Arbitrator Finds Employer Sick Leave Plan a "Greater Benefit" Than New Paid Personal Emergency Leave

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A decision issued in April 2018, *USW, Local 2020 and Bristol Machine Works Ltd. (GB-01-18)*, 2018 Carswell Ont 5531 (Mitchnick) ("*Bristol Machine*"), deals with whether the new paid Personal Emergency Leave ("PEL") provisions of the Ontario *Employment Standards Act, 2000*(the "ESA") are applicable if the employer provides a "greater right or benefit." The Union in *Bristol Machine* grieved the employer's refusal to provide two paid PEL days under the ESA *in addition* to collective agreement sick leave benefits. Numerous cases over the years have focused on whether a contract or collective agreement provision violates the ESA and is therefore void, or whether it provides a "greater right" over the ESA, and therefore replaces the ESA provision. This issue arises as a result of section 5 of the ESA, which provides as follows:

"5(1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.

5(2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply."

As such, a contractual provision may, in some respects, fall below the minimum standard, but in other respects it may be greater than the minimum standard. The issue then becomes whether the contractual provision is "greater", and therefore replaces the ESA standard, or whether it is *not* "greater", in which case the ESA standard applies.

As of January 1, 2018, section 50 of the ESA was amended to provide that the first two PEL days must be paid, while the remaining eight PEL days are unpaid. PEL days are generally available in the event of an employee's illness, or a defined family member's illness, bereavement or other urgent matter concerning a defined family member. The employer in *Bristol Machine* took the position that the paid PEL days did not apply because it provided a "greater benefit", consisting of: a weekly indemnity program that provided for a Weekly Indemnity sickness/accident income protection plan of up to seventeen weeks of benefits (with coverage of 65% of wages), beginning on the first

day in case of accident, and after seven days in case of sickness, as well as a Long-Term Disability Insurance Plan.

The Decision

Arbitrator Mitchnick began his analysis by stating the following general propositions:

- If a collective agreement provides a greater benefit, the provisions of the ESA do not apply.
- For there to be a “greater right or benefit”, the collective agreement benefit must directly relate to the same benefit as provided by the ESA.

The arbitrator accepted that in making this assessment the collective agreement provisions relating to the sick leave benefit must be viewed in their entirety (considering both those elements that were more favourable than the ESA and those elements that were less favourable than the ESA), in order to determine whether the sick leave benefit was, overall, a "greater right or benefit".
In coming to his conclusion — that the collective agreement provided a "greater benefit" than the ESA standard for PEL — the arbitrator held as follows:

"As for the statute, what it provides on that issue is two days of leave with pay, period. The Plan under the collective agreement, on the other hand, paid for fully by the employer, provides up to 17 weeks of Sickness and Accident Insurance, at 65% of earnings ($700 weekly maximum), followed by an unlimited period of Long-term Disability Insurance, again at 65% of earnings ($2,500 monthly maximum). When these two levels of income protection for sickness are placed in the pans of the metaphorical scale described by Mr. Justice White, the comparison, I consider apparent, is not close. The Plan negotiated by the Steelworkers’, as one might expect, is manifestly better than the minimal pay protection provided to all employees, represented or otherwise, under the terms of the *Employment Standards Act*. I find this to be true notwithstanding the waiting period of seven days (for illness, as opposed to accidental injury) under the short-term Sickness Plan, and the eighteen-month service period applicable to the more extensive coverage provided to employees under the Long-term Plan. Neither of those, in my view, are of such an unreasonable length as to negate the vast superiority of the collective agreement’s Income-protection Plan over the Act."

The arbitrator rejected the Union’s submission that employees should receive the Weekly Indemnity Plan benefit as well as the two paid days of PEL, finding that since the Weekly Indemnity Plan benefit was a "greater right", the employees were entitled to the Weekly Indemnity Plan, and the ESA PEL provisions were therefore not applicable.

The arbitrator carved out an exception for probationary employees who were not entitled to the Weekly Indemnity Benefit under the collective agreement. He held that probationary employees were in a different "category", and since they did not have a "greater right" under the collective agreement, they were entitled to the minimum ESA PEL while they were probationary.

Takeaway for Employers

This decision underscores the importance of reviewing your collective agreements, contracts and policies, to assess whether the ESA, in respect of any particular benefit,

applies to your employees, or whether — in respect of that benefit — you provide a "greater right or benefit", such that the benefit in the ESA is not applicable.

By

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