Supreme Court Allows Employees To "Double-Up" On Pregnancy And Parental Benefits

A regular point of contention between unions and employers is the appropriate treatment of employees who are on protected pregnancy and parental leaves. This is doubly so where the collective agreement provides for special benefits for such employees. The Supreme Court of Canada recently had occasion to examine one such conflict, and decided the case in a manner that will doubtlessly concern employers.

Surrey Teachers' Association

The collective agreement between the parties set out a Supplementary Unemployment Benefit ("SUB"), which is a standard term in many collective bargaining relationships. Under such a benefit, employees who are in receipt of employment insurance benefits due to a pregnancy or parental leave are entitled to a payment from the employer which, along with their benefits, restores their take-home pay to a level more commensurate with their regular salary.

The collective agreement allowed for 17 weeks of SUB benefits for any qualifying parents, whether adoptive, male or female, or whether they took pregnancy leave. The employer paid 17 weeks of SUB benefits per employee over the course of their absence, regardless of whether the employee was taking pregnancy leave, parental leave, or a combination of the two.

The Union grieved this interpretation by the employer. The Union alleged that employees who took a pregnancy leave and then later took a parental leave should be entitled to two separate periods of eligibility for SUB benefits, one for each leave taken. That is to say, that an employee would be entitled to 17 weeks of SUB benefits for pregnancy leave, and an *additional* 17 weeks of SUB benefits for parental leave if they also took such leave.

The Arbitrator agreed with the Union, finding that the employer's interpretation of the provision discriminated against birth mothers. The rationale for this decision was that the structure of the SUB provision forced pregnant mothers to "forego" their SUB benefits for the parental leave by taking pregnancy leave, a choice with which other parents were not confronted.

On appeal, the British Columbia Court of Appeal overturned the arbitrator's decision. The Court found that pregnancy and parental leaves were all related to the birth or adoption of a new family member, and should not be differentiated for the purposes of

the discrimination analysis. As a result, the employer's interpretation did not result in any discriminatory exclusion – any parent of a new family member was entitled to 17 weeks of SUB benefits. The fact that a pregnant mother had the option of taking those benefits during their pregnancy or their parental leaves was not material, and did not constitute unequal treatment.

The case was appealed, and heard by the Supreme Court of Canada.

The Supreme Court released a very brief oral judgment in which it restored the arbitrator's decision. It held that the arbitrator was entitled to make the finding that the employer's interpretation of the agreement was discriminatory, and that that decision was entitled to deference from the Court of Appeal, which had not been shown. While the Supreme Court stopped short of endorsing the arbitrator's approach, it did state that the Court of Appeal failed to take into account the difference between pregnancy and parental benefits, without further comment.

What Employers Should Know

This case illustrates the difficulty in crafting benefits language where an employee may be on leave for multiple reasons. It seems probable that the decision of the Supreme Court could open the door to additional challenges by unions that collective agreement provisions seeking to limit entitlement to one benefit in favour of another are discriminatory. Plainly in this case the employer had negotiated language and bargained other monetary items on the assumption that employees could not double-dip.

Query then: could the parties have better expressed their intention in a manner compliant with human rights legislation? I.e. In this case, the parties provided separately for parental and pregnancy leave benefits, but reserved (as many collective agreements do) that mothers would only be entitled to one or the other. Had the collective agreement instead provided a set number of months of SUB benefits for any new birth or adoption, and that employees could elect to start those benefits at any point leading up to the birth or a set period thereafter, would the provisions have been lawful?

Last Updated: December 15 2014

Article by Stringer LLP