



Education Law eBulletin

A newsletter for educators

Issue No. 8 May 2018

SHIBLEY RIGHTON LLP
Barristers & Solicitors
www.shibleyrighton.com

Toronto Office:
250 University Avenue
Suite 700
Toronto, ON M5H 3E5
Tel.: (416) 214-5200
Toll free: 1-877-214-5200

Windsor Office:
2510 Ouellette Avenue
Suite 301
Windsor, ON N8X 1L4
Tel.: (519) 969-9844
Toll free: 1-866-422-7988

Education and Public Law Group

Brian P. Nolan
brian.nolan@shibleyrighton.com

Sheila M. MacKinnon
sheila.mackinnon@shibleyrighton.com

Thomas McRae
thomas.mcrae@shibleyrighton.com

Jessica Koper
jessica.koper@shibleyrighton.com

Gaynor J. Roger
gaynor.roger@shibleyrighton.com

John De Vellis
john.devellis@shibleyrighton.com

Megan Marrie
megan.marrie@shibleyrighton.com

Recent Arbitration decision provides some guidance on the new Personal Emergency Leave provision

Arbitrator Mitchnick recently released a decision arising from a grievance brought by United Steelworkers, Local 2020 (the "Union") against the employer, Bristol Machine Works Ltd. (the "Employer"), which was referred to the Ministry of Labour for an expedited hearing pursuant to the *Labour Relations Act*. The issue before the Arbitrator was whether s. 50 of the *Employment Standards Act* ("ESA") and the 10 days of personal emergency leave ("PEL"), for which the first two days must now be paid, provide a greater right or benefit than the benefits provided for in the Union's collective agreement.

The facts before the Arbitrator were specific and important in appreciating the impact of the decision on unionized workplaces, including school boards across the province, with respect to the two paid PEL days. First, in this case, the Union's collective agreement provided for no paid "sick days." Rather, the collective agreement provided income protection for employees at 65% of an employee's earnings with a short-term disability plan (up to 17 weeks) and a long-term disability plan (for an unlimited period).

Second, the Union brought the grievance once employees asked for and were denied the two paid PEL days when they called in sick following January 1, 2018, once the new s. 50 of the *ESA* came into effect. The Employer's position was that the provisions in the collective agreement covering the short term and long term disability plans provided a greater benefit for employees who are sick than s. 50(1) of the *ESA*, which provides for only two paid days for a sick leave and eight days unpaid.¹ Therefore, the Employer found that the PEL days do not apply to its employees.

Consistent with a line of previous decisions, the Arbitrator confirmed that the "greater benefit" analysis must be used to determine whether the benefits in a collective agreement provide a greater benefit than the benefits provided for in the *ESA*. The analysis requires an assessment of the benefits by comparing and matching the benefits in the collective agreement and the *ESA* that directly relate to one another. Within this analysis, the Arbitrator confirmed that the purpose of the benefits that are compared is important. However, it is the *totality* of the benefit in the collective agreement that must be weighed against the *totality* of the benefit in the *ESA*.

In this case, the Arbitrator found that the income protection provided with the personal leave for illness forms part of the totality of the benefits for sick leave. In comparison, the *ESA* only provides for two days of leave with pay. The Arbitrator concluded that this comparison was "not close." In other words, the short term

¹ Subsection 50(1) of the *ESA* provides a leave for personal illness, injury or medical emergency

and long term disability plans offered to the Union's members for sick leave are "manifestly better" than the minimal two paid days provided for under the *ESA*. The Arbitrator found that a waiting period of seven days under the short term disability plan and the minimum 18-month service period under the long term disability plan did not make enough of a difference to find that the statutory benefits are superior to the collective agreement's benefits. Similarly, the fact that both plans are adjudicated by the insurer did not tip the scale either.

It is important to keep in mind that the purpose of the two types of benefits in this case were clear as they both pertained to sick leave. The employees had called in sick and asked for a paid sick leave day pursuant to s. 50(1) of the *ESA*. However, section 50(1) of the *ESA* provides for two paid PEL days if an employee is absent for other reasons, including for the death, illness, injury, medical emergency or any "urgent matter" of a select group of the employee's relatives. The Arbitrator was clear that his decision did not address the fact scenario where an employee asked to use a paid PEL day for those reasons (i.e., bereavement).

Finally, the Arbitrator found that for the Employer's probationary employees², who are not covered under the short term or long term disability plans, and who otherwise receive no benefit for sick leave under the collective agreement, are entitled to the PEL days (two paid PEL days and eight unpaid PEL days) under the *ESA*.

New Child, Youth and Family Services Act is now in effect

The new *Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sched. 1 came into effect on April 30, 2018, replacing the previous *Child and Family Services Act*, commonly referred to as the *CFSA*.

We previously reported on the changes that came into effect as of January 1, 2018, which affected the age of protection and raised it from 16 to 18 years of age.³ With the new legislation that is now in effect, all other changes are now in place, which includes, but is not limited, to the following:

- Changes to specifically consider the cultural identity and connection to communities for First Nations, Inuk or Metis children, when looking at the best interests of the child in child protection cases and to generally provide more culturally appropriate services to children and youth.
- A whole new focus on the child in the decision-making process surrounding child protection and when possible, a child's own views will be taken into consideration.
- Greater control and oversight of children's aid societies by the Ministry of Child and Family Services to ensure consistency and the provision of high-quality services.

We welcome your comments and questions. Send them, and any updated contact information, to jessica.koper@shibleyrighton.com. If you wish to unsubscribe to this eBulletin, please send a blank e-mail to christen.broadbent@shibleyrighton.com

Legal Disclaimer: The information contained in this publication is not intended to be legal advice. It is general information only. You should take appropriate professional advice on your particular circumstances. Shibley Righton LLP disclaims all responsibility for all consequences of any person acting on, or refraining from acting in reliance on, information contained herein.

² Employees with less than 60 working days

³ Reporting of a 16 or 17 year old to a society who is in need of protection is not mandatory, unlike youth who are younger than 16