

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
<b>DATE AWARD ISSUED:</b>	
<b>October 29, 2007</b>	

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

