LEGAL UPDATE
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MATERNITY/PARENTAL LEAVE AND PRORATION OF VACATION PAY

In the Corporation of the Township Langley and CUPE, Local 403, unreported March 12, 2018 an arbitrator found that proration of vacation pay for employees on maternity/parental leaves was not discrimination on the basis of sex and family status under the Human Rights Code.

BACKGROUND AT ARBITRATION

This dispute related to the proration of vacation pay for employees on maternity or parental leave, pursuant to Article 12.4(c) of the Collective Agreement which provided as follows:

> "12.4 Maternity and Parental Leave
>
> (c) Return to Work
>
> On resuming employment an employee shall be reinstated in their previous or a comparable position and for the purposes of pay increments and benefits, referenced in (e) herein, and vacation entitlement (but not for statutory holidays or sick leave) maternity and parental leave shall be counted as service. Vacation pay shall be prorated in accordance with the duration of the leave and an employee may elect not to take that portion of vacation which is unpaid."

Article 12.4(c) was negotiated in the early 1990s and there were no bargained changes to the language since that time. There was no other reference in the Collective Agreement to the proration of vacation for other leaves.

In general practice, employees who were eligible and took unpaid leaves of absence of any kind had their annual paid vacation prorated for any calendar month in which the employee did not work the better part of the month.

The Union took the position that vacation pay was a status-driven benefit and the proration discriminated on the basis of sex and family status in contravention of s. 13(1)(b) of the *Human Rights Code*, RSBC 1996, c. 210.

The Employer asserted that vacation pay was a service or compensation-driven benefit and could properly be pro-rated for the time employees did not receive wages on unpaid leave. It said the proration was not based on any prohibited ground under the *Human Rights Code*, rather it was a trade-off negotiated by the parties in bargaining. The Employer maintained that providing labour was an essential requirement for receiving work-related benefits. If the benefit is a form of compensation in return for work, it is not discriminatory to distinguish between employees who are providing services and those who are not. In the

alternative, if prima facie discrimination was found, the employer submitted that proration was a bona fide occupational requirement ("BFOR").

THE DECISION

The Arbitrator noted that the critical question in this case was whether the proration of vacation pay for employees on maternity/parental leave is a distinction based on a work-driven benefit, or a denial of a status-driven benefit that amounts to discrimination. The Union conceded that if the entitlement was work-driven, the proration was not discriminatory and the grievance could not succeed.

The analysis of the characterization of the benefit was a contract interpretation exercise to determine the parties mutual intention with respect to the purpose of the entitlement. There was no dispute on the applicable principles of interpretation. The task is informed by the Collective Agreement itself. Other well-established rules include the notions that: all words and clauses should be given meaning; different words are a presumed intention of different meanings; the entire agreement must be considered; and a contextual, purposive approach should be employed.

The Arbitrator found that Article 12.4 (c) provided support for the Employer's provision; however, it was necessary to consider it in the context of the Collective Agreement as a whole. In that respect, the Arbitrator examined Article 10.2 which dealt with vacation and holidays for full-time employees. Arbitrator Nichols noted that similar (but not identical) language had been interpreted in a previous case involving the City of Burnaby (where vacation pay had been found to be status-driven); however the language in Langley case had some substantial differences and given the long-standing practice of prorating vacation pay for all employees on unpaid leave she found that it was the parties mutual intention that they intended vacation pay to be work-driven.

Given this conclusion and the Union's concession, Nichols found that a prima facie case of discrimination had not been shown. The Arbitrator noted that it was unnecessary to assess whether a BFOR existed. However, she confirmed that had it been necessary to do so, she would have found that the requirements to establish justification were met given that there was a rational connection between vacation pay and the performance of the job; there was no suggestion of bad faith; and the recognition that parties make trade-offs in reaching the Collective Agreement.

Any duty to accommodate would not go so far as to require an employer to fundamentally change the essence of the bargain that it struck. Accordingly the grievance was dismissed.

WHAT THIS MEANS FOR EMPLOYERS

This decision reinforces the general principle that service or compensation-driven benefits can be properly pro-rated for the time that employees do not receive wages on unpaid leave without contravening the *Human Rights Code*. Such a finding depends on the language of the Collective Agreement as a whole and potentially the past practice of the parties. If discrimination is found there may be a BFOR defence with a recognition that parties make trade-offs

in reaching the Collective Agreement and any duty to accommodate would not go so far as to require an employer to fundamentally change the essence of the bargain that has been struck.

QUESTIONS?

If you have any comments or questions about this update, please contact Karen Jewell, Division Manager of Information, Compensation and Advisory Services at 604-432-6228 or by email at karen.jewell@metrovancouver.org.

SOURCES

The Corporation of the Township of Langley and CUPE, Local 403, unreported March 12, 2018 (Nichols)