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Update on Personal Emergency Leave in the Municipal Sector

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The introduction of two paid personal emergency leave (PEL) days to the *Employment Standards Act, 2000* (ESA) has revived the debate about whether collective agreements or policies provide a Greater Right or Benefit (GROB), or alternatively, whether entitlements under the collective agreement or policies can be offset against the PEL entitlement. The first arbitration case since the paid PEL days were introduced (from Arbitrator Mitchnick) has brought an interesting twist to the debate.

Interplay Between GROBs and the PEL Requirements: A Refresher

Employers who can establish that they have a GROB to the PEL entitlement do not have to apply the PEL requirements under the ESA but can simply apply their collective agreement or policy. Employers who don't have a GROB must consider the question of how to integrate the PEL requirements with the entitlements under their collective agreements and policies, including whether offsetting is permitted.

PEL Questions Commonly Asked by Employers

In the municipal sector there continue to be many unanswered questions regarding how the two paid days co-exist with the typically generous collective agreement benefit entitlements. Questions that we are fielding on a regular basis include:

- If you offset, how do you count PEL for firefighters on 24 hour shifts? Is one shift "two" PEL days?
- How do you apply collective agreement language regarding the requirement that employees provide medical notes when they are absent for a certain number of days? Can you still require employees to bring in notes for that purpose? If you do require a note, can you still offset the day from the PEL entitlement?
- Can PEL days be included in a percentage in lieu of benefits for part-time employees? What if the percent has not changed with the introduction of PEL?
- If you offset PEL from other entitlements, how do you count your PEL days under the attendance management program where the paid entitlement from which you are offsetting is counted for the purposes of the program?

It is difficult to answer these questions and we anticipate that there will be grievances and arbitrations about these issues – particularly where in many cases municipal employers are adopting a stricter interpretation. A finding of a GROB would be preferable to addressing all of the difficulties with offsetting. For that reason, the recent decision by Arbitrator Mitchnick in *United Steel Workers, Local 2010 and Bristol Machine Works* is a welcome addition to the case law regarding GROB.

PEL Cases Pre-Bill 148

Before reviewing the *Bristol Machine Works* case, it is helpful to revisit the PEL GROB cases from the days before Bill 148.

In the often-quoted Divisional Court decision *Queen's University,* the appropriate analysis involves "the placing in one pan of a metaphorical scale the minimum standard … and placing in the other pan the totality of rights or benefits" from the collective agreement.[1]

Siemens is a rare example of a case where an arbitrator held that an employer was providing a GROB.[2] The employer implemented a new policy in which it started to count six Personal Paid Allowance (PPA) days offered under the contract as

statutory emergency leave days, in addition to providing four unpaid PEL days. The arbitrator found that the employer provided a greater benefit than the ESA. It is noteworthy in this case that the PPA days were available for all of the same reasons for which emergency leave days can be used under the ESA.

In other cases where a GROB was not found, the arbitrators focused on the question of whether the collective agreement provisions covered all of the purposes for which the leaves can be taken under the ESA. In addition, they considered whether employees could take the leaves as of right, rather than at the discretion of the employer. Arbitrators commented that the purpose of PEL is time off from work to attend to personal and family emergencies. Where the collective agreement entitlement is not for the same purposes, arbitrators have found that there is no GROB. For example, in *Hartmann Canada Inc. v. U.S.W.A., Local 1-500*,[3] Arbitrator Brown, in assessing whether or not the collective agreement provision were a GROB, wrote:

40 On one hand, the collective agreement almost certainly is more generous than the statute with respect to the total number of days of leave available to employees for reasons covered by the legislation. …

41 On the other hand, the statute is more generous than the collective agreement with respect to the range of reasons for which employees are entitled to take leave. The statute grants leave for personal illness, death or illness of a family member and other urgent family matters. There is a contractual right to leave in the event of personal illness or death in the family, but no right to leave due to illness in the family or urgent matters concerning a family member. Under the collective agreement, leave for family reasons, other than death, is granted only at the discretion of management; discretionary leave is worth substantially less than time off as of right.

42 Considering both the total number of days off available under the collective agreement and the reasons for which contractual leave may be taken, I am not persuaded the contract provides a greater benefit than the statute.

One of the questions arising from the Bill 148 changes is how arbitrators would address the introduction of the provision that medical notes cannot be requested to substantiate an entitlement to PEL. Cases such as the *Hartmann* decision suggested that if an entitlement under a collective agreement or policy was contingent upon the provision of a medical note, it could not be considered a GROB. In addition, it raised the question of whether the entitlement could be offset from PEL.

The *Bristol Machine Works* Case

In the *Bristol Machine Works* case, Arbitrator Mitchnick considered sick benefits provided under the collective agreement compared to PEL. He agreed with the employer that the collective agreement provided benefits that were vastly “superior” to those provided under the ESA. The benefit provided for sick pay on a graduated basis starting on the first day in the case of an accident and after seven calendar days in case of sickness. Medical notes were required to establish an entitlement to the benefit.

In concluding that the collective agreement provided a GROB for non-probationary employees, Arbitrator Mitchnick canvassed the case law interpreting s. 5(2) of the ESA including the *Queen’s University* case and the many pre-Bill 148 arbitration cases. He interpreted the *Queen’s University* case as ruling firmly against a “line against line” comparison between the protection available by statute versus that available under the collective agreement. He stated:

Rather, as the cases since *Queen’s* have repeatedly made clear, the correct comparison to make is with “the totality” of the benefit in question as it exists under the collective agreement versus the totality of the benefit as provided by the Act. And in that regard the Act’s section 5(2), as aptly captured by Arbitrator Brown in the *Hartmann* case, *supra*, both limits and extends the comparison to “one or more provisions in an employment contract … “that directly relate to the same subject matter as an employment standard”. I consider that directive to focus on substance rather than form, and in that regard note that what the standard in question is dealing with is “a personal illness, injury or medical emergency”. More specifically, the extent to which income protection is provided along with personal leave for illness is, on the claim put forward here, the critical part of the comparison between the totality of the benefit provided by the statute, and the totality of the benefit provided by the collective

agreement. 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 21 Disability Insurance, again at 65% of earnings ($2500 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. As would be expected, claims under both the short and long-term insurance plan, the Union notes as well, are subject to review or "adjudication" by the Insurer, whereas the two days of paid leave under the Act are available without the employer being allowed to require substantiation by a "qualified medical practitioner", as defined. That difference, it seems to me however, is a reflection of the dramatic difference in the extent of the two benefits, and again falls short of advancing the two days of paid leave under the *Employment Standards Act* to a position of superiority over the extensive Plan provided by the collective agreement. The protection under either vehicle is obviously intended for those who are legitimately unable to attend work because of illness, and in that context one would not anticipate the requirement for medical evidence of the disability under the agreement's more extensive Plan to be an overly demanding one.

Arbitrator Mitchnick dismissed this aspect of the grievance. However, he upheld the grievance to the extent it related to probationary employees who did not receive the benefit of the Plan until they competed 60 days service. He found that the full PEL provisions of the ESA applied to this group of employees until they acquired protection under the Plan.

One of the interesting features of the *Bristol Machine Works* decision is that Arbitrator Mitchnick references the *Hartmann* decision but does not refer to Arbitrator Brown's comments below regarding the weight to be given (or lack thereof) to the fact that a collective agreement provision is a paid provision:

32 … When the legislature grants time off without pay, the obvious objective is to allow employees relief from work, not to fatten their wallets. In the language of section 5(2), the "subject matter" of the employment standard is time off, not compensation. A contractual entitlement to pay does not "directly relate" to the "same" subject. The logic of this analysis extends to any trade of money for unpaid time off under the statute, including emergency leave. For example, ten days of unpaid emergency leave cannot be traded for five such days with pay, just as the statutory entitlement to emergency leave cannot be exchanged for a regular wage exceeding the minimum guaranteed by statute. …

35 Turning to the facts at hand, I conclude contractual entitlements to pay when sick or bereaved have no bearing on the application of section 5(2), because the purpose of emergency leave under the statute is to provide relief from work. This does not mean one should ignore entirely time off under the collective agreement by reason of sickness or death of a relative. It means only such leave is to be accorded no additional weight by virtue of being paid. [emphasis added]

Arbitrator Brown's approach focused on the purpose of PEL – to provide time off. In effect, Arbitrator Brown is asserting that a paid entitlement that does not provide the same time off in the same circumstances, will not be a GROB.

Of course, arbitrators often differ in their approaches. Arbitrator Mitchnick clearly preferred an approach that did not include a "line by line comparison" of the ESA compared to the collective agreement entitlement and instead weighed all of the related provisions together. In other words, Arbitrator Mitchnick's approach is less apples to apples, oranges to oranges, and more of a fruit salad approach – if there is enough fruit salad overall, it may not matter that apples are not included in the salad.

It is important to note that Arbitrator Mitchnick was not invited by the parties to the arbitration to consider anything other than the entitlements to personal sick leave. As he stated in the award:

… I would note my concurrence with the arbitrators cited above that the assessment of any claim put forward for the minimum benefits provided by way of section 50 of the Act requires attention to the specific purpose for which the "emergency leave" provisions are being considered; the present case deals solely with the question of income protection in the event of a disability, and the comparison of the section 50 benefit with the corresponding provisions of the collective agreement has been limited to that. I make no comment on the employer's argument with respect to a comparison of "bereavement" leave provisions, for example (as was the subject of the *Sobey's* case referred to at the hearing), or the discretionary granting of "leaves" under the instant collective agreement in general. Those are issues for another time (and hopefully place).

Going Forward

The *Bristol Machine Works* case is unique in that the other GROB cases about PEL did not parse out one entitlement (personal illness or injury) from the other entitlements (family illness or injury, bereavement and urgent matters). It remains to be seen whether other arbitrators adopt a similar approach.

In the meantime, employers now have some support in GROB arguments that paid sick leave entitlements that require doctors' notes can be a GROB.

If you have any questions regarding the PEL or other Bill 148 changes to the ESA, please contact your regular Hicks Morley Lawyer.

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[1] *Queen's University v. Fraser* (1986), 51 O.R. (2d) 140, 19 D.L.R. (4th), at para. 38 (Div. Ct.)
[2] *Siemens VCO Automotive Inc. v. CAW, Local 1941*, [2005] O.L.A.A. No. 548 (Brent)
[3] 2006 CarswellOnt 5003, [2006] O.L.A.A. No. 79, 84 C.L.A.S. 228 (Brown)

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