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File: 566-02-9888

Citation: 2019 FPSLREB 89

Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

GREGORY PIUS BURKE

Grievor

and

DEPUTY HEADEPUTY HEAD
(Department of National Defence)

Employer

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

In the matter of an individual grievance referred to adjudication

Before: David Olsen, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Himself

For the Employer: Vanessa Reshitnyk and Richard Fader, counsel

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Heard at Halifax, Nova Scotia,
April 14 and November 24 to 27, 2015; April 26 to 29, September 7 to 9, and October 4 to 6, 2016; May 9 to 12 and August 3, 2017; and January 9, 2018,
(Written submissions filed January 26 and May 22, 25, 26, and 28, 2018.)

I. Individual grievance referred to adjudication

[1] Gregory Pius Burke ("the grievor") was a shipwright employed by the employer the Department of National Defence (DND) at Fleet Maintenance Facility (FMF) Cape Scott in Halifax, Nova Scotia. Following a team meeting of shipwrights and their supervisor on May 11, 2011, during which it was alleged that the grievor became agitated and made remarks that the employer considered profane and threatening, the employer decided that he would be required to consent to undergo a psychiatric fitness-to-work evaluation (FTWE) to address concerns about his health and the stress he was causing other employees before he would be permitted to return to work.

[2] On January 8, 2014, the employer terminated the grievor's employment under s. 12(1)(e) of the *Financial Administration Act* (R.S.C., 1985, c. F-11; *FAA*) for his failure to agree to participate in the FTWE with Health Canada.

[3] Mr. Burke grieved his termination. The grievance was denied at the final level of the grievance process and was referred to adjudication.

[4] The fundamental issue in the case is whether the employer had reasonable and probable grounds to keep Mr. Burke out of the workplace, to request that he consent to a psychiatric FTWE by his physician, and ultimately, to request that he consent to one at Health Canada.

[5] For the reasons that follow, I have concluded that the employer did not meet its onus of establishing through sufficient cogent evidence that it had reasonable and probable grounds to keep Mr. Burke out of the workplace and to terminate his employment for his failure to participate in a Health Canada FTWE.

A. Preliminary issue

[6] Do the doctrines of issue estoppel or abuse of process apply such that I am bound by a finding in the decision of Adjudicator McNamara in *Burke v. Deputy Head (Department of National Defence)*, 2014 PSLRB 79 ("*Burke 2014*") regarding the employer's request that the grievor submit to a psychiatric FTWE? The case dealt with a grievance that Mr. Burke filed before he was formally terminated, in which he alleged that the employer had constructively dismissed him when it refused to permit him to work unless he consented to undergo the FTWE. Mr. McNamara determined that he was without jurisdiction to adjudicate the grievance as Mr. Burke had not been

constructively dismissed. In the decision, the adjudicator stated that the employer had been within its rights to request the FTWE since it had legitimate concerns about the grievor's health and the impact those concerns could have had on the safety and security of the workplace.

B. The fundamental issue

[7] Assuming that the adjudicator's statement in *Burke 2014* is not binding on me, did the employer have reasonable and probable grounds to keep Mr. Burke out of the workplace, to request a psychiatric FTWE from his doctor, and ultimately, to request that he undergo an independent psychiatric FTWE by a Health Canada doctor?

II. Issues not relevant to the determination of this grievance

[8] I intend to review only the evidence relevant to the issues that have been identified.

[9] I do not intend to review *de novo* the conclusion that Adjudicator McNamara reached that Mr. Burke's employment was not terminated on May 11, 2011, on the basis of a constructive dismissal.

[10] I do not intend to review *de novo* the conclusion that Adjudicator Richardson reached in *Burke v. Deputy Head (Department of National Defence)*, 2012 PSLRB 119 ("*Burke 2012*"), when he dismissed Mr. Burke's grievance against his three-day suspension for assaulting Mr. Covey ("the Covey incident").

[11] I do not intend to review the penalty imposed on Mr. Burke as a result of an exchange of profanity with Mark Meehan ("the Meehan incident") as the grievance was filed late, and the penalty is deemed final.

[12] Those decisions are final and binding. I have no authority under the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") to sit in review of them.

[13] I do not intend to pursue Mr. Burke's argument that he lost his employment through no fault of his own as determined under the *Employment Insurance Act* (S.C. 1996, c. 23). That was a decision made for the purposes of determining employment insurance (EI) benefits, and it is not relevant to determining whether the employer had cause to terminate his employment. See *Bennett v. Treasury Board (Post Office*

Department), PSSRB File No. 166-02-1655 to 1670 (19750803)*; King v. Deputy Head (Canada Border Services Agency)*, 2010 PSLRB 125 at para. 5.

[14] The grievor claimed that he was without proper union representation. He also alleged a contravention of s. 187 of the *Act*, which is the duty-of-fair-representation provision. That matter has not been brought properly before the Federal Public Sector Labour Relations and Employment Board ("the Board") as part of a complaint filed under s. 190, and I am without jurisdiction to determine it.

[15] For clarity this is not an adjudication of a grievance relating to a disciplinary discharge for alleged culpable misconduct in the workplace.

[16] The employer called the following 11 witnesses:

1. Joseph Haché, the work-centre supervisor at HMC Dockyard in Halifax and Mr. Burke's supervisor;

2. Stephen Wournell, a shipwright, co-worker of Mr. Burke, and the vice president of the United Brotherhood of Carpenters and Joiners of America ("the UBCJ");

3. Roger Foster, a shipwright, co-worker of Mr. Burke, and the UBCJ's president;

4. Fred Cox, a shipwright, co-worker of Mr. Burke, and the UBCJ's treasurer;

5. Charles Hawker, the group manager at FMF Cape Scott;

6. Donald Monty, the regional manager of the Public Service Occupational Health Program at Health Canada;

7. Rear Admiral John Newton, Commander, Maritime Forces Atlantic (MARLANT);

8. Nancy Oldford, Acting Regional Manager, Public Service Commission; at the material times, she was a human resources specialist at FMF Cape Scott;

9. Lindsay Gallivan, a human resources officer with DND; at the material times, she was a labour relations officer with DND;

10. Robin McKay, a policy officer in the Directorate of Civilian Labour Relations at DND; at the material times, she was a team leader, labour relations, at DND; and

11. Sandy Clattenburg, a compensation team leader in Human Resources, DND.

[17] The grievor called as witnesses himself and Doctor Roetka Gradstein, a medical doctor and his personal physician.

III. Background and summary of facts not in dispute

[18] Beginning in 2007, Mr. Burke was an indeterminate employee of DND. He worked as a shipwright at FMF Cape Scott. He holds certificates in carpentry, welding, precision woodworking, and scaffolding. His performance appraisals reflect that he was a productive and highly reliable employee.

[19] Mr. Burke worked as a shipwright on the acoustic tile team installing tile on HMCS Windsor, a submarine located in the HMC Dockyard. Initially, up to 19 shipwrights worked on that team. However, in 2011, as the work was nearing completion, the remaining tile team was composed of 5 members. Three of them were Mr. Foster, the president; Mr. Wournell, the vice president; and Mr. Cox, the treasurer of the shipwrights' union, of which Mr. Burke was also a member. The work was scheduled to be completed in the late spring or early summer of 2011.

[20] In January 2011, Mr. Burke was appointed by his supervisor, Mr. Haché, as the team leader of the acoustic tile team. He acted in that role from January 25 to March 11, 2011.

[21] Other members of the team complained to Mr. Haché. They alleged that Mr. Burke segregated himself from the team, that meetings were not held to discuss the work of the day, that there was no consultation, and that Mr. Burke showed irritation to the point of aggression in verbal exchanges when carrying out his team leader duties.

[22] Mr. Cox found it difficult to work with Mr. Burke. He requested a transfer to another team during Mr. Burke's tenure as team leader. The request was accommodated.

[23] Other members of the team, along with Mr. Foster and Mr. Wournell, subsequently requested transfers to another team.

[24] Mr. Haché met with Mr. Burke on May 3, 2011, to discuss his performance as the team leader. During the meeting, he advised the grievor that some communications

issues had arisen during his team leader term. He advised the grievor that he had received several requests from team members to be transferred to the shipwrights' work centre.

[25] Mr. Burke asked who had complained about him. Mr. Haché was not prepared to give him the names. Mr. Burke felt that if someone complained about him, he had a right to know the name and said that he would see the general manager, Mr. Hawker, about it. He met with Mr. Hawker, who advised him that he would obtain the supervisor's input. Mr. Hawker did not get back to Mr. Burke.

[26] On May 11, 2011, the new team leader, Mr. Wournell, asked Mr. Haché if anything would be done about Mr. Burke and his lack of communication with other team members and the fact that he tasked himself with whatever work he saw fit to take on. Mr. Foster testified that Mr. Burke and Mr. Wournell had had poor communication over the previous two weeks.

[27] Mr. Wournell felt that the situation was undesirable and that it had escalated almost to the point of being volatile. He felt that management had failed to address it. Mr. Haché advised Mr. Wournell that he had been in the process of setting up a meeting with Human Resources for guidance on how to deal with it.

[28] Mr. Haché decided to immediately meet with the entire acoustic tile team, put the issues on the table, and discuss how to resolve the process and the personal issues.

[29] Mr. Haché advised the team that he did not have full assurance that all his expectations were being met. He would not accept personality conflicts or personal issues as an excuse for inadequate adherence to protocol or poor workmanship. The focus needed to be redirected to teamwork and improving communication.

[30] After a discussion on quality issues that primarily involved Mr. Burke and his time as the team leader, Mr. Burke raised the communications issues that he and Mr. Haché had discussed on May 3 and the fact that Mr. Haché refused to disclose the names of those who had complained about the grievor.

[31] It was agreed that they would not discuss the names at that particular time but that they would discuss the issues "offline" afterwards, meaning between the two of them and Mr. Hawker.

[32] However, the meeting again turned to the issue of communication among the team members and focused on Mr. Burke's time as team leader and whether he had asked for and had received help from the team.

[33] Mr. Haché asked Mr. Burke if he minded working with his present team or if he objected to it. He replied that it was more that the team did not want to work with him. Mr. Haché asked him what would make him say that. Mr. Burke suggested that he should ask the team.

[34] Mr. Haché then asked the team members if they minded working with Mr. Burke and if so, why. He stated that to bring the team together, he thought it was appropriate to "air out the laundry".

[35] The details of the verbal exchanges will be reviewed in more detail later in this decision. Ultimately, all three of the other team members stated that they did not want to work with Mr. Burke. During the exchange, Mr. Burke became agitated and uttered expressions that management considered profane and threatening.

[36] As the three members of the current team had said that they did not wish to continue working with Mr. Burke, Mr. Haché advised Mr. Burke that he had decided to remove him from the acoustic tile team and to transfer him to the surface tile team.

[37] Due to the exchange of in Mr. Hache's words "raw personal feelings" towards each other, Mr. Haché did not let any of the team members out of his sight after the meeting. He had observed that Mr. Burke had been in an agitated state.

[38] He followed Mr. Burke and Mr. Foster to ensure that no incident took place. This will be reviewed in more detail during the evidence.

[39] Mr. Burke contended that Mr. Haché allowed the meeting to get out of hand, which led to a climate in which he felt personally attacked and unduly provoked. He admitted to using profanity but denied engaging in threatening behaviour.

[40] Later in the morning, Mr. Burke approached Mr. Haché and told him that he was going home as he felt ill. He had learned in anger-management training that in a volatile situation, the best practice is to remove oneself from it.

[41] Mr. Haché felt that he was obligated to report this incident to Mr. Hawker, the general manager, due to the grievor's inappropriate behaviour and unacceptable comments during the team meeting.

[42] Mr. Haché met with Mr. Hawker and representatives from Human Resources and Labour Relations on May 12, 2011. He expressed concerns about Mr. Burke's behaviour and difficulty with team members.

[43] Mr. Hawker decided that an FTWE by a physician would be appropriate to address their concerns about Mr. Burke's health and the stress he was causing other employees. He decided that until the evaluation was completed, Mr. Burke would not be permitted to return to the workplace.

[44] Based on what had occurred on May 11, and reflecting about previous discipline, Mr. Hawker thought that Mr. Burke did not seem to be correcting his behaviour. As it appeared that discipline was not working, Mr. Hawker thought it was important to ensure that management was aware of all underlying medical conditions.

[45] Mr. Haché testified that he did not agree that a medical FTWE of Mr. Burke was necessary.

[46] The past discipline for misconduct that Mr. Hawker referred to related to two incidents.

A. The Covey incident

[47] On November 18, 2009, Mr. Burke was given a three-day suspension for the first offence, assaulting a co-worker, Mr. Covey, on October 28, 2009. He was also placed on a course called "Managing Angry Moments". He grieved the suspension, and the grievance was referred to adjudication.

[48] The Public Service Labour Relations Board (PSLRB) heard the grievance in September 2012. In *Burke 2012*, it denied the grievance. The decision will be reviewed in more detail later in this decision, in the course of reviewing the evidence.

B. The Meehan incident

[49] On June 17, 2010, Mr. Burke was given a five-day suspension for admitting to using profanity with a co-worker, Mr. Meehan, on May 12, 2010. Both employees

admitted to using profanity. Mr. Meehan was given a one-day suspension because it was his first offence. The employer considered Mr. Burke's profane statement to constitute workplace violence within the meaning of the *Canada Occupational Health and Safety Regulations* (SOR/86-304; "the *Regulations*"), which were enacted pursuant to Part II of the *Canada Labour Code* (R.S.C., 1985, c. L-2; *CLC*).

[50] Mr. Burke sought to file a grievance. However, the bargaining agent missed the time limit for filing it, and the employer denied it on that basis.

[51] It is also important to understand that other employees had alleged that Mr. Burke had physically assaulted them. However, after investigations were conducted, it was concluded that the allegations were unfounded.

C. The McDougall incident

[52] It was alleged that Mr. Burke assaulted another team member, Allan McDougall, on December 3, 2010. After an investigation by Mr. Hawker, it was determined that Mr. Burke had not misconducted himself, and he was found not guilty as a result. Mr. Burke was advised of this result on January 5, 2012.

D. The Turnbull incident

[53] On August 25, 2011, two captains of the Royal Canadian Navy delivered their final investigation report. The commanding officer of FMF Cape Scott had appointed them to investigate a workplace violence complaint that David Turnbull had made against Mr. Burke. The complaint arose from an incident on June 12, 2009, and a work refusal under Part II of the *CLC* that Mr. Turnbull initiated on August 5, 2010, over alleged fears from Mr. Burke's action or conduct at work that arose out of that June 2009 incident.

[54] The investigators concluded that the allegations of workplace violence against Mr. Burke were unfounded. The report was not delivered to the employer until after Mr. Burke was directed not to return to the workplace in May 2011.

[55] The investigators also made general observations of the workplace. They found that incidents of mild violence amongst all the staff (i.e., physical assaults), about 20 since 2007, had gone unreported. They also found that there were inadequate procedures and knowledge for summoning assistance and that the existing

preventative controls were ineffective. The observations will be examined more closely in the reasons for decision.

[56] Although it was provided to the employer on August 25, 2011, Mr. Burke was not provided with a copy of the report until January 2012.

[57] Returning to the period immediately following the May 11, 2011 meeting, on May 16, 2011, Mr. Hawker wrote to Mr. Burke. He referred to prior discussions about disrespectful behaviours and actions that would not be tolerated in the workplace. He stated that he had become quite concerned that Mr. Burke continued to get angry very quickly, took out his anger on others around him, threw materials, demonstrated aggressive behaviours, refused to accept direction, and in general, did not work well in a team.

[58] He advised Mr. Burke that his work was carried out in an industrial setting with a team of multidisciplinary tradespeople and that safety for him and others was his primary concern. For those reasons, he requested that the grievor ask his physician for an FTWE.

[59] Mr. Burke was advised that he should cooperate by agreeing to have an FTWE conducted as soon as possible and that Mr. Hawker required the information requested of the grievor's physician before the grievor could return to work.

[60] The grievor was advised that if he did not consent, Mr. Hawker would not be able to determine if the workplace was safe for him or other employees, that he would continue to have to stay out of the workplace, and that he would be placed on leave without pay.

[61] He also advised the grievor that he would look into his behaviour during the May 11, 2011, meeting. If he found that the allegations warranted using the discipline process, the grievor would be advised that an investigation would be conducted according to the employer's discipline policy.

[62] The employer never conducted an investigation into what happened during the May 11, 2011, meeting.

[63] Mr. Hawker stated that he was hopeful that Mr. Burke's doctor would be able to provide, by May 20, 2011, the information requested in his May 16 letter.

[64] A letter was attached to Mr. Hawker's May 16 letter addressed to Mr. Burke that was dated the same day and that was addressed to an unnamed doctor. It listed the grievor's unacceptable behaviours in the workplace and requested a FTWE, to determine whether Mr. Burke needed to be accommodated. Attached were his work description and an analysis of his work.

[65] The doctor was asked whether Mr. Burke had any limitations based on his work description, and if so, whether they were permanent and whether accommodation was required. The letter also asked that if the limitations were not permanent, what the anticipated time frame would be for the accommodation.

[66] As noted, during their evidence, Mr. Haché and Mr. Hawker did not agree on the necessity of Mr. Burke undergoing an FTWE by his physician based on his conduct. Mr. Burke did not believe that one was necessary. The resolution of this issue will require a detailed review of the evidence and a finding of fact.

[67] Furthermore, Mr. Haché and the grievor did not believe that the list of behaviours attributed to Mr. Burke in the letter addressed to the doctor was accurate, while Mr. Hawker believed that it was. This will also require a review of the evidence and a finding of fact.

[68] Mr. Burke did not submit a leave application. When he left work on May 11, 2011, he indicated that he was going on sick leave. His sick leave ran out on June 22, 2011.

[69] After stating that he was ill and leaving work on May 11, 2011, the grievor saw a doctor at a walk-in clinic. The doctor completed a medical report that stated that for medical reasons, the grievor was unable to work for one week, due to his symptoms.

[70] As Mr. Burke did not have a family doctor, on May 17, 2011, he arranged to see Dr. Gradstein as she was taking new patients. She completed a medical report stating that he had been seen in the clinic on that date and that he would be off sick for medical reasons until May 24, 2011.

[71] Dr. Gradstein saw Mr. Burke again on May 24 and completed a medical report. It stated that he had been seen in the office on May 17 and 24, that he was put off work for medical reasons, and that he would remain off work until June 10, 2011. She testified that she examined him and that he was put off work due to anxiety.

[72] Mr. Burke responded on June 9, 2011, by letter to Mr. Hawker's May 16, 2011, letter. He denied the misconduct allegations.

[73] Mr. Burke and Mr. Hawker spoke by telephone on June 9. Mr. Burke told him that his doctor had cleared him to return to work as of June 10, the next day, and that he had a letter to that effect. He also stated that his physician had advised him that an FTWE was not necessary.

[74] Mr. Hawker would not let the grievor return to work. Mr. Burke allegedly stated that he would come in and that the general manager had no authority to stop him or to overrule his doctor. Nevertheless, he was not permitted to return to work.

[75] On June 13, 2011, Mr. Hawker wrote to Mr. Burke with respect to his status and requested that he follow through immediately, to ensure that he received a response to his letter of May 16, 2011.

[76] Mr. Hawker stated that in the letter, he asked for the grievor's attending physician to respond to the specific questions about the grievor's fitness to work and for consent to have the physician share that information with Mr. Hawker so that he could determine if an accommodation were required. He stated that if it was not possible, then the grievor could opt to provide it by consenting to undergo a FTWE at Health Canada.

[77] Mr. Hawker placed Mr. Burke on sick leave without pay when his sick leave ran out on June 10, 2011.

[78] Ms. Clattenburg had a telephone discussion with Mr. Burke on July 5, 2011. He felt that he was ready to be at work but that management was not allowing him to work. He had concerns about the documents, having a doctor complete them, his privacy being breached, and his human rights being violated.

[79] She stated that the grievor called her back and stated that he would not apply for EI, sick leave benefits, or disability insurance (DI) because he would get the FTWE done and that he planned to return to work the next week.

[80] Mr. Burke stated that from June 10, 2011, onwards, he had no income.

[81] On July 12, 2011, Human Resources and Skills Development Canada issued a record of employment (ROE) for Mr. Burke, stating that his final pay period ending date had been June 22, 2011, and that the reason for issuing it was illness or injury.

[82] The compensation team leader stated that an ROE is issued within five days of an employee going on leave without pay as required by the *Employment Insurance Act*. As Mr. Burke had not applied for leave, management decided that sick leave would be the best benefit for him in terms of pension contributions, DI, and sick leave benefits, which is why the ROE stated that the reason for issuing it was illness or injury.

[83] Mr. Burke faxed a number of pages to the employer on July 28, 2011. They included a medical note dated May 13, 2011, from a doctor stating that the grievor had been unable to work for one week since May 11 due to his symptoms; a medical note dated May 17, 2011, from Dr. Gradstein, his new family physician, stating that he would be off sick for medical reasons until May 24, 2011; and a medical note dated May 24, 2011, from her stating that he had been seen in the medical office on May 17 and 24 and that he had been put off work for medical reasons until June 10, 2011.

[84] On August 2, 2011, Mr. Burke faxed the employer. The materials included a physician's certificate of disability for duty that Dr. Gradstein prepared and that was dated June 5, 2011. It stated that she had attended to Mr. Burke, that he had been incapable of working from May 17, 2011, due to illness or injury, and that his estimated date to return to duty was June 10, 2011.

[85] As noted, Dr. Gradstein saw Mr. Burke as a patient on May 17, 2011. During that visit, they discussed the employer's FTWE request. She also saw him on July 22, 2011, after which she prepared a letter stating that he was fit to return to work at that time, based on her medical assessment.

[86] Dr. Gradstein testified that she determined that Mr. Burke was fit to work from a physical capability perspective. She also made notes with respect to his mental situation. She did not make a psychological assessment.

[87] The letter stated, "This patient was seen in the clinic today. He is fit to return to work at this time."

[88] Mr. Hawker wrote to Mr. Burke on August 15, 2011, stating that the notes from Mr. Burke's attending physicians did not respond to the questions he had asked the

grievor to take to his physician in his May 16, 2011, letter. Mr. Hawker stated that he required Mr. Burke to undergo an FTWE no later than August 22, 2011, and that until the employer could determine whether the grievor was fit to return to work, he would not be authorized to return to the workplace.

[89] Enclosed in the letter was a Health Canada consent form by which Mr. Burke could agree to undergo an FTWE there. He was advised that should he agree to cooperate, Mr. Hawker would request that FTWE.

[90] The letter also stated that Mr. Burke had to be on authorized leave during his absence and that it was his responsibility to request leave.

[91] Mr. Burke responded on August 19, 2011. He advised that on May 25, 2011, his doctor concluded that the FTWE forms that had been sent were not needed as no FTWE was needed. He stated that his union had advised him that if he had a doctor's note stating that he was fit to work, it was all that was necessary for his return and that such a note had been provided. He enclosed a response to the reasons behind the FTWE request and stated that they were baseless.

[92] Mr. Burke did not apply for DI as his doctor had advised him that he was fit to return to duty. Since he was not ill, he would not have been entitled to DI.

[93] On October 7, 2011, Mr. Hawker wrote to Mr. Burke. He summarized his previous correspondence and reiterated his rationale for the necessity of an FTWE. He invited Mr. Burke to a meeting on October 25, 2011.

[94] The letter referred to the following three options:

1. consent to a Health Canada FTWE;
2. consent to Mr. Hawker corresponding directly with Mr. Burke's attending physician with the intent of receiving answers to his outstanding questions; the letter stated that he was not seeking information about Mr. Burke's medical condition but information to determine if he was fit to work; and
3. provide the attending physician with the May 16, 2011, letter and inform Mr. Hawker when the physician received it and the expected time frame for a response.

[95] If satisfactory medical information from Mr. Burke's physician were not received, he would have had only the first two options.

[96] He was also advised that Mr. Hawker would continue to authorize his absence as sick leave without pay.

[97] The letter stated that a failure to abide by the request would result in an unauthorized absence, which could lead to administrative or disciplinary action, up to and including termination of employment.

[98] Mr. Burke replied on October 17, 2011. He provided his perspective, reiterated that his doctor had determined that no FTWE was required, stated that Labour Relations had advised him that a doctor's certificate stating that he was fit for work was all that was required, and stated that Mr. Hawker had received it. He stated that he was willing to meet with the general manager, to find a resolution.

[99] On December 8, 2011, Mr. Burke wrote to Mr. Hawker. He attached a letter sent to his Labour Council representative dated October 13, 2011. He advised the general manager that he had given his permission through his Labour Council representative for the employer to contact his doctor, with the stipulation that he receive a written copy of the questions the employer intended to ask her.

[100] The letter to the Labour Council representative set out the background to the dispute as well as the fact that the bargaining agent had advised him that a letter from his doctor indicating that he was fit to work would be sufficient. It also referred to advice from the representative that the doctor's letter had to state that she had read the letter that was sent to her.

[101] In the letter, Mr. Burke assured the Labour Council representative that his doctor had received all the documentation sent to him and stated, "If management needs any further proof of this, they have the address of my Doctor and can send a letter to her along with a copy to myself."

[102] On December 9, 2011, Mr. Burke sent a handwritten letter to Dr. Gradstein, stating as follows:

…

> *Enclosed are letters which have been sent to my employer and my Labour Council representative. They basically deal with my consent of allowing my employer to contact you, with the stipulation that they send me a copy of the questions they ask. My employer is not seeking information pertaining to my medical*

> *condition, but rather information to determine if I'm fit to return to work with or without restrictions. Thank You [sic] in advance.*
>
> …

[103] During her testimony, Dr. Gradstein was unable to confirm that the handwritten letter had been scanned into her file. However, the Labour Relations representative, Ms. Gallivan, wrote in her notes of a discussion on February 17, 2012, with the doctor that the doctor had referred to the grievor's December 9, 2011 letter.

[104] Mr. Hawker sent a letter dated December 13, 2011, to Mr. Burke that was a follow-up to recent correspondence in which Mr. Burke indicated that he would be willing to meet with the general manager to arrange a face-to-face meeting on January 5, 2012.

[105] On January 5, 2012, Mr. Burke received a letter from the Department of Human Resources and Skills Development with responsibility for Service Canada about his EI claim. Since in his application, he had stated that he was not working due to a strike or lockout, and the ROE submitted by his employer had stated "Illness", the EI commission had to conduct a fact-finding investigation. After obtaining statements from all the concerned parties, departmental officials had determined that he had lost his job through no fault of his own.

[106] A meeting also took place on that date. Present were Mr. Burke, Mr. Hawker, the Labour Council representative, and Ms. Gallivan from Labour Relations.

[107] Mr. Hawker stated that the purpose of the meeting was to obtain Mr. Burke's consent for an FTWE as he had been out of the workplace for some time, which was the standard practice.

[108] In his view, Mr. Burke was not there to cooperate with respect to an FTWE; he was there to gather information for his preparation for the adjudication on the Covey incident that had led to his three-day suspension. Ms. Gallivan provided him with a copy of his personnel file.

[109] During the meeting, Mr. Burke stated that the FTWE request was not valid because a harassment investigation into his conduct was still outstanding, i.e., into Mr. Turnbull's complaint, and he had not planned to proceed further until he had the

report. He also stated that he wanted to respond to the reasons that management was requesting an FTWE; i.e., he did not throw materials on the shop floor, etc.

[110] Mr. Hawker gave him consent forms for a Health Canada FTWE.

[111] At one point in the meeting, the grievor tried to convince Mr. Hawker that his employment had been terminated. He showed Mr. Hawker the ROE.

[112] He stated that he had given his consent to contact his doctor and asked why management had not called her. The Labour Council representative stated that the letter was not proper consent.

[113] Mr. Burke took the consent forms for a Health Canada evaluation, stating that he wanted to think about it.

[114] On January 20, 2012, Mr. Hawker wrote to Mr. Burke, setting out his perspective on how the January 5 meeting had gone. Attached was a consent form authorizing the employer to contact the grievor's attending physician.

[115] Dr. Gradstein prepared a letter dated January 28, 2012, for Mr. Burke that was submitted to the employer. It reads as follows:

> *This letter is regarding Mr. Greg Burke's fitness for work. He has no limitations in his ability to perform his work duties and can return to full time work. He does not require any follow up with me regarding his health and he can return to work as soon as possible as can be accommodated by his workplace.*

[116] Dr. Gradstein stated that the letter was based on her medical assessment of Mr. Burke during an office appointment. She confirmed that he was fit to return to work.

[117] Mr. Hawker was not satisfied with the medical note as he did not have the appropriate information about the FTWE.

[118] On January 30, 2012, Mr. Burke filed a grievance with his employer alleging that he had been wrongfully dismissed. It stated on its face that the act that gave rise to it was his notice of dismissal from Service Canada (EI), the ROE. He sought compensation for wage losses and damage to his character and reputation, along with the return of his security pass and his job.

[119] The employer denied that the grievor had been terminated. The grievance was referred to the Board for adjudication. It was before the adjudicator in July and December 2013.

[120] In *Burke 2014*, the adjudicator determined that it was without jurisdiction to consider and decide the grievance given that no termination of employment had taken place.

[121] In his reasons, the adjudicator stated that there was ample evidence to conclude that the employer had been within its rights to request that Mr. Burke undergo an FTWE.

[122] On February 17, 2012, Ms. Gallivan telephoned Dr. Gradstein to ask her about the January 28, 2012, letter she had provided to the Department. Dr. Gradstein confirmed that she had the May 16, 2011, letter and that she had seen it.

[123] Dr. Gradstein was asked if she had received a handwritten note from Mr. Burke dated December 9, 2011, and if after reading it, she would consider that it constituted consent. She stated that she had received the letter. She was asked if based on her medical assessment, Mr. Burke was fit to work, without restrictions. She stated that she had told the employer as much in July 2012 and January 2013.

[124] Dr. Gradstein considered that Ms. Gallivan was being unethical when she asked her medical questions about Mr. Burke.

[125] Ms. Gallivan concluded that the telephone call with Dr. Gradstein had been unproductive. She advised management that it should only consider having Health Canada examine Mr. Burke.

[126] On February 27, 2012, Mr. Hawker wrote to Mr. Burke. He referred to the May 16, 2011, letter. He noted that it included specific questions to ensure that when determining if the grievor was fit to work, his treating physician considered the information that the employer had provided.

[127] He noted that the employer had confirmed with the grievor's attending physician that she had received the letter. However, she had not indicated that she considered the information provided in the letter. As a result, Mr. Hawker was not satisfied that a comprehensive medical assessment had been conducted.

[128] It was noted that the employer had asked for Mr. Burke's consent to either allow it to contact his attending physician directly or undergo a Health Canada FTWE and that he had chosen not to sign either consent form.

[129] It was noted that Mr. Burke had expressed that he had given the employer his consent to contact his physician directly. However, this information conflicted with the information received from the physician as she stated that she did not have his consent to provide the employer with the information it required to determine if he was fit to return to work. Mr. Burke was advised that his only remaining option was to consent to a Health Canada FTWE.

[130] On June 8, 2012, Mr. Hawker wrote to Mr. Burke, asking the grievor to inform him by no later than Friday, June 29, 2012, if he would consent to a Health Canada FTWE.

[131] On December 21, 2012, Mr. Hawker wrote to Mr. Burke, again requesting that he consent to undergo a Health Canada FTWE and to provide Mr. Hawker with the response by no later than January 30, 2013. The last paragraph of the letter states as follows:

> *Please be advised that this is my last request to have you undergo a fitness to work evaluation through Health Canada. If you continue to refuse this request, I may be recommending your file to the appropriate delegation of authority to proceed with termination of employment for cause.*

[132] Mr. Burke responded to the general manager's letter on January 24, 2013. He stated that his doctor had answered the questions in the fitness-to-work package she had received from him. She had evaluated him as being fit to return to work as of June 10, 2011. The general manager had received the letter but had not allowed him to return to work.

[133] He referred to the accusations in the May 11, 2011, letter that he had cursed, thrown materials, and stomped off the job as fabrications in an attempt to construct reasons for his dismissal.

[134] He stated that Labour Relations had contacted his doctor but had not provided a copy of the questions in advance, which he had requested in writing. He also stated

that the questions that were asked pertained to personal medical details that his doctor correctly did not have the liberty to disclose.

[135] On January 30, 2013, Mr. Burke signed a Health Canada consent form in the presence of a witness to undergo its FTWE. The consent was valid from January 30 to March 28, 2013.

[136] The same day, he also signed a DND consent form that was valid for the same period to allow Mr. Hawker to contact his attending physician, Dr. Gradstein, for an interpretation of her medical assessment. It would contain a description of his abilities to perform the duties of his position, including any functional limitations that might arise due to the identified medical (physical and mental) conditions. The form stated that the physician would not disclose any clinical information.

[137] Mr. Burke added a note to the bottom of each consent form that reads in part, "In the spirit of cooperation, to further satisfy a workplace manager and have my employment reinstated, I submit these forms in an effort to reinforce what has been stated by my family physician …".

[138] Neither Mr. Hawker nor any other employer representative nor Health Canada contacted Dr. Gradstein.

[139] On February 7, 2013, Mr. Hawker wrote to Mr. Burke, acknowledging receipt of the signed Health Canada consent forms and advising him that Health Canada required that the forms expire one year from the date of signing to ensure that it had sufficient time to complete the evaluation process. He enclosed new consent forms with the expiry date of February 22, 2014.

[140] On February 28, 2013, Mr. Burke responded to Mr. Hawker's February 7 letter. He stated that it had been nearly two years since Mr. Hawker had unjustly refused to permit him to return to work and that Mr. Hawker had caused extreme undue hardship to him and his family. The consent forms would remain with an expiry date of March 28, 2013, and if Health Canada advised him that it could not complete an evaluation by that date, he would decide then whether to extend it.

[141] On March 7, 2013, Mr. Hawker replied to Mr. Burke. He stated that he had been advised that Mr. Burke and Health Canada had reached an agreement by which

Mr. Burke had consented to an eight-month period for Health Canada to complete its evaluation. Mr. Hawker attached new consent forms.

[142] On March 15, 2013, Mr. Burke replied. He referred to a telephone discussion with Health Canada. His reply letter reads in part as follows:

> …
>
> *In a March 5th 2013 phone conversation with Health Canada supervisor, Donald Monty, we discussed preference for an applicant to consent to a one year time period for a Health Canada Fitness To Work Evaluation. This would constitute a time interval of one month shy of three years since my last day worked, May 11th, 2011. It is common knowledge as Mr. Monty said, an evaluation could be done in as little as two weeks for applications such as mine, where applicants already had their family physician file a fitness to work evaluation with DND.*
>
> *I questioned my requirement to summit a one year expiry date. Mr. Monty replied in some cases a specialist needs to be consulted and Health Canada wanted to avoid having to contact applicants every three weeks to update their application. He proposed an expiry date of eight months for my application. This was* ***not*** *agreed upon. He also said that there would not be enough time to consult my family physician before my existing applications expiry date. For this reason, I am enclosing a new date of May 11, 2013, which will be exactly 2 years from my last date of employment. This will allow another eight weeks from the present date.*
>
> …
>
> [Emphasis in the original]
>
> [*Sic* throughout]

[143] Mr. Burke enclosed new signed consent forms with the expiry date of May 11, 2013.

[144] Mr. Burke testified that he advised Mr. Monty he could not wait eight more months as he was not being paid. He acknowledged that things became heated during their discussions. He did not agree, as it would have constituted a three-year delay since his last day of work.

[145] After his discussion with Health Canada, Mr. Burke's wife advised him that" she had had enough" and that she was relocating to Winnipeg, Manitoba. He also relocated there.

[146] On October 2, 2013, Mr. Hawker wrote to Mr. Burke, providing him with a final opportunity to consent to a Health Canada FTWE in Winnipeg. The letter stated that Health Canada had made it clear that he had to agree to a one-year time frame in which the evaluation could take place. If Mr. Hawker did not receive a response by the date provided or if the grievor did not agree to participate in the evaluation by providing the required dates on the consent forms, Mr. Hawker would recommend terminating the grievor's employment, for cause.

[147] On October 12, 2013, Mr. Burke wrote to Mr. Hawker. He enclosed a copy of the letter he had sent to Mr. Hawker dated March 15, 2013. He advised Mr. Hawker that he continued to be in good health and that he was employed in his vocational trade. He stated that Mr. Hawker had neglected to include the consent forms in his October 2 letter.

[148] On November 5, 2013, Mr. Hawker sent Mr. Burke the consent forms with the requirement that one year of consent be given to Health Canada to perform the evaluation.

[149] Mr. Burke replied to Mr. Hawker on November 17, 2013. He recited his efforts to comply with the FTWE demand. He stated that he had agreed to a generous approximate period of six months in which Health Canada had to conduct the evaluation. He continued to assert that the evaluation request was baseless.

[150] On December 16, 2013, the Commanding Officer of FMF Cape Scott recommended to the Commander, MARLANT, that the grievor's employment be terminated under s. 12(1)(e) of the *FAA*. A briefing note was attached that Labour Relations had prepared. It referred to a number of incidents recorded in Mr. Burke's personnel file that had not been investigated and in some cases not even reported to supervisors but were said to be examples of his behaviour. Save for the two for which he was disciplined, Mr. Burke had not been aware of those notes in his personal file.

[151] On January 8, 2014, the Commander, Marlant, Rear Admiral John Newton wrote to Mr. Burke, terminating his employment. The letter stated that it was further to the October 2, 2013, letter in which his manager had advised the grievor that he would recommend terminating the grievor's employment should he choose not to participate in the Health Canada FTWE. The letter reads in part as follows:

…

> *Over the past two and a half years management have [sic] attempted to obtain sufficient medical information from you and your attending physician. These attempts have proven to be unsuccessful. You were also provided with the option to consent to undergo a fitness to work evaluation through Health Canada, however the most recent correspondence you provided to management dated 22 November 2013 confirms that you do not agree to participate in the fitness to work evaluation process. Therefore, in accordance with Section 12 (1)(e) of the* Financial Administration Act*, I hereby terminate your employment….*

[152] Rear Admiral Newton terminated the grievor's employment after reviewing the material that was provided in a synopsis of Mr. Burke's labour file at FMF Cape Scott, including Labour Relations' recommendation. Commodore Mike Wood provided the synopsis, together with his recommendation to terminate the grievor's employment.

[153] Rear Admiral Newton had met with the civilian resource team to ensure that the team had followed process and that the decision was defendable. He was able to convince himself that the recommended action was warranted, and he signed the letter of termination willingly.

[154] He was not aware of the full chain of reporting relationships that would have included Mr. Haché and Mr. Hawker.

[155] The termination was justified because of workplace threats and intimidation. He referred to a litany of incidents in the briefing note.

[156] The grievor asked him what would happen if Mr. Hawker's May 16, 2011, letter to the grievor's doctor was picked apart and it "crumbled." He replied that that was up to the adjudicator.

[157] From the chronology, he thought that an honest attempt had been made to get Mr. Burke to return to work and that it reflected his failure to return to work. He agreed that there could be other outstanding evidence of which he was unaware.

IV. Preliminary issue

[158] Do the doctrines of issue estoppel or abuse of process apply such that I am bound by Adjudicator McNamara's decision, who found that the employer had had reasonable grounds to ask Mr. Burke to submit to an independent medical examination by Health Canada, in determining that Mr. Burke was not constructively dismissed?

A. The employer's submissions

[159] In this grievance, which Mr. Burke presented on January 28, 2014, he stated that he had already grieved his constructive and wrongful dismissal (see 2014 PSLRB 79). He indicated that he was waiting for a decision from that earlier grievance and that "[t]here is no further evidence to be given".

[160] It is important to note that the grievance against the alleged constructive dismissal was heard over the course of seven days, July 9 to 12 and December 3 to 5, 2013, and that the same witnesses testified about the same events. The grievor alleged that the employer's refusal to allow him to return to work in light of his medical notes was a constructive or wrongful dismissal. Mr. McNamara rendered *Burke 2014* on August 22, 2014. The grievor did not seek judicial review of it.

[161] Adjudicator McNamara found that the grievor's physicians did not address the employer's legitimate questions and that the employer's request for an FTWE was legitimate and supported by ample evidence. See paragraphs 85 and 88 of that decision.

[162] It should be noted that the binding nature of that decision was raised in the employer's opening submissions as an issue-estoppel objection. The Board reserved on the objection, noting that it was too early in the process to rule on it.

[163] The factors that the Supreme Court of Canada outlined in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, are met in this case. Furthermore, the employer relied on Palmer and Snyder, *Collective Agreement Arbitration in Canada*, 5th edition, at page 55, as follows: "Since Danyluk, arbitrators have concluded that they would not revisit decisions of various other bodies relating to the grievances before them, including decisions by … a Labour Relations Board …". It was respectfully submitted that the Board's earlier decision (*Burke 2014*) was "judicial" and that it therefore should engage the doctrine of issue estoppel.

[164] In the alternative, the Board should be bound by the earlier decision (*Burke 2014*) based on the principle of abuse of process. See the Supreme Court of Canada's decision in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 ("*C.U.P.E.*") at paras. 23, 24, 32 to 35, 37, 51 to 53, and 55, in which the Court found that the principle of abuse of

process applied even in cases in which the strict requirements of issue estoppel were not present.

[165] The findings made in the earlier decision (*Burke 2014*) were based on the testimonies of many of the same witnesses, and the parties were the same. Allowing the grievor to relitigate these matters, given that he failed to seek judicial review of the earlier decision, would be an abuse of process.

[166] In the further alternative, the evidence supports the same findings made in the previous case (*Burke 2014*) even if approached *de novo* .

B. The Grievor did not make Submissions on this Issue

C. Analysis of issue estoppel

[167] Donald J. Lange, in Chapter 2 of his text *The Doctrine of Res Judicata in Canada*, Third edition, outlines the key principles governing issue estoppel as follows:

…

> *The key principles governing the doctrine of issue-estoppel as decided by the courts of Canada are:*
>
> - *The same question test governs.*
> - *The question to be decided in the second proceeding must be the same question that has been decided in the first proceeding.*
> - *The question decided in the first proceeding, governing the same question test in the second proceeding, must be fundamental to the decision in the first proceeding, not collateral to the decision.*
> - *The question decided in the first proceeding, governing the same question test in the second proceeding, includes all subject matter encompassing the question whether decided expressly or by necessary logical consequence.*
> - *If the question has been decided in the first proceeding, the same question cannot be relitigated in a second proceeding based on a separate and distinct cause of action.*
> - *The same parties, and their privies, cannot relitigate the same question in a second proceeding.*
> - *The decision in the first proceeding must be a final decision on the question.*
> - *The decision in the first proceeding must be a judicial decision on the question.*

> - *The decision-making forum in the first proceeding must have the jurisdiction to decide the question*
>
> …

[168] In his reasons for decision, Adjudicator McNamara states as follows at paragraphs 80, 83, 84, and 86:

> *80 … 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.*
>
> …
>
> *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.…*
>
> *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 [sic] 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.*
>
> …
>
> *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… 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.*

[169] Adjudicator McNamara found that he was without jurisdiction to consider and decide the grievance given that no termination of employment had taken place.

[170] The question to be decided in the second proceeding is not the one decided in the first proceeding. In the first one, Mr. Burke argued that he had been constructively dismissed from his employment. He relied on evidence such as the ROE that stated he had lost his employment by reason of illness and the report from Service Canada that he had lost his job through no fault of his own. Adjudicator McNamara concluded that

Mr. Burke had not met his onus of establishing that he had been constructively dismissed.

[171] The question to be decided here is whether it was reasonable to terminate Mr. Burke for not agreeing to participate in the FTWE process.

[172] The question that had to be decided in the first proceeding, governing the same question test in the second proceeding, had to be fundamental to the decision in the first proceeding and not collateral to it.

[173] Whether the employer was within its rights to request that Mr. Burke undergo an FTWE was not fundamental to the determination that he had been constructively dismissed; it was collateral to that decision and is *obiter*.

[174] It is also argued that in the event that I conclude that the doctrine of issue estoppel does not apply, the Board should be bound by the previous decision as allowing Mr. Burke to relitigate the issue would be an abuse of process, relying on the decision of the Supreme Court of Canada's decision in *C.U.P.E.*

[175] In that case, a recreation instructor employed by the City of Toronto was charged criminally with sexually assaulting a boy under his supervision. He pleaded not guilty. At trial, he testified and was cross-examined. The trial judge found that the complainant was credible and that the recreational instructor was not. He was convicted, which was upheld on appeal. He was sentenced to 15 months in jail, followed by a year of probation.

[176] After his conviction, the City fired the recreational instructor. He grieved the termination. In arbitration, the City submitted the conviction, the complainant's testimony from the criminal trial, and the notes of the instructor's supervisor. The complainant did not testify. The instructor testified, claiming that he did not sexually assault the boy. The arbitrator ruled that the criminal conviction was admissible but not conclusive as to whether the instructor had assaulted the boy. The arbitrator ruled that the presumption raised by the conviction had been rebutted as he concluded on the evidence that the sexual assault did not take place. The instructor was reinstated.

[177] The Court ruled that when asked to decide whether a criminal conviction ought to be rebutted or taken as conclusive, courts will turn to the doctrine of abuse of process to determine whether relitigation would be detrimental to the adjudicative

process in circumstances in which the strict requirements of issue estoppel are not met and allowing litigation to proceed would violate such principles as judicial economy, consistency, finality, and the integrity of the administration of justice.

[178] In that case, issue estoppel did not apply, because the parties to the criminal and the arbitral proceedings were not the same.

[179] However, the Court ruled that the union was nevertheless not entitled, either at common law or under statute, to relitigate the issue decided against the grievor in the criminal proceedings and that the facts constituted a blatant abuse of the process that results when the relitigation of situations like that one is permitted. The arbitrator reached a patently unreasonable conclusion.

[180] In this case, the parties were the same in both proceedings. However, as I have already noted, the requirements of issue estoppel are not met as the issue to be determined in the first proceeding is not fundamental to the issue in the second proceeding. As such, I find that, in contrast to *C.U.P.E.,* the grievor would not be relitigating the same case. The essence of the case that was litigated in *Burke 2014* was different than that which is before me now. To allow Mr. Burke to proceed with his litigation would not violate any of the principles listed in *C.U.P.E.* It would not constitute an abuse of process. If anything, preventing him from proceeding would be far more troubling as it would effectively deprive him of his right under the *Act* to challenge his termination.

[181] In the further alternative, the employer argued that the evidence supports the same findings made in the earlier case (*Burke 2014*) even if it is approached *de novo*.

[182] Of course, this alternative requires analyzing the evidence *de novo*, which I am mandated to do under the *Act* and how I have proceeded in addressing the fundamental issue in this decision.

V. The fundamental issue

[183] Did the employer have reasonable and probable grounds to keep Mr. Burke out of the workplace, to request a psychiatric FTWE from his doctor, and ultimately, to request that he undergo a psychiatric FTWE at Health Canada?

A. The psychiatric evaluation

[184] During his cross-examination by Mr. Burke, Mr. Hawker was asked what he had wanted from Mr. Burke's doctor after receiving the May 16, 2011, letter. Mr. Hawker stated that he had wanted an assessment and that he had been looking for limitations. He was asked whether he had concerns that something was not right with Mr. Burke and whether he was referring to a medical or a mental problem. He replied that a mental problem is part of a medical problem. He was asked whether he had been after an FTWE on mental issues. He replied, "No; maybe psychological."

B. Grounds for the FTWE set out in the May 16, 2011, letter to Mr. Burke's doctor

[185] In his May 16, 2011, letter to Mr. Burke and in the letter dated the same day addressed to Mr. Burke's doctor, Mr. Hawker set out the grounds for his FTWE request. Mr. Burke was directed to take the letter to his doctor and was asked that his doctor provide the information by May 20, 2011. The letter reads as follows:

> …
>
> 1. *… The reason for this evaluation is two fold; first Mr. Burke is continuously demonstrating unacceptable and unsafe behaviours in the work place and secondly we have ask that he not return until such time as we receive relevant information from you and we have had a chance to evaluate.*
> 2. *Mr. Burke's supervisor and I have discussed with him issues relating to his aggression and anger. He frequently has violent angry responses that included profanity, throwing material, stomping off the job at hand, yelling at colleagues and has even resorted to physical violence against another employee. He acts aggressively and tries to intimidate his fellow teammates… His behaviour is impacting on other workers and it is concerning me that an unsafe work environment has been created. We have tried moving him from one team to another but the situations occur more and more employees are refusing to work with him. Several employees have expressed concerns about what they fear he might do to them when they work with him especially when there are disagreements and things do not go his way.*
> 3. *Mr. Burke can be a productive employee but it is often in isolation and not necessarily what the team needs him to be working on and the work is completed at the standard he choices rather than the organization requirement. He also exhibits difficulty accepting any constructive criticism from his team leader and co-workers, especially when his approach is being questioned. The situation I am describing has deteriorated from the time he was initially hired in 2007.*

> 4. *There are various tools used by the department to aid in bringing to the workers attention the job and organization's requirement; however, in the situation at hand the employee is not responding and changing his behaviour. Therefore it is important that we determine if the employee needs to be accommodated. This is the reason for this request for a fit for work assessment. I have attached Mr. Burke's work description and analysis of his work to provide a detailed picture of the challenges he has to accomplish both in an industrial and team setting.*
> 5. *Given this situation we are requiring information relating to the following questions:*
>
>> 1. *Does Mr. Burke have any limitations based on the work description and analysis of his work attached;*
>> 2. *If Mr. Burke has limitations, are they permanent limitations;*
>> 3. *If Mr. Burke has limitations, what accommodation does he require, i.e. part-time hours, reassignment of duties etc.;*
>> 4. *If limitations are not permanent, what is the anticipated timeframe for each accommodation;*
>> 5. *Should he be re-schedule for a follow up appointment relating to a proposed accommodation(s) and if so at what time interval;*
>> 6. *If you determine through the course of your review any other information that would assist the employer to accommodate this employee and/or assist in providing a safe work environment please feel free to provide the information to me.*
>
> …
>
> [*Sic* throughout]

[186] The work description sets out the key activities of Mr. Burke's shipwright position, which include manufacturing and repairing custom furniture, ship accessories, targets, floats, scaffolding, insulation deck coverings, wooden vessels, and their components for HMC ships, submarines, and shore establishments and manufacturing and repairing casting patterns for a variety of machinery and equipment and the layout of full-size templates of ship components on the loft mould floor.

[187] The predominant emphasis of the work description is with respect to the physical effort required to achieve the key activities. It consists of 10 pages.

C. The employer's submissions

[188] This is an important case for the DND and the federal public administration as it involves the employer's ability to deal with concerns of employee safety and, in particular, workplace violence.

[189] On January 28, 2014, the grievor filed a grievance letter indicating that he had already grieved his constructive and wrongful dismissal (see *Burke 2014*). He indicated that he was waiting for a decision on that earlier grievance and that "[t]here is no further evidence to be given" (Exhibit E-48).

[190] It is important to note that the grievance against the alleged constructive dismissal was heard over the course of seven days, July 9 to 12 and December 3 to 5, 2013, with the same witnesses testifying about the same events. The grievor alleged that the employer's refusal to allow him back to work in light of his medical notes was a constructive or wrongful dismissal. Adjudicator McNamara's decision was rendered on August 22, 2014 (*Burke 2014*), and the grievor did not seek judicial review of it.

[191] The respondent's request for an FTWE was legitimate and supported by ample evidence, specifically as noted as follows at paragraph 88 of *Burke 2014*:

> *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).*

[192] The respondent argued that the evidence supports the same findings as in that case, even if approached *de novo*.

[193] It is well established that the respondent has the legal authority to carry out a non-disciplinary termination under the *FAA* for an employee who refuses to provide

adequate information to satisfy the respondent that he or she is fit to work. The statutory authority is provided to deputy heads in s. 12(1)(e) of the *FAA*, as follows:

> ***12 (1)*** *Subject to paragraphs 11.1(1)(f) and (g), every deputy head in the core public administration may, with respect to the portion for which he or she is deputy head …*
>
> …
>
> ***(e)*** *provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service for reasons other than breaches of discipline or misconduct ….*

[194] The respondent has an obligation under Part II of the *CLC* to protect employees (s. 124) and specifically to protect them from workplace violence (s. 125), which includes physical and non-physical acts of violence.

[195] The case law affirms that employers have the right (a) to demand that employees undergo a medical assessment when there is a reasonable basis for the demand, (b) to bar them from the workplace until they carry it out, and (c) to terminate them for non-disciplinary causes, if they continue to refuse.

[196] This is further affirmed in *Injury and Disability in the Workplace* (Canada Law Book), which notes that an employer has the right to demand a medical examination if it has reasonable and probable grounds for suspecting that an employee is a source of danger to himself or herself, other employees, company property, or the general public or alternatively, is unfit to perform his or her duties. After reviewing the relevant jurisprudence, the authors note, "If that is refused, then the employer has the right to discharge the employee for refusing a reasonable request and because the employee is an occupational health and safety risk."

[197] Turning to the facts of this case, the question becomes, did the respondent have reasonable and probable grounds for suspecting that the grievor was a source of danger to himself, other employees, company property, or the general public or alternatively that he was unfit to perform his duties? The answer is yes.

[198] The respondent was faced with an employee who had physically assaulted a colleague, causing his mouth to bleed (which resulted in a 3-day suspension). Shortly after that, the same employee verbally abused a colleague, which the respondent characterized as workplace violence (which resulted in a 5-day suspension). The

respondent was faced with a team of employees refusing to work with the grievor because of his temper and abusive language. It was faced with the events that occurred during the May 11 meeting. The grievor was combative with his supervisor and verbally abused Mr. Foster, at one point telling him to "shut the f--- up". He threatened Mr. Wournell and followed Mr. Foster after the meeting. And Mr. Hawker noted that at least 10 other employees approached him to express their concerns about the grievor.

D. The grievor's submissions

[199] The grievor's submissions read in part as follows:

> …
>
> ***(1.)*** *My name is Pius Gregory Burke, I am the Grievor in this PSLRB adjudication hearing for wrongful dismissal/ termination of wages and benefits from my indeterminate employment position as a civilian employee with the DND Fleet Maintenance Facility, Cape Scott, Halifax, NS.*
>
> *As you read this, my final argument for this hearing, I ask you to keep in mind the following;*
>
> - *I am fifty nine years of age*
> - *I began my career as a carpenter at the age of sixteen, while in high school*
> - *After high school I spent the following thirty years working throughout Canada, in Calgary, Toronto, Vancouver and Halifax, mostly employed in the heavy construction industry. These thirty years are accident free, with no time on worker's compensation or sick benefits.*
> - *After passing security and criminal record checks and attending interviews in 2007, I was granted a indeterminate position as a civilian shipwright employee with FMF Cape Scott.*
> - *The four and a half years I worked at FMF Cape Scott were accident free with no recorded record of what is termed as near misses (close calls).*
> - *The past seven years, since my last day of work with FMF Cape Scott in 2011, and the last five years of working in Winnipeg, remain accident free.*
> - *I have been involved in the construction industry for forty three years, all of which has been accident free.*
> - *I have no criminal record.*
> - *I have no health problems and do not require a family doctor.*

- *In 2009, after two years of working at FMF Cape Scott, I was physically assaulted by a work challenged, Mr. David Turnbull… I placed a complaint with my supervisor. Unknown to me at the time Mr. Turnbull placed a counter complaint. In the following days I was asked by Mr. Steve Wournell to spend a term on the acoustical tile team which was relocating to D-53 at the other end of the dockyard. I agreed.*
- *Without my knowledge, until after my last day at work with FMF Cape Scott, DND Manager, Mr. Hawker took steps which prohibited me from having the privilege of returning to the Shipwright shop. Mr. Hache and Mr. Hawker gave testimony supporting this action.*
- *Fourteen months later Mr. Turnbull filed a refusal to work application based on his counter complaint that I had assaulted him… This started the Marlant Investigation into Violence in the Workplace… After approximately two and a half years after the original incident when I was assaulted by Mr. Turnbull, Mr. Turnbull's counter complaint was found to be without merit and was ruled "Unfounded".*
- *This Marlant investigation and the fact that I was the one who was physically assaulted has been totally ignored by those in authority including, Mr. Hawker, Mr. Hache, Ms. Gallivan, Commander Newton, Adjudicator Mr. McNamarra, Adjudicator Mr. Richardson and also council for the employer, Mr. Fader.*
- *Mr. Hawker referred to the Marland investigation as being irrelevant and that he had nothing to do with it because it was being carried out on a higher level of authority. Ms. Gallivan accused me of being paranoid, having difficulty focusing and bringing up irrelevant things from the past because I announced that I was awaiting the outcome of the Marland investigation into violence in the workplace.*

(2.) *The following are statements made by witnesses who appeared before the Marlant Investigators three months before my last day of employment with FMF Cape Scott, May 11, 2011…*

- *… Mr. Forsythe "Mr. Burke is a good worker, with a good work ethic"*
- *… Mr. Roy, "Mr. Burke is a good worker to get things done"*
- *… "Mr. Wournell states that Mr. Burke is a hard worker"*
- *… Mr. Turple, "Mr. Burke's work is fine and is a hard physical worker"*

- *… Mr. Knoll, "Mr. Knoll feels Mr. Burke is a hard worker"*
- *… Mr. Ford, "To Mr. Burke, work is everything. He is a good worker"*

…

[*Sic* throughout]

[200] Mr. Haché testified that either Darlene Nelson or Ms. Clattenburg of Human Resources composed the May 16, 2011, letter to the grievor's doctor, with information that he and Mr. Hawker provided. Mr. Haché stated that in his view, the FTWE was initiated solely due to the grievor's actions at the May 11, 2011, team meeting, which Mr. Haché outlined in his evidence. The grievor responded to this self-contradicting account of Mr. Haché.

[201] Noteworthy is that Mr. Haché also testified that after his "urgently" named tile-team meeting, on the morning of May 11, 2011, he did not feel the need for the grievor to undergo an FTWE. He reassigned the grievor to report to the surface-tile team.

[202] Mr. Haché testified that in the morning of May 11, 2011, with one week remaining in the two-year tile installation project, Mr. Wournell, one of the grievor's co-workers, reported that the workplace had become nearly "volatile".

[203] Mr. Haché and Mr. Wournell testified they could not give any specifics as to why the workplace became nearly volatile on that particular morning, which made it necessary to arrange the "urgently" called meeting.

[204] One week before that so-called "urgently" called meeting, on May 3, 2011, Mr. Haché notified the grievor that Mr. Haché had had some co-workers report that they no longer wanted to work with the grievor.

[205] Mr. Haché would not allow the grievor to know the co-workers' names. The grievor told him that he would see Mr. Hawker, to iron things out. Mr. Hawker told the grievor that he had five minutes to explain the situation. Mr. Hawker never provided a response to the grievor.

[206] Mr. Haché testified that Mr. Wournell and Mr. Foster refused to work with the grievor three weeks before they all attended the "urgently" called team meeting.

[207] The report that Mr. Wournell did not want to work with grievor was no surprise to the grievor.

[208] At the meeting on the following morning, March 11, 2010, Mr. Wournell asked the grievor how the tiles were coming along. Mr. Burke said that he had the next five blocks of tile done. Mr. Wournell asked if that was F, G, H, I, and J. Mr. Burke replied that it was whatever came after A, B, C, D, and E. He thought Mr. Burke was being smart. Mr. Wournell said that he might as well have let the grievor know that once the acoustical tiles installation had finished on HMCS Windsor, the grievor would be out of there.

[209] Mr. Haché testified that Mr. Hawker's letter, dated May 16, 2011, was not accurate. The grievor has addressed that letter many times. The testimony at the hearing fell far short of substantiating Mr. Hawker's wild rant of baseless accusations in that letter.

[210] Mr. Haché also concealed from the grievor that Mr. Wournell and Mr. Foster were the co-workers who two weeks before the May 11, 2011, meeting, had made Mr. Haché aware that they had no intention of continuing working with the grievor. Given the testimonies of those witnesses, the grievor did not receive a legitimate reason that they felt the way they did.

[211] The grievor did not threaten a co-worker. He stated that there are other ways of dealing with issues.

[212] As for Mr. Haché's written account of the May 11, 2011, meeting, one of only a few established facts it contains is that Mr. Burke made it clear that he was looking at other ways of dealing with this issue along with other issues, through a meeting with Mr. Hawker and Mr. Haché, to straighten things out.

[213] In his submissions, the grievor commented on Mr. Hawker's May 16, 2011, letter as follows:

> …
>
> *Subject; Fit for Work Assessment (Grievors comment italicized [in the original, but not italicized in this quote]) Mr. Hawker, Quote;*
>
> *"1. You have met several times with your supervisor and myself to discuss concerns in the workplace."* (On May 3, 2011 with only 2 weeks remaining in the two year task of applying acoustical tile I

met with supervisor Hache at his request. He began by telling me that the completion date which we were on schedule to meet was moved backwards 1 month and that we were going to be two weeks over the projected schedule. He said he had complaints during my time as team leader in which I asked him why he waited till now to bring this up. He could not answer this so he said he had team members that were refusing to work with me.

Wanting to get to the bottom of this due to safety concerns I asked him who they were. He said he's not telling me. I told him if he thought I was going to sit here and take this nonsense he's mistaken. I told him I was reporting to manager Charles Hawker and left. I entered Mr. Hawker's office who I suspect Mr. Hache contacted while I was making my way to Mr. Hawker's office. He didn't look surprised to see me and immediately said, "I have no time for you but whatever you have to say, make it quick because you only got five minutes". I asked if he would contact Mr. Hache and find out what Mr. Hache's talking about because I have no idea where he's coming from. Mr. Hawker said he would. I never heard back from Mr. Hawker. Two weeks later he sent me this May 16, 2011, letter I'm now commenting on.

Mr. Hawker, Quote; *"As a result of these discussions you are aware that disrespectful behaviors and actions are not and will not be tolerated in the workplace."* (I can tell you I knew this before my first day of work 40 years ago) *"I have become quite concerned that you have continue (???) get angry very quickly; take out the anger on others around you"* (Who? When? Where? Why?) *"and/or throw materials";*(There has been no testimony supporting that I threw anything. Mr. Cox testified, I threw a piece of metal scaffolding. He said I was dismantling scaffolding that we had set up and he could tell by the sound that I had thrown a piece. He said he didn't see me throw it but he could tell by the sound. This hasn't been investigated and I have no idea what he's talking about.) *"demonstrate aggressive behaviors";* (All accusations brought forward against me, including complaints that weren't reported, form a pattern, of the complainant entering my workspace and initiating their so-called response from me. No testimony has supported otherwise.) *"refuse to accept direction"* (from whom? No investigation supports this) *"and in general do not work well in a team".* (I guess it depends on who you talk to. Testimony supports I was a good worker and was able to sustain a quality and rate of production in keeping up with the task of preparing the acoustical tile over a two year period. This along with all other work I was tasked with. *"As you are aware your work is carried out in an industrial setting with a team of multi-disciplined trade persons, within the client's workplace; therefore safety for you and others must be our primary concern".*(Safety has always been my top concern over the lifetime of my career. I have no vested interest in injuring myself or others. There were zero reported incidents of safety infractions while I worked at FMF Cape Scott. *"For these reasons I am requesting that you ask*

> *your physician to provide the information requested in the attached letter."*
>
> …
>
> *… In Mr. Hawker's letter to the Grievor's doctor, dated May 16, 2011 … Mr. Hawker, Quote;*
>
> *"He frequently has violent angry responses that include profanity, throwing material, stomping off the job at hand, yelling at colleagues…."*
>
> ***(127.)*** *Mr. Wournell testified at this present adjudication hearing that the Grievor, on average, cursed less than that of his co-workers, and that the Grievor's profanity would take place during the Grievor's so-called flare-ups. Mr. Wournell then stated that he witnessed the Grievor having so-called flare-ups 3 or 4 times over the 4 and a half years the Grievor was employed at the Dockyards. Mr. Wournell did not report any details at the time of these so-called flare-ups. These flare up simply weren't reported.*
>
> …
>
> ***(140)*** *Mr. Hawker testified, as well as listed it in his reasoning for requesting the fit to work assessment … Mr. Hawker, Quote;*
>
> *"We have tried moving him from one team to another but situations occur and more and more employee's are refusing to work with him"*
>
> …
>
> [Emphasis in the original]
>
> [*Sic* throughout]

[214] When the grievor made a complaint that Mr. Turnbull had assaulted him in June 2009, Mr. Turnbull filed a counter-complaint. Mr. Hawker made the decision to bar the grievor from the shipwright shop. Mr. Hawker incriminated the grievor, who was sent down to the surface tile building under Mr. Haché's supervision.

[215] Mr. Hawker basically rescinded the grievor's shipwright status.

[216] The grievor was never notified of Mr. Hawker conducting any investigation into the assault. The grievor was not told that Mr. Turnbull had filed a counter-accusation until he was informed one year and seven months after the incident.

[217] During the same time that Mr. Turnbull assaulted the grievor in June 2009, the acoustical tile team was relocated from the shipwright shop. Mr. Wournell asked the grievor to join them. The grievor agreed, with the expectation of returning to the shipwright shop at intervals during the lifetime of the acoustical tile installation project.

E. The employer's reply submissions

[218] Both the employer and the grievor submitted comprehensive submissions outlining their positions. The parties have a profoundly different recollection of the evidence as well as the state of the law in this area. The employer will not reiterate its position on these points as this was already done in its original closing submissions. However, for greater clarity, the primary themes that emerge from the grievor's submissions are as follows.

[219] The employer had no basis to request an FTWE. Specifically, any information that management might have based its reasoning on was unsubstantiated i.e., uninvestigated claims. And his colleagues were on a witch-hunt to oust him.

[220] The employer responded that there was ample evidence supporting the FTWE request, including the events that led to the grievor's prior discipline, the concerns of his colleagues, his behaviour at the team meeting, and the fact that he had unilaterally removed himself from the workplace and did not provide medical notes or an explanation for his sick leave until he was notified that his paid sick leave was about to run out.

[221] The employer's willingness to allow the grievor to burn through his sick leave without a proper request for leave and medical documentation shows its good faith.

[222] The claim that the grievor's colleagues were on a witch-hunt is a question of credibility for the Board, given that they all testified. The employer's position is that the testimonies of the grievor's former colleagues were consistent and that they should be preferred to his.

F. Analysis of this issue

1. The Legal Framework

[223] The *FAA* sets out the powers of deputy heads in the core public administration as follows:

> …
>
> ***12 (1)*** *Subject to paragraphs 11.1(1)(f) and (g), every deputy head in the core public administration may, with respect to the portion for which he or she is deputy head …*
>
> …

> ***(e)*** *provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service for reasons other than breaches of discipline or misconduct ….*
>
> …
>
> ***(3)*** *Disciplinary action against, or the termination of employment or the demotion of, any person under paragraph (1)(c), (d) or (e) or (2)(c) or (d) may only be for cause.*
>
> …
>
> [Emphasis in the original]

[224] Thus, the termination of employment of an employee in the public service for reasons other than breaches of discipline or misconduct may only be for cause.

2. The jurisprudence

[225] The leading case law with respect to whether an employer has the authority to require the release of an employee's personal medical information to a physician it has retained and to require a medical examination of one of its employees is Arbitrator Kenneth Swan's decision in *NAV Canada v. Canadian Air Traffic Control Assn.*, [1998] C.L.A.D. No. 401 (QL), and the decision of Mr. Justice Shore in *Canada (Attorney General) v. Grover*, 2007 FC 28 (affirmed in 2008 FCA 97).

[226] In *NAV Canada*, the employees in question were air traffic controllers (ATCs). The underlying issue was whether an employee-patient could be required to consent to the release of personal medical information and to a medical examination by an employer-retained physician under threat of a possible disciplinary sanction. The union in that case did not challenge the information releases or medical examinations covered by the statutory and regulatory licensing regime applicable to ATCs. Rather, it challenged the employer's ability to require the same cooperation relative to other circumstances, such as for return-to-work medicals and FTWEs.

[227] The arbitrator determined that the employer had no independent right to require the disclosure of either medical information or third-party medical examinations, which could be enforced by disciplinary action.

[228] However, the employer was justified in imposing administrative action to withhold sick benefits or to refuse to allow an employee to return to or continue to work until it was satisfied that a sick-benefits claims was valid or that the employee was fit for duty. If an employer reasonably required such disclosure or examination to

make its determination, then employees would have to choose between suffering the continued administrative consequences and consenting to the release or the examination.

[229] Arbitrator Swan reasoned as follows:

> …
>
> *4 In general, the policy grievance as refined deals with two issues: whether the Employer has the authority to require the release of personal medical information to a physician retained by the Employer, and whether the Employer has the authority to require a medical examination of an employee by a physician retained by the Employer.*
>
> *5 The Employer has asserted this authority in a range of situations, including but not limited to cases where the fitness of an employee to return to work is at issue, where the validity of an illness or disability for which an employee has claimed sick leave is at issue, or where the fitness of an employee to remain actively at work is at issue.*
>
> *6 Obviously, medical information can only be released, and a medical examination can only be conducted, with the consent of the patient. The issue is therefore whether the Employer may require that such consent be given, failing which sanctions such as discipline, the withholding of sick leave benefits, or a refusal to allow the employee to work, may be imposed.*
>
> …
>
> *57 … the Employer also asserts a right to require third party access to medical information and third party medical examinations in return to work or fitness for work situations. The collective agreement makes no specific reference to such circumstances, and the Employer relies on Article 3, the management rights provision, for its authority. A large number of arbitration decisions were referred to me by both parties, dealing with a broad range of circumstances. For the most part, the individual cases turn on their facts, and are not really of great assistance in the position in which I find myself, required to deal with a policy grievance in general terms, rather than a more specific fact situation.*
>
> *58 I do not intend to review in great detail all of the cases presented. Rather, I think that there are two main propositions, which are to a certain extent contradictory, which may be gleaned from all of these cases. When those two propositions are put together, and are rationalized, it is my view that they adequately deal with the policy issues presented by this grievance.*
>
> *59 The first proposition is that an employer, particularly one whose operations involve public safety, has a right to assure itself that its employees are medically fit either to return to work from*

an absence due to illness or injury, or to remain at work. The present Employer not only has such a right, it appears to have an obligation, at least in relation to its Air Traffic Control employees, as a condition of its operating licence in relation to the air navigation system.

60 The second proposition is that, absent some statutory authority or express consent either in a contract of employment or a collective agreement, an employer has no right to compel disclosure of personal medical information from an employee, or to compel the employee to undergo a medical examination by a physician of the employer's choosing. I have already detailed the extent to which the specific statutory structure applicable to ATCs requires such disclosure of medical information or such medical examinations. The collective agreement adds nothing specific to these statutory intrusions on personal privacy and integrity.

61 As I have observed, these two propositions are, at least on the surface, inherently contradictory. There may be circumstances where only the opinion of a physician, whether a specialist in aviation medicine or some other discipline, would be sufficient to satisfy the Employer that a particular ATC is capable of returning to work or remaining on duty. If the employee does not consent to providing information to that physician or undergoing a physical examination by that physician, the Employer may simply be unable to satisfy itself of the employee's fitness, as it is both entitled and required to do.

62 In my view, in such circumstances, the Employer has authority under the management rights provision of the collective agreement, again provided that it has acted reasonably in exercising this discretion, to refuse to allow an employee to return to duty or to continue at duty. Such a decision may or may not, depending upon the circumstances, amount to an administrative suspension from duty. It may also result, in some circumstances, in a reduction in or cessation of salary. In each case, the collective agreement must be consulted to determine the rights of the individual employee affected.

63 However, while it is my view that Article 3 of the collective agreement is broad enough to allow the Employer to refuse to allow an employee to work unless it is satisfied of the employee's fitness, it is not broad enough to permit the Employer to compel release of medical information to or medical examination by a third party. The Employer may request that an employee consent so to do, and if the request is reasonable in all of the circumstances, an employee who does not consent may well suffer the consequences of not demonstrating his or her fitness for duty. But beyond that the Employer cannot go.

64 Specifically, it is difficult to imagine circumstances in which an employee could be disciplined for not granting consent. The very notion of consent would, indeed, be undermined by any such conclusion. There may be administrative consequences of refusal of consent, including being placed on leave, paid or unpaid

> *depending upon the circumstances, but I am unable to envision circumstances in which discipline for, for example, insubordination could ever be justified by a refusal to provide information or to undergo an examination which has no statutory or collective agreement authorization, and which would amount to a serious invasion of personal privacy or integrity.*
>
> …
>
> *69 … I have concluded that the Employer has no independent right to require disclosure of medical information or third party medical examination which can be enforced by disciplinary action. Article 3 and Article 9 are, however, broad enough, for the reasons set out above, to justify administrative action to withhold sick benefits, or to refuse to allow an employee to return to or continue to work until the Employer is satisfied under Article 9 of the validity of a claim for sick benefits, or is satisfied that the employee is fit for duty, pursuant to its general rights and obligations under Article 3. If, in all of the circumstances, the Employer can only reasonably be satisfied by the disclosure of evidence to its medical advisors or by an examination by a physician specified by the Employer or agreed between the parties, then the employee may have to choose between suffering the continued administrative consequences, or consenting to the release or the examination.*
>
> …

[230] In concluding his decision, Arbitrator Swan dealt with the extent to which the employer may receive medical information, as follows:

> …
>
> *70 Finally, I should observe that some of the arbitration awards cited to me deal with the extent to which the Employer may receive medical information itself. In my view, these issues are adequately avoided by the arrangements which have been established with MEDCAN, which provides a firewall between the employee and the examining physicians, whoever they may be, and the Employer. The Employer is entitled to know whether an employee is fit or not, and any limitations which may have to be accommodated. The Employer is not entitled to sensitive medical information. The MEDCAN contract would probably be a better protection for employees had it been entered into with the Association as well as with the Employer, but in the absence of any evidence of breach of the confidentiality obligations set out in the MEDCAN agreement, it provides a degree of security of private information sufficient to respond to the concerns expressed by many arbitrators, including me in some cases, about the direct release of sensitive medical information to an Employer. It will follow that, in the absence of these protections or their equivalent in any future contract for medical services, this award would have to be reconsidered.*
>
> …

[231] In *Grover*, the Federal Court summarized the principles to be applied when determining whether in a given case, an employer may insist on an independent medical examination. In that case, the National Research Council of Canada (NRC) suspended an employee who was frequently absent on stress leave without pay because he would not undergo an examination by an employer-chosen physician.

[232] The employer was suspicious of the information the employee provided from his physician and claimed that he posed a safety threat until he was examined. A PSLRB adjudicator ruled that the NRC did not have sufficient grounds to make such a request, and it allowed the employee's grievance.

[233] In upholding the adjudicator's decision, Mr. Justice Shore stated as follows at paragraphs 64 and 65:

> *[64] … The foundational principle is that employees have a strong right to privacy with respect to their bodily integrity and a medical practitioner; therefore, a trespass is committed if an employee is examined against his or her will. Consequently, the employer cannot order an employee to submit to a medical examination by a doctor chosen by the employer unless there is some express contractual obligation or statutory authority. (*Thompson and Oakville (Town) *1963), 41 D.L.R. (2d) 294 (Ont.H.C.) at p.302.)*
>
> *[65] Notwithstanding the above, it is also well established that employers have an important obligation to ensure a safe workplace. This means employers have the right to know more about an employee's medical information if there are reasonable and probable grounds to believe the employee presents a risk to health or safety in the workplace.*

[234] As follows, the employer has the duty to explain why a medical certificate tendered by an employee is insufficient:

> …
>
> *[66] It does not follow that an employer can automatically demand that an employee undergo a medical examination. Rather, to balance the employee's right to privacy and bodily integrity, the employer must explore other options to obtain the necessary information. If the employer is dissatisfied with these other options, including and in particular a medical certificate tendered by the employee, it has the duty to clearly explain to the employee or state the reasons why the information is insufficient. Again, this respects the employee's right to privacy and allows him or her to assess the employer's objections and produce other information if needed. It is only after all of the steps have been canvassed that an employee can in certain instances insist than employee must*

*attend a doctor chosen by the employer. (*Air Canada and Canadian Airline Employees Association *(1982), 8 L.A.C. (3d) 82 (Simmons) at pp. 13-14;* Riverdale Hospital and Canadian Union of Public Employees, Local 79 *(1985), 19 L.A.C. (3d) 396 (Burkett) at pp. 406-407;* Nelsons Laundries Ltd. and Retail Wholesale Union, Local 580 *(1997), 64 L.A.C. (4th) (Somjen) at pp. 125-127)*

[67] The Ontario Divisional Court recently affirmed the arbitral jurisprudence in this regard. In Ontario Nurses' Association v. St. Joseph's Health Centre *(2005), 76 O.R. (3d) 22 (Ont.Div.Ct.), the Court ruled as follows:*

> [19] We were referred to a number of arbitral cases canvassing the issue of what information an employer can require of an employee returning from a medical leave. Not surprisingly, in view of the privacy interests involved, limits of reasonableness have been developed by arbitrators.
>
> [20] The weight of the arbitral cases is that employers are entitled to seek medical information to ensure that a returning employee is able to return to work safely and poses no hazard to others. The employee's initial obligation is to present some brief information from the doctor declaring the employee is fit to return. If the employer has reasonable grounds on which to believe that the employee's medical condition presents a danger to herself or others, the employer may ask for additional information to allay the specific fears which exist, explaining the reasons to the employee. The request must be related to the reasons for absence; no broad inquiry as to health is allowed. In my view, these are sound principles.

*[68] It is also important to emphasize again that the employer's interest must relate to safety. Concerns about the validity of an employee's sick leave cannot justify a demand for a medical examination. Indeed, there is a "fundamental difference" between requiring a medical examination for fitness to work versus testing the validity of an illness. (*Riverdale Hospital*, above at pp. 405-406)*

[69] The Applicant takes issue with the adjudicator's statement that "the request for an independent medical examination to determine fitness to work should be considered only in exceptional and clear circumstances". The Applicant argues that the articulation of a need for "exceptional and clear circumstances" is somehow inconsistent with the jurisprudence. There is no merit to this argument.

[70] Numerous cases speak to the requirement that a medical examination must be shown to be "necessary" due to a "legitimate doubt". The onus lies on the employer, who must be prepared to call "cogent evidence" to support its position. The need for a medical examination is described as "drastic action" which must have a "substantial basis" and will only be required in "rare cases". In light of such arbitral commentary, the adjudicator's description of the need for "exceptional and clear circumstances" clearly arises

*from the cases. (*Riverdale Hospital, *above at pp. 406-407;* K. Nicholson and Treasury Board (National Defence), *[1991] C.P.S.S.R.B. No. 267 (QL) at pp. 10-11;* Dennison and Treasury Board (Solicitor General), *[1983] C.P.S.S.R.B. No. 89 (QL) at p. 20;* Consumers Glass and C.A.W., Local 29 *(1990), 18 C.L.A.S. 171 (Marcotte) at paras 40 and 44;* Nelson Laundries, *above at p. 123)*

[71] Finally, the Applicant argues that the adjudicator should have interpreted the NRC's Occupational Health and Safety Policy in a more "liberal" fashion. The policy indicates there must be "sufficient evidence" for a [sic] management to be concerned over the ability of an employee to perform his or her job "without creating a safety risk". Basically, the Applicant asserts that the employer met this requirement if it could show a potential risk of some kind.

*[72] Again, the Applicant's argument has no merit and is inconsistent with the arbitral jurisprudence. The significance of the risk will depend on the seriousness of the illness and the nature of the employee's duties. Furthermore, "reasonable and probable grounds" must exist for assuming the employee is a danger. This would necessarily exclude speculation or conjecture. Indeed, in the words of one arbitrator, "An employer may not refuse to allow an employee to return to work on the mere possibility of medical problems in the future." The NRC policy is consistent with this jurisprudence and it was properly interpreted by the adjudicator. (*Air Canada, *above;* Kolski and Treasury Board (Agriculture Canada), *[1994] C.P.S.S.R.B. No. 149 (QL) at p. 21;* Inco Ltd. and United Steelworkers *(1988), 35 L.A.C. (3d) 108 (Burkett) at pp. 112-113;* Nelsons Laundries, *above at pp. 126-127)*

Failure by NRC to justify demand that Dr. Grover see physician not of his own choice

[73] The Applicant does not agree with the adjudicator's conclusion that the NRC did not have sufficient reasons to demand a medical assessment. No grounds exist whatsoever to suggest that the adjudicator's decision was patently unreasonable in this regard.

[74] The "mere possibility" that an employee may be ill or otherwise presents a safety risk does not amount to "reasonable and probable grounds" for so believing….

*[75] Finally, the Applicant makes no mention of the procedural aspect of this test. The Applicant apparently accepts that employers must show that they have reasonable and probable grounds to be concerned about a safety risk caused by the employee's health; however, there is also a "procedural fairness" component as well. According to the case law, the employer must clearly explain its reasons for doubting an employee's medical certificate. More significantly, it must be open to other options to satisfy its concerns short of demanding an assessment by a doctor not of the employee's choosing. (*Nelsons Laundries, *above at p. 125)*

…

[Emphasis in the original]

[235] In *Niagara Peninsula Energy Inc. v. IBEW local 636* (2017), 217 L.A.C. (4th) 307, Arbitrator Dissanayake applied Mr. Justice Shore's reasoning in deciding that an employee's alleged repeated incidents of unsafe conduct, disrespectful behaviour, and insubordination, including an incident of angry swearing at a co-worker followed by agitated behaviour at a meeting with management, did not constitute reasonable and probable grounds to require that the grievor submit to a psychiatric evaluation as a condition of being allowed to return to work. He reviewed the evidence at paragraph 119 as follows:

> *[119] … the evidence indicates that in the incidents in question, even from the employer's own perspective, the grievor's problem was one of losing his temper and reacting with aggression. Mr. Wilkie, who was the ultimate decision-maker [sic], did not assert that even subjectively he believed that the grievor's conduct was caused by a mental health issue. The gist of his testimony was to the effect that he had a doubt whether the grievor's conduct was voluntary and therefore culpable, or whether it was non-culpable behaviour brought on by a mental health issue. That clearly falls for [sic] short of the standard required in the arbitral jurisprudence.…*

[236] The arbitrator quoted from *Grover*, as follows:

> …
>
> *[119] … the Court, sitting in judicial review, framed the issue as "What is the balance to be struck between an employee's right to privacy and employer's legitimate duty to maintain a safe workplace?". That accurately applies to the issue in the instant matter also. At para. 64, the Court reviewed the law that stands for the proposition that an employer is not entitled to order an employee to submit to a medical examination in the absence of a contractual obligation or statutory authority, and stated at para.65:*
>
> > *Notwithstanding the above, it is also well established that employers have an important obligation to ensure a safe workplace. This means employers have the right to know more about an employee's medical information if there are <u>reasonable and probable grounds</u> to believe the employee presents a risk to health or safety in the workplace. (Emphasis added)*
>
> *At para. 70 the court wrote:*
>
> > *Numerous cases speak to the requirement that a medical examination must be shown to be "necessary" due to a*

> *"legitimate doubt". The onus lies on the employer, who must be prepared to call "cogent evidence" to support its position. The need for a medical examination is described as "drastic action" which must have a "substantial basis" and will only be required in "rare cases". In light of such arbitral commentary, the adjudicator's description of the need for "exceptional and clear circumstances" clearly arises from the cases.*
>
> *Most significantly at para.74 the court concluded:*
>
> *The "mere possibility" that an employee may be ill or otherwise presents a safety risk does not amount to "reasonable and probable grounds" for so believing.*

[237] The arbitrator concluded as follows:

> *[120] I conclude that the "doubt" in the employer's mind in the present case is no different than a "mere possibility", held by the court to be not sufficient to meet the "reasonable and probable grounds" test. Indeed if a "mere possibility" or "doubt" is held to be a sufficient basis to require a psychiatric assessment as a condition of returning to work, such a requirement may be justified any time an employee engages in repeated misconduct. The test developed in the jurisprudence with a view to balancing the employee's privacy rights and the employer's right and duty to maintain a safe workplace imposes a burden of proof on the employer to meet a higher standard, namely that it had "reasonable and probable grounds" to believe that the grievor posed a danger. Mr. Wilkie's doubt falls far short of meeting that test.*
>
> [Emphasis in the original]

[238] In the course of his reasoning, the arbitrator reviewed a number of other cases that specifically dealt with the issue of balancing the employee's privacy rights and the employer's duty to maintain a safe workplace in the context of a requirement to undergo a psychiatric assessment. He stated at paragraphs 113 through 116 as follows:

> *[113] … In* [Re Magee, [2006-1916, 2006-1918], May 20, 2008, Ontario Grievance Settlement Board] *… the Board stated that to justify a requirement to undergo a psychiatric assessment, it is not sufficient that the employer simply believed that some mental health issue was causing the employee's unacceptable conduct, and that some objective standard has to be met.*
>
> *[114] In Re Brinks Canada Ltd., [1994] 41 L.A.C. (4th) 422 (Stewart), the arbitrator cited the decisions in Re Studebaker-Packard of Canada Ltd. And U.A.W. Local 525, (1960) 11 L.A.C. 189 (Cross); Re Eaton Automotive Canada Ltd. and U.A.W. Local 27 (1969), 20 L.A.C. 218 (Palmer); Re Firestone Tire & Rubber Co. of Canada Ltd.*

And United Rubber Workers, Local 113 (1973), 3 L.A.C. (2d) 12 (Weatherill), and at p. 430 observed:

> The issue to be determined is whether in the particular circumstances of this case, reasonable and probable grounds existed for the employer to require that Mr. Matchett attend for [*sic*] a psychiatric evaluation by Dr. Margulies. In considering this matter I agree with Mr. Riendeau's submission that considerable weight must be given to the fact that Mr. Matchett is equipped with a firearm in the course of his employment. The employer is clearly justified in exercising utmost care in ensuring that an employee is mentally able to deal with that responsibility and to take steps to satisfy itself in this regard. However, an employee's right to privacy must be taken into account and must not be unnecessarily or unduly interfered with, particularly in connection with a psychiatric assessment.
>
> *(Emphasis added)*

[115] In Re Magee (supra) at para. 39, the Board adopted that standard and elaborated as follows:

> However, as I have already concluded, the employer must be held to some objective standard. Given the particularly intrusive nature of a psychiatric examination, I conclude that the standard of "reasonable and probable grounds" is the appropriate standard. That is, the Board must be satisfied, based on the evidence as to the information the employer had at the time, that it had reasonable and probable grounds to be concerned that the grievor was unable to perform the field duties due to reasons of his mental health.

[116] In Re Canadian Pacific Railway Co., [2011] 209 L.A.C. (4th) 399 (M.G. Picher), the "reasonable and probable grounds" test was reiterated, the Board, at para.13, requiring the employer to discharge "the burden of proof to demonstrate that it had reasonable and probable grounds to withhold the grievor from service without pay until such time as he agreed to undergo a psychiatric examination."

[Emphasis in the original]

3. The application of these principles to the facts of this case

[239] The relevant provisions of the collective agreement between the union and the employer read as follows:

…

> ***5.01*** *The Council recognizes and acknowledges that the Employer has and shall retain the exclusive right and responsibility to manage its operations in all respects and it is expressly understood that all such rights and responsibilities not specifically covered or*

> *modified by this Agreement shall remain the exclusive rights and responsibilities of the Employer.*
>
> *Such rights will not be exercised in a manner inconsistent with the expressed provisions of this agreement.*
>
> …
>
> ***12.01 Credits***
>
> *An employee shall learn sick leave credits at the rate of ten (10) hours for each calendar month for which the employee is entitled to pay for at least eighty (80) hours.*
>
> ***12.02 Granting of Sick Leave With Pay***
>
> *An employee is eligible for sick leave with pay when the employee, is unable to perform his/her duties because of illness or injury provided that:*
>
> *(a) the employee satisfies the Employer of this condition in such manner and at such time as may be determined by the Employer,*
>
> *and*
>
> *(b) the employee has the necessary sick leave credits.*
>
> ***12.03** Unless otherwise informed by the Employer, a statement signed by the employee stating that because of illness or injury the employee was unable to perform his or her duties shall, when delivered to the Employer, be considered as meeting the requirements of paragraph 12.02(a), if the period of leave requested does not exceed forty (40) hours.*
>
> …
>
> [Emphasis in the original]

[240] As did Arbitrator Swan in *NAV Canada*, based on similar language, I conclude that the employer has the authority under the management's rights provisions of the collective agreement, provided that it acted reasonably in exercising its discretion, to refuse to allow an employee to return to duty or to continue on duty as it has the right to assure itself that its employees are medically fit either to return to work from an absence due to illness or injury or to remain at work.

[241] I also adopt Arbitrator Swan's conclusion that while the management-rights clause of the collective agreement is broad enough to allow the employer to refuse to allow an employee to work unless it is satisfied of his or her fitness, it is not broad enough to permit the employer to compel the release of medical information or to compel the employee to undergo a third-party medical examination. The employer may request that an employee consent to one, and if the request is reasonable in all the

circumstances, an employee who does not consent may well suffer the consequences of not demonstrating his or her fitness for duty. But the employer cannot go beyond that.

[242] Arbitrator Swan reasoned that it would be difficult to imagine circumstances in which an employee could be disciplined for not granting consent as the very notion of consent would be undermined by any such conclusion. However, he noted that there may be administrative consequences to refusing consent, including being placed on leave, either paid or unpaid, depending on the circumstances.

4. Did the Employer have Reasonable and Probable Grounds to require Mr. Burke to Consent to a Fitness to Work Psychiatric Evaluation

[243] As noted, Mr. Hawker's May 16, 2011, letter and the letter dated the same day and addressed to Mr. Burke's doctor set out a number of the grounds for Mr. Hawker's request for an FTWE.

…

1. *Mr. Burke is continuously demonstrating unacceptable and unsafe behaviours in the workplace*
2. *He frequently has violent angry responses that included profanity, throwing material, stomping off the job at hand, yelling at colleagues and has even resorted to physical violence against another employee.*
3. *He acts aggressively and tries to intimidate his fellow teammates… His behaviour is impacting on other workers and it is concerning me that an unsafe work environment has been created. We have tried moving him from one team to another but the situations occur more and more employees are refusing to work with him….*

…

[*Sic* throughout]

5. A Review of The Evidence Relevant to These Allegations and Analysis

a. Mr. Hache

[244] Mr. Haché testified that he did not think that an FTWE was necessary. He had seen Mr. Burke become agitated in the past, after which he had returned to normal. He indicated that everything had been fine after the May 11, 2011, meeting.

[245] He did not request an FTWE. Others decided it at the May 12, 2011, meeting.

[246] He had seen the May 16, 2011, letter that set out the grounds for an FTWE. It was not 100% accurate in that it had some accuracy and some inaccuracy.

[247] He was asked whether he ever saw Mr. Burke throw pipes across the floor. He replied in the negative. He confirmed that this allegation was never investigated.

[248] He agreed that he did not have any specifics that Mr. Burke had stomped off the job.

[249] With respect to the allegations that Mr. Burke had yelled at colleagues, he referred to the Covey and Meehan incidents and the May 11, 2011, meeting.

[250] He agreed that Mr. Burke handled 90% of the process of sanding acoustical tiles in the shop and that it would not have been out of the ordinary for him to be in the shop while the rest of the team was installing tiles on the submarines.

[251] Mr. Wournell was asked if he had ever seen Mr. Burke throwing material. He stated "not really." He had reported Mr. Burke slamming a chair into a table.

[252] He was asked whether Mr. Burke used profanity often. He replied in the negative. The grievor used profanity when he was mad and cursed when he lost control. He was asked how often Mr. Burke lost control. He stated it had been 3 or 4 times over 4½ years.

b. Safety issues

[253] Mr. Wournell was asked if he had ever noticed if Mr. Burke carried out any unsafe practices. He stated that he saw the grievor working on scaffolding that was not up to par. He was asked whether there was a tag on the scaffolding. He replied that there was. He was asked whether the tag indicated that it had been accepted and approved. He replied that it was tagged. He remembered Mr. Burke getting off the scaffold one day. He and Mr. Cox rebuilt it. He was asked whether the scaffold had been tagged. He replied that he did not remember. He was asked whether there was anything else of a safety nature that he could recall. He replied in the negative.

[254] Mr. Foster was asked if during the 4½ years that he worked with Mr. Burke he had had any safety concerns with him. He stated that once when they were short of materials, Mr. Burke decided to build railings out of wood on the north side of a scaffold tower on a submarine. Wood railings were not part of the engineered system

for the scaffold. Mr. Foster and another team member disagreed with Mr. Burke. However, ultimately, the wood railings were replaced with engineered components. The three of them as a group, including Mr. Burke, corrected the situation. Mr. Burke did not agree that it was necessary.

[255] One other incident occurred, involving the slope of a ramp, which led to the Meehan incident. Mr. Foster stated that there had been no other safety issues.

[256] Mr. Cox referred to an incident early in 2006 to 2007. He and Mr. Burke were asked to erect a scaffold inside a water-transfer tank on a submarine, in a confined space. He asked Mr. Burke to be on watch outside the tank and to get help if an issue arose. At one point, Mr. Burke came into the tank to take some measurements and left. When Mr. Cox exited the tank, Mr. Burke was climbing up the scaffold with two-by-fours. He challenged Mr. Burke as he had left the opening of the tank. They exchanged words and then calmed down. Mr. Cox reported the incident to the supervisor. Nothing was done. It was not investigated. Mr. Cox apologized to Mr. Burke, to avoid a confrontation.

[257] Mr. Cox stated that Mr. Burke swore on occasion when he was upset. He could not recall witnessing Mr. Burke ever throwing material.

[258] Mr. Hawker was asked about the May 16, 2011, letter requesting an FTWE. He stated that Ms. Nelson of Human Resources had composed it and that he and Mr. Haché were responsible for its input. He had not observed any of Mr. Burke's behaviour first-hand. He had never observed Mr. Burke on the work floor. He had conducted investigations.

[259] He received a complaint from Mr. Covey about an incident. He also received one from Mr. Meehan about an incident and one from Mr. Haché about the May 11 meeting.

[260] He had not observed Mr. Burke throwing material. His source was Mr. Haché. He acknowledged that he had agreed to put it in the letter because Mr. Haché had raised it, although he could not recall him providing details. It was not investigated.

[261] He acknowledged that the information in the letter, which stated that Mr. Burke refused to accept direction, did not come from him. He was asked if Mr. Haché had provided details and whether an investigation had taken place, to which he replied,

"Probably not." He stated that the incidents in the letter were based on conversations with Mr. Haché.

[262] Mr. Hawker was referred to the sentence in the letter that states, "We have tried moving him from one team to another but the situations occur more and more and employees are refusing to work with him." He was asked whether the reference in the letter that he was moved was because of the allegation that Mr. Turnbull had filed a refusal-to-work complaint against Mr. Burke. Mr. Hawker stated that it was in there.

[263] He was asked to confirm that Mr. Burke's alleged assault on Mr. Turnbull was unfounded, and yet, he was moved for that reason. Ultimately, Mr. Hawker acknowledged that the fact that Mr. Burke and Mr. Turnbull had been separated was part of the consideration for the FTWE. He stated it was not a determining factor.

6. Analysis

[264] The May 11, 2016, letter sets out the basis upon which the employer relied to establish reasonable and probable grounds for the grievor to undergo a psychiatric evaluation initially by his own physician and then ultimately one of the employer's choosing.

[265] From the jurisprudence, the onus was on the employer to call cogent evidence in support of its position.

[266] Based on the evidence adduced, I am not persuaded that the employer has proven on a balance of probabilities that Mr. Burke **frequently** has violent angry responses that include profanity, throwing material, or stomping off the job at hand. There is no evidence that he has thrown material or stomped off the job. The evidence is that 3 or 4 times over the course of 4½ years, he used profanity when he became angry. In my view, this evidence does not support the conclusion that he **frequently** engages in violent angry responses that include profanity. Nor does it support the conclusion that he refuses to accept direction.

[267] The evidence does not support the conclusion he continually carries out unsafe practices. Two incidents were referred to, which were reported to supervisors, who then chose not to investigate. Mr. Burke was not even advised that the incident that occurred in 2006 or 2007 concerning the submarine watch was reported. He was surprised to hear it for the first time at adjudication.

[268] The reference that an attempt was made to move him to another team but that co-workers refusing to work with him occurred more and more was based on Mr. Turnbull's work-refusal complaint. After the complaint, Mr. Hawker directed Mr. Haché to move Mr. Burke to the acoustic tile team. The complaint was based on an alleged assault by Mr. Burke on Mr. Turnbull. After a lengthy investigation, it was determined unfounded. As of when the May 16, 2011, letter was composed, the investigation was still ongoing. It concluded in August of that year.

7. A review of Evidence with respect to the Covey incident, the Meehan incident and the meeting of May 11, 2011 and Analysis

[269] Mr. Hawker was asked what he relied upon when he stated that Mr. Burke had engaged in unsafe behaviour. He replied the Covey incident, the Meehan incident, and the May 11, 2011, meeting.

a. The Covey incident

[270] Mr. Hawker stated that in May 2011, this was still in the process of adjudication. He composed the discipline letter and was responsible for rendering a decision based on the facts. He imposed the three-day suspension.

[271] He was referred to page 36 of *Burke 2012*, in which the adjudicator stated that the conduct amounted to little more than roughhousing. He was asked whether he agreed with that. He replied that he believed that assault is serious and that Adjudicator Richardson's conclusion would not have impacted what he put in the letter.

[272] At page 7, in his reasons, Adjudicator Richardson described the issues before him as the following:

> …
>
> - *What happened between Messrs. Burke and Covey… the morning of October 28, 2009?;*
> - *Did the incident constitute an assault?*
> - *If so, was the discipline imposed reasonable?*

[273] He concluded as follows on that same page:

> ***A. What happened?***

> *29 This is a simple matter. The testimonies of Messrs. Burke and Covey indicate that, and I so find, there was a history between the two men. Regardless of who was responsible for the bad feelings between them, the fact is that Messrs. Burke and Covey were not enamoured with each other. Their testimonies also agree on the initial events of October 28, 2009, which were that there were words between them and that, shortly after the exchange, Mr. Covey started towards Mr. Haché's office to report that exchange….*
>
> …
>
> *31 I am more than satisfied on a balance of probabilities that Mr. Covey's account is essentially accurate. I am satisfied and so find that he was grabbed from behind by Mr. Burke; that Mr. Covey was spun around and pushed backwards onto a table; that Messrs. Burke and Covey then fell to the floor; that during the tussle, Mr. Covey bit his tongue; and that, only after Messrs. Burke and Covey fell to the floor was Mr. Covey able to free himself from Mr. Burke's grip and escaped to Mr. Hache's office....*

[274] At pages 8 and 9, he stated as follows:

> *36 Indeed, this particular assault does not amount to much more than rough housing and, while serious and not to be ignored….*
>
> …
>
> *38 Based on my conclusion above, I am satisfied that what happened amounts to an assault. There was non-consensual physical contact between Messrs. Burke and Covey and a non-consensual struggle.*

[275] Part XX of the *Regulations* deals with violence prevention in the workplace. Workplace violence is defined as follows at s. 20.2:

> ***20.2*** *In this Part, "work place violence" constitutes any action, conduct, threat or gesture of a person towards an employee in their work place that can reasonably be expected to cause harm, injury or illness to that employee.*

[276] As Adjudicator Richardson determined that Mr. Burke's conduct amounted to assault, I have no difficulty in concluding based on his finding of fact that Mr. Burke's assault constituted workplace violence within the meaning of Part II of the *CLC*. As I did not hear the evidence in that case, I also accept Adjudicator Richardson's characterization of the assault as not amounting to much more than roughhousing.

b. The Meehan incident

[277] Mr. Burke was given a five-day suspension on June 17, 2010, for using profanity during a verbal exchange with Mr. Meehan on May 21, 2010. This was his second offence. It was alleged that during a very loud and heated exchange, he made a threatening statement. It was contended that the statement constituted workplace violence as outlined in the *Regulations*. Mr. Meehan was also disciplined for using profanity.

[278] Mr. Burke sought to grieve the gravity of the suspension. However, his union missed the time limit for filing the grievance, and the grievance was dismissed on that basis.

[279] Mr. Hawker stated that he had interviewed all the parties involved and that he had determined that there was misconduct. The incident involved a complaint and an argument over precut plywood that was being used as a ramp to one of the submarines. Mr. Meehan believed that the slope was too steep and that it had to be changed. Mr. Burke believed that it was not too steep. That led to an argument. Mr. Hawker concluded that both Mr. Burke and Mr. Meehan had exchanged profane language and that both were guilty of misconduct.

[280] Mr. Foster was asked if he recalled Mr. Meehan coming into Mr. Burke's workspace and demanding that Mr. Burke change the ramp's slope. He agreed that Mr. Meehan did go there but did not recall word-for-word what Mr. Meehan said. He recalled Mr. Burke stating that if Mr. Meehan wanted to change the ramp, Mr. Burke "… would shove a book up Mr. Meehan's ass," referring to the Canadian Standards Association codebook. He confirmed that at the time, Mr. Meehan stood about 6 feet and 4 or 5 inches tall and that he weighed approximately 280 to 285 pounds. He conceded that given Mr. Meehan's size, it would not be very reasonable to imagine Mr. Burke following up on this statement.

[281] Mr. Burke testified that Mr. Meehan came into his workspace and complained about a ramp that Mr. Burke had been building. He challenged Mr. Burke and asked him if he wanted to fight. Mr. Burke told him to "go f---" himself, for which he was suspended 5 days. Had Mr. Meehan had the Canadian Standards Association codebook to demonstrate that there was too much of an incline to the ramp, he could have shown it to the grievor. He did not. With respect to the complaint about the grievor's

alleged threat about the book, he noted that no book was present, and pointed to Mr. Meehan's very tall and stocky stature.

[282] To constitute workplace violence, the conduct must reasonably be expected to cause harm injury or illness to the employee. In my view, the evidence does not support the conclusion that the threat that the grievor uttered in the circumstances could reasonably be expected to have caused harm or injury to Mr. Meehan. Therefore, it did not constitute workplace violence as defined in the *Regulations*. Nevertheless, the statement was a threat, and it could not be condoned. As noted, I have no authority to deal with the five-day suspension.

8. Events leading to the May 11, 2011 meeting

[283] The events leading to the May 11, 2011, meeting are not materially in dispute. The following reflects the evidence of Mr. Haché and Mr. Burke.

[284] In January 2011, Mr. Haché discussed with Mr. Burke him taking over the team leader role for the acoustic tile team even though he had concerns about the grievor isolating himself from the team. Mr. Burke agreed. Mr. Haché did not consult the other team members before appointing the grievor. When he advised them of the appointment, he hesitated, as they suggested that Mr. Wournell should be given a chance to be team leader. He also hesitated because of earlier incidents reported by some team members that Mr. Burke was somewhat difficult to work with. Mr. Burke acted as team leader from January 25 to March 11, 2011.

[285] Mr. Haché stated that the things did not work out quite so well. He was advised that Mr. Burke had segregated himself from the group. No meetings were held in the mornings to discuss the work of the day, there was no consultation, and Mr. Burke showed irritation to the point of aggression in verbal exchanges.

[286] On February 21, 2011, Mr. Cox, a member of the tile team, a safety-conscious person, and a representative on the Health and Safety Committee advised Mr. Haché that in his view, a scaffold for an acoustic tile casing built by Mr. Burke was not up to safety standards. He raised it with Mr. Burke on February 15, 2011. Mr. Burke believed that it was fine and became irate. Mr. Cox got to the point of becoming emotionally aggressive. He left it to Mr. Burke.

[287] Mr. Cox requested a transfer to another team. Mr. Haché accommodated the request and transferred him.

[288] Over the next period, Mr. Foster expressed concerns about a lack of communication and cooperation with Mr. Burke as did Mr. Wournell, who both requested that Mr. Haché transfer them to another team.

[289] Mr. Burke testified that on May 2, 2011, he had returned to work after being off sick for a few days. Mr. Haché advised him that he wanted to make some changes, that he was making Mr. Wournell the new team leader, and that he wanted to sit down and discuss the grievor's term as the team leader.

[290] They met on May 3, 2011. Mr. Haché asked Mr. Burke how his experience as team leader had gone. Mr. Burke advised him that as the team was on target to finish in June, it had completed its required tasks, and that as there had been no complaints, in his view, the term had gone well.

[291] Mr. Haché reminded Mr. Burke that he believed that communications issues would arise between the grievor and his team members before the grievor was appointed the team leader.

[292] He informed the grievor that as expected, some communication issues had arisen, and that as a team leader, the grievor needed to communicate with the team.

[293] Mr. Burke questioned why Mr. Haché brought it up then and why he had not raised it earlier when the grievor was the team leader, especially with the project ending in a few weeks. Mr. Haché said that he wanted to help the grievor out and to go over some of the communications issues that had arisen.

[294] He advised the grievor that he had received several transfer requests from team members because of issues that had arisen.

[295] Mr. Burke asked him who had complained. He told the grievor that he was not prepared to give him the names. Mr. Burke said that he had not been told about the complaints. Mr. Burke insisted that he be given the names because if someone complained about him, he had the right to know who it was.

[296] Mr. Burke testified that Mr. Haché advised him that he had a feeling that this would happen when he asked the grievor to be the team leader.

[297] Mr. Burke told him that he would see Mr. Hawker. Mr. Haché said that that was all right.

[298] The grievor met with Mr. Hawker and asked him if he had a few minutes. Mr. Hawker advised him that he had five minutes. He told Mr. Hawker what had gone on with Mr. Haché. Mr. Hawker said that he would contact Mr. Haché and get his take on the story. He did not say whether he would get back to Mr. Burke. In the end, he did not.

9. Summary of the evidence of the May 11, 2011, Meeting and Analysis

[299] On the morning of May 11, 2011, Mr. Wournell, who had replaced Mr. Burke as the team leader, asked Mr. Haché if anything would be done about the grievor's lack of communication with the other team members. Mr. Wournell felt that the situation was undesirable and that it had escalated almost to the point of being volatile. He did not feel that management had addressed the situation. Mr. Haché told him that he was in the process of setting up a meeting with Human Resources for guidance on how to deal with it.

[300] Mr. Wournell advised him that if he expected team members to continue working with Mr. Burke, thinking everything would be fine, he did not fully appreciate the team's dysfunctional operation.

[301] Mr. Haché decided to immediately meet with the acoustical tile team, put the issues on the table, and discuss how to resolve the process and personal issues. Present in the lunchroom were Mr. Burke, Mr. Wournell, Mr. Foster, Mr. Lee Burke another shipwright and member of the acoustical tile team, and Mr. Haché.

[302] He informed the team that as their coach and supervisor, he was responsible for ensuring that the acoustic tile process was followed; that objective, quality evidence was recorded, collected, and properly filed; and that the team's output was of an acceptable quality.

[303] He advised the team that he did not have full assurance that all his expectations were being met and that he would not accept personality conflicts or personal issues

as an excuse for an inadequate adherence to protocol or poor workmanship. These issues had to be set aside and the focus redirected to teamwork, improving communication, and ensuring the delivery of a quality product.

[304] He held a round-table discussion to confirm that everybody understood his direction. They all agreed to work as a team.

[305] Mr. Burke asked him about the quality issues and to provide an example. Mr. Haché advised that he was not satisfied with the positive gapping between the acoustic tiles because they were not within specification. Whatever the reasons, it had to be rectified. Mr. Burke asked him how he knew that the gapping was too wide and who had reported it. Mr. Haché replied that he had witnessed it for himself.

[306] Mr. Burke then raised the issue of recording data with respect to the air and surface temperature when applying acoustic tile, stating that the recording had always been done. Mr. Haché agreed that the recording had been done but not when the acoustic tile had been applied.

[307] Mr. Burke raised with Mr. Haché the communications issues they had discussed at their May 3 meeting and the fact that Mr. Haché had refused to disclose the names of those who had complained about the grievor and who had asked to be transferred because they no longer wished to work with the grievor. Mr. Haché advised Mr. Burke that he was not prepared to discuss the names at that time but that he was willing to discuss the issue offline.

[308] He held another round-table discussion and asked each member if he was prepared to return to the shop floor, communicate, and work together as a team. Mr. Wournell, Lee Burke, and Mr. Foster agreed to follow his direction.

[309] Mr. Burke told him that he had been hired to work and was paid to work, which is what he was there for. Mr. Haché again asked him if he was willing to work as a team member, to which he replied that he had already answered the question. He told Mr. Haché that he was there to work.

[310] Mr. Haché then told Mr. Burke that Mr. Wournell was considered the resident expert with respect to acoustic tile application. Mr. Burke asked what made Mr. Wournell the expert as no one could be called an expert because their certifications

had expired. Mr. Haché agreed that no one had been recertified due to lack of funding and acknowledged that maybe they were not experts.

[311] Mr. Burke again raised the issue of communication and Mr. Haché's refusal to give him the names of those who had complained about him. Mr. Haché stated that he was still prepared to discuss the details of the complaints and that they could meet after the meeting if the grievor wished to.

[312] Mr. Burke suggested that perhaps he, Mr. Haché, and Mr. Hawker should sit down and discuss the issue. Mr. Haché told him that he would set up a meeting with Mr. Hawker.

[313] Mr. Burke raised the issue about his tenure as team leader and the fact that Mr. Haché had relieved him from that role due to his lack of communication with the team. He stated that he was the one who did not receive any communication or help from the team.

[314] Mr. Wournell stated that he believed that Mr. Burke did not ask for help because he did not want help and that for the most part, he preferred to work alone.

[315] Mr. Wournell asked Mr. Burke why he chose to come to work angry all the time. Was it because he did not like the acoustic-tile-team members? Or did he just not like working with them?

[316] Mr. Haché then asked Mr. Burke if he minded working with his present team. Mr. Burke replied that it was not that he did not want to work with them but more like they did not want to work with him. He asked Mr. Burke what would make him say that. The grievor said that he did not know and that if Mr. Haché wanted to know, he should ask the team members.

[317] Mr. Haché then asked Mr. Foster, Lee Burke, and Mr. Wournell if they minded working with Mr. Burke.

[318] Mr. Foster stated that he, Lee Burke, and Mr. Wournell wanted to work as a team and that the grievor made doing so difficult. Personally, he did not like working with Mr. Burke because the grievor got what he wanted through intimidation,communicated very little, and worked by himself. There was no collaboration with the team members.

[319] Mr. Burke said that he did not like working with Mr. Foster because he was two-faced. Mr. Foster advised Mr. Burke that the feeling was mutual and that he did not like working with Mr. Burke. The grievor said he was not the one who did not want to work with the others.

[320] Mr. Haché testified that to bring the team together, he thought that it would be appropriate to air out the laundry. He went around the table.

[321] Lee Burke said that he had tried to get along with the grievor but that he did not like working with him because he never knew how to approach the grievor. Mr. Haché stated that the grievor then became defensive and asked Lee Burke for an example. Lee Burke referred to a situation a few days earlier, when he had asked the grievor where the nozzle for the shop vacuum was and had received an abrupt and rude answer. The grievor denied giving a rude answer, stating that he had just told Lee Burke to go look for himself.

[322] Mr. Haché then invited Mr. Wournell to comment. He said that he did not like to work with Mr. Burke because of what already had been said, which was that Mr. Burke did not communicate with the team and decided to do whatever he wanted when he first started in the morning and that he did not work well with the team.

[323] Mr. Burke told Mr. Wournell that he was two-faced like Mr. Foster and questioned Mr. Wournell as to why Mr. Foster was present at the meeting, as one moment he was on the tile team, and the next, he was acting as the boss in the other shop. As a union president, how did he get away with sitting in a management position?

[324] Mr. Wournell stated that personally, he was not in favour of it, but as it was voted on at a union meeting, the members of the union had to accept it.

[325] Mr. Haché vouched for Mr. Foster and stated that Mr. Wournell had opted out of acting as a supervisor because he was a union vice president. Mr. Wournell told Mr. Burke that if he did not like the situation, he needed to attend a union meeting, where he could have his say, but that was the way it was for now.

[326] Mr. Haché noted that Mr. Burke got up and headed to the water station to replenish his water bottle after consuming it fully during the heated exchange of personal comments.

[327] Mr. Haché stated that Mr. Foster did not necessarily do whatever he wanted because when it came time to solicit an acting supervisor, management followed a list.

[328] Mr. Foster interjected, stating that Mr. Burke was wrong in making the comments he had made and proceeded to explain how the process worked.

[329] On his way back to his seat, the grievor stopped, turned to Mr. Foster, and said that he was not talking to him but to Mr. Haché and said, “You have got a lot to say.” He gestured while opening and closing his hand and said, “You need to shut the f--- up.”

[330] Mr. Foster told Mr. Haché that he had had enough and that he did not want to work with Mr. Burke anymore. The grievor told Mr. Foster that he did not want to work with him.

[331] Mr. Burke then raised an incident that he believed Mr. Foster, as a union president, should not have allowed to occur when he permitted a painter to cut acoustic tile because the painter was not allowed to do shipwright work.

[332] Lee Burke accused the grievor of being guilty of doing the same thing by permitting an employee from Engineering to use the acoustic tile team’s bandsaw to cut wood. Arguments ensued, and both Mr. Foster and Mr. Burke denied that the incidents presumably contravened the work in the bargaining unit article in the collective agreement.

[333] Lee Burke argued that the grievor was not allowed to give permission to anyone to cut wood with the bandsaw because the saw dust would contaminate the acoustic tiles. The grievor stated that he had prevented that from happening because he had vacuumed it all up. Mr. Haché agreed with Lee Burke.

[334] Mr. Haché noted that Mr. Burke became more agitated, his face became redder, and he repeatedly sipped from his water bottle.

[335] Mr. Burke reiterated that Mr. Wournell was two-faced but that if the grievor had issues, he would not talk about people behind their backs. He said that he did not like two-faced people, that he felt the same way about Mr. Wournell, and that he did not care to work with Mr. Wournell. Mr. Wournell acknowledged the grievor’s position and

said that it made the two of them even because also, he did not like working with the grievor.

[336] The grievor said that he did not care what Mr. Wournell thought and explained that it was not the first time this had happened because they had run into it before. Mr. Wournell asked what he was referring to. Mr. Burke stated that it was okay because there were ways of dealing with this.

[337] Mr. Haché asked Mr. Burke what he meant by his comments, but Mr. Burke ignored him. Mr. Wournell asked what was meant by ways of dealing with this. The grievor stated as follows: “Oh, there’s ways of dealing with this. You know what I mean, and you know how to deal with this too.”

[338] Mr. Haché stated that Mr. Wournell had smirked. He noted that the grievor, who had become irate, was quick to take in that facial expression and asked Mr. Wournell if he thought the situation was funny. Mr. Burke and Mr. Wournell had a stare down. The room went quiet for about 25 seconds. Mr. Wournell then expressed to Mr. Haché that he had had enough and that he no longer wanted to work with the grievor.

[339] Mr. Haché then asked Lee Burke for his position. He stated that after all that had been said, and given the current situation, he also did not want to work with Mr. Burke.

[340] Mr. Haché that he advised Mr. Burke that his decision was to remove the grievor from the acoustic tile team and to transfer him to the surface tile team. Mr. Haché’s decision was final. He then adjourned the meeting.

[341] In his notes, Mr. Haché stated that since the climate was tense due to the exchange of raw personal feelings, he understood that it was his responsibility and that it was due diligence not to let any team member out of his sight.

[342] In his testimony, he stated that understandably, Mr. Burke was in an agitated state. He stated that Mr. Foster and Mr. Burke were the last two to leave the lunchroom, so he followed them directly. Mr. Burke did not appear to be in a relaxed mood but considering what had just happened, it was understandable that he would be agitated and irate.

[343] Mr. Foster went down the stairwell first, and Mr. Burke followed him. At the bottom of the staircase, Mr. Foster turned left, and Mr. Burke followed directly behind

him. Mr. Foster changed direction and turned to the right, while Mr. Burke changed his course to match that of Mr. Foster. Mr. Foster stopped. Mr. Burke noticed Mr. Haché on the staircase. He moved around Mr. Foster's right side and kept going.

[344] Later in the morning, Mr. Burke approached Mr. Haché and told him that he was going home as he felt ill.

[345] He was asked about the grievor's statement, which was that there were other ways to settle this, and whether he had had a previous discussion with Mr. Burke. He stated that in 2009, he had asked Mr. Covey to help Mr. Burke on a project. Mr. Covey said that he wanted to transfer to another shipwright team. Mr. Covey advised him that although when they had worked in the past together, everything had been fine, he had heard that Mr. Burke had been charged with attempted murder. Mr. Haché believed that Mr. Burke had been present at the time of the discussion with Mr. Covey.

[346] Mr. Haché later met with Mr. Burke to see how things were going. However, after the meeting, Mr. Burke told him that the Covey matter was not settled, yet there were ways to deal with it. He stated that it was not yet over.

[347] Mr. Haché referred to the Covey incident, which had led to Mr. Burke's three-day suspension.

[348] In cross-examination, Mr. Haché was asked whether when Mr. Wournell said that the situation was volatile on the morning of May 11,2011 he referred to any cause. He was also asked whether an incident had led to the meeting being held immediately. He said that Mr. Wournell was concerned that the team was not communicating.

[349] Mr. Haché agreed that he had told Mr. Burke that he had to take an anger-management program on instructions from Mr. Hawker as part of the disciplinary response to the Covey incident. He was not aware that the course was voluntary. He agreed that he was not familiar with anger-management techniques. He was asked whether he knew that in a situation that was in the process of becoming volatile, the first recommendation in anger management is to leave the situation. Mr. Haché was not aware of that technique.

[350] He stated that when he arranged the May 11 meeting, he thought that he could control the situation.

[351] He was asked to acknowledge that by identifying Mr. Wournell as the in-house tile installation expert and then recanting it, his statement had inflamed the situation and had created ill will. He acknowledged that that had not been his intent. However, he understood how Mr. Burke could feel that way.

[352] He was asked whether, when it became apparent that the meeting was no longer functional, he should have ended it. He replied that he had not considered it.

[353] He confirmed that before the meeting, he did not provide Mr. Burke with the names of the persons who had indicated they did not wish to work with him.

[354] He did not know whether the persons had spoken with each other before the meeting. He was asked for the reason for going around the room and asking the three other team members whether they wanted to work with the grievor, when he already had the answers. He stated that he wanted to go around the table to air out the laundry.

[355] It was put to him that the purpose of the meeting had not been functional. He was referred to his notes, where he confirmed that the meeting did not go as well as he had hoped and where he stated that the purpose was to judge Mr. Burke's reaction. He was asked whether he could see that he had set up the dynamics of the meeting to become confrontational and to cause animosity. He did not reply.

[356] He was asked whether Mr. Burke took the right action after the meeting by leaving the workplace. He agreed. He also agreed that the meeting's events had not been investigated.

[357] He acknowledged that after the meeting, the grievor had taken the most convenient way to reach his work area. He also agreed that there was no violence. The situation had been intense but not so extreme as to require calling the military police.

a. Mr. Wournell

[358] Mr. Wournell stated that working with Mr. Burke was not too bad at first. However, as time went by, it became worse. Much of the time, they had a good working relationship. Mr. Burke mostly worked alone doing the sanding while he and the others worked on the submarine. In the last year, they started working on casings, and they were not outside as much. At that point, the team removed eight or nine employees

and a couple of apprentices. The working relationship changed, as they were all in the same location every day. Mr. Burke became more confrontational. Once, Mr. Burke was asked what he had ready in terms of tiles. He said, "You know what I have ready." He threw a chair against a table, stating, "I told you how many tiles I have ready." Another time, it was mentioned to him that the gaps between the tiles were too big. Mr. Burke stuck a retractable knife into a gap and stormed out the door. The gap had to be backfilled.

[359] Mr. Wournell's recollection of the events of the May 11 meeting was not materially different from Mr. Haché's.

[360] Mr. Wournell took it as a threat when Mr. Burke said to him, "… There are ways of dealing with this. You know what they are."

[361] He agreed that Mr. Burke had done most of the tile sanding over two years and to an acceptable standard. He was asked whether Mr. Burke had been on his own because he had been the only one who had wanted to sand the tiles. He replied that that could have been the reason.

[362] He was referred to the briefing note and the chronology in support of the recommendation for Mr. Burke's termination that mentions the May 11, 2011, meeting, as follows: "At the end of the meeting, Mr. Burke made a threatening statement to his team leader suggesting that there were other physical ways to deal with their issues." He was asked whether he agreed that the word "physical" had not been used. He stated that when Mr. Burke threatened him, it was physical, although Mr. Burke did not use the word "physical". He agreed that had Mr. Burke said that there were "other" ways or "physical" ways to deal with issues, there would be two different meanings.

b. Mr. Foster

[363] Mr. Foster described Mr. Burke as a typical co-worker. They engaged in small talk about their travels, hockey, and likes and dislikes. As time passed, their relationship became a little more tense, unfriendly, and more businesslike, with less communication. The reduced communication had not been one-sided; he had reciprocated it.

[364] When he worked with Mr. Burke as the team leader, early on, it seemed fine. Mr. Burke took the role seriously, and they interacted positively. The situation was normal, and the communication was acceptable.

[365] As time went on, Mr. Burke stopped holding morning meetings and reviewing the day's goals. Mr. Burke started doing his own tasks, and he thought that Mr. Burke expected the rest of the team to do their own tasks. By the end of his term, he no longer communicated with the team.

[366] As to what precipitated the May 11 meeting, he stated that the project of installing acoustic tiles on the submarine was coming to a close, and the casings were being brought into the shop. Until then, there had been two teams. Mr. Burke preferred to work by himself and did not want help, and the other three worked together on the same project but on different cases. He stated that there was poor communication between Mr. Wournell, who had been become team leader, and Mr. Burke and the rest of the team. Some incidents had occurred in the two weeks before May 11.

[367] He felt that Mr. Burke became defensive during the meeting when the issue of gapping the tiles was raised. When Mr. Haché reinforced the fact that Mr. Wournell was now the team leader and that he had expertise in installing acoustic tile, Mr. Burke took exception as he felt that he had been equally trained and that he had the same amount of experience.

[368] Mr. Foster received a phone call and stepped out of the room. When he returned, Mr. Haché, Mr. Burke, and Mr. Wournell were in a discussion. It led to a confrontation.

[369] Mr. Burke told Mr. Wournell that there was another way to deal with the issue — between them. Mr. Wournell asked what he meant. He replied, "We can handle this another way, outside." Mr. Foster took it as a threat.

[370] He stated that everything had escalated as the meeting progressed. Everybody was out of his comfort zone. Mr. Burke was sipping from an empty water bottle. He was so agitated, he did not realize that there was no water in it. After a while, he filled it at the water cooler.

[371] When Mr. Foster tried to explain the process for appointing an acting supervisor, Mr. Burke took exception to it and, while opening and closing his hand,

approached Mr. Foster where he was sitting and said, “Shut the f--- up.” He repeated that Mr. Foster was always flapping his mouth and thought that he knew everything.

[372] He described the grievor’s body language as rigid, aggressive, and intimidating. He had never had such an interaction with Mr. Burke and had never seen that side of him.

[373] After the meeting, he went downstairs to the landing. He turned and observed Mr. Burke walking down behind him. It made him feel uneasy. He went down the second set of stairs and looked over his shoulder. Mr. Burke was three or four feet behind him. He started to go left but then stopped and turned right. Mr. Burke started to follow him. He noticed Mr. Haché behind Mr. Burke. Mr. Burke passed Mr. Foster and went to the shop. Mr. Foster stated that he found the situation intimidating.

[374] In cross-examination, Mr. Burke asked him whether he feared there would be an altercation. He replied that he had felt “[f]ear of not knowing what was going to happen.” He acknowledged that the stairs to the main floor pass the cable shop, where employees work. He agreed that the most common and normal way of leaving the lunchroom is to take the stairway to the cable shop.

[375] He acknowledged that no meeting had ever been called to deal with team morale before May 11, 2011.

[376] He was asked whether it would have been appropriate to call the military police. He replied in the negative. He had been told to shut up, which is what he did. He did not feel as if he would be physically attacked in that group.

[377] He was asked whether if someone were advised that people did not want to work with that person but if that person was not given the names, it would make the situation more divisive, because in the back of that person’s mind, he or she would want to know who they were. He replied, “Yes.”

[378] He was referred to his evidence in which he had said that over time, the relationship with Mr. Burke deteriorated and whether he had ever asked Mr. Burke why. He replied, “No.” He was also referred to when he had stated that he had also begun to reciprocate. He stated that “reciprocate” in that context meant a lack of communication.

[379] Mr. Foster's written statement of the events of May 11, 2011, was entered as an exhibit. His notes mention that after Mr. Burke had stated that he wanted to know the names of the co-workers who had refused to work with him and Mr. Haché had given the same answer as before, Mr. Foster stated that to resolve the issues, they had to get it all out on the table. At that point, he asked Mr. Burke if he liked working with him.

c. Ms. Gallivan

[380] Ms. Gallivan first became involved with Mr. Burke's file in September 2011 in the role of an advisor to Mr. Hawker. She drafted the briefing note recommending terminating the grievor's employment that included a description of Mr. Burke's conduct at the May 11, 2011, meeting.

[381] She was asked whether the allegations against the grievor that arose from the May 11, 2011, meeting were investigated and who decided that they were observable behaviours. She stated that it was based on information brought forward by management. It was put to her that both sides had not been heard. She replied that that is why it was written as an allegation. It was put to her that allegations are not observable behaviours, as described in the briefing note.

[382] With respect to that meeting, the briefing note reads in part as follows:

> …
>
> *… At this meeting Mr. Burke became highly agitated and defensive, even swearing at some of his co-workers. At the end of the meeting, Mr. Burke made a threatening statement to his team leader suggesting that there were other* ***physical*** *ways to deal with their issues. Following the meeting Mr. Burke advised his supervisor Mr. Haché that he was not feeling well and would be leaving work. Mr. Haché engaged his Group Manager Mr. Charles Hawker and a notice of alleged misconduct was issued informing Mr. Burke that the incident would be investigated upon his return to the workplace. Furthermore given that management continued to be concerned with the violent and aggressive behaviour demonstrated by Mr. Burke in the workplace, they [sic] sent Mr. Burke a letter for him to provide to his attending physician….*
>
> …
>
> [Emphasis added]

[383] She was referred to Mr. Haché's notes of the May 11 meeting and was advised that nowhere did it say that Mr. Burke had threatened anyone; nor had he used the

word “physical”. She stated that it would have been communicated or conveyed to her. She was asked to confirm if those were her words. She agreed. She was asked to confirm that those words were not in the reports of the meeting. She replied that she had not been there and that she did not know.

[384] Ms. Gallivan was referred to the detailed chronology included for reference in the briefing note supporting the recommendation for terminating the grievor’s employment, in which following a description of a number of the key incidents, it was stated that while the incident had never been formally addressed or investigated, it demonstrated an example of Mr. Burke’s workplace behaviour.

[385] She stated that it was an allegation to show a possible behaviour pattern. She was asked if there was a wide discrepancy between the possibility that something had happened and the actuality that something had happened could it be said that behaviour had been demonstrated. She stated that management had brought forward those facts. She acknowledged that possibly, they had not been demonstrated.

[386] When she received the file, it contained reports and briefing notes. She stated that she was not involved in any of the prior investigations. She did she seek to confirm their findings. She provided a chronology of the facts and documents in the file and wrote the briefing note.

d. The grievor

[387] On May 11, the grievor was in his workplace when Mr. Foster approached him and advised him that they had to attend a meeting. The rest of the team was there. He sensed that all eyes were on him.

[388] When the grievor arrived, the four others were already in the room and seated on one side of the table. He had had no notice of the meeting. In his view, it was not a natural atmosphere.

[389] He referred to Mr. Haché’s written statement that refers to the reasons for meeting in which Mr. Wournell told Mr. Haché that something had to be done because the situation had become undesirable and had escalated almost to the point of volatility.

[390] Mr. Burke stated that Mr. Haché's reasoning was questionable and concocted. He failed to record anything in particular that happened that morning as causing the so-called situation to escalate to the point of being volatile. There was no immediate need to call a meeting. The situation was no worse than it had been the day before or on May 3, the date of Mr. Burke's evaluation as team leader.

[391] The grievor had sought to meet with Mr. Hawker on May 3 to get to the bottom of the situation. Mr. Hawker had given him 5 minutes to explain the situation. Mr. Hawker advised the grievor that he wanted to get Mr. Haché's side of the story. Mr. Hawker never contacted the grievor, and 13 days later, he sent the grievor the letter requiring him to undergo an FTWE.

[392] Mr. Haché did not know how to proceed and wanted advice from Human Resources. Despite whether the situation had become volatile, he called the meeting immediately. In Mr. Burke's view, there was no indication that it had become volatile.

[393] Mr. Haché raised the issue of the recording, collecting, and filing of evidence that the acoustic tile process was not being followed. Mr. Burke stated that the recording, collecting, and filing had been done and queried why Mr. Haché had raised the issue at the end of the project.

[394] He stated that Mr. Haché referred to Mr. Wournell as the acoustic tile application expert. Mr. Haché drove another wedge between the grievor and the other workers. In his view, the meeting was nothing less than a badgering fest. He had worked two years and given his best.

[395] Mr. Burke referred to Mr. Haché's notes that reflect that he had asked Mr. Burke if he minded working with his present team. He had replied that that was not so because it was not that he did not want to work with them but more like they did not want to work with him. Mr. Haché then asked the team if it minded working with Mr. Burke and if so, why.

[396] Mr. Burke stated that it is apparent that Mr. Haché knew before he called the meeting and before he asked the question that the team members did not want to work with him. He stated that the question was asked to provoke him.

[397] The grievor stated that the other employees attended the meeting after telling their supervisor that they did not want to work with him. He stated that they went to

the meeting under the pretense of resolving issues. In his view, it was underhanded, and they were not being up front.

[398] He acknowledged that at the meeting, he called Mr. Foster two-faced. He did not accuse Mr. Foster of doing things behind his back. He accused Mr. Foster of joking with other employees and then bad-mouthing them once they left because they were in favour of bringing in outside contractors. He also called Mr. Wournell two-faced because he did the same thing.

[399] He stated that after Lee Burke and Mr. Wournell had stated that they did not care to work with the grievor and he had explained that this was not the first time that this had happened, Mr. Wournell expressed that he was completely lost, and he questioned what Mr. Burke was referring to. Mr. Burke stated that Mr. Wournell had smirked at him and that he had asked Mr. Wournell what he was smirking at. At that point, Mr. Burke stated that he told Mr. Wournell that there were other ways of dealing with this. He never indicated to Mr. Wournell that it was a physical threat.

[400] He stated that whenever Mr. Haché raised an issue about Mr. Burke, Mr. Foster backed up Mr. Haché. The grievor stated that he told Mr. Foster, “For f---’s sake, be quiet.”

[401] At the conclusion of the meeting, Mr. Haché stated that he could no longer allow Mr. Burke to work on the acoustical tile team and that he was transferring the grievor to the surface ship tile team. Mr. Burke stated that it was a slap in the face as he had worked and had given his best for two years on the project, and he had received no credit for it.

[402] He stated that if Mr. Hawker and Mr. Haché had had concerns, he had gone to them before May 11 to discuss them. They had had plenty of time before May 11 to resolve them.

VI. Analysis

[403] On a balance of probabilities, I have no difficulty concluding on the evidence that during the May 11, 2011, meeting, Mr. Burke became highly agitated and irate. He admitted to telling Mr. Foster, “for f’s sake be quiet”. He also acknowledged telling Mr. Wournell, “There were other ways to deal with this”, although he stated that it was not a physical threat. I prefer Mr. Haché’s and Mr. Wournell’s recollections of the more

complete sentence, “Oh there’s ways of dealing with this. You know what I mean, and you know how to deal with this too”, given the grievor’s agitated state at the time.

[404] In my view, based on the “raw emotions” (Mr. Haché’s term) of the participants at that point, I conclude that the words constituted a threat. However, I am not persuaded that the threat constituted workplace violence, within the meaning of s. 20.2 of the *Regulations*. In my view, it could not reasonably have been expected to cause harm, illness, or injury to Mr. Wournell as it was made in the presence of Mr. Haché and the rest of the team and was highly unlikely to be actioned. Mr. Foster did not believe that he for one would be physically attacked by Mr. Burke in that group.

[405] Mr. Haché testified that to bring the team together, he thought it was appropriate to air out the laundry by going around the table and ask each one if he minded working with Mr. Burke, and if so, why. He acknowledged that the meeting had not gone in the direction he had hoped for. Mr. Wournell, Mr. Foster, and Lee Burke all said that they did not want to work with the grievor.

[406] Yet, before the meeting, Mr. Haché knew that Mr. Foster and Mr. Wournell had asked to be transferred to another work team because they did not want to work with Mr. Burke. He acknowledged that as the meeting went on, Mr. Burke became more and more agitated. In his notes, he wrote that Mr. Burke was in an agitated state for “understandable reasons” and that considering what had just happened, it was “understandable” that he would be agitated and irate.

[407] In my view, Mr. Haché’s prior decision to seek a meeting with Human Resources to receive guidance on how to deal with the situation was the preferred approach. Incidents of problematic behaviour should be dealt with by talking to the employee in private about how the behaviour negatively impacts performance in a timely way, in accordance with the provisions of the collective agreement. Mr. Burke learned on May 3 that some of his co-workers, who were not identified, had complained about him and no longer wished to work with him. He sought to resolve the issue with Mr. Hawker that day. It was not addressed.

[408] It is not surprising that the team and the grievor had communication issues after May 3, 2011 as Mr. Foster described. He acknowledged that when advised that unidentified people do not want to work with a person but at the same time that

person is not given their names, the situation would become more divisive because in the back of his or her mind, the person would want to know who they were.

[409] The proposal made at the May 11 meeting to discuss offline the concerns about employees who no longer wished to work with Mr. Burke, in a meeting with Mr. Hawker should have been pursued.

[410] Although it was not deliberate, airing the laundry with the entire team by asking each of the team members whether they wanted to work with Mr. Burke provoked Mr. Burke to the extent that he became agitated and irate. If this were a discipline case, it would be a ground to mitigate a disciplinary penalty. This is not a disciplinary case. However, the provocation explains Mr. Burke's reactions and in Mr. Haché's words, it was "understandable" why the grievor would be agitated and irate.

[411] A number of other reasons than those mentioned in the letter of May 16, 2011, were also advanced as a basis for requesting the FTWE.

[412] The first of these was the allegation that the grievor had been accused of attempted murder. Mr. Haché stated that initially, he was not sure if he should be the one to say it to the Board, however, the information in the workplace that Mr. Burke had been charged with attempted murder was a consideration in the FTWE request. He was asked whether he had any evidence to substantiate the allegation. He stated he had obtained the information from a former worker, presumably Mr. Covey.

[413] Mr. Hawker stated that he did not receive information about an attempted murder charge being made against Mr. Burke.

[414] Mr. Burke testified that he has no criminal record and that he was unaware before the first hearing day of the information about that charge, which Mr. Covey provided to Mr. Haché.

[415] I accept Mr. Haché's evidence in this respect. Clearly, he wanted to bring that information to the Board's attention and elected not to discuss it with counsel before testifying. As of the date of his testimony, he had retired and was no longer in the workplace. In my view, he provided very balanced and cogent evidence.

[416] The information was never investigated or corroborated. Mr. Burke stated that he has no criminal record. He was not challenged on that. I can conclude only that this

unsubstantiated rumour was, on a balance of probabilities, widely circulated in the workplace, that it contributed to ostracizing Mr. Burke, and that it played some role in him being falsely accused of assaulting other team members.

[417] Also of relevance is the MARLANT Harassment Investigation Team's workplace investigation into Mr. Turnbull's allegations that Mr. Burke assaulted him on June 10, 2009, and into Mr. Turnbull's work refusal on August 5, 2010, over fears of Mr. Burke's action or conduct at work. The Team concluded that on a balance of probabilities, Mr. Turnbull's allegations were unfounded and provided its observations with respect to the workplace. Its report reads in part as follows:

…

> *68. … This investigation finds that incidents of mild violence have gone unreported due to a lack of trust of the supervisors. There is a sense that little or no corrective actions [sic] will be taken, and when action is taken, such as ordering anger management, it is seen as ineffective… Conditions are now set to resolve the work refusal and to establish safety parameters associated with the assurance of voluntary compliance.*
>
> *69. <u>Occupational Health and Safety Issues.</u> There are inadequate procedures and knowledge for summoning assistance outside the workshop. The existing preventative controls are ineffective in part because of the rotation of team leaders for work projects, changes in personnel at the TSS level, the isolation of workplaces and job sites, and a lack of communication about critical issues effecting [sic] occupational health and safety. Procedures for harassment, access to alternative dispute resolution, workplace violence and occupational health and safety violations must be clearly articulated and delineated for this workplace.*
>
> …
>
> *73. The fluidity of the work teams and work locations has contributed to this conflict. Addressing this conflict in a timely manner was not done, and contributed to worsening the situation.…*

…

[418] The report refers to some 20 incidents of mild violence, i.e., physical assaults, taking place over a period of several years, which were unreported. That workplace context must be taken into account when assessing Mr. Burke's behaviour. The report implies that minor workplace violence appeared almost commonplace.

[419] Mr. Hawker was asked when management first considered the issue of the grievor's fitness to work. He stated that it was not a "eureka" moment. Based on what

had occurred on May 11, 2011, his team, Mr. Haché, and Ms. Nelson from Human Resources, while thinking back to previous discipline, thought that Mr. Burke did not seem to be correcting his behaviour. He found alarming the totality of the situation. He thought it was important to ensure that management was aware of any underlying medical conditions.

[420] As noted, Mr. Burke asked him, in reference to the May 16, 2011, letter to Mr. Burke's doctor, what Mr. Hawker wanted after he agreed that the doctor was not directed how to answer the questions in the letter, that the doctor was to decide the procedure, and that he had directed the doctor to the job description. Mr. Hawker stated that he had wanted an assessment and that he had been looking for limitations. He was asked whether he had had concerns that something was not right with Mr. Burke and whether he referred to a medical or a mental problem. He replied that a mental problem is part of a medical problem.

[421] He was asked whether he had sought an FTWE on mental issues. He replied in the negative, and stated that maybe it had been for psychological issues.

[422] In *Grover*, Mr. Justice Shore stated as follows at paragraphs 70 and 72:

> *[70] … The onus lies on the employer, who must be prepared to call "cogent evidence" to support its position. The need for a medical examination is described as "drastic action" which must have a "substantial basis" and will be only be required in "rare cases."…*
>
> …
>
> *[72] … Furthermore, "reasonable and probable grounds" must exist for assuming the employee is a danger. This would necessarily exclude speculation or conjecture. Indeed, in the words of one arbitrator, "An employer may not refuse to allow an employee to return to work on the mere possibility of medical problems in the future."…*

[423] In *Niagara Peninsula Energy Inc.*, the arbitrator ruled that a grievor's problem of losing his or her temper and reacting with aggression did not constitute reasonable and probable grounds to require that the grievor submit to a psychiatric evaluation as a condition of being allowed to return to work. He stated at paragraphs 119 and 120 as follows:

> *[119] … The gist of his* [the employer's] *testimony was to the effect that he had a doubt whether the grievor's conduct was voluntary and therefore culpable, or whether it was non-culpable behaviour brought on by a mental health issue. That clearly falls far short of the standard required in the arbitral jurisprudence.…*
>
> *[120] I conclude that the "doubt" in the employer's mind in the present case is no different than a "mere possibility", held by the court to be not sufficient to meet the "reasonable and probable grounds" test… The test developed in the jurisprudence with a view to balancing the employee's privacy rights and the employer's right and duty to maintain a safe workplace imposes a burden of proof on the employer to meet a higher standard, namely that it had "reasonable and probable grounds" to believe that the griever [sic] posed a danger.…*

[424] In my view, the reasons Mr. Hawker provided for requesting a psychiatric evaluation of the grievor were tentative. In his response to whether he had asked for an evaluation on mental issues. He replied, "No; maybe psychological." In his correspondence with Mr. Burke and his letters to Mr. Burke's doctor or to Health Canada, Mr. Hawker did not refer to conducting a psychiatric examination. Only in response to a question in cross-examination, after a number of days of evidence, did I learn that at issue in this case was a psychiatric examination.

[425] Mr. Hawker's correspondence also references the fact that Mr. Burke might have been subjected to discipline as a result of the May 11, 2011, meeting. That reference is consistent with his tentative view that there was only a possibility that Mr. Burke was suffering from a mental disability as he had not ruled out the possibility that Mr. Burke had engaged in culpable misconduct.

[426] Did the employer meet the higher standard? Namely, that it had reasonable and probable grounds to believe that Mr. Burke posed a danger?

[427] Based on the grounds articulated in the May 16, 2011, letter, I am not persuaded that the employer has proven on a balance of probabilities that Mr. Burke frequently has violent angry responses that include profanity, throwing material, or stomping off the job at hand. The evidence is that 3 or 4 times over the course of 4½ years, he used profanity when he became angry. This evidence does not support the conclusion that he frequently engaged in violent, angry responses, including profanity.

[428] The evidence does not support the conclusions that the grievor refused to accept direction and that he continually carried out unsafe practices. Two incidents

were referred to, which were reported to supervisors, who elected not to investigate. Mr. Burke was not even advised of the incidents in in 2006 and 2007 concerning the submarine watch, which were reported but never investigated.

[429] However, I conclude that based on Adjudicator Richardson's decision, Mr. Burke engaged in workplace violence when he assaulted Mr. Covey in October 2009. I accept Adjudicator Richardson's characterization of the conduct as little more than roughhousing. I also conclude that Mr. Burke engaged in threatening behaviour and that he exchanged profanities with Mr. Meehan in May 2010, some seven months later. However, I have concluded that that conduct did not constitute workplace violence as the nature of the threat could not reasonably have been expected to harm or injure Mr. Meehan.

[430] I also conclude that Mr. Burke used profane language to Mr. Foster on May 11, 2011, a year after the May 2010 incident, by telling him to shut the f--- up. I also conclude that Mr. Burke threatened Mr. Wournell by stating, "… You know what I mean, and you know how to deal with this too", after Mr. Wournell had told Mr. Burke that he did not like working with Mr. Burke. However, in those circumstances, the threat could not reasonably have been expected to harm Mr. Wournell and in my view did not constitute workplace violence.

[431] I have concluded that the decision to air the laundry with the entire team, although not deliberate, served to provoke Mr. Burke to the extent that he became agitated and irate. In Mr. Haché's words, it was understandable that Mr. Burke would be agitated and irate, and it provides a rational explanation for his inappropriate behaviour. Mr. Burke's response, although it cannot be condoned, did not appear greatly out of proportion to the circumstances he experienced in the meeting.

[432] Clearly, the rumour that Mr. Burke had been charged with attempted murder was not proved. As noted, I accept Mr. Haché's evidence that it was a factor in requesting the FTWE.

[433] For the foregoing reasons, as in *Niagara Peninsula Energy Inc.*, in which the employee also exhibited incidents of losing his temper and acting with aggression, I am not persuaded that the employer has met its onus of leading cogent evidence that it had reasonable and probable grounds to conclude that it was probable that

Mr. Burke was suffering from a mental illness such as to request that he undergo a psychiatric examination before letting him return to the workforce.

[434] The employer argued that the evidence supports the same findings made in *Burke 2014*, even if approached *de novo*.

[435] I carefully reviewed Mr. McNamara's decision and make the following observations. There is no reference in the decision to the fact that what the employer sought was for Mr. Burke to undergo a psychiatric evaluation by a Health Canada doctor. As reviewed in the case law, the test for requiring an employee to undergo a psychiatric evaluation is higher than that of an FTWE, given the privacy concerns.

[436] In terms of witnesses, Richard S. Gaetz, another shipwright, testified for the employer before Mr. McNamara. He was not called to testify in this case.

[437] The review of the evidence does not reflect Mr. Haché, who was Mr. Burke's immediate supervisor and who had first-hand knowledge of the grievor's behaviour, testifying that he did not believe that an FTWE was necessary and that Mr. Burke could have returned to the job without incident. Nor does the decision reflect Mr. Haché's testimony that the part of the May 11, 2011, letter that sets out the grounds for the evaluation was not accurate and why it was not. Nor does the decision reflect the fact that the unsubstantiated information or rumour that Mr. Burke had been charged with attempted murder was a consideration in requesting an FTWE.

[438] Furthermore, Adjudicator McNamara noted that Mr. Wournell testified that he witnessed a heated exchange and bumping incident in the lunchroom between the grievor and Mr. Turnbull. Adjudicator McNamara's decision did not reflect the conclusion of the MARLANT investigation that exonerated Mr. Burke.

[439] Nor does Mr. McNamara's decision reflect Mr. Wournell's evidence that he observed Mr. Burke swear and become angry 3 or 4 times over the course of some 4½ years. In my view, this does not indicate that Mr. Burke frequently lost his temper such that it might have been an indication of a mental health issue.

[440] This is not to be taken as criticism of Mr. McNamara's decision. Although a number of the witnesses were the same, clearly, the evidence reflected in his decision and the evidence that I heard is significantly different.

[441] Accordingly, for these reasons, Mr. Burke's grievance is allowed. I conclude that Mr. Burke's termination was not for cause.

[442] Although the employer submitted numerous cases and authorities in its submissions, I have not addressed each one individually in this decision. However, I reviewed all of them and have referred to those that directly address the dispute between the parties.

[443] As a matter purely of obiter, from the evidence the briefing note prepared for the senior commanders and decision-maker listed a number of incidents on the grievor's personal file, allegedly relating to his performance and conduct,that were neither formally reported nor investigated. It was also apparent that reports relating to these incidents were not shared with the grievor. As a matter of procedural fairness may I suggest that reports relating to an employee's conduct and performance that may be used against that employee in the grievance and adjudication process be provided to the employee in a timely way.

[444] As noted in this decision, the evidence and questions that counsel and Mr. Burke asked give rise to a number of other issues. However, given my finding that the employer did not meet its onus that it had reasonable and probable grounds to conclude that Mr. Burke was suffering from a mental illness that justified him undergoing a psychiatric examination while being kept out of the workplace, the determination of those issues is not strictly necessary for the disposition of the grievance. Furthermore, the issues were not the subject of full argument by counsel and Mr. Burke in the exchange of their written submissions. Nevertheless, in my view, they are worth highlighting.

[445] The issues are as follows:

1. Was the employer obligated to clearly explain to Mr. Burke why it rejected his physician's notes that stated that he was fit to work without limitations and to clearly explain why it sought his consent to undergo a psychiatric FTWE by Health Canada? If so, did it meet that obligation?
2. Was the employer's requirement that Mr. Burke consent to a limit of one year in which to undergo a Health Canada FTWE reasonable in the circumstances in which he was without income? If not, should DND have retained a health specialist, independent of Health Canada, to provide a more timely assessment?

3. Was the employer obligated to take steps to place a firewall between the grievor and the examining physician, and the employer and its labour relations officers, to safeguard Mr. Burke's privacy?

[446] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

VII. Order

[447] The grievance is allowed. As the parties requested, I will remit to them the issue of remedy and will remain seized of the file for a period of 60 days in the event that they are not able to resolve that issue.

September 23, 2019.

David Olsen,
a panel of the Federal Public Sector
Labour Relations and Employment Board