

Maternity And Paternity In Quebec: Two Different Concepts



In a very important decision handed down on July 20, 2015, the arbitrator dismissed a grievance after determining that not receiving wage replacement benefits on top of government benefits while on paternity leave, when mothers on maternity leave receive such additional wage replacement benefits, is not discriminatory against fathers.

Background

The Public Service Alliance of Canada (the Alliance) filed a grievance alleging that the fact that only mothers on maternity leave received benefits from their employer, Aéroports de Montréal, in addition to government benefits, to the exclusion of fathers on paternity leave, was discriminatory. The Alliance and the employer sought an interpretation decision from arbitrator Marc Gravel on the contested legality of not paying additional benefits to fathers on paternity leave. That decision would, at the same time, address other similar grievances, including grievances filed on behalf of other units against the same employer.

It is important to note that both mothers and fathers who decided to take parental leave could receive an additional employer-paid benefit for a certain number of weeks on top of the benefits paid under the Quebec Parental Insurance Plan. In other words, while there was a distinction between maternity leave and paternity leave, in the case of Parental leave, which was shared between the two parents, benefits were paid without regard to the gender of the parent who was on leave.

Decision

In his decision, the arbitrator reviews and analyzes the question in detail, focusing on the union's claim of discrimination and disparity in treatment. He broadly outlines the parties' representations and joins, with approval, the employer's argument supporting non-discrimination.

The arbitrator begins by pointing out that a similar grievance was upheld in a decision by arbitrator André Sylvestre for the Old Port of Montreal Corporation. He concludes, however, that, while he clearly does not have the jurisdiction to overturn that decision, there was no discrimination in that case. He attaches importance to the argument whereby, under the applicable law, i.e. the *Canada Labour Code*, the mother shall have access to maternity leave even if her child does not survive the pregnancy or birth.

He also concludes that “[translation] *[m]aternity is not paternity. It never will be, as human nature is such that there is no case in which the one can be the other.*” The *Canada Labour Code*, moreover, clearly recognizes that distinction: it refers to maternity leave or parental leave, but makes no reference to paternity leave.

Most notably, the arbitrator emphasizes that even if there appears to be differences in treatment, with mothers seeming to benefit from an advantage, it does not automatically follow that there is discrimination in every case – in this instance, against fathers. He points out the obvious difference between carrying and fathering a child and the fact that the two cannot be regarded as identical, stating “[translation] *[t]o claim that paternity leave must be considered in the same way and treated in all cases in the same way as maternity leave is to ignore the thousands of years of existence of the human race, which has taken this long to reach the point of recognizing that carrying a child to term, giving birth to it and caring for it in the first months of life may be incompatible with the work a woman does for a living.*” In doing so, the arbitrator invokes an idea that has come up repeatedly in decisions in Western Canada regarding the obvious difference between maternity and paternity and the fact that absence of the mother in the context of birth is mandatory, whereas a father’s absence may be perceived as more optional.

The arbitrator then looks at the concept of discrimination in the light of landmark Supreme Court of Canada decisions. He cites, in particular, *Law v Minister of Human Resources Development*,² which states that protection of equality rights is concerned with distinctions that are truly discriminatory. **He emphasizes that true equality is not necessarily equality resulting from identical treatment.**

Based on the case law and the principles derived from it, the arbitrator determines that maternity and paternity cannot be compared in order to conclude that fathers, as a whole or as a group, are stigmatized or discriminated against in relation to women. There are legitimate reasons for this difference in treatment. For example, only a woman can give birth. There is therefore no discrimination between the sexes if a benefit is granted to a mother who is pregnant, who is going to give birth or who gives birth and then takes care of her baby. According to the arbitrator, **maternity leave is leave based on pregnancy and granted so that the mother may recover from the pregnancy and the birth of her baby.** Consequently, a mother may take maternity leave regardless of the viability of the child (after a particular stage of pregnancy), whereas a father may only take paternity leave if the child is viable.

The arbitrator concludes by stating that maternity and its components (pregnancy, birth and nursing) are not at all comparable to paternity. Comparing the two at any cost distorts the concept of discrimination, which must be interpreted with nuance. The advantage or benefit does not have to be identical and there is no discrimination as a result.

The take-away

This is a **major** decision on allegations of discrimination. The arbitrator accepts the main argument that identical treatment is not required in all circumstances. In particular, he holds that maternity leave concerns the recovery of the mother, who has to carry and give birth to the child, although it should be noted that, in this grievance, parental leave was no longer in dispute and maternity leave was determined to be different from paternity leave in that context.

This is a landmark decision, as businesses providing additional benefits during parental leaves in their broad sense are beginning to encounter these types of challenges. This is also an important decision for businesses when it comes to equality rights, as the arbitrator holds that true equality is not necessarily

equality resulting from identical treatment in all circumstances. It is a robust and intelligent decision on the concept of discrimination.