Date: 20160517

Files: 566-02-5253, 5255, 5257, 5266, 5268, 5269, 5271 and 5273

Citation: 2016 PSLREB 42

Public Service Labour Relations Act Before an adjudicator

BETWEEN

ROBIN WALLACE CAMPBELL, STEVE DOBSON, BRIAN DUBOIS, TANYA HOPKINS, PAM MURCHISON, JAMIE PARIS, TERRY QUILTY

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Campbell v. Treasury Board (Correctional Service of Canada)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: William H. Kydd, adjudicator

For the Grievor: Arianne Bouchard and André Legault, counsel, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN) Atlantic Region

For the Employer: Christine Langill, counsel

Heard at Moncton, New Brunswick,
June 24 to 26, 2014.

I. Individual grievances referred to adjudication

[1] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the Board") to replace the former Public Service Labour Relations Board ("the former Board") as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 396 of the *Economic Action Plan 2013 Act, No. 2*, an adjudicator seized of a grievance before November 1, 2014, continues to exercise the powers set out in the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") as that Act read immediately before that day.

[2] This adjudication arose out of a number of grievances filed between November 1, 2010, and November 17, 2010, by 15 correctional officers employed at the Springhill Institution, in Springhill, Nova Scotia, alleging that the Treasury Board (Correctional Services of Canada) ("the employer") breached the collective agreement by requiring them to provide medical certificates every time they requested sick leave. The grievors, listed by name in paragraph 5, allege that that breach violated clause 31.03 of the collective agreement between the Treasury Board and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("the bargaining agent"), which expired on May 31, 2010 ("the collective agreement").

[3] Clause 31.03 must be read in conjunction with clause 31.02. Those provisions read as follows:

> *31.02 An employee shall be granted sick leave with pay when he or she is unable to perform his or her duties because of illness or injury provided that:*
>
> > *a. he or she satisfies the Employer of this condition in such a manner and at such time as may be determined by the Employer,*
> >
> > *and*
> >
> > *b. he or she has the necessary sick leave credits.*
>
> *31.03 A statement signed by the employee stating that because of illness or injury he or she was unable to perform*

> *his or her duties, shall, when delivered to the Employer, be considered as meeting the requirements of paragraph 31.02(*a*). However, the Employer may ask for a medical certificate from an employee, when the Employer has observed a pattern in the sick leave usage.*

[4] The employer took the position that a pattern in the sick leave usage of each grievor had been observed and that therefore it was justified requiring medical certificates from them when such leave was requested.

[5] The grievances at issue were assigned file numbers at the former Board, and the correctional officer who filed each grievance along with its filing date and its file number are as follows:

- Gregory Henwood, November 1, 2010, File 566-02-5261
- Charmaine Chase, November 2, 2010, File 566-02-5254
- Brian Dubois, November 6, 2010, File 566-02-5257
- Jamie McIsaac, November 6, 2010, File 566-02-5264
- Pam Murchison, November 8, 2010, File 566-02-5266, November 12, 2010, File 566-02-5273, and November 13, 2010, File 566-02-5256 (with Steve Dobson)
- Sean Harrison, November 10, 2010, File 566-02-5272
- Steve Dobson, November 12, 2010, File 566-02-5255, and November 13, 2010, File 566-02-5256 (with Pam Murchison)
- Marvin Murray, November 12, 2010, File 566-02-5267
- Terry Quilty, November 12, 2010, File 566-02-5268
- Jamie Paris, November 12, 2010, File 566-02-5269
- Tanya Hopkins, November 12, 2010, File 566-02-5271
- Robin Campbell, November 13, 2010, File 566-02-5253
- Simon MacKey, November 13, 2010, File 566-02-5263
- Robert Henderson, November 15, 2010, File 566-02-5258
- Deborah Miller, November 17, 2010, File 566-02-5265

[6] During a pre-hearing teleconference on June 13, 2014, the employer asked the bargaining agent to confirm that the grievances filed by Ms. Hopkins and Ms. Chase

were moot because the employer had advised them that they were not required to file medical certificates. The bargaining agent responded that there was still a live issue relating to those two grievors as they had pay deducted when they took sick leave without providing medical certificates. The bargaining agent advised that the amounts being claimed would be included in an agreed statement of facts. It advised that none of the grievors would be giving evidence and that it would rely upon the agreed statement of facts.

[7] The bargaining agent also advised at the teleconference that it was withdrawing three grievances. In fact, before the hearing, Ms. Chase's grievance was withdrawn, as were the joint grievances of Mr. Dobson and Ms. Murchison and the grievances of Mr. Henwood, Mr. MacKey, Mr. McIsaac, Ms. Miller, Mr. Murray, and Mr. Harrison. As a result, at the start of the hearing, the remaining grievances to be adjudicated were those of Mr. Dobson, Ms. Murchison, Mr. Dubois, Mr. Quilty, Mr. Paris, Ms. Hopkins, and Mr. Campbell.

II. Preliminary matters

[8] At the start of the hearing, the bargaining agent advised that it would call Mr. Campbell as its only witness. No agreed statement of facts was adduced. It was understood by all parties that the evidence adduced and arguments heard pertained only to Mr. Campbell's grievance.

[9] The employer advised that in 2012, it removed Mr. Campbell's obligation to file medical certificates and asked that I rule on whether his grievance was therefore moot. In reply, the bargaining agent submitted that the outstanding issue remained of compensation for deductions from Mr. Campbell's pay when he took sick leave without having a medical certificate.

[10] The employer also raised and asked for a ruling on an issue of timeliness. It submitted that the evidence would show that on December 1, 2009, Mr. Campbell was advised by email that he was required to have all future sick leave certified by a medical practitioner and that on October 15, 2010, he was advised that the sick leave that he took on September 19, 2010, would be recovered from his pay as "unauthorized leave without pay", which he did not grieve until November 13, 2010.

[11] Clause 20.10 of the collective agreement reads as follows:

> *An employee may present a grievance to the First (1st) Level of the procedure in the manner prescribed in clause 20.05 not later than the twenty-fifth (25th) day after the date on which he or she is notified orally or in writing or on which he or she first becomes aware of the action or circumstances giving rise to the grievance.*

[12] The employer submitted that Mr. Campbell should have filed his grievance within 25 days after December 1, 2009.

[13] I ruled that I would address the issues of mootness and timeliness in my decision after I had heard all the evidence.

III. Summary of the evidence

[14] At the hearing, I heard the testimonies of Mr. Campbell; Jeff Earle, the warden of Springhill Institution; and Judy Amos, its assistant warden of operations.

[15] Mr. Campbell has frequently suffered from asthma attacks. He commenced working as a correctional officer in August 2001 in British Columbia and while working there had an asthma attack that required hospitalization.

[16] In August 2008, he was transferred to Springhill Institution, where he was employed as a CX-02 correctional officer.

[17] In October 2008, Mr. Campbell was hospitalized after a severe asthma attack and was off work for one month after his discharge from hospital.

[18] In February 2009, Mr. Campbell slipped on ice and injured his knee, resulting in him being off work and receiving workers compensation for approximately nine months. When he returned to work, the Workers' Compensation Board assessed that he had 3% permanent impairment of his left knee. Since then, he has experienced fairly constant pain, which flares up in damp weather. He missed time in September and October until the Workers' Compensation Board cleared him to return to work on October 13, 2009.

[19] Mr. Campbell also suffered from sleep apnea, which was treated by surgery on his sinuses, the last occurring during 2009 or 2010. Complications from the surgery cost him to lose probably another two weeks of work. He continues to have periodic asthma attacks, which, along with flare-ups of knee pain, cause him to miss work.

[20] Correctional officers at Springhill Institution are entitled to 15 days per year of sick leave. If they exhaust them, they can be granted an additional two days. Their sick leave is cumulative. In addition, the collective agreement states that an employee can "borrow" up to 200 hours of sick leave.

[21] On September 14, 2009, Mr. Earle, as warden, sent the following memo to all Springhill Institution staff:

> *Subject: Attendance Management*
>
> 1. *The management of workplace attendance is an important aspect of supervision in the workplace. All managers are responsible for the detailed, ongoing monitoring and analysis of attendance of their respective employees.*
>
> 2. *Effective supervisory efforts to manage attendance will not only reduce our direct and indirect cost, but will increase operational efficiencies and programs, enhanced [sic] staff morale in the workplace and create a healthy, safe and secure environment where employees attend work regularly as scheduled. The Attendance Awareness Program is also designed to encourage consistency and fairness throughout the institution in effectively managing the attendance of all employees. More details regarding the objective responsibilities associated with the Attendance Awareness Program at the Springhill Institution are outlined in Standing Order 066….*
>
> 3. *Employees are also responsible for the management of their leave balances. If you are not already doing so, I suggest that you regularly review and monitor your leave status report in HRMS. This information will provide you with monthly and annual entitlements, ensure ongoing accuracy, and allow you to plan accordingly.*
>
> 4. *For employees who are in a challenging leave balance situation (i.e. currently have a negative balance), your supervisor/manager will be scheduling a meeting with you over the coming weeks to discuss this matter with you.*
>
> 5. *Please take some time to review your leave status and prepare for this session.*
>
> 6. *Your cooperation and anticipated attention to this matter is [sic] appreciated.*

[22] The evidence indicates that, on the balance of probabilities, Mr. Campbell

received that memo. However, he had no idea what his sick leave balance was at the time. He tried to look it up but he did not have access to that information until 2012. He could not remember meeting with his supervisor or manager about his sick leave balance at the time.

[23] "Standing Order 066" was attached to the September 14, 2009, memo. There appears to have been no change to the language with respect to the "Attendance Awareness Program" since July 2008. That portion contains the following provision:

> *All managers are responsible for the detailed, ongoing monitoring and analysis of attendance of their respective employees.*
>
> *Managers are to regularly review leave records taking particular care to note any cumulative amounts, unusual duration, apparent excessive frequency and any significant history of pattern usage, which in their judgment is unusual.*
>
> *Where concern over the usage of leave exists, intervention by the manager shall be made at the earliest opportunity.*
>
> *Possible consequences of absenteeism include but are not limited to:*
>
> - *Discussion with management on the cause of absenteeism;*
> - *Documentation on leave file of the employee;*
> - *Inclusion of performance deficiency in the evaluation reports/reference checks;*
> - *Requirement for medical certificates for future absences;*
> - *Follow-up program by supervisor/manager;*
> - *Restriction by management for activities requiring dependability;*
> - *Restriction by management on exchange of shifts or overtime;*
> - *Refusal of advancement of sick leave privilege;*
> - *Low sick leave credits when an employee actually injures himself/herself or is ill and the sick leave credits are not sufficient to cover the absence with pay;*
> - *Referral to Health Canada for an assessment on fitness to*

> *perform duties;*
>
> - *Performance related corrective action, due to excessive absence;*
>
> - *Dismissal for incapacity to perform the duties of the position.*
>
> *Managers need to ensure that they have made their expectations known to their staff and that sufficient time has been allowed to properly assess if the employee(s) corresponding [sic] to those expectations.*

[24] Standing Order 66 describes the Attendance Awareness Program. Mr. Earle directed the establishment of an Attendance Awareness Management Committee to provide oversight to the program, which was composed of senior managers, who reported directly to him, and other managers, who had cases to present. The committee was to ensure that there was consistency in how the program was implemented. The plan was to meet every couple of weeks, but this did not happen as the fall of 2009 was much busier than usual, and included three bomb scares and some cases of H1N1 virus. Both resulted in labour action.

[25] Mr. Earle could not speak to individual cases but generally, the committee looked for patterns such as officers using multiple leaves to extend vacation time. One of the things the committee observed was that on sunny days and on Fridays, Saturdays, and Sundays, overtime increased.

[26] Mr. Earle testified that while it was not policy, it was a suggested good practice for managers to first interview employees before imposing the mandatory requirement that all employees' sick leave be certified. He could not speak to individual cases and could not say in all cases that a manager would meet with an employee before placing him or her on the Attendance Awareness Program.

[27] A Correctional Service of Canada bulletin dated November 2006 contained a similar direction, which read as follows:

> **<u>Management may request medical certification</u>**
>
> *Prior to granting sick leave, with or without pay, the employee's manager must be satisfied that the employee was unable to work due to an injury or illness (31.02 (a)). In accordance with clause 31.03, a manager may request that employees submit a medical certificate from a medical*

> *practitioner when the employer has observed a pattern in the sick leave usage. In any instance, in which an employee has an established pattern of illness the employer has the right to request a medical certificate.*
>
> *A pattern can be defined further to a review of sick leave records, taking particular care to note the cumulative amounts, unusual duration, apparent excessive frequency and any co-relation [sic] between the usage and behaviour over time, which appears to be unusual.*
>
> [Emphasis in the original]

[28] When Mr. Earle sent the memo on September 14, 2009, approximately 17 correctional officers had negative leave balances. The excessive use of sick leave commonly resulted in correctional officers having none available when catastrophic medical problems arose. As an example, just two weeks before the hearing, a staff member had a traumatic event occur, requiring time off, and the officer had exhausted his sick leave by using it regularly in small increments. The result was that the bargaining agent asked Mr. Earle what the employer would do to help.

[29] On December 1, 2009, Kathy Paul, Mr. Campbell's manager at the time, sent him the following memo ("the December 1, 2009, memo"):

> *Subject: Certified Sick Leave*
>
> 1. *You currently have a negative balance on your sick leave account. It has been determined through Attendance Awareness discussions with Management that you will be required to have all future sick leave certified by a medical practitioner. This requirement will remain in effect until your sick leave account returns to a positive balance.*
>
> 2. *During this period you are to provide an original medical certificate from a medical practitioner each time that you are absent due to illness. This medical certificate, which can be on a "blue slip" (HC/SC500) or a signed medical note, must be submitted within 5 working days of your return to duty.*
>
> 3. *The medical slip is to be accompanied by a completed Leave Application and Absence Report. Your anticipated cooperation is appreciated.*

[30] Mr. Earle agreed that the only reason given to Mr. Campbell for requiring medical certificates starting December 1, 2009, was that Mr. Campbell currently had a

negative balance.

[31] Mr. Earle's office was centrally located and accessible. He was fairly certain that Mr. Campbell had never approached him about being required to have his sick leave certified.

[32] Before receiving the December 1, 2009, memo, Mr. Campbell could not recall Ms. Paul or any manager discussing with him whether there was a pattern to his absences or why he had a negative balance. He could not recall if he took any steps to speak to management about the memo. He tried to comply with the December 1, 2009, memo, but he found that at times, five days was not sufficient to obtain a doctor's note.

[33] Mr. Earle was referred to an email dated February 18, 2010, from Amos Margeson, stating that "… the attendance management committee has taken the stance that a persistent negative balance is indeed a pattern." Mr. Earle confirmed that Mr. Margeson was at that time a member of the Attendance Awareness Management Committee but said this statement "was an oversimplification".

[34] On or about September 19, 2010, Mr. Campbell missed a day of work when he was hospitalized following an asthma attack.

[35] The employer put in evidence a printout showing Mr. Campbell's absences from work for the period from June 30, 2006, to the hearing. The absences included such leave as vacation leave, family related leave, and uncertified sick leave. The printout shows a number of uncertified sick leaves or unauthorized instances of leave after December 9, 2009, and before October 10, 2010, including September 19, 2010.

[36] On October 10, 2010, Ms. Amos, as assistant warden of operations, sent Mr. Campbell the following memo:

> *Subject: Recovery of funds – unauthorized leave without pay*
>
> 1. *You did not have your sick leave certified as requested. Therefore, the sick leave you took on September 19th (8.5 hours) is being submitted to Compensation Services to be recovered from your pay as unauthorized leave without pay, which is non-pensionable.*
>
> 2. *If you wish to discuss this issue prior to this action being taken, please contact your CM - Greg MacLeod and should*

> *he not be on shift, please contact the AWO immediately. Please be advised that the leave without pay request will be submitted to Compensation Services one week (7 calendar days) from the date of this notice, in order to have them recover the amount owing from the first available funds.*
>
> *3. The compensation unit will advise you via email when this memo has been processed with the date of your affected pay cheque.*

[37] Mr. Campbell did not remember contacting Correctional Manager Greg MacLeod or any of the other managers within the seven calendar days. He thought this was the first time that the employer took steps to recover money paid to him for unauthorized sick leave.

[38] Employees were entitled to borrow sick leave hours under the provisions of clause 31.04 of the collective agreement, which read as follows:

> *31.04 When an employee has insufficient or no credits to cover the granting of sick leave with pay under the provisions of clause 31.02, sick leave will be granted to the employee for a period of up to 200 hours, subject to the deduction of such advanced leave from any sick leave credit subsequently earned.*

[39] On November 13, 2010, Mr. Campbell filed a grievance, grieving that the employer had violated clause 31.03 of the collective agreement by requiring a medical certificate when sick leave was claimed. As corrective action, he requested in his grievance that he be removed from the Attendance Awareness Program, that any pay action be removed, and that he be repaid any financial losses incurred, plus interest.

[40] In August 2012, Mr. Campbell met with Ms. Paul and discussed with her why he had taken an excessive amount of sick leave. She told him that she was going to recommend that he be taken off the Attendance Awareness Program and that they would revisit his progress again in three to four months. As of October 2012, Mr. Campbell was no longer required to have his sick leave certified by a physician.

IV. Summary of the arguments

A. For Mr. Campbell

[41] The bargaining agentl argued that although clause 20.10 imposed a 25-day limit

within which to file a grievance, it did not apply to Mr. Campbell's grievance as it was a continuing grievance. Such grievances allege repetitive breaches of a collective agreement and therefore are not limited by when the first breach occurred. Each time uncertified sick leave was denied, it was a new breach of the collective agreement.

[42] On the main issue, the bargaining agent's position was that the employer was entitled to require medical certificates only if it established a pattern of recurring absences. The employer's right to require medical certification was governed by clauses 31.02 and 31.03. The language of clause 31.03 imposed an onus on the employer to show that before requiring medical certification, it had observed a pattern of sick leave usage that justified requiring medical certificates.

[43] The evidence showed that the employer's decision to require medical certification was based solely on the fact that Mr. Campbell had a negative sick leave balance. Having such a balance is not a pattern. Focusing on a single fact is simply applying a blanket policy that allows the employer to ignore relevant information and avoid making an analysis to see if a pattern emerged as to how and when the employee used sick leave that was indicative of possible abuse.

[44] The bargaining agent referred me to the following authorities: *Baker v. Treasury Board (Correctional Service of Canada)*, 2008 PSLRB 34; *Watson v. Treasury Board (Department of National Defence)*, 2012 PSLRB 105; *City of Toronto v. Canadian Union of Public Employees, Local 79* (1984), 16 L.A.C. (3d) 384; *Kirby v. Treasury Board (Correctional Service of Canada)*, 2013 PSLRB 92; *McMurrich Sprouts Daycare v. Canadian Union of Public Employees, Local 4400*, 2013 CanLII 87403 (ON LA); *Newfoundland and Labrador Hospital and Nursing Home Association v. N.L.N.U.*, (2005), 82 C.L.A.S. 284; *Canada (Attorney General) v. Timson*, 2012 FC 719; *Shneidman v. Canada (Attorney General)*, 2007 FCA 192; and *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (F.C.A.) (QL).

B. <u>For the employer</u>

[45] The employer's position was that the grievance should be dismissed as it was not filed within the 25 days required by clause 20.10. Mr. Campbell was advised in the December 1, 2009, memo that he was required to have all future sick leave medically certified. He did not file his grievance until November 13, 2010.

[46] The Federal Court of Appeal, in *Canada (National Film Board) v. Coallier*, [1983] F.C.J. No. 813 (C.A.) (QL), ruled that a time limit such as the one in clause 20.10 begins to run as soon as a grievor is informed or learns of an action or circumstances giving rise to his or her grievance.

[47] In any event, if it is found that the grievance should be allowed because of its continuing nature, it is well settled that in the face of a mandatory time limit, damages in a continuing grievance are limited to the time within which the grievance could have been filed.

[48] The second preliminary issue, which was raised by the employer, was its contention that Mr. Campell's grievance was moot because the employer had advised him in October 2012 that he was no longer required to have his sick leave certified by a physician.

[49] On the main issue, an employer has the right to manage its workforce if is not otherwise restricted by the collective agreement. Although the collective agreement uses the word “pattern”, the language does not restrict the employer’s inherent right as manager to judge what constitutes a pattern. It can be simply excessive sick leave usage, as was decided in *Bencharski v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 75.

[50] In any event, the employer’s decision was not based solely on Mr. Campbell’s negative sick leave balance. The evidence shows that the employer’s practice in all cases was to review sick leave records, taking particular care to note cumulative amounts, unusual duration, apparent excessive frequency, and any correlation between sick leave usage and behaviour over time that appeared unusual.

[51] The employer referred me to the following additional authorities: *Professional Institute of the Public Service of Canada v. National Research Council of Canada*, 2013 PSLRB 88; *Alcan Smelters and Chemicals Ltd. v. Canadian Auto Workers, Local 2301* (1997), 62 L.A.C. (4th) 371; *Dashwood Industries Ltd. v. United Brotherhood of Carpenters and Joiners of America, Local 3054* (1998), 73 L.A.C. (4th) 395; *Honda Canada Inc. v. Keays*, 2008 SCC 39; *Kirby*; *City of Toronto v. Canadian Union of Public Employees, Local 43* (1987), 29 L.A.C. (3d) 97; *Salvation Army Grace Hospital v. U.N.A., Local 47* (1995), 47 L.A.C. (4th) 114; *Sault Area Hospital v. Ontario Nurses’ Assn.*, [2014] O.L.A.A. No. 176 (QL); *Baker*; and *Mark v. Canadian Food Inspection Agency*, 2007

PSLRB 34.

V. Reasons

[52] As stated at the outset, this adjudication arose from a number of grievances, and while many were withdrawn, seven were still outstanding when the hearing began. However, except for Mr. Campbell's grievance, there was no evidence or agreed statement of facts adduced for the remaining six grievances, which therefore are dismissed.

[53] Clause 20.10 of the collective agreement provides that a grievance may be presented no later than the 25th day after the date on which the employee is notified orally or in writing or on which he or she first becomes aware of the action or circumstances giving rise to it.

[54] On Tuesday, December 1, 2009, Mr. Campbell was sent Ms. Paul's memo advising him that he was required to have all future sick leave certified by a medical practitioner. He filed his grievance on November 13, 2010.

[55] The first issue to be decided is the employer's submission that Mr. Campbell's grievance should be dismissed as it was out of time.

[56] The December 1, 2009, memo was not in response to a request from Mr. Campbell for sick leave approval for a specific date or dates but was intended to apply to any future requests he might make. However, on a number of occasions, he took sick leave without obtaining medical certification between December 1, 2009, and September 19, 2010, and the employer paid him, without objection.

[57] In my opinion, this is a continuing grievance where there has been an alleged recurring violation of section 31.03 of the collective agreement; it does not refer to any specific date. The evidence shows uncertified sick leaves or unauthorized instances of leave after December 9, 2009, and before October 10, 2010. In *Baker*, the former Board stated as follows at paragraph 15:

> *[15] It is generally recognized in the arbitral jurisprudence that continuing grievances are ones that allege repetitive breaches of a collective agreement rather than simply a single or isolated breach. The test applied by arbitrators is whether there has been a recurring breach of duty and not merely recurring damages. The significance of*

> *characterizing a grievance as continuing relates to the remedy available. Failure to file a continuing grievance within a required period of time (such as one set out in a collective agreement) will not render it inarbitrable. However, the relief available under a continuing grievance may be limited to the time limit specified under the collective agreement (see Brown and Beatty,* Canadian Labour Arbitration, *4th ed. (February 2008), para 2:3128).*

[58] This reasoning was subsequently confirmed in *Watson*.

[59] In *Mark*, the adjudicator commented as follows at paragraph 27:

> *[27] The principle of the continuing grievance, that is, a recurring violation of the collective agreement, is sometimes applied in order to assess whether a grievance is timely. This occurs, for example, when the employer's decision has continuing consequences, such as a denial of a salary increase or overtime at each pay period….*

[60] Although I have determined that I am seized of a continuing grievance, the employer submits that damages in a continuing grievance are limited to the time within which the grievance could have been filed.

[61] *Baker* interprets clause 20.10 and contains an analysis of the jurisprudence relating to it starting at paragraph 17 as follows:

> *17. The jurisprudence on clause 20.10 has generally developed along the lines described by Brown and Beatty. In* Canada (National Film Board) v. Coallier, *[1983] F.C.J. No. 813 (C.A.) (QL), the Federal Court of Appeal set aside the decision of an adjudicator on the following basis (at the time of* Coallier*, the time limit in the collective agreement was 20 days):*
>
> > In our opinion this twenty-day period began to run as soon as *[sic]* respondent learned of the facts on which his grievance was based: contrary to what the adjudicator held and counsel for the respondent argued, it did not begin to run on the day on which *[sic]* respondent was told that the employer's actions were illegal.
>
> *On this reasoning, the Court held that the employee in* Coallier *was entitled to a remedy only during the twenty days preceding the grievance (now twenty-five days).*
>
> *18. Although the judgment in* Coallier *does not specifically describe the grievance in that case as a continuing one, I note*

> *that subsequent decisions have applied it to continuing grievances (for example,* Black v. Treasury Board (Department of National Defence)*, 2007 PSLRB 72). I also note that the decision in* Macri v. Treasury Board (Indian and Northern Affairs Canada)*, PSSRB File No. 166-02-15319 (19871016) (upheld by* Canada (Treasury Board) v. Macri*, [1988] F.C.J. No. 581 (C.A.) (QL)) declined to follow* Coallier*. This was on the basis that a strict limitation of twenty days for a remedy would be an incentive for an employer to delay the grievance procedure. I acknowledge that policy concern, but there is no evidence of that situation in this case.*
>
> *19. In summary, where there is a continuing grievance under the collective agreement there may not be a timeliness issue as a result of the late filing of the grievance. However, any remedy under that grievance is limited to the twenty-five-day period prior to the presentation of the grievance at the first level of the individual grievance process….*
>
> …

[62] In the present case, there was no evidence to suggest that the employer had delayed the grievance process to minimize possible damages.

[63] The result is not that the grievance is inarbitrable but that any remedy ordered in this case is restricted to compensation for the 25-day period immediately preceding its filing at the first level of the grievance process.

[64] A second preliminary issue was the employer's contention that the grievance was moot because, as of October 2012, Mr. Campbell had been advised that he was no longer required to have his sick leave certified by a physician. The bargaining agent submitted that the issue of damages still remained, as on October 10, 2010, the employer commenced recovering from his pay the 8.5 hours that he had been paid for the sick leave that he took on September 19, 2010. If the pay was recovered in the 25-day period allowed in clause 20.10, then that amount is recoverable as damages, if the grievance is upheld. Additionally, as it involves a continuing grievance, a declaration is an appropriate remedy. For the reasons raised by the bargaining agent, I agree the issue is not moot.

[65] The main issue is whether a pattern was found that justified the employer's requirement for physician certification every time Mr. Campbell took sick leave after the December 1, 2009, memo was issued.

[66] The collective agreement does not define "pattern". *Kirby* involved the same

collective agreement and the same correctional institution, i.e. Springfield Institution. The adjudicator in that case, based on a finding of fact that the employer had considered only the grievor's negative sick leave balance, found that no pattern existed justifying the employer requiring medical certification for future sick leave. The following extracts are relevant:

> *40. … Under clause 31.03 of the collective agreement, an employee's onus of establishing that he or she has a legitimate reason to be absent is satisfied once the employee has provided the employer with a signed statement affirming that he or she was unable to perform his or her duties because of illness or injury. The observation by the employer of a pattern in the use of sick leave by the employee is a precondition for requiring an employee to provide a medical certificate when requesting sick leave under that clause. That requires the employer to, at the very least, assert the pattern it has observed before imposing the requirement to provide medical certification.…*
>
> …
>
> *43. Displaying a negative sick leave balance, in and of itself, is not in my view a pattern. If it were, the employer would have included language to that effect in clause 31.04 of the collective agreement, but it did not. In fact, clause 31.04 states that the employer will grant up to 200 hours of sick leave when an employee has no credits, without requiring certification. Obviously, granting 200 hours of sick leave to an employee who has no sick leave credits will create a negative sick leave balance, yet no certification is required under clause 31.04. That fact strongly suggests that the negative balance that would automatically result from requesting and being granted sick leave credits under clause 31.04 should not be considered a pattern. Having a negative sick leave balance is not, in and of itself, a reliable sample of a person's traits, acts, tendencies or observable characteristics; nor is it automatically indicative of an unusual behavior, duration or frequency.*
>
> …

[67] The adjudicator's conclusions are persuasive, and are applicable in this case, that simply having a negative sick leave balance does not equate to a pattern in the context of clause 31.03. The employer's bulletin dated November 2006, referred to earlier in this decision, suggests multiple considerations to weigh when determining whether a pattern exists suggesting possible misuse or abuse. In my opinion, observing a pattern in the context of clause 31.03 means observing multiple sick-leave claims

that together suggest the possibility that sick leave is being improperly claimed. Simply having a negative sick leave balance is not a pattern and is clear violation of clause 31.03 of the collective agreement.

[68] The employer referred to *Bencharski*, which found that "excessive leave usage" was sufficient to entitle the employer to a medical certificate under a collective agreement containing clause 31.03. However, that decision did not elaborate the facts used when determining that leave usage was excessive. The adjudicator commented in paragraph 52 as follows:

> *[52] … Although the collective agreement uses the word "pattern" in clause 31.03, I do not believe that this restricts the inherent rights of management to the extent proposed by the grievor. I conclude that in the case where there is "excessive leave usage", an employer must be able to monitor the reasons for all leave….*

[69] However, I agree with the conclusion in *Kirby*, at paragraph 43, that displaying a negative sick leave balance, in and of itself, is not a pattern.

[70] The employer submitted that *Kirby* should be distinguished from this case as in that case a factual finding was made that the employer's decision was solely based on the grievor having a negative sick leave balance. It submitted that in this case, Mr. Earle testified that the managers were instructed to weigh all the considerations listed in internal bulletins and memos, such as the one noted earlier in this decision. However, Mr. Earle could not speak to individual cases.

[71] Mr. Margeson's February 18, 2010, email indicates that the committee was not looking beyond whether there was a negative balance. Ms. Paul's December 1, 2009, memo to Mr. Campbell makes no mention of a pattern and indicates the rationale behind requiring future sick leave to be certified was that Mr. Campbell currently had a negative balance on his sick leave account. Ms. Paul was not called as a witness to contradict or amend what is clearly expressed in her memo. The language of clause 31.03 places the onus on the employer to prove that before requesting a medical certificate, it has observed a pattern in sick leave usage. In my opinion, the employer did not discharge that onus.

[72] For all of the above reasons, I make the following order:

(The Order appears on the next page)

VI. Order

[73] The grievance is allowed.

[74] I declare that the employer's direction on December 1, 2009, to require Mr. Campbell to have all future sick leave certified by a medical practitioner, and that this direction remained in effect until his sick leave account returned to a positive balance, violates clause 31.03 of the collective agreement.

[75] I order the employer to cease and desist from keeping that requirement in place simply because the grievor's sick leave account has a negative balance.

[76] I order the employer to pay Mr. Campbell, with interest, any amounts deducted from his pay in the 25-day period between October 19, 2010, and November 13, 2010, because of the sick leave he took on September 19, 2010.

[77] I will remain seized of the grievance for a period of 60 days from the date of this order with respect to the matter of the compensation the grievor is entitled to under the circumstances.

May 17, 2016.

William H. Kydd,
adjudicator