

## **Arbitration Award Summary**

### **06-068 - Abandonment of Position**

#### **Case outline:**

The grievance falls under the Collective Agreement expiring March 31, 2009.

In this case, the member had worked in Human Resources with one of the Health Authorities. When the amalgamation took place, he was to move into a position within Human Resources Headquarters. The member felt very uncomfortable with this and expressed this concern with Senior Management within Human Resources. At the same time the members mother was seriously ill and living outside of the Territories.

The member took six weeks annual leave and went to where his mother lived to take care of her. During this time period, the member requested a years leave without pay to assist his mother. This leave request was denied based on the Employer's inability to have his position in flux for a year and potentially beyond if the situation with his mother did not change.

Shortly prior to his annual leave ending, the member saw his Doctor and the Doctor issues a certificate that the member was too ill to return to work for one month, and this may have to be extended. The Doctor's certificate did not get to the employer until after the member's return to work date. The member applied for sick leave based on the Doctor's advice. The member returned to where his mother was residing. The Employer indicated to the member that the sick leave was not approved, that they required a prognosis from the Doctor and that he had until April 10<sup>th</sup> to return to work or they would have to declare him to have abandoned his position.

By April 11<sup>th</sup> the Employer had not received a prognosis, neither did the member return to work. They received the prognosis on April 21<sup>st</sup>. Within the prognosis the Doctor indicted that he was extending the members leave another month. The Employer sent a letter to the member indicating that the requested period of sick leave was ending April 14<sup>th</sup> and that he was expected to return to work at least by the 18<sup>th</sup> and that if he did not return by the April 24<sup>th</sup> the supervisor would be recommending to the Deputy Minister that he be declared to have abandoned his position.

The member did not return and he was declared to have abandoned his position.

#### **Employer's argument:**

The Employer argues that when looking at all of the circumstances surrounding this case, it would appear that there were too many inconsistencies and coincidences, such as the member'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 caring for his 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 leave coverage on the day he was scheduled to come back to work. Even setting the stage for possibly more time off work as indicated by the Doctor's initially reporting that his return to work apparently depended on how his mother was doing. The Employer concluded that the member wanted to be with his mother and was not willing to embark on any meaningful discussion with his physician or the Employer regarding

the possibility of any accommodation plan to allow him to continue working in Yellowknife. The declaration of abandonment was accepted with the member not having returned to Yellowknife, not having contacted his manager or any other superior.

The Employer argued that the declaration of abandonment of position was valid and proper under the authority of the Public Service Act Section 26, and the arbitrator does not have jurisdiction to rule on the issue.

**Union's argument:**

The Union argued that the member was suffering from an illness in the nature of stress/anxiety which was covered by the sick leave benefits provided under the collective agreement. He should be taken at all material times to have acted in compliance with the collective agreement, having made a reasonable claim, and followed his physician's directions. The Doctor should have been taken at his word when he declared the member to be unable to attend work. It does not matter where the member chose to recover, in Yellowknife or any other place. The member's doctor did not disagree. At least the member could be by his mother's side where he was able to at least feel that he was being helpful to her, and ease some of his stress.

The Union made reference to the well developed arbitral case law, indicating that a long standing consensus has developed recognizing workplace stress/anxiety and reactive depression as difficulties capable of medical assessment, certainly capable of leading to periods of medical leave, sometimes substantial, under appropriate circumstances. The Employer did not indicate that it was in disagreement with that principle, although it certainly views the circumstances presented in this case quite differently than the Union.

The Union argued that the arbitrator did have jurisdiction, in that the employer used abandonment of position to improperly dismiss the member, which opens it up to an arbitrator looking at the merits and ruling on the abandonment issue.

**Arbitrator's decision:**

The arbitrator found that he was without jurisdiction in this matter and dismissed the grievance on this basis.

The grievor had gone back to where his mother resided with only a brief return to Yellowknife in March where he was assessed by the Doctor. The member never had another face-to-face visit with the Doctor mainly due to the fact that he never returned to Yellowknife despite two written demands from the employer. Nor did the grievor seek treatment elsewhere. The grievor has steadfastly held to the position throughout that his state of mind was such, and for those reasons described in evidence by both him and the Doctor that it either mattered little, or was even helpful for him to be caring for his mother.

The arbitrator ruled that it is a rare case where one claims entitlement to a period of paid illness or disability leave and then simply leaves the jurisdiction altogether for a lengthy period of time while he tends to personal affairs, however compelling they might be thought to be on a personal level. It is not a case where the grievor was already away from home, became ill and was unable to return, or where he openly went to another jurisdiction to seek proper medical investigation and assessment. Nor is it a situation where a diagnosed illness or injury is so obviously extreme and incapacitating

that it matters little where a person chooses to convalesce.

The arbitrator found that the grievor had chosen to ignore his job responsibilities and disregarded the employment relationship.

**NOTE**

The onus to prove a termination case is normally on the employer. With the exception of abandonment of position cases, in which the Union must prove that the employer was not acting in good faith, and in fact was using the abandonment situation as a disguised dismissal. If the Union is not able to prove this, the arbitrator does not have jurisdiction to hear the case.