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Collective Agreement Benefits vs. Paid Emergency Leave – First Look After Bill 148

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Bill 148 introduced, for the first time in Ontario, a requirement that all employers provide paid leave for the first two days of Personal Emergency Leave ("**PEL**") taken by an employee in a calendar year. Labour arbitrators are frequently tasked with examining the interplay between the benefits provided under a union collective agreement and the minimum employment protections and benefits set out in the *Employment Standards Act, 2000* (the "**ESA**"). The recent decision of Arbitrator Mitchnick in *USW, Local 2020 and Bristol Machine Works Ltd. (GB-01-18), Re* ("*USW*") has provided a first look at how arbitrators may balance the new benefits introduced under Bill 148 with existing benefits provided by Ontario employers.

In *USW*, the central issue was whether the existing collective agreement between the company and the union, which provided employees with short-term disability pay for up to 17 weeks of sickness (but only at 65% of earnings), constituted "sick pay" in excess of this new ESA requirement to such an extent that the company was not required to additionally provide the two paid PEL days.

Arbitrator Mitchnick considered how labour arbitrators should compare and offset the benefits bestowed by collective agreements with those required by the ESA. Are the benefits to be narrowly compared on an item by item basis, or should arbitrators take a more wholesome approach by weighing the totality ofthe benefits to determine whether a collective agreement provides a greater benefit than the ESA?

As set out in the leading Divisional Court case on the topic, *Queen's University v. Fraser*,[1] "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." The arbitrator considered the paid PEL for employees suffering from "a personal illness, injury or medical emergency" as the relevant comparative subject matter. By considering the benefits provided in the collective agreement for personal leave for illness *as a whole* – which included compensation for up to 17 weeks at 65% of earnings – the arbitrator concluded that the agreement is "manifestly better than the minimal pay protection provided to all employees under the *Employment Standards Act*." As a result, the unionized employees with the company would not be entitled to the two new paid PTO days in addition to the paid short-term disability leave provided under their collective agreement.

Employer Takeaways

While this is only the first decision to consider paid PEL days and how they may fit within existing benefits, employers should take note and review their benefit packages when examining the sufficiency of employee benefits and how they may exceed the new ESA requirements to avoid an overlap in benefits.

[1] (1985) 51 O.R. (2d) 140.

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