

ARBITRATION BULLETIN

Human Rights Issue: The right of an employee to receive benefits during Maternity Leave

October 4, 1991

WORKPLACE ISSUES IN HUMAN RIGHTS **BOARD OF INQUIRY** **UNDER THE INDIVIDUAL'S RIGHTS PROTECTION ACT**

Concerning a complaint by Susan Parcels against The Red Deer General & Auxiliary Hospital and Nursing Home District #15 and The United Nurses of Alberta Local 002 and The Alberta Hospital Association alleging discrimination on the basis of sex in contravention of the Act because she was required to pay 100% of the premiums for certain health benefits when she was absent from work on Pregnancy Leave.

And concerning the meaning of the Supreme Court of Canada's decision in Brooks v. Canada Safeway: For What Part of a Maternity Leave must an employee benefits plan compensate the employee - What is a valid health related absence from the workplace; Is the benefits plan liable to pay if the employee takes a voluntary maternity leave first; What is the inter-relationship between benefits plans and the unemployment insurance scheme; How is any income differential to be treated?

** The text which follows is an excerpt from Anne de Villars full decision in this case issued at Edmonton, Alberta on 19 June 1991 (written in first person).

BACKGROUND

The case was argued before a Board of Inquiry appointed by the Minister under the Individual's Rights Protection Act rather than before an arbitrator. Susan Parcels had filed a grievance as well as a complaint with the Human Rights Commission but the grievance was later withdrawn by the consent of all parties in favour of the Human Rights Inquiry. The questions which the Inquiry was to answer were very wide ranging and well beyond what was necessary to answer Susan Parcels' complaint. The Inquiry was a better vehicle for this purpose.

I believe that this decision will affect arbitrators' decisions when they are faced with grievances which specifically allege discrimination on the basis of pregnancy or more generally allege discrimination on some other basis. When deciding such a case, arbitrators must consider any applicable human rights legislation although the collective agreement may make no mention of it.

There are three circumstances when grievors can ask a board of arbitration to import human rights legislation into its deliberations:

1. Firstly, collective agreements cannot be in conflict with human rights legislation. If an arbitration board is faced with a grievance which alleges a breach of the Individual's Rights Protection Act or the Charter, it must apply human rights legislation to decide the case. However, the arbitration board must be dead right. This is not a situation where the court will give judicial deference to the board's decision or apply "patently unreasonable" principals.

2. Secondly, an arbitration board can use human rights legislation to construe a collective agreement in order to resolve an ambiguity or uncertainty in it (the human rights principles govern).
3. Thirdly, the collective agreement may be silent. There is no specific conflict with human rights legislation or ambiguity in the collective agreement. What role is there then for human rights legislation in the arbitration process?

A board of arbitration cannot find that a collective agreement has breached human rights legislation if it is silent. The arbitrator's jurisdiction only arises when an employee or union grieves. Without a grievance, there is no jurisdiction.

More and more grievors will use human rights arguments to justify their grievances. Collective bargaining must take place against the backdrop of human rights legislation. Any provisions in collective agreements that breach human rights legislation are void.

Issues

The issues in this Inquiry are as follows:

a) The narrow issue:

- ? Did Susan Parcels' employer and her union discriminate against her when they required her to prepay 100% of the premiums for her employee benefits when she was away from work for reasons of pregnancy?

b) The wider issue:

- i. What does Brooks mean?
- ii. When does Brooks begin?
- iii. When does Brooks end?
- iv. How does Brooks interact with preceding voluntary maternity leaves?
- v. How does Brooks affect any differential in income replacement between one benefit scheme and another?

The Narrow Issue

All parties agree that there is some discrimination in the Collective Agreement and the treatment afforded Susan Parcels. The Collective Agreement is discriminatory where it allows dissimilar premium payment treatment among employees who are absent for health-related reasons, whether by reason of pregnancy or not.

The Hospital voluntarily paid its share of her premiums. In this regard, she has been treated the same as any other employee on sick leave. As a result, the discrimination inherent in this provision of the Collective Agreement has been corrected as far as Susan Parcels is concerned.

The Wider Issues

i. What Does Brooks Mean?

Mr. Armstrong put the meaning of Brooks in a nutshell when he said in cross examining Mr. McComb, "Brooks requires You to treat pregnant women at least as well as you treat sick employees" (Transcript p. 700)

a) Explicit Statements by the Supreme Court of Canada in Brooks

The Supreme Court makes two unequivocal statements.

The Safeway plan is discriminatory because it discriminates on the basis of pregnancy.

- The Safeway sickness and accident plan discriminates against pregnant women when it completely dis-entitles them during a 17 week period from receiving disability benefits under the plan. Pregnant employees receive significantly less favorable treatment than other employees for this 17 week period when they are not entitled to any compensation at all, regardless of the reason they are unable to work and whether the reason is tied to pregnancy or not. Other employees, absent for a health related reason, can enjoy Safeway's generous compensation for up to 26 weeks.

If an employer enters compensates for health conditions, excluding pregnancy as a valid reason for compensation it amounts to discrimination.

Once an employer decides to provide an employee benefit package, exclusions from the scheme cannot be made in a discriminatory fashion, and benefits must be disbursed in a nondiscriminatory manner.

b) Discrimination on the basis of pregnancy is discrimination on the basis of sex. Discrimination on the basis of pregnancy is a form of sex discrimination because of the basic biological fact that only women have the capacity to become pregnant.

Necessary Implications of the Brooks Decision

(The Board of Inquiry extrapolated from the Supreme Court's reasoning).

A blanket exclusionary period that denies compensation for pregnancy, such as 17 weeks, is discriminatory. The key is that the plan pays benefits for a valid health-related absence whenever it occurs and for whatever reason, provided it is health-related. It therefore follows that if an absence for a health-related reason occurs either before or after delivery, it must be compensated.

ii. When Does Brooks Begin?

The Supreme Court is clear that the Brooks rationale begins when the valid health-related reason for absence during pregnancy begins. The medical evidence is clear that all women need some time off work before delivery for purposes of their health even if it is only at the onset of labour. Payments under a benefits plan that compensates health-related absences must begin as soon as the pregnant woman is away from the workplace for a health-related reason.

iii. When Does Brooks End?

The Supreme Court is equally clear that the Brooks rationale ends when the valid health-related reason for absence during pregnancy ends. The Supreme Court focuses on compensation for absences required for health-related reasons. There is no doubt that all woman, the minute or the day after delivering a baby, still need time off from work for purposes of their health. It is therefore contrary to the Brooks rationale to say that date of delivery is the proper cut-off point for Brooks.

U.I. is the only scheme available. But if the employer has a benefits plan, it must treat all health-related absences equally.

What is "Pregnancy"?

I include in that term, as to the gynecological obstetrical experts, the entire procreation process from conception to recovery from the birth.

The medical evidence establishes that the health-related reason for absence continues until some time after delivery.

What is a "Health-Related Absence"?

A "health-related absence from the workplace" is an absence that is required by the patient's medical condition. The medical condition is such that it is desirable or necessary for the patient not to perform her job tasks.

Medical Evidence Gynecological and Obstetrical

During every normal pregnancy, as it was defined during the Inquiry, all women must be absent from the workplace for reasons of their health for some period of time pre and post delivery. As a general proposition, Dr. Uretsky says that at least six weeks prior to delivery is the minimum. Dr. Enkin strongly suggests that eight to nine weeks is the minimum recovery period required post delivery. The required time off lengthens if the pregnancy is not "normal" and if the job requirements are more rigorous than those needed in a sedentary occupation.

Both doctors agree that it is difficult to establish a rule of general application.

Medical Evidence Occupational

The theoretical framework of the fitness-for-work evaluation applies in all jobs for all people. However, Dr. Corbet says he is rarely called upon to perform an assessment in the context of pregnancy. His evaluation is more likely to be needed because of a special characteristic of the pregnant woman's job rather than because of her special characteristic of being pregnant.

The standard of proof that substantiates a valid absence for other illnesses applies to absences because of pregnancy. In the vast majority of cases, employers rely on the opinion of the woman's own physician when deciding if the absence is valid.

But if one of the three triggers occurs when the woman is still in the workplace, then Brooks begins and she is paid from the employer's benefits package even if she has already scheduled an unpaid voluntary leave to begin at a date later than the trigger occurrence. In this respect, all parties diverge from the present insurance principle that the benefits only continue until the date of the pre-scheduled leave arrives.

Actuarial Evidence

Benefits packages are a common incidence of employment today. It is clear from Brooks that if an employer chooses to enter this field, the plan can have no discriminatory element. The present pregnancy exclusion is illegal.

The traditional pregnancy exclusion is a carry-over from times and perceptions past, given credence by the provisions of the Unemployment Insurance regulations. Its life is now at an end. If it was sputtering after Brooks, this decision is its death knell.

The evidence is that a plan can be designed that allows unpaid leaves to be suspended whilst an intervening health-related leave is compensated. Costs increase. It is harder to adjudicate the beginning and ending points of the health-related leave when the employee is already on voluntary leave and will continue voluntary leave after the health-related portion ends. A plan designed with presumptive periods leads to lower claims adjudication costs but higher benefits payments.

Unemployment Insurance Scheme Evidence

U.I. benefits are paid for a maximum 17 week period the first two weeks of which are an unpaid qualifying period. The earliest date to apply for U.I. is 10 weeks before expected date of delivery. The latest date is the date of delivery. The recipient of U.I. maternity benefits does not have to be unfit to work during the payment period; the mere fact of pregnancy is enough.

An employer with a qualified S.T.D. plan (which at the moment can exclude pregnancy and still remain qualified) pays reduced premiums to U.I. An employer with a qualified S.T.D. plan that includes pregnancy receives no additional premium relief.

SUB plans give some relief to employers whose plans cover maternity benefits. SUB plans allow an employer to remain as second payer of maternity benefits, merely topping up the U.I. payments to the employer plan level without the recipient suffering any reduction in the U.I. payment. They can be contingent on recipient disability.

There is a cap on the combination of payments, so that from U.I. and SUB plan together a recipient cannot receive more than 95% of normal earnings. In this sense, a pregnant woman is treated differently and discriminatorily from a sick employee, who receives 100% of normal earnings during sick leave days. The pregnant woman must be treated equally. The ways around this are to pay her 100% from the employer plan or to reduce pay for sick leave days to 95%. The latter is probably unacceptable to the union.

If the employer must bear 100% of the costs of sick leave days, SUB plans do not help the employer to reduce costs in this period. U.I. also has an absolute dollar cap on payments. If the dollar maximum is less than 60% of salary, then the employer must pay the differential as well as the SUB plan benefits.

Maternity Leave

The Supreme Court says that pregnancy is of fundamental importance in our society, and there are costs attached to this societal good that everyone must share. There is always a period during pre-delivery, childbirth, and recovery from childbirth when a woman must be absent from the workplace for a health-related reason. This is compensable. This is the new reality.

The whole discussion in Brooks revolves around the idea of pregnancy as a health-related absence, not as a voluntary leave. The Court specifically finds that pregnancy is not a voluntary condition which can be treated differently from other health-related reasons for absence.

I recognize that maternity leave is a composite of voluntary and health-related leaves. The only reason for taking the voluntary leave is the pregnancy. Maternity usually also dictates that a further portion of voluntary leave occurs after the health-related absence is over.

Presumptive Period

I am not inclined to set a presumptive period when it is presumed that all pregnant women need to be away from the workplace.

The medical experts are not consistent even on the necessary minimums. Although they are not far apart, there is sufficient deviation to suggest that too many women will fall out of the average. The Commission and Union want the presumptive period extended where medically supported. This requires proof. Obtaining proof eliminates one advantage of the presumptive period which needs none.

Who Will Pay?

One necessary implication of Brooks is that employers with a benefits package, whether negotiated or voluntary, will pay the extra costs generated by the Supreme Court's decision.

There is no doubt that if a plan must provide more benefits than it is presently designed to do, the premiums will increase. Employers are probably not happy about this. They can lower their costs by eliminating their benefit plans altogether; or by reallocating the premium sharing ratio between themselves and their employees.

The Law

This is a case of direct discrimination, not adverse effect discrimination. All agree that there has been some discrimination.

The Hospital and Association want the limits of prohibited and allowed discriminatory behavior to be clearly defined. I have done this by interpreting Brooks and defining a health-related absence. The Commission takes issue with the idea that there can be any allowable discrimination unless the case is one of adverse effect discrimination, where the employer can show a section 11.1 defence or can prove there is a bona fide occupational requirement defence.

As I understand it, the Hospital and Association are putting forward no defence as such, they simply require a clear description of how Brooks is to operate in the reality of the workplace.

Union Liability

The Hospital and the Association have agreed to amend the Collective Agreement so that it meets their understanding of the Brooks decision. They acknowledge that this decision might force further changes.

I interpret section 10 of the Act to prohibit a union from discriminatory practices not only as between its members in internal matters but generally in the workplace. Section 10(c) forbids discrimination by a union against any "person or member". I do this on a broad and purposive construction of the legislation, giving it a wide application.

No invidious intent is necessary to find discrimination. The Union has breached section 10 of the Act, just as the Association has breached section 7.

DECISION

The decision of this Board of Inquiry is

- ? Susan Parcels was discriminated against by her Employer and her Union. It is discrimination for the Collective Agreement to require an employee on maternity leave to pre-pay 100% of premiums in order to retain benefits coverage for that part of her absence which is health-related. The Employer has breached section 7 and the Union has breached section 10 of the Individual's Rights Protection Act.

- ? The rationale in Brooks is that an employer with a benefits plan must compensate its pregnant employees when they are absent from the workplace for a valid health related reason in the same way and at the same level as it compensates any employee absent on sick leave.
- ? The benefits plan must pay pregnant employees for the entire period of their health-related absence wherever it occurs during the pre-delivery, childbirth, and recovery from childbirth period.
- ? There is no presumptive period for the beginning or ending of the health-related portion of the absence. A pregnant employee must follow current proof of claim procedures to establish that the health-related absence is valid.
- ? The benefits for the health-related absence portion of a maternity leave are payable whether or not this portion occurs before, during, or after a period of unpaid voluntary maternity leave. In particular, the benefits must be paid notwithstanding current insurance principles, which in other cases would prevent payment of benefits when a health-related reason for absence occurs during a voluntary leave. The foreseeability of a health-related absence due to pregnancy in the course of a maternity leave distinguishes the present case from other circumstances in which the indemnity principle of insurance operates to prevent payment.
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- ? Employers can take advantage of the U.I. SUB plans regulations to offset some increases costs. However, an employee cannot receive less than she would under the employer benefits plan. An employer cannot use a SUB plan if it results in discrimination.
- ? Accordingly, the Collective Agreement and benefits plan must be amended to provide for payment of the benefits in these circumstances. The ultimate cost of this decision will have to work its way through the market place in a non-discriminatory fashion.