Date: 20140822

File: 566-02-7727

Citation: 2014 PSLRB 79

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

PIUS GREGORY BURKE

Grievor

and

DEPUTY HEAD
(Department of National Defence)

Respondent

Indexed as
Burke v. Deputy Head (Department of National Defence)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Michael F. McNamara, adjudicator

For the Grievor: Himself

For the Respondent: Allison Sephton, counsel

Heard at Halifax, Nova Scotia,
July 9 to 12 and December 3 to 5, 2013.

I. Individual grievance referred to adjudication

[1] Pius Gregory Burke ("the grievor") grieved what he characterized as his wrongful dismissal. He believes that he is fit to work and challenged the Treasury Board's ("the employer") refusal to allow him to return to work. He requested compensation for lost wages and for damage to his character and reputation. He requested that his security pass be returned and that he be given back his job.

[2] At the outset of the hearing, the grievor sought permission to record the proceedings. He believed doing so would assist him in his self-representation. Following a discussion, which referenced a similar request he made in an earlier adjudication, I refused the request. In 2012 PSLRB 119, the adjudicator ruled as follows at paragraph 8:

> *[8] I overruled Mr. Burke's objections. I observed that, as a rule, hearings held pursuant to the* Public Service Labour Relations Act *are not recorded, subject to exceptional circumstances, which did not exist in this case. The fact that a hearing is not recorded does not offend the rules of natural justice: see* Turner v. Canada (Canada Customs and Revenue Agency)*, 2004 FC 1558; and* Nash v. Treasury Board Secretariat (Correctional Service of Canada)*, 2008 FC 1389*....

[3] At this point, counsel for the employer raised a preliminary objection to my jurisdiction to hear this case. She stated that the grievor had not been dismissed but had been placed on sick leave without pay, which was only an administrative measure and was not covered by paragraph 209(1)(*b*) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*").

[4] The grievor responded that he had been wrongfully dismissed and referred to a letter from the employer dated April 5, 2013, requesting a fitness-to-work evaluation (FTWE) for him. He identified that the letter stated that he was not permitted to report to work.

[5] The grievor also produced documents from his own physician that indicated that he was readily available and able to return to full duties.

[6] When the employer continued to refuse to allow the grievor to return to work, and when it issued a separation certificate for him, he believed that he had been dismissed.

[7] I told the parties that I would reserve on the issue of jurisdiction and proceed with the evidence portion of the hearing.

II. Summary of the evidence

A. For the grievor

[8] The grievor is employed by the Department of National Defence as a shipwright, classified SR-WOW-08, at FMF Cape Scott in Halifax, Nova Scotia.

[9] At the outset of the hearing, the grievor presented three volumes of documents, which he indicated he would refer to throughout his testimony.

[10] The grievor's testimony was related to actions the employer took to keep him away from the workplace as well as to his evidence that he was fit to return to work and that he had medical clearance to do so.

[11] The grievor began by explaining that the employer had issued a record of employment (ROE) that he had not requested and that had been inaccurate. In a conversation, his pay office had indicated that an employer must issue an ROE when pay has ceased, which in this case occurred when the grievor ran out of leave credits. The grievor wanted to contest a statement in the ROE that indicated "illness or injury" as the reason for the cessation of his pay. While he had left the workplace on May 11, 2011, because he had been feeling ill, he was no longer ill and, therefore, was not away from the workplace because of "illness or injury." At the Employment Insurance (EI) office, he was told that he could request an investigation into the reasons for the ROE only if he actually applied for EI, so he did. Following a fact-finding process that it conducted, Service Canada determined that he had lost his job through no fault of his own (Exhibit 6). He believed it had been a wrongful dismissal.

[12] The grievor went on to testify that he continued to receive letters from the employer concerning an FTWE. It is useful to reproduce one at this point (Exhibit 1). It contains a request to a medical officer for an FTWE of the grievor that summarizes the employer's efforts in this matter.

05 April 2013

Medical Officer, Clinic Services Occupational Health and Safety Agency Suite 1817 Maritime Centre
1505 Barrington Street
Halifax, NS B3J 3Y6

RE: REQUEST FOR FITNESS TO WORK EVALUATION

Dear Sir/Madam,

I am writing this letter regarding an employee, Mr. Greg Pius Burke, who has been employed at the Department of National Defence working at Fleet Maintenance Facility Cape Scott in the capacity of a Shipwright since May 2007.

Commencing in 2009, management began to observe aggressive and unsafe behavior from Mr. Burke. In one particular instance Mr. Burke was disciplined for engaging in a physician altercation with another co-worker. Mr. Burke subsequently grieved management's disciplinary decision and the grievance was recently heard by the Public Service Labour Relations Board. The adjudicator ruled that they believed on the balance of probabilities Mr. Burke did physically assault his co-worker. In June 2010 Mr. Burke received a 5 day suspension following an investigation whereby he was alleged to have made threatening and aggressive statements to a fellow co-worker. On 11 May 2011 Mr. Burke was alleged to have misconducted himself by threatening a co-worker at a team meeting and displaying intimidating behavior. Following this incident, Mr. Burke went out on certified sick leave. On 16 May 2011 management sent a letter to Mr. Burke's attending physician outlining their concerns with his behavior in the workplace. This letter was sent to Mr. Burke via registered mail requesting he present the letter to his attending physician. In the letter, management explained their concerns regarding Mr. Burke's behavior in the workplace, and that Mr. Burke would not be permitted to return to work until management received further information from his physician. The letter is included for your consideration as Reference A.

On 09 June 2011 Mr. Burke called his manager Charles Hawker explaining that his doctor had deemed him fit to return to work. Mr. Hawker advised Mr. Burke that he had not received any response to his 16 May 2011 letter and would therefore require more information prior to permitting Mr. Burke back into the workplace. Mr. Hawker suggested that Mr. Burke could also undergo a fitness to work evaluation through Health Canada,

however Mr. Burke did not feel it was necessary. Mr. Hawker documented that he found Mr. Burke's behavior during the phone conversation to be aggressive and inappropriate, specifically Mr. Burke raising his voice stating that Mr. Hawker did not have the authority to stop him from coming to work. On 13 June 2011 a letter was mailed to Mr. Burke requesting he have his attending physician respond to the questions outlined in the 16 May 2011 letter. The option was also provided to Mr . Burke to undergo a fitness to work evaluation through Health Canada. On 22 June 2011 Mr. Burke was advised in writing that effective 22 June 2011 he would be placed on Sick Leave Without Pay.

Management was later advised by Mr. Burke's union representative that they had spoke to Mr. Burke who said he would comply with the request to have his physician complete management's questions. On 27 July 2011, Mr. Burke phoned the Human Resources Officer explaining that he had a new family doctor who advised him that he doesn't need a fitness to work evaluation.

On 28 July 2011 Mr. Burke faxed 4 doctor's notes to Human Resources. The first note was completed by one physician and the rest of the notes were completed by his new physician. One of the notes stated Mr. Burke would be sick for medical reasons until 24 May 2011. Another note stated that Mr. Burke will be off work for medical reasons until 10 June 2011, and requested that management provide short term disability forms to Mr. Burke. The last note was dated 22 July 2011 and indicated that Mr. Burke was fit to return to work. On 28 July 2011 the Human Resources Officer called Mr. Burke to advise him that management needed the specific questions that were sent in the 16 May 2011 letter answered prior to him being permitted back to work.

Over the next few months, management continued to send registered letters to Mr. Burke explaining the reasons why they required further information to determine he was fit to return to work. Included with this correspondence was the option for Mr. Burke to go to Health Canada for a fitness to work evaluation, along with all of the subsequent paperwork. Mr. Burke responded to management's requests indicating that his doctor had already cleared him to return to work and that no fitness to work evaluation needed to be done. In order to ensure Mr. Burke fully understood the reasons why management were requesting a fitness to work evaluation, they offered to meet with him off site to discuss his concerns.

A formal meeting was requested by management with Mr. Burke on 05 January 2013 at an offsite location. In attendance at this meeting was myself, Labour Relations Officer, Mr. Charles Hawker, Mr. Greg Burke, and Lorne Brown, Union representative. Management explained that the intent of the meeting was to help Mr. Burke understand the reasons why he has not been permitted back to the workplace, and why a fitness to work evaluation was required. At the meeting, Mr. Burke appeared agitated and unable to focus on the current issue at hand as he was bringing up issues from several years prior. It was evident that Mr. Burke had difficulty communicating and organizing his thoughts. As the meeting continued, Mr. Burke became more agitated, standing up as if to leave and then sitting back down. Mr. Burke also wanted to show management a document, but when management went to reach for it, he would not let go of the paper. Mr. Burke also made comments that he feels he has been dismissed because he received his record of employment to apply for Employment Insurance. Management explained that he had not been dismissed, and the record of employment was a standard document sent to employees who had had an interruption in earnings. Management provided Mr. Burke with consent forms, either to go to Health Canada and or for them to contact his attending physician. Mr. Burke explained that he has given his consent to contacting his physician however he took the consent forms with him and the meeting was concluded.

At the end of January 2012, Mr. Burke called the associate Deputy Minister of National Defence to explain he would be filing a grievance because he had been wrongfully dismissed. Soon thereafter management received Mr. Burke's grievance presentation package which included a CD that had a recorded CBC interview on workplace bullying and harassment. The grievance has since gone through the various levels and was denied at the third level on 20 September 2012. The grievance was denied based on the fact that Mr. Burke has not been dismissed from the Department of National Defence, rather he has been placed on sick leave without pay. The grievance has since been referred to adjudication with the hearing scheduled for July 2013.

In January 2012 management sent a letter to Mr. Burke requesting he complete either the consent form to contact his attending physician, or the consent forms to go to Health Canada. On 10 February 2012, Mr. Burke sent a letter to my attention with a new letter from Mr. Burke's attending physician dated 28 January 2012. The letter stated that Mr. Burke has no limitations in his ability to perform his work duties and could return to work full time.

On 17 February 2012, I called Mr. Burke's attending physician to confirm if she received the 16 May 2011 letter and if she considered it as part of her assessment in determining Mr. Burke was fit to return to work. The doctor indicated that she did not recall if she ever received any correspondence from the Department, nor did she ever receive any consent from Mr. Burke to speak with the Department. The doctor later said she had received the letter, but she did not understand what we were asking and did not know what else the Department wanted from her. During the conversation the physician became very agitated making it clear that she did not wish to speak further.

A follow up letter was sent to Mr. Burke on 27 February 2012 and 08 June 2012 indicating that the medical certification he provided from his attending physician did not confirm that they considered the letter from the Department as part of their assessment. Furthermore, the attending physician confirmed that Mr. Burke did not provide her with his consent to contact her directly. Therefore, given management still had not received satisfactory information regarding Mr. Burke's fitness to work, they were requiring him to undergo the fitness to work evaluation through Health Canada.

In November 2012 Mr. Burke sent a letter to the Canadian Human Rights Commission alleging discrimination. Mr. Burke has since been referred through the internal grievance procedure.

In December 2012 Mr. Burke was sent a final letter requesting him to consent to undergo a fitness to work evaluation with Health Canada. Mr. Burke was advised in the letter that if he continued to refuse this request, management would be recommending his file to the appropriate delegation of authority to proceed with termination of employment for cause.

In January 2013 management received a response from Mr. Burke with his consent to undergo a fitness to work evaluation. The consent forms had the expiry date of 28 March 2013 therefore I placed a call into the Health Canada office to ask how to proceed. I was informed that Mr. Burke had already spoken to the Regional Manager and had agreed to an 8 month expiry date for the consent forms. As such, a revised letter with new consent forms were sent to Mr. Burke for his completion. Mr. Burke responded with another letter and new consent forms with the expiry date of 11 May 2013. A copy of this

correspondence was also sent by Mr. Burke to Mr. Donald Monty, Regional Manager Health Canada.

It should also be noted that from June 2009 until February 2012 there was violence in the workplace complaint that was submitted against Mr. Burke by one of his co-worker. The investigation results concluded that the allegations were unfounded and as such no further action was taken.

In light of the fact that Mr. Burke has been out of the workplace on sick leave without pay for close to two years, along with the fact that he has displayed aggressive and unsafe behavior, and management have been unable to receive satisfactory information from Mr. Burke's attending physician regarding his fitness to work, they are requesting an assessment be completed by Health Canada. Specifically, management is looking for answers to the following questions:

- *Is Mr. Burke fit to return to work at this time?*
- *If Mr. Burke is not fit to work, when will you expect him to be able to return to work?*
- *Is Mr. Burke fit to perform the full duties of his substantive position? If not, is Mr. Burke capable of performing any other related or modified work duties? If specific modifications are required, how long will Mr. Burke be subject to these limitations prior to returning to full duties?*
- *Are there any other specific limitations pertaining to Mr. Burke's medical condition? Would these limitations be permanent or temporary? Are there any recommended accommodation measures that would be needed based on these limitations? Would these accommodation measures be permanent or temporary?*
- *When will Mr. Burke be re-assessed?*

Please offer any additional comments and insights that would be helpful.

To assist you in dealing with this matter I have enclosed with this letter a completed physical demands assessment and a copy of Mr. Burke's current work description. I have also included the signed consent forms and a completed 3312 form. Should you require further information or clarification you can contact me directly at the coordinates below.

> *Thank you in advance, you assistance in this matter is greatly appreciated.*
>
> [Signature]
> *Lindsay Gallivan*
> *Ph: 902-427-3010*
> *lindsay.gallivan@forces.gc.ca*
> *Labour Relations Officer*
> *Department of National Defence – CHRSC (Atlantic)*
> *PO Box 99000, Stn Forces*
> *Halifax, NS B3K 5X5*
>
> *CC: Greg Pius Burke*
> *10 Emerson St. Bedford, NS B4A 1V7*
>
> *CC: Charles Hawker*
> *Group Manager – Hull Support*
> *PO Box 99000, Stn Forces*
> *Halifax, NS B3K 5X5*
>
> *Enclosure:*
> *Job Analysis*
> *Work Description – SR WOW 08*
> *Consent Forms*
> *Form 3312*
> *Ref A: 16 May 2011 letter to attending physician*
>
> [*Sic* throughout]

[13] Throughout the same period, the grievor also sent letters to the employer and to his bargaining agent indicating that he saw no justification for keeping him out of the workplace. However, he did not follow the employer's instructions about the letter it sent him on May 16, 2011, and about following up on the request for an FTWE.

[14] In a letter dated January 4, 2012, Lorne Brown, President, Federal Government Dockyard Trades and Labour Council East ("the bargaining agent"), responded to letters from the grievor concerning the employer's request for an FTWE. In this response, the bargaining agent indicated that its advice had been and would continue to be that the grievor present the May 16, 2011, letter to his doctor and have the doctor in response indicate that he or she has reviewed the letter. That advice is provided consistently to all bargaining agent members. The bargaining agent also advised the grievor in the letter that the employer had the right to request an

assessment from Health Canada if it felt that there was a need and advised him to use his doctor as a first route to resolving any issues requiring medical information.

[15] In January 2013, following the employer's final letter dated December 21, 2012, the grievor agreed to an FTWE but allowed only a short time for it by limiting the period on the consent forms he was asked to sign to allow the employer access to his physician and to his medical information. Health Canada normally requires one years' notice to ensure that it has enough time to complete the FTWE. The grievor expected the process to take a week to 10 days to complete and did not see the need for agreeing to a longer period.

[16] In March 2013, the grievor again wrote to the employer and conveyed his thoughts on the timeline issue for the FTWE as well as a summary of conversations he had had with Donald Monty, Regional Manager at Public Service Occupational Health Program of Health Canada. Mr. Monty apparently told the grievor that it was common knowledge that an FTWE could be done in as little as two weeks for such an application, when a family physician has already filed an FTWE. On the one-year issue, Mr. Monty explained that in some cases, a specialist has to be consulted, and that Health Canada wanted to avoid having to contact applicants every three weeks to update their authorizations. Mr. Monty proposed an eight-month window, which the grievor did not agree to. Eventually, the grievor allowed a two-month window, which was to expire on May 11, 2013.

[17] In the end, the grievor did not undergo the FTWE when Health Canada withdrew its consent.

[18] Throughout that entire period, and in all the correspondence and meetings with the employer as well as with his bargaining agent, the grievor insisted that he was fit to return to work, that his doctor agreed and that since he was not being allowed back into the workplace, he had been wrongfully and constructively dismissed.

B. <u>For the employer</u>

[19] The employer called seven witnesses: Charles Hawker, Michel Hache, Lindsay Gallivan, Sandra Clattenburg, Roger Foster, Fred Cox and Scott Wournell.

[20] Mr. Hawker is a group manager 2 who has been with FMF Cape Scott since August 5, 2008. In 2011, Mr. Hawker was Mr. Hache's supervisor. Mr. Hache was usually the grievor's direct supervisor.

[21] An incident occurred in the break room between the grievor and another employee, Dave Turnbull, on June 10, 2009. This led Mr. Turnbull to file a refusal-to-work complaint. The employees were separated. After the resulting cooling-off period, no further incidents occurred.

[22] About a year later, the two employees were again assigned to the same project, and Mr. Turnbull filed a formal work refusal complaint. A formal investigation was launched into an allegation of harassment against the grievor, but it was determined unfounded.

[23] Mr. Hawker testified about the grievor's current employment status. The grievor is on sick leave without pay; he has not been terminated, and he is not in the workplace because he needs an FTWE for the employer to ensure a safe work environment for him and for the rest of the employees in the workplace. The grievor has not cooperated with the employer's instructions. Mr. Hawker referred to incidents of disrespectful behaviour and actions by the grievor as well as concerns about anger he exhibited towards fellow workers and about materials he threw in a dangerous manner.

[24] In his May 16, 2011, letter to the grievor, Mr. Hawker outlined the course of action that the employer was instituting to ensure a safe workplace and to enable the grievor's return to work. He also explained his request for the grievor's physician to file a report answering several employer questions. He went on to state that if accommodations were necessary, they would be addressed, and that if the grievor did not consent to the request, the employer would be unable to determine if the workplace was safe for the grievor or other employees. As a result, the grievor would not have access to the workplace. The letter encouraged a positive response. Mr. Hawker also offered to meet with the grievor, his physician or physicians, and his bargaining agent representative to facilitate a discussion that could help the grievor return to the workplace.

[25] Mr. Hawker told the grievor that a number of incidents had led him to believe that the workplace was unsafe, including the grievor's assault on a co-worker,

Vince Covey, an altercation with a mechanic, information from another co-worker, Fred Cox, about a scaffolding incident, the grievor's lack of remorse or discipline, and his refusal to acknowledge the assault on Mr. Covey.

[26] While the adjudication on the grievor's five-day suspension from the incident with Mr. Covey had not yet been issued, Hawker had completed his investigation and had reasonably taken it into account.

[27] Mr. Hawker confirmed that an investigation would be launched into the grievor's actions of May 11, 2011, when he left the workplace. The investigation was being delayed until then.

[28] Mr. Hache was the grievor's supervisor. On May 11, 2011, Mr. Hache convened a meeting of the acoustic tile team to address an issue that had been brought to his attention by another team member, team leader Scott Wournell. Mr. Wournell told him that the team was dysfunctional and that the grievor and other team members communicated little, if at all, which was creating a tense atmosphere. He stated that he thought that the situation was close to being volatile.

[29] During a round-table discussion at the meeting on May 11, Mr. Burke became agitated and argumentative about an issue of the specifications applied to the "positive gapping" of acoustic tiles and about timely data collection and recording. After some discussion on the issue of personality conflicts, Mr. Hache appealed to the group to put them aside and to work as a team. Everyone was onside except for the grievor, who stated, "I get paid to work; that's what I'm going to do." From this and from a further exchange concerning Mr. Wournell being the resident expert on tile application, the grievor argued that since no one was currently certified in tile application, no one was an expert. Mr. Hache confirmed that everyone on the team was not certified but pointed out that all had been trained, that only a lack of funds stood in the way of employees being recertified and that perhaps the use of the word "expert" was wrong. The grievor then questioned Mr. Hache about his use of the word "expert," saying, "Which is it?", meaning, "Are we experts or not?"

[30] Mr. Hache realized that the grievor did not seem to agree with the purpose of the meeting and did not seem to want to discuss the issues. The grievor still seemed agitated and argumentative and became more so when Mr. Foster pointed out that

Mr. Wournell was the go-to person on the team. The grievor did not agree with that statement.

[31] By the end of the meeting, and following some foul language from the grievor, the other three team members stated that they no longer wanted to be assigned to work on the same team as the grievor.

[32] Mr. Hache then realized that he had never witnessed this type of behaviour from the grievor, although he had heard about it. At the end of the meeting, Mr. Hache was concerned that the meeting had not gone as per his intentions and that major concerns had arisen. He decided to move the grievor to another team.

[33] After the meeting, the grievor was still agitated. When Mr. Foster left the meeting, the grievor left as well and seemed to be following Mr. Foster. When Mr. Hache noticed it, he followed the grievor, who continued following Mr. Foster until it appeared that the grievor noticed Mr. Hache's presence. At that point, Mr. Hache approached the grievor and asked him if he wanted to speak with Mr. Hawker. After giving a positive response, the grievor went to the north side of the building. Mr. Hache went in the same direction. Following an unrelated conversation with another supervisor, the grievor approached Mr. Hache and said that he was feeling unwell and was going home because he was sick.

[34] Mr. Hache met with Mr. Hawker about his concerns. Three members of the acoustic tile team asked for a transfer away from the grievor. Some team members stated that they were losing sleep, that they could not approach the grievor about anything, that he was not communicating and that he was very aggressive, which caused undue stress because of his unpredictability.

[35] Following consultations with Darlene Nelson, Labour Relation Officer, Mr. Hawker wrote his May 16 letter to the grievor about an FTWE.

[36] Ms. Gallivan is a labour relations officer (LRO) with the DND in Halifax. She was the LRO advisor to management on the grievor's file. Before Ms. Gallivan, Mr. Charles Hart and Ms. Nelson managed the file.

[37] Ms. Gallivan reviewed the contents of her letter to the medical officer dated April 5, 2013 (Exhibit 1), as that letter was about a request for an FTWE of the grievor. She also related an email received from Mr. Monty, who had received her FTWE request,

and his subsequent conversation with the grievor. He stated that the grievor had been aggressive on the phone and had used abusive and inappropriate language. Given the grievor's attitude and his refusal to follow proper procedure, his file was closed (Exhibit 76).

[38] Ms. Clattenburg is a service coordinator with the Integrated Personnel Support Centre, DND. Her responsibilities include providing advice and information about pay, pensions, benefits and insurance.

[39] On May 26, 2011, Ms. Clattenburg sent a memo to the grievor (Exhibit 77) concerning his sick leave without pay and providing him with pertinent information about his options and responsibilities. As required by the *Employment Insurance Act* (S.C. 1996, c. 23), she included information about an ROE being issued.

[40] The memo to the grievor also included a note that identified when he would exhaust his leave credits and the date on which he would begin to be on leave without pay, as well as leave forms filled out for him and a request for him to sign and return them as soon as possible.

[41] A record of employment was issued (Exhibit 78) when the grievor ran out of leave. Even though he had not filled out the required leave forms, the employer kept paying him until he exhausted his leave credits. It assumed that he was on sick leave and identified as much on his ROE.

[42] Mr. Foster is a journeyman shipwright at FMF Cape Scott and President of the United Brotherhood of Carpenters and Joiners of America, Local 1405. He occasionally works as a work centre supervisor as well.

[43] Mr. Foster has known the grievor for a number of years. While in the beginning, they had a pleasant and professional interaction, towards the end of the acoustic tile team's life, when it was down to its last four members, things became more difficult.

[44] The grievor spent some time as the team leader, but it ended early, and then Mr. Wournell became team leader. At that time, the grievor seemed to become more distant and worked more by himself than with the team.

[45] Some issues arose with tile gapping. The gaps between tiles were critical. When it was pointed out to the grievor that his gaps were too wide, he became agitated. He

felt it was an attack on his work, and he became difficult to approach. Concerns arose that a physical altercation was possible.

[46] During the May 11, 2011, meeting, Mr. Foster's recollection (Exhibit 80) was that while the meeting started out normally, it began to deteriorate as the grievor asked Mr. Hache question after question without allowing him to completely answer.

[47] In addition, the grievor wanted to know who was refusing to work with him because of safety concerns, because he did not want someone getting hurt and him being blamed. Mr. Hache wanted that discussion to take place in another forum and would not provide the names of the team members who were complaining.

[48] In an attempt to obtain consensus about returning to appropriate workplace dynamics, the employer asked the team members if they were prepared for that return. While every other team member answered "yes," the grievor stated only that he was "here to work." When Mr. Hache challenged him as to whether that was a positive reply, the grievor repeated, "I am here to work."

[49] Mr. Hache continued the meeting and went on to state that Mr. Wournell was the team leader and that all were equally trained and had expertise, but that Mr. Wournell would give the final directions, due to his experience and expertise with acoustic tile installation. The grievor questioned why Mr. Wournell had the final say if every team member was an expert and was experienced. Mr. Foster replied that Mr. Wournell had experience, was one of the original shipwrights trained in that area, had more hours logged, and had the most training, knowledge and experience, and therefore was the most competent of the team.

[50] A couple of other confrontational episodes occurred, and the meeting seemed to become fairly hostile. At one point near the end, the grievor told Mr. Foster, "Shut up, Shut the f*** up." The meeting broke up shortly after that.

[51] Mr. Foster testified that when he left the meeting to return to work, he believed that the grievor was following him and began to anticipate a confrontation until they became separated.

[52] Richard S. Gaetz is a shipwright at FMF Cape Scott and has worked with the grievor, mostly in a team setting. He observed that after about a year, the grievor became confrontational with everyone, which seemed to escalate. He related two

examples. The first involved taking down some staging materials when pipes were being lowered to the ground. As they were being handed down, water leaked on the grievor's face. While not an unusual occurrence, the grievor seemed irritated and might have thought that it was intentional. Mr. Gaetz suggested that they switch positions and then, while passing a seven-foot pipe to the grievor, the grievor pulled the pipe in an aggressive manner, which almost badly jammed Mr. Gaetz's hand. The incident was reported to Mr. Hache.

[53] The second incident involved a new thickness sander for the acoustic tile team. As the equipment was being installed, the grievor was nearby. After it was installed, Mr. Gaetz and another worker thought that once the machine became operational, procedures should be put in place for its proper use. However, the grievor took over its operation and, as it seemed to Mr. Gaetz, started abusing the machine and tiles by running it too hard and perhaps destroying product. Mr. Gaetz's partner that day, Dennis Edwards, then shut the machine off, but the grievor turned it back on, in a rage. Based on their prior experiences with the grievor, Mr. Gaetz and Mr. Edwards left him, and then Mr. Edwards reported the incident to Mr. Hache.

[54] Mr. Wournell is a shipwright at FMF Cape Scott with 31½ years of experience. He has worked with the grievor both as peers and as his team leader on the acoustic tile team. He generally found that the grievor was moody, argumentative and difficult to work with and that he would flare up quickly. Mr. Wournell witnessed a heated exchange and bumping incident in the lunchroom between the grievor and Mr. Turnbull.

[55] During a regular morning meeting of the tile team, when the grievor was asked about the progress of the tile sanding, where he was taking on most of the work, he exploded, swore twice and walked away.

[56] In response to a comment about positive gapping, the grievor lost it and stormed out.

[57] Near the end of the tile team project, all trust had evaporated, and the rest of the team, exclusive of the grievor, was trying to protect itself, especially after the incident with Mr. Covey.

[58] Mr. Wournell approached Mr. Hache in an attempt to get the team working together again. At the meeting on May 11, Mr. Wournell was the last team member to speak. He began by saying that he did not care to work with the grievor any longer. When the grievor reacted by saying that Mr. Wournell was two-faced, just like Mr. Foster, and alluded that "there are other ways to take care of this," Mr. Wournell decided that he had had enough and realized that they were never going to get along. He sensed that in the future, something physical would occur, and he just wanted it to end.

III. Summary of the arguments

A. For the grievor

[59] The grievor began by stating that he objected to Mr. Foster testifying against him. He stated that, as the president of his local, it was not Mr. Foster's role to do so. It was pointed out to him that all witnesses from the bargaining unit were issued subpoenas to attend and to testify at the employer's request.

[60] The grievor attempted to introduce what appeared to be new documents, which the employer objected to. However, upon review it became apparent that no new evidence was being introduced and that he was trying to simplify the document process by re-arranging into a different format documents that had already been produced.

[61] The grievor referred to the three options that were offered to him and stated that he had followed through on all three. First, in response to a request to establish his fitness to work, his doctor has provided medical notes stating that he was fit to return to work. Second, he gave permission to have his doctor contacted but was not provided with the questions to be asked, as he had requested. Third, he had agreed to the Health Canada FTWE, but that agreement was conditional on a limited timeline. He was anxious to get back to work and did not want any unnecessary delays.

[62] The grievor's continuing employment outside the public service indicates that he is fit for work; therefore, the employer is being malicious by keeping him away from the workplace.

[63] The grievor referred to the results of the Service Canada investigation and its statement that he was being kept out of the workplace "through no fault of [his] own."

[64] The grievor took the position that on-the-job disagreements are bound to occur in any workplace and that occasional profanity or ill temper is to be expected. People are supposed to be able to put up with hostile people, but that does not describe him. He is not a chronic complainer. The acoustic tile project was two years overdue; the employer should fire those who serve no purpose.

[65] The grievor described himself as a good worker and a hard worker. He took on the bigger work, worked the most overtime and did the work no one else wanted to do. He often asked for help. But the employer was trying to get rid of him. If Mr. Hawker never attended the workplace, how could he determine the need for an FTWE? It is only through other witnesses' accounts that he received any information.

[66] The May 11 meeting was held just to provoke the grievor. Why was this meeting held with only two weeks remaining in the life of the tile team?

[67] The grievor was feeling ill on the morning of May 11, so eventually he went home.

[68] Ms. Clattenburg filled out the ROE, identifying the reason for it as "illness or injury," which was an error, but it was chosen because nothing else would fit. Is this the reason for the FTWE? The grievor was no longer ill; he was able to provide a doctor's certificate, and it was in his best interests to be present at work.

B. <u>For the employer</u>

[69] The employer raised three elements in its argument.

[70] First, the grievor has not been dismissed — he is out of the workplace because of a request for an FTWE. Given this fact, an adjudicator has no jurisdiction to deal with the issue.

[71] Second, an FTWE is an administrative procedure and is not disciplinary; therefore, an adjudicator has no jurisdiction to deal with this issue.

[72] Third, the employer had reasonable and probable grounds to ask for the FTWE and referenced the *Campbell* decision, *Campbell v. Treasury Board (Canadian Radio and Television Commission)*, PSSRB File No. 166-2-25616 (19960513), which states that

the grievor is responsible for the consequences of his own actions by not agreeing to undergo an FTWE.

[73] The ROE was issued because of a requirement in law, not because the grievor was terminated. Ms. Clattenburg explained the statutory reason for issuing the ROE. Mr. Hawker stated that the grievor had not been dismissed or suspended. The grievor must provide an FTWE, which has not yet been done.

[74] The *Act* and the *Financial Administration Act* (R.S.C., 1985, c F-11), govern employment and terminations in the public service, and no action was taken to terminate the grievor.

[75] If the FTWE were a form of disguised discipline of the grievor, then the burden of proof would fall on him, and no proof has been adduced to establish that that is so in this case.

[76] There is ample evidence to establish that the employer was justified in asking for an FTWE. Many incidents of concern arose involving the grievor, including violence in the workplace; aggressive, intimidating behaviour; highly confrontational and unpredictable behaviour; and frequent and quick flare-ups.

[77] The employer had safety concerns for both the grievor and his fellow employees.

[78] The grievor's actions were not the proper way to deal with disagreements in the workplace. Intimidation and aggressive behaviour are not justified responses. The employer chose to find out if any medical issues might have been responsible for the grievor's actions, which was a reasonable decision to make. There was no safe way to deal with him in the workplace.

[79] Therefore, the employer is justified keeping the grievor away from the workplace until he satisfies it that he is fit to return to work.

IV. Reasons

[80] The grievor filed this grievance to establish that he was dismissed from the workplace, that he provided ample evidence to the employer of his fitness to be in the workplace, and that he is ready to get back to work and to be properly compensated for his losses. Briefly put, the grievor contests what he believes to be his termination.

The employer denies that the grievor was ever terminated and characterizes the measures taken as administrative in nature.

[81] Given the above and in accordance with a substantial number of prior decisions of both this Board and its predecessor as well as of the Federal Court of Canada, it is the grievor who bears the onus of proving that a termination in fact took place: *Ho v. Deputy Head (Department of National Defence)*, 2013 PSLRB 114, *Flynn v. Treasury Board (National Defence)* PSSRB File No. 166-2-29015 (1999) (QL), *Canada (Attorney General) v. Leonarduzzi* (2001), 205 F.T.R. 238 (FCTD), *Bratrud v. Office of the Superintendent of Financial Institutions* 2004 PSSRB 10, *Thibault v. Treasury Board (Solicitor General of Canada - Correctional Service),* Board File No. 166-2-26613 (1996) (QL); *Hamelin v. Treasury Board (Solicitor General - Correctional Service)* Board File No. 166-2-19440 (1991)(QL).

[82] I find that the grievor has failed to discharge his onus.

[83] As evidence of his having been discharged, the grievor pointed to a report issued by Service Canada following his application for benefits. After investigating the events surrounding the grievor's absence from work, the report concluded that the grievor had "lost his job through no fault of (his) own". Unfortunately for the grievor, the report in question was drafted for a purpose and under a piece of legislation which is different from the context under which this grievance must be decided and cannot be determinative of the issue that I have to decide. I also note that the report in question does not, and indeed cannot, conclude that the grievor was "terminated" as that term is recognized under the applicable labour legislation. Rather, the focus of the report is the grievor's entitlement to Employment Insurance under the legislation applicable to that program. Also, I note that the same document indicates that on his application for benefits, the grievor stated that his reason for not working was "due to a strike or lockout", which seems to contradict his stated belief before me that he was not working because he had been terminated.

[84] The grievor also pointed to the ROE which the employer issued as evidence that he had been terminated. However, the employer explained, and their evidence on this issue was not contradicted, that it only did so because it was obligated to under legislation in the event that the grievor's earnings were interrupted. I accept the employer's evidence on this issue.

[85] The grievor also, in argument, stated that he had complied with the employer's requests: he had provided medical documentation of his fitness to return to work, he had given permission for his doctor to be contacted and had agreed to a FTWE by Health Canada. While this evidence might be helpful in a case in which the grievor has been terminated, it does nothing to establish that he has in fact been terminated. Further, and contrary to the grievor's pretensions, the medical documentation provided by the grievor's doctor did not address the specific issues and questions that the employer wished to have addressed by the FTWE. Specifically, the medical information only stated that the grievor was fit to work without limitations but ignored the employer's specific questions and did not disclose whether or not the doctor was aware of the grievor's background at work. I therefore find that the grievor has not complied with the employer's directives and request for information and has not submitted information sufficient to address the employer's concerns and that the request for information remains outstanding.

[86] The evidence before me confirms the employer's submission that the grievor has been the subject of an administrative measure and has not been discharged. The grievor's own evidence indicated that the employer continued to contact him even after he had, according to him, been discharged. As Exhibit 1 he filed a letter from his employer addressed to him and dated April 5, 2013 in which the employer again requests that he undergo a FTWE if he wished to return to work. While the grievor may disagree with the employer's right to request an FTWE, the fact that it continued to do so corroborates the employer's contention that the employment relationship is continuing and has not been terminated.

[87] At this point, I feel that it is important to point out that the grievor filed and fought a termination grievance to adjudication. In the portion of the grievance form entitled "Grievance details" he simply put "Wrongful dismissal please see attached details". The attached details are contained in a letter format with the reference line "Details for Individual Grievance Presentation for Wrongful Dismissal" and the letter ends with the line "I therefore present this Grievance for Wrongful Dismissal". Had he contested the employer's right to suspend him, the focus of the hearing would have been somewhat different and the issue before me would have been different, although I doubt that the result would have been different. In any event, he has not done so. Instead, he has contested the employer's right to terminate him. In order to contest

that decision, he must first convince me that he has in fact been the subject of a disguised disciplinary discharge, something that he has failed to do.

[88] The employer, on the other hand, has provided me with ample evidence on which to conclude that it was well within its rights to make such a request. From the numerous accounts of seemingly unprovoked hostility, anger, aggressiveness and confrontation and from the witness' testimony regarding their unease about working with the grievor, I find that the employer acted properly in this matter. The employer's actions were motivated by legitimate concerns about the grievor's health and about the impact that those concerns could have had on the safety and security of the workplace (*Lacoste v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 68 and *Hood v. Canadian Food Inspection Agency,* 2013 PLSRB 49).

[89] I find that this case has obvious parallels with an earlier decision of this Board in *Theaker v. Deputy Head (Department of Justice)*, 2013 PSLRB 163. In that case, the grievor had been off duty due to illness and the deputy head required a fitness-to-work evaluation report before allowing her to return to the workplace. The grievor grieved that decision as a constructive or disguised dismissal and as in the case before me, the deputy head objected to an adjudicator's jurisdiction to hear the grievance. The adjudicator found that the evidence established that the decision to require a fitness-to-work evaluation report before allowing the grievor to return to the workplace had no disciplinary overtone and that furthermore, the evidence established that the grievor's employment had not been terminated, therefore, the adjudicator found that she had no jurisdiction to deal with the merits of the grievance.

[90] As in *Theaker*, I find that there were no disciplinary overtones to the employer's actions. Indeed, all of the evidence presented leads me to the conclusion that the employer always considered that the grievor's actions were the result of illness and I can find no indicia of any disciplinary motive whatsoever.

[91] The grievor devoted an enormous amount of time and energy detailing his prior work history with the employer and the events which had occurred over the years. The grievor's intention in doing so, while not clearly stated by him in argument, was to demonstrate to me that the employer had acted inappropriately all along and that he had been the victim of an ongoing campaign whose intention it was to result in his termination. I only have jurisdiction to decide the grievance before me, which

grievance contests a disguised disciplinary termination and have no jurisdiction to somehow review past incidents that are not the subject of the grievance.

[92] However, I have nonetheless considered the grievor's evidence on his work history in the context of his allegation that he was subject to a disciplinary termination and have considered whether or not this evidence leads me to conclude that the employer's present actions are a continuation of the employer's intention to treat his behaviour with a disciplinary approach in order to build a termination case against him. While the employer had taken disciplinary action against the grievor in the past, I accept that with respect to its refusal to allow the grievor to return to work, such considerations had since given way to a genuine concern on the employer's part regarding the grievor's health and the impact that his health appeared to be having on his behaviour in the workplace. I find that the employer had dispensed of any disciplinary intention and had, reasonably and appropriately, changed its approach to one that took into account health concerns and the possible need for accommodation and that such an approach was not disciplinary and was not a pretext for further disciplinary action.

[93] In conclusion, I therefore find that I am without jurisdiction to consider and decide this grievance given that no termination of employment has taken place.

(The Order appears on the next page)

V. Order

[94] I order the file closed.

August 22, 2014.

Michael F. McNamara,
adjudicator