

IN THE MATTER OF A GRIEVANCE ARBITRATION

BETWEEN:

GOVERNMENT OF THE NORTHWEST TERRITORIES

(the "Employer" or "GNWT")

-and-

The UNION OF NORTHERN WORKERS  
(a component of the PUBLIC SERVICE ALLIANCE OF CANADA)

(the "Union" or the "UNW")

**RE: GRIEVANCE #22-P-02917 (Covid Leave Codes)**

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**AWARD**

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Heard: June 29, 2022

Issued: December 30, 2022

Arbitrator: J. Alexander-Smith (the "Board")

Appearances:

For the Employer:

Thomas Wallwork, counsel

Julia Paille, co-counsel

Tyler Vibert, Labour Relations Advisor

Michaela Miltenberger, Superintendent Southern Region Finance, Human Resources Division,  
witness

For the Union:

Janice Maslanko, counsel

Anne Marie Thistle, Director Membership Services UNW, witness and UNW representative

## I. INTRODUCTION

- [1] This matter involves a policy grievance submitted to arbitration in May 2022 concerning the interpretation and application of the negotiated COVID-19 Leave Codes as set out at page 20/22 of the Memorandum of Settlement between the UNW and the Employer dated May 28, 2021, thereafter incorporated into the Collective Agreement between the parties expiring March 31, 2023 (the “Collective Agreement”) [Exhibit 1].
- [2] The Union asserts the Employer’s unilateral decision to terminate member access to the COVID-19 Leave Codes effective April 1, 2022 constitutes a violation of the Collective Agreement, which the Employer disputes.
- [3] This matter proceeded to a virtual arbitration hearing (the “Hearing”) in June 2022. Prior to the Hearing the Union and the Employer provided the Board with both documents and authorities, detailed below, augmented by the *viva voce* evidence of the witnesses presented to the Board and followed by counsels’ oral argument to conclude the Hearing.
- [4] Pursuant to Article 37 of the Collective Agreement, the parties accepted the composition and jurisdiction of the Board to hear and determine the merits of grievance #22-P-02917 (the “Grievance”).

## II. EXHIBITS

- [5] The additional documents submitted to the Board in connection with the Grievance were entered into the Record as Exhibits as follows:

- Exhibit 1 COLLECTIVE AGREEMENT Between The Union of Northern Workers and The Minister of Human Resources expires March 31, 2023
- Exhibit 2 Memorandum of Settlement (22 pages)
- Exhibit 3 Grievance (2 pages)
- Exhibit 4 Grievance Reply (3 pages)
- Exhibit 5 Court Services Exposure Control Plan March 31, 2022 (8 pages)
- Exhibit 6 Email string between Shane Pike and Camilla Offredi (Apr 7-June 20, 2022) (13 pages)
- Exhibit 7 Updated COVID 19 Info for Employees March 28, 2022 (24 pages)
- Exhibit 8 NTHSSA 2022-23 Guidelines on COVID-19 Leave for Frontline Staff March 28, 2022 (2 pages)
- Exhibit 9 ACRT Post-Public Health Emergency and Staff Testing and Isolation Guidance 02 May 2022 (10 pages)
- Exhibit 10 Email Kimberly Riles May 27, 2022 Re 2022-05-19 COVID Leave Guidelines\_final (002) (1 page)
- Exhibit 11 Public Health Orders

- (a) Chief Public Health Officer Travel Restrictions and Self-Isolation Protocol 03 21 2020 (121 pages)
  - (b) Chief Public Health Officer COVID – 19 Protocols 05 15, 2020 – 03 01, 2022, 2020 (177 pages)
  - (c) Public Health Order Temporary COVID-19 Restrictions 08 15 2021 (6 pages)
- Exhibit 12 COVID-19 Information for Employees March 16, 2020 (1 page)
- Exhibit 13 (a) Freq Asked Questions about COVID-19 March 30, 2020 (3 pages)
- Exhibit 13 (b) Freq Asked Questions about COVID-19 May 4, 2021 (10 pages)
- Exhibit 13 (c) Freq Asked Questions about COVID-19 July 6, 2021 (4 pages)
- Exhibit 14 GNWT Ending COVID-19 Public Health Emergency March 31, 2022 (3 pages)
- Exhibit 15 Public Health Act, Declaration of State of Public Health Emergency Orders (54 pages)

### III. AUTHORITIES

[6] For the Union:

- Tab 1 *Public Service Alliance of Canada v Treasury Board*, 2022 FPSLRB 12
- Tab 2 *\*Government of the Northwest Territories v Northwest Territories Teachers' Association (Covid Leaves and Special Leaves)* November 1, 20221 (Sims)

\*The Employer objects to the Board's consideration of this decision, discussed at para. 89 below.

[7] For the Employer:

- Tab 1 *Lumber & Sawmill Workers' Union, Local 2537 v KVP Co.*, 1965 CarswellOnt 618, [1965] O.L.A.A. No. 2, 16 L.A.C. 73
- Tab 2 *Pacific Press v G.C.I.U., Local 25-C*, 1995 CarswellBC 3177, [1995] B.C.C.A.A. No. 637, 41 C.L.A.S.488
- Tab 3 *Saskatchewan Health Authority and SEIU-West (Transcription)*, Re 2020 CarswellSask 615, 147 C.L.A.S. 4, 322 L.A.C. (4<sup>th</sup>) 185
- Tab 4 *Ontario Power Generation and Society of Energy Professional (OPGN-2010-5706/1538)*, Re 2013 CarswellOnt 17912, 117 C.L.A.S. 79
- Tab 5 *Alberta Health Services and UNA (Scheduling Changes to Hours per Shift)*, Re 2013 13 CarswellAlta 2970, [2014] A.W.L.D. 3644, [2014] A.W.L.D. 3645, [2014] A.W.L.D. 3650, [2014] A.G.A.A. No. 44, 119 C.L.A.S. 344
- Tab 6 *Swoop, Inc. and ALPA (Law)*, Re 2021 CarswellNat 2931, 149 C.L.A.S. 97

[8] For the Board:

1. Brown & Beatty, Canadian Labour Arbitration, 5th Edition, 4:2152.

#### IV. RELEVANT PROVISIONS OF THE COLLECTIVE AGREEMENT

##### ARTICLE 5 CONFLICT OF PROVISIONS

- 5.03 Where there is any conflict between the provisions of this Agreement and any employer policy, direction or other instrument dealing with terms and conditions of employment issued by the Employer, the provisions of this Agreement shall prevail.

##### ARTICLE 7 MANAGERIAL RESPONSIBILITIES

- 7.01 Except to the extent provided herein, this Agreement in no way restricts the Employer in the management and direction of the Public Service.

##### ARTICLE 19 SPECIAL LEAVE

- 19.02 For the purpose of this article, immediate family is defined as an employee's father, mother, step-parent, brother, sister, spouse, common-law spouse, child, step-child, foster child, father-in-law, mother-in-law, grandmother, grandfather, grandchild, son-in-law, daughter-in-law, brother-in-law, sister-in-law and any relative permanently residing in the employee's household or with whom the employee presently resides.

- (1) The Depute Head shall grant special leave earned with pay for a period of up to five (5) consecutive working days:
- (a) when there is a death in the employee's immediate family. The employee may be granted up to three (3) additional days special leave for the purpose of travel;
  - (b) when an employee is to be married.
- (2) The Deputy Head may grant an employee special leave with pay for a period of up to five (5) consecutive working days:
- (a)
    - (i) where a member of the **employee's** immediate family requires surgery, becomes ill (not including childbirth), **or has a disability** and the employee is required to **temporarily** care for **that family member**;
    - (ii) where a member of the immediate family becomes seriously ill.
  - (b) where special circumstances not directly attributable to the employee prevent **the employee** reporting to duty, including:
    - (i) serious household or domestic emergencies;

- (ii) a transportation problem caused by weather if the employee makes every reasonable effort to report for duty;
    - (iii) serious community emergencies, where the employee is required to render assistance;
  - (c) in circumstances which are of general value to the Public Service, such as where the employee:
    - (i) takes an examination which will improve **the employee's** position or qualifications in the Public Service;
    - (ii) attends **their** University Convocation, if **the employee** has been continuously employed for at least one (1) year;
    - (iii) attends a course in civil defence training;
    - (iv) requires a medical examination for enlistment in the Armed Forces or in connection with a veteran's treatment program.
  - (d) Such leave will not be unreasonably withheld.
- (3) The Deputy Head shall grant special leave for a period of up to three (3) days to allow an employee to attend the funeral of the employee's niece, nephew, aunt or uncle.

## ARTICLE 20

### SICK LEAVE

#### CREDITS

- 20.01 (a) An employee shall earn sick leave credits at the rate of 0.057693 hours for each hour that an employee receives pay. The time to which this applies is set out in Article 17.07.
- (b) Sick leave will be taken in hours, on the basis of the employee's regularly scheduled hours of work for the day the leave is taken.
- 20.02 All Employer approved sick leave utilized by employees shall be recorded based upon the actual sick leave time taken.
- 20.03 Unless otherwise informed by the Employer an employee must make a statement stating that because of **the employee's** illness or injury, **the employee** was unable to perform **their** duties.
- 20.04 The Employer shall only require a variation beyond the basic requirement described in 20.03, in the form of a medical certificate from a medical or nurse practitioner, where there is a demonstrated and reasonable basis for doing so.
- 20.05 Where leave of absence without pay is authorized for any reason, or an employee is laid-off because of lack of work, and the employee returns to work upon expiration of such

leave of absence or lay-off, **the employee** shall retain any unused sick leave existing at the time of lay-off or commencement of leave without pay.

- 20.06 In circumstances where sick leave would be authorized but the employee has insufficient or no sick leave credits, at the discretion of the Employer, **the employee** shall be granted sick leave in advance to a limit of fifteen (15) days, which shall be charged against future credits as earned. If the employee dies before authorized unearned sick leave has been liquidated, no recovery shall be made from the employee's estate.
- 20.07 An employee is not eligible for sick leave with pay for any period during which **the employee** is on leave of absence without pay or under suspension.
- 20.08 When an employee is granted sick leave with pay and injury-on-duty leave is subsequently approved for a concurrent period, there shall be no charge against **the employee's** sick leave credits for the period of concurrency.

[balance of Article 20 intentionally omitted]

**LETTER OF UNDERSTANDING  
BETWEEN  
THE GOVERNMENT OF THE NORTHWEST TERRITORIES  
AND  
THE UNION OF NORTHERN WORKERS**

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**In recognition of the unprecedented impact of the COVID-19 pandemic and subsequent public health orders issued by the Chief Public Health Officer of the Northwest Territories, the parties agree that COVID-19 related sick leave and special leave will no longer draw from employees' existing sick leave and special leave banks.**

**The Employer has introduced new COVID-19 paid sick leave and New COVID-19 special isolation leave codes.**

**Time previously entered as sick leave or special isolation leave due to COVID-19 will be reinstated in employee's respective leave banks.**

**V. FACTUAL BACKGROUND**

[9] Commencing in March 2020 and continuing thereafter, there is little dispute that the COVID-19 global pandemic caught many unprepared for its profound and unforeseen impacts, including the many subsequent disruptions to daily lives then visited upon us; whether individually or within our families, our workplaces, our health care systems, our communities and, indeed, upon all members of our global community. By almost all accounts, it was a fearful and uncertain time; and this virus and its many variants have not, to date, yet been eradicated.

[10] It is within this context and in response to the COVID-19 pandemic that the Government of the Northwest Territories ("GNWT") declared a State of Public Health Emergency on March 18, 2020, which was thereafter continually renewed without interruption pursuant to its *Public Health Act*, up to and including March 31, 2022.

- [11] Throughout the State of Emergency, everyone resident, visiting (where applicable), and/or operating within the GNWT, inclusive of individuals, businesses and government departments or agencies, were required to adhere to an ongoing series of Public Health Orders (also referred to as “PHOs”) issued through the office of the Chief Public Health Officer of the Northwest Territories.
- [12] The PHOs included COVID-19 travel restrictions, contact tracing, symptom identification and isolation requirements.
- [13] The Employer responded to the COVID-19 State of Emergency in a variety of ways to better secure the health and safety of both its citizens and its employees.
- [14] Importantly, the Employer unilaterally introduced for its employees specialized sick and special leave codes, outside of the established sick and special leave accruals set out in Articles 19 and 20 of the Collective Agreement. In essence, the Employer’s adoption of these COVID-19 specialized codes allowed it to track COVID-19 leaves and, more importantly, extended to its employees access to unlimited COVID-19-related paid sick and special leave in accordance with its terms and conditions.
- [15] Anne Marie Thistle is employed by the Union as its Director of Membership Services. In that role, she is involved in grievances, collective bargaining, member representation, negotiation and other essential services on behalf of the UNW and its members.
- [16] Ms. Thistle was involved in all bargaining sessions for the current Collective Agreement between the parties, expiring March 31, 2023, which included the Letter of Understanding concerning the creation of COVID-19 Sick Leave and Special Leave Codes (the “LOU”) under the Collective Agreement, as set out at page 174 thereunder.
- [17] Ms. Thistle testified that the specific contents of the LOU reflected the Union’s proposal to provide critical support and assistance for its members in response to the global COVID-19 pandemic as declared by the World Health Organization in March 2020 and as further declared via public health ordinances throughout Canada thereafter.
- [18] In the Union’s perspective, the importance of the adoption of the Sick and Special Leave Codes as later reflected in the LOU was an expression of the necessary support for the health and safety of its members impacted by COVID-19. For that reason, Ms. Thistle explained that during bargaining the Union withdrew several other proposals in order to achieve an agreement on this COVID-19 leave provision in recognition of an unprecedented global event and its impact upon employees, whether by virtue of the PHOs or Employer policies. She noted that under existing special leave provisions, employees could accrue only 6 days a year to a maximum of 30 days, which may be quickly depleted and either forcing employees into leave without pay situations in such extraordinary circumstances or, worse, generating a risk that employees sick or exposed to Covid would come to work even though sick because they could not afford a period of “leave without pay”.

- [19] Although no member of the Employer’s bargaining team was presented to testify at the Hearing regarding the creation and inclusion of the LOU within the Collective Agreement, Ms. Thistle explained during cross-examination that the content of the LOU was not a component of a “larger package” in bargaining, as the Employer had requested that they restrict themselves to a “short term Collective Agreement and a reduced package”. She further explained that as a result, a very small number of proposals were submitted and each of which was thereafter withdrawn in favour of the increases sought by the Union for enhanced COVID-19 Sick and Special Leave, which was described as a high priority for the Union.
- [20] Ms. Thistle further elaborated upon the Union efforts in bargaining for the unlimited COVID-19 Sick and Special Leave provisions, regardless of the status of any existing or new Public Health Order(s) or Employer policies. The LOU was concluded more than a year into Covid, as it continued to evolve. Having identified the health and safety needs of employees and others as a significant priority, the provisions of the LOU allowed employees to be cognizant and mindful of themselves and others in efforts to reduce the spread of COVID-19, without an accompanying financial burden.
- [21] In the Union’s view, regardless of whether the GNWT was/is shut down or opened up, so long as COVID-19 evolves and exists, COVID-19 Sick Leave and Special Leave Codes continue to apply, at the very least until the expiry of the current Collective Agreement.
- [22] According to Ms. Thistle, the Union’s proposed wording of the LOU was accepted by the Employer; without inquiry, concern, objection, restriction or amendment. The Employer accepted the proposal as written, without seeking to limit its scope in any way. Member entitlements thereunder commenced with retroactive application; meaning any COVID-19-related sick or special leave earlier “advanced” by the Employer by way of a policy initiative was reinstated into employee sick and special leave banks under Articles 19 and 20 of the Collective Agreement. Thereafter, employee COVID-19 Sick and Special Leave was a codified entitlement under the Collective Agreement and entered on time sheets accordingly.
- [23] On cross-examination, Ms. Thistle agreed that during bargaining of the LOU the parties did not discuss the specific impact, if any, in the event that the COVID-19 Public Health Orders were rescinded. However, she added that it was not necessary to have that discussion since COVID-19 still existed and the negotiated support for employees impacted by COVID-19 continued to apply, where applicable, until the expiry of the current Collective Agreement. She also acknowledged that the LOU could/would be subject to further bargaining between the parties in the future.
- [24] Ms. Michaela Miltenberger, Superintendent Southern Region Finance Human Resources Division explained the operation of the “ordinary” sick leave and special leave provisions available to employees under Articles 19 and 20 of the Collective Agreement, as well as the distinct COVID-19 Sick and Special Leave Codes under the LOU generated during the State of Emergency.
- [25] In her role, Ms. Miltenberger provided advice on the use of these codes to various government departments within the southern region as part of a Human Resources operations team.



- [26] According to Ms. Miltenberger, under Articles 19 and 20, Sick and Special Leave is earned based upon hours worked via a set formula. Those working regular hours would typically accrue fifteen (15) days of sick leave annually, which employees could accumulate without limit. Sick leave was tracked based upon time sheet entries through its Peoplesoft program. Employees were able to “advance” up to a year’s entitlement to sick leave, which could be “earned back” through hours worked thereafter.
- [27] Similarly, Special Leave under Article 20 is earned by a formula akin to Sick Leave to an upper limit of 225 hours (30 days), which could also be advanced up to a year’s accrual of six (6) days. Special Leave is available to employees for a variety of reasons, such as illness in a family, death, birth, marriage and distinguished by the use of specific time codes.
- [28] On March 16, 2020 the Employer introduced new COVID-19 Sick and Special Leave Codes which initially drew on employees’ Sick and Special Leave banks. Once PHOs were introduced, particularly those concerning self-isolation requirements for those unable to work from home, these new codes were available to staff without “caps”, thereby avoiding employees having to take a “leave without pay” when complying with particular Public Health Orders.
- [29] Throughout the COVID-19 Public Health Emergency, the GNWT updated its “My HR” Website and encouraged employees to access this resource as it provided Human Resource related information regarding COVID-19 protocols in accessing COVID-19 Sick and Special Leave for themselves and when required to attend to affected family members.
- [30] Prior to the ratification of the Collective Agreement, Ms. Miltenberger explained that employees were still drawing on Sick and Special Leave banks under Articles 19 and 20, but once the LOU was ratified under the Memorandum of Settlement May 28, 2021, which established unlimited COVID Sick and Special Leave benefits, its provisions were applied retroactively to the beginning of the COVID-19 Pandemic. All regular Sick and Special Leave banks used or advanced were reinstated as necessary.
- [31] On March 31, 2022 the GNWT announced an end to the COVID-19 Public Health Emergency and the lifting of all associated PHOs effective Friday, April 1, 2022 at 12:00 a.m. Thereafter, the effect of the Public Health Orders were transitioned from legally binding measures to “recommendations” in recognition that “...the end of the Public Health Emergency does not mean the end of COVID-19” [Exhibit 15, page 2]
- [32] Ms. Miltenberger testified that the COVID-19 Sick and Special Leave Codes were eliminated once the Public Health Orders were rescinded. Thereafter, employees requiring Sick or Special Leave as a result of COVID-19 were restricted to their entitlements under their regular Sick and Special Leave banks under Articles 19 and 20 of the Collective Agreement. She also pointed out that self-isolation leave under the LOU was no longer necessary in any event as employees were no longer legally obliged to self-isolate due to COVID-19.

[33] Once the PHOs were no longer in effect, Ms. Miltenberger acknowledged that her departments received questions from employees regarding their ability to access the COVID-19 Sick and Special Leave provisions in the LOU. She described the typical response to such inquiries as follows:

*...it's tied to the Public Health Orders and people are no longer required to self-isolate or stay home if they have COVID anymore.*

[34] At this time the GNWT also introduced a *Court Services Exposure Control Plan – March 31, 2022* (the “Court Services Plan”). Its purpose was described as follows:

*The safety and well-being of the judiciary, Court Services staff and all court participants, is of paramount importance. This plan is designed to ensure that all NWT Courts facility users are protected, and the procedures, policies and environmental controls put into place to prevent and reduce the transmission of COVID-19 are effective pursuant to s. 88 of the Occupational Health and Safety Regulations. [Exhibit 5]*

[35] The Court Services Plan specifically identified the Omicron variant of COVID-19 as “more highly transmissible than earlier strains” and further identified the risk of transmission in the workplace as primarily through direct contact, indirect contact and airborne transmission. It required “Staff who are sick or who are required to isolate are to stay home” and those “...who have tested positive for Covid-19 are to isolate or work from home immediately and not present themselves to the workplace”. [Exhibit 5, pages 6 and 7 of 8]

[36] It is evident that under the Employer’s Court Services Plan, employees were required to isolate or work from home if possible notwithstanding the rescission of the Public Health Orders.

[37] In response to the Employer’s unilateral decision to eliminate the COVID-19 Sick and Special Leave Codes effective April 1, 2022, the Union filed the Grievance on April 7, 2022 which is now before the Board, asserting:

*The Union alleges that the employer is in violation of the Collective Agreement and letter of understanding concerning COVID-19 Sick and Special Leave codes.*

*The Employer has unilaterally taken away this entitlement that has been negotiated into the Collective Agreement and LOU.*

[Exhibit 3]

[38] The Employer denied the Grievance on the following basis:

*As employees are no longer required to isolate when exposed to COVID (the rationale for granting COVID leave in the first place), all leave related to COVID-19 will be treated the same as any other illness going forward. In other words, employees will be required to access leave from their existing sick and special leave banks if they are sick with COVID as they would with any other illness (e.g. common cold, influenza, cancer treatment, etc.).*

*Furthermore, as the exposure plans related to COVID-19 will no longer be required, GNWT departments will revert back to the workplace health and safety policies and procedures they had in place prior to the public health emergency. [Exhibit 4, page 2]*

- [39] In May 2022, the Employer introduced a new Covid-19 Leave policy, in the absence of any Public Health Orders, entitled “Northwest Territories Health and Social Services Authority 2022-23 Guidelines on Covid-19 Leave for Front Line Staff”. This policy provided certain employees with new Covid-19 leave codes referred to as **LCVS-Front Line Hlth Care EE Use** for up to five (5) days paid leave (non-refillable) during the 2022-2023 fiscal year, on the following basis:

*Due to the unique work environment of the Authority, the NTHSSA continues to have workplace entry procedures and restrictions in place for staff related to COVID-19. These procedures include staff testing and isolating guidance that may include restrictions from entering the workplace – dependent on COVID-19 test results and symptoms. [Exhibit 8]*

## **VI. SUBMISSIONS OF THE PARTIES**

### **The Union**

- [40] It is the Union’s position that the Employer is in violation of the Collective Agreement by virtue of its unilateral decision to eliminate the duly negotiated COVID-19 Sick and Special Leave Codes available to all members of the bargaining unit impacted by COVID-19 (and not merely impacted by Covid restrictions instituted by the GNWT to combat COVID-19) as of April 1, 2022, thereby amending the Collective Agreement rather than respecting it.
- [41] It further submits that the Employer’s later introduction of the NTHSSA Policy for Front Line Staff, allowing some members of the bargaining unit up to five (5) days paid Covid-related leave in certain circumstances during the 2022-2023 fiscal year, is itself in conflict with the Collective Agreement and pursuant to Article 5.03 thereof, the Collective Agreement must prevail.
- [42] The Union argued that the scope of the NTHSSA Policy is unreasonable in any event as it only recognizes front line health care workers who are unable to work remotely, yet ignores front line correctional officers and ferry workers in analogous circumstances.
- [43] The Union submits that the negotiated COVID-19 Sick and Special Leave Codes set out in the LOU are independent of the regular and very specific wording of sick and special leave accruals under Articles 19 and 20, each of which are part of the Collective Agreement and outside of the Employer’s authority to unilaterally rescind employee access to the COVID-19 Codes during the currency of the Collective Agreement through the unilateral introduction of a workplace policy or rule. Counsel submits that the Board must apply the conflict provisions set out in Article 5.03 of the Collective Agreement and allow the Grievance because the bargained provisions of the LOU must prevail.
- [44] The Union further submits that in interpreting the LOU, the Board must give effect to its plain meaning which provides specific assistance to all eligible members who are impacted by COVID-19, regardless of the introduction or elimination of subsequent Public Health Orders. The Union argued that the Board must provide its members with the bargained entitlements under the

Collective Agreement, which include both regular Sick and Special Leave under Articles 19 and 20 **and** COVID-19 Sick and Special Leave under the LOU. To deny members access to the COVID-19 Codes, the Union submits is both unreasonable and a violation of the Collective Agreement.

- [45] The Union seeks a declaration that the Employer is in violation of the Collective Agreement and by way of remedy seeks that its members be made whole for any losses reasonably established by the Employer's elimination of the COVID-19 Codes and an order reinstating members' access to the COVID-19 Codes through the currency of the Collective Agreement.
- [46] The Union further submits that the Employer wilfully ignored the agreed wording of the LOU despite signing off on the Memorandum of Settlement on May 28, 2021 and which was thereafter ratified under the Collective Agreement. As a result, the Union seeks an award of damages should the Board conclude that the Employer acted in bad faith in so doing.
- [47] In support of its position, the Union relies on the authorities set out at para. 5 above.

### **The Employer**

- [48] It is the Employer's position that it was the State of Emergency declared in the Northwest Territories on March 18, 2020 and continuing thereafter until March 31, 2022, owing to the COVID-19 Pandemic **and** the subsequent series of Public Health Orders in place during this period as detailed at Exhibit 15, that triggered an entitlement to the COVID-19 Codes for eligible employees, and not otherwise.
- [49] Counsel pointed out that it was the PHOs that created the legal obligation to adhere to all PHOs introduced under the *Public Health Act* in the NWT, including the obligation to self-isolate in a number of circumstances, as follows:
- (i) Residents who had travelled outside of the NWT or who shared accommodations with travellers from outside NWT [Exhibit 11(a)];
  - (ii) Individuals who displayed symptoms of COVID-19, tested positive for COVID-19 or had an identified contact with a known COVID-19 case [Exhibit 11(b)];
  - (iii) Unvaccinated or partially vaccinated individuals within two (2) identified communities in early August 2021 [Exhibit 11(c)].
- [50] Employees who were required to self-isolate who could work from home were not required to take sick leave. Rather, it was only those employees either too ill to work from home or who could not work from home during a self-isolation period who were initially forced to access the regular Sick and Special Leave banks under Articles 19 and 20 of the Collective Agreement. Counsel submitted that these provisions were not unlimited, unlike the COVID-19 Codes under the LOU.
- [51] Counsel argued that because the regular Sick and Special Leave provisions proved inadequate to manage the demands upon employees who could not work from home and were either forced to self-isolate or who themselves became ill with COVID-19 in response, the Employer temporarily lifted the caps set out in Articles 19 and 20 in order to permit affected employees to comply with the PHOs without interruption in pay. It was in that context that the Employer submits the LOU

was negotiated and the Memorandum of Settlement was executed on May 28, 2021; subsequently ratified and incorporated into the current Collective Agreement.

[52] Counsel urged the Board to reject the Union's argument that the rescission of all PHOs effective April 1, 2022 had no impact upon members' entitlements to access the COVID-19 Codes because it ignores the context in which the LOU was created. Counsel submits that the wording of the LOU was only agreed to because of the existence of the various PHOs issued by the Chief Public Health Officer.

[53] Counsel also submits that the purpose, animation and maintenance of the COVID-19 Codes is exhausted in the absence of Public Health Orders and that the only reasonable interpretation of the LOU is that it is of no force and effect as of April 1, 2022.

[54] It is the Employer's position that its unilateral policy of requiring employees to be directly or indirectly affected by a PHO in order to be eligible for COVID-19 Leave Codes satisfy the essential elements set out in the *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co. Ltd.*, supra:

- : the Employer's rule is reasonable;
- : is not inconsistent with the Collective Agreement; and,
- : the rule is clear, unequivocal and brought to the attention of all GNWT employees.

[55] The Employer argued that from May 2021 onwards, through its Frequently Asked Questions (FAQ) page posted on its websites, it provided a consistent and updated resource tool in advising employees who were subject to self-isolation of an ability to access the self-isolation rules and benefits.

[56] It is the Employer's position that recurrent postings to its FAQ page thereby constituted sufficient notice to employees that in order to access the COVID-19 Codes, that somebody in a household had to be affected by a PHO. The Board was further urged to consider that in the absence of a requirement of a PHO requiring self-isolation, that component of the COVID-19 Codes is meaningless.

[57] In interpreting the LOU, Counsel argued that the Board was obliged to apply well-established rules of interpretation in order to ascertain the mutual intentions of the parties as summarized in *Pacific Press*, supra.

[58] It is the Employer's submission that the Board must consider that a fundamental component of the bargain between the Employer and its employees is that employees will perform labour in exchange for compensation from the Employer. It is on this basis that there are limits to the Sick Leave and Special Leave provisions under Articles 19 and 20 of the Collective Agreement. In addition, it submits that the parties negotiated a mechanism for non-culpable termination under Article 32.06 in the event an employee is unable to fulfill his or her responsibilities owing to long-term illness in exchange for a severance payment.

[59] The Board is urged to give effect to both required components necessary to trigger an entitlement to COVID-19 Sick and Special Leave under the LOU as captured in its opening words: "*In recognition of the unprecedented impact of the COVID-19 pandemic and subsequent public health orders issued by the Chief Public Health Officer...*" [emphasis added by the Board]. As such,

counsel argued that without any Public Health Orders in place, the rationale for the extraordinary and unprecedented exceptions to Articles 19 and 20 disappear. To hold otherwise, the Board would thereby violate an interpretative presumption.

[60] Counsel pointed out that the Collective Agreement contains two (2) other Memorandum of Understanding that address entitlements during the pandemic to respond to decreases in the Northern Allowance rates and Vacation Carry Over Provisions, neither of which make any reference to Public Health Orders and specify the durations of these provisions (“for the life of this agreement” and “liquidation in June, 2023” respectively). Accordingly, if the parties intended that the COVID-19 Codes would continue to the expiry of the Collective Agreement, they would have explicitly inserted such a provision in the LOU.

[61] It is the Employer’s position that applying long-established rules of interpretation to the LOU and having distinguished the Union’s authorities, it submits that the Grievance must be dismissed as it would otherwise establish an absurd two-tier Sick and Special Leave under the Collective Agreement.

### **Union Reply**

[62] The Union disputes the Employer’s inference of the intention of the parties in selecting the specific wording of the LOU in light of the absence of evidence before the Board speaking to the Employer’s intentions, other than its decision in simply accept the Union’s proposal for the COVID-19 Codes without comment. Nor was any evidence presented to establish the context in which the other two LOUs referenced in the Employer’s submissions were bargained.

[63] The Union argued that the COVID-19 Codes respond to the “unprecedented impact of the Covid 19 Pandemic”, even in the absence of Public Health Orders. The Union submits that the Employer’s position is inconsistent given that it re-introduced other COVID-19 Codes for some front line workers in the absence of PHOs, which yields an absurd result and violates the Collective Agreement itself.

## **VII. ANALYSIS AND DECISION**

[64] In determining the merits of this Grievance, I have carefully considered the documentary evidence entered as Exhibits and the *viva voce* evidence of the witnesses presented at the Hearing. In addition, I have considered the submissions of counsel as well as the authorities upon which counsel relied, which will be addressed below in due course.

[65] While I accept that in interpreting the LOU concerning COVID-19 Sick and Special Leave Codes in issue the Board is tasked with determining the mutual intentions of the parties as expressed in the LOU, whether through the evidence of relevant witnesses and/or through interpretative tools, where necessary.

[66] Of the two parties before the Board, only the Union presented evidence through a member of its bargaining team involved in the negotiation of this LOU, that being Anne Marie Thistle. Ms. Thistle testified at length about the Union’s priorities in obtaining enhanced COVID-19 Sick and Special Leave Codes for its members in response to the global COVID-19 pandemic, without particular

reference to the existence of Public Health Orders. Ms. Thistle's evidence was not diminished or undermined through cross-examination.

[67] I accept Ms. Thistle's uncontradicted evidence as to the Union's intentions and rationale in pursuing enhanced Covid Sick and Special Leave Codes to protect its members amidst the COVID-19 Pandemic, as follows:

- She was present at all bargaining sessions for the current Collective Agreement.
- Although she did not draft the Memorandum of Settlement ("MOS"), she was amongst those who were tasked with reviewing the MOS for editing purposes.
- The parties involved in the negotiation of the Collective Agreement were experienced and sophisticated and well understood the importance of the words used in ascertaining the parties' intentions where necessary.
- The Union's proposed LOU was drafted in response to the impact of the pandemic upon employees and members of their families and members of the public.
- It was a priority for the Union to obtain enhanced Covid-related leave benefits separate and apart from the regular Sick and Special Leave accruals under Articles 19 and 20, in part in awareness that if members had to draw on their own banks or have to take leave without pay, it may force employees to go to work sick and expose others to COVID-19.
- Restrictions and/or limits under the LOU were not discussed.
- The Union tabled the wording of the LOU which was accepted by the Employer without comment, inquiry, limit or amendment.
- In tabling the wording of the LOU, the Union withdrew other proposals, in order to obtain the greater benefits and protections under this LOU solely related to COVID-19 for its members. One such proposal advanced by the Union replicated the language of the "699 Leave" provisions adopted in *Public Service Alliance of Canada*, supra, and later abandoned in favour of the wording of the LOU.
- Public Health Orders also responded to the COVID-19 Pandemic.
- COVID-19 persisted in the absence of Public Health Orders.
- Subsequent to the rescission of COVID-19 related PHOs, the Employer introduced additional Policy Guidelines for the NTHSSA staff which included the introduction of 5 paid days of 'covid leave' in limited circumstances for the 2022-2023 fiscal year; and additional Guidelines for Courthouse staff which also included isolation requirements but without additional COVID-19 related benefits.
- There are no temporal and/or volume limits to the negotiated benefits under the LOU.

[68] Conversely, the Employer did not present direct evidence of the Employer's position during the bargaining of the COVID-19 Sick and Special Leave provisions. Rather, the Board was presented with Ms. Miltenberger's interpretation of the operation of the LOU during the continuation of the Public Health Orders, and the Employer's subsequent unilateral elimination of employee access to the benefits under the LOU once the PHOs were rescinded; which of course is the issue in this Grievance.

[69] Although the Employer submitted in argument that the wording of the LOU was only agreed to because of the existence of the various PHOs issued by the Chief Public Health Officer, I am unable to accept the Employer's argument in lieu of evidence to support its argument and decline to apply an inference of the Employer's intention in such circumstances. Similarly, I am unable to accept the Employer's argument that "the animating reason" behind the LOU from the Employer's perspective was that it was intended to apply only while the State of Emergency continued or the Public Health Orders were in effect in the absence of evidence of the Employer's intentions.

[70] Accordingly, the Board is left to interpret the agreed wording of the LOU in determining the outcome of this Grievance.

### **The Wording of the LOU**

[71] For the sake of convenience, the LOU is set out below:

*In recognition of the unprecedented impact of the COVID-19 pandemic and subsequent public health orders issued by the Chief Public Health Officer of the Northwest Territories, the parties agree that COVID-19 related sick leave and special will no longer draw from employees' existing sick leave and special leave banks.*

*The Employer has introduced new COVID-19 paid sick leave and New COVID-19 special isolation leave codes.*

*Time previously entered as sick leave or special isolation leave due to COVID-19 will be reinstated in the employees' respective leave banks.*

[72] This Board's task is to construe the Letter of Understanding executed on May 28, 2021, having regard to the words chosen and agreed to by the parties to express the bargaining reached between them on the subject of employee access to the COVID-19 Sick and Special Leave Codes set out therein.

[73] A number of recognized rules of construction are to be applied as aids in construing an agreement where necessary were helpfully summarized by Arbitrator Bird in *Pacific Press* [1995] B.C.C.A.A.A. No. 637 as cited by Arbitrator McPhillips in *Crown Packaging v Communications, Energy and Paperworkers Union of Canada, Local 433*, *supra* para.24, among them:

1. The object of interpretation is to discover the mutual intention of the parties.
2. The primary resource for an interpretation is the collective agreement.
3. Extrinsic evidence (evidence outside of the official record of agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention.
4. Extrinsic evidence may clarify but not contradict a collective agreement.
5. A very important promise is likely to be clearly and unequivocally expressed.
6. In construing two provisions a harmonious interpretation is preferred rather than one which places them in conflict.
7. All clauses and words in a collective agreement should be given meaning, if possible.
8. Where an agreement uses different works(sic) or presumes that the parties intended different meanings.
9. Ordinarily words in a collective agreement should be given their plain meaning.
10. Parties are presumed to know about relevant jurisprudence.

[74] The parties are at odds as to the impact of the words "and subsequent public health orders" upon employee access to the new COVID-19 Sick and Special Leave Codes. The Union submits that employee access to the new codes under the LOU continues while COVID-19 persists even in the absence of Public Health Orders, at the very least until the expiry of the Collective Agreement. The Employer submits that the LOU is superfluous in the absence of a declared Public Health Emergency or in the absence of applicable Public Health Orders.



- [75] The Employer argued that both elements (the continuation of the COVID-19 pandemic **and** the existence of subsequent Covid-related public health orders) need to be met in order to trigger employee access to the Covid-19 Sick and Special Leave Codes.
- [76] In essence, the Employer submits that in interpreting the LOU, the Board must apply a normal conjunctive meaning to the word “and” in the absence of a context which requires a contrary interpretation [see: Brown & Beatty, *Canadian Labour Arbitration*, 5<sup>th</sup> Edition, 4:2152].
- [77] The Union submits that the language of the LOU does not support the Employer’s interpretation of the LOU; most particularly it submits that the reference to “and subsequent public health orders” cannot reasonably be interpreted as the “existence of public health orders” as a mandatory prerequisite to employee access to the new COVID-19 Sick and Special Leave Codes.
- [78] Rather, the Union seeks to persuade the Board that the only reasonable interpretation of the LOU is that employee access to these new Codes is triggered by being impacted by COVID 19, whether through access to its Sick Leave provisions or through a requirement to either isolate or remain out of the workplace, whether under pursuant to a public health order or an Employer policy, such as the Guidelines imposed post-PHOs upon some front line workers, in this case front line workers of the NTHSSA, but not upon front line correctional officers, and the Guidelines imposed under the Court Services Exposure Control Plan, but without the additional benefits provided to NTHSSA front line workers, such as they are.
- [79] I am persuaded that based upon the plain and ordinary meaning of the words used in the LOU, this Grievance must succeed.
- [80] In the first place, the reference to “and subsequent public health orders” in the Board’s view does not reasonably translate into a mandatory prerequisite that there must be public health order(s) in effect in order for members who are impacted by COVID-19 to access the new Covid Leave Codes set out in the LOU. That is not the bargain negotiated by these sophisticated parties as set out in the LOU. These provisions apply not just in the event of a need to isolate under the Special Leave Codes, but include Covid Sick Leave benefits for members themselves.
- [81] The Board is also persuaded that the plain meaning of the words used in the LOU do not reasonably translate into the extinguishment of all rights under the LOU as a result of the rescission of COVID-related Public Health Orders.
- [82] The words set out in the LOU provide, in part:

*...the parties agree that COVID-19 related sick leave and special **will no longer draw from employees’ existing sick leave and special leave banks.***

*The Employer has introduced new COVID-19 paid sick leave and New COVID-19 special isolation leave codes.*

***Time previously entered as sick leave or special isolation leave due to COVID-19 will be reinstated in the employees’ respective leave banks.***

[emphasis added by the Board]


- [83] In the Board's view, the plain meaning of these words do not support the Employer's position that access to and the continuation of the Covid-19 Sick and Special Leave Codes set out in the LOU are predicated upon the existence of PHOs. There are no such limiting words expressed in the LOU. Based upon the evidence before the Board, in order to reach either conclusion would constitute an amendment of the LOU, which the Board is expressly prohibited from doing pursuant to Article 37.22 of the Collective Agreement.
- [84] The Board is persuaded that the entitlement to the new COVID-19 Sick and Special Leave Codes constitute negotiated benefits during the currency of the Collective Agreement applicable to all members of the bargaining who are impacted by the COVID-19 pandemic once the terms of the LOU are met. These provisions prevail over employer rules or policy which are in conflict pursuant to Article 5.03 of the Collective Agreement.
- [85] The Board is persuaded that this interpretation of the LOU reflects the intentions of the parties based upon the evidence before the Board.
- [86] In reaching this conclusion the Board is unable to conclude that the wording of the two additional LOUs which reference COVID-19 in the Collective Agreement are properly considered in connection with this Grievance. No evidence was introduced to inform the Board of the circumstances in which these other LOUs were negotiated or why they may or may not be relevant to determine the outcome of this Grievance.

## **DECISION**

- [87] For all of these reasons, the Grievance is allowed. The Board declares that the COVID-19 Sick and Special Leave provisions set out in the LOU remain in effect throughout the currency of this Collective Agreement. The Board directs that affected employees be made whole for those benefits to which they are entitled under the LOU.
- [88] In terms of the remedies sought by the Union, the Board is persuaded that the evidence presented during the course of the Hearing fails to establish that the Employer engaged in acts of bad faith in asserting its interpretation of the LOU and therefore declines to impose a damage award as a result.
- [89] For the reasons set out above, the Board's decision in allowing the Grievance was reached independently of a consideration of Arbitrator Sim's Award in *Government of the Northwest Territories v. Northwest Territories Teachers' Association*, dated November 1, 2022. However, the Board, being presumed to know relevant jurisprudence, has indeed reviewed this award for its relevance; although it did not influence the substantive outcome of its decision-making process. Rather, a consideration of Arbitrator Sim's decision was merely consistent with this Board's decision. While the Board heard argument as to the Employer's objections to such a consideration, the Board is persuaded that in terms of arbitral authorities and relevant court decisions, it is not confined to those authorities presented by the parties in determining the outcome of a grievance.

[90] The Board will remain seized of its jurisdiction without temporal limits should the parties require assistance or clarification in the implementation of the Award.

Dated this 30<sup>th</sup> day of December, 2022.



J. Alexander-Smith  
Arbitrator