Date: 20160302

Files: 566-02-7231 and 7232

Citation: 2016 PSLREB 18

Public Service Labour Relations and Employment Board Act and *Public Service Labour Relations Act*

Before a panel of the Public Service Labour Relations and Employment Board

BETWEEN

CECILIA CLOSE AND ANDREA STEVENS

Grievors

and

TREASURY BOARD
(Department of Citizenship and Immigration)

Employer

Indexed as
Close and Stevens v. Treasury Board (Department of Citizenship and Immigration)

In the matter of individual grievances referred to adjudication

Before: Kate Rogers, a panel of the Public Service Labour Relations and Employment Board

For the Grievors: Jacek Janczur, Public Service Alliance of Canada

For the Employer: Pierre-Marc Champagne, counsel

Heard at Sydney, Nova Scotia,
June 2 and 3, 2015.

[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 PSLRB") 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 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") before November 1, 2014, is to be taken up and continue under and in conformity with the *Act* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

I. Individual grievances referred to adjudication

[2] Cecilia Close is a service delivery agent classified CR-05 and employed in the Case Processing Centre of Citizenship and Immigration Canada (CIC or "the employer") in Sydney, Nova Scotia.

[3] On February 9, 2011, Ms. Close was three hours late for work because of the time it took her to clear her driveway following a snowstorm that started on February 8, 2011, and continued overnight. She requested 3 hours of paid leave under article 52 ("Leave with or without pay for other reasons") of the collective agreement between the Treasury Board and the Public Service Alliance of Canada (PSAC) for the Program and Administrative Services (PA) Group; expiry date, June 20, 2011 ("the collective agreement").

[4] The employer denied Ms. Close's leave request. Instead, she was given the option of either making up the hours or using a different form of leave with pay.

[5] On April 13, 2011, she filed a grievance ("the Close grievance") alleging a violation of article 52 of the collective agreement. The grievance was heard and denied at the second and final levels of the grievance process and was referred to adjudication on June 22, 2012.

[6] Andrea Stevens (with Ms. Close, "the grievors") is also a service delivery agent classified CR-05 in the CIC Case Processing Centre in Sydney. Between May 17 and

26, 2011, she vacationed in Europe. She was scheduled to work between 8:30 a.m. and 2:15 p.m. on Friday, May 27, 2011. However, there were problems with her return flights from Europe, and she did not return home in time to work her scheduled hours. She requested 5.25 hours of paid leave under article 52 ("Leave with or without pay for other reasons") of the collective agreement that succeeded the one mentioned earlier and that expired June 20, 2014 ("the next collective agreement").

[7] The employer denied Ms. Stevens' request for paid leave under article 52 of the next collective agreement. Because of that fact, she was required to use vacation leave to cover the absence.

[8] On July 6, 2011, she filed a grievance alleging a violation of article 52. Her grievance was heard and denied at the second and final levels of the grievance process and was referred to adjudication on June 22, 2012.

[9] Although the applicable collective agreements have different expiry dates, the provision in question is the same. It provides as follows:

> ***52.01*** *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;*
>
> *(b) leave with or without pay for purposes other than those specified in this Agreement.*

[10] Because both grievances concerned the same employer, the same workplace, and the same collective agreement provision, the parties requested that they be scheduled and heard together at adjudication. At the hearing, the evidence relating to each grievance was presented separately, but the arguments for both grievances were joined. The format of this decision reflects that approach.

II. Summary of the evidence

A. Close grievance

[11] Ms. Close testified and called her husband, Curtis Close, as a witness. She introduced six documents. The employer called Mary Elizabeth Keough, a manager, to testify and entered three documents.

[12] Ms. Close testified that she lives about 12 kilometres from her workplace, in an area that she described as "somewhat rural". The lots are large, and therefore, she does not have many neighbours. She stated that there is no public transport in the area. To access public transport, she would have to go to a mall, which is about 8 kilometres from her home. She believed that it would take about an hour or more to walk to the mall to take public transport. Normally, it is about a 15-minute drive from her home to her workplace. She and her husband bought the property in around 2002. She stated that it lies lower than other properties on the street and that there is a sharp incline from the bottom of her driveway to the street. Mr. Close estimated that the driveway is about 35 feet long and about 7 feet wide.

[13] Ms. Close stated that she believes that the houses on her side of the street receive more snow than those on the other side, based on her observations of the snow accumulated on the roofs of the houses. She testified that because her property is lower than the others and because it seems to get more snow, the driveway can be difficult in the winter. She believes that when the municipality put in sidewalks it made the driveway incline worse and therefore harder to manage in the winter.

[14] Ms. Close and her husband relied on their snowblower to clear the driveway. Normally, Mr. Close operated it. He testified that it was not economically feasible or reliable to hire someone to clear the driveway for them. Ms. Close testified that she has arthritis and bursitis in her hip. If she walks on sand or snow, it flares up, and she is frequently in pain. That was one of the reasons she and her husband bought the snowblower and was the reason her husband operated it. Before February 9, 2011, she had never operated it.

[15] It began to snow on February 8, 2011. Ms. Close, who normally works from 7:00 a.m. to 3:15 p.m., left work an hour early that day because it was snowing heavily, and she was concerned about the weather conditions. She drove home directly. The roads were slippery, and she had to drive with caution. A trip that normally took 15 minutes took about half an hour that day. There was some snow accumulated in the driveway when she arrived home. It continued to snow overnight. Between February 8 and 9, 2011, 24.4 centimetres of snow fell (Exhibit G-2).

[16] Ms. Close could not recall if February 2011 was an usually snowy month. She acknowledged in cross-examination that other days that month had had greater

accumulations of snow than February 8 and 9 (Exhibit G-2). She agreed that the weather report for that month showed that close to 30 centimetres of snow fell between February 1 and 3, 2011. She could not remember if she had difficulty getting to work on those days.

[17] Ms. Close had no difficulty driving her car down the driveway on her return from work on February 8. She did not consider parking closer to the street because she had learned from experience that she needed the whole driveway to accelerate up the incline.

[18] Mr. Close did not clear the driveway on February 8, 2011. Ms. Close stated that she did not see the point of clearing the driveway on February 8 because the forecast was for snow all night long, and her husband would still have had to clear it in the morning.

[19] However, on the morning of February 9, 2011, Mr. Close was not able to clear the driveway as expected because pain from an old back injury had flared up overnight. He testified that he was unable to operate the snowblower on February 9 and that, in fact, he was not able to move around because of the pain, even though, according to Ms. Close, he took the snowblower out of the shed and showed her how to operate it.

[20] Both Ms. and Mr. Close testified that the accumulation of snow in the driveway was so high that it would have been impossible to get the car out without clearing it. She did not consider calling the person that she had sometimes used in the past to clear the snow because she assumed from experience that he would not come until he had taken care of his regular clients, which would probably have taken him until the afternoon. She also did not consider taking a cab to work because it would have necessitated walking up the driveway in the deep snow because she knew that no cab would drive down it. She conceded in cross-examination that it did not occur to her to simply clear a path up the driveway to the street to meet a cab. Similarly, she stated that she did not try to get a ride to the office with neighbours because they all worked in different directions from her office. Although she has a colleague who lives somewhere in the subdivision, she did not contact that person to see whether she could get a ride.

[21] Ms. Close decided that clearing the driveway herself was the best option to ensure that she got to work, even though she had never used the snowblower before. She testified that although she started early, it took her several hours to clear the driveway because she had to stop frequently to rest her hip.

[22] Once the driveway was cleared, the drive to work took about 20 minutes. Ms. Close stated that she arrived shortly before 10:00 a.m. When she arrived, she spoke to her supervisor, Nelson Martel. She could not recall whether she had called him earlier that morning to explain her circumstances, but she explained what had happened when she arrived. She submitted a leave form for leave with pay for other reasons, which is coded as "699" leave.

[23] Ms. Close's application for 699 leave was rejected on March 31, 2011. Another supervisor, Anne-Louise MacNeil, told her that she would have to make up the hours that she missed on February 9, 2011. She testified that she made up the time by working an extra hour a day for three days. She could not remember exactly when she did it but she testified that she thought that she had spoken to Ms. MacNeil about making up the hours.

[24] When Ms. Close learned that her leave application was rejected, she wrote to Ms. Keough, who was manager of citizenship operations, to explain her circumstances. She detailed the weather conditions on February 9, 2011, and noted that schools, the university, and the shopping mall had all been closed because of the weather. She explained the layout of her property and that her husband had been unable to clear the snow on the morning in question because he was not well and that, therefore, she cleared the driveway. She also explained that because of her hip problems, she was unable to clear the snow quickly. She questioned the employer's fact-finding because to her knowledge none of her colleagues had been questioned about when they had arrived at work on February 9, 2011 (Exhibit G-6).

[25] On April 13, 2011, Ms. Keough responded to Ms. Close and confirmed that her leave request was denied (Exhibit G-6). She wrote that a number of factors had been considered when the decision was being made that denied the request. She noted that the directors of three government departments in the region were consulted and that they took into account the weather conditions, the ongoing forecast, whether public transport continued to operate, and the road conditions. She noted that the employer

supported the use of "699" leave in specific circumstances that are not in an employee's control but that she considered that Ms. Close's circumstances had been within her control.

[26] Ms. Keough testified that she received an electronic copy of Ms. Close's leave request (Exhibit E-2) on February 9, 2011. She stated that, as a rule, she would have looked at all the leave requests from employees within a few days and consulted with other managers to see if they had received similar requests. She also would have consulted with Human Resources to ensure that her response was consistent with other responses to such requests, and she would have asked for further information from team leaders and employees requesting leave. She noted that employees can provide only limited information on an electronic leave request. Once she had all the necessary information, she would have made a decision.

[27] In Ms. Close's case, Ms. Keough asked for additional information from the team leader on March 28, 2011 (Exhibit E-3). She testified that she wanted to give Ms. Close the opportunity to explain what had prevented her from reporting to work on time on February 9, 2011, given that employees are expected to plan for inclement weather. She testified that when that she asked for the information, she had no information other than Ms. Close's comment on her electronic leave request about her particular circumstances.

[28] On March 31, 2011, having received no additional information, Ms. Keough denied Ms. Close's leave request. She testified that she did so because the only information that she had about Ms. Close's circumstances indicated that she could not report for work because her driveway was not cleared. Ms. Keough believed that it was within Ms. Close's control to clear her driveway in time to report for work at the scheduled time.

[29] Ms. Keough testified that she received Ms. Close's explanation (Exhibit G-6) on April 7, 2011. She reviewed the information that Ms. Close provided and consulted with Human Resources. However, Ms. Close's explanation did not change her belief that Ms. Close bore the responsibility of ensuring that she reported to work on time. The fact that schools and the shopping mall were closed on February 9, 2011, did not change her opinion because the decision to keep the office open was made in

consultation with other government departments and was based on a number of factors, including road conditions and the fact that public transportation was available.

[30] Ms. Keough testified that she believes that employees make choices about where they live and that when they make their choices, they have to be prepared to deal with inclement weather so that they can report for work on time. The fact that Ms. Close's husband was ill on the day in question did not change her opinion. She believed that Ms. Close had other options on the morning of February 9, 2011. She could have called a colleague or a taxi to pick her up, she could have arranged for someone to clear the driveway for her, or she could have changed her hours of work so that she was not late.

[31] Ms. Keough acknowledged in cross-examination that she did not know whether any of Ms. Close's co-workers lived near her and that she had no personal knowledge of the conditions of Ms. Close's property or driveway. She agreed that by clearing the driveway on her own, Ms. Close made a reasonable effort to get to work.

[32] Ms. Keough testified that to her knowledge Ms. Close did not make up the hours that she missed on February 9, 2011. However, in response to a question from me, she testified that she had no personal knowledge as to whether Ms. Close did or did not make up the hours.

B. Stevens grievance

[33] Ms. Stevens testified and entered four documents into evidence. The employer called her manager, Joanne Harvey, as a witness and entered one document.

[34] Ms. Stevens testified that she travelled to France on holiday with her mother and her daughter in May 2011. Her husband booked the flights and arranged that they were to leave for France on May 17 and return on May 26, 2011. Ms. Stevens took vacation leave from May 17 to 26, 2011, inclusive. She was expected to return to work at 8:30 a.m. on Friday, May 27, 2011, for her regular shift.

[35] The itinerary that Ms. Stevens' husband booked had her travelling from Halifax to Marseille, France, through Philadelphia, Pennsylvania, and Frankfurt, Germany, on May 17, 2011, and returning to Halifax from Marseille via Frankfurt and Philadelphia on May 26, 2011 (Exhibit G-2). She expected to arrive in Halifax on the return flight at

11:26 p.m. From Halifax, she planned to drive to Sydney and arrive on May 27 at about 3:00 a.m.

[36] Questioned in cross-examination about why her return from France was scheduled in such a way that her estimated time of arrival in Sydney was just a few hours before she was scheduled to work, Ms. Stevens stated that the flights were the cheapest that her husband could find on short notice. She did not know whether other flights would have had her home earlier. Her husband booked the flights, and she told him that the times were fine. She stated that she did not believe that it was risky to schedule her return flight so close to the start of her shift. She had done it in the past without issue, and had everything worked as planned, she would have been on time for work on May 27, 2011, despite arriving at 3:00 a.m.

[37] However, not everything went as planned. Ms. Stevens' scheduled flight from Philadelphia to Halifax at 8:25 p.m. was delayed and then cancelled (Exhibit G-4). She learned that when she arrived at the gate for the flight in preparation for boarding. The airline advised passengers to rebook their flights. On the airline's advice, she booked the same flight for the next day on the same airline. She was told that that was her only option. However, when speaking to her husband later that night, she learned that the airline's cancellation policy allowed her to book a return flight on a different airline.

[38] The following morning, Ms. Stevens returned to the Philadelphia airport at 7:30 a.m. Because the flight that she had booked the night before did not leave until the evening, she decided to look at the possibility of getting on an earlier flight. Armed with the information that her husband had given her about the airline's cancellation policy, she returned to the airline's service agent, who found her a flight through Montreal, Quebec, on standby. The flight left Philadelphia at 11:14 a.m. and arrived in Montreal at 12:30 p.m. Once in Montreal, she was again put on standby for a flight to Halifax. Eventually, she managed to get on a flight to Halifax at 4:25 p.m., which arrived at 5:00 p.m. on May 27, 2011, after her scheduled workday had ended (Exhibit G-4).

[39] As it turned out, Ms. Stevens did not arrive home until much later than expected because her luggage did not arrive on the flight with her. Her car keys were in her

suitcase, and she was unable to drive home. Therefore, she had to wait until her husband drove from Sydney to Halifax with a set of keys for her car.

[40] Ms. Stevens had arranged for a message explaining her travel problems to be given to her team leader on May 27, 2011. When she returned to work on Monday, May 30, 2011, she confirmed that her team leader had received the message.

[41] Ms. Stevens requested 699 leave and was told to speak to her manager, Ms. Harvey. When she did, she was told to submit the leave request with all the supporting documents, and it would be considered. On June 17, 2011, she was told that her request was denied.

[42] Ms. Harvey testified that she denied the leave request because she believed that the circumstances had been within Ms. Stevens' control. She had booked her vacation leave, and she had booked her itinerary. It had been within her control to book sufficient leave to cover her travel or to choose a flight schedule that gave her some margin of error. However, she chose a flight schedule that allowed her very little margin of error. At Ms. Stevens' request, Ms. Harvey put her rationale for denying the leave request in writing (Exhibit E-1).

[43] Ms. Harvey acknowledged in cross-examination that the cancellation of the flight from Philadelphia to Halifax had not been within Ms. Stevens' control and that she had made a reasonable effort to get home. However, Ms. Harvey stated that from her perspective, the real problem was with the initial trip planning. She believed that Ms. Stevens bore the responsibility to plan appropriately so that she would be able to report to work on time.

III. Summary of the arguments

A. For the grievors

[44] Clause 52.01(a) is identical in both collective agreements and has been the subject of many decisions of the PSLREB's predecessors. The most recent statement interpreting the language in question can be found in *Martin v. Treasury Board (Department of Veterans Affairs)*, 2014 PSLRB 37.

[45] In that case, the adjudicator developed a two-pronged test. First, it must be determined whether circumstances not directly attributable to the employee prevented

him or her from reporting to work. Second, if the first element is established, it must be determined whether the employer unreasonably withheld leave with pay, if it was requested. Employees do not have to make heroic efforts to get to work. The only requirement is whether circumstances not directly attributable to them prevented them from reporting to work. The reasonableness or unreasonableness of the decision to deny leave with pay is a factual question that turns on whether, at some point, the circumstances that prevented the employee from reporting to work changed.

[46] Citing *Cloutier et al. v. Treasury Board (Agriculture Canada)*, PSSRB File Nos. 166-02-21838 to 21840 (19920721), [1992] C.P.S.S.R.B. No. 104 (QL), and *Colp and Bunch v. Treasury Board (Employment and Immigration Canada)*, PSSRB File Nos. 166-02-23215 and 23216 (19930803), [1993] C.P.S.S.R.B. No. 138 (QL), which examined language identical to clause 52.01(a), the PSAC argued that the employer had to take into account the grievors' particular circumstances when denying applications for leave with pay. In *Cloutier*, the adjudicator considered that the employer did not exercise its discretion reasonably when it failed to consider whether the circumstances of the employees who reported to work were the same as the grievors' circumstances. In *Colp*, the adjudicator held that the fact that the grievors lived a considerable distance from the workplace was not in itself reason to deny special leave. There must be some evidence that the grievors' choice of residence prevented them from reporting to work in normal conditions, but in fact, in that case, the evidence demonstrated that the grievors had rarely missed work because of storms.

1. <u>Close grievance</u>

[47] As held in *Colp*, Ms. Close cannot be faulted for her choice of residence. There was no evidence that in normal weather conditions, she had any difficulty getting to work. Furthermore, she took reasonable steps to ensure that she was prepared for the weather, given the particular location of her property. She and her husband bought a snowblower, which he operated because Ms. Close's hip injury prevented her from doing so.

[48] On February 9, 2011, a significant amount of snow accumulated (Exhibit G-2). Mr. Close was unable to clear it because an old back injury caused him pain. Ms. Close decided to clear the driveway, and because she did not normally operate the snowblower and because of her hip injury, it took her several hours. She testified that

she did not call a snowplow contractor to clear the driveway because she knew from experience that he would come only after he had dealt with his regular clients. She did not call a cab because she knew from experience that no cab driver would drive down her driveway in those conditions, and therefore, she would still have had to trudge through the snow to the street to meet one, which would have exacerbated her hip problems.

[49] Ms. Close was asked in cross-examination why she did not simply clear a path to meet a cab rather than the whole driveway, but nothing suggests that that would have been faster. Furthermore, Ms. Close cannot be expected to make a heroic effort or to think of everything. She made a reasonable effort and got to work, albeit three hours late.

[50] The employer considered Ms. Close's request for special leave not on her particular circumstances but on the basis of whether other employees were similarly situated. Ms. Keough testified that she consulted Human Resources for the purpose of ensuring consistency, but in an attempt to create consistency, she might not have judged each situation on its facts, as required by the case law. The failure to investigate individual circumstances was the basis of *Cloutier*.

[51] Furthermore, Ms. Keough was influenced by her belief that Ms. Close's circumstances were entirely within her control, especially as she had chosen where she lived. But, as held in *Colp*, Ms. Close should not have been faulted for her choice of residence when there was no evidence that under normal weather conditions, she had any problems getting to work. Ms. Close did not control the weather, and she did not control her husband's health. In dismissing the relevance of the school and mall closures, Ms. Keough seemed to be searching for a reason to deny Ms. Close's leave request rather than genuinely enquiring whether Ms. Close was prevented from reporting to work for reasons not directly attributable to her. It was notable that Ms. Keough conceded that Ms. Close had made a reasonable effort to get to work.

[52] It should also be noted that Ms. Close provided the only direct evidence concerning whether she made up the hours that she missed. Ms. Keough conceded that she had no evidence that Ms. Close did not work the extra hours. She should be credited with the hours of leave under clause 52.01(a) that she requested because she made up that time.

2. Stevens grievance

[53] Ms. Stevens was prevented from reporting to work on May 27, 2011, because the Philadelphia to Halifax portion of her return flight from Europe on the evening of May 26, 2011, was cancelled, and on the airline's advice, she was rescheduled on the same flight the following day. She returned to the Philadelphia airport on the morning of May 27, 2011, to search for an earlier flight. She found one and returned to Halifax on the evening of May 27, 2011. She did not try to purchase new tickets on May 26, 2011, which would have returned her home in time for her scheduled work shift, but the case law does not require that employees exhaust every conceivable option or engage in heroic measures to get to work.

[54] Ms. Stevens was prevented from reporting to work by circumstances that were not attributable to her. Ms. Harvey, her manager, conceded that the circumstances that prevented Ms. Stevens' return had not been within her control and conceded that she had made reasonable efforts to return home when she could. Therefore, the decision to deny her leave request for 5.25 hours of special leave was unreasonable.

[55] *Martin* held that the determination of reasonableness is driven by the question of whether the circumstances that prevented the employee from getting to work changed. In this case, nothing changed. Ms. Stevens' flight was cancelled, and she did everything that she could to get home as fast as possible.

[56] Ms. Harvey testified that she was influenced by the fact that Ms. Stevens had cut her return trip too close to her scheduled work shift, but Ms. Stevens testified that she had done it before without issue and had reported for work on time. There was no evidence to the contrary. In *Martin*, the grievor's scheduled flight from Europe was also close to the start of her first scheduled workday following her holiday. The adjudicator in that case did not fault her for that fact and noted that while there is some inherent risk in travelling, there was no evidence to support the apportionment of risk.

[57] Through her own efforts, Ms. Stevens got home earlier than she might have had she followed the airline's advice, which was not reflected in the employer's memo outlining the reasons for denying her leave request (Exhibit E-1).

[58] It is not possible for employees to plan for all problems that might arise when travelling. They are not clairvoyant and cannot anticipate problems. Nor are they

required to. Things happen unexpectedly. That is one of the reasons that clause 52.01(a) exists, and therefore, the grievance should be allowed.

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

[59] The employer argued that it is important to remember that clause 52.01(a) is discretionary and that any examination of leave requests made under that provision must respect the employer's exercise of discretion rather than limit it. The clause cannot be interpreted so flexibly that the employer must accept employees' decisions even when they are unreasonable. The employer's discretion was explicitly recognized in the clause, which the parties negotiated. In agreeing to the language of the clause, the PSAC accepted that leave granted under the provision was discretionary and that leave requests would be assessed according to the criteria established.

[60] The foremost requirement of clause 52.01(a) is ". . . when circumstances not directly attributable to the employee prevent his or her reporting for duty . . ." . That means that the burden rests on the employee to establish that the circumstances were not directly attributable to him or her.

[61] *Martin* established a two-step analysis. The first requirement is that the employee establish that the circumstances were not directly attributable to him or her. Only after that fact is established is it necessary to determine whether the requested leave was unreasonably denied. The assessment of reasonableness does not require an adjudicator to put himself or herself in the employer's shoes. It requires simply that the employer's response fall within a range of reasonable decisions. Furthermore, the employer's obligation to investigate, accepted in *Martin*, cannot be pushed too far without limiting the employer's discretion and changing the burden. It is not up to the employer to establish that the circumstances were not directly attributable to the employee; it is up to the employee.

[62] The determination that circumstances were not directly attributable to the employee is fact driven, and there are many adjudication decisions on the subject. The majority deal with adverse weather conditions. Each decision must be considered in light of the facts particular to that decision. It is not appropriate to take generic statements from the case law without examining the specific facts that led to those statements.

1. Close grievance

[63] Citing *Strickland v. Treasury Board (National Capital Commission)*, PSSRB File No. 166-02-14697 (19850215), [1985] C.P.S.S.R.B. No. 74 (QL), and *Dollar v. Treasury Board (Canada Employment and Immigration Commission)* (1979), 21 L.A.C. (2d) 34, the employer argued that a number of relevant factors had to be considered. For example, the kind of road Ms. Close had to navigate, the state of her vehicle, whether schools and other public places were closed, and the remoteness of her location could all be relevant to the determination that the circumstances preventing her attendance at work were not directly attributable to her.

[64] She was not in a remote location. Although schools and a mall were closed, there was no evidence that the roads were dangerous or impassible. To the contrary, she stated that once she cleared her driveway, it took her only 15 minutes more than usual to drive to work. The snowstorm was not unusual; it was one of several that occurred in February 2011.

[65] Ms. Close's problems getting to work arose because of her driveway. She and her husband chose their house knowing that the driveway might be a problem. They took no steps to rectify the problem, not even when the municipality installed the sidewalks that Ms. Close believed compounded her problems. The employer should not have to bear the burden of Ms. Close's choices.

[66] Ms. Close was not prevented from reporting to work by circumstances not directly attributable to her but by her choices. She chose not to park the car in such a way that it would have been easier to get out in the morning. She chose not to clear the driveway the night before so that it would not have been so much work in the morning. She chose not to get up earlier to clear the driveway. She chose not to call a snowplow operator or to seek help from neighbours. She chose not to call a cab.

[67] As in *Sinclair v. Treasury Board (Solicitor General Canada)*, PSSRB File No. 166-02-14295 (19840507), [1984] C.P.S.S.R.B. No. 64 (QL), and *Chutter v. Treasury Board (National Defence)*, PSSRB File No. 166-02-15160 (19870325), [1987] C.P.S.S.R.B. No. 73 (QL), Ms. Close was prevented from reporting to work because of choices she made rather than because of circumstances outside her control. Employees are not required to exhaust all possible options but must make a reasonable effort and consider reasonable options. She did not. It is not unreasonable for the employer to

determine that other better choices could have been made to ensure that Ms. Close got to work on time. The employer also cited *Ryan v. Treasury Board (Indian and Northern Affairs)*, PSSRB File Nos. 166-02-11431 and 11432 (19820820), [1982] C.P.S.S.R.B. No. 143 (QL), and *Webber v. Treasury Board (Health and Welfare Canada)*, PSSRB File No. 166-02-17970 (19890711), [1989] C.P.S.S.R.B. No. 185 (QL).

2. Stevens grievance

[68] Ms. Stevens made a risky choice when she decided to book the last possible flight home from Europe, leaving her no margin for error. She made that decision for economic reasons, and the risk was hers. She should have considered that flights get cancelled and should have planned for it. She explored other options only after her flight was cancelled, and by that time, it was already too late to allow her to report for work on time.

[69] The employer argued that *Martin* did not actually examine the issue of whether the original return flight booked by the grievor in that case was reasonable, but that issue was specifically addressed in *Justason v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-10376 (19820906), [1982] C.P.S.S.R.B. No. 132 (QL), which held that the grievor in that case was prevented from reporting to work on time by his failure to allow for a margin of error for unforeseen circumstances when making his travel plans and that he should have borne the burden of that decision rather than the employer.

[70] The employer asked that both grievances be denied on the grounds that the grievors had not met the test set out in *Martin.* There was no evidence that the circumstances that prevented them from reporting to work had not been directly within their control; therefore, the analysis should stop there. Furthermore, even if the circumstances are found to have been outside the grievors' control, the employer's exercise of discretion was reasonable.

C. Grievors' reply

[71] Although clause 52.01(a) is discretionary, there is no such thing as an unfettered discretion. The employer is required to be reasonable in its exercise of discretion. Furthermore, the grievors did not submit that the employer must investigate every circumstance, but a reasonable exercise of discretion does require

that it knows the facts, which were described in *Martin* as the "factual underpinning[s]" of the decision.

[72] Concerning the Close grievance, although the employer contended that the roads were passable, that was not Ms. Close's problem and is not relevant. She was prevented from reporting to work on time by the combination of the state of her driveway and her husband's back injury, which prevented him from taking on his customary role of clearing the driveway. Her actions and decisions of deciding to park in her usual spot and of not clearing the driveway the night before were entirely reasonable given her lack of knowledge that her husband would be unable to clear the driveway the next morning.

[73] The cases cited by the employer are old and are distinguishable. The more recent cases cited by the grievors are preferred. Both grievances should be allowed, and I should remain seized for implementation purposes.

IV. Reasons

[74] The grievances before me concern the interpretation and application of clause 52.01(a), which provides in part as follows:

> ***52.01*** *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;*
>
> . . .

[75] Leave under article 52 is discretionary, but the employer's exercise of that discretion is limited by the requirement that it not unreasonably withhold leave requested under the provision. The grievors bore the onus of establishing first that circumstances not directly attributable to them preventing them from reporting for duty and second that their leave requests were unreasonably denied.

[76] Similar versions of the provision have been in the collective agreement for over 30 years, and therefore, a substantial number of decisions have considered its interpretation and application. For the most part, cases concerning article 52 or its earlier incarnations are fact driven and concern whether the circumstances that prevented the employee from reporting to work were directly attributable to him or

her. A 1979 PSSRB decision, *Barrett v. Treasury Board (Department of Transport)*, PSSRB File No. 166-02-7738 (19800123), which dealt with the interpretation of almost identical language, described at page 10 the fundamental issues of interpretation as follows:

> *. . . the intention of the collective agreement is not to sacrifice legitimate requests for special leave where foresight and care are exercised and, notwithstanding the employee's recourse to appropriate and reasonable measures, the worst of contingencies do in fact occur. If that be the case, then the employee is duty bound to make a sincere effort to mitigate the adverse effects occasioned by such unforeseen contingencies. In such circumstances, the employer, once having addressed itself to all the prevailing factors, must act reasonably in resolving the legitimacy of the employee's request for special leave. In substance, delays caused by adverse weather conditions 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 under the terms of the collective agreement. . . .*

[77] I agree with that approach. Clause 52.01(a) provides a negotiated benefit to employees falling within its ambit. It provides a form of protection when despite reasonable care and foresight, an employee is prevented from reporting for duty by circumstances outside his or her control. There is no doubt that it is a discretionary benefit, but the employer's exercise of discretion must be reasonable. As noted in *Barrett*, the employer cannot establish such a rigid and impenetrable standard that employees must meet to qualify for leave that it renders the provision meaningless.

[78] The question of whether an employee is prevented from reporting for duty by circumstances not directly attributable to him or her is one of fact. As the employer noted in its argument, the case law on the question is frequently driven by adverse weather conditions. In such cases, factors such as road conditions, the location of the employee's residence, and the attempts made to counteract the effect of the weather have often been considered relevant. But the case law has not established hard and fast rules because each case must be considered on its particular circumstances.

[79] I believe that, following *Barrett*, when determining whether the circumstances that prevented an employee from reporting to work were directly attributable to him or her, the first question should be whether, with reasonable foresight and care, the circumstances giving rise to the request could reasonably have been anticipated and

prevented. It seems to me that if the answer to that question is "yes", then the employee is responsible for not taking reasonable measures to prevent them from occurring.

[80] If the answer to that question is "no", then the question becomes: Did the employee take reasonable measures to counteract or overcome the circumstances that interfered with him or her reporting for duty? When reasonable foresight could not have prevented the circumstances, and the employee took appropriate measures to deal with the problem, then it seems to me that the circumstances cannot be found directly attributable to the employee. In that case, the employer must consider the facts particular to the employee's situation and make a reasonable decision on those facts.

A. Close grievance

[81] The evidence established that Ms. Close lived in a subdivision that was normally a 15-minute drive from her workplace. There was no public transportation in the area and she drove to work daily. There was no evidence that the location of her residence caused problems reporting to work under normal circumstances. In fact, in her cross-examination, it was noted that on other days in February 2011, more snow fell than on February 8 and 9, but no evidence was presented that Ms. Close had difficulty reporting to work on those days. Therefore, I do not find that the location of her residence was a determining factor in preventing her from reporting to work on February 9, 2011.

[82] Ms. Close testified that she and her husband decided that buying and using a snowblower would be the best, most efficient, and most economical method of clearing their driveway during the winter months. There was no evidence that, as a general rule, their decision was unreasonable. Mr. Close testified that he took care of clearing the driveway. If that measure was not reasonable or effective, I would have expected to see evidence that Ms. Close frequently had problems reporting for work when it snowed. No such evidence was presented.

[83] Neither the location of Ms. Close's residence nor the measures that she and her husband had put in place to clear the driveway in winter prevented her from reporting to work on February 9, 2011; it was that her husband was unable to operate the

snowblower because of a back injury. In my opinion, that event could not have been foreseen or prevented and was not a circumstance directly attributable to Ms. Close.

[84] The question, then, is whether the measures Ms. Close took to mitigate the problem she faced were reasonable. I find that they were. She testified that she and her husband had occasionally used a snowplow contractor in the past to clear the driveway and that she knew that, based on her experience, he would not come to clear their driveway on the morning of February 9 until he had dealt with his regular customers. Given that her assessment was based on her experience, I do not find it unreasonable that she did not call him.

[85] She did not call a taxi because she knew from experience that it would not come down the driveway, and given her hip injury, she did not believe she could trudge through the deep snow to the street. Asked in cross-examination why she did not simply clear a path to the street, rather than the whole driveway, she admitted that it did not occur to her. She also did not call neighbours for a ride because they work in different areas; therefore, it was not practical. Even had she managed to get a taxi or find a ride, there was no public transportation, so she had to consider how she would get home at the end of the day.

[86] Ms. Close did not fail to plan for snow removal. She did not simply sit back and make no effort. Her usual and reasonable arrangements for snow removal failed, and considering all her options, she decided that the best course of action was to clear the snow herself, even though she had a bad hip and it took her longer than it would have taken her husband. I cannot find that her actions were unreasonable, even if, hypothetically, other actions might have been more effective.

[87] Ms. Keough's decision to deny Ms. Close's leave request was based on considerations that I do not consider applicable to Ms. Close's particular circumstances. The fact that three government departments decided not to close on the basis that roads were not closed and public transportation was running was not relevant to Ms. Close's particular circumstances. The storm did not cause Ms. Close problems; the storm in combination with her husband's back injury did.

[88] Ms. Keough considered that Ms. Close was the author of her misfortune because she made a choice about where to live and was therefore responsible for ensuring that she had a plan to deal with inclement weather so that she could report to work on

time. In my opinion, that determination failed to take into account the fact that the location of Ms. Close's residence was generally not a problem and that she had a plan to deal with inclement weather that generally worked.

[89] Ms. Keough also considered that Ms. Close should have taken other steps to get to work on time on the day in question, such as getting a ride with a colleague or neighbour, but had no personal knowledge of whether those options were reasonable or possible or would have been more effective than the measures Ms. Close took. However, although she was made aware of Mr. Close's incapacity, Ms. Keough did not consider it relevant as a factor preventing Ms. Close from reporting to work on February 9, 2011. For those reasons, I do not find her denial of Ms. Close's leave request reasonable.

[90] Ms. Close testified that she made up the three hours that she was late. There was no evidence to contradict her testimony. Therefore, I find that she worked the three hours as directed by the employer. I believe that her request for three hours' leave under clause 52.01(a) was unreasonably denied and that she should not have been required to make up the three hours in question. Therefore, she should be credited with the hours of leave under clause 52.01(a), as she requested and consequently, she should be compensated for the three hours that she was required to work.

B. <u>Stevens grievance</u>

[91] Ms. Stevens alleged that the employer unreasonably denied her request for leave under clause 52.01(a) when she was unable to report for duty at 8:30 a.m. on May 27, 2011, because one leg of her return flight from Europe was cancelled.

[92] Ms. Stevens argued that she was prevented from working on May 27, 2011 by circumstances that were not directly attributable to her. I do not agree. She scheduled her return flights in such a way as to leave no margin of error. As originally booked, she did not expect to return to Sydney until 3:00 a.m. on May 27, 2011, for her scheduled workday at 8:30 a.m. She was flying from Marseille through Frankfurt and Philadelphia to Halifax. The fact that she had no control over the cancellation of her flight or that she took all possible steps to find another flight is irrelevant when considered in light of the fact that once her flight was cancelled, there was no

possibility she would be able to report for duty on time because she left no room for such eventualities in her planning.

[93] In *Barrett*, involving a grievance filed under a provision similar to clause 52.01(a), the adjudicator considered an employee's failure to plan his return trip from a vacation appropriately, given the season and the potential for delays. The adjudicator wrote as follows at page 10:

> *. . . the failure by an employee to anticipate in advance the delays that might be occasioned by adverse weather conditions and allow himself sufficient lead time to permit his scheduled return to work is a factor that ought to be deemed to be within his control. Failure to allow for such contingencies is in itself a reckless venture that ought not normally in the exercise of the employer's discretion to [sic] give rise to benefits under Article 18.04 . . . .*

[94] Similarly, in *Justason*, an employee's failure to allow a margin of error for unforeseen circumstances when making travel plans was found to be the true reason that the employee failed to report for duty as required and was a circumstance directly attributable to him.

[95] I agree with the principles enunciated in *Barrett* and *Justason.* Ms. Stevens was responsible for her travel arrangements. She knew that she was booked on the last flight out of Philadelphia to Halifax on May 26, that she had to drive from Halifax to Sydney, and that she would arrive, if all went exactly according to plan, just five-and-a-half hours before the start of her scheduled workday. A delay in any portion of her return itinerary could have resulted in her missing the last flight and would have prevented her from returning to Sydney in time for her scheduled workday. She left no room to deal with any of the problems that accompany air travel, such as adverse weather or mechanical difficulties or even lost luggage. In my opinion, that kind of planning does not meet the requirement that an employee exercise reasonable foresight and take reasonable measures to ensure that he or she is able to report for duty. The employer should not have to pay for the risk and the lack of foresight that Ms. Stevens demonstrated.

[96] I do not find *Martin* applicable to the circumstances of this case. That case concerned the steps that the grievor took after her flight was cancelled. It did not

examine whether she had left herself a sufficient margin of error in her travel planning.

[97] In the circumstances of this case, I find that Ms. Stevens has not met the onus of establishing that she was prevented from reporting to work by circumstances not directly attributable to her; therefore, I cannot allow the grievance.

[98] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[99] Grievance 566-02-7231 (of Ms. Close) is allowed. I order the employer to credit Ms. Close with the three hours leave under clause 52.01(a) requested in her grievance and, as a consequence, to compensate her for the three hours that she worked at the employer's direction to make up the time that should have been granted as leave under 52.01(a).

[100] I will remain seized for a period of 60 days for the purposes of implementing that decision.

[101] Grievance 566-02-7232 (of Ms. Stevens) is denied. I order the file closed.

March 2, 2016.

Kate Rogers,
a panel of the Public Service Labour Relations and Employment Board