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Please ensure that this bulletin is circulated to all administrative staff in both the district office and schools who must rely on the collective agreement in the performance of their duties.

BC Court of Appeal Rules No Discrimination in Supplementary Employment Benefits Case

In a decision released September 23, the British Columbia Court of Appeal (BCCA) allowed the appeal of the Employer (SD No. 36 (Surrey)) with respect to a decision of Arbitrator John Hall. In that arbitral decision, Arbitrator Hall granted the union's grievance, which alleged that birth mothers were treated in an unequal fashion vis-à-vis birth fathers and adoptive parents concerning Supplementary Employment Benefits (SEB) paid to these categories of persons by the employer during birth and parental leave periods.

Pursuant to the collective agreement at issue, birth mothers, birth fathers and adoptive parents receive 95% of the amount of their salary for a two-week unpaid waiting period for EI benefits and 70% of the difference between EI benefits and their salary for an additional 15 weeks, which constitutes the SEB. Arbitrator Hall found that there was discrimination because birth mothers experienced differential treatment by being denied both maternity benefits and the parental SEB available to birth fathers and adoptive parents. Arbitrator Hall allowed the grievance and ordered the parties — then engaged in a new round of bargaining — to remedy the discriminatory provisions, with his retention of arbitral jurisdiction if the parties were unable to agree.

In its decision, the BCCA determined that it had appellate jurisdiction. While the respondent union argued that the essence of the appeal concerned interpretation of a collective agreement and was a matter of labour relations, the BCCA decided that the case involved a decision about principles of human rights legislation, was a matter of general law and, accordingly, the Court of Appeal had appellate jurisdiction.

The BCCA further determined that the arbitrator erred in his interpretation of the human rights principles applicable to this case and in his finding that the distinctions between the benefit afforded to birth mothers and the benefit afforded to birth fathers and adoptive parents constituted discrimination. The Court ruled:

“While the jurisprudence notes distinctions between leave afforded to birth mothers and leave afforded to birth fathers and adoptive parents, it seems to me that the general purpose underlying such provisions is a unitary one, namely the fostering of the health of parents and

children to serve an important societal interest. Since in my opinion these respective leaves have a common underlying purpose, I fail to see any significant divergence of interests between persons taking advantage of maternity leave and parental leave SEB provisions. I see the leaves as a holistic approach to the advancement of a healthy environment for the young and the caregivers. Mothers on maternity leave as well as persons who can access parental leave are, under the collective agreement, entitled to 15 weeks of SEB as well as payment for a two-week waiting period before statutory benefits become available.

The arbitrator found some distinction between maternity leave and parental leave. However, in my analysis of the case, I do not see any great materiality in such a distinction. Both forms of leave relate to the occasion of an addition of a new member to a family unit. Both types of leave conduce to the societal purpose of the enhancement of family health and stability. It is not obvious to me that there is anything particularly discriminatory occasioned by providing fifteen weeks of SEB to birth mothers, birth fathers and adoptive parents. On the face of it, this seems to me to be equal as opposed to unequal treatment.

... Here, all three categories of those entitled to leave and statutory leave benefits associated with birth or adoption are entitled under the terms of the collective agreement to receive payment for the two-week exclusionary or waiting period and the 15 weeks' SEB as salary top up at a defined level. I fail to see either exclusion (as in the birth father case) or underinclusion as was the situation in a case like *Brooks*. In my respectful opinion, the learned arbitrator erred when he found that birth mothers were subject to unequal treatment. Absent a sustainable finding on unequal treatment, there is no basis for the conclusion of the arbitrator that birth mothers are being treated in a discriminatory way contrary to the *Human Rights Code*."

Because of its decision on discrimination, the BCCA did not go on to consider the issue of the arbitrator's remittance of the matter to the parties for resolution through bargaining, with retention of arbitral jurisdiction in event of the parties' inability to agree.

Questions

Should you wish to discuss this issue further, or have any questions, please contact your BCPSEA district liaison.