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## Family Day entitlement considered by two Ontario arbitrators

Readers of FOCUS alerts are well aware of the existence, since October 2007, of Family Day, the new and ninth public holiday in Ontario. It falls on the third Monday in February (See “Family Day added to list of public holidays in Ontario” on our What’s New page). As we have explained, the impact of the new holiday on employers varies based on a number of factors. The obligation of unionized employers in the provincially-regulated sector to provide the new holiday depends on the holiday benefits provided in their collective agreements.

In this regard, the key provision in the *Employment Standards Act, 2000* (ESA) is section 5(2), which says:

s. 5(2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.

As we noted, arbitrators have ruled this means that where a collective agreement already provides more than the enumerated statutory holidays under the ESA, the employer will not be obliged to honour every such listed holiday. Now two Ontario arbitrators have specifically considered separate claims by unions that their memberships are entitled to Family Day, in circumstances where both collective agreements provided more than nine paid holidays. The unions’ grievances were denied in both cases.

### ‘EMPLOYMENT STANDARD’

In both *Sun Parlour Emergency Services v. S.E.I.U., Local 1* (February 14, 2008) and *U.S. Steel Canada v. U.S.W., Local 8782* (March 19, 2008), the unions argued that the term “employment standard” in s. 5(2) of the ESA should be understood to refer to Family Day itself – not to the number of public holidays provided under the ESA. Since in both cases, neither collective agreement provided specifically for a public holiday in mid-winter, the unions argued that there were no collective agreement provisions that “directly related” to the benefit provided to the employment standard at issue, *i.e.*, Family Day.

These arguments were based on the differences in wording of the ESA and its predecessor statute, the *Employment Standards Act* (1990). In the earlier law, section 4(2), the precursor to ESA section 5(2), read as follows:

s. 4(2) A right, benefit, term or condition of employment under a contract, oral or written, express or implied, or under any other Act or any schedule, order or regulation made thereunder that provides in favour of an employee a higher remuneration in money, a greater right or benefit or lesser hours of work than the requirement imposed by an employment standard shall prevail over an employment standard.

The unions argued that the new wording means that the balancing model applied by arbitrators and adjudicators under the 1990 ESA, in which the total number of public holidays provided under the statute was evaluated against the total number of such paid holidays provided under a contract or collective agreement, was no longer valid. Instead, the comparison must now be between the particular employment standard, in this case Family Day, and the provisions of the collective agreement.

This assertion was rejected by the arbitrators in each case. The arbitrator in *U.S. Steel Canada* stated that there was no basis for departing from the previous balancing test:

“This approach would constitute a radical departure from that adopted under the [1990 ESA] where the reference was also to the ‘employment standard’ and where the totality of Part VII, Public Holidays, was considered to be, and was treated as, the relevant employment standard. If the legislature had intended such a departure, it would not have continued to define the balancing as between the collective agreement provisions, on the one hand, and ‘the employment standard,’ on the other. [...] Accordingly, to repeat, the scope of the balancing under the *Employment Standards Act 2000* is not limited to the specific public holiday, regardless of its purpose, but rather it is as between the provisions of Part X, Public Holidays, of the *Employment Standards Act 2000* and the provisions of the collective agreement ‘that directly relate to the same subject matter’ as that employment standard.”

## FLOATING HOLIDAY ISSUE

In the collective agreement at issue in the *U.S. Steel Canada* award, one of the 10 holidays provided was a “Floating Holiday” to be observed for employees within the bi-weekly pay period in which their birthdays occurred. The union argued, based on an award in 2001, *Toronto Zoo v. C.U.P.E. Local 1600*, that such floating holidays could not be used in the comparison, as they did not relate to the same subject matter as the public holiday employment standard.

The arbitrator in *Toronto Zoo* had based her reasoning on a number of factors, including:

- Floating holidays were listed in a separate provision from that dealing with listed public holidays
- Floating holidays were subject to being taken at a time convenient to the employee’s supervisor
- Floating holidays not taken prior to the end of the contract year were forfeited

The arbitrator in *U.S. Steel Canada* held that in this case the same restrictions did not apply to the floating holiday provided under this agreement:

“Under this collective agreement, the floating holiday is listed along with each of the other statutory holidays as days in respect of which each employee who qualifies shall receive a day’s pay. The floating holiday is to be observed within a specified time frame, *i.e.* on any day in the bi-weekly pay period in which his/her birthday occurs. Finally, there can be no forfeiture of the day. Accordingly, under this collective agreement, the birthday floater [...] constitutes a provision that directly relates to the subject matter of the public holiday employment standard and, therefore, must be counted for purposes of the Section 5(2) statutory balancing.”

Accordingly, the grievance was denied.

## In our view

One other union argument was disposed of by the arbitrator in *U.S. Steel Canada*, to the effect that the language of s. 5(1) of the *ESA* now requires a specific contracting out of the employment standards under the Act as a prerequisite to comparing the standards offered under the agreement with those of the statute. Section 5(1) reads as follows:

s. 5(1) Subject to subsection (2) [the provision discussed above, providing for the prevalence of a greater contractual right over the statutory employment standard], no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.

The union argued that since no such explicit contracting out of the *ESA* standard had occurred in this case, there could be no balancing of the contractual rights against the employment standard.

This argument was rejected by the arbitrator who held that there was no intention in the new legislation to abandon the previous model under which there was no prerequisite to formally contract out of the employment standard in order that the contractual benefit prevails over the employment standard.

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