2019 CarswellNS 335
Nova Scotia Arbitration

Unifor, Local 2215 and I.M.P. Group Ltd. (AB), Re

2019 CarswellNS 335

In the Matter of an arbitration pursuant to the Trade Union Act, RSNS 1989, c.475, as amended ("Mr AB Grievance")

UNIFOR, Local 2215 (The "Union") and I.M.P. Group Limited (Aerospace Division) (The "Employer")

Augustus M. Richardson Member

Heard: April 17, 2019; April 18, 2019
Judgment: May 15, 2019
Docket: None given.

Counsel: Chad Johnston, for Union
Rebecca Saturley, Guy-Etienne Richard, for Employer

***Augustus M. Richardson Member*:**

Introduction

1 Is masturbation at work in a washroom cubicle a breach of the provisions of a collective agreement, or to an employer's workplace conduct policy or guidelines? Does such conduct warrant discipline up to and including termination? Could such conduct be the product of a disability (namely, a sex addiction), so as to mitigate or avoid any discipline that might otherwise be imposed for such activity? These are some of the questions raised in this grievance.

Background

2 The Union and the Employer are parties to a collective agreement with effective dates of April 1, 2016 to March 31, 2019 (the "Collective Agreement"). The parties agreed that I had jurisdiction to hear the grievance before me. They also agreed to waive any time limits imposed by the Collective Agreement on the delivery of an award.

3 This being a discipline case, the Employer went first. On its behalf I heard the testimony of

a. Kim Maguiness, currently the Employer's vice-president of Human Resources;

b. Kate Lang, currently the Employer's Senior Manager of Human Resources; and

c. James Lamb, formerly a production worker at the Employer's Hanger 9, but currently and for the past two years a Production Supervisor.

4 On behalf of the Union, I heard the testimony of

a. Mr AB, the grievor, and former president of the Union;

b. Dr Michael Buckley (PhD Psychology); and

c. Matt Blois, a Union shop steward.

5 Both parties introduced tabbed binders of documents as exhibits. The parties also agreed that given the conduct which had prompted the Employer's disciplinary action, the grievor's name would not be used. I have accordingly referred to him throughout as Mr AB or "the grievor."

6 The grievor had 18 years of service with the Employer, primarily as a aircraft log controller. He was terminated for cause on April 27, 2018: Ex. E1, Tab 18. The termination letter did not specify a reason for the termination. However, the parties agreed and understood that the Employer terminated the grievor because he was heard by other employees masturbating in a stall in a male washroom on the Employer's premises; and because, the Employer alleged, he had been warned two years before that such conduct was not appropriate and should cease.

7 There was not much dispute between the parties as to the facts. The principal disputes were over the inferences or legal effect of those facts. That being the case I will simply set out the facts as I found them to be, referring to the evidence only where necessary to explain a particular finding by me.

8 I should note here that one of the defences raised by the Union was that the grievor suffered from a sex addiction. In aid of that defence the Union put in a document prepared by Dr Buckley and called him to give evidence. Counsel for the Employer objected to the introduction of this evidence on the grounds that Dr Buckley was not an expert qualified to give opinion evidence on the issue. I will discuss this objection any my ruling with respect to it later.

The Facts

9 The Employer operates a number of aircraft repair, maintenance and upgrade facilities at the Halifax Stanfield International Airport in Nova Scotia. One of these facilities is a large hanger space known as Hanger 9. The hanger is big enough to accommodate a number of aircraft being worked on. There is also a three-story structure in the hanger that contains offices. It also contains washrooms that are used by the office employees (the grievor being one) as well as by the mechanics and other employees working on the production floor of the hanger.

10 Prior to joining the Employer in 2000 Mr AB had served in the military as an avionics technician, a career that at times took him away from home for upwards of seven months at a time. He testified that there was little or no privacy while on such tours of duty. People slept in tents with eight or nine others, and ate in messes of upwards of 40 people. When he masturbated during such tours of duty he would do so in his sleeping bag (if he was in a room by himself) or in a stall in a washroom. He did so in order to maintain his privacy.

11 Mr AB was hired by the Employer in June 2000: Ex. E1, Tab 1. In April 2010 he was provided with a copy of the Employer's Code of Business Conduct (the "Code"): Ex E1, Tab 2-3. I was provided with a copy of the Code: Ex. U2, TAb 1, as well as excerpts from the Human Resources - Policy and Procedures Manual (the "Manual") that was referred to by the Code as providing further details: Ex. E1, Tab 3. The Code and the Manual are essentially consistent, notwithstanding the differences in format, numbering and presentation. In particular, both provide that the Employer

> a. was committed to fostering a work environment in which all individuals are treated with respect and dignity;
>
> b. expected employees to conduct themselves with honesty and integrity, and to treat others with fairness, dignity and respect;
>
> c. expected that all relationships among persons in the workplace would be business-like and free of unlawful discrimination and harassment; and
>
> d. defined harassment as any behaviour, often recurrent in nature, which negates an individual's dignity and the respect to which they are entitled because the behaviour is offensive, embarrassing or humiliating,

12 The Manual provided further refinement with respect to harassment, stating that it included "any improper conduct that is directed at and offensive to another employee, by a person who knew or ought reasonably to have known would be unwelcome:" Ex. E1, Tab 3, para.4.1. Both the Code and the Manual provideed "non-exhaustive" lists of examples of harassment, including "any other action that may reasonably be perceived as offensive or disrespectful."

13 The grievor acknowledged during cross examination that he had received a copy of the Code and that he understood it. In particular, he understood that harassment of others was prohibited; and that it included embarrassing others.

14 The grievor worked on the first floor of the office space in Hanger 9. This floor had doors accessing the hanger space proper. It had two washrooms, one at either end. One was a small, one-person washroom. The other was larger, with four toilet stalls, a row of sinks and urinals. It was used by all male employees, including those mechanics and other technicians would worked in the hanger area. There were also washrooms on the upper floors of the office building.

15 The grievor testified that after starting to work at Hanger 9 he continued his practice of masturbation in private in the washrooms. He testified that he would masturbate most if not all of the times in the larger washroom on the first floor in one of the four toilet stalls. He said he did not do so when there was someone using a stall next to him. He denied ever moaning or groaning while masturbating in a stall. He admitted that he did watch pornography on his smart phone sometimes while masturbating. He used his own data network to do so, not that of the Employer. He testified that he always muted the sound on his phone when watched pornography. He testified that no one ever challenged him about his habit; no one ever complained to him about it; no one ever told him to stop the practice at work; and that no one ever told him that his practice made them uncomfortable.

16 The Employer's evidence was different. Ms Maguiness testified that at some point in mid January 2016 she became aware of complaints from the floor that someone was masturbating in the washroom in Hanger 9. In particular, there was an email dated January 19, 2016 from a production manager who advised that he had "two techs asking for guidance on how to deal with a person who is masturbating in the toilets in 9 Hgr:" Ex. E1, Tab 6. The two had apparently approached Matt Blois, the Union's shop steward, but it was reported that "he apparently didn't want to entertain this issue:" Ex. E1, Tab 5. Management spoke to the two technicians: see notes at Ex. E1, Tab 5. One was satisfied that it was the grievor because he had waited outside the washroom and the grievor was the only one to come out. The other noticed the person's shoes while sitting in the stall, and later noticed that the greivor wearing the same type of shoes.

17 On the basis of this complaint and evidence Ms Maguiness provided a script of talking points to Mr Maurice Hurley, Manager of Production Control, to be used in a meeting with the grievor: Ex. E1, Tab 5, last page. The script read in part as follows:

> "[Mr AB], thanks for coming in and meeting with me. I want you to know that everything that is discussed in this room today will be confidential. As a manager I have a due

diligence to share that concerns have been brought forward and inquire if there is anything that we need to be aware of as a Company.

"There have been multiple individuals who come forward out of concern because of noises they have heard in the 9 Hanger bathroom. These individuals have stated that while using the bathroom, there was another individual in the stall next to them who was breathing heavily, making erratic movements and moaning. Every person who came forward identified that there was only one other individual in the bathroom at this time, and they have all identified this person as you.

"If this is you, as identified, according to what has been brought forward, I am concerned for your well-being. I want you to know that if this is in relation to a medical issue is important for you to bring this information forward to attention of the Company through Kate Laing, you don't have to tell me.

"It will be best if you could call Kate and set up a meeting to determine next steps. From a safety perspective the company wants to ensure that we have documentation on file from Manulife reassuring us that they are looking over your medical, and they can let us know how you are impacted in your day to day activities:" Ex. E1, Tab 5, last page.

18 The grievor admitted that a meeting did take place between himself and Mr Hurley at this time. The grievor did not have union representation, which in his experience as Union president was the practice when any meeting was considered disciplinary in nature. He denied that the topic of masturbation was mentioned. He agreed that Mr Hurley had told him that "unusual noises had come from a stall I was in, and wanted to know if there was a medical reason for them and, if there was, that I needed to tell HR." Mr Hurley did not tell him that the noises were improper. He did say that when he attended the meeting he was "very nervous." When asked why that was, the grievor testified that it was because "I suspected where he [Mr Hurley] was going but he didn't say anything about it and as it was a private issue for me and no one else I didn't see the need to go further with it."

19 Mr Blois testified that he also met with the grievor about this time. He testified that other members of the Union had spoken to him about "rumours about inappropriate noises in the bathroom." He and the Union's Unit Chair met with the grievor and told him that "we had heard rumours ... that [Mr AB] told us that he was going to seek some medical help ... there was no admission of wrong doing on his part."

20 After these meetings in January 2016 the grievor testified that he stopped for a while, but then picked up the practice again, although he was "more cautious." It is not surprising then that new complaints arose from the floor in April 2018 about "an issue recently with a male masturbating in the bathroom:" Ex. E1, Tab 13. On April 18, 2018 Mr Joe Jardany, a production worker, emailed the Human Resources department to complain that it had been

going on "for a few months now;" that it had been brought up to lower levels of management "only to be dismissed as a joke;" and that it was "becoming more frequent and brazen." He asked that "HR please take immediate action on this issue as management is neglecting to do so:" Ex. E1, Tab 13.

21 An investigation was conducted. Several employees were interviewed on April 19 and 20, 2018. The notes of the investigation were entered as part of the Employer's case: Ex. E1, Tabs 14 and 15. Some had first hand knowledge pointing to the grievor as being the person masturbating in the stalls; others just had rumours that it was him. Some heard sounds consistent in their view with masturbation. Some heard heavy breathing, moaning and sounds that they thought were consistent with orgasm. One heard female moans, which he assumed to be coming from porn being watched by the person in the stall on his smart phone. Some refused to use the washroom because of what they heard while there.

22 At the conclusion of the investigation a meeting was held on April 23, 2018. Present were the grievor, his Union representative Mr Blois, Ms Maguiness and Ms Lang. The grievor was told that it concerned masturbation in the workplace; that the reports had been investigated; and that three of those interviewed had identified the grievor as the person responsible. Ms Lang recorded the grievor saying that he was "not going to deny anything;" that he admitted that he was the one heard masturbating in the washroom stalls; that he had been advised earlier that the behaviour was "inappropriate;" that he "didn't have a good answer" for why it was still happening; and that he was watching porn in the bathroom. He was asked if there was anything that the Employer should take into consideration or needed to know. The grievor shook his head. He went on to offer to clear out his desk, but was told that the Employer still had to make a decision to determine the appropriate remedy: Ex. E1, Tab 14, last page. He was told go home pending a decision on the Employer's part as to what it would do.

23 The grievor in his testimony before me did not deny the gist of the Employer's evidence of what he had said during the meeting, but sought to explain his responses as being the result of stress or panic: "In context I would have agreed that I was Santa Claus ... I'm a very private person and finding out that people had complained about it stressed me ... so any question asked of me I would have said 'yes'."

24 While at home the grievor sought assistance from the Employee Assistance Program ("EAP"). He was referred to Dr Buckley. He testified that prior to his meeting with Dr Buckley he did not believe that he had any kind of a sex addiction; but that after meeting with Dr Buckley he had been provided with an opinion that he had one. He said he had one or two meetings with Dr Buckley prior to his termination on April 27, 2018.

25 The grievor testified that his addiction did not affect his ability to do his work. Indeed, the Employer accepted that there was no problem with his work or service, and that his activity did not affect or interfere with his work as a log controller.

26 During cross examination, the grievor stated that before meeting with Dr Buckley his opinion regarding his activity was this: "What I did behind locked doors was my business and no one else's." After meeting with Dr Buckley he was now "on the fence" about the appropriateness of his activity. He also testified that after his meeting with Mr Hurley in 2016 he went to see his family doctor, but he refused to say what had been discussed. All he was prepared to say was that his medication was changed.

Dr Buckley

27 As earlier noted, I allowed the evidence of Dr Buckley. I did so over the objections of counsel for the Employer for two reasons. First, I thought that it might be of some assistance to me given the unique nature of the issue before me. Second, Dr Buckley had seen the grievor on a number of occasions and so might be able to shed some light on his conduct. I did however rule at the time that his evidence would in the end be subject to weight.

28 Dr Buckley is a Registered Counselling Therapist with the Nova Scotia College of Counselling Therapists. As such he is not entitled to diagnose psychological conditions, although he maintained that he was entitled to offer opinions as to such conditions. He received his Ph.D. in Psychology from the Harold Abel School of Psychology at Capella University, which is an online university. He acknowledged that Capella University was not accredited by any national psychological association. He suggested, however, that while he "had not kept track" he thought that Capella had been "regionally accredited in a number of states." His Ph.D. dissertation was on problem gambling. He acknowledged that he had no specific training in sex addiction. He had attended "a number of workshops" on sex addiction, though he could only remember one in New Brunswick where "research in the field had been discussed." He emphasized that his training and practice was essentially focussed on what he called "process addiction" which, he said, including gambling and sex addiction. He explained that process addiction, as opposed to substance addiction, referred to types of behaviour that became compulsive in nature. A person suffering from process addiction is addicted to a specific behaviour which they are compelled to repeat again and again. He also explained that such addictions affected people's brains at a neurological level that could be detected by MRI scans. His resume contains no reference at all to sex addiction: Ex. E1, TAb 23. The only process addiction mentioned is "problem gambling." The research papers he has prepared for publication (though not apparently published) or for presentation all relate to gambling.

29 Regarding the status of sex addiction as a diagnosis, Dr Buckley acknowledged that sex addiction was not recognized in either version 4 or 5 of the Diagnostic and Statistical Manual

("DSM") of the American Psychiatric Association. He agreed that there was "significant controversy" over its existence, but suggested that its inclusion in the next version of the DSM was under consideration.

30 Dr Buckley had provided the Union with a report dated March 28, 2019: Ex. E1, Tab 21. In the report Dr Buckley listed 12 symptoms that, as he wrote, "allow me as an addiction professional to make the determination of Sex Addiction." I note a few of these symptoms only by way of example:

> **"Loss of Control"** - increased frequency, duration, or depth of involvement in sexual acting out behaviour indicating a possible loss of control within or between sessions.
>
> **"Craving"** - a strong desire to participate in sexual acting out behaviours, such as pornography, sexual contact, flirtation, sexting, video chat, phone conversation, masturbation, etc.
>
> **"Threat to Life Roles"** - Repeated participation and commitment to sexual acting out despite recurrent social or interpersonal problems or costs - e.g. Conflict at home or at work as a result of sexual acting out or the costs in time and energy of carrying out and keeping up the deception used to hide the behavour.
>
> **"Negative Mood"** - using sex or sexual acting out behaviour to alleviate negative mood states, stress, tension, or irritation.

31 During cross examination Dr Buckley acknowledged that there was in fact no standard list of symptoms attributed to sex addiction. He agreed that there were a number of suggested tests or criteria being discussed in the field, but that he "didn't agree with any particular one of them." He explained that he had taken symptoms common for any process addiction and then modified them for sex addiction. The bolded terms in the list (and in the examples above) were those common to process addictions in general, while the non-bolded specific examples of behaviour had been "tailored by me for sex addiction."

32 In his report Dr Buckly stated that he had "evaluated [the grievor] to have 8 of these symptoms, indicating that he most certainly has a sex addiction problem." The report did not however contain any examples of behaviours specific to the grievor. Dr Buckley explained that that was because the report was "not a whole assessment report." He also acknowledged during cross examination that he could not recall at that point which of the 12 symptoms he had listed specifically applied in the grievor's case, though he was reasonably certain that a number did, adding that "anyone with over three of the symptoms warrants serious examination for sex addiction."

33 Dr Buckley testified that he had treated the grievor with talk therapy only, and that his advice had included that he (the grievor) should do something to distract himself from

the urge to masturbate; but that if distraction did not work they ought to "seek out a private place where there was a reasonable expectation of privacy to perform the activity and then return to work as soon as possible." He was pressed in cross examination about whether such expectation existed in a stall that was part of four in a large washroom used by a number of people at the same time. He took the position that "when in a stall with a door closed you have a legal expectation of reasonable privacy." He maintained that this opinion was based on conversations he had had with "police and others about that opinion." He added that a person in such a stall who was loudly moaning could still consider him-or herself to be "in a private place."

34 Dr Buckley also testified that when he first saw the grievor "he [the grievor] stated that he had a sex addiction problem, so he was not in denial about it, but he did not have a full idea of how it affected him." He said he thought the grievor was "highly motivated" but that he was "struggling to understand whether his behaviour was an addiction or normal." He added that in his view at this point it would be better if the grievor was not returned to work because of a "poisoned atmosphere" created by the knowledge of his co-workers that he had been masturbating in the washrooms.

Submissions on Behalf of the Employer

35 Counsel for the Employer commenced by noting that this was an unusual case. Neither she nor the Union's representative had been able to find any case dealing with masturbation in the work place. She submitted that there were two issues before me:

a. is masturbation at work while watching pornography inappropriate behaviour? and

b. if so, what is the appropriate penalty in this case?

36 Counsel submitted that I should find as a fact that the grievor was masturbating in a space that was not in the circumstances private, and that such conduct was seriously inappropriate. As she put it, no one should be exposed at work to sexual behaviour of others — and that that is what had happened in this case.

37 Counsel emphasized that the incident in 2016 was crucial. Employees had registered concerns or complaints with the Employer that someone they suspected or knew to be the grievor was masturbating in a stall in the larger wash room on the ground floor of Hanger 9; that they were disturbed and uncomfortable about that fact; that some refused to use the wash room as a result; and that management should do something about it. Management (Mr Hurley) spoke to the grievor. The Union, while not present, was obviously aware of the issue since the grievor met with Mr Blois around the same time. Counsel submitted that notwithstanding the grievor's equivocation on his understanding of what was being discussed at the meeting with Mr Hurley, it was clear and I should find that the grievor knew that it

was about his masturbating in the bathroom stalls. He also knew that the Employer viewed such conduct as inappropriate; and that if there was a medical condition causing the problem he should get medical or other help.

38 Counsel pointed to the grievor's testimony, wherein he had acknowledged that he had been masturbating in the washroom in 2016, and that he had stopped doing it for a period of time thereafter. The fact that he stopped was a sign that the grievor recognized that the behaviour was inappropriate. But the behaviour started again and had become an issue by April 2018. A formal complaint was filed by a co-worker (Mr Jardany). While that employee had not directly experienced such an episode he was aware that it was going on because others had had such direct experience and were disturbed and talking about it. Some of those others would not use the washroom as a result. All were disturbed by it. Counsel submitted that such conduct violated the Employer's respectful conduct policy.

39 Turning to Dr Buckley, counsel submitted that no weight could be placed on his opinion and, in particular, on his opinion that the grievor suffered from a sex addiction. Dr Buckley was not qualified to provide an opinion or diagnosis as to whether the grievor had such a condition. Moreover, sex addiction was not recognized by the DSM 4 or 5. Dr Buckley had himself acknowledged that there was no generally agreed list of signs or symptoms for sex addiction.

40 Counsel concluded by noting that bad judgment was not a mental health issue. Even assuming that sex addiction did exist, there was nothing to suggest that it had disabled the grievor in any way. His work performance and attendance had always been good. His habit of masturbating at work was not disabling in any way — it was just bad judgment, and bad judgment was not a mental health issue. Nor, for that matter, had the grievor ever advised the Employer that he had such a disability.

41 Counsel relied on several authorities: *Ajax (Town) and Ajax Professional Fire Fighters' Association* 2016 CarswellOnt 20158 (Surdykowski); *Yellow Pages Group Co and Unifor Local 6006* (unreported, Ontario, Aug 8, 2017; Luborsky); and *Interior Health Authority and Hospital Empoyees' Union* 2013 CarswellBC 988 (Young).

42 Counsel concluded by submitting that the conduct was egregious about which the grievor had been warned before, and that this was not a case for which progressive discipline was appropriate. The grievance should be dismissed.

Submissions on Behalf of the Union

43 The Union's representative submitted by way of introduction that the Employer had not met the burden on it of establishing just cause. The Employer had not established that masturbation carried out in the privacy of a bath room stall was grounds for termination;

or that the grievor had been warned in 2016 that masturbation was inappropriate conduct that could attract discipline.

44 The Union's representative submitted that management's 2016 discussion with the grievor had not been specific enough. Mr Hurley "skirted the issue," leading to the grievor's misunderstanding as that what was being discussed was "inappropriate noise" rather than masturbation. The grievor did not understand that his masturbation was the issue of concern. He thought it was an issue of "sounds related to a medical condition." He was not warned or put on notice that his masturbation in the privacy of a bath room stall should stop. Masturbation was not an illegal act. That being the case an employer who wanted to stop an employee from masturbating at work had to say that expressly. Concerns about "nicety" or personal embarrassment about the topic of conversation should not stand in the way of explicit warning and prohibition.

45 The Union's representative also pointed to the grievor's testimony that he was not making any sound while masturbating. He was quiet. He kept the volume on his phone muted. Hence there was nothing to put him on notice that people were aware that he was doing it. Had he been warned directly and expressly in 2016 he would sought medical help, as he did in 2018.

46 The Union's representative conceded that discipline would have been warranted in 2016, and again in 2018, but that it should have been progressive: Brown & Beatty, *Canadian Labour Arbitration* (4th ed), paras. 7:4416 (warnings);7:4422 (rehabilitation potential); 7:4424 (employee's state of mind); Focus 18 (Damages in Lieu of Compensation); *Vernon Professional Firefighters' Association, I.A.A.F. Local 1517 and Vernon (City) - Bond Grievance* 2019 CarswellBC 576 (Dorsey); *Indusmin Ltd and U.L.G.W., Local 488* 1978 CarswellOnt 936 (Picher); *Famous Players Inc and I.A.T.S.E., Local 348* 1999 CarswellBC 3842 (Lanyon); *Toronto Transit Commission and A.T.U. Local 113* 1994 CarswellOnt 6069 (Fraser).

47 Turning to Dr Buckley's evidence, the Unions' representative submitted that it explained the grievor's behaviour. Was there a reason for the grievor's conduct? Dr Buckley said 'yes.' The Union's representative submitted further that the grievor's conduct could be justified, or at least understood, in one of two ways. First, it was a mistake. He did not realize that his actions could be heard beyond the stall walls — or, perhaps better, he did not understand that privacy applied only to visual privacy — i.e. masturbation could not be said to be carried out in private if its actions could be heard. Second, it was the result of a medical condition.

48 The Union's representative concluded by noting that the grievor had a new job working elsewhere (albeit at a lesser rate of pay). The rumours at the workplace about his actions now made it impossible for him to return to his former position with the Employer. Accordingly,

by way of remedy, I should grant the grievance but substitute an order of damages in lieu of reinstatement.

Reply on Behalf of the Employer

49 Counsel submitted that some of the older authorities relied upon by the Union were no longer on point. Times and attitudes regarding sexual conduct in the presence of others had changed. So, for example, publically displaying and touching one's penis in the presence of a female co-worker would not attract the 14 day suspension that it did in the *Famous Players* award; it would today be grounds for termination.

50 Counsel submitted that it was clear that the grievor did know in 2016 that he was being warned to stop masturbating at work. First, while he waffled in his testimony, it was clear (she submitted) that he knew the issue was not "noises from a medical condition" but rather noises of his masturbation. Second, on his own admission he stopped for a while after 2016. If he hadn't known that masturbation was the issue there would have been no reason for him to stop. Third, the Union talked to him about it after the meeting. Fourth, in 2018 he admitted that he had been told once before to stop the behaviour.

51 Regarding the lack of express complant by co-workers to the grievor, counsel pointed out that men just as well as women could feel awkward about complaining about sexualized conduct. Such reluctance did not mean that they were not disturbed by the conduct. It was in any event common sense to conclude that people as a general rule were embarrassed or disturbed by being exposed to the sexual activities of another.

Analysis and Award

52 I deal first with the issue of what the grievor knew or understood about the message that the Employer was conveying to him in January 2016. Common sense and the evidence satisfied me that while Mr Hurley may not have used the word "masturbation," or any comparable term, the grievor understood what activity was being discussed. He testified that he suspected the meeting was about this activity. It was a practice that by his own admission he carried on frequently in those stalls What was discussed were the "unusual noises" coming from a bathroom stall that he occupied. Other male employees reported to the Employer that the sounds were consistent with the sound of masturbation. The grievor did not testify as to any other possible source for the "unusual sounds" that others were hearing. (For example, he did not suggest that he had intestinal issues that could have created such sounds.) I am satisfied then that the grievor knew at this point that the Employer had become aware of his practice; that it had become aware of it because other employees had heard it happening and were disturbed by it; that if there was some medical reason for such conduct he should do something about it; and that it was inappropriate and should not be continued.

53 The same reasoning applies with respect to the evidence of Mr Blois. Masturbation is not a topic of conversation about which people feel comfortable discussing openly. That plus concerns about privacy would make any attempt to discuss it personally embarrassing and likely to result in the use of euphemisms. Even if Mr Blois's discussion with the grievor was couched in terms of "unusual noises" I am satisfied that both knew exactly what was being discussed — and that it was an activity that was causing concern amongst the grievor's co-workers and ought to be stopped.

54 There is finally the meeting that took place on April 23, 2018. This time management was clear that the meeting was about him masturbating in the washroom stalls. The grievor admitted then that he had been warned before that the practice was inappropriate.

55 There is accordingly no doubt in my mind that as of January 2016 the grievor knew that the Employer knew what he was doing; that it knew because his co-workers had complained about it to management; that it considered his conduct to be inappropriate, in part because it was disturbing other employees; and that he should stop doing it. But, as it turned out, he did not.

56 While I am on this point I do not accept the grievor's testimony that he made no sounds while performing this activity. Obviously if that were true no one would have known that he was doing it. But people did know. They could only have known about it because they could hear it. Nor do I accept that he did not know that he could be heard, at least on occasion. Even if he did not know that he could be heard prior to January 2016, he was certainly aware after his meeting with both Mr Hurley and Mr Blois that he was heard by co-workers masturbating in the bathroom stalls.

57 I turn now to the question of whether discipline was appropriate. On this point I accept that there is nothing illegal about masturbation. I emphasize too that this case is not about whether masturbation at work is *in and of itself* a violation of the Collective Agreement or of the Employer's Code or Manual. Nor does it involve any issue of time theft. Certainly, no such issue was raised by the Employer. The issue rather is whether masturbation conducted in such a way that other employees become personally aware (either by sight or sound) that the activity is taking place *in their immediate vicinity* is such a violation and as such grounds for discipline.

58 I believe I can take arbitral notice of the fact that it is a general social norm in our society that sexual activity, whether conducted alone or with another, is conducted in private. Those engaged in the activity do not want others to watch or listen to what they are doing. They are or would be embarrassed, if not upset or angry, to know that others were watching or listening their activity.

59 By the same token, those not engaged in the sexual activity of others do not want to become inadvertent voyeurs. They want those engaged in such activity to maintain walls of privacy (both visual and auditory). They expect their sense of personal decorum to be respected. They expect those engaged in such activity to respect their feelings, and to take all possible steps to ensure that the wall of privacy is maintained and not breached.

60 But this the grievor did not do. He instead conducted an activity that he knew (and certainly ought to have known) would and did cause embarrassment and distress to his co-workers once they became aware that he was doing it in close proximity to them. He had been warned that he was not in fact masturbating "in private" because co-workers using the wash room could hear him doing it, and could hear the porn he was watching while doing it. Notwithstanding that knowledge and that warning he continued his activity. To do so surely constitutes "behaviour, often recurrent in nature, which negates an individual's dignity and the respect to which they are entitled because the behaviour is offensive, embarrassing or humiliating."

61 I am satisfied based on these findings that discipline was warranted, subject to consideration of the Union's submission that the behaviour can be excused because it was a disability caused by a sex addiction. This brings me back to the evidence of Dr Buckley.

62 Having reviewed and considered Dr Buckley's resume, his report and his testimony I was not persuaded that the Union had established that he was qualified to offer an opinion as to whether sex addiction existed as a recognized condition or disability; or that, if it did, that the grievor suffered from it. The only specific addiction that Dr Buckley had any training or experience in was that of problem gambling, not anything called sex addiction. There was no reference in his resume to training or experience or professional work in anything relating to sexual behaviour. The best that could be said about Dr Buckley's views on the matter is that they were informed by reviewing a few articles or attending a few workshops. That is not the basis for an expert opinion. His conclusion that the grievor suffered from such a condition was particularly problematic because

a. sex addiction is not a condition generally recognized by any accredited professional governing body (such as the AMA) or by the DSM;

b. the symptoms upon which Dr Buckley's conclusion was based are non-specific, and apply on their face to a multitude of behaviours and thought processes; and

c. the examples against which he measured the grievor's behaviour were more or less made up by Dr Buckley himself, as opposed to being part of some recognized test.

63 I note too that there was no evidence from either Dr Buckley or the grievor that the latter's actions were interfering in any way with his home life or with his ability to attend work regularly, or to perform his work, or to be a productive employee. The grievor did not say that his masturbation was the product of an overwhelming compulsion that drove him to perform it. I venture to say that masturbation is a fairly common (and normal) habit in the general population as a whole, and there was nothing to suggest that the grievor's practice of it (other than his proclivity to do it at work) fell outside that norm. The best that he and Dr Buckely could say was that the grievor did it to relieve stress at work. But stress is a normal part of every life. It does not in and of itself constitute a disease or disability. Nor was there any evidence to suggest that any such stress had of necessity to be relieved in the manner selected by the grievor. The grievor's "addiction," if that is what it was, may have interfered with the work or activities of other employees, but it did not affect his own work. Nor was there any evidence that it could not be controlled.

64 In short, even if there was a condition that could be called a "sex addiction" — and I was not persuaded on the evidence that there was — and even if that was what the grievor suffered from — and again I was not persuaded that was the case — there was nothing to establish that it was disabling in any way. But if it did not affect his ability to perform the tasks and duties of his job then there was no disability — hence no duty on the Employer's part to accommodate him. Nor would it offer anything by way of mitigation for his decision to continue on with the activity after being warned about it in 2016.

65 The question then becomes whether the Employer's decision to terminate the grievor breached the principles of progressive discipline, and whether some lesser form of discipline would be appropriate in substitution thereof.

66 While I agree and accept that in normal course progressive discipline is an appropriate and just approach to issues of discipline, I do not see it as an invariable rule that must be followed in all cases regardless of the circumstances. Every case is different, and this one is particularly unique. The grievor had known for a long time, both during his military career and after he started work for the Employer, that masturbation was not an activity to be conducted in such a way that others would become aware that he was doing it while he was doing it. He knew and understood that people were embarrassed and affronted to hear it being done in their immediate proximity. He was warned in January 2016 that notwithstanding what he said were his attempts to masturbate in secret, his co-workers could hear him doing it. He was also warned at the time that the Employer considered his actions to be inappropriate.

67 I accept that the grievor's meeting with Mr Hurley in 2016 was non-disciplinary, in the sense that no discipline was imposed. But that does not mean that it cannot be

taken a satisfying the principle that underlies the theory of progressive discipline — timely communication of an Employer's expectations and a warning of consequences. The grievor certainly understood the meeting's purpose and message, and that they were serious. He testified that he was nervous about the meeting because he suspected what it was about. And yet notwithstanding that warning he continued with his practice in the apparent belief that what he did in a bathroom stall was no one's business but his own, even though he knew that his co-workers could hear what he was doing while he was doing it, and were discomforted by it. The fact that he said that he was prepared to clean out his desk at the end of the meeting on April 23rd, 2018 evinces his appreciation of the seriousness of his misconduct.

68 I am accordingly persuaded that the Employer had just cause not only to discipline the grievor, but to terminate his employment. The grievance is dismissed.