

ARBITRATION BULLETIN

Grievance Issue: Interpretation of Compassionate Leave

September 1, 1989

SEINE RIVER SCHOOL DIVISION NO. 14
and
SEINE RIVER TEACHERS' ASSOCIATION NO. 14
of the
MANITOBA TEACHERS' SOCIETY
RE: GRIEVANCE OF ANDREW SHCHUDLO (GRIEVOR)

Board Composition:

Chairman Paul Teskey

Division's Nominee Gerry Parkinson

Association's Nominee David Shrom

Counsel:

For the Division: Rob Simpson

For the Association: Mel Myers, Q.C.

THE ISSUE

The grievor alleged that the school division violated the Compassionate Leave Article of the Collective Agreement by failing to allow him three days of compassionate leave without loss of salary in the case of a "serious illness" of his wife. His wife was delivering a child born through Cesarean Section.

BACKGROUND

On September 19, 1988, the grievor wrote to the Division requesting five days compassionate leave so that he could be with his wife during delivery of his child by Cesarean Section on September 29th and to provide assistance following her return home on October 3 6th.

The Superintendent denied the request for compassionate leave, but granted five days personal leave at the cost of a substitute for two days and 1/200 deduction for the remaining three days.

The grievor was absent for only two days, September 29 and October 3 the day of the actual surgery and birth and the day of release from the hospital. The grievor was compensated for those days by "personal leave at cost of substitute". 30th the Division and the Association produced a physician as an expert witness.

RELEVANT COLLECTIVE AGREEMENT LANGUAGE.

Article 8 Compassionate Leave of the Collective Agreement:

"Each teacher shall be allowed compassionate leave without loss of salary up to but not exceeding three days in the case of death or serious illness of any member of the immediate family of the teacher; immediate family to include wife, husband, son, daughter, father, mother, father-in-law, mother-in-law, sister, brother, grandparents. Leave without loss of salary beyond the time and for persons other than provided for herein granted at the discretion of the Superintendent."

Article 17 Paternity Leave of the Collective Agreement:

"The provisions of The Emoloyment Standards Act with regard to paternity leave shall apply."

THE ASSOCIATION'S ARGUMENT

Counsel for the Association described the issue as being whether or not there was a serious illness and, if so, there was accordingly a violation of the Compassionate Leave article in that leave should have been provided. He noted that the provisions of the procedure manual would also require that leave be granted in the event of serious illness.

Counsel argued strenuously that given all of the factors such as the woman's previous history of Cesareans and difficulties with same, the difficulty of the pregnancy in question, the risks of a C section (and the even greater risk of not having one) combined with the natural concerns and experience of the mother and father clearly resulted in the situation of the grievor having to be absent from work for a reason that would naturally fall within the normal meaning of compassionate leave. He argued that the critical element of the purpose of compassionate leave was need and legitimate concern and that such matters as being present at the birth, providing comfort and support, looking after the children or bringing his spouse home were all legitimate parts of that need and that, therefore, both the days claimed should have been fully paid.

While he did not go so far as to argue that pregnancy per se should be considered as an illness or a serious illness, the circumstances and the evidence supported a strong apprehension of risk and need and might properly be considered as part of a need arising from complications of a pregnancy rather than simply pregnancy itself. On this point both he and Counsel for the Division furnished the Board with a great number of authorities.

Association counsel stressed that both of the medical witnesses had indicated that a C section was considered major surgery and involved serious risk of either death or morbidity and therefore, the grievor was entitled to some compassion.

It was noted that Compassionate Leave was a provision that had been bargained for and, presumably, something else had been given up in order to achieve its inclusion in the Agreement. Therefore, it should be interpreted broadly to allow the benefit to be available.

He urged that the illness was "serious" in either the normal sense or under the dictionary definition of the word. It was also suggested that "serious" did not have to equate to "life threatening" or "emergency".

In summary, counsel argued that there was a violation of the Agreement, there was a grave concern and a legitimate need for the grievor to be present on the two days taken and that the request was refused without the appropriate investigation being undertaken.

THE DIVISION'S ARGUMENT

In his submission, Counsel for the Division indicated that the evidence disclosed that no complications arose, release from the hospital on the fourth day showed that recovery was good and that neither of the medical witnesses at any time had characterized the surgery itself as a serious illness. He conceded that the surgery may have caused anticipatory anxiety but stressed that those fears never came to fruition.

The grievor's spouse agreed to be discharged from the hospital and by her own choice spent the first evening at her parent's home for what appeared to be more social than medical reasons and again decided herself to return home the next day.

It was submitted that on October 3 there was no evidence to indicate any necessity for the grievor to be present nor that his spouse was ill or that he, in fact, was required to care for her. He suggested that the grievor's whole case and claim was anticipatory and not based upon what existed but rather but what might be needed. In that respect, he noted that the original request of the grievor (which was the request before the Superintendent when he made his determination) was for five days of fully paid leave. Nor did he consider there to be any facts disclosed or indication of additional risk or grounds for sympathy or pity to be generated. Consideration was therefore given based upon the information provided and, accordingly, counsel suggested that the Division had not acted unreasonably at all. For example, leave was never denied; rather two days personal leave was granted in accordance with the Division policy and additional time if needed was also granted albeit without pay. The real issue, he argued, was quite simply who should pay the sixty dollars per day, (substitute rate) a figure which was one-third the normal daily salary.

It was also noted that the parties themselves in the Collective Agreement had addressed the rights of the prospective father in that Article 17 provided for paternity leave in accordance with the provisions of the Employment Standards Act (Section 37 of same providing up to six weeks of continuous leave without pay). It could therefore be inferred that this type of circumstance (particularly given the fact that complications did not result) was not intended to fall within the ambit of

compassionate leave or the normal or dictionary meaning of the word "compassionate" itself.

It was suggested that "serious illness" was a prerequisite to entitlement under the Compassionate Leave article and such serious illness did not exist when the application was made, nor did it ever exist.

In reply, Counsel for the Association submitted that the Superintendent had not referred to the fact of paternity leave being in the Collective Agreement as a reason for denial of the request and noted that if two benefits were available under an agreement, it was the employee's right to choose which of the two was more beneficial or, if possible, to even claim both.

THE DECISION

"There has been a great deal of arbitral and judicial consideration of what aspects or matters related to a pregnancy or delivery may form the basis of entitlement of the mother for utilization of such sick leave provisions as may exist in any particular collective agreement.

It is agreed that pregnancy per se does not constitute sickness, illness or disability. However, the cases are clear in that sickness or complications that may arise during or from the pregnancy may change the characterization. It is of interest that the Agassiz School Division situation involved a teacher delivering her baby by Cesarean Section a week earlier than expected. The board of arbitration awarded that sick leave benefits were available upon the basis that the surgery and recovery period constituted a "sickness" pursuant to the relevant article in the collective agreement. Upon application for judicial review, the Court (while not relying upon the reasons given by the majority in Agassiz) noted we find that the C-Section in this instance can qualify as an "illness" within the meaning of the Compassionate Leave Article, although it may have been "planned", it was clearly required for her health and safety. This is not a situation where the surgery was performed by choice or, for example, simply to allow for convenient timing of the birth.

The next issue that must be addressed is whether or not this "illness" can be considered as a "serious illness" for the purposes of Article 8. We find that in this instance it can. While we appreciate that the trend is a decreasing rate of mortality and morbidity, the procedure as it presently exists is still considered as "major surgery" and the potential risks involved are significantly higher than a normal delivery.

Webster's Dictionary defines the word serious as, inter alia, "...weighty, important, grave; (of quantity or degree) considerable" or "attended with danger; giving cause for anxiety".

There were sufficient significant dangers or risks in the procedure to reasonably give rise to the anxiety or apprehension experienced by the spouse and the grievor, particularly in light of her previous history. Nor is it likely that many objective lay observers would be inclined to view the situation as less than serious.

The last issue to be addressed is what entitlement of leave the grievor should or should not receive pursuant to Article 8. Firstly, it is worth noting that the wording of same is interesting. The initial word "shall" indicates a mandatory entitlement of "up to but not exceeding three days" the language obviously contemplates that different amounts of time may be required depending upon the circumstances (to a maximum of three days). The final sentence of the Article which provides for the possibility of entitlement beyond the three days or "for persons other than provided for" is discretionary in nature, such discretion residing with the Superintendent.

It is important to consider the purpose and nature of compassionate leave itself. Division counsel provided us with the definition of the word "compassionate" found in the shorter Oxford English Dictionary (Third Edition) which is as follows:

- "1. Affected with or expressing compassion; pitiful, sympathetic and
2. Fitted to excite compassion; pitiable, piteous"

There are some important differences between compassionate leave and sick leave. Firstly, compassionate leave is not "banked", nor is it absolutely limited. For example, in the most unfortunate of situations, an employee under this Agreement could well be entitled to a number of different compassionate leaves based upon a series of misfortunes all occurring within a relatively short period of time. It is, however, a benefit that is bargained for as was suggested by the Association and, in that sense, it is possible that, depending upon the fact situation, a claim could be made under Article 8 as well as the possibility of a claim existing under other articles of the collective agreement (such as paternity leave, or pursuant to personal leave as allowed by the policy). Notwithstanding that, the essence of compassionate leave is that the need for same (which under Article 8 is limited to "the case of death or serious illness of the immediate family") gives rise to the situation where such compassion should be exercised and where the leave is reasonably related.

There is an element of both need and circumstance beyond the control (and we do not use the word "control" in an overly

technical or restrictive sense) of the employee which gives rise to the benefit of absence without loss of pay being available. That combination of those two characteristics, we would respectfully suggest is (and must be) fluid to some degree, which idea is reflected in the entitlement in Article 8 of "up to but not exceeding three days". Given this type of conceptual framework, it is possible that the entitlement may arise prospectively or retrospectively. For example, the serious illness contemplated may contain the potential for serious risk and need but which ultimately proves to be of shorter duration or, conversely, what first is perceived to be a simple surgical procedure might produce complications which would raise it to a different level. However, the entitlement to three days is not absolute and does depend upon the facts of each situation.

The "need" of the individual employee which is addressed by a compassionate leave provision is not susceptible of a definition that would cover every circumstance imaginable but, rather, is very much to be determined upon the facts of each situation. The onus is upon the grievor to present those facts which establish that the "need" is consonant with the purpose of such a provision and it does not appear to us to be useful (or perhaps even possible) to attempt to list all of the situations which might be described in that matter.

In this instance, we find that the day of the surgery itself, September 29 should fall within the provisions of Article 8. The circumstances in this particular instance are such that the requirement for the presence of the grievor was established for the purposes of Article 8. While, luckily, the fears did not crystallize, nonetheless that fact could not be known when the procedure commenced. However, this Board is in the position of having the relevant facts before it and, accordingly, we rule that September 29, 1988 should be compensated at full pay pursuant to Article 8.

The same does not apply to the second day of absence on October 3, the day the mother was released from hospital. There was insufficient evidence before us to conclude that the need of the grievor to be present on that day was of such a nature as to qualify for "compassion" under Article 8. On the evidence as a whole, we see a distinction to be drawn between the two days.

As well, the Division did provide personal leave for that day based upon the policy at fairly minimal cost to the grievor.

We do not need to deal with the subsequent days of October 4-6 as the only remedy requested at the hearing itself was in relation to September 29 and October 3.

We also wish to state that our ruling is based specifically upon the configuration of facts presented to us. The question we were required to answer was whether or not the grievor was entitled, upon those facts, to part or any of the remedy requested in the grievance. To decide as we have, it was not necessary to determine the question, one way or the other, of other circumstances which would or would not justify entitlement to any extent under Article 8.

Accordingly, we rule that the grievor shall be compensated for the loss of income on September 29, 1988 and the grievances be allowed to that extent."
