What's New in HR Law

Arbitrator Concludes that Workplace Indemnity Plan Disentitles Employees to Statutory Personal Emergency Leave

May 10, 2018

BOTTOM LINE

An employee may be disentitled to statutory personal emergency leave for personal illness, injury or medical reasons, if he or she has a greater contractual entitlement to illness-related income protection.

Facts: Employees claimed personal emergency leave pay after Bill 148 enacted

In *United Steel Workers, Local 2020 and Bristol Machine Works Ltd*, several employees called in "sick" and attempted to claim personal emergency leave pay from the employer after the Bill 148 amendments came into force. Many will recall that Bill 148 added two days of paid personal emergency leave to the *Employment Standards Act, 2000* (the "*ESA*").

When the employer refused to provide any personal emergency leave pay, the employees' union filed a group grievance claiming that the employer had violated the *ESA*.

The employer argued that the *ESA*'s personal emergency leave provisions did not apply because the parties' collective agreement provided a greater right or benefit regarding sick leave. Although the collective agreement did not provide employees with individual sick days, it included income protection benefits for employees who were ill or injured.

Specifically, seniority employees could be entitled to: (a) up to 17 weeks of sickness and accident insurance (consisting of 65% of the employee's earnings, to a maximum of $700 per week); and (b) long-term disability insurance (consisting of 65% of the employee's earnings, to a maximum of $2500 per month).

"Totality of the Benefit": Is there a greater total benefit provided under the statute or under an employment-related contract?

Arbitrator Mitchnick held that the income protection plan under the collective agreement was "manifestly better" than the personal emergency leave pay entitlements under the *ESA*.

In reaching this conclusion, Arbitrator Mitchnick compared "the totality of the benefit" provided by the *ESA* to that of the collective agreement. He found that the *ESA* entitled employees to only two days of paid leave in relation to personal illness, injury, or medical emergency—a far lesser entitlement than the income protection benefits provided under the collective agreement.

Moreover, Arbitrator Mitchnick found that the requirements of the income protection plan did not negate the superiority of the plan's benefits.

The income protection plan required medical evidence to substantiate an employee's illness or injury, while the *ESA* did not. The income protection plan also required employees to wait seven days before they could receive sickness and accident insurance and to have 18 months' service before they could access long-term disability insurance. Given the extent of the benefits under the income protection plan, Arbitrator Mitchnick found that these requirements were neither overly demanding nor unreasonable.

However, Arbitrator Mitchnick did uphold the grievance to the extent that it applied to probationary employees. Probationary employees did not have access to the income protection plan until they had completed 60 days of work. As such, the collective agreement did not provide a greater right or benefit in respect of personal emergency leave to probationary employees.

Check the Box

This decision clarifies the interaction between personal emergency leave under the *ESA* and other paid leaves provided by an employer.

- This case confirms that the *ESA*'s personal emergency leave provisions will likely not apply if a contractual entitlement provides a greater "totality of benefits" than statutory personal emergency leave.
- Accordingly, an employer does not necessarily have to provide two paid days of personal emergency leave to employees claiming entitlement due to personal illness, injury or medical emergency, if the employer already provides a greater right to paid leave via the sick leave provisions of the collective agreement.

- When it comes to bereavement or other leaves, however, employers should proceed with caution: only personal illness leaves were considered by the arbitrator.
- Employers should review their sick leave policies in light of this case to ensure that employees are receiving their statutory entitlements to personal emergency leave, where applicable.

Date: April 4, 2018

Forum: Ontario Arbitration

Citation: *United Steel Workers, Local 2020 and Bristol Machine Works Ltd*, 2018 CarswellOnt 5531

Need more information?

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