

CONTRACT INTERPRETATION MANUAL

Article 42 LEAVE - SICK

Interpretation Guidelines

Article 42.01 – Accumulation

RFT employees earn 1.5 working days sick leave per month. A regular employee covered by the Extended Work Day Memorandum receives 11.25 working hours credit (e.g. 1.5 working days x 7.5 hour day = 11.25 hours) per month. This accumulation is prorated for RPT employees.

RPT employees earn sick leave based on a percentage of hours paid per month (Article 42.01 (C)). Hours paid for the purpose of accrual of sick credits include any extra shifts the RPT employee works (Fraser Burrard Hospital Society (Royal Columbian Hospital) and BCNU, December 13, 1995 (Munroe)).

Casuals working in a temporary appointment under Article 17.02 (C) transfer to regular status for the duration of the temporary appointment and are entitled to sick leave accrual based on the FTE of the temporary appointment. Their sick leave bank is frozen when they finish the temporary appointment.

Casuals who take a temporary position pursuant to Article 17.03 change their employment status to regular and accrue sick leave for the duration of the temporary position. When the position is over their sick leave bank is frozen and will be unfrozen when the casual either posts into another temporary position or appointment under Article 17.02 (C) or 17.03 or posts into a permanent regular position.

Sick leave credits may accumulate to a maximum of 156 work days defined as 7.5 hour days (1170 hours).

Article 42.02 – Payment

All regular employees receive regular pay for each day of sick credit used.

RPT employees who have been pre-scheduled to work extra shifts are entitled to use sick credits if they are unable to report for the extra shift(s) due to illness (Fraser Burrard Hospital Society (Royal Columbian Hospital) and BCNU, December 13, 1995 (Munroe)).

Article 42.03 - Proof of Illness

Sick leave with pay is only payable because of sickness or injury. This includes sick leave due to cosmetic surgery (HEABC (Cancer Agency) and BCNU, August 25, 1997 (Larson)). The Arbitrator said “there are no words in Article 42 that restrict entitlement to paid leave to whether a particular type of surgery is covered by the Medical Services Plan or even to whether it is medically necessary”.

Regular employees (and casuals in temporary appointments Article 17.02 (C) or temporary positions Article 17.03) may utilize sick leave credits if they are unable to attend work due to reasons associated with pregnancy, childbirth or recovery. There have been occasions where Employers have suggested an employee start their mat leave early, however this issue was arbitrated and the Arbitrator sided in favour of the Union (University Hospital (UBC Site) and BCNU, October 18, 1988 (Hope)). The Employer was

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ordered to pay sick leave benefits, the arbitrator wrote: “exceptions to the entitlement to sick pay for pregnancy-related illness had to be defined in clear language”.

Sick leave for stress is payable, if it shows itself in a physical or mental disability which results in the employee not being able to perform their job.

A medical note may only be requested after the employee has been on sick leave for more than three consecutive days. Employees should be advised before their return to work if a medical note is required. All medical notes should be provided to workplace health or disability management only. Enrollment in EDMP occurs after five days of absence (Appendix A).

Employers cannot enforce sick leave policies that make it mandatory for every employee to provide a medical note for all sick leave (Nav Canada and Canadian Air Traffic Control Association (CATCA), February 18, 2000, 86 LAC 4th 370 (Brault)).

The information on a medical note may be restricted to:

1. Confirming in general the nature of illness or injury; any restrictions or limitations;
2. General information about the approximate date of return;
3. For a long term absence, see Appendix A and refer the member to the appropriate EDMP representative depending on the length of the illness;
4. The Employers right to information needs to be balanced by the employee’s right to privacy ((Freedom of Information and Protection of Privacy Act (FIPPA) and Personal Information and Protection Act (PIPA));
5. The Employer cannot ask for details that exceed the general nature of the condition such as asking what medications or special treatments the employee is receiving (Appendix A);
6. The Employer cannot contact the employee’s physician directly without the permission of the employee, as this would violate the employee’s privacy rights, as per the following Union guidelines:
 - (a) If the employee has signed a release of information this allows the Employer to contact the employee’s physician directly;
 - (b) The Union strongly discourages employees from signing a release unless the release has been reviewed and agreed to by the Union (i.e. by the LRO); and
 - (c) The EDMP representative should be involved if the Employee has been off work for 5 consecutive workdays, if this is a WSBC injury, or if the employee is struggling at work due to a medical condition (Appendix A); and
7. Once the employee provides the doctor’s certificate the onus shifts to the Employer to prove it is not enough.

Where the Employer rejects a doctor’s certificate, it must be on reasonable grounds (Parkridge Private Hospital and BCNU, March 10, 1992 (McPhillips)). The Arbitrator found that the employee had provided sufficient and adequate information to meet the onus of proving a bona fide illness and the Employer was found to be acting unreasonably in seeking further information.

The Employer must advise the employee of the reasons for the rejection and give the employee an opportunity to obtain the necessary information. Examples where a doctor’s certificate has been rejected:

1. Where the doctor has seen the employee after the illness is over;

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2. Where the certificate has been given on the basis of a telephone conversation without a physical exam; and
3. Where employees or witnesses provide concrete evidence that demonstrates that the employee was not ill.

Employers cannot require an employee to see a doctor or service provider of the Employer's choosing. However, they can require the employee to take a medical examination (Article 32.02).

The PCA does not provide for an employee to be reimbursed for a doctor's certificate under Article 42.03 (Richmond Lions Manor and BCNU, January 21, 1997 (Kelleher)). The Arbitrator determined that this was not a "medical exam" as described in Article 32.02 where the cost is reimbursed. Appendix A provides for reimbursement for the approved Occupational Functional Assessments (OFA).

Article 42.04 - Benefits Accrue

Employees on paid sick leave continue to accrue all the benefits of the PCA. For example, vacation, special leave credits, seniority, health benefits coverage etc.

Where an employee has used up all their accumulated sick time and are placed on an unpaid leave of absence, they come under the provisions of Article 37. Therefore, they will only continue to accrue all the benefits for the first 20 days of unpaid LOA. Review with an LRO as there are multiple factors impacting benefits including seniority accrual (Article 13.03 and Appendix A.5).

Employees who choose to use sick leave credits to "top-up" their LTD benefit are not entitled to benefits accrual after 20 workdays on LTD (Nicola Valley General Hospital and BCNU, July 2, 1992 (Hope)).

Article 42.05 – Notice

Employees are required to notify the Employer before the start of their shift if they are going to be absent due to sickness.

Employees who are unable to complete their shift due to illness need to advise their Employer before leaving the worksite.

Employees are required to notify the Employer before returning to work.

Employers cannot enforce a sick leave policy that requires employees to advise their Employer of their absence a specified number of hours in advance of the start of their shift and a specified number of hours in advance of the subsequent return to work (Rosewood Manor and HEU, 1990, 15 LAC[4th] 395 (Greyall)).

Article 42.06 - Expiration of Sick Leave

Employees who have depleted their sick bank are placed on an unpaid leave (Article 37) until they are in receipt of LTD benefits. Employees are able to use banks, such as OT or vacation leave, in the LTD wait period.

Employees who remain on unpaid leave may be eligible for EI during this time. They need to contact the EI office to check their eligibility.

The interpretations in this manual are provided on a *without prejudice, errors and omissions basis* to any position Unions in the Nurses' Association of Bargaining Agents may take in any arbitral proceeding or any other forum.

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Applying for EI or accessing other banks does not negatively impact the LTD qualifying period.

Employers should provide employees with notification when their 20 days of unpaid leave is approaching the point of running out. At that time they should provide a form that allows the employee to select which benefits they wish to continue and pay for, they should also provide a form for the employee to apply for premium maintenance should they qualify (Appendix A.7). Please connect with a Steward or EDMP rep for further information on benefits, including continuing to pay LTD premiums. It is advised to continue paying benefits while waiting for LTD.

Benefit selection can only be altered once an LTD claim is accepted or the employee returns to work.

Article 42.07 - Workers Compensation

Worker's Compensation Board (WCB) is the legal title of the board that does business under the title Work Safe British Columbia (WSBC).

Every year 1200 -1400 nurses are injured at work.

Failure to document injuries means these claims may be turned down more frequently. Every year over 300 BCNU members are forced to file appeals after WCB denies benefits on their claim. That means that nurses may wait a year or more to receive payment from WCB. Many of these appeals would have been unnecessary if, at the time of injury or illness, the nurse had provided detailed information about the specific incident at work that caused the injury or illness.

If you are injured at work, tell your Employer first.

1. Do not wait to tell your Employer. Employers often protest claims from employees who waited more than a couple of days to report an injury.
2. It's a requirement of WSBC that you report your injury to your Employer as soon as possible. The WCB Act requires that a claim for compensation be filed within one year except in exceptional circumstances, such as mental incapacity or coma.
3. Remember that notifying the Employer of an injury is separate from applying for WSBC benefits. The WSBC application process may be found at the WSBC website. For example, an employee who suffers a back injury while lifting a patient may not take enough notice of the incident because they are about to start four or five regular days off and believe they will be OK by the time they return to work. But if they do not report the incident until after returning to work, WSBC may question whether the injury occurred at work or on the nurses' days off.
4. Ensure WSBC and your Employer know you are injured by filling out an application for compensation form and an incident report form. Follow your Employer's policy regarding incident forms. The application for compensation benefits is available online at the WSBC website.
5. Make sure you send the application form to the WSBC and give a copy to your Employer and keep another copy for your own records.
6. If a BCNU OH&S Steward is on shift, you may want to contact them for advice.

You must see your Doctor or other health care provider as soon as possible after suffering a workplace injury.

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After suffering a workplace injury or illness, call your Employer's absence line and depending on the options available choose injured at work or other.

Remember to identify the specific incident each time:

1. When filling out the application for compensation and the incident report
2. When talking with your Employer, and
3. When visiting your Doctor.

Tell WSBC:

1. You must fill out a WSBC application form.
2. Describe the incident and injury in the same way as you described it on your injury incident report form and in your Doctor's report.
3. If the symptoms change, report that as well.
4. Take your time when filling out any WSBC claims forms.
5. Always remember, the more details you supply, the easier it will be for WSBC to accept your claim.
6. Include all the details. Many employees whose claims were eventually denied by WSBC understated what they were doing at the time of the injury. For example, do not just state you transferred a patient from the wheelchair to a bed. WSBC may refuse your claim because it doesn't describe what caused your injury. Instead include all pertinent information, such as "the patient's knees buckled, and I caught them before they fell to the floor. As I caught them, I twisted my back. That is when the injury occurred".
7. If a WSBC officer calls, ensure you have a copy of your injury incident report form to refer to. The agent will ask a number of questions, many of which you answered earlier on the form.
8. Be certain your answers are the same as the ones you have given throughout the process. Your credibility, which is a significant factor in claims decisions, is at stake.
9. Never display anger. An angry response might make it easy to conclude your problems are emotional, rather than injury related.
10. The details of all your conversations with the WSBC are entered into their files so it is advisable to keep notes of any conversation you have.

Questions and Answers about WSBC

What should I do if WSBC denies my claim or makes an adverse decision?

1. Contact the BCNU office immediately to request assistance with your appeal.
2. As well, you should be enrolled in the EDMP program for any workplace injury and your EDMP representative can also assist you.

What should I do if I return to work before my workplace injury is totally healed?

1. If you should return to work but continue to suffer from symptoms, it is extremely important to continue seeing your Doctor at least every 4 weeks.
2. Ensure the specific nature of your condition is noted.
3. That way if you are forced to take more time off, you will have built up the appropriate documentation that will help WSBC reopen your claim.

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What happens if WSBC terminates my claim while I am still totally or partially disabled?

1. Contact BCNU immediately.
2. Labour Relations Officers who specialize in WSBC appeals are there to help members file an appeal.

Should I continue to see my Doctor after my WSBC claim is accepted?

1. Yes.
2. Visit your Doctor every 2 weeks while on claim.
3. Also, if your claim lasts for more than a few months, you may need to be seen by a specialist.

What do I do if I receive a letter from the WSBC saying that “I have the right to appeal”, even though I already have an appeal in progress?

1. Phone the BCNU office immediately, you need to respond to every letter you receive from the WSBC regardless of the status of your appeal.

Once the WSBC claim is accepted:

You are away on temporary wage loss benefits.

If the claim is accepted, the Employer is required to adjust the credits deducted from your sick leave bank.

Employers are entitled to receive periodic updates on your fitness and disability.

If you are a regular employee on paid WSBC leave, the WSBC generally sends the wage loss payments directly to the Employer and the Employer pays you. The amount that WSBC pays to your Employer may be different than the amount that you are entitled to receive under the PCA.

If you are receiving wage loss benefits you are entitled to net pay for the duration of your compensable injury or illness. Net pay is calculated by subtracting normal deductions from normal earnings. Normal earnings for the purposes of net pay calculations includes:

1. Extra shifts for regular part-time employees;
2. Shift differential;
3. Weekend premium;
4. Responsibility pay;
5. Statutory holiday pay; and
6. Overtime (including call-back).

You must pay to the Employer any amount you receive for loss of wages in settlement of any claims, including amounts received directly from WSBC in respect to wage loss. You are not required to pay the Employer any wage loss benefits that you received for work at another employer (e.g., if you are casual at another worksite).

While on a WSBC wage loss claim all benefits continue to accrue except for vacation and paid holiday accruals which stop accruing after 20 days on claim. Other benefits such as Dental and Extended Health are continued.

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If the employee is on a long term WSBC claim the claim may be converted from a wage loss claim to a Vocational Rehabilitation claim and payments and accruals may be affected, contact your Steward.

Employees on a WSBC or while waiting for adjudication of their claim cannot be terminated except for cause.

New language in 2019 provides for the maintenance of wages and benefits for employees who have suffered a workplace injury or illness due to workplace violence until the WSBC claim is adjudicated.

Benefit Entitlement (for employees not covered by Article 42.07 (A))

Workers injured after June 30th, 2002 are entitled to receive tax free wage loss benefits at the rate of 90% of their average net earnings from all employers.

Average net earnings are calculated after an amount equal to Federal and Provincial income taxes, Canada Pension Plan (CPP) contributions and EI premiums are deducted from gross average earnings. These amounts are not actually deducted from your WSBC payments but are used to determine net earnings.

Benefits cannot exceed the maximum set out in the Workers' Compensation Act (WCA). Benefits are adjusted for inflation annually, at the rate of 1% less than inflation, to a maximum of 4% in a year.

If you are working at more than one job, you need to report your wages from all other jobs as you are entitled to benefits for all jobs.

Article 42.08 - Enforceable Legal Claim

If an Employer requests an employee take legal action against a third party to recover lost wages or benefits they should contact the Union Office for advice and direction.

Article 42.09 – Appointments

Employees referred to a specialist may utilize sick leave credits to cover necessary travel time to a maximum of 3 workdays (Kiwanis Village Care Home and BCNU, June 24, 1994 (Johnston) (Industry Troubleshooter)).

Article 42.10 - Six Months Service

New employees who are not covered by the portability provisions of Article 51, and do not complete 6 months service with the Employer, are required to pay back the Employer for any paid sick leave taken within the first 6 months.

Article 42.11 - Cash-In of Sick Leave Credits

Employees leaving the workforce (e.g. retiring), on or after their 55th birthday, are entitled to a 40% pay out of their sick leave credits at the employee's current rate of pay at the time of leaving. This provision only covers employees who were employed by an Employer listed in the PCA prior to January 1, 2013. New

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employees after January 1, 2013 are not entitled to any sick bank payout on retirement. LPN entitlement may differ (Appendix EE).

If the employee returns to work after the payout, they will be starting with no credits in their sick bank and will not receive a second payout on any subsequent departure from the workforce.

Employees terminated for cause are not entitled to a payout under this provision.

Article 42.12 - Sick or Injured Prior to Vacation

Employees who are sick or injured before they start their vacation are entitled to have their vacation replaced with sick leave and their displaced vacation returned to their vacation bank to be used at a later date. The employee must request an adjustment and the Employer should not unreasonably refuse the request.

When an illness occurs on a regular day off connected to the employee's vacation, the illness will be considered to have occurred before their vacation (Surrey Memorial Hospital and RNABC, June 28, 1979 (Hall)). The PCA at the time did not contain language regarding sick or injured prior to vacation.

Article 42.13 - Voluntary Treatment

Employees who are in voluntary attendance at a full-time treatment program for substance use disorder are entitled to use sick leave credits and are placed on unpaid leave if their sick leave bank has expired.

In certain situations, unsatisfactory work performance, following completion of a treatment program may still result in termination of employment (Royal Inland Hospital and BCNU, April 23, 1992 (Munroe)). This case deals with application of a "last chance" agreement. However, there are more recent awards that speak about the lack of enforceability of "last chance" agreements. Basically, the process is the same when any employee is terminated; the facts of each individual situation need to be carefully assessed.

Sick Leave Policies

All sick leave policies or attendance management programs (and any revisions) need to be forwarded by Stewards for review by the LRO. The following criteria are provided to assist in the evaluation of these policies:

1. Lumber and Sawmill Workers Union and KVP Co. Ltd. (1965) 16 LAC 73 (Robinson) set out the following requirements for Employer policies and are included to be used as a general guideline in evaluating sick leave policies or attendance management programs (and any revisions):
 - (a) The policy must not be inconsistent with the collective agreement;
 - (b) The policy must not be unreasonable;
 - (c) The policy must be clear and unequivocal;
 - (d) The policy must be brought to the attention of the employee, before the Employer can act on it;
 - (e) The employee concerned must have been notified that a breach of such a policy could result in discharge, if the policy is used as a foundation for discharge; and

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- (f) Such a policy should have been consistently enforced by the Employer from the time it was introduced.
2. A 2002 Labour Board decision upheld the arbitration award dismissing the grievance of HEU on the Employer's unilateral implementation of an attendance management program (Royal Jubilee Hospital, HEABC (Royal Jubilee Hospital) and HEU, BCLRB No. B112/2002). The original arbitration award has been used by Employers as a template for attendance management programs. There have been more recent rulings by various arbitrators that have placed limits on Attendance Management Programs.
3. The 2013 Vince Ready decision on Attendance Wellness Programs (AWP) also defines what must be included and dropped from the policies.
4. BCGEU, CUPE, HSA, HEU, and UFCW and Vancouver Coastal Health Authority, (Ready) January 2013. This ruling eliminated the automatic punitive nature of the programs including OT bans and reduction of hours.
5. BCNU v HEABC (Ready) January 2015. This ruling stated that employees could not be in both EDMP and AWP.
6. BCNU v HEABC (Ready) (EDMP) March 2016. The Arbitrator ruled in this case that the Duty to Accommodate (DTA) falls under the EDMP language. They also ruled that the Human Resources (HR) and Disability Management (DM) functions are separate and that if information collected through the DM process is needed for HR purposes further consent is necessary. Finally, the ruling sent the parties back to negotiate a process for dealing with employees who are struggling at work and the services they should be provided.

Arbitration Awards

1. Surrey Memorial Hospital and BCNU, April 1, 1996 (Munroe). Employees on paid WCB leave are entitled to payment of shift and weekend premiums that are part of their work cycle.
2. Peace Arch Hospital and BCNU, November 20, 1997 (Chertkow). Employees on paid WCB leave are entitled to payment of stat pay rate for scheduled stat days while on WCB leave.
3. HEABC/Nanaimo Regional Hospital and BCNU, December 5, 1997 (J.A. Pratte Federal Court of Appeal). Employees who get topped up by their Employer will have the total amount received from the Employer (including the WCB component) counted as insurable earnings for the purpose of the calculation of EI benefits.
4. Vancouver Hospital and Health Sciences Centre (UBC Pavilions) and BCNU, January 28, 1998 (Munroe). The Arbitrator found that additional shifts worked by RPT employees are to be counted in the calculation of paid WCB leave.
5. HEABC (Royal Columbian Hospital) and NBA, February 10, 2001 (Larson). A nurse who is off on paid WCB leave should be paid a cheque equal to the amount they would be receiving if they were at work. This includes overtime if the employee would have worked it normally. The award also dealt with the calculation of "net pay", specifically the deductions the Employer could make from gross pay. These include:
 - (a) Income tax – the Employer is limited to a notional amount because income tax is not actually deducted or paid to the Government.
 - (b) CPP and EI – while the period in which a nurse is paid Workers' Compensation Benefits is not a period of insurable purposes, the Arbitrator said that these deductions should continue to be paid in order to arrive at net pay even though not required by law.

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- (c) Canada Savings Bonds – the complete amount would continue to be deducted and used to purchase Bonds. If you want to stop this while on WCB leave, you will need to let your Employer know.
6. HEABC, Simon Fraser Health Region (Royal Columbian Hospital) and NBA December 11, 2001 (Larson). Supplementary award dealing with retroactivity where the Arbitrator awarded retroactivity back to June 30, 1999 across the industry. The Arbitrator declined to award interest saying it was premature.
 7. HEABC, Simon Fraser Health Region and NBA, October 28, 2002, BC Labour Board Decision No. 46749. Application for review, set aside the supplemental award on OT and retroactivity. Retroactivity was limited to being from the date the grievance was filed.
 8. BC Children's Hospital and BCNU, August 20, 1996 (McPhillips). Ruled that an employee is not entitled to paid WCB leave from a new Employer for an injury that is deemed to be a continuing injury sustained while employed with a previous Employer.

Additional Resources

Legislation

1. Workers' Compensation Act (www.worksafebc.com).

Non-Culpable Absenteeism

Non-culpable absenteeism is an absence from work due to illness or non-occupational injury, including absences that may be the result of a disability.

The objective of attendance management programs developed by Employers is to reduce absenteeism and provide evidence where necessary for termination due to culpable (the employee's at fault) or non-culpable absenteeism (it is not the employee's fault).

Since the Supreme Court of Canada decision in BCGSEU and The Government of the Province of BC as represented by the Public Service Employee Relations Commission ("Meiorin"), September 9, 1999, Arbitrators and Human Rights tribunals are ruling that Employers need to apply the same test to non-culpable absenteeism as they do in other duty to accommodate situations. As a result, Employers have to meet a much higher standard of proof, to successfully defend a termination for non-culpable absenteeism.

In applying the Meiorin test, Employers have to demonstrate that the chronic absenteeism of an employee cannot be accommodated and is causing them undue hardship.

The Meiorin test was applied in two cases: *Parisien v. Ottawa-Carleton Regional Transit Commission* (2003) C.H.R.D. No.6 and *Corporation of the Town of Ingersoll and London Civil Employees Local 107* (2003) LAC 4th as follows:

1. *Parisien v. Ottawa-Carleton Regional Transit Commission* (2003) C.H.R.D. No.6 is a Human Rights case dealing with a termination for non-culpable reasons. The employee had logged nearly 2000 days absence over 16 years, mostly related to their recurring problem of post-traumatic stress. The Tribunal found that the complainant was exposed to prima facie discrimination in that they were terminated for not meeting the Employer's standard of attendance due to a condition of disability.

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- (a) The Tribunal applied the Meiorin test to assess whether the standard of attendance required by the Employer could stand as a bona fide occupational requirement.
 - i. They determined there was a rational connection between a rule designed to maintain a reasonable level of attendance and the requirements of the job; however
 - ii. In considering the 3rd element of the Meiorin test, the tribunal concluded that the Employer failed to establish that the attendance management program was reasonably necessary to the accomplishment of the purpose of maintaining reasonable levels of attendance since the Employer could not demonstrate that Mr. Parisien could not be accommodated without due hardship.
 - (b) The Tribunal clarified the following:
 - i. Tolerating or living with disability-related absenteeism is an appropriate and required form of accommodation.
 - ii. The hardship attending Mr. Parisien's past and future absenteeism did not constitute undue hardship (The Tribunal accepted the evidence that included costs of driver's salary, potential overtime costs for replacement drivers and potential complaints from transit users if services were disrupted due to Mr. Parisien's unexpected absences).
 - (c) Important messages:
 - i. The duty to accommodate includes tolerating disability-related absences.
 - ii. Tolerating or living with such absences means refraining from treating such non-culpable absenteeism as inconsistent with the employment bargain.
 - iii. Employers of any significant size are likely to be expected to tolerate a significant amount of disability-related absences.
2. Corporation of the Town of Ingersoll and London Civil Employees Local 107 (2003) LAC 4th was an arbitration case dealing with a termination for non-culpable reasons. The employee's absences (158.45 days between 1999 and 2003) due to chronic migraine headaches were considered to be excessive when compared with the average sick time usage of 6-7days per year. The Town had attempted to accommodate the employee by implementing a 4 day work week. However, the employee was still absent more than the average number of days each year.
- (a) The arbitrator applied the Meiorin principles reasoning that absences arising out of a disability under the Code cannot be relied upon to justify termination of employment for non-culpable absenteeism unless there has been accommodation of such disability-related absences to the point of undue hardship.
 - (b) The arbitrator accepted and considered the evidence of inconvenience to other co-workers and the replacement cost per year estimated to be approximately \$3000.00. However in applying the legal test for undue hardship, the arbitrator concluded neither the inconvenience nor the financial cost constituted undue hardship.

Important Lessons from these two cases are:

1. Employers need to adjust historical approaches to managing and responding to non-culpable absenteeism if the absenteeism relates to a disability.
 - (a) Absenteeism rates compared to other employees are irrelevant.
 - (b) Number of absences is irrelevant, in the absence of evidence of undue hardship.
2. The duty to accommodate disability-related absenteeism requires that Employers tolerate disability-related absenteeism unless they can demonstrate that the amount of absenteeism for the particular Employer would create an undue hardship.

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Arbitration Awards

1. Lumber and Sawmill Workers Union and KVP Co. Ltd. (1965) 16 LAC 73 (Robinson). Set out requirements for Employer policies.
2. Surrey Memorial Hospital and CRNBC (CRNBC (RNABC)), June 28, 1979 (Hall). An employee who is sick on a regular day off connected to a vacation may have this covered by sick leave credits and have her/his vacation rescheduled.
3. University Hospital (UBC Site) and BCNU, October 18, 1988 (Hope). The Employer was ordered to pay sick leave benefits for the two week waiting period for which the employee did not receive employment insurance benefits. Exceptions to the entitlement to sick pay for pregnancy related illness have to be defined in clear language.
4. Rosewood Manor and HEU 1990, 15 LAC[4th] 395 (Greyall). Employers cannot enforce a sick leave policy that requires employees to notify within a certain number of hours when they are going to be off sick and when they are able to return to work.
5. Parkridge Private Hospital and BCNU, March 10, 1992 (McPhillips). The employee had provided sufficient and adequate information to meet the onus of proving a bona fide illness and the Employer was found to be acting unreasonably in seeking further information.
6. Royal Inland Hospital and BCNU, April 23, 1992 (Munroe). Unsatisfactory work performance following return from participating in a treatment program for substance abuse, can still result in termination.
7. Nicola Valley General Hospital and BCNU, July 2, 1992 (Hope). Employees who choose to use sick leave credits to “top-up” their LTD benefit are not entitled to benefits coverage and accrual after 20 workdays on LTD. Also employees on LTD are required to pay their health plan premiums in order to maintain coverage.
8. Fraser Burrard Hospital Society (Royal Columbian Hospital) and BCNU, December 13, 1995 (Munroe). Accrual of sick credits include any extra shifts the RPT employee is able to pick up and are entitled to use sick credits to cover sick leave on any extra shifts pre- scheduled shifts.
9. Richmond Lions Manor and BCNU, January 21, 1997 (Kelleher). Employees are not entitled to payment for the cost of obtaining a doctor’s certificate.
10. HEABC (Cancer Agency) and BCNU, August 25, 1997 (Larson). Employers cannot deny payment for sick leave to someone who has undergone surgery on a voluntary basis (e.g. cosmetic surgery).
11. Nav Canada and Canadian Air Traffic Control Association (CATCA), February 18, 2000, 86 LAC 4th 370 (Brault). Employers cannot enforce a blanket policy on the provision of doctor’s certificates that is aimed at all staff and whose application is unrelated to individual circumstances.
12. Corporation of the Town of Ingersoll and London Civil Employees Local 107 (2003) LAC. The arbitrator applied the Meiorin principles reasoning that absences arising out of disability cannot be relied upon to justify termination of employment for non-culpable absenteeism unless there has been an accommodation of such disability-related absences to the point of undue hardship.

Industry Troubleshooter

1. Kiwanis Village Care Home and BCNU, June 24, 1994 (Johnston). Employees referred to a specialist may utilize sick leave credits to cover necessary travel time to a maximum of 3 workdays.

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Additional Resources

Tribunals and Commissions

1. BCGSEU and The Government of the Province of BC as represented by the Public Service Employee Relations Commission (“Meiorin”), September 9, 1999. This decision set out the principles for both Employers and Unions to follow in dealing with the duty to accommodate including the requirement to meet the test of “undue hardship”.
2. Parisien v. Ottawa-Carleton Regional Transit Commission [2003] C.H.R.D. No.6. The Tribunal ruled that the Employer’s actions in terminating the employee for non-culpable absenteeism amounted to discrimination on the basis of a disability and clarified that living with disability-related absenteeism is an appropriate and required form of accommodation.

Legislation

1. Freedom of Information and Protection of Privacy Act (FIOPPA) - governs the amount and type of personal information the Employer is entitled to collect from employees.
2. Employment Insurance Act and Employment Insurance Regulations.

Labour Board Decisions

1. HEABC (Royal Jubilee Hospital) and HEU, BCLRB No. B112/2002. A Labour Board decision that upheld the arbitrator’s decision to dismiss the grievance against the unilateral implementation of an attendance management program.

Footnotes

Article**Sub-Article****Last Update****Related Articles**

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42.01, 42.02, 42.03, 42.04, 42.05, 42.06, 42.07, 42.08, 42.09, 42.10, 42.11, 42.13

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11, 32, 37, 38, 42, 47, 48, 51.02, Extended Work Day Memorandum, Appendix A, Appendix A.4, Appendix A.7, Appendix G, Appendix W