

Health Spending Accounts Not Sufficient To Meet ESA Sick Leave Requirements



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A British Columbia arbitral decision is the most recent in a developing line of authority cautioning BC employers that sick days conferred under the *Employment Standards Act*, R.S.B.C. 1996, c. 113 (the “*ESA*”) may be qualitatively different than sick leave benefits under a collective agreement.

To recap, in May 2021, the BC government added employer-paid sick leave under section 49.1 of the *ESA*. Under this provision, employees who have been employed for 90 consecutive days are eligible for up to 5 days of paid leave for “personal illness or injury”.

When section 49.1 was first introduced, it was subject to the “meets or exceeds” test under section 3 of the *ESA*. Stated otherwise, if a collective agreement contained provisions that, read together, conferred a benefit that was at least equal to the benefit conferred by section 49.1 of the *ESA*, the benefit under the *ESA* did not apply.

In March 2022, however, the BC government changed the rules. Section 49.1 is no longer subject to the “meets or exceeds” analysis and unionized employers can no longer avoid a strict application of the provision around employer-paid sick leave under the *ESA*.

This was most recently confirmed by Arbitrator John Hall in *Canadian Maritime Engineering Ltd. (Alberni) v. Marine Workers and Boilermakers, Local 1 (ESA Paid Sick Days Grievance)*, [2024] B.C.C.A.A. No. 32 (Hall) (“*CME Ltd.*”).

In *CME Ltd.*, the union alleged, among other things, that the employer had failed to recognize the 5 days of paid sick leave to which its employees were entitled under section 49.1 of the *ESA*.

The employer responded that the collective agreement provided employees with an annual spending account, which was to be used at an employee’s discretion for several purposes, including “health, dental, sick or days taken as leave without pay”. The employer argued that there was no support for the proposition that the Legislature intended 5 *additional* days for employees who already had access to at least 5 paid days under the collective agreement.

The evidence at the hearing demonstrated that employees had used their spending account for a wide variety of purposes, including "sick days; personal days; time off to deal with the death of a family dog; time off to care for a sick child or spouse; time off to accompany a partner to their ultrasound and prenatal appointments; time off to help family members following a car accident; time off for bereavement leave; dental surgery and other dental expenses; the purchase of heart monitoring equipment; and the coverage of medication expenses after their benefit plan maximums had been reached, amongst other things ..."

Arbitrator Hall found that the employees' spending accounts could be, and indeed had been, used for a number of purposes – not just for sick leave. The Arbitrator emphasized the arbitral consensus that employers are precluded from requiring employees to use an existing benefit under their collective agreement to satisfy or reduce an employer's statutory obligation to provide paid sick leave.

Arbitrator Hall concluded that the spending accounts did not provide for the sick leave required by section 49.1 of the *ESA*, and ordered that the employer cease breaching the *ESA* and make whole any employee who had taken sick days that should have been paid in accordance with section 49.1 of the *ESA*.

Unionized employees may be entitled to sick leave under section 49.1 of the *ESA* *in addition to* sick leave benefits available under their collective agreement. This is particularly so where the collective agreement provides for leave banks or spending accounts that can be used for multiple purposes at the employee's discretion.

Employers should also be aware that if they are in breach of the *ESA* like the employer in *CME Ltd.*, they may be required to make affected employees whole by paying out any sick days that should have been paid in accordance with section 49.1.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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