

IN THE MATTER OF AN EXPEDITED ARBITRATION

BETWEEN:

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

Employer

-and-

**THE UNION OF NORTHERN WORKERS**

Union

**Grievance re: Policy Grievance - Sick Leave Certificates (#03-548)**

**MEMORANDUM**

BEFORE:	Tom Jolliffe
FOR THE EMPLOYER:	Blair Chapman
FOR THE UNION:	Laurin Mair
HEARING LOCATION:	Yellowknife, NWT
HEARING DATE AND ORAL DECISION:	February 8, 2005

**Date Memorandum Issued:**  
**February 14, 2005**

This arbitration matter (grievance file no. 03-548), comprising a policy grievance related to sick leave certificates, was heard under the expedited arbitration procedure as set out in art. 37.27 of the collective agreement. An oral decision was not possible in Yellowknife on the day of hearing, February 8, 2005. I have now reviewed the facts and circumstances of this matter, and the applicable language of the collective agreement, and am providing a memorandum confirming the conclusions I have now reached together with the brief reasons constituting my award.

There was no *viva voce* evidence. The parties filed an Agreed Statement of Facts in respect to the grievance as follows:

1. **In certain situations, the Employer has requested in advance, not including where an employee has been off work for greater than three consecutive days or has used 9 days uncertified sick leave in a year, that employees must provide a certificate from a qualified medical practitioner to support specific periods of sick leave.**
2. **In situations where employees have used excessive sick leave (significantly greater than average) employees have been advised they must submit a certificate from a qualified medical practitioner certifying they were absent and unable to attend work due to illness.**
3. **In situations where employees have patterned absences, employees have been advised they must submit a sick leave certificate to support they were absent and unable to attend work due to illness.**
4. **In situations where employees have allegedly misused sick leave, the veracity of the sick leave certificate has been challenged upon submission and employees have been advised they must submit a certificate from a qualified medical practitioner certifying they were absent and unable to attend work due to illness.**
5. **The applicable article of the collective agreement is Article 20.**

The Union advises that the issue of the Employer requesting in advance that some employees submit medical certificates to support specific periods of sick leave without

reference to their having to be off work for three consecutive days or having used nine days in a given year, by the Union's description, has its origin in management's perception that some employees in some departments make excessive use of their sick leave for their own purposes having missed considerable periods of time on a short term and intermittent basis. These employees, the Union says, are simply told that for the upcoming fiscal year they must produce doctor's certificates on every future illness situation, however short the absence, and until further notice. The Union objects to this practice in its filed policy grievance.

The language of the collective agreement dealing with signing statements stating the inability to perform one's duties and being required to produce a medical certificate reads as follows:

**20.03(a) Unless otherwise informed by the Employer an employee must sign a statement stating that because of his/her illness or injury he/she was unable to perform his/her duties:**

- (i) if the period of leave requested does not exceed three working days, and**
- (ii) if in the current fiscal year, the employee has not been granted more than 9 days sick leave wholly on the basis of statements signed by him.**

**(b) For the purposes of 20.03(a), a day refers to a calendar day, not the number of hours in the employee's shift.**

**20.04 An employee is required to produce a certificate from a qualified medical practitioner, certifying that such employee is unable to carry out his/her duties due to illness:**

- (a) for sick leave in excess of three(3) working days;**
- (b) for any additional sick leave in a fiscal year when in the same fiscal year the employee has been granted nine(9) sick leave wholly on the basis of the statements signed by him.**

The Employer holds to the view that in certain troubling circumstances such

as excessive sick leave usage, which is to say significantly higher than average, or in situations of patterned absences, or in situations where it has reason to doubt the veracity of the statement respecting illness, the Employer by exercise of usual management rights, has the ability to request a medical certificate, even in a situation where the sick leave is not in excess of three(3) days or the individual has not accumulated more than nine(9) days in the fiscal year on the basis of statements signed by him. In this respect, the Employer also views the opening words of art. 20.03(a), namely, "unless otherwise informed by the employer..." as providing it with a broad discretion on whether and when to move outside the statement and/or certificate requirements of art. 20.03 and 20.04 in order to demand more information as a means of dealing with excessive absenteeism situations. The Union treats these opening words of art. 20.03 as dealing only with the issue of an employee otherwise having to sign a statement which the Employer can forego at its discretion, where the leave requested does not exceed three(3) working days and is less than nine(9) days in a fiscal year. It points out that the same qualifying language is not included in art. 20.04 with respect to the rules for having to provide a medical certificate. Mr. Mair said that there might even be room to apply the *expressio unius-exclusio alterius* (inclusion of the one excludes the other) rule with respect to limiting those introductory words of art. 20.03 to the Employer's discretionary decision not to obtain an employee's statement and suggesting that art. 20.04 be limited by reference to the usual and ordinary meaning of its language dealing with the Employer requiring medical certificates.

In now having had the opportunity to consider the language used by the parties relative to substantiating periods of illness leave, I am satisfied that in looking to the wording of the two articles under review, although certainly they must be read in context, one with the other, it is apparent that art. 20.03 deals with the issue of employees being off work for three days or less, or no more than nine days in a fiscal year, nevertheless having to sign a statement respecting the illness or injury taking one away from his duties, unless the Employer chooses not to require the employee to sign such a statement as presumably might

occasionally be the case. It would seem to be the type of thing usually covered in an application form for illness leave, a simple signed statement to the effect that the person has required time off work and is calling upon his casual illness leave benefits to cover the situation. Presumably supervisors might choose to complete the forms themselves without bothering to have them signed by the applicants in some circumstances. The language covering an employee having to produce a medical certificate is contained in art. 20.04. It states such a requirement for both sick leave in excess of three days and sick leave in excess of nine days for the same fiscal year. The Employer is not assisted by the “unless otherwise informed” language of the previous article dealing with the employee’s *own* statement. The question remains whether art. 20.04 exhaustively deals with any requirement to produce a medical certificate or is it simply informative in the sense that it advises employees that they are at least required to produce one if they are sick for more than three days or more than nine days in a given fiscal year without limiting the Employer’s right to require certificates at its discretion in some other circumstances such as suspected abuse situations.

Having concluded that the issue of the Employer requiring a signed statement from the employee “unless otherwise informed” under the terms of art. 20.03 is distinct from it also requiring the employee to produce a medical certificate under art. 20.04, the issue centres on one considering whether there is any room for the Employer to move beyond/outside the language and demand certificates for the purposes set out in the agreed facts. One is mindful of the description set out at Topic 8:3320 of *Brown and Beatty*’s text, Canadian Labour Arbitration (3<sup>rd</sup> Edition), where they comment:

**...As well as being obliged to establish one’s employment status in order to claim benefits paid under a medical plan or sick-pay scheme, arbitral jurisprudence in general, and collective agreements in particular, invariably require that an employee affirmatively prove the fact of the injury or the illness which caused him to remain off work, unless, of course, it was the employer who required the employee to book off sick....The nature of the proof that can properly be required by the employer is usually described in the agreement, and medical certificates of one form or another seem the most common vehicle. Generally,**

**arbitrators have said that an employer can only demand medical verification of an illness or incapacity in a form and at a time which is consistent with the terms of the agreement and where there is a reasonable basis for the requirement....**

On the basis of the language set out in this collective agreement, I do not see how there is any room for the Employer to unilaterally require medical certificates to cover occasional or intermittent absenteeism outside the parameters of art. 20.04. This is not to say that art. 20.04 should be construed as diminishing the onus ultimately resting with the employee to establish the existence of an incapacitating illness in order to claim the illness leave benefit, and which under some suspicious circumstances, possibly on a case by case basis, could present the need to address the fundamental reason for the employee's absence in a suitable way, but without being able to actually force the employee into providing additional medical certificates by reference to bargained rights and obligations contained within the collective agreement.

In the result the policy grievance succeeds in that, as understood from the factual paragraphs one through five as agreed upon, the Employer's policy described therein fails to comply with art. 20.04 requirements.

DATED this 14<sup>th</sup> day of February, 2005.



---

Tom Jolliffe

**Expedited Arbitration  
GNWT**

**Union - Sick Leave Policy**

**#03-548**

---

***Sick Leave – requirements for medical certificate***

The union filed the grievance as a result of the employer policy of requesting medical certificates from certain employees who had not used more than 9 days of uncertified sick time or who were not absent for more than 3 consecutive days. These employees, were suspected of abusing sick leave. The argument was made on the difference in language between article 20.03(a) and article 20.04 of the collective agreement.

**Decision:**

Although the articles must be read in conjunction, the employer can not “unilaterally require medical certificates to cover occasional or intermittent absenteeism outside the parameters of art.20.04”.

**Grievance Allowed  
February 14, 2005**

**Jolliffe, Tom**