Case In Point

Supreme Court of Canada On Pregnancy and Parental Leave Top-Ups

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The Supreme Court of Canada recently upheld a decision of a British Columbia arbitrator which had found that denying birth mothers entitlement to parental supplemental employment ("SEB" or "top-up") benefits where they had received pregnancy SEB plan benefits was discriminatory.

The issue before the arbitrator turned on an interpretation of the collective agreement in place between the British Columbia Public School Employers' Association and the British Columbia Teachers' Federation. The language in issue read:

i) The Board shall pay a pregnant employee who takes pregnancy leave pursuant to the pregnancy leave provisions of the *Employment Standards Act* (as amended in 1996) of B.C. (or to a parent who qualified for Employment Insurance benefits for birth or adoption) 95% of the employee's current salary for the first two (2) weeks of the leave, THEREAFTER,

ii) For a further fifteen (15) weeks, the Board shall pay the employee the difference between 70% of the employee's current salary and the amount of E.I. benefits received by the employee. (Article G.21.4)

A review of the bargaining history between the parties shows that entitlement to SEB benefits had been gradually extended beyond birth mothers, who were solely entitled to that benefit in the 1988-1990 collective agreement. The language was amended in 1990-1992 such that SEB benefits would be eligible for "a parent who qualifies for Unemployment Insurance benefits for birth or adoption" thus extending entitlement to adoptive parents. During this round of bargaining the union was unsuccessful in its attempt to have separate maternity and parental leave provisions inserted into the collective agreement.

A grievance was filed in 1998 which argued that failure to provide for SEB parental benefits to birth fathers was discriminatory. The question of discrimination against birth mothers regarding this benefit was not raised at this time. The arbitrator stated that while the mutual intent of the 1990-1992 amendment was that the SEB benefits apply to adoptive parents, the language was sufficiently broad to apply to birth fathers. He concluded that the exclusion of entitlement to this benefit for birth fathers was discriminatory. The grievance was upheld and SEB benefits then became payable to eligible birth fathers, as well as adoptive parents. Birth mothers continued to be eligible for the SEB benefits when they took pregnancy leave.

The union in this case argued that the language of the existing collective agreement was broad enough to entitle birth mothers who had received pregnancy leave SEB benefits to SEB parental leave benefits as well. In essence, the earlier reasoning which had resulted in a finding of discrimination against birth fathers denied parental leave was used here in support of the claim of birth mothers to parental leave. The union asserted that denial of those parental top-up benefits was contrary to human rights legislation and the equality rights provision of the *Canadian Charter of Rights and Freedoms*. The employer argued, among other things, that the collective agreement did not confer two types of top-up benefits; rather birth mothers could access either the top-up benefit during pregnancy or during parental leave, thereby receiving the same benefit as birth fathers or adoptive parents.

The arbitrator referred to a "respected and unassailable body of case law" which differentiates between pregnancy and parental leaves and concluded that the purpose of those leaves was separate and distinct. He cited examples where birth mothers must recover from pregnancy health-related issues before they could be in the same position as birth fathers and adoptive parents "to care for and bond with their children." The arbitrator concluded that birth mothers would be subject to differential treatment if they were forced to forego the pregnancy leave top-up benefits in order to claim the parental leave top-up, which was available to all other parents. As a result, the impugned provision of the collective agreement infringed section 15 of the *Charter* and the infringement could not be saved by section 1. A violation of the *Human Rights Code* (discrimination in employment) was also found. A declaration of invalidity was suspended to allow the parties time to renegotiate non-discriminatory language into the upcoming renewal collective agreement.

The B.C. Court of Appeal found that the arbitrator erred in his finding that birth mothers were subject to unequal treatment, and set the decision aside.

In a brief oral ruling, the Supreme Court of Canada restored the arbitrator's decision, stating that it was entitled to deference and that the Court of Appeal failed "to recognize the different purposes of pregnancy benefits and parental benefits."

What does this case mean for employers? The underlying message is that in designing a top-up plan for parents, all parents must be given the same benefit or a finding of discrimination may result. There is no obligation to offer any benefits at all. However, once the benefits are provided, they must be provided in a non-discriminatory way. In this case, the employer offered pregnancy SEB benefits *and* parental SEB benefits. If the employer offered only one type of benefit – SEB parental benefits for all parents, and not SEB pregnancy benefits (birth mothers only) the outcome would likely have been different.

This case is also significant because of the remedy awarded by the arbitrator. Given the bargaining history, the remedy of sending the matter back to the parties to renegotiate was the optimal result in the circumstances. This is preferable to an arbitrator imposing an expensive financial remedy under human rights legislation or the *Charter* where the union agreed to the benefit that was

subsequently found to be discriminatory, especially where there is clear evidence that the union has been unable to achieve an extension of the benefits at bargaining. The law regarding discrimination evolves over time. Employers who negotiate benefits in good faith that subsequently become the subject of a meritorious claim of discrimination, should try to negotiate a compromise rather than simply agreeing to extend the benefit to the excluded group.