Cassels

Separating the "Apples" From the "Oranges" - When Can Paid Time Off Benefits Replace Personal Emergency Leave?

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On January 1 of this year, Ontario's Bill 148 officially expanded the reach of the personal emergency leave provisions of the *Employment Standards Act, 2000* (the ESA) to not only require all Ontario employers to grant employees 10 personal emergency leave days (PEL days) per year but to require that the first two such PEL days be paid. For Ontario employers already offering employees related, but not identical, paid time off benefits at the time, this naturally led to a number of critical questions: are we already compliant with the ESA? do we need to change the benefits we offer or how we administer them? do we need to pay even more?

While we are now more than six months out from the coming into force of this ESA amendment, the answers are still less than clear. What limited jurisprudence there is out there consists of labour arbitration decisions arising from disputes in unionized workplaces where employee entitlements are often codified in negotiated collective agreements, rather than employer-drafted policies. All the same, there are certainly important takeaways, even for non-unionized employers, to be gleaned from the case law to date.

One of the most recent pronouncements on this issue arose in a labour arbitration decision between Carillion Services Inc. (Carillion) and the Labourers' International Union of North America, Local 183 (the Union).

Carillion Services Inc. and LIUNA, Local 183 (*Carillion*)

In *Carillion*, the collective agreement between Carillion and the Union contained an article entitled "Paid Holidays" which, after identifying each of the days that would be treated as an employee holiday, provided employees in the bargaining unit with the additional right to three paid "floater days" in a twelve-month period running from July 1 to June 30. While this article also noted that "[t]he Employer will apply any available floater days when the employee fails to report to work for any justified absence until floater days have been used," in practice, Carillion would instead give an employee the option to use a floater day whenever he or she was out of the workplace for a justified absence.

The grievances in question arose when, post-January 1, two employees in the bargaining unit missed work due to illness and claimed entitlements to paid PEL days in circumstances where, in one case, the employee in question had exhausted her paid floater days and, in the other, the employee simply did not wish to use up her last remaining floater day. Carillion took the position, meanwhile, that the three paid floater days it provided its employees constituted a "greater right or benefit" than two paid PEL days for

purposes of the ESA and, consequently, superseded or replaced such PEL day entitlement. As such, as far as Carillion was concerned, the employees were not entitled to compensation for the days in question.

At arbitration, the arbitrator acknowledged that while "floater days as such are not equivalent to and do not directly relate to the personal emergency leave days required by statute," given the option under this particular collective agreement to substitute a floater day for a PEL day, such floater days "are not always to be excluded as being irrelevant to the fulfillment of the Employer's obligations to furnish employees with paid leave in personal emergency situations." In the words of the arbitrator, floater days and PEL days "are not 'apples and oranges' in all circumstances contemplated by the collective agreement."

In the particular circumstances before him, however, the arbitrator held that the link between floater days and PEL was "weak and, at most, a conditional or contingent one." Given that floater days could be used as holidays, it was hard to argue they served the same purpose as PEL days. Moreover, given Carillion's historic practice of giving employees the discretion to decide whether to use a floater day in cases of "justified absence" or whether to, effectively, save it for later, it could not now purport to unilaterally take away that discretion to its financial advantage. In other words, according to the arbitrator, each employee should get to decide for him- or herself whether an absence will draw on his or her bank of floater days or, alternatively, be treated as a PEL day (whether paid or unpaid). Moreover, the fact that the floater day benefit covered the period from July 1 to June 30 rather than the calendar year further supported a conclusion that they ought not to be treated as comparable benefits to paid PEL days.

As such, the grievances were allowed and Carillion was ordered to compensate the grievors for the days in question as PEL days, without drawing on any remaining floater days.

Takeaway for Employers

While such was the arbitrator's finding in the specific circumstances in the *Carillion* case, we note that other arbitrators have come to very different conclusions where other "substitute" benefits have been offered. In *USW, Local 2020 and Bristol Machine Works Ltd.*, another recent arbitration decision, for example, the arbitrator held that an employer-funded Income Protection Plan offering both short-term Sickness and Accident Insurance and Long-term Disability Insurance benefits (paid at 65% of earnings) ***did***, in fact, amount to a "greater right or benefit" than paid PEL days, at least in circumstances where the absences at issue related to employee illness or disability and the employees in question were eligible for the Plan.[1]

Going forward then, it is important that any employer (unionized or not) that believes it is already providing employees with a "greater right or benefit" than the two paid PEL days required by the ESA, give due consideration to whether what it is offering in place of PEL days really is: (a) not only a greater entitlement in totality; but (b) comparable to and intended to address the same purposes as PEL days – in other words, that we are comparing "apples to apples." A failure to properly consider either of these factors could leave an employer effectively paying twice – once for the arguably greater benefit it offers and a second time for

each employee's paid PEL day entitlement.

For further information, please contact Adrian Jakibchuk or any other member of the Employment & Labour Group.

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[1] This was the case even though there was a 7-day waiting period before a sick employee could become eligible for any compensation at all.

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