

IN THE MATTER OF ARBITRATION

BETWEEN:

GOVERNMENT OF THE NORTHWEST TERRITORIES
as represented by the Minister responsible
for the *Public Services Act*

Employer

- and -

THE UNION OF NORTHERN WORKERS

Union

Grievance re: David Barnet (06-068)

AWARD

BEFORE:	Thomas Jolliffe, Q.C.
FOR THE EMPLOYER:	Brian Asmundson
FOR THE UNION:	Debra Seaboyer
HEARING LOCATION:	Yellowknife, NWT
HEARING DATE AND ORAL DECISION:	June 25,26, 27, 2007
DATE AWARD ISSUED:	
October 29, 2007	

The grievor in this matter, Dave Barnet, a relatively long service employee overall, had been assigned to work in a pay officer position at Financial Management Board Secretariat (F.M.B.S.), in Yellowknife. His career had extended through some interruptions in the employment relationship, with his most recent stint as a civil servant lasting from October 2001 through April 25, 2006. On that date his Deputy Minister, Lynn Elkin, advised him in writing that she was accepting the recommendation of his manager that he be declared to have abandoned his current position by reference to section 26 of the *Public Service Act*. His employment was terminated on that basis. The statutory provision on which the Employer relies reads as follows:

An employee who is absent from duty without leave for a period of one week may, by an appropriate instrument in writing, be declared by the Minister to have abandoned his or her position, in which case the position becomes vacant and the employee ceases to be an employee.

The Union has taken the position throughout that the Employer failed to accommodate the grievor and that he was terminated without just cause. It has continued to assert that at the time of the supposed abandonment, circumstances were such that the grievor should have been considered as being on medical leave. It relies on his having provided the Employer with medical documentation supporting his absence as stated in the grievance, and contends that the Employer was compelled to recognize the symptoms of the grievor's condition. These symptoms were said to have rendered him unfit to perform the duties of his position. The Union says that the Employer should be directed to withdraw the termination, which is to say it should be considered as without substance, also that the grievor be allowed to access short term disability benefits until deemed fit enough to return to work, and further that he be compensated in every appropriate fashion and made whole. The Employer has responded to the grievance filing with a lengthy written description of the facts as understood by management, indicating that the grievor did not report for duty when directed to do so following the denial of his leave application which realistically eventually led to the

declaration of abandonment. As will become apparent, during the outline of the pertinent facts which follows, the entire circumstances of this matter as taken from the testimony and documentary materials placed in evidence, are both convoluted and complicated as they played out to conclusion.

Facts in Evidence: In October 2001, following a time away from government service, the grievor commenced his re-employment as a pay and benefits officer. By June 2005 he was working as a senior benefits officer at F.M.B.S. having taken a transfer to the higher paying position during a period of internal restructuring. By the grievor's description, given in testimony, due to some health issues including stress related symptomology, at some point he found that he "couldn't do it anymore". He took approximately a one month period of sick leave during which time, by his recollection, his health continued to deteriorate even to the point of suffering "a mini-stroke", although undocumented on his personal file.. Upon his return to work, and not feeling up to the rigors of continuing with the senior benefits officer's duties, on August 2, 2005 he accepted a transfer into the lower rated pay officer category, at a lesser salary, following which he was assigned to work with the Yellowknife Health and Social Services Authority (Y.H.S.S.A.) which placement was expected to last through January 2006. During the six months in the assignment, the grievor did not report any health problems, nor were there any indications presented in his evidence of encountering any work related difficulties. By his description, in about early January while being aware that the job placement was expected to be "winding down" by month's end, he reasoned that it was the appropriate time to take annual leave, having accumulated to that point six weeks' credits. He was thinking, he testified, that he could go back to work and be ready to take up his assigned payroll officer duties at F.M.B.S. by the beginning of March. At the same time, through his discussions with the Director of Client Services, Sharilyn Alexander, also in early January, he became aware that a problem had developed in finding him a pay officer position at the F.M.B.S. main office in Yellowknife and accordingly a temporary placement was worked out with him to report to one of the satellite offices

following his return from vacation. Ms. Alexander in her testimony acknowledged being at least aware that the grievor would have preferred to work in the benefits administration area where he had ample past experience which they discussed in their January meeting, as opposed to his taking a pay officer assignment in the central payroll office at some point. However there were no benefits administrators' positions available at that time with the area being fully staffed. By the grievor's description, the fact of his possibly having to take additional software training and working with a system where he was not already fully familiar left him "scared and nervous", while admittedly disappointed that he was not being immediately allowed to return to an area of his past experience, namely benefits administration. Nevertheless, he had most recently worked quite successfully as a pay officer. His intention on taking six weeks annual leave, he said, was to return and try to get out of the pay officer position when another placement developed, possibly in benefits. Ms. Alexander confirmed his upcoming assignment in her correspondence to the grievor dated January 11, 2006. It was clear in evidence that at no time during her discussions with the grievor leading up to his accepting the proposed assignment did he ever indicate to her that he was concerned over the placement from a personal health perspective, including not mentioning any reluctance due to any stress and anxiety issues. There had been no health issues raised over the previous five months working in his pay officer duties, no sick time to speak of. However, she recalled in her testimony that the grievor did raise the issue of his preferring to have been returned to a higher previous salary level, and had said that any probationary period which might attach should be waived. He had also indicated to Ms. Alexander during their discussion that his elderly mother who resided back in New Brunswick, was ill, and that he wanted to take his six weeks annual leave prior to commencing his next placement with F.M.B.S. in order to be with her. Ms. Alexander had no difficulty in honoring that request.

As matters developed, and as indicated in later e-mail correspondence to his Deputy Minister, Lynn Elkin, the grievor's mother was admitted to hospital the next week where she

remained through to the time of his commencing his annual leave and his then arriving in Fredericton on January 25 where she resided. By the grievor's description, his mother went through a period of being gravely ill and was not released from hospital to return home until February 20. As reported by the grievor to Ms. Elkin in his February 23 e-mail to her, after almost dying, his mother had been released from hospital three days previously and was "in the recovery and strength building stages". He also advised therein that his mother had no family in the Fredericton area, with both his siblings also residing in Yellowknife who could not commit to care for her and, accordingly, "I would like to offer assistance and be her caregiver for the next year". The grievor went on to state in his e-mail that the one year leave would be enough for him to prepare arrangements for the care of his mother, and if at the end of the year she had not recovered sufficiently to care for herself, he would resign his employment. He also stated that, "if something happens during the upcoming year, I could look at other alternatives, including returning to work earlier or remain on leave until the period of leave expired". He went on to request her response "if possible", by the next day and added that "the reason for this urgent request is that I need to give 2 weeks notice if my plan is to resign, but I am hoping that my request will be approved and I will not have to resign". He added therein that after working the number of years he had "I just need this time to assist my aging mother". Notably perhaps, in this February 23 e-mail, he raised no health issues of his own which might affect his return from annual leave, not a hint, only that his efforts at that point were focused on caring for his mother in Fredericton. Ms. Elkin responded by e-mail later the same day, February 23. She indicated therein that while she sympathized with his situation, and for the need to care for his mother, she was unable to provide him with the leave without pay as requested. She stated "we are not in a position operationally to have the position in a state of flux for the year and potentially beyond if the situation is such that you need to remain south with your mom". Thereafter, there was no immediate response from the grievor. In light of Ms. Elkin's denial of the one year's leave of absence request, the grievor was expected to return to work as scheduled on Monday,

March 13, 2006.

By the grievor's description given in testimony, at the point of sending the February 23 e-mail to Ms. Elkin, and knowing that his mother was still recovering from being gravely ill, he was "not in good mental shape" as he put it, adding that while he knew that if he was to resign he should give two weeks notice, he had no intention of going through with his resignation at that point, despite having alluded to that possibility in his e-mail. He testified that on receiving Ms. Elkin's reply e-mail advising that his leave request was denied, he was "totally disappointed and bewildered". Interestingly, as he pointed out, his wife, also an N.W.T. government employee (Justice Department), had just been approved for a one year leave of absence, giving him cause to wonder why he could not have gotten one too. He said that he contacted his union representative to discuss the issue, but did not file any grievance at that point. As matters developed, the grievor returned from Fredericton to Yellowknife on March 6, 2006, knowing that his annual vacation was about to end and that he was expected to return to work in his new pay officer assignment on March 13, in that nothing to the contrary had yet been indicated. However, by the grievor's description, "not feeling good" about returning to work at that point, or about himself, he decided instead to visit his family physician in Yellowknife, Dr. Harith Alward, that day. By his description, he had had some suicidal thoughts while still in Fredericton and wanted to talk to him to "figure out what to do". He also testified that even prior to leaving Fredericton, some days or weeks earlier, he had telephoned Dr. Alward "to ask for help" indicating to him that he was suffering from anxiety and was having suicidal thoughts "because of (his) mother and (his) situation". He said that Dr. Alward had prescribed anti-anxiety medication at that point, apparently over the telephone. In his evidence, the grievor denied wanting to use his sick leave benefits as a vehicle to look after his ailing mother. He also outright denied asking his doctor to put him on sick leave in order that he could do so. However he recalled telling him at least that his mother was sick, which was causing him stress, and that he had been denied the leave as requested to care for her. At the same time, he said, he remained

“nervous” over the prospect of performing pay officer duties in a centralized system with which he did not feel he was familiar enough. By the grievor’s description, the job he had been doing as a pay officer at the Y.H.S.S.A. was unlike the pay officer position he was expected to fulfill at the F.M.B.S central office, although he knew that for a time he was going to be posted to a satellite office. Admittedly, he had not worked a day in that assignment.

On the morning of March 13, 2006 when the grievor, who was known to be back in Yellowknife by then, did not report for work as scheduled, his manager instructed his supervisor to telephone him and advise that he was considered absent without approved leave at that point, and that he needed to either submit a written resignation or report to work. Further, she was to advise him that his failure to report by the end of the week would result in the Employer deeming him to have abandoned his position. . The next day the grievor applied for certified sick leave to extend for a month until April 14, done on the basis of his physician’s presumed supporting medical report to follow. The grievor was , at that point at least, still in Yellowknife. In his report, dictated on March 15, 2006, but interestingly not received by the Employer until eight days later, Dr. Alward reviewed the grievor’s medical history. It included episodes of past high blood pressure which was being controlled by medication, also some previous depressed mood difficulties He stated his opinion therein that the grievor was currently under stress due to his job assignment change which was causing “detrimental consequences on the progression of his health problems”, which has been “compounded by family issues with his mother”. He also reported his understanding that the grievor was the only one of his family members who was available to take care of her and that she was unable to take care of herself, which had required his traveling to New Brunswick to be with her and to take care of her. His report went on to advise:

I have advised this patient to be off work because of the stress he is experiencing, including stress at work and stress regarding his mother’s health. I have taken the liberty of giving Dave a stress leave from March 13 to April 15, 2006. During this time he will be with his mother, who is

now in the hospital for health problems. This period of leave could possibly be extended for an extra one-month period, depending on how his mother is doing.

I have advised Dave to follow-up with me after finishing this one-month period of stress leave on April 15. At that time I will re-evaluate the situation.

In short, by outward appearances to the grievor's superiors,, his family physician, Dr. Alward, had been enlisted to give the grievor a one month stress leave, while advising that during that time he would be back in New Brunswick attending to his ailing mother. Dr. Alward had raised the possibility of the supposed leave being extended "depending on how his mother is doing".

On her review of the situation presented, Ms. Alexander from her past dealings with the grievor, was aware that he would have preferred to work in the benefits administration area where he had ample past experience, and which they had discussed in January 2006, as opposed to his having to take another pay officer assignment for some period of time. She understood that the position offered had left him "disappointed". However, as she had explained to him before he went off on vacation, there were no benefits administrators' positions available at that time inasmuch as the area was fully staffed. By the grievor's description, the fact was he anticipated on taking up the F.M.B.S. assignment that he would have to arrange for some computer software training and that working with a software system concerning which he was not already fully familiar left him "scared and nervous". Nevertheless, he said his initial intention had been that after taking six weeks annual leave he would be returning to work, and would focus on getting out of the pay officer assignment when another placement developed, possibly going into benefits administration when a position opened. However, by the time he returned to Yellowknife in early March, by the grievor's description, he knew he could not go into the pay officer position at all and needed to explain to Dr. Alward the difficulties he had been experiencing, including his mother's illness, his having been denied one year's leave, and what he recollected as some

suicidal feelings he had experienced while in New Brunswick.

Certainly, the payroll office supervisor, Christine Hoiland, had been expecting the grievor to return from his six weeks annual leave on March 13 to his assigned pay officer position. She, admittedly, was concerned when he did not show up at work as she was expecting to be able to slot him into working on some 500 to 600 active files covering final pay backlogs for exiting employees needing to be researched and resolved. She had been previously made aware by Ms. Alexander that the grievor's one year leave request had not been granted. Instead she was presented with the grievor's certified sick leave request dated March 13, as delivered by the grievor's wife, and eventually also the supporting medical report from Dr. Alward dated March 15 and received on March 23. The medical report when received, caused the same concerns for supervisor Hoiland as it had for Ms. Alexander and also Ms. Elkin, namely that it seemed to focus on the grievor's perceived need to care for his mother in New Brunswick, which he had previously asked to do on the basis of a one year leave which was denied. Her doubts were not lessened by the fact that she had received an e-mail on March 20, from the grievor's wife, Nancy Barnet, informing her that the doctor's report, dated March 15 and not yet delivered at that point, was waiting to be typed. Ms. Barnet also advised therein that the grievor had returned to New Brunswick that morning to be with his mother who was by then back in hospital. In short, the grievor had already left town without allowing his superiors any time to investigate the medical leave request within the context and background of the grievor's known personal circumstances.

On Deputy Minister Elkin's review of Dr. Alward's initial March 15, 2006 letter, she too was concerned over the emphasis placed on the grievor being available to care for his mother in Fredericton while there was no indication as how the doctor had concluded that the grievor was unable to do any job related duties in Yellowknife. By her reckoning, the situation presented raised the possibility of accommodation being applied in some way if his health was sufficiently sound to be able to be his mother's care giver in Fredericton. At that point she knew, it was not a matter of the grievor immediately having to work in the

F.M.B.S. central office. She was aware that he was expected for a time at least following his return to be working at a satellite F.M.B.S. office. She was also aware that prior to his taking his annual vacation, the grievor had been performing pay officer duties at Y.H.S.S.A. where he had not been sick at all, and had missed no time. She did not see how any significant change was expected, being the same kind of work with his returning to a pay office function. At the same time she was concerned over the requested leave being open ended with the doctor mentioning the possibility of an extra one month period, "depending on how his mother is doing". At that point, she wanted to see a detailed prognosis from the physician. It was a matter of management, she said, wanting to sit down and discuss what the grievor might be able to do, or not do, within the parameters of the employment relationship, as opposed to not questioning his taking an extended period of time off work while he was out of the Northwest Territories caring for his mother.

In response to the grievor's sick leave application, with the concern noted over Dr. Alward's report, and on instructions, Ms. Hoiland corresponded with the grievor after receiving a copy of Dr. Alward's medical report on March 23. The grievor, being back in Fredericton at that point, did not receive it until April 6. Ms. Hoiland indicated therein that a more detailed prognosis was required in order for the requested sick leave to be approved or the possibility of accommodated duties to be investigated. She attached a pay officer job description for his physician's reference requesting that the grievor have Dr. Alward address his capabilities and limitations he might currently have in the context of his duties, and having regard to the circumstances surrounding his application for sick leave. She stated therein... "the prognosis will be most helpful if your physician is able to address in a specific and practical way, the impact your condition will have on your ability to perform all of the duties of your position". She went on to advise that the Employer accepted the responsibility to accommodate an employee in every reasonable way. In order to assist his physician in addressing that issue she provided therein for his doctor's consideration, an historical breakdown of events, including his previous period of sick leave from June 24 until

July 29, 2005, the accommodation which had been put in place at that time to assist his return to the workplace, his six month placement which he had successfully worked without experiencing any health problems or ever indicating being unable to report for work and perform his assigned duties. She mentioned therein that his request for a one year leave of absence to care for his mother had been denied, and his having taken his annual vacation leave before being expected to start his new assignment. Up until March 13, 2006, she pointed out in her letter, there had been no indication of any expectation of health difficulties upon his return from vacation. His advice had been that if the one year leave of absence were not granted he would give two weeks notice if he were going to resign, and most lately returning to Eastern Canada to take care of his mother. Ms. Hoiland requested in her correspondence that the grievor provide a copy of the letter to his physician in order that the medical prognosis could be completed keeping in mind the continuing absence circumstances of the matter. She pointed out that the Employer was willing to accommodate him, do whatever it could, to enable him to return to work. She also pointed out that currently, given that his absence was contemporaneous with the denial of unpaid leave and his apparent ability to travel and care for his sick mother, the requested sick leave was not currently approved. She indicated in her closing paragraph that he was currently considered to be absent without approved leave and that it was imperative he either provide a detailed medical prognosis or return to work on Monday, April 10, failing which the recommendation would be made that he be declared to have abandoned his position.

The grievor responded to Ms. Hoiland in correspondence dated April 7, 2006, still being in Fredericton at that point, that he had received her letter the previous day which had left him "somewhat shocked, disappointed and puzzled at the contents", and regretting that his employer had been unable to approve his sick leave. However he also indicated that he had provided Ms. Hoiland's letter to his physician who was described as being "fully aware" of all the circumstances surrounding his current situation. He would request his assistance to provide a more detailed prognosis. He went to state that he was currently being treated

for hypertension, anxiety and stress. His treatment, he advised, "included medications, diet and exercise". The grievor also stated in his letter that he would make every attempt to ensure that the Employer was advised as quickly as possible as to his medical prognosis and that his physician should be providing further details soon. As it was, he pointed out, the Employer had a copy of this physician's letter taking him away from work until April 14.

Thereafter, with no further medical documentation yet received and with the grievor not having returned to work on the morning of April 10, Ms. Hoiland had a telephone conversation with Dr. Alward that afternoon. In her testimony, and as indicated in her follow-up memorandum placed on file, Dr. Alward took issue with their expecting the grievor to be returning to work, indicating that he viewed the grievor as being in no condition to be at work at that point. She advised in her discussion with him that she had wanted to ensure he had all the same information the Employer did. It included the grievor having requested a year's unpaid leave which was denied, and which the Employer took to be suspicious inasmuch as he was claiming he was too ill to return to work while having taken up residence in his mother's house in Fredericton to care for her. By Ms. Hoiland's recollection, Dr. Alward said that he knew the grievor had gone back to Eastern Canada to take care of his mother. Ms. Hoiland found it to be worthy of note that when she pointed out that the requested unpaid leave of absence had earlier been denied as the grievor was needed in the office, Dr. Alward had responded "then who would take care of his mother". The response she said led her to suggest that the issue of his mother's ongoing home care in New Brunswick was not up to the Employer to address. By her description, she went on to advise Dr. Alward that she would need another letter from him to address the points she had raised, concerning which he had indicated he would do so. He dated his second report the following day, April 11, but it was only received by the Employer on April 21. The grievor, by then, had not returned from Fredericton, had not contacted the Employer himself and as turned out was leaving it up to his family physician to deal with the Employer. To that point, his illness application was still not approved. Needless to say, being in Fredericton, he had not visited

Dr. Alward within that time frame either. Dr. Alward advised in his April 11 report to Ms. Hoiland that he was extending the grievor's stress leave another month. His report, copied to the grievor was relatively brief. It does not address his having had further contact, if any, with the grievor, or provide any prognosis, or consider any possible accommodations to allow his return into some level of work performance. The report concludes with the rather disconcerting remark, for the Employer at least, "...there is still no other family member to take care of his mother". It reads as follows in its entirety:

As per our phone conversation yesterday regarding Mr. Barnet and as a follow-up to a letter I sent to you on March 15, 2006, I mentioned that this patient qualifies for stress leave.

Mr. Barnet had been seen by me with signs and symptoms of stress, and that is the reason why I provided this letter for him - it was my medical judgment that Mr. Barnet qualified for stress leave. Per the letter you sent to me regarding the responsibility for Mr. Barnet with regards to work in the new department, you said he didn't start this work, however he had stress because of it.

Mr. Barnet's symptoms and signs have been typically within the criteria of stress, and that is the reason why I provided him with the stress leave.

This patient is still having the same symptoms of stress, and according to the patient's condition, I have extended the period of stress leave to May 15, 2006. In addition to him suffering the same symptoms of stress, which is the reason why I provided him with this leave of absence and the reason why I extended it, there is still no other family member available to care for his mother.

By the time she received Dr. Alward's report on April 21, Ms. Hoiland had already corresponded with the grievor on April 12, to advise that she had discussed the situation with his physician on April 10, and had summarized a number of facts and events leading up to his seeking sick leave, including that he had requested one year's leave of absence to care for his mother, failing which he was intending on resigning and apparently had already returned to Eastern Canada. One might observe that he had done so, without so much as

discussing that eventuality with his supervisor or manager prior to leaving. She also pointed out that she had requested a medical prognosis that took all of the events into consideration in the physician making his determination as to whether the grievor would be able to perform some or all of the duties of his position, as any reasonable accommodation was a possibility.

She also advised that Dr. Alward had indicated that he had seen him on March 13, considered that he was unfit to report to work at that point, while also stating his view that the grievor was required to care for his ailing mother, and that he was not aware of there being anyone else available to do so. She admitted in testimony, that circumstance had prompted her to point out in her letter to the grievor that parent care was not considered to be an appropriate use of sick leave benefits. She went on to advise that his requested period of sick leave was ending April 14, 2006, and that was expected to report to work at least by April 18, following which, again, he would be considered absent without a leave and that if it continued until April 24, she would be recommending to the Deputy Minister that he be declared to have abandoned his position.

Ms. Alexander in her testimony, acknowledged that once Dr. Alward had taken the grievor off work for the first month, albeit his apparently holding to the view also that the grievor should be back in Fredericton caring for his mother, and mentioning the possibility that additional time off work was going to be required, the Employer by reason of its illness leave policy was looking at that point to investigate the possibility of a work place accommodation if any were realistically required. With more information being sought from Dr. Alward, his written response, dated April 11, was to take the grievor off work for another month on the basis of requiring even more stress leave. She found it disconcerting that he also remarked in his report, "there is still no other family member available to take care of his mother". Further, Dr. Alward made no mention of the recent request he had received in writing from Ms. Hoiland regarding the job description and the possibility of the grievor being accommodated at work. As with Ms. Hoiland, Ms. Alexander was concerned that this "continuing thread" of his mother's ill health seemed to permeate the physician's

considerations, and he was not prepared to comment on what he could do or could not do at work, and what might be done to accommodate his return. At the same time, she was aware that the grievor was still back in Fredericton with his mother. There was no indication of his coming back to Yellowknife for an updated assessment by his physician who was apparently prepared to extend his leave for another month.

Certainly, Deputy Minister Elkin's concerns were not alleviated by the updated April 11 correspondence from Dr. Alward received on April 21 where he indicated he was extending the grievor's period of stress leave another month, while pointing out that there was still no other family member available to care for his mother. She did not see that the validity of the sick leave application had ever been accepted. Ms. Elkin too, did not see any explanation from Dr. Alward speaking to the job description material he had been provided, relative to the possibility of suitable work being made available for the grievor on an accommodation basis, if even required as opposed to his intending to remain in Fredericton with for his mother. Certainly she was opposed to the current situation continuing, and was aware that Ms. Hoiland, on instructions, had corresponded with the grievor, pointing out that disputed sick leave had been set to end on April 14 in any event. He was expected to return to work and that if he failed to do so, a recommendation for position abandonment would follow.

With the grievor remaining in Fredericton, Ms. Elkin eventually determined that the position abandonment alternative should be pursued. She saw nothing inappropriate about the Employer needing a better and fuller explanation from the grievor over his supposedly needing even more time off work as matters were unfolding. According to Ms. Elkin, there were "too many inconsistencies and coincidences", such as the grievor's good work and suitable attendance record in his pay officer duties during the six months prior to going on annual leave; his applying for a year's leave of absence to extend his stay in Fredericton to care for his ailing mother, without there yet being any mention of a job stress related issue; and upon the unpaid leave not being approved, his applying for a substantial period of illness

