unhappiness with the employer's responses to his safety concerns, the worker's identification of the safety issues and pointing out his views of the employer's lack of adequate response, was not in any part the motivation for the employer terminating his employment. Rather, the evidence satisfies us that it was Captains C's and T's perception of the worker's cold detachment and apparent disinterest in the DI's purpose that did form part of their motivation to terminate his employment. The perception that the worker was rejecting the purpose of the employer's DI panel was justification, in our view, for Captain T to comment on the worker's apparent unhappiness and ask him if he wanted to continue working for the employer.

Our responses to the worker's other submissions

[209] We now respond to other submissions made by the worker in final argument. These will be summary responses for the sake of brevity.

Failure of all members of the employer's executive team to testify

[210] We note the worker's argument that the employer failed to illustrate its state of mind by merely calling two witnesses, Captains C and T. The worker points out that the termination decision was made at the executive level and involved several executive vice-presidents as well as the employer's president. By hearing evidence only from Captain T who was one of the executive vice-presidents, and Captain C who was a vice-president but not an executive vice-president, the worker says the employer has not led any or sufficient evidence to exclude the possibility that the employer's termination decision was free of anti-safety animus.

[211] We disagree. We do not consider that an employer is required to lead evidence from every possible participant in a termination decision that is alleged to contravene section 151 of the Act. That is particularly so where, as in this case, the employer is a large corporation and the evidence indicates that it delegates some of the substance of its decision-making to other appropriate levels within the corporate hierarchy. In our view, it is enough for an employer to lead evidence from the primary or key players involved with the decision in question.

[212] In this case, Captain T testified about the procedure adopted by the employer in deciding to terminate the worker's employment. Captain T said that the termination was technically decided at the executive level; however, as a practical matter this decision was made on the basis of Captain C's recommendation and with additional input from Captain T at the executive level.

[213] We note that the worker ultimately reported to Captain C who was the vice-president in charge of the employer's fleet operations. In addition, Captain C had been instrumental in hiring the worker as an exempt Master and knew the worker's qualities as a mariner from personal observation and experience. Captain C also had the opportunity to observe the worker during the DI.

[214] It follows that Captain C was both sufficiently senior and sufficiently knowledgeable to reasonably have been tasked with the responsibility of evaluating the worker's employment status after the sinking. We are therefore satisfied that that Captain C's recommendation would have been central to the employer's decision to terminate the worker's employment.

[215] In addition, we note that Captain T, as an executive vice-president, added his endorsement of Captain C's recommendation at the executive level where the decision was made. Captain T's input at the executive level was the result of him having participated in the DI, of being an experienced mariner, and of having known the worker for many years. Captain T's contribution at the executive level would therefore have been particularly persuasive.

[216] Accordingly, we are satisfied that the combined effect of Captain C's termination recommendation together with Captain T's similarly persuasive input at the executive level provides sufficient insight into and explanation for the employer's motivation at the time it decided to terminate the worker's employment.

[217] Consequently, we do not agree with the worker's argument that the employer has failed to lead sufficient evidence to properly describe its intention and state of mind at the time of the worker's dismissal and thereby rebut the *prima facie* case of discrimination established by the worker.

Failure to credit the worker with heroism and a prompt evacuation

[218] The worker referred to a variety of examples where in his submission, Captains C and T downplayed the worker's heroic actions during the evacuation and rescue mission on the night of March 22, 2006. The worker submits that their reluctance to give the worker full recognition in that regard compromised their credibility on the key issues in this appeal.

[219] Several times in their testimony both Captains C and T did acknowledge the worker's heroism, the difficult challenges posed by the marine accident, and his role in leading the crew to evacuate the ship and rescue as many people as possible. They also readily acknowledged his skills as a ship handler with Captain C testifying that the worker was a better ship handler than him. We agree that there were other times, notably during cross-examination, when they needed to be pressed to give the worker full credit on certain points. There were also a few instances when they did not readily agree with certain propositions put to them by the worker's legal counsel and then when pressed, did agree.

[220] We do not find, however, that those instances compromised their credibility on the key appeal issues. We found that sometimes those instances were merely examples of the type of "sparring" that can occur during vigorous cross-examination as in this case. We find that other times these instances revealed that Captains C and T, while trying to be fair in their assessment of the worker, were also influenced in their answers by personal feelings of antipathy toward him. We find that Captain C feels the worker betrayed him by accepting the promotion to exempt Master yet failed to embrace the employer's management values. Captain T, although he testified that he respected the worker in many ways, clearly did not respect the worker as a management team member. In short, the worker was not "one of them" in the sense of behaving like a member of the employer's management team and they disliked him for it. We find that more than anything, this was the reason for their occasional reticence in praising him.

Employer's failure to comply with Fleet Regulations for a record of the DI proceedings

[221] Under item 9.09 of the employer's Fleet Regulations, a DI chair must, among other responsibilities, arrange for a record of the DI proceedings, "either by tape or by a recording secretary." This did not happen with the DI investigation of the grounding and sinking of the ship. The evidence was that the first DI chair, who resigned very soon after the DI convened, did not make those arrangements. The testimony from Captain T who succeeded as the DI chair was that he simply continued on with the same procedures as established by the first DI chair and did not see the need for any type of formal recording such as an audio or video tape or official transcript by a recording secretary. In Captain T's view, he had the authority to promulgate Fleet Regulations and therefore could authorize any deviation from them. In his view, handwritten notes of DI panel members were a sufficient record of the proceedings.

[222] The worker submits that it is hypocritical and unreasonable for the employer to claim that it lost confidence in his ability as a Master when the employer itself failed to comply with its Fleet Regulations. There was also a suggestion in cross-examination of the employer's witnesses that the failure to have a formal record of the DI proceedings was an attempt to hide the proceedings from scrutiny.

[223] Section 151 of the Act is not a "just cause" provision and therefore we do not have a mandate to decide whether or not the employer's termination of the worker's employment was unfair, hypocritical, or unreasonable except as related to whether or not the employer has rebutted the basic case of unlawful discrimination under the Act raised by the worker.

[224] The worker's suggestion is that the employer's failure to record the DI demonstrates a cult of secrecy. However, in our view, the employer's failure to record the DI must be considered in the context of the other investigative proceedings being conducted at that time by the TSB and the R.C.M.P. Indeed, both the employer and the TSB intended to issue public reports in this regard. We also take notice of the considerable media attention following the sinking of the ship. Finally, we point out that although the DI was not formally recorded there were five DI members, including a trade union member, taking notes of the DI proceedings. In these circumstances we are not satisfied that the employer's decision not to formally record the DI proceedings leads to any particular conclusion either for or against the employer's ability to rebut the *prima facie* case raised by the worker under section 151 of the Act.

[225] From Captain T's testimony we find that he clearly believed that there was no necessity for a formal record and he did not need to comply with Fleet Regulations' requirement for a formal record of the DI proceedings. We find that Captain T's decision to carry on the DI proceedings without making arrangements for a formal record was not motivated

by malice toward the worker. We do not find a relationship between the employer's decision not to arrange for a formal record of the DI and its decision to terminate the worker's employment.

Did the employer withdraw its opposition to the worker's reinstatement?

[226] The worker submits that the employer's claim that it has lost confidence in the worker as exempt Master and would not accept him in that role again is hollow given that the employer withdrew its opposition to the remedy of the worker's reinstatement in its December 9, 2008 submission to the Board case officer. The worker says that the employer cannot persist in its position that trust and confidence in the worker are irrevocably lost in light of its reversing its position on remedy in the Board proceedings.

[227] After reviewing the December 9, 2008 employer's submission to the Board case officer, we disagree that it constitutes a withdrawal of the employer's opposition to reinstatement as a remedy. The letter begins with the employer's indication that it objected to the case officer's ruling on an evidentiary matter concerning the conditions placed upon the employer providing an expert opinion in response to the worker's expert opinion regarding damages. The employer then states as follows:

> In light of the ruling by the Investigations Division, which decided to received the Complainant's expert evidence in respect of the issue of remedy, and the limitation imposed upon the Employer to provide expert evidence which addresses only the quantum of the Complainant's loss without any comment on the assumptions underlying the calculation of that alleged loss, *the Employer, for purposes of this proceeding only and without prejudice to any arguments which it may make on appeal, does not make **further** arguments against an order of reinstatement.*
>
> [bold and italic emphasis added]

[228] The employer further went on to state that with respect to an order of reinstatement the employer repeated and relied upon the submissions it had made in its October 9, 2008 submission. We note that the October 9, 2008 submission opens with the employer's view that it does not agree "that reinstatement is an appropriate remedy in all of the circumstances of this case, and certainly not on the conditions proposed by" the worker's counsel. The employer requested that "a reasonable amount in respect of severance be provided" to the worker. On page 4 of that submission the employer again stated that it would be inappropriate to reinstate the worker to the position of Master "or to any position" with the employer "under all of these circumstances. The employer repeats that it has lost confidence in the worker's ability to serve as the Master of a vessel as the result of his utter failure to appreciate the responsibilities of that position."

[229] In the October 9, 2008 submission the employer made an alternative submission that applied only in the event that the Board case officer decided to order the worker's reinstatement; that alternative submission was that reinstatement be only to the position of exempt Master with the employer entitled to use its discretion to assign the worker according to its operational needs.

[230] We find that the employer's statement that it was not going to make further submissions against reinstatement but relied on its earlier October 9, 2008 submissions on the matter (which opposed reinstatement), and the fact that its alternative submission was predicated only on the event that it would be required by law to comply with a Board order to reinstate, does not constitute the employer reversing its position on remedy. Under cross-examination Captains C and T were asked if they could explain the employer reversing its position on reinstatement as inappropriate and they had no knowledge of such a reversal. They were firm in their testimony that the worker should not work again for the employer and they did not understand that the employer had changed its mind on that point. Their unshaken testimony supports our interpretation of the employer's December 9, 2008 submission.

[231] We also note that the employer requested WCAT to stay the Board case officer's decision on remedy, pending the outcome of these appeal proceedings. Such a request for a stay indicates that the employer continued to oppose the Board case officer's remedy decision, including the order for the worker's reinstatement.

Employer's January 15, 2007 letter explaining why it was terminating the worker's employment

[232] The worker has referred to the fact that the employer falsely advised him in the January 15, 2007 termination letter due to operational and staff requirements that it no longer required his services. The employer's response to the Board was that it was an attempt to "soften the blow" of the employment termination, given its gratitude for the worker's actions in the evacuation and rescue of the ship's crew and passengers. The employer confirmed that the worker's termination was without cause and that the employer did not consider it necessary to describe to the worker its perception of his shortcomings.

[233] The worker's response is that it is disingenuous for the employer to claim that it wanted to soften the blow for him because the employer has been high-handed and arrogant, "evincing a complete disregard for the 20-year career path" leading the worker to become an exempt Master. The worker's position is that the employer was lying at the time to cover up its unlawfully discriminatory reasons for terminating his employment and that it has continued to try to cover up the reasons throughout the proceedings before the Board and WCAT.

[234] We find that the employer's explanation to the worker in the January 15, 2007 letter was because it was not relying on "just cause" as a reason for terminating his employment and was planning on a severance arrangement; the letter also requested the worker to have his legal counsel contact the employer's legal counsel to discuss separation arrangements. In July 2007 the employer then made the proposal of retaining the worker on full payroll and benefits through to April 15, 2008 together with providing a letter of reference. We accept the employer's explanation that not relying on just cause as a reason for dismissal, the employer did not see the need nor did it want to provide details for its opinion that the worker was not suitable as a member of the employer's management team. This may be characterized as "softening the blow" or merely avoiding unnecessary statements. We do not find that the evidence establishes that the employer's failure in the January 15, 2007 letter to state the true reasons for the employment termination was an attempt to disguise reasons for termination that contravened the unlawful discrimination provisions of section 151(c)(i) of the Act.

"Complete exoneration" – "Blame" – Specific issues relating to the worker's performance as the ship's Master

[235] A great deal of time was spent during the oral hearing on specific items referred to in the employer's April 8, 2008 submission to the Board case officer as relating to the worker's performance as the ship's Master. We emphasize that the employer's submission was made in response and in dispute of a statement made in the worker's written complaint to the Board that the DI report "completely exonerated" him. The worker has also repeated that statement in submissions in this appeal.

[236] The *Concise Oxford Dictionary* (9th ed., 1995) defines the word "exonerate" as meaning to "free or declare free from blame" or to "release from a duty." Just as the TSB report should not be construed as assigning fault or determining civil or criminal liability, we find that the DI report should also not be construed in those ways. The DI report is written in an objective tone that does not purport to directly assign blame, responsibility, or accountability to any person. The DI report does not name any person or persons as at fault for the marine accident. The DI report is the report of all its members although the evidence is that Captain C was the person mainly responsible for authoring it. His evidence was that the DI report was not intended to blame anyone for the marine accident.

[237] Having said that, we find that the DI report does not exonerate anyone from responsibility or accountability for the grounding and sinking of the ship. Its purpose was not to cast blame or assign responsibility or accountability, but neither was its purpose to relieve anyone from responsibility or accountability for the accident. Captain C testified that the concept of "fault" is a complex matter – it was not one

specific thing that caused the accident but a complex chain of events. Captain T similarly testified that usually with an accident of that magnitude it was not just one big thing that caused the accident but rather a lot of little things. Captain C listed a number of persons and things that in his view were at fault for the accident, including himself and other employer officers on the list as well as the "maritime industry" and "Canadian culture." He explained that this was why the DI report gave a long list of recommendations and conclusions, in an effort to try to improve the safety of the fleet. The objective of the DI report, he said, was not to place responsibility for the accident on the worker's shoulders.

[238] With that background we turn to briefly examine some of the specific items referred to in the employer's April 8, 2008 submission to the Board case officer and to assess the worker's submission that in raising those items the employer is not credible in maintaining that it lost confidence in the worker as an exempt Master. In general the worker's arguments in that regard fail to appreciate the important distinction between misconduct or fault and a Master's ultimate responsibility for everything that occurs on his ship:

- The deck watch failing to maintain a proper lookout by all available means; and the DI report's finding that a casual watchkeeping behaviour was practiced at times on the ship;

  There was considerable evidence from Captains C and T on these matters which supports a finding that the employer did hold the worker accountable for the deck watch failing to maintain a proper lookout. First, they held him accountable simply because he was the Master of the ship that grounded and sunk. They perceived that despite his position as Master he took no accountability for the watch's failure and so lost confidence in him as an exempt Master. Further, we find that because the DI investigation found that a radio had been playing on the bridge before the ship's navigational error (albeit that the evidence is that the music began to be played after the worker had retired to his cabin for the evening), and because Captain F identified the worker as one of the Masters who allowed music on the bridge, the employer did fault the worker for at times setting a casual tone for the bridge watch. This is clear from Captain C's testimony at the oral hearing on this point.

  On cross-examination Captain C also indicated that it "entered his mind" as a contributing factor to his losing confidence in the worker as Master that the worker should have considered removing the QM1 from the deck assignment. The evidence did not support that it would have been reasonably possible for the worker to have made that change in the crew assignment and that the indications were that the crew were properly trained and certified for the watch. Although the worker argues that Captain C's testimony on this point illustrates that his entire testimony in the proceedings is not believable, we do not agree. We find that this was an

example where Captain C's antipathy toward the worker, and Captain C's quest for perfection in a ship Master, coloured his views on this point. We do not find that it renders the employer's position not credible that it lost confidence in the worker as Master because of the problem with the casual watchkeeping behaviour on the ship and the bridge crew's failure to follow proper navigational practices on the night in question.

- Challenges with the cabin sweep (absence of a passenger cabin assignment list, absence of chalk to mark cabin and stateroom doors; the fact that multiple pass keys were required to open staterooms and cabins);

  We find that the evidence on this point from Captains C and T establishes that these factors were not such safety risks that rendered the ship unseaworthy and were no basis for the worker to have refused to sail the ship. The passenger cabin assignment list was the responsibility of the chief steward and the terminal manager on shore, although it was a flaw on the ship for which the Master was ultimately accountable. This was the same situation with the multiple pass keys and the absence of chalk – while no personal blame can reasonably be attributed to the worker for these problems, the employer's position reflects only the principle of ultimate accountability of the Master. We find Captains C's and T's reticence under cross-examination to forthrightly state that the worker was not responsible for these matters reflects a combination of (a) their firm position that a Master is responsible for everything that goes wrong on his or her ship (b) their antipathy toward the worker and (c) with some of their answers on cross-examination, sparring with the worker's legal counsel.

- The failure to take the log book ashore;

  It was very clear from Captains C's and T's testimony that a ship's log book is a vital document that usually does not leave the Master's possession, and that it is a critical item of information for investigations after marine incidents. In this case, in the emergency situation after the ship's collision, the worker directed one of his officers to take the log book. The worker was understandably preoccupied with other critical matters such as saving lives during the evacuation. The designated officer forgot the log book when he evacuated. The sum of testimony by Captains C and T is that this one small matter would not cause them to lose confidence in the worker except, again, insofar as the log book is the ultimate responsibility of a ship's Master. We find that this issue was raised in the employer's submissions to the Board largely to demonstrate that the worker's performance as Master was not "perfect" and thus to dispute the worker's submission that the DI Report completely exonerated him.

- Countermanding Senior Master's bridge orders;

  This was a matter that the DI Report found was not causative of the ship's grounding. Further, Captains C and T testified that the worker's procedures may well have been better, in the sense of being simpler, than the posted procedures. We find that nevertheless Captains C and T had the opinion that the worker was wrong to have changed the bridge orders without posting new orders and without consulting the Senior Master and/or marine superintendent. In their view this reflected poorly upon the worker as a member of the employer's management team and it caused them to lose confidence in him as an exempt Master.

[239] For the foregoing reasons, we find that the list of items mentioned in the employer's April 8, 2008 submission to the Board case officer do not detract from the credibility of the employer's position that it lost confidence in the worker as an exempt Master. Largely, they reflect the employer's disagreement with the worker's submission that he was completely exonerated by the DI report. In the employer's view, that submission alone illustrates that the worker does not understand the ship Master's role of being ultimately responsible for everything that goes wrong on the ship. They are mentioned to dispel the notion that things were perfect or there was nothing that possibly could have been done better by both the employer and the worker.

[240] In his testimony Captain T identified two small issues, one involving a failure of the ship to have proper sound signals, and the lack of an adequate number of radios, as part of the employer's decision to terminate the worker's employment. He referred to the sound signals as a very small factor in his decision that the employer needed to terminate the worker's employment. With respect to the insufficient number of radios on the ship, Captain T indicated that this problem did not cause him to lose confidence in the worker but that in his view it was a small contributory factor in the employer's decision to terminate the worker's employment. In our view Captain T's reference to these small matters was his way of sticking to his position that the worker's performance as Master was not perfect, that as Master the worker was totally accountable for every single flaw on the ship and to dispute the worker's submission that the DI report completely exonerated him. Our view was that otherwise these matters had very little significance for the employer in making the decision to terminate the worker's employment.

Typed notes of DI panel member Mr. E

[241] The worker was concerned that the typewritten version of Mr. E's notes of the DI interviews had been altered to intentionally add an exclamation point to provide extra emphasis to one of Captain T's statements in an improper attempt to highlight the employer's commitment to safety. We are not prepared to read that much into the change to the handwritten notes. However, we have not relied on the typewritten version of Mr. E's notes for this decision.

The Morfitt Report

[242] The worker refers to the Board case officer's reliance on the Morfitt Report as illustrating that tension between the employer and the union was sometimes an impediment to resolving operational safety issues. This in turn led the case officer to infer that at least part of the employer's motivation in terminating the worker's employment was that by raising safety issues, the worker had aligned himself with the union and therefore was not suitable as a member of the management team. We disagree with that argument. We have found that the employer, particularly in the context of the DI, was not averse to hearing safety concerns. On the contrary, we have found that the employer expected and required interviewees, including exempt Masters, to fully canvass relevant safety issues.

Conclusion

[243] We allow the employer's appeal and vary the Board case officer's decision dated July 21, 2008 to find that the employer has rebutted the statutory presumption in section 152(3) of the Act and to find that the employer did not violate section 151(c)(i) of the Act.

[244] Our conclusion is that the employer was not motivated in any part to terminate the worker's employment because he acted under section 151(c)(i) of the Act in raising safety concerns. Rather, we have found that with the sinking of the ship and the loss of two lives, the worker's continued employment as exempt Master was already in serious jeopardy. Subsequent events confirmed, in the employer's mind, that the employment relationship could not continue. We have found that the employer terminated the worker's employment because he was the on-duty Master of a ship that sunk and in that position he was accountable for that accident; further, the employer lost confidence in the worker's suitability as an exempt Master due to the employer's perception that the worker failed to accept ultimate responsibility and accountability as Master for the marine accident and due to the employer's perception that the worker did not appreciate his role as a member of its management team. We have found that these were the sole reasons for the employer's termination of the worker's employment.

[245] We note that the employer does not take the position that it had just cause to terminate the worker's employment. We have no jurisdiction to make any findings on an issue of just cause, only on whether the employer violated section 151 of the Act.

[246] The grounding and sinking of the ship on March 22, 2006 was a tragedy that cost two people their lives. It was also a tragedy for the worker who had only recently accepted the promotion to exempt Master. By all accounts, prior to the sinking of the ship the employer viewed his performance as a Master as excellent. The worker was asleep in

his cabin at the time of the ship's collision and there is no question that he was entitled to be there at the time. His role in the evacuation and rescue of the ship's passengers and crew was heroic. Our ruling in this appeal does not detract from the courage and leadership he displayed in the aftermath of the marine accident.

[247] In this appeal there were no requests for reimbursement of appeal expenses and we make no order in that regard.

Heather McDonald
Vice Chair

Lesley A. Christensen
Vice Chair

Warren Hoole
Vice Chair

HMcD/hb

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