

“SPECIAL LEAVE” WITH PAY - SNOWSTORMS/INCLEMENT WEATHER

SOME PRINCIPLES

Most collective agreements covering PSAC members contain a provision similar, if not identical, to the following:

At its discretion, the employer may grant:

(a) leave with pay when circumstances not directly attributable to the employee prevent his or her reporting for duty; such leave shall not be unreasonably withheld;

The following principles outline what we have learned from arbitrators' decisions on the many grievances on denial of “special leave”. While the above provision can also apply to a variety of other circumstances that prevent an employee's reporting for work, the following principles and references apply to snow storms and other weather-related conditions. The references represent a sample of arbitrators' decisions.

1. The main thrust of the provision is to provide for the exceptional treatment of particular employees under certain kinds of circumstances. This is why one speaks of “special leave”. Ultimately, each case must turn on its own particular facts.
2. The first issue to be decided is whether the circumstances preventing the employee from reporting for duty were or were not directly attributable to the employee. The conclusion must be arrived at reasonably on the basis of the information obtained after a due and diligent enquiry by the employer.

3. The second issue to be decided is whether the employer, in the exercise of its discretion, is acting reasonably. This includes reviewing the merits of the situation, not taking into account irrelevant considerations or failing to consider relevant matters, nor forming the opinion on the basis of insufficient evidence. The employer must make a serious and diligent inquiry. The manner in which a decision is made, as well as the basis for it, may be a key factor in determining that the special leave was unreasonably withheld.
4. The decision of the employer may be modified by an arbitrator where the arbitrator finds the decision is unreasonable. However, an arbitrator must not substitute his/her judgement where the employer's decision is reasonable, even though the arbitrator might have reached a different conclusion on the same set of facts. In other words, it is not for an arbitrator to step into the shoes of the employer and ask what s/he would have decided in the circumstances.
5. The fact that other employees who live in the same area reported for work in no way weakens the validity of a claim for special leave. The employer needs to consider the particular situation of each employee to determine whether the circumstances in which other employees who reported for work were the same as, or similar to, those of the employees who did not make it into work.
6. If an employee seeks to have the employer exercise discretion in her/his favour, s/he is well advised, if not under an obligation, to report all relevant facts to the employer concerning the situation which prevents the employee from reporting for duty. It is up to the employee to try to satisfy the employer, and to attempt to convince the employer of the justice of the claim.
7. Reporting for duty means reporting on time and doing what is reasonable in order to do so. It also means making as many attempts as are appropriate and reasonable in the circumstances. The responsibility to get to work ends at the end of the working day or shift, even though only a portion of the working day may remain.

8. An employee has an ongoing obligation and responsibility to continue to closely observe weather conditions and to keep trying to get in to work (as is prudent and reasonable under the circumstances). This includes attempting alternate routes or alternative means of transportation, as are reasonable under the circumstances.
9. An employee who is away from the geographical area (e.g., travelling, fishing, at a cottage), has a responsibility to check and/or monitor weather forecasts or conditions which may impede her/his ability to report for work. While the weather conditions may be the factor that is not directly attributable to the employee, there may be other factors that are attributable to the employee that contribute to his/her being prevented from reporting for duty.
10. On the other hand, efforts taken by the employee to allow for and accommodate the unexpected must be reasonably considered by the employer. Delays caused by adverse weather cannot be used by the employer in such a way as to raise a strict and rigid bar to the special leave benefits negotiated by the parties.
11. A denial of special leave solely on the basis that an employee had requested special leave contiguous to a day of other leave is a direct violation of the special leave provision. The employer must make inquiries into the reasons (e.g., snowstorm, weather and road conditions) that prevented an employee from reporting for duty, and the efforts the employee made, including planning for contingencies in the event of the unexpected.
12. An employee's choice of residence is not sufficient justification, in and of itself, to deny leave with pay. While a small number of earlier decisions of arbitrators identified distance or "remoteness" as sufficient cause in themselves for denying leave, the majority of decisions clearly require an employer to objectively analyze and assess the circumstances as a whole. The location of an employee's residence is but one of several causally relevant factors. Arbitrators seem to agree that the record of absences due to weather conditions is a factor that cannot be ignored in deciding whether a location is so remote or isolated that an employee must bear some of the risk of inaccessibility.

Every situation is different, but generally speaking, there are a number of factors that tend to support an employee's entitlement to special leave with pay. These include an employee's not relying solely on radio reports but making serious, but reasonable, efforts to get to work; maintaining contact with the employer to provide updates to the circumstances that are preventing reporting for duty; exploring alternative means of transportation; taking reasonable precautions or steps such as getting up earlier than usual or parking the vehicle needed to travel to work in an accessible place if the storm and its effects can be anticipated. The standard used to measure "effort" is affected by the severity of the storm or weather conditions and is one of reasonableness. Employees are not required to make heroic or reckless efforts to get to work, and there is room for the exercising of an employee's judgement which must be assessed according to a standard of reasonableness. One attempt, and turning back after a short distance may be sufficient under the circumstances. Several attempts throughout the day may be required under another set of circumstances. Or making no physical attempt at all may be a reasonable and prudent exercise of judgement under another set of circumstances.

Listed below are a number of decisions that provide guidance on the case law on this issue.

References:

1. Hunter (166-2-5387).
2. McDougall (166-2-6157); Meldrum (166-2-9156).
3. Benson et al (166-2-1557 to 1565); Hunter (166-2-5387); McDougall (166-2-6157); Meldrum (166-2-9156); Ryan and Ryan (166-2-11431 and 42); Critch (166-2-13526).
4. Villeneuve (166-2-629); Benson et al (166-2-1557); Rosario (166-2-2443).
5. Cloutier et al (166-2-21838, 21839 and 21840); Britton (166-2-19593).
6. Strickland (166-2-14697).
7. Ryan (166-2-13828); Strickland (166-2-14697); Martin and Hamel (166-2-14835 & 14836); Dorais (166-2-18311); Britton (166-2-19593); Thomas (166-2- 21965).

8. Johnston (166-2-21750); Thomas (166-2-21965).
9. Chrétien (166-2- 5280); Smith (166-2-14632); Martin and Hamel (166-2-14835 & 14836); Segouin and Spatt (166-2-21024 and 21025).
10. Barrett (166-2-7738); House (166-2-10320).
11. Segouin and Spatt (166-2-21024 and 21025).
12. Townsend (166-2-3460); Charbonneau and Brisebois (166-2-4825 and 4826); Dollar (166-2-5024); Hunter (166-2- 5387); Richmond (166-2-6909); Meldrum (166-2-9156); Warford (166-2-15306).