Date: 20210810

Files: 569-02-38379, 566-02-38382, and 566-02-39698

Citation: 2021 FPSLREB 91

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

MAURICE KENNY

Grievor

and

DEPUTY HEAD
(Department of National Defence)

Respondent

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

In the matters of individual grievances and a policy grievance referred to adjudication

Before: Augustus Richardson, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Ronald A. Pink, QC

For the Respondent: Richard Fader, counsel

Heard at Halifax, Nova Scotia,
August 12 and October 21 to 24, 2019,
and, via videoconference, June 2 to 4, 2020.

REASONS FOR DECISION

I. Individual grievances and policy grievance referred to adjudication

[1] This matter involves three discipline grievances referred by the Federal Government Dockyard Trades and Labour Council (East) ("the union") to the Federal Public Sector Labour Relations and Employment Board ("the Board"). All three arose out of an allegation by Maurice Kenny ("the grievor") that the Treasury Board ("the employer") was not enforcing a safety protocol that prohibited using cell phones in the workplace.

[2] Two of the central questions addressed in this decision are: Does concern that a supervisor is not enforcing safety regulations in the workplace justify refusing to attend the workplace? Does stress arising from that concern amount to a disability that justifies such a refusal?

[3] A number of grievances arose from the events involving the dispute between the grievor and the Treasury Board, as follows:

1) The grievance in Board File No. 566-02-38382, dated February 6, 2018, about the employer's refusal to allow the grievor to return to work and its failure to accommodate him ("the return-to-work grievance").
2) The grievance in Board File No. 566-02-39698 dated October 9, 2018, about the employer's termination of the grievor on September 27, 2018 ("the termination grievance").
3) The grievance in Board File No. 569-02-38379, dated February 6, 2018, about the employer's "… failure to enforce the no cell phone policy at CFAD Bedford" ("the policy grievance").

[4] The termination grievance included five disciplinary grievances, all involving the same issue, which was the grievor's refusal to return to work that ended with his termination. All were filed against progressive suspensions that had been imposed on him and are dated May 11 (against 1- and 5-day suspensions), June 13 (against 10- and 15-day suspensions), and July 25, 2018 (against a 20-day suspension), respectively.

[5] Another grievance was filed and was dated November 20, 2016 (Board File No. 2016-8685). It was about the employer's decision to place a letter of reprimand in the grievor's file. However, in their closing submissions, the parties agreed that that grievance was not properly before me and that it would not be pursued.

[6] Finally, the union also agreed to withdraw the policy grievance. Having said that, the issue of the employer's cell-phone policy and the extent of its enforcement was at the heart of this dispute.

II. Summary of the evidence

A. The central issue

[7] All the grievances arose from a dispute between the grievor and the employer over whether it was enforcing certain of its safety policies in the workplace. The policy at issue in essence prohibited possessing or using cell phones within what was called the "Explosives Area" of the Canadian Forces Ammunition Depot (CFAD) Bedford in Halifax, Nova Scotia ("CFAD Bedford").

[8] The grievor alleged that the employer was not enforcing the policy and that its failure to led to fear, stress, and anxiety on his part that was strong enough to cause him, first, to leave the workplace, and second, to be unable to return. His particular focus was on his allegation that cell phones were being possessed and used in Building 212, where he worked, which was within the Explosives Area. Missile servicing and maintenance was carried out there. He said that the employer failed to take steps to rectify the problem, that it had a duty to accommodate him, and that it failed to discharge that obligation. All this meant that the employer's decision to terminate him on October 3, 2019, when he refused its order to him to return to work, was unjust.

[9] For its part, the employer said that it did enforce the policy in question and that any breaches of it took place without its knowledge and did not, in any event, cause any undue hazard in the grievor's workplace. It also maintained that it made efforts to accommodate him, which he rejected, and that in any event, any stress he experienced did not amount to a disability justifying his refusal to return to the workplace when he was ordered to return. Accordingly, it said that all the discipline, including the termination, was for just cause.

B. The hearing

[10] The hearing included six days of evidence and one day for closing submissions. It stretched over almost a year and covered three distinct sets of appearances, two in person, and one, the last, via Internet videoconference, as follows:

1) August 12, 2019;

2) October 21 to 24, 2019; and
3) June 2 to 4, 2020.

[11] Also, a site visit occurred on October 21, 2019, immediately before the testimony given on that day. I attended the grievor's workplace with him, counsel, and representatives of the parties. I observed several aspects of the employer's operations.

[12] Turning to the testimony, on behalf of the employer, I heard it from the following witnesses:

- Lt. Marc Muise, Material Control Officer, CFAD Bedford;
- LCdr. Gregory Walker, at the material time Commanding Officer, CFAD Bedford;
- Paul Perrin, at the material time Explosive Safety Officer, CFAD Bedford, under LCdr. Walker;
- Robert Maillet, at the material time the supervisor of the Ship Repair (SR) Group staff in Building 212 at CFAD Bedford, where the grievor worked;
- Dr. Karen MacDonald, at the material time Medical Officer, Clinic Services, Health Canada, who conducted a number of fitness-to-work evaluations of the grievor after he left work in May 2016;
- Anne-Marie Baker, at the material time Human Resources - Client Services Officer at the Department of National Defence's (DND) Cape Scott facility in Halifax; and
- Ian Mitchell, at the material time In-Service Support Manager for shipbuilding at Cape Scott.

[13] On behalf of the union, I heard testimony from the following witnesses:

- Dr. Robert Wadden, a physician seen by the grievor from time to time;
- Dr. Allan Abbass, a psychiatrist, who was qualified to provide opinion evidence;
- the grievor; and
- Alain Beauchamp, an electronics technician who worked in Building 212 with the grievor.

[14] A large number of documents was also put into evidence.

[15] At the start, I should say that the parties had few disputes as to the facts. Their disputes had more to do with the inferences to be drawn from those facts or their legal impact. That being the case, I will set out the facts as I found them without detailing in great length the bulk of several witnesses' testimonies.

[16] I note too that much of what transpired between and among the witnesses as well as others at the time was recorded in emails, memos to file, letters, and reports. Since they make a contemporaneous record of what was said and done, I relied on

them somewhat. I will detail the witnesses' testimonies only when necessary to explain a particular finding, when the parties diverged on a particular fact.

C. The grievor's background

[17] The grievor started working at Cape Scott in 1986 in the machine shop there. He obtained his "Red Seal Machinist" papers and continued working there for roughly 16 years. He then transferred to the Fire Control Shop, which maintains the weapons systems on-board ships. He held an MI-11 classification. He worked there for about 6 years. He then sought and obtained a transfer to CFAD Bedford in 2008, in part because he lived in Bedford, which made for a shorter commute. He worked in Building 212 from 2008 until he left his work in 2016. He was terminated in 2018.

D. The worksite: CFAD Bedford

[18] CFAD Bedford, commonly referred to as the "Bedford Magazine", is a major Canadian Forces munitions depot occupying the northern shore of the Bedford Basin near Halifax. It houses and services weaponry and munitions for the Canadian Forces' Maritime Forces Atlantic Formation ("MARLANT"). It has a loading jetty together with several storage bunkers (for storing munitions) and buildings in which munitions such as missiles and their canisters are serviced.

[19] First in order of appearance at CFAD Bedford is the Administrative Building. It contains offices and a lunchroom. It has a parking area in front. Employees arrive here in the morning and park their cars. They then enter a DND van. The van drives down a road to the Explosives Area. That area consists of a large parcel of land covering some hectares that is fenced off from the rest of the base. It has a single gate and a gatehouse.

[20] Despite its name, the area is not all "explosive" in nature. It is quite large and includes a lot of vacant land that slopes down to the Bedford Basin, where a wharf is used to load and offload several kinds of munitions. The area also includes a number of storage bunkers and operations buildings. The grievor worked in Building 212, where ship-borne missiles and the canisters in which they are stored are serviced.

[21] The entry gate to the Explosives Area has a sign that warns that certain items that pose a risk if used in the vicinity of ammunition or explosives such as cell phones and cigarette lighters, are not permitted there. The concern over the use of cell phones

there arose because of the electromagnetic radiation associated with their use. Such radiation has been known to trigger electronically initiated detonators ("EIDs"). Not all buildings or workshops there contain munitions that use EIDs. However, as LCdr. Walker testified, at one point, the goal of the general prohibition was to foster safe habits when working in or around the Explosives Area.

[22] When the van reaches the gatehouse, it stops. Commissionaires are posted in the gatehouse. They log vehicles and the names of the employees in them. Visitors (that is, people who are not regular employees in the Explosives Area) must exit their vehicles and enter the gatehouse. They must provide identification and surrender their cell phones and lighters, which are then stored in the gatehouse, with their identification. They receive a pass that identifies them as visitors. Employees receive their appropriate identification pass.

[23] The process is somewhat different with regular employees. Rather than have all the employees exit the vehicle, the driver instead collects their cell phones and lighters and then enters the gatehouse, supplies the identification, and receives the passes. The driver then returns to the vehicle and distributes the passes to the employees.

[24] Neither visitors nor employees arriving at the gate are ever put through a pat-down or wand search. I also note that for the purposes of this decision, there is one exception to the prohibition against cell phones in the Explosives Area. The supervisor of Building 212 is permitted to take his or her cell phone through the gate and to the building. However, the supervisor may use it only in a certain area of the building.

[25] The van then continues on to the worksite, which in the grievor's case was Building 212.

[26] For the purposes of this decision, it is sufficient to describe Building 212 as follows. It is essentially divided into two parts. The first part is administrative. It contains a small meeting room, a washroom, lockers for the employees, and an office for the supervisor. It is separated from the second, or operations, part by a secure door that is electronically locked. The supervisor is not permitted to take his or her cell phone past that door. The supervisor's cell phone is DND property, but it is otherwise a normal cell phone like any other consumer cell phone.

[27] The employees, including the grievor, work in the operations part. The primary occupation there is work on the missiles used on navy vessels and on the canisters in which the missiles are stored. In general, missile electronics and software are tested and upgraded, and missile canisters are inspected, cleaned, refurbished, repaired, and maintained.

[28] This is what the employees, including the grievor, do and did. I will return later to the issue of the risks associated with the use of cell phones in this part of the building.

E. The prohibition against cell phones in the Explosives Area

[29] The employer's prohibition against cell phones in the Explosives Area is of long standing. It is repeated and emphasized in a number of ways.

[30] First, employees receive a safety briefing every year, which always includes a warning that personal cell phones are prohibited in the Explosives Area (Exhibit E2 (2012)). In the early days of cell phones, the employer permitted its supervisors to use specialized, low-wattage ones, albeit with restrictions as to where in the Explosives Area they could be used.

[31] However, more recently, the employer began to issue its supervisory staff with cell phones that are no different from the consumer cell phones that its employees use. The explanation from a number of witnesses was that the newer consumer cell phones have a lower wattage, so there is no longer any need for specialized cell phones. There was no evidence as to when this transition occurred. However, it appeared to me from the witnesses' testimonies that it had happened a considerable time before the events in 2016. And in any event, despite that cell-phone technology change, the general prohibition against them in the Explosives Area remained and continued in effect as of the hearing.

[32] Second, as already noted, there is a sign and a protocol at the entrance gate to the Explosives Area that is designed to warn people entering to surrender their cell phones.

[33] Third, at the material time, employees were urged to leave their cell phones locked in their cars at the Administrative Building or to shut them off before entering magazines or workshops (Exhibit E7, Tab 8A, page 4).

F. The events leading to the grievor leaving his work

[34] The grievor provided some detail as to his work experience at CFAD Bedford leading up to the incidents in 2016. He recalled being provided with an extensive safety manual, of perhaps 100 pages, upon his arrival in 2008. It took him 3 to 4 hours to read and sign it. Along with his co-workers, he received annual safety refresher seminars that could cover a multitude of different safety issues. The prohibition on the use of cell phones in the Explosives Area was always mentioned. There was also a brief weekly safety talk.

[35] The grievor often acted as the van driver, taking the employees to Building 212 in the morning. He described passing through the gate and how sometimes, the passengers had to go into the gatehouse to retrieve their passes, and how more recently, the driver would simply pick up the passes and distribute them to the passengers. He recalled that "a few times", while driving the van, a passenger would have a cell phone but said that it would just be left at the gatehouse. Employees were not directly questioned at the gate as to whether they had their cell phones with them. They were not "wanded".

[36] The grievor noted that supervisors were permitted to have cell phones in the Explosives Area but only in the administrative part of Building 212. They were not to take them past the secure door into the operations area. However, he noted that "somewhere" in 2014 or 2015, he became aware that cell phones were present "where they were not supposed to be".

[37] The grievor provided three examples of this. One involved a co-worker, Mr. Paul Gaudet. The grievor saw him take his cell phone out of his pocket, turn it off, and put it in his locker in the administrative area. The grievor said that he had seen it happen roughly 50 times, although he had never seen Mr. Gaudet with his cell phone in the area behind the security door. The second involved another co-worker, Mr. Beauchamp. The grievor testified that he saw Mr. Beauchamp text from his cell phone several times in several places, including in the operations area behind the security door. The grievor testified that it happened a few times in the building in front of the supervisor, Mr. Maillet, although it was not clear where exactly. He stated that he also recalled one incident, when Mr. Beauchamp accidentally "pocket dialled" Mr. Maillet from the bathroom in the administrative area of Building 212. Finally, the grievor testified that he saw another co-worker, Steve Hartland, use his cell phone three times in the period

from 2014 to 2016, "on the other side of the door." (It was not clear on which side of the security door it happened.)

[38] The grievor testified that he never went to his supervisor, Mr. Maillet, to the Occupational Heath and Safety (OHS) Committee or, for that matter, to anyone else about the use of cell phones in the Explosives Area in general or in Building 212 in particular. From time to time, he would tell a co-worker about not being permitted to have a cell phone in the building. He explained that he did not want "the fight it would create" if he reported Mr. Beauchamp's use of his cell phone or if he complained to Mr. Maillet. As he explained, "the two that were doing it were on the OSH [*sic*] committee, and plus my supervisor knew about it, and I just didn't want to get tangled up." He added that it was his supervisor's responsibility "to take care of it."

[39] The grievor testified that when he saw cell phones in the Explosives Area during the period from 2014 to 2016, he was "scared there could be an explosion." He said that over time, it began to bother him more and more. He worried about the possibility of an explosion, which was a concern he took home.

[40] In late March 2016, a shop meeting was held with Mr. Maillet, Sophie Doucette, a material control officer, and Lt. Muise to discuss any safety issues the employees in Building 212 might have. A number were identified, including fumes and chemical residues, aluminum dust from sanding, cadmium coatings, loose vises, and cell-phone use in the Explosives Area. The grievor raised a number of them, including the cell-phone one. He testified that everyone was shocked when he raised it. In response, a brief presentation was made in the lunchroom to reinforce the prohibition about the presence or use of cell phones in the Explosives Area.

[41] Some time later, on May 10, 2016, at 8:16 a.m., Mr. Maillet emailed his staff, including the grievor, enclosing what he proposed as the standard operating procedure for working on a missile canister. He asked that they review it and send any changes or additions, including any safety items they thought were important (Exhibit U12).

[42] It was not clear in the evidence whether the grievor received the email before or after he arrived at work that morning. However, it is clear that at about that time, an incident involving cell phones occurred in the Explosives Area.

[43] The grievor testified that he was a passenger in the van being driven to Building 212 that morning. Mr. Hartland was driving, and Mr. Beauchamp and Mr. Gaudet were in the back. As they approached the building, Mr. Hartland's cell phone vibrated in his pocket. The grievor did not say or do anything. He just continued into the building and did his work. He stewed about the incident. He had raised the issue in March, yet the practice was still occurring. He had wanted it to stop, but his co-workers still did it.

[44] This incident was on the grievor's mind when he responded to Mr. Maillet's email at 10:22 a.m. that day. He also copied Ms. Doucette, who at the time was the material control officer responsible for overseeing the movement of ammunition and munitions into and within the Explosives Area. The grievor complained that he and his co-workers were being exposed to toxic paint dust. He then added as follows (Exhibit U12): "I'm getting sick and tired of you putting my health and wellness in jeopardy. I think it's time for somebody that actually cares about our safety to come in here and clean this place up."

[45] At 11:24 a.m., Ms. Doucette responded to the grievor's email in some detail. It was copied to Jerry Ryan, the union's president, as well as to others at CFAD Bedford because of a concern that labour relations issues might be triggered. Ms. Doucette responded to the grievor's concerns about dust and explained what had been done about it. She went on as follows (Exhibit U12):

…

> *Mr. Kenny, your opinions are valued, but management will maintain the right to manage. There is no next level for the issues within your email, in conducting work that you have been assigned to and you should discuss this with your union rep or health and safety rep (enclosed in this email). If you are unhappy with your employment, you should seek options to resolve the matter, at CFAD Bedford we value our employees and their employability, and your email clearly indicates that you may have additional problems you may want to discuss.*

…

[46] The grievor left work at the end of the day. He testified that the van incident continued to "really bother" him. He testified that he felt sick, "very sick", and said that he "had to do something about this, [he] can't go to work in a sick environment." In the end, he decided that he "felt sick and didn't want to go back to work unless this

was fixed." He decided to go into work on May 11 but only to email his supervisors and co-workers (Exhibit U12).

[47] The email was sent to most if not all of management and to the commanding officers, as well to as many of his co-workers at CFAD Bedford. It was sent on the morning of May 11 at 7:34 a.m. In it, he repeated his concerns about dust and how the employer had handled the issue. He then turned to a new issue, as follows (Exhibit U12):

> *… I'm glad you brought up the* "other problem" *issue. Let me tell you a little story. Almost* [number] *2 years ago I distanced myself from others in the shop because they were using their cell phones in 212. As time went on so did the usage. My guess for the last fiscal year would be between 50 — 100 occurrences. You can double that if you count just seeing cell phones. Everyone in 212 knows it's going on and who is doing it. My supervisor has caught them numerous times and looked the other way. Maybe now you understand why* "your view does not reflect the voice of other employees" *and* "your attitude is contrary to proper communication within this workplace and is very divisive among your team." *What a crock. There's me and them. The only reason why I am in this situation now is because I wouldn't lower my standards to them and follow. You do have a right to manage but you also have a duty to keep me safe. When you have a manager that condones this behaviour nothing but trouble will follow. You should really give this issue the attention it deserves. In closing, if you're not satisfied with my work and the contribution I make to this shop, get rid of me. In the meantime this environment has become a poison to me and I have no choice but to take some leave. My doctor will decide when or even if I return. I'll forward a blue form in the next couple of weeks.…*
>
> *…*

[48] He then added the following postscript: "… a phone went off in the van when we got to 212 yesterday morning" (Exhibit U12). The grievor left the workplace and never returned, save for a very few days in 2018.

G. Events after the grievor departed

[49] In mid-June 2016, LCdr. Walker wrote to the grievor. He asked the grievor to consent to a fitness-to-work evaluation because of the length of the grievor's absence and "… the undetermined circumstances which led us to this situation." Health Canada was to carry out the evaluation. He enclosed consent forms for the release of medical information and for the evaluation (Exhibit E7, Tab 3).

[50] On July 5, 2016, Dr. Wadden, the grievor's family physician, filled out a "Physician's Certificate of Disability for Duty" form. This form, often referred to as the "blue" form by the employer and its employees, is a standardized form prepared by the Medical Services Branch of Health Canada. It requires the physician who completes it to certify that he or she has been in attendance upon the employee since the date on which the employee left work, that the physician has knowledge of the employee's condition, and that the physician is of the opinion that the employee is "… incapable, by reason of illness or injury, of working at his/her normal occupation." The form's apparent intent is to maintain the confidentiality of the employee's medical condition while at the same time offering the employer some assurance that the employee is off work for a valid reason. As with most compromises, the form has shortcomings. In particular, the vagueness of the explanation makes it less and less useful as an explanation for an employee's absence as time goes on.

[51] The form that Dr. Wadden completed on July 5 certified that he had treated the grievor with respect to his absence from work since June 20, 2016, and that in his opinion, the grievor was "… incapable, by reason of illness or injury, of working at his/her normal occupation." The estimated date of return to duty was set for August 5, 2016 (Exhibit U8, Tab 2).

[52] On August 4, 2016, Dr. Wadden filled out another blue form repeating his opinion from the last form. This time, the grievor's estimated date of return to duty was set for September 9, 2016 (Exhibit U8, Tab 3).

[53] On September 6, 2016, Dr. Wadden filled out another one, repeating his opinion from the other forms. This time, the grievor's estimated date of return to duty was set for October 3, 2016 (Exhibit U8, Tab 4).

[54] On September 23, 2016, the grievor emailed an administrative assistant at CFAD Bedford, copying the union. He had considered applying to Sun Life, the disability insurer, but its requirement for documentation was delaying matters. Accordingly, he asked for a three-week advance of sick leave "as per [his] collective agreement." He also inquired as to the status of a "663 form" that he said, "should have been generated from the start" (Exhibit E7, Tab 4).

[55] On the same day, Lt. Muise responded to the union about the grievor's inquiry. He advised that the form 663 had not been completed because the employer still did

not know what the injury was, that the grievor had been off work, and that the employer had received blue forms from his physician stating that he was not fit to return to work. Lt. Muise added that the employer had a statement from the grievor, which Lt. Muise summarized as noting that "… the work environment has become a poison thus he has no choice but to take some leave" and that his doctor would "decide when or even if he is to return."

[56] Lt. Muise went on to say that it was the grievor's responsibility to initiate a Workers' Compensation Board (WCB) claim "if this is in fact applicable" as well as the form 663 process. He added that the grievor's request for a three-week advance could not be granted until the employer received a fitness-to-work evaluation from Health Canada. He noted that the appropriate forms had been provided to the grievor in June but that they had still not been completed (Exhibit E7, Tab 4).

[57] On October 3, 2016, Dr. Wadden filled out another physician's certificate, repeating his opinion again. This time, the grievor's estimated date of return to duty was set for November 7, 2016 (Exhibit U8, Tab 6).

[58] On October 28, 2016, LCdr. Walker formally requested a fitness-to-work evaluation of the grievor (Exhibit U/E 9, page 150). In the request, he explained that the grievor had been on sick leave since May 12, 2016, that his sick leave had been depleted as of October 11, 2016, and that he had been on leave without pay since then. He tied the grievor's departure to a series of emails that the grievor had sent to his supervisors and others that included allegations that his supervisor was not looking out for his safety, which were considered inappropriate and resulted in discipline. The OHS Committee had considered the allegations unfounded.

[59] As well, the grievor had been advised of his right to file a refusal to work under the *Canada Labour Code* (R.S.C, 1985, c. L-2), a DND form 663, or a WCB claim, none of which he had used (as of that date). LCdr. Walker also said that the grievor's co-workers had expressed concern about an apparent change in his demeanour, tone, conduct, and level of camaraderie, particularly in the previous two years (Exhibit U/E 9, pages 150 and 151). The fitness-to-work request eventually ended up with Dr. MacDonald.

[60] On November 8, 2016, Dr. Wadden filled out another physician's certificate, repeating the same opinion. This time, the grievor's estimated date of return to duty was set for December 8, 2016 (Exhibit U8, Tab 8).

[61] On November 21, 2016, the grievor filed a WCB accident report. As the WCB later described it, he explained that he worked in an explosives area where cell phones were not allowed, that his co-workers had nevertheless been using them in that area, and that he had reported it to his managers. The WCB noted that the grievor had advised it that because of the potential for serious consequences, he had felt stressed and had gone on sick leave on May 11, 2016 (Exhibit U/E 9, page 102).

[62] On December 8, 2016, Dr. Wadden filled out another physician's certificate identically to the older ones. This time, the grievor's estimated date of return to duty was set for January 8, 2017 (Exhibit U8, Tab 9).

[63] On January 10, 2017, Dr. Wadden filled out another certificate, repeating his opinion one more time. This time, the grievor's estimated date of return to duty was different — it was said to be "unknown" (Exhibit U8, Tab 10).

[64] During this time, the grievor's WCB claim was working through that system. Dr. Michael Ross, a psychologist who had seen the grievor four times in September and October 2016, prepared a report for the WCB dated February 14, 2017. Dr. Ross noted that the grievor's mood was "best characterized as depressed." He noted that the grievor was "preoccupied with the situation at work" and that he said the following: "'I didn't do anything wrong' adding that the supervisor should be the one dealt with, 'not me.'" Dr. Ross opined that at the time he had seen the grievor he "met the criteria for an Adjustment Disorder with a Depressed and Anxious Mood …." He went on to provide his understanding, based on the grievor's report, as to the situation at the grievor's workplace, as follows (Exhibit U8, Tab 12):

…

> *… Several months before I met with Mr. Kenney [sic] in 2016 he said he left work one day saying,* "I won't be back until it is fixed." *He said he feared for his safety. He cited numerous examples of protocols not being followed at work. He works at a facility that stores ammunition for the military. He was particularly concerned about coworkers using cell phones in restricted areas, as he said they were a safety risk and a security risk.* ***He feared they could trigger an explosion or fire and/or could be used to take***

> ***pictures of classified information that could then be disseminated to others that should not have access to such information.*** *He said his working group have [sic] received seminars on a number of occasions by safety experts and those in authority about not taking cell phones into restricted areas and that there were signs posted prohibiting cell phones as well as they were deemed to be a safety and security risk.* ***He said he estimated he saw this restriction violated between 60 and 100 times, including a number of times when his immediate supervisor was present and did not enter and did not enforce the restriction.*** *He said he became increasingly ostracized from his peers at work and grew increasingly concerned, apprehensive and anxious about the situation and he did not believe it would likely change. He eventually wrote a letter to a person of higher authority outlining his concerns.*
>
> …
>
> [Emphasis in the original]

[65] I pause to note that Dr. Ross did preface this account of what he recalled the grievor telling him as possibly being incomplete. However, the account is substantially similar to that of the earlier email and of the grievor's testimony such that I am satisfied that Dr. Ross's recollection of what the grievor told him in September and October 2016 was reasonably accurate.

[66] On January 25, 2017, the Depot Sergeant Major emailed all CFAD Bedford employees, noting that cell-phone lockboxes had been installed in the lunchroom in the Administrative Building. The email reminded them that controlled articles, such as cell phones, had to be left there or in the employee's vehicles. It went on to note in bold that employees found possessing a cell phone in the Explosives Area would be reported immediately to their supervisors, for further disciplinary action (Exhibit E5).

[67] On February 23, 2017, the WCB issued its denial of the grievor's claim. This followed its conversation with him on February 22 to discuss it. In its explanation, the WCB noted that in part, the grievor had said that there had been several incidents "over a period of time" in which cell phones had been used in prohibited area, that he had reported it to management on March 29, 2016, that his concern over the risks associated with such use had caused him stress to the point of being sick, and that as a consequence, had gone on sick leave on May 11, 2016 (Exhibit U/E 9, page 103).

[68] The WCB noted that while certain types of stress could result in compensable claims, stress due to labour relations issues, such as interpersonal relationships and conflicts, was not compensable. It explained that as follows (Exhibit U/E 9, page 104):

> …
>
> *The stress you describe relates specifically to labour relations issues and interpersonal conflicts. From your description of events, it is evident that you feel safety matters were not addressed. You note that you feel those who use cell phones do not have consequences. It is clear from your description of events and your employer's description that there are interpersonal conflicts, labour relations issues and disciplinary matters at issue.*
>
> …

[69] It appears that the grievor appealed this decision. I say this because on April 10, 2017, LCdr. Walker wrote to the WCB's Appeals Department. He disagreed with the grievor's submissions that a work condition threatened worker safety. He noted that in support of his appeal, the grievor had submitted only part of a presentation on the hazards of electromagnetic radiation, which all employees had received. He went on as follows (Exhibit U1, Tab 13):

> …
>
> *In the presentation, given regularly to employees, the regulation is presented. In the discussion of the reasons, it is explained that Ammunition and Explosives (A&E) containing Electrically Initiated Detonators (EIDs) are susceptible to Hazards of Electromagnetic Radiation to Ordinance (HERO). It is further explained that the items in the Missile Maintenance Facility (MMF), where Mr. Kenny and his team work, do NOT contain any EIDs. The EIDs [sic] items, stored elsewhere at the depot, are safe from HERO when contained in their shipping and storage packaging, and are only considered unsafe when removed from their packages. Mr. Kenny does not work with items containing EIDs, and in fact Mr. Kenny's work is to prepare missile canisters, which contain no explosives at all.*
>
> *Employees are advised that cell phones are not permitted in the operational area at CFAD Bedford, which included the MMF where Mr. Kenny works. There are several reasons for this regulation. The primary reason is because other workers, and other buildings, do work with items which contain EIDs. The reasons cell phones are not permitted in the MMF is that the electronic circuit cards in items processed in the MMF are susceptible to Electrostatic Discharge (ESD), which can damage a circuit card. The other reason for the cell phone ban is due to security, in that we control what photos are taken within the operational area.*

…

[70] On March 6, 2017, Dr. MacDonald called LCdr. Walker for more details about his October 28, 2016, request for a fitness-to-work evaluation. She had a meeting with the grievor scheduled for March 22, 2017. In her notes of the conversation, she recorded that LCdr. Walker told her that the grievor had become very angry since his divorce 2 years ago. (It became apparent at the hearing that his divorce had been closer to 10 years ago.) The grievor had isolated himself from others at the job over the past two years, as well as making comments about doing harm to his wife. LCdr. Walker noted that the grievor had been eligible to retire in February 2017 and that his claims for disability insurance and WCB benefits had both been turned down. He also said that the grievor's co-workers did not want him back on the job and were afraid of him (Exhibit U/E 9, page 100).

[71] On March 9, 2017, LCdr. Walker emailed the grievor. He noted that he had not heard from the grievor lately. He wanted to break through the third-party conversations that had been taking place. He wanted to see if the employer could re-establish a supportive relationship with the grievor and requested that they meet at a local coffee shop. The grievor responded that in his view, LCdr. Walker's concern was "too little too late" but that he was willing to meet "because of [his] respect for [LCdr. Walker's] position." The meeting took place on Friday, March 10, 2017 (Exhibit U8, Tab 11), but it changed nothing.

[72] On March 22, 2017, the grievor met with Dr. MacDonald for a fitness-to-work evaluation related to the mechanical instrument/systems technician position (Exhibit U/E 9, page 84). Afterwards, Dr. MacDonald sought additional information and opinions from Dr. Wadden, the grievor's physician, and Dr. Abbass, a psychiatrist, retained by Health Canada from time to time to provide mental-health assessments.

[73] Dr. MacDonald prepared a lengthy note to file about the meeting with the grievor, which had lasted an hour-and-a-half. She recorded his complaints that the prohibition against cell-phone use in the Explosives Area was not being followed by his co-workers or being enforced by his supervisors or management. He told her that he had emailed his supervisor about his concern. In May, a cell phone was heard in the area again. He went on sick leave after that.

[74] The grievor told her that he did not receive a response to his earlier email until two weeks after he had left on sick leave, at which point he was informed that he was being investigated. A letter of reprimand was put in his file. He denied "any verbal abuse on the job, no swearing, no violent actions such as throwing things etc. The safety issues were [his] concern." He also mentioned a concern about asbestos dust. All the safety issues he had raised had been going on for a couple of years. He said that he did not associate with his co-workers "since [he has] 'ratted on them' as regards their cell phone use". He went home for lunch since he lived nearby (Exhibit U/E 9, page 93).

[75] Dr. MacDonald referred the grievor to Dr. Abbass,. She provided him with copies of her March 22 examination note to file, Dr. Ross's report of February 14, 2017, the WCB's February 2017 report denying the grievor's WCB claim, her notes of her conversation with LCdr. Walker of March 6, and a job description and job analysis (Exhibit U/E 9, page 76).

[76] Dr. MacDonald had also asked Dr. Wadden to provide her with a detailed narrative report about the grievor's long-term disability claim. On March 23, 2017, he reported to her that "… the primary medical disabling condition causing cessation of work is adjustment disorder characterized by moderately severe anxiety, moderately depressed concentration, insomnia, fatigue." Dr. Wadden felt that all those symptoms "impaired [the grievor's] ability to perform his job" (Exhibit U/E 9, page 62). He added that the grievor might be able to do other types of work "but certainly would not be able to perform the duties of his current occupation." On the grievor's prognosis, he mentioned the following (Exhibit U/E 9, page 62):

…

> *… prognosis for a return to full time or part time work the patient insist [sic] he will be able to retrun [sic] to his current occupation if safety regulations were imposed and enforced which would reassure the patient that his workplace would in fact be a safe place to work.*

[77] On March 31, 2017, the grievor met with Dr. Abbass. In Dr. Abbass's resulting report to Dr. MacDonald, he noted the grievor's concerns about safety at work, adding that all of it "centres around a specific supervisor who he has been at odds with for some period of time." Dr. Abbass conducted some psychological tests that were reflective of a moderate level of anxiety and depressiveness. The grievor's score on a

test for interpersonal problems was in the normal range. Dr. Abbass then provided the following assessment (Exhibit U8, Tab 12):

> …
>
> *… Mr. Kenney [sic] is a person who has unprocessed complex feelings in relationship to his supervisor which is resulting in a fixation on the actions and inactions of the supervisor leading him to feel unsafe and unprotected in the workplace situation. On a more conscious, overt level he is a man concerned about safety standards not being followed in the workplace. This has inevitably led to tension and frustration and lengthy disruption of work relationships.*
>
> *From the perspective everything I see here I do see him as fit to work. He could work in another area or a similar area if there were some adjustments made and some corrections in the relational process. In addition, psychological treatment may possibly help reduce the intensity with which he feel [sic] so badly treated by this person. However, that would likely not remove the conscious concerns about safety and questions about whether the supervisor is living up to standards of safety for that workplace.*
>
> …

H. The April 10, 2017, fitness-to-work evaluation

[78] Dr. MacDonald reviewed Dr. Abbass's report of March 31, 2017, as well as Dr. Wadden's report of March 23, 2017. She then prepared her assessment of the grievor's fitness for work, dated April 10, 2017, as follows (Exhibit U8, Tab 15):

> …
>
> *Mr. Kenney [sic] is considered fit for work but in an alternate work environment since the relationship between him and his supervisor (and perhaps other coworkers as well) has been soured. Return to the same work situation will very likely flare-up his medical condition and result in lost time from work once again.*
>
> *There are no other medical limitations apart from the above.*
>
> *This is expected to be permanent.*
>
> …

[79] Dr. MacDonald sent copies of her assessment to Dr. Wadden, the grievor, and John Mayich (a human resources (HR) officer; Exhibit U8, Tabs 14 and 16).

I. The reaction to the assessment

[80] On April 18, 2017, Dr. MacDonald received a call from Mr. Mayich, who sought clarification of her April 10 report. She confirmed her opinion that the grievor had a medical limitation. She also thought Dr. Abbass's recommendation about treatment might help but that there was no guarantee and that in any event, it was not an option in the short term. She recorded her opinion in her note to file as follows (Exhibit U8, Tab 18):

…

> *I feel the best course of action is for Mr. Kenny to be under another supervisor and perhaps with another group of employees as well. This is not a slur against the supervisor. There is a significant conflict between Mr. Kenny and the supervisor and if the relationship continues, it would be expected to flare up Mr. Kenny's medical condition once again.*

[81] On the same day, Dr. MacDonald stated that she had a "heated conversation" with LCdr. Walker related to her April 10 report (Exhibit U8, Tab 19). She recorded in her notes that he was concerned that by making the grievor's condition a medical limitation, he could not return to the same work — which meant that there must be some problem at CFAD Bedford that had caused an injury. She told him that saying that it was a medical condition did not necessarily mean that the workplace had caused an injury and that that was for the WCB to decide.

[82] LCdr. Walker also told her that he did not think that CFAD Bedford could accommodate the grievor at CFAD Bedford since there was only one supervisor and six employees doing the kind of work the grievor did. He also doubted his ability to accommodate the grievor at Cape Scott because of his understanding that the grievor had had trouble with a supervisor there. Dr. MacDonald responded that any issue of accommodation was in his area of responsibility, just as cause was with the WCB. She closed with the observation that LCdr. Walker "was clearly not pleased with [her] assessment" (Exhibit U/E 9, page 57).

[83] On April 27, 2017, LCdr. Walker wrote to Dr. MacDonald to set out his understanding of her opinion. In correspondence of May 2, 2017, she confirmed that he was correct in the following (Exhibit U8, Tabs 20 and 21):

> *a. Mr. Kenny is fit to work but has a medical condition resulting [sic] limitations of employment.*
>
> *b. Mr. Kenny's medical condition is expected to be permanent.*
>
> *c. The workplace accommodation that is required to address the limitation of employment is that Mr. Kenny must not work for his previous supervisor and/or with the previous coworkers of the Ship Repair team at CFAD Bedford.*
>
> *d. Mr. Kenny's medical condition will flare up if Mr. Kenny is not granted accommodation.*

J. The offer of temporary accommodation at Cape Scott

[84] Ms. Baker, a human resources/client services officer for Cape Scott; Mr. Mitchell, a manager at Cape Scott; Mr. Ryan, the union president; and others met in late July and early August to discuss possible accommodations for the grievor at Cape Scott. It was determined that a position — mechanic — had opened up that might be suitable, given the grievor's work history.

[85] On August 10, 2017, Ms. Baker emailed the grievor and the union. She advised them that currently, Cape Scott had no positions in the trades in which he had experience, although some might arise in the future. As a result, it was proposed that he come to Cape Scott on assignment. CFAD Bedford would continue to pay his salary, but he would work at Cape Scott. With that in mind, she wanted to discuss with him the possibility of working temporarily as a machinist. He would continue at his current rate of pay until Cape Scott could offer him a deployment, at which point his pay would be adjusted to align with that occupational group and level (Exhibit U1, Tab 20).

[86] The attached "Assignment/Secondment Agreement" noted that the assignment was being done pursuant to the employer's duty to accommodate. It offered him an assignment as an SR-MAC-09 machinist, adding that "[w]hen he has been reacquainted with the Machinist work, management will conduct a test to confirm that Mr. Kenny can adequately perform the duties of the position." It anticipated that the test would take place one or two months after he started. If it was successful, he would be offered a deployment to that position once a vacancy opened up. He would remain on assignment until that time. If he was not successful in the test, management would re-evaluate what was available (Exhibit U1, Tab 21).

[87] The grievor did not receive a copy of the Assignment/Secondment Agreement form until September 9, 2017. On September 21, 2017, he emailed Mr. Mitchell. He said that he did not believe that the offer was a reasonable accommodation for his disability, in part because no job description was attached, and in part because he had not worked as a machinist in 15 years. He objected to signing the form because he felt that it would confirm that he was satisfied, even though he was not satisfied. However, he was prepared to sign it, under protest (Exhibit U1, Tab 22).

[88] On September 26, 2017, Mr. Mitchell replied. In his view, there was "no process" for signing an Assignment/Secondment Agreement under protest. Accordingly, he took it that the grievor refused the assignment. Therefore, he had no option "other than to let you [the grievor] deal with your decision" and that it was now up to CFAD Bedford to pursue alternative options (Exhibit U1, Tab 22). Mr. Mitchell then forwarded his response to the union, adding that "as [he] explained all parties have to agree, you cannot sign under protest that you don't agree with it" (Exhibit U1, Tab 22).

[89] I now step outside the chronology to note that Mr. Mitchell's suggestion that the form could not be signed under protest was quite simply wrong. An employee is not entitled to refuse to accept a suitable accommodation when it is offered, but that does not mean that the employee has to agree that it is in fact a suitable accommodation. Mr. Mitchell was not entitled to refuse to offer the grievor what the employer had selected simply because the grievor wanted to record his refusal to agree that it was in fact suitable. The grievor should have been permitted to accept the position "under protest". However, given the ultimate disposition of these grievances, it is not necessary for me to expand on this observation.

K. Dr. Abbass's November 9 report

[90] At some point during this period, the grievor retained a personal solicitor, who asked Dr. Abbass to reassess the grievor. Dr. Abbass saw the grievor in consultation on November 9, 2017. Dr. Abbass reported that "… the primary issue for Mr. Kenny leading to him not returning to work was concern about safety. In specific [*sic*], he was concerned about people having cell phones in areas where they were not supposed to have cell phones due to risk of explosions." Dr. Abbass reported that as of November 9, the grievor still had the same feelings, and went on as follows: "In specific [*sic*], I do see him as capable of return [*sic*] to work in a situation in which safety principles are followed according to the rules and guidelines."

[91] Dr. Abbass conducted two self-report psychological tests that indicated moderate levels of anxiety and depression. He then continued as follows (Exhibit U8, Tab 24):

> …
>
> *If the workplace situation is following the safety guidelines and can show some signs that they are properly enforcing the rules then I see no reason why he could not make a successful return to work. This appears to me to be the primary reason for him being off work at this point in time. I have mentioned before that there were some conflicts in regards to the supervisor but in clarifying it today the conflicts were only because the supervisor is not following safety principles.*
>
> …

[92] It also appears that at some point, the grievor filed a compensation claim under the federal *Government Employees Compensation Act* (R.S.C., 1985, c. G-5). I mention this because on November 25, 2017, LCdr. Walker again wrote to the WCB, this time to provide additional information about the grievor's claim. He advised that no traumatic event had occurred at CFAD Bedford. He said that the grievor cited unsafe work conditions as his reason for leaving work, even though the concerns had been investigated and found unsubstantiated. The grievor had failed to initiate the refusal-to-work process, even though it had been explained to him. He had refused offers of alternative dispute resolution. In LCdr. Walker's opinion, "… the true incident [initiating the claim] to be a labour relations issue involving an exchange of email in which Mr. Kenny made inappropriate comments regarding his supervisor" (Exhibit U1, Tab 15).

[93] On November 27, 2017, counsel for the grievor's union wrote to LCdr. Walker. He noted that he had reviewed LCdr. Walker's April 10, 2017, letter to the WCB. He read the letter as stating that there was no threat to workers safety at CFAD Bedford. He noted the grievor's concern about the use of cell phones in the Explosives Area. He went on to suggest to LCdr. Walker to remove the policy that prohibited their use in that area. If the policy was modified in that way, then the grievor "would have the obligation to return to work in this area because his concern about safety would have been diminished" (Exhibit U8, Tab 25).

[94] On December 21, 2017, LCdr. Walker commenced efforts to arrange for a meeting with the grievor and his union representative to address the comments in the

that letter from the union's counsel and to make a renewed offer for an assignment to a machinist position at Cape Scott (Exhibit U1, Tab 23).

[95] On January 8, 2018, the grievor replied to correspondence from LCdr. Walker dated December 5, 2017. No copy of that correspondence was included in the documents submitted at the hearing. However, it appears to have related to a second or renewed offer of an assignment to a machinist position at Cape Scott, inasmuch as the grievor stated as follows: "The offer for the machinist position has been declined previously and my position hasn't changed." He went on to advise that the union counsel's letter of November 27, 2017, had been sent at the union's behest. That being the case, LCdr. Walker should deal with the union with respect to any action requests in the letter (Exhibit U1, Tab 24).

[96] On January 10, 2018, a meeting took place between LCdr. Walker and Brandi Roberts, the labour relations officer for CFAD Bedford, on one hand, and the grievor and Mr. Ryan on the other. The purpose was to discuss once again the proposal that the grievor work as a machinist at Cape Scott (Exhibits U1, Tab 16, and U8, Tab 26).

[97] In his letter of January 12, 2018, LCdr. Walker noted that the grievor had advised that the cell-phone policy was the reason for his interpersonal conflicts with his supervisor. The grievor thought that he could perform other SR work, but LCdr. Walker understood that the medical limitation applied to the entire depot — which meant that the grievor could not be accommodated at CFAD Bedford. The grievor advised that he had new medical information that could affect Health Canada's assessment.

[98] The proposal that he go to Cape Scott to work as a machinist was discussed. As reported in the letter, the grievor was told that it would be only temporary and that it would not result in him being reassigned from his substantive position. At the end of the meeting, it was agreed that Ms. Roberts would contact Health Canada to determine when the grievor could send his new medical information to Dr. MacDonald. The grievor was advised that he had a duty to co-operate with the efforts to accommodate him and that Ms. Roberts would again look to accommodate him temporarily in the machinist position at Cape Scott (Exhibit U1, Tab 16).

[99] Ms. Roberts called Dr. MacDonald the next day, January 11. She told Dr. MacDonald that the grievor "does not want the accommodation and claims he has

medical information from a psychiatrist allowing him to return to CFAD Bedford?!" At that point, he was still off work, was not being paid, and had had his WCB claim rejected. Nor had he applied for long-term disability benefits. Ms. Roberts did not have a copy of the report to which he had referred. Dr. MacDonald noted that it was agreed that he should send the report directly to her and that if management wanted her to reassess him, it should put its request in writing (Exhibit U8, Tab 26).

[100] On January 12, 2018, Ms. Roberts wrote to Dr. MacDonald to formally request a reassessment of the grievor's fitness for work in light of the new medical information (Exhibit U8, Tab 27). In particular, she requested answers to the following questions:

> • *Is Mr. Kenny fit to perform the full duties of his extensive position? If not, please identify any restrictions that management would need to enter in an accommodation.*
>
> • *If not able to perform the duties of his substantial position, is Mr. Kenny capable of performing any other related or modified duties? Would this be temporary or permanent?*
>
> • *If Mr. Kenny is currently not fit to resume work in his substantial position, is this a permanent or temporary restriction?*
>
> • *Are there any medical limitations that must be addressed? If yes, are they permanent?*
>
> • *If your position remains that he must return to an alternate work environment due to the relationship between him and his supervisor (and perhaps other coworkers as well), could you clarify what is meant by work environment?*
>
> • *In accordance with his work description, Mr. Kenny is responsible for* "removing and replacing weapons and components from transport conveyances and containers and fitting electro-explosive and pyro-technical [*sic*] devices such as; squibs, igniters and propellant grain assembly." *Is there any specific limitations to working with explosive material?*

[101] Dr. MacDonald responded to Ms. Roberts on January 18, 2018. She noted the reassessment request. She explained that before she could answer the questions, she would need the new medical information that the grievor had referenced. She said that once she had it, she would advise "whether a new fitness for work evaluation is indicated …". (Exhibit U8, Tab 28).

[102] On February 6, 2018, the grievor and the union filed the return-to-work and policy grievances.

[103] Ms. Roberts received a copy of Dr. Abbass's report on February 20 or 21, 2018. I pause to note that on the evidence before me (being Exhibits U8, Tab 24, and U/E 9, pages 29 to 35), I am satisfied that the grievor sent Ms. Roberts a redacted copy of Dr. Abbass's November 9 report. I find that the grievor redacted a paragraph in the report that spoke of the existence of moderate levels of anxiety and depression as well as this sentence: "In specific [*sic*], I do see [the grievor] as capable of return [*sic*] to work in a situation in which safety principles are followed according to the rules and guidelines."

[104] The first-level hearing of the grievor's return-to-work grievance took place on February 20, 2018 (Exhibit E7, Tab 21). The next day, Ms. Roberts advised Dr. MacDonald that the grievor presented a redacted copy of Dr. Abbass's November 2017 report. According to Ms. Roberts, it was the first time the employer became aware that the grievor was concerned about the cell-phone policy as opposed to safety issues associated with its lack of implementation (Exhibit U8, Tab 30).

[105] I should state that I found three things odd about the grievor's handling of Dr. Abbass's November 2017 report. First is the fact that he did not forward it to the employer once he received it. That seems odd, given his later argument that it supported his return to work at CFAD Bedford. Second, he continued to hold on to the report even after the January 10 meeting, and even though he apparently believed that it supported his return to that worksite. And third, when he finally did forward it to the employer on February 20 or 21, he blacked out portions of it.

[106] On February 20, Ms. Roberts wrote to Dr. MacDonald to repeat her request for a reassessment of the existing fitness-to-work evaluation (that is, the one of March 22, 2017; Exhibit U8, Tab 29). Her letter refers to an attached "doctor's note regarding his current medical situation" that I take to have been the redacted copy of Dr. Abbass's November 2017 report. In light of that report, she requested a report on the following two questions:

> • *In the 10 April 2017 letter you state that* "the relationship between him and his supervisor (and perhaps other coworkers as well) has been soured," *based on the attached letter, would your recommendation regarding Mr. Kenny's limitations change?*
>
> • *If these medical limitations are in relation to the interpersonal relationships between Mr. Kenny and his colleague, is he fit to participate in the mediation process?*

[107] On February 22, 2018, the grievor forwarded an unredacted copy of Dr. Abbass's November 9, 2017, report to Dr. MacDonald (Exhibit U8, Tab 24). In his covering email, he stated that he had been "instructed to forward the latest medical info provided by Dr. Abbass" (Exhibit U8, Tab 24).

[108] The grievor received a copy of Ms. Roberts' reassessment request on the same day (Exhibit U/E 9, page 19). He considered the inquiry as to his ability to participate in mediation as being outside Health Canada's mandate, since in his words, it did not deal with "mediation, negotiations, collective agreements or discipline." In the email, he went on to detail his take on the events involving the cell-phone issue since May 2016. He included all this in an email to his personal lawyer, his union, and Dr. MacDonald on February 26, 2018 (Exhibit U/E 9, page 19).

[109] On February 27, 2018, Dr. MacDonald replied to Ms. Roberts' request for a reassessment of her March 22, 2017, fitness-to-work evaluation of the grievor for his substantive mechanical instrument/systems technician position. She noted that she had reviewed Dr. Abbass's November 2017 report. She went on as follows (Exhibit U8, Tab 31):

> …
>
> *I have reviewed Mr. Kenny's file and consider that he is presently fit to return to work with **no** medical limitation; however, to maximize the chance for a successful return to work, the workplace conflict issues need to be dealt with through your usual administrative practices.*
>
> *Mr. Kenny is considered medically fit to participate in a mediation process if such is indicated.*
>
> *It is possible that these medical symptoms may flare up once again if the conflict issues are not resolved; however, at the present time he is considered fit to return to work with no medical limitations.*
>
> …
>
> [Emphasis in the original]

[110] Ms. Roberts called Dr. MacDonald on March 13, 2018. In Dr. MacDonald's notes of the conversation, she wrote that Ms. Roberts told her about the meeting to review the return-to-work steps and about the grievor apparently refusing to "sign the form."

Ms. Roberts told Dr. MacDonald that the cell-phone policy would not be changed, and that CFAD Bedford had had no problems with it in the past. She asked Dr. MacDonald whether these facts would change her opinion on the grievor's fitness for work. Dr. MacDonald indicated that they did not, noting that "**[h]e is considered medically fit and all these other issues are labour relations issues**" [emphasis added] (Exhibits U8, Tab 32, and E7, Tab 23).

[111] I note that Ms. Roberts' notes of the conversation, dated March 13, 2018, mirror those of Dr. MacDonald, as follows (Exhibit E7, Tab 23):

> …
>
> *Dr. McDonald [sic] stated that from a medical standpoint this does not change his fitness to work evaluation and that at this point, he is medically fit to return to work in his substantial position with no medical limitations. Issues of conflict will have to be dealt with administratively.*

L. The grievor's return to work

[112] On March 13, 2018, the employer issued a return-to-work letter over LCdr. Walker's signature. It advised that the grievor would resume working with the Ship Repair Group in Building 212. He would report directly to Mr. Maillet. It noted that a few workplace processes had had updates, for which he would receive training. It also explained what he should do if he expected to be absent and how safety assessments were to be carried out. Much of it appeared to be more-or-less boilerplate text.

[113] However, the letter did go on to speak directly of the concerns that the grievor had raised about the failure to enforce the cell-phone prohibition. It advised that an investigation had been carried out, that some incidents had occurred of unauthorized cell phones being found in the Explosives Area, that appropriate measures had been taken to report and stop any such behaviour, and that the policy was being enforced. Accordingly, the employer considered the matter closed (Exhibit U1, Tab 25).

[114] On March 13, 2018, LCdr. Walker and Ms. Roberts were on one side, and the grievor and Mr. Ryan on the other, at a meeting. The March 13 letter was presented to the grievor and Mr. Ryan. Ms. Roberts took notes. They record that the grievor did not agree with the letter's representation of the cell-phone incident; he stated that he never received a copy of the investigation report. Mr. Ryan asked how the policy was being

enforced. LCdr. Walker said that it was still being enforced. As well, employee lockboxes had been installed in the Administrative Building, to make it easier for them to store their cell phones before entering the Explosives Area. Mr. Ryan advised that he would discuss the letter and its contents with the grievor and that they would have an answer by the end of the week; that is, March 16 (Exhibit U1, Tab 27).

[115] The employer did not receive a reply by March 16. LCdr. Walker then sent a letter dated March 19, 2018, to the grievor. He noted that he had received no reply from either the grievor or the union. He directed the grievor to return to work on March 22 and to report to Mr. Maillet. He noted a request the grievor had made for an investigation into the concerns he had raised in March and May 2016. LCdr. Walker said that such an investigation had been carried out and that it had been closed on May 25, 2016. It was his hope that CFAD Bedford's policies and practices would be sufficient to alleviate any continuing concerns that the grievor might have (Exhibit U1, Tab 29).

[116] On March 20, 2018, Mr. Ryan replied to LCdr. Walker as follows (Exhibit U1, Tab 30):

> …
>
> *There was some confusion on my end as to who would reply to you. I am very sorry about the delay. Maurice* [Kenny] *is prepared to return to work on Thursday. He requests that he be allowed to perform sonobouy work in the non restricted area while we work to resolve the outstanding grievances. He makes this request agreeing with Health Canada's opinion that* "in order to ensure that the return is successful the labour relations issues should be dealt with." *He has maintained all along that his belief in the lack of adherence to the cell phone safety policy has been and is the problem. We are inquiring if training on safety process and complaints resolution can be arranged with Marlant formation safety for Maurice. He is anxious to return but needs some assurances that he clearly understands his rights and responsibilities. He also requests that any individual meetings that he is asked to attend with management he will be allowed to bring union representation. We are accepting the second level meeting next Tuesday. It will be everyone's understanding that he is in way prejudicing his right to pursue all outstanding requests from his grievance by returning. As this has been a long* [number] *2 year absence (without pay) I hope you will agree that the simple requests are reasonable.*
>
> …
>
> [*Sic* throughout]

[117] LCdr. Walker responded the same day as follows, copying the grievor (Exhibit U1, Tab 30):

> …
>
> *I have arrange [sic] work with sonobouys [sic] to get you started as per your request. I have taken steps to reduce the risk of conflict by ensuring that the staff are aware of your return and by communicating my expectation of professional conduct and the maintenance of a welcoming and respectful workplace.*
>
> …

[118] The grievor did go to work on March 22, 2018.He was reintroduced briefly to the staff, had a safety briefing, and went to start his work. Because of what followed, I have set out LCdr. Walker's email to the union and Ms. Roberts in some detail, as follows (Exhibit U1, Tab 31):

> …
>
> *There was one small hint of conflict. I explained to Mr. Kenny that we are not currently working on sonobuoys because of the high demand for missiles and canisters, but that I had set up some sonobuoy work so that we could have meaningful employment for him for the short term while we administratively and socially reintegrate him back into the workforce. He became defensive about this and said, as per the agreement with his union rep, he did not have to go down to work in the explosives area until his grievances were resolved. I de-escalated this conflict by telling him we would take this one step at a time and that our main goal for now was to get him comfortably reintegrated with his coworkers.*
>
> *Eventually I'm going to have to move him down to BM212 to work on canisters. There is no medical limitation and no duty to accommodate. Seeing that this may be a trigger point for him, I think it will be important that the union help him realize his responsibilities, and perhaps be available to him on the day that we first bring him into the area. On Wednesday 28 March we will be loading missiles onto a ship at Jetty NN. It is expected that the SR group participate in that event as per usual routine. This means on Tuesday 27th Maurice will be made aware that he is assigned to that missile crew, and on Wednesday* [March 28] *he will be expected to work on the jetty. I think this is a good opportunity to get him in a work environment with the rest of the staff, but it may be a trigger point. He may or may not contact Jerry [Ryan] on Tuesday, but either way I would like to have Jerry available to Maurice on Wednesday to help reduce any anxiety he may be feeling that date.*

> *On Monday 2 April I will be planning to move Mr. Kenny back into BM212 for regular work. I will manage this based on his reintegration this week and next with the intention to limit any potential anxiety and support his return to work. If there are any questions or concerns, please feel free to contact me.*
>
> …

[119] It is not clear when or whether the grievor received a copy of this email. But two things are clear. First, on March 27, the second-level grievance hearing took place about the employer's cell-phone policy. It advised that it would not change its policy to suit the grievor's objections. Second, on the same day, he learned that he was expected to return to work with his co-workers in Building 212. He objected. At 7:33 a.m. on March 28, 2018, he emailed Mr. Maillet and the union the following (Exhibit U1, Tab 32): "With the events that transpired yesterday I must remove myself from the situation and return on sick leave. I will forward a blue form as soon as I can get to see my doctor. Please forward this to all concerned."

[120] The grievor's objection was based in part on what he said had been an agreement between his union representative and LCdr. Walker that he would be assigned to sonobuoy work until all his grievances were resolved. However, I am satisfied that based on the contemporaneous documentary record as well as the testimonies of LCdr. Walker and the grievor, there was no such agreement.

[121] I am satisfied that sonobuoy work (which involved disassembling old sonobuoys for parts) was not central or crucial to the operations of CFAD Bedford. Moreover, the work that had to be done at Building 212 had increased. The fact that there was little or no work at the sonobuoy shop coincides with LCdr. Walker's comment that the assignment was simply to help the grievor ease back into the work world; it was not to be permanent pending the resolution of his grievances.

[122] On March 29, Ms. Roberts reported to Dr. MacDonald that the employer had offered alternative dispute resolution to help resolve the conflict, which the grievor had declined. She also reported that he had left work given the employer's refusal to change its cell-phone policy and given the fact that he had been told he was to return to work at Building 212 on March 28. Dr. MacDonald recorded her response to Ms. Roberts on March 29 as follows (Exhibit U8, Tab 33):

…

> *I advised Ms. Roberts that they need to handle the case administratively and I cannot advise them on how to do their administrative role.*
>
> *From our perspective he is **medically fit** and another FTWE is **not** indicated. **He** made the decision to take himself off work. **This is an LR issue**.*
>
> [Emphasis in the original]

[123] Ms. Roberts made a note to file of her conversation with Dr. MacDonald (Exhibit U1, Tab 38).

[124] The grievor visited Dr. Wadden on March 29. The doctor made the following note in his file: "This patient is medically capable of working but only outside the explosive area" (Exhibit U/E 9, page 11).

M. The return-to-work order

[125] On April 4, 2018, LCdr. Walker emailed the grievor and the union. The email was sent further to his voicemail to the grievor of that day. He said that the grievor had not provided any medical information to document the reason for his absence. He directed the grievor to return to work on April 5. He stated that if the grievor did not return then, discipline could result (Exhibits E7, Tab 28, and U1, Tab 36).

[126] The grievor responded by email the same day. He attached "… the information [LCdr. Walker was] looking for." He added that it always took a few days to secure an appointment with a professional (Exhibit E7, Tab 28).

[127] The "information" that the grievor referred to was not attached to the document received in evidence. However, I assume that it was another certificate from Dr. Wadden because LCdr. Walker replied to the grievor's email on the same day. He noted that Dr. MacDonald had overridden Dr. Wadden's opinion. The grievor was directed to return to work on April 5. He also advised that upon his return, he would be provided with information about his right to refuse to work under the *Canada Labour Code* (Exhibit E7, Tab 28).

[128] On the same day, Ms. Roberts emailed Mr. Ryan her note to file about her conversation with Dr. MacDonald, which I have already referenced (Exhibit U1, Tabs 37 and 38).

[129] On April 4, 2018, the grievor provided the employer with copies of Dr. Wadden's medical note dated March 29 and a "Physician's Certificate" dated April 4, 2018 to the effect that he was unfit to work until April 18, 2018 (Exhibits U/E9, pages 10 and 11). Dr. MacDonald asked that the information be sent to her.

[130] On the same day, the grievor emailed Dr. MacDonald to provide her with his "side of the story." It was sent in response to a copy of Ms. Roberts' note to file of March 29 that he had received on or about April 5.

[131] In his email to Dr. MacDonald, the grievor provided his version of what had happened since his return to work on March 22. He stated that the "deal" had been that he "would perform sonoboy [*sic*] work outside the explosive area until the grievances were settled." He said that shortly after his return, the employer reneged on the arrangement and told him that he was to return to the Explosives Area in four days. With respect to the offer of alternative dispute resolution, he stated that he had been offered it in 2016 but that he had told the employer that "back then that there was no conflict with co-workers. The conflict was with their actions and supervisors [*sic*] inaction with the use of cell phones in the explosive area." He made a number of other points, including the following (Exhibit E/U 9, page 4):

> …
>
> *4. Management hasn't tried to mitigate the conflict in health [sic] Canada letter dated 28 February 2018. The conflicts still remain. Namely, safety in the explosive area – not addressed, 2 grievances – ongoing, letter of reprimand – pending. These issues belong to me and management doesn't get to dictate what they should be.*
>
> *5. Again the conflict was never personal. It was co-worker's actions and supervisor's inaction with regards to cell phone use in explosive area. No investigation ever conducted on a very serious safety breach.*
>
> …
>
> *7. Your statement that* "I'm not out of work due to recommendation from a doctor but rather by my own choice" *is kind of hard for me to understand. If anybody knows what kind of*

> *hell I've been through over the last 2 years it's my doctor. Frankly I'm surprised that you would question his integrity.*

[132] Again, I note that this email and in particular the last statement represents the grievor's response to Ms. Roberts' note of her conversation with Dr. MacDonald on March 29. The Doctor's record of the conversation has already been noted.

[133] On April 6, 2018, Lt. Muise emailed the grievor to advise that he would be the grievor's point of contact on his return to work. He advised the grievor that the employer did not accept the medical documentation that the grievor had provided on April 5, such that he was not entitled to sick leave. However, it would send the information to Health Canada (i.e., Dr. MacDonald) "to clarify whether you [the grievor] continue to have any medical limitations keeping [*sic*] out of the workplace." He warned that if Health Canada decided that the grievor was fit to work without limitations, management would determine the disciplinary action to render (Exhibit U1, Tab 40).

[134] On April 11, 2018, Dr. MacDonald addressed the issues once again in a letter to both Ms. Roberts and the grievor. She stated as follows (Exhibit U1, Tab 41):

> …
>
> *I have reviewed Mr. Kenny's entire file once again and it is clear that this is a* ***labour relations issue****.*
>
> *Our opinion is that Mr. Kenney is medically fit. There are no work limitations. He is medically fit to undergo conflict resolution if such is recommended by your department.*
>
> *The difficulty with trying to assess this case medically is due to the fact that it is* ***not*** *a medical issue. A medical solution cannot be found for a non-medical problem.*
>
> *This is* ***clearly a labour relations issue and must be handled through your usual labour relations protocols.*** *We cannot advise you on such.*
>
> *Once again,* ***our medical opinion is that Mr. Kenney meets the medical requirements for his mechanical instrument/systems technician position and there are no medical limitations.***

> *We will not entertain further requests for advice and further fitness for work evaluations are **not** indicated.*
>
> [Emphasis in the original]

[135] On April 13, 2018, Lt. Muise emailed the grievor. He referenced Health Canada's conclusion that he was fit to return to work. Thus, his absence from work was not justified, and he was directed to report to work on April 16. A failure to report would be considered insubordination and would result in discipline (Exhibit U1, Tab 42).

[136] The grievor did not return to work. On April 18, 2018, Lt. Muise wrote to the grievor. He told the grievor that the employer did not accept the medical notes from Dr. Wadden. Health Canada had considered him fit to work. Thus, his current absence from work was unauthorized. He was directed to report for work. Failing to report would be considered insubordination and an unauthorized absence that could result in discipline (Exhibit U1, Tab 17).

[137] On April 23, 2018, the employer met with the grievor and his representative, Mr. Ryan. It imposed a one-day suspension on the grievor, to be served on April 27 (Exhibit U1, Tab 43).

[138] On April 25, 2018, the employer held another right-to-respond meeting to discuss the grievor's continuing refusal to obey its direct orders to return to work. This time, neither the grievor nor any union representative attended. A five-day suspension was imposed on the grievor on April 26 (Exhibit U1, Tab 44).

[139] On May 24, 2018, Dr. Wadden filled out another physician's certificate, repeating that in his opinion, the grievor was "… incapable, by reason of illness or injury, of working at his/her normal occupation." This time, the grievor's estimated date of return to duty was set for June 30, 2018 (Exhibit U8, Tab 38).

[140] The employer scheduled a right-to-respond meeting for May 29 to discuss the grievor's continued absence from work. Neither he nor his union representative attended.

[141] LCdr. Walker wrote a disciplinary letter on May 31, explaining that the employer had installed lockboxes in the Administrative Building's lunchroom for cell-phone storage, that the safety officer continued to check periodically for cell phones in the Explosives Area, and that it had offered conflict resolution services to address any

workplace conflicts. He also noted that the employer did not accept the medical information that the grievor had been offering (from Dr. Wadden) in light of Health Canada's opinion that he was fit for work.

[142] As a result of the grievor's continued refusal to obey the employer's directions that he return to work, a 15-day suspension was imposed on him (Exhibit U1, Tab 45).

[143] The grievor remained off work. At about this time, LCdr. Walker left CFAD Bedford. Lt. Muise took over command. He scheduled a right-to-respond meeting for June 25. Again, neither the union nor the grievor attended. Lt. Muise repeated the employer's warnings about the grievor's continual refusal to obey its orders to attend work and its advice that the medical information he provided was not accepted. A 20-day suspension was issued, with the warning that termination could result if he continued in his course of action (Exhibit U1, Tab 46).

[144] On July 4, 2018, Dr. Wadden filled out another physician's certificate, repeating his same opinion again. This time, the grievor's estimated date of return to duty was set for August 15, 2018 (Exhibit U8, Tab 39).

[145] On August 30, 2018, Dr. Wadden filled out another certificate, repeating his opinion one more time. The grievor's estimated date of return to duty was set for September 20, 2018 (Exhibit U8, Tab 40).

[146] On September 26, 2018, Dr. Wadden filled out another certificate, repeating his opinion again. The grievor's estimated date of return to duty was set for October 26, 2018 (Exhibit U8, Tab 41).

[147] On September 27, 2018, the employer terminated the grievor. It noted that he had failed to heed its directions to return to work, which was wilful and insubordinate conduct (Exhibit U1, Tab 47). The following grounds were set out in the termination letter:

> …
>
> *You failed to adhere to this order* [to return to work] *and therefore, I find that you have breached the Standards of Conduct and Values and Ethics Code of the Public Service. Your wilful behaviour and insubordination directed to your Deputy Commanding Officer is unacceptable and can be neither condoned nor tolerated as a Public Servant. I expect you to comply with the Standards of Conduct and the Values and Ethics Code for the*

> *Public Service that are the principles by which we carry out our roles and responsibilities and are part of the Terms and Conditions of your employment in the Public Service.*
>
> …
>
> *In arriving at this decision, I have considered that you have been previously warned and counselled for similar insubordinate behaviour. I further considered the fact that you show little remorse for your actions and that you have not demonstrated any changes to your behaviour as a Public Servant.*
>
> …

N. Technical and medical testimony about the risks of cell-phone use and the grievor's mental and physical state

[148] The evidence at the hearing was in two basic categories. The first consisted of the emails, notes and memos to file, letters, and reports that several people sent, received, and prepared at the relevant time. These documents and the record they create have significant weight, because the record is contemporaneous to what people said and thought at the time.

[149] The second category was found in the testimonies of several witnesses at the hearing. Much of this evidence followed form with the documentary record. That is not surprising, given the passage of time. But some of it elaborated on or explained some of the comments and statements in the documents.

[150] Given that difference, I found it more useful to set up the facts based on the first category and then to turn to the second to flesh out the facts. These two questions were material to the grievances when employing this approach: the question of the risks associated with using cell phones in the Explosives Area in general and in Building 212 in particular, and the question of the grievor's medical condition.

O. The risks associated with cell-phone use in the Explosives Area and in Building 212

[151] LCdr. Walker testified as to his understanding of the reason for the no-cell-phones policy. Some areas or buildings in the munitions-storage facility were susceptible to electromagnetic radiation, but not all of them. That being the case, and given that employees or contractors might move from place to place within a depot like CFAD Bedford, it was safest and best to implement a blanket policy forbidding cell phones anywhere within the Explosives Area. The point was that putting such a policy

in place would make its observance a habit that would be drilled into the behaviour of every person in that area.

[152] LCdr. Walker also testified that different types of risk were associated with electromagnetic radiation. For example, EIDs could explode if exposed to that radiation. For that reason, they were kept in secure, radiation-resistant containers in separate bunkers at CFAD Bedford. On the other hand, the missiles in Building 212 had no risk of exploding because they were not detonated by EIDs. However, certain electronic components, expensive in their own right, but not when compared to the overall cost of a missile, were susceptible to electromagnetic radiation. Thus, there was a risk that an otherwise fully operational missile could be rendered inoperative were one of its electronic components exposed to that radiation. But there was no risk that the missile would explode.

[153] As of the hearing, Mr. Perrin was an explosives safety officer. His duties included the general safety of the working environment. He also acted as a return-to-work coordinator. He is a member of a union (the Public Service Alliance of Canada). In the past, his positions have included acting as an area supervisor for work on missiles, torpedoes, and ammunition workshops and as a transit supervisor of ammunition technicians. He was appointed as a safety officer in 2011.

[154] Mr. Perrin first became involved in the issues that Mr. Kenny raised when LCdr. Walker asked him to give a safety presentation on the prohibition on cell-phone use in the Explosives Area. This was the March 23, 2016, presentation and was mostly the version entered as Exhibit E3 (or some portions of it). He testified that he was not aware at the time as to why he had been asked to make the presentation. It contained this relevant slide:

PROHIBITED ARTICLES

…

- *Cellular phones, portable radios and other transmitters.*

  - ***Personal cell phones are prohibited***

  - *DND cell phones are allowed with restriction on where they can be used.*

  - *Minimum of 5 meters from cell phone and packaged ammunition.*

  - *Cell phones are prohibited in magazines and workshops (allowed in office areas of BM 212 & BM 239.*

[Emphasis in the original]

[155] The next slide in the sequence listed a number of "Hazards of Electromagnetic Radiation to Ordinance" (HERO) accidents and incidents, not all of which involved munitions or led to injuries.

[156] Mr. Perrin testified that after giving the presentation, he asked if there were any questions. There were none. He did explain that other times, employees would come to him with safety concerns, both big and small, when they were reluctant to speak to their supervisors. Mr. Perrin would then investigate himself, noting that it was a form of anonymous reporting system that augmented the regular reporting structures.

[157] At some point, and at about this time, Lt. Muise asked Mr. Perrin to conduct cell-phone monitoring in Building 212. He did it three times, randomly, over a six-month period. He did not detect cell-phone use in the operational part (i.e., the area beyond the security door) on those visits. On two of the three visits, he spoke to Mr. Maillet, who confirmed both times that he had reminded his staff that cell phones were prohibited and that if anyone breached that rule, he would support management and not the individual (Exhibit U1, Tab 8). In his testimony, Mr. Perrin added that he thought that Mr. Maillet was an excellent supervisor, with an excellent safety record. For example, Mr. Maillet had pushed to obtain fume extractors for Building 212.

[158] Mr. Perrin testified that he conducted his monitoring by using a detector. He had purchased a cell-phone detector called the "Pocket Hound" on the Internet. In cross-examination, as well as in his report to Lt. Muise in June 2016, he acknowledged that it had certain limitations. It depended on the cell phones being on and in use. It was limited to a distance of about 75 feet, and could be blocked by some of the thick walls in Building 212 (Exhibit U1, Tab 8). He added that the only people he detected using cell phones were some contractors in the Explosives Area (but not Building 212). He sent them outside the area for about an hour, and when they returned, he checked to make sure that they had left their cell phones at the gatehouse.

[159] Mr. Maillet testified as to his duties and responsibilities as the supervisor of the SR technicians in Building 212. Trained as a machinist, he worked first at the Halifax dockyard on underwater weapons, then spent time in the private sector as an industrial ship mechanic in Yarmouth, Nova Scotia. In 1993, he returned to working with underwater weapons at the Halifax dockyard before moving to CFAD Bedford to

work in the missile shop. In 2007, he became the supervisor of operations at Building 212. He explained that there are two types of SR technicians: electronic and mechanical. The former performs the electrical maintenance of the missile canisters and makes any software upgrades that the missiles may need. The latter performs corrosion inspection and maintenance, along with the cleaning and repair of the missile canisters.

[160] Mr. Maillet testified that he had never seen anyone in the operations area of Building 212 with a cell phone. He added that he would be disappointed to learn that his employees had or used cell phones in that area, if it was the case. None of the employees (including Mr. Kenny) in Building 212 had ever reported such use to him. He agreed in cross-examination that if such use were happening, it would be a valid concern, as it would be if management knew of it and did nothing.

[161] However, the first time he heard that such use could be an issue was in March 2016, when it came up as part of the list of occupational health and safety concerns. His recollection was that it had been listed as one of a number of concerns that had been put on a board at a meeting but that it had not had the same prominence as had such things as the need for dust and fume extractors. Later, he was shocked and hurt by the allegations in Mr. Kenny's emails of May 10 and 11, 2016. He testified that he took pride in his safety record, both for himself and for his employees. In particular, Mr. Beauchamp, whom the union later called to testify, had never raised any concern about cell-phone use in Building 212 with him.

[162] Mr. Maillet did recall what came to be called "the van incident". It happened just after the March 26 presentation on cell-phone use. To his recollection, Mr. Beauchamp told him that it had been his cell phone and that it had been heard while he and some other technicians were in the van, just as they pulled up to Building 212. The van drove him back to the gate, where he turned over his cell phone.

[163] The union called to testify Mr. Beauchamp, one of Mr. Kenny's co-workers. He worked on the missile canisters and sometimes on the missiles in the operational area of Building 212. He has served on the OHS Committee since 2008. He understood that cell phones were not permitted in the Explosives Area, although some supervisors were allowed them in certain areas, for example, in the case of Building 212, in its administrative part.

[164] He recalled Mr. Kenny bringing up the issue of cell-phone use at the March 2016 meeting. He remembered Mr. Perrin's cell-phone presentation. He seemed a little surprised to learn that the HERO slide had been included (stating, "maybe I was sleeping during the meeting") but nevertheless was well aware of the incidents and the risks. He also admitted that his cell phone had made sounds in his pocket just as the van that he and some others were in pulled up to Building 212. He said that he had forgotten about it and that he had made a mistake. The van driver took him back to his car, where he left his cell phone. He added that Mr. Kenny had been in the van at the time but had not said anything about the incident to him, although he recalled that the grievor had looked disappointed or angry.

[165] In cross-examination, Mr. Beauchamp testified that sometimes, employees had their cell phones in their lunchboxes or jackets, either because they had forgotten them or because they did not want to leave their cell phones in their cars or at the gate. He added that if someone had a cell phone, it was only in the administrative area and not beyond the security door unless, of course, one was forgotten in a pocket. He admitted that once, while he was in the operational area, his cell phone rang when his daughter called him. He tended to minimize the risk in any event, noting that contemporary cell phones are much less powerful than the older ones had been and stating that if they posed no risk to his brain, then they posed none for a missile. However, he added that statement was "just for [him], not for everyone."

[166] Mr. Beauchamp testified to another occasion when he happened to have his cell phone in the administrative area of Building 212. He had gone to the bathroom and had accidentally "butt-dialed" Mr. Maillet, who received the call on his office computer. He admitted that Mr. Maillet took a dim view of the incident, chewed him out in a loud voice, and warned him that he would be disciplined the next time it happened. He also acknowledged that Mr. Maillet was "pretty serious about the rules" and that "we are old enough to know better, so to know that we don't do it again or we'll be in trouble." He also admitted that he and the others would hide their cell phones from their supervisors. He stated as follows: "I'm not crazy, I'm not going to show it to my supervisor."

[167] Mr. Beauchamp agreed that once the lockboxes were installed in the Administrative Building, the number of times cell phones ended up inside the Explosives Area decreased, unless, he explained, "they forgot." When asked about the

grievor's evidence that he had seen cell phones in the explosives area 50 to 100 times, he explained that that number would not apply to what he had seen over a period of 8 months, but that it might, if it applied to what everyone might have seen. He added the caveat that people might not actually have used their cell phones (they might have been turned off or placed in airplane mode) but simply might have had them in their lockers or lunchboxes, or as he did, they might have simply forgotten one in their pockets.

P. The grievor's fitness to work: the medical evidence

[168] Three physicians testified at the hearing: Dr. Wadden, Dr. Abbass, and Dr. MacDonald. They all had treated or at least assessed the grievor. All had had personal attendances with him, but Dr. MacDonald had had only one.

1. Dr. Wadden

[169] Dr. Wadden testified as the grievor's family physician. He testified that he ran a fairly typical family practice with about 2000 patients of all ages having a wide variety of medical issues. He couples his family practice with one providing hair transplantation. He stated in cross-examination that the breakdown is roughly 60 to 80% family practice and 20 to 40% hair transplantation. He agreed that he is not a psychiatrist or a psychologist.

[170] Dr. Wadden saw the grievor first in 2007 about the stress associated with his separation and eventual divorce in 2008 to 2009. He did not see the grievor after that until 2016. The grievor presented with signs of anxiety and stress related to what he said was an unsafe work environment coupled with workplace conflict over the use of cell phones in an area in which they were supposedly banned. He told Dr. Wadden that he feared that such use could result in a fire or an explosion. Dr. Wadden has been seeing the grievor every month or so since then.

[171] No one gave Dr. Wadden a job description. Everything he knew about the worksite was based on what the grievor had told him. He had not gone there and had never been in the Explosives Area. He did not know whether explosive materials were stored in or worked upon at the grievor's worksite. As he admitted at one point, the situation was somewhat technical and abstract for him; he had just a general idea, based on what the grievor had told him.

[172] Dr. Wadden did not prescribe any medication to the grievor, who felt that he did not need it and that the cure for his anxiety and depression was resolving the workplace safety issue.

[173] In cross-examination, Dr. Wadden testified that his impression at the time, based on what the grievor told him, was that the employer was not enforcing its safety and occupational health policies. He believed that if it had done so, the grievor would have been able to return to his position.

[174] Dr. Wadden was asked about his report of March 23, 2017 (Exhibit U1, Tab 11). He testified that the diagnosis of "adjustment disorder" was based on its definition in the *Diagnostic and Statistical Manual of Mental Disorders, 5th Edition* ("the DSM-5"). (He noted that he did not refer to the DSM-5 at the time and that he had simply "had it in his mind.") He defined it as an emotional response of anxiety or depressed mood associated with a stressor when such symptoms are significant enough to cause some effect. The condition is generally short-lived, resolving roughly six months after a stressor is removed.

[175] Dr. Wadden testified that the grievor's anxiety was not severe but that it was a "little worse" than moderate, based on the impairment of functions that the grievor had reported to him, including sleep disturbance, spending little time outside the home, frequent sighing, moderately decreased ability to concentrate, and elevated blood pressure. With the exception of the last, all these signs or symptoms were based on the grievor's self-report.

[176] With respect to his medical notes of April 2018, Dr. Wadden testified in cross-examination that he completed them while hoping that the labour relations issue would be resolved that would have enabled the grievor to return to work. He added that he told the grievor that he had no medical treatment for him and that he asked him what would happen if he returned to work. The grievor said that he would kill himself were he forced to work in that area.

[177] Accordingly, Dr. Wadden felt it necessary to put him off work in the hope that the labour relations issue could be resolved. Other than that, he took no steps related to the grievor's threat. He gave him no medication. He did not put him under observation. He testified that there was no need to since there was little or no risk of suicide as long as the grievor was not at the worksite.

2. Dr. Abbass

[178] Dr. Abbass is a psychiatrist practising in Halifax. He is a Fellow of the Royal College of Physicians & Surgeons of Canada. He holds a position at Dalhousie University, where he carries out research and teaches. He also spends a half day per week performing consults for the WCB and for independent medical examinations. He also has patients, seeing roughly 4 to 12 a week at his Dalhousie University office. His clinical practice for the past 10 years has dealt primarily with patients with somatic stress, anxiety, and depression. He spends about 20 hours a week researching and writing, primarily with respect to psychotherapeutic methods to deal with anxiety, depression, and physical issues made worse by stress. Both the parties and I recognized him as capable of providing expert psychiatric opinion evidence.

[179] Dr. Abbass testified that Dr. MacDonald referred the grievor to him. He received roughly 15 to 20 such referrals from her each year. He testified that the tests he administered to the grievor indicated that he had some depression and some anxiety. His results with respect to interpersonal relations were in the normal range, although there was some shyness. Dr. Abbass also noted that when the grievor talked about his supervisor, he had significant muscle tension that reflected some emotions involving the supervisor. Dr. Abbass testified that the grievor focussed to some degree on safety issues, including concerns about asbestos and certain tools.

[180] Dr. Abbass was asked to compare his report of March 31, 2017 (Exhibit U8, Tab 13), to that of November 24, 2017 (Exhibit U8, Tab 24). He testified that the grievor's lawyer at the time had asked for a follow-up assessment. Dr. Abbass met with the grievor and conducted the same tests. The results indicated that he was more distressed overall and that the situation appeared to be wearing on him. The issue, then as before, related to stress surrounding his safety concerns about cell-phone use.

[181] In cross-examination, Dr. Abbass testified that the grievor's test scores were probably in the range of 60 to 70, which was the same as before. He stated that results at that level mean that a patient could have some stomach upset or an occasional panic attack but that in general, the patient could function to some degree. Only when the results fall below 50 could more serious interference with function occur. He was satisfied that the grievor was able to receive and process information and that he could have participated in mediation.

[182] In cross-examination, Dr. Abbass was asked to explain the difference between medical conditions and work conditions. He explained that a medical condition has the effect of reducing function to some degree. A work condition is not a medical condition. Some stress can be expected in work situations. However, worry or anxiety about work that becomes severe enough to reduce physical function to some degree becomes a medical condition.

3. Dr. MacDonald

[183] Dr. MacDonald was retired as of the date of her testimony. She had worked in Health Canada's occupational health program for 30 years. Her practice included assessing federal employees' fitness for work, covering all civilian and Coast Guard employees. To perform an assessment, she would collect information from the employee and from his or her family physicians and medical specialists. Sometimes, she referred particular cases to specialists.

[184] Dr. MacDonald met with the grievor only once, for an hour-and-a-half, in the course of preparing her original assessment of April 10, 2017. After that, her reassessments were based on medical reports and information she received, including Dr. Abbass's report of November 9, 2017.

[185] Dr. MacDonald was asked about her assessments of the grievor over time from April 2017 to April 2018. She testified that the he was fit for work, save that his relations with his supervisor and co-workers had soured, leading to depression and high blood pressure. He had moderate levels of anxiety and depression. By the end, she was satisfied that he was fit for work, except that the workplace-conflict issues had to be resolved. She testified in direct examination that over time, it became clear to her that the barriers to the grievor's return to work related to labour relations rather than to medical issues. Dr. Abbass's November 7, 2017, report contributed to that shift in her opinion.

[186] In cross-examination, Dr. MacDonald was asked about Dr. Abbass's assessment that the grievor was fit for work if the workplace relations were repaired or if he was placed in a different location. She explained that when physicians speak of being fit for work, they meant both physically and mentally. She added that it was very difficult to tease out the separate issues and that 10 doctors would come up with 10 answers.

[187] She noted that in the grievor's case, he was fit for work, provided that he had no safety concerns. If he did have some, then they could or would affect his ability to work. If he were put back into the same workplace without the safety concerns being addressed, his medical conditions, the depression and anxiety, would flare up. She stated that the controversy in the medical community arose at this point: Was it a medical problem or a labour relations problem? Some doctors would say that it was medical, some that it was labour relations. She noted that Dr. Abbass was "just as confused as [she] was by the issue."

[188] Strictly speaking, the grievor's issues were not medical, but they arose from issues in the workplace that had to be dealt with. She did agree that a patient's perception that there is a safety issue, regardless of whether it is right or wrong, could result in stress that could manifest in anxiety and depression that could affect the patient's ability to work and thus become a medical condition.

[189] Dr. MacDonald was also pressed in cross-examination about several items of correspondence from LCdr. Walker and Ms. Roberts. It was suggested that they attempted to have her change her opinion as to the grievor's fitness for work. She explained that nothing was unusual about that. Managers often do not like the medical opinions they receive, in part because they fear that assessments might be taken as slurs on their supervision.

[190] However, Health Canada is independent. She is not a company doctor and is not an employee advocate. Her role is somewhere in the middle. She simply tried to provide a fair and objective assessment to all the parties She also insisted that in the end, her opinion over time was essentially the same. The grievor was fit for work provided that the labour relations issues in the particular workplace were addressed. If not, then the stress and anxiety they caused him could continue to affect his ability to work there.

III. Summary of the arguments

A. For the employer

[191] Counsel for the employer submitted that this is a straightforward case of insubordination and of a termination that followed the principles of progressive discipline. He submitted that the grievor's alleged concerns about occupational health

and safety in his workplace were belied by his conduct, up to the point of his termination.

[192] Counsel submitted that the principles with respect to insubordination were clear. The employer had to have given an order, the order had to have been clearly communicated to the grievor, the person giving the order had to have the proper authority to give it, and the grievor did not comply, at least once.

[193] Counsel submitted a large number of cases dealing with insubordination for my review, and they all substantiated those principles. In particular, an employee failing to perform work assigned to the employee (see *Charinos v. Deputy Head (Statistics Canada)*, 2016 PSLREB 74; and *Chauvin v. Deputy Head (Offices of the Information and Privacy Commissioners of Canada)*, 2012 PSLRB 66) or refusing or failing to report to work without proper authorization (see *Riche v. Treasury Board (Department of National Defence)*, 2013 PSLRB 35 at paras. 127 and 128) could amount to, and has amounted to, insubordination.

[194] Counsel further submitted that the penalties that the employer imposed for the grievor's failure to attend work were appropriate. They followed an increasing scale of severity. The onus was on the grievor to persuade me that the penalties were clearly unreasonable or wrong. He failed to meet that burden. The employer was justified in escalating the sanctions that it had imposed in the face of his repeated and unjustified refusals to show up for work when ordered to.

[195] Counsel then turned to the question of the medical evidence and in particular, to the grievor's allegation or defence that he was medically unfit to comply with the orders to show up for work.

[196] Counsel submitted that the grievor had the burden of establishing the elements of such a defence. The existence of a disability was not in itself sufficient. Rather, the question was whether the disability (in this case, depression, stress, or anxiety associated with the alleged use of cell phones at the worksite) was sufficient to undermine his ability to understand the significance of his actions or his ability to comply with the orders given to him. Counsel relied in particular upon the decision in *Canada Safeway Ltd. v. Bakery, Confectionary and Tobacco Workers' International Union, Local 252*, (Madole Grievance) [2002] AGAA No. 91 (Smith) at 42 which stated that the following is necessary to establish a medical defense:

- it must be established that it was a disability;
- once established, there must be a linkage between the disability and the conduct;
- if there is such a linkage, the Board must be persuaded that there was a sufficient displacement of responsibility from the grievor to render his conduct less culpable; and
- assuming all these elements are met, the Board must be satisfied that the grievor has been rehabilitated, and it must be established that there was a disability.

[197] Counsel for the employer submitted that the grievor failed to establish that the had a disability or that the disability was connected to the insubordinate behaviour.

[198] Counsel acknowledged that the initial medical assessment was that the grievor's behaviour was linked to a medical condition. As a result, LCdr. Walker had arranged a position at Cape Scott as an accommodation. That fell through because of medical information that LCdr. Walker interpreted as meaning that medical limitations prevented the grievor returning to work at CFAD Bedford.

[199] The grievor disputed that conclusion on the ground that new medical information supported his return to work. But once it was conducted, the reassessment that he insisted upon revealed that the issue was rooted in labour relations rather than in any medical condition. That conclusion was supported by the position set out in the union counsel's November 27, 2017, letter stating that removing the policy prohibiting the use of cell phones would allow the grievor to return to work because doing so would diminish his health and safety concerns.

[200] Counsel then submitted that the grievor was terminated not because he had a disability but because of his insubordination. The grievor's reliance on his alleged medical condition was neither genuine nor *bona fide*.

[201] Counsel also referred to *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30; and *Aujla v. Deputy Heard (Correctional Service of Canada)*, 2020 FPSLREB 38, in support of his submission that nothing in the medical evidence suggested that the grievor was unable to comply with the employer's rules (in particular that he show up for work when ordered). The medical evidence established that he was capable of rational thought and decisions. Nothing impaired his ability to understand what was required of him or that his failure to comply could have serious consequences for him.

[202] Counsel further submitted that the employer made repeated and reasonable efforts to accommodate the grievor. It offered him alternative employment at Cape Scott. It offered to ease him back to work at CFAD Bedford. It offered him the opportunity to engage the services of a health-and-safety officer from the Labour Program pursuant to Part II of the *Canada Labour Code*.

[203] The grievor refused all those accommodation offers and continued to insist on his unreasonable (and unsupported) demand that the employer change its national policies with respect to its ammunition depots. Forcing the employer to accommodate the grievor to that extent would be an undue hardship; see *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43; *Mutart v. Deputy Head (Department of Public Works and Government Services)*, 2013 PSLRB 90 at paras. 107 and 108; and *Casey v. Treasury Board (Public Works and Government Services Canada)*, 2005 PSLRB 46 at paras. 192, 194, and 195.

[204] Counsel concluded by submitting that all these grievances ought to be dismissed. In the alternative, in the event that some or any of them are allowed, the issue of remedy ought to be bifurcated, especially given the evidence that the grievor failed to mitigate and is, in any event, in receipt of a full pension. Counsel also requested that the decision first be released to the parties confidentially so that counsel may make submissions on redactions that may be necessary for public-policy purposes.

B. For the union and the grievor

[205] Counsel for the union submitted that while this is a complicated case, it revolves around a simple point. The grievor was ill. He was unable to work. He could not comply with the employer's orders because of that debilitating illness. The employer did not accommodate his disability because it refused to accept the reality of it.

[206] Counsel submitted that the case turns on the medical evidence. He submitted that the evidence established a *prima facie* case of discrimination. The employer had a policy forbidding the presence or use of cell phones in the Explosives Area. Yet, the evidence was clear that the policy was not being followed and that the employer knew it. Its position was that the policy had been put in place for safety purposes and that it

was designed to prevent explosions. But the employer failed to enforce it. That failure led to the grievor's disability, which involved his fear and anxiety of possible injury or death due to the employer's failure to enforce its policies.

[207] In this case, the grievor believed that the employer's policies and concerns were well grounded. He believed what it said about the risks associated with cell-phone use in the Explosives Area. That acceptance and belief led to his medical illness. There was no evidence that he did not believe the reasons for the employer's policy.

[208] Counsel submitted that the grievor could not attend the workplace precisely because he believed in the employer's words and policies. His belief led to his fear and anxiety. The belief and resulting fear led to his inability to return to work.

[209] Counsel submitted that the employer continually refused to accept the medical evidence being offered. Indeed, it went further than that in that it repeatedly tried to have several doctors change their medical opinions. The employer knew that the grievor was medically unfit to return to work but refused to accept that medical evidence. It did all it could to avoid or misinterpret the clear conclusions in the medical reports.

[210] Counsel submitted that this is a classic mental health and disability case. The grievor could not return to work because of a mental condition (fear and anxiety) that was due to the employer's training and policies. He could have done nothing to prevent that disability, at least not as long as the employer persisted in maintaining a policy that it failed to enforce.

[211] Counsel further submitted that the employer's failure to accommodate the grievor was profound. For example, when he met to discuss the possibility of working at Cape Scott, the employer would not tell him what was involved, what tests he would have to perform, and how long the trial would last. It was unreasonable and unfair for the employer to expect him to accept such a job as an accommodation. Moreover, when he did offer to accept the accommodation in his words "under protest", the employer refused to proceed with it.

[212] Counsel submitted that the sonobuoy-work accommodation was a disgrace. On the employer's evidence, there was little for the grievor to do. There was no

meaningful work. Offering a disabled employee a position that was, in essence, a make-work project was not a proper accommodation.

[213] Counsel then took me through an extensive review of the evidence. When dealing with the medical reports, he put special emphasis on what he called the employer's "attempt to poison the mind" of Dr. MacDonald. That attempt, particularly that of LCdr. Walker, supported a conclusion that the employer did not make a *bona fide* effort to accommodate the grievor. Counsel pointed to what he called the employer's "full-court press" in April 2018 to have Dr. MacDonald change her opinion.

[214] Counsel submitted that the question before me is not one of a refusal to work. The grievor was sick. He simply could not return to work. The fact that he had a good work record in the past supports the conclusion that his inability to continue after May 2016 was rooted in a medical condition, not in insubordination.

[215] Counsel submitted that as a result of the wrongful termination, the grievor was financially ruined. He had been humiliated and embarrassed. He had been forced to live in his brother's basement. He had suffered emotionally. He had suffered lost wages and benefits. He was entitled to be compensated for that loss, including interest, as well as special and general damages associated with the employer's discrimination against him and its failure to accommodate him.

[216] Counsel for the union then turned to a number of authorities in support of his submissions. See *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, which established my jurisdiction to award general and special compensatory damages for breaches of human rights legislation.

[217] In *Pepper v. Treasury Board (Department of National Defence)*, 2008 PSLRB 8 and 2008 PSLRB 71 (judicial review application dismissed in 2010 FC 226), the employer so mistreated the grievor that he became ill and unable to perform his duties, and then, it failed to make *bona fide* efforts to accommodate him. Compensation and damages were awarded for loss of income and overtime opportunities, including $9000 for pain and suffering and $8000 in additional compensation; see 2008 PSLRB 71 at para. 47.

[218] In *Telus Communications Inc v. TWU*, 2009 CarswellNat 7045, damages were awarded when the employer made no effort to accommodate the grievor in the face of medical evidence that indicated that it was necessary.

[219] In *Nicol v. Treasury Board (Service Canada)*, 2014 PSLREB 3, general and special damages, among other remedies, were ordered given that the employer had ignored evidence and had misinterpreted medical reports.

[220] In *Cyr v. Treasury Board (Department of Human Resources and Skills Development)*, 2011 PSLRB 35, damages were awarded because the employer seemed more interested in trying to catch the grievor than to accommodate her.

[221] Counsel also pointed to *Ontario Public Service Employees Union (Hyland) v. Ontario (Community Safety and Correctional Services)*, 2014 CanLII 26450 (ON GSB). In that case, the employer had a no-smoking policy that it failed to enforce. The grievor witnessed smoking violations and brought them up with his supervisors, who did nothing. He was sensitive to smoke, and his exposure to it (due to violations of the employer's policy) led to him leaving work on occasion. The employer did nothing to accommodate him. Damages were awarded for the employer's discrimination and failure to accommodate the grievor.

[222] Counsel also submitted that the employer's reliance on the grievor's failure to exercise his rights under the *Canada Labour Code* was misplaced. An employee who cannot work because of a medical condition is not an employee complaining of an unsafe workplace. The grievor was unable to work because of his illness, not because the workplace was unsafe.

[223] To put it another way, the issue was not whether the workplace was in fact unsafe but rather that the grievor believed that the employer said that certain situations in the workplace were unsafe. And if the employer continually said that it was unsafe, then he could not stop believing that it was unsafe and thus could not end his work absence. The concern was personal to him, not to the workplace. Therefore, the danger of which he complained is not contemplated by s. 128 of the *Canada Labour Code*; see *Saumier v. Canada (Attorney General)*, 2009 FCA 51 at paras. 54 to 56; and *Canada Post Corporation v. George Stout*, 2013 OHSTC 39 at para. 48.

[224] Counsel concluded by submitting that these grievances should be allowed. The grievor should be reinstated; reimbursed lost wages and benefits, with interest; and awarded general and special damages for the employer's discrimination against him and its failure to accommodate him. I should remain seized of the remedial aspects of any such award.

C. The employer's reply

[225] Counsel noted that mediation or alternative dispute resolution was offered and that neither the grievor nor the union took it up.

[226] Counsel submitted that there was no evidence to support the allegation that the employer (and in particular LCdr. Walker) badgered the medical professionals. He acknowledged that LCdr. Walker had pushed back against some of the medical opinions. But that was to explore whether there were options for the grievor to work at CFAD Bedford. Moreover, at the January 12, 2018, meeting, the union and the grievor said that there was new evidence. LCdr. Walker had looked at the new information, but the gist of it was that the grievor could return to CFAD Bedford only under a new supervisor. But no other possible supervisor was available. In any event, it is not for employees to dictate who their supervisors might be.

[227] Counsel pointed to Dr. Abbass's report of November 9, 2017. The opinion was that the grievor's problem was not related to a medical condition. Rather, it stemmed from his belief that the supervisor was not following the no-cell-phone policy.

[228] Dealing with the offer of the machinist position at Cape Scott, counsel noted that the person in the best position to answer the grievor's questions was the shop manager. But the grievor made no effort to speak to him.

[229] As far as cell-phone use was concerned, LCdr. Walker's evidence was clear. There is no risk associated with it in Building 212. As well, the policy had a dual purpose: one was to maintain HERO protections in areas of a real risk of explosion, and the other was to inculcate habits or practices about using cell phones, primarily to ensure that they were not used where they might in fact cause problems. Building 212 was not such a place, but that did not mean that the habit should not have been encouraged in it.

[230] With respect to accommodation, counsel noted that the duty to accommodate is a substantive rather than a procedural right and that evidence is required that supports the need for accommodation. He noted that *Cyr* suggested that the right is procedural, which the Federal Court of Appeal rejected; see *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2014 FCA 131.

[231] Counsel noted that in any event, the employer took steps to respond to the grievor's concerns. It installed lockboxes in the Administrative Building, and it repeated the prohibition in no uncertain terms. Indeed, Mr. Beauchamp testified as to the warning's effectiveness.

[232] With respect to the allegation that LCdr. Walker had engaged in a "full-court press", counsel noted that he had just sought clarification. He had been frustrated with the lack of clarity in the medical opinions and was trying to determine the problem so that he could deal with it. In the end, Dr. MacDonald's opinion was clear that the problem was not medical. Instead, it was the result of a conflict between the grievor and his supervisor, which is a labour relations issue, not a medical condition.

IV. Analysis and decision

[233] I noted at the beginning of this decision that initially, three grievances were before me: the return-to-work grievance, the termination grievance, and the policy grievance, which the union withdrew. To a large extent, the first two are intertwined and in essence come down to the following interrelated questions:

- Was the grievor insubordinate, and if so, was termination the appropriate penalty?
- In the ordinary course, would his actions be considered insubordinate?
- Were they explained or due to a medical condition or illness that made him unable to comply with the employer's direction to return to work or in the alternative that constituted a mitigating factor, which should be taken into account when determining the appropriate penalty?
- If the grievor did have a medical condition or illness that made it difficult or impossible for him to return to work, was the employer under a duty to accommodate him, and if so, did the employer breach that duty?

A. Was the grievor insubordinate?

[234] As a general rule, to establish that an employee has been insubordinate, an employer must establish the following three things (see Mitchnick and Etherington, *Labour Arbitration in Canada*, at page 351):

1) a clear order was given, which the employee understood;
2) a person in authority gave the order; and
3) the employee disobeyed the order.

[235] The essence of insubordination is the challenge to authority. As stated in *Lortie v. Deputy Head (Canada Border Services Agency)*, 2016 PSLREB 108 at para. 168, "Conduct that displays a contemptuous attitude and/or defiance of authority also falls under that category." So, for example, insubordination may be found even when an order is followed, as when an employee loudly and repeatedly questions the rationality or fairness of the order; see *Volvo Canada Ltd. v. C.A.W., Loc. 720*, [1990] N.S.L.A.A. No. 12 (QL).

[236] An employee may also contest an employer's authority by challenging management's abilities or the rationality of its operational decisions. This is particularly true if the challenge is done in front of other employees or in an email copied to co-workers, supervisors, and upper management. This is not to say that every question or request for an explanation from management amounts to insubordination. But questions or emails copied to multiple recipients that are worded in such a way as to suggest that a supervisor is stupid, incompetent, or does not know what he or she is doing may be found insubordinate; see *Schuberg v. Treasury Board (Employment & Immigration Canada)*, PSSRB File Nos. 166-02-15123, 15159, 15350, and 15424 (19860318), [1986] C.P.S.S.R.B. No. 83 (QL) and *Crossley Carpet Mills Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Local 4612*, [2003] N.S.L.A.A. No. 22 (QL).

[237] On the evidence and the facts before me, it is clear that the grievor was repeatedly ordered to return to work in 2018 and that the orders were given by someone with the authority to give them. It is also clear that the orders were coupled with clear warnings that penalties would be, and increasingly were, attached to his failure to obey. And finally, the grievor failed to follow each and every one of the orders.

[238] Nor was there anything in the medical evidence to suggest that the grievor had any difficulty with comprehension or with understanding that his actions might have adverse consequences. Nothing suggested that he did not understand that the orders stated that he was to return to work or that he would be disciplined if he failed to comply. He refused to obey, not because he did not understand the orders, but

because he felt that the employer still had not answered his questions and concerns about cell-phone use in the Explosives Area.

[239] In short, there was nothing to deny a conclusion that the grievor understood the orders given to him and understood that they were being given by a person with the authority to give them and yet he refused to obey them. He was insubordinate.

[240] Now for the second question: Was the grievor's insubordination due to, or the result of, a medical condition or illness that rendered him unable to comply with the employer's direction to return to work? Or, in the alternative, did it constitute a mitigating factor that should be considered when determining the appropriate penalty?

B. Was the grievor prevented from obeying because of a mental condition?

[241] I understood that in essence, counsel for the union's position was that the employer had a policy forbidding the use of cell phones in the Explosives Area, based in part on the possibility that their use could cause an explosion; that the grievor believed in the existence of the risk and that the policy was intended to protect those working in the Explosives Area (including him); and that the employer (particularly, the grievor's supervisor) was not enforcing the policy. That failure to enforce the policy led to growing fear and anxiety on the grievor's part that the risk underlying the policy could materialize. The resulting fear and anxiety, grounded in the employer's actions (or its failure to act), eventually became a disabling mental or medical condition that prevented him from returning to work in Building 212.

[242] In other words, the issue, according to counsel, was not whether there actually was a risk. Rather, the issue was whether the grievor believed so strongly in the existence of a risk that his fear and anxiety became overpowering.

[243] I was not persuaded that the grievor could so easily sidestep the issue of whether there was a risk. The nature and degree of a risk is surely a factor in assessing the nature and quality of the mental condition, if any, triggered by that risk. For example, when a risk is real, material, and substantive, one can more easily see a causal connection between it and a mental condition due to exposure to it.

[244] By the same token, the smaller the risk, the more difficult it will be to establish not just a resulting mental condition but its severity. This is not to say that a small risk could never trigger an extreme reaction. But it is to say that when the risk is

objectively small, more will be required to establish that on a balance of probabilities, it should be treated as a mitigating factor with respect to disciplinary penalty.

[245] Accordingly, in terms of the grievor's medical condition as a mitigating factor, I must address the following two subsidiary issues:

1) Was there an objective risk capable of triggering fear and anxiety to such an extent as to prevent the grievor from obeying the employer's orders to return to work?
2) If not, did the grievor nevertheless experience fear and anxiety to the extent that he could not obey the return-to-work order? Was there an objective risk capable of triggering fear and anxiety to such an extent as to prevent the grievor from obeying the employer's orders to return to work?

[246] The question is whether there was an objective risk associated with possessing or using cell phones in Building 212. The absence of one would not mean that the employer was unreasonable in forbidding such use. On the facts, its policy was reasonable. But the absence of such a risk would make more difficult the grievor's position that his fear and anxiety were triggered by the existence of an objective risk.

[247] And on that point, I was not persuaded that solid, objective evidence supported the grievor's concern that the intermittent use of cell phones in Building 212 created a risk of an explosion of any kind, and I accept LCdr. Walker's testimony. The only real risk was that the electronic parts of a missile could have been damaged by the electromagnetic energy associated with an operating cell phone. Even then, the risk was simply that the missile would be rendered inoperative, not that it could explode.

[248] I note too Mr. Beauchamp's testimony to the effect that cell phones were present that had sometimes been forgotten in pockets and that they might even have been used accidentally in the building. The fact that such incidents happened, while still prohibited and liable to discipline, provides some support to LCdr. Walker's testimony. The grievor's co-workers were all experienced technicians who were used to working in close quarters with munitions. Their apparent lack of concern over some furtive or inadvertent use of cell phones in Building 212 does not support a conclusion that there was a real risk.

[249] By saying that, I acknowledge that employees' slipshod conduct, as far as safety protocols are concerned, is not in and of itself evidence of no danger. People often do stupid things or take unnecessary risks. But it is to highlight that the grievor's

professed concern of the presence of cell phones differed markedly from that of his co-workers, which in turn raises a question as to the accuracy of his concern.

[250] Second, there is the fact that at the material time, there was no difference between a supervisor's and an employee's cell phone. In the past, apparently, there had been a difference, and the supervisors were assigned special, low-radiation versions. But that was long ago. And if supervisors were able to have and use their cell phones in the administrative part of Building 212 (that is, on the **safe** side of the security door), then there could not have been any higher risk associated with employees having or indeed using their cell phones in that same area.

[251] Indeed, at no point in his evidence did the grievor complain about the fact that his supervisor was permitted to have and use a cell phone in Building 212. His complaint was focussed on his co-workers' and supervisor's alleged indifference to such use. That is not to say that employees were entitled to have and use their cell phones in Building 212. But it is to say that if at least some of the co-workers' alleged possession or use of cell phones mirrored that of the supervisor, then it is difficult to understand how that use could have caused any concern on the grievor's part.

[252] Third, there is the fact that in his evidence, the grievor never differentiated between the s**afe** and **unsafe** use of cell phones in Building 212. In May 2016, he alleged that he had seen cell phones being used in Building 212 at least 50 to 100 times in the past 2 years and that if the mere presence of cell phones was included, the number would increase to 100 to 200.

[253] I pause to note that I found problematic the grievor's evidence about the number of times he said he had seen cell phones used in Building 212. If the number was as high as he said it was, and given that by his testimony, he did nothing about it, then it is difficult to accept that he was as concerned about the risk of such use as he claimed to be. His lack of reporting that use suggests instead either that he exaggerated or that he was not particularly concerned about any risks associated with that use.

[254] I note that a number of his examples referred to instances in which a cell phone was used or could be heard either outside Building 212 (the van incident) or in the administrative area (the butt-dialing incident). So some number of the cell-phone uses he raised as a concern were in areas that did not pose any HERO risk.

[255] True, their use or presence was prohibited to employees in those areas. But the fundamental reason for that prohibition, as explained by LCdr. Walker, was not because it was unsafe or posed a HERO risk but because it was contrary to the effort to create a habit and practice in employees not to have or use their cell phones anywhere in the Explosives Area.

[256] This brings me to the fourth difficulty with the grievor's position; I will touch on the issue of his credibility. His evidence was that cell-phone use was common and unchecked and that at least some of it took place in the operations area of Building 212; that is, where the missiles were worked on. He said that it had gone on for at least two years. But throughout that time, he did not complain to his supervisor. If, given his complaint that his supervisor knew about it but did nothing, then there was always Mr. Perrin.

[257] As I have already noted, Mr. Perrin explained that any employee concerned about safety issues but reluctant to follow normal reporting channels could also speak to him. He would then conduct a type of anonymous investigation. But the grievor did not speak to him or raise the issue with the OHS Committee. His explanation for that failure was not because he was afraid of any retribution but because he thought that the employee members of the committee already knew about the use. That answer does not explain why he did not bring it to the attention of the OHS Committee's employer representatives. After all, his evidence was that his supervisor, not management, knew of it and did nothing.

[258] And indeed, in March 2016 and again in his email of May 11, 2016, the grievor did in fact go over the heads of his supervisor and his co-workers to raise the issue. Yet, if he was as concerned as he said he was, and if he believed that cell-phone use posed such a risk, then one is left to wonder why he did not raise the issue long before then.

[259] And finally, there is the grievor's (and for that matter, the union's) failure to exercise his rights pursuant to s. 128 of the *Canada Labour Code*. If he had reasonable cause to believe that cell-phone use in Building 212 or elsewhere in the Explosives Area constituted a danger to him or to others, he could have triggered the complaint process outlined in s. 128, which in turn would have triggered an investigation and report by the employer. The grievor would not have been obligated to accept the

employer's report, meaning that the matter would have been referred to the OHS Committee for a further investigation and a report that again, he would not have had to accept.

[260] The point is that I would have expected the grievor or his union to pursue that avenue if either truly believed that the cell-phone use he complained of in fact did constitute a risk not only to his safety but also to that of his co-workers in Building 212. But if nothing could have led the grievor to have, to use the words of s. 128(1)(b), " … reasonable cause to believe that … a condition exists … that constitutes a danger to the employee …", then it is difficult to accept that there was a real risk.

[261] While on this point, I should address the grievor's allegation that the employer, and in particular, his supervisor, Mr. Maillet, was not enforcing its protocols about the use of cell phones in the Explosives Area. The evidence did not support his allegation.

[262] On the whole, certainly, the employer made a consistent effort to explain, maintain, and enforce its safety protocols about the presence or use of cell phones in the Explosives Area. The fact that employees might have forgotten that their cell phones were in their pockets or that they took steps to actively hide their cell phones from their supervisors (as Mr. Beauchamp stated) can hardly be laid at the employer's feet. Indeed, on its face, the grievor's failure to report was no different from Mr. Beauchamp's testimony that employees would hide their cell phones from their supervisors.

[263] I was not impressed with the grievor's attempt to evade responsibility for his failure to report by attempting to shift the blame onto his supervisor. For if some employees hid their use of cell phones, and if others failed to report such breaches of protocol, how could their supervisors be blamed if they remained unaware of what was going on under their noses?

[264] Returning to the question, I was not persuaded that the evidence supported a finding that on a balance of probabilities, the presence or use of cell phones in Building 212 in the manner described by the grievor posed a material risk of harm to him.

[265] I turn now to the question of whether despite the absence of any material risk, the grievor nevertheless developed a real belief in the existence of one such that he

developed a medical condition of fear and anxiety that made it impossible for him to obey the employer's orders to return to work.

1. If not, did the grievor nevertheless experience fear and anxiety to the extent that he could not obey the return-to-work order?

[266] Now for the medical evidence. The question is whether that evidence establishes that on a balance of probabilities, the grievor had a mental condition, caused or triggered by the employer's alleged failure to enforce its policy, which amounted to a disability that required accommodation by the employer.

[267] I did not find any support for the grievor's position in the evidence of Dr. Wadden. He had not seen the grievor for at least six or seven years before 2016. He relied entirely on what the grievor told him. He did not know anything about the worksite, Building 212, or what took place in it. His understanding, based solely on what the grievor told him, was that the grievor's supervisor was not enforcing the prohibition against cell phones.

[268] Dr. Wadden's opinion that the grievor was suffering from an "adjustment disorder" was based on his recollection of the definition in the DSM-5. He did not actually look into the DSM-5 to verify his impression. (In any event, it was not clear to me that Dr. Wadden had the qualifications necessary to offer such an opinion in the first place.) He noted only that the grievor's anxiety was perhaps "a little worse" than moderate — but again, his assessment was based almost entirely on what the grievor told him.

[269] Dr. Wadden did not say that the grievor's anxiety was so great as to disable him in any way. Indeed, by April 2018, his opinion had evolved into seeing the problem as essentially one of labour relations. He put the grievor off work in the hope that those labour relations issues could be addressed. But I do not see that as amounting to an opinion that the grievor had a mental condition or that the labour relations issues had created one.

[270] I turn now to the evidence of the psychiatrist, Dr. Abbass. Unlike Dr. Wadden, he has training and experience in diagnosing and treating patients dealing with somatic stress, anxiety, and depression. The tests he administered to the grievor did not demonstrate the existence of a debilitating depression or anxiety.

[271] Of note is the fact that the grievor discussed his other issues with his supervisor — such as the presence of asbestos or certain tools — in addition to the cell-phone use. And on balance, Dr. Abbass's opinion, as set out in his report of November 9, 2017, was that the grievor's issue related to work conditions rather than medical conditions.

[272] Again, nothing in Dr. Abbass's evidence supports a conclusion that the grievor suffered from a mental condition that made it impossible to obey the employer's orders.

[273] Then there is Dr. MacDonald's evidence.

[274] First, I should observe that despite the pressing and able cross-examination of the union's counsel, I was not persuaded that Dr. MacDonald ever changed the opinions she expressed, either at the relevant time or before me, due to bending to pressure from the employer (and in particular, LCdr. Walker). She worked for Health Canada for most of her career. She had dealt with many HR people, managers, and supervisors over the years. She was well able to and stood her ground.

[275] The essence of her opinion and testimony was that over the period from April 2017 to April 2018, the grievor was fit for work. True, he suffered from elevated depression and anxiety stemming from soured relations with his co-workers and supervisor. Neither rendered him unfit for work. The best that could be said was that the elevated depression and anxiety would remain as long as he worked with that supervisor and those co-workers. But nothing in her evidence supports a conclusion that the depression or anxiety was so severe as to make it impossible for him to return to working with those co-workers or under that supervisor.

[276] I emphasize this point because the jurisprudence is clear that the fact that an employee experiences depression, anxiety, or stress from a work environment is not sufficient in and of itself to establish disability; see *Halfacree v. Canada (Attorney General)*, 2014 FC 360 at paras 37 and 40 (aff'd 2015 FCA 98) and *Hughes v. Canada (Attorney General)*, 2021 FC 147 at paras 82 and 84. Depression, anxiety, and stress are common everyday experiences that wax and wane over the course of an employee's work life. Disagreements with supervisors or management can be stressful. The feeling of having one's concerns downplayed or ignored can be frustrating. But that is a labour relations issue, for which there are well-recognized remedies. In this case, the grievor

could and did file his grievances. Other avenues were also open to him, even though he did not pursue them.

[277] Moreover, disagreeing with how a supervisor manages co-workers or the working environment is not in itself a reason to refuse to work under that supervisor. So in this case, and even accepting (and I do not) that Mr. Maillet was perhaps too tolerant of employees failing to rigorously follow the dictates of the employer's cell-phone policy in Building 212, I do not see how that would justify the grievor's decision to absent himself from work. Work now, grieve later, is the appropriate remedy for such disagreements unless, of course, there is an immediate threat to life or limb. And the grievor did not persuade me that such a threat existed.

[278] In the end, I was not persuaded on the evidence that the grievor's reported stress, anxiety and depression rendered him unable to work in Building 212. His objection to what he considered his supervisor's inadequate enforcement of the cell-phone policy was just that — an objection. Well-recognized options were available to him to deal with it. He could have complained to the safety officer. He could have gone to the OHS Committee. He could have exercised his rights under the *Canada Labour Code*. He could have filed a grievance. He did none of those things; instead, he preferred to claim that he could not work under a supervisor whom his witness (Mr. Beauchamp) labelled a stickler for work safety.

[279] Accordingly, I am not persuaded on the evidence that the grievor has shown on a balance of probabilities that his reported stress, anxiety and depression constituted a mitigating factor that would lead me to conclude that the discipline imposed, including termination, was excessive.

C. Was there a disability that the employer did not accommodate?

[280] The grievor did not establish the existence of a disability that made it impossible for him to obey the employer's order to return to work. That being the case, the employer had no duty to accommodate him by removing his supervisor or by changing its national cell-phone policy. Nor was there anything to mitigate the justified penalties it imposed for his persistent insubordination.

D. The return-to-work grievance

[281] This grievance arose from the employer's refusal to permit the grievor to return to work at CFAD Bedford without a medical clearance in the early part of 2018. While the parties did not spend much, if any, time dealing with this particular grievance, I understood that it arose from the employer's initial request for the updated medical clearance that the grievor said he had and that he said allowed him to return to work (Dr. MacDonald's reassessment) and from the employer's later refusal to keep him in the sonobuoy shop pending the resolution of his other grievances.

[282] If that was indeed the thrust of this grievance, then it fails. The grievor's position throughout these proceedings was that he had a medical condition that prevented him from working in Building 212. That being the case, the employer was entitled and indeed obligated to obtain medical confirmation that he could in fact return to work in some capacity. Once that medical report revealed that he was fit to return to work, the safety concerns were addressed, and that the only impediment was his inability to get along with his supervisor, then the employer was entitled to require him to return to his substantive position in Building 212. It was under no obligation to allow him to dictate where and when he would work.

V. Conclusion

[283] On the facts, and for the reasons already set out, I am satisfied with respect to the following:

- The employer had just cause to discipline the grievor for insubordination.
- The grievor failed to establish that he had a mental or medical condition or an illness that made it impossible for him to comply with the employer's return-to-work orders; thus, the employer had no duty to accommodate him.
- The penalties that the employer imposed — increasingly longer suspensions — were appropriate.
- Accordingly, the employer had just cause to impose the final penalty, the termination.

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

(The Order appears on the next page)

VI. Order

[285] The following is ordered:

1) The grievance in Board File No. 566-02-38382, dated February 6, 2018, about the employer's refusal to allow the grievor to return to work and its failure to accommodate him (the return-to-work grievance) is dismissed, and the file is closed.
2) The grievance in Board File No. 566-02-39698, dated October 9, 2018, about the employer's termination of the grievor on September 27, 2018, and with the subsidiary grievances respecting the suspensions that led to the termination (the termination grievance) are dismissed, and the file is closed.
3) The grievance in Board File No. 569-02-38379, dated February 6, 2018, and about the employer's failure to enforce the no-cell-phone policy at CFAD Bedford (the policy grievance) was withdrawn by the union, and the file is closed.

August 10, 2021.

Augustus Richardson,
a panel of the Federal Public Sector
Labour Relations and Employment Board