

Ontario court rules better benefits for adoptive parents not discriminatory

The Ontario Divisional Court has recently upheld an arbitration award that allowed an employer to provide benefits to adoptive parents that it did not offer to biological parents. In *Ontario Secondary School Teachers' Federation v. Upper Canada District School Board* (September 26, 2005), the collective agreement provided a salary top-up to employment insurance benefits of 10 weeks of parental leave to adoptive parents, but no equivalent benefit to biological parents. Pregnant women were entitled to 15 weeks of top-up benefits while on pregnancy leave.

Two male teachers grieved the provision after the employer denied their applications for the top-up parental leave benefit. The union alleged that the parental leave benefits provision violated the Ontario *Human Rights Code* and section 15 of the *Canadian Charter of Rights and Freedoms*. In fact, the union had proposed the benefit differential during collective bargaining, after the employer had rejected the union's initial proposal to provide equivalent parental leave benefits to adoptive and biological parents.

The arbitration board heard evidence about the experience of adoptive parents when a child first arrives in their home. This evidence showed that, typically, there are significant special needs when an adoptive child enters a family, in part because most adopted children are not infants and many are adopted internationally. As well, the President of the union local gave evidence that the rationale for the special treatment of adoptive parents was to recognize that their experience was different from that of biological parents.

BOARD: PROVISION AMELIORATIVE, NOT DEMEANING

In ruling against the union, the majority of the arbitration board applied the 1999 decision of the Supreme Court of Canada in *Law v. Canada (Minister of Employment and Immigration)*. *Law* was a decision that interpreted subsection 15(1) of the *Charter*, in which the Court held that a key element of the guarantee of equality was the protection of human dignity.

The issue in *Law* was whether the Canada Pension Plan violated subsection 15(1) of the *Charter*, because survivor benefits were not available to spouses under the age of 35 without dependent children unless they were disabled. Also, those under the age of 45 were subject to conditions for eligibility that were not imposed on those over 45.

The Court in *Law* held that the provisions were not discriminatory because they did not violate the claimant's essential human dignity "when the dual perspectives of long-term security and the greater opportunity of youth are considered". Moreover, the legislation did not "stereotype, exclude, or devalue adults under 45". Finally, the Court pointed to the ameliorative purpose of the legislation, noting that the distinction that the legislation drew corresponded to "the greater long-term need and different circumstances experienced by the more disadvantaged group being targeted" and that it did not violate the dignity of the persons denied the benefit.

The arbitration board held that, while the provisions of the collective agreement did result in a differential treatment of adoptive and biological fathers, it also had the "ameliorative purpose" of providing additional benefits to those with special needs. Nor did the provision demean or stigmatize biological fathers. It merely recognized the special needs of adoptive fathers.

COURT: LAW APPLIES TO HUMAN RIGHTS LEGISLATION

The union applied to the Divisional Court to quash the award, arguing that the arbitration board had erred in applying the interpretation of subsection 15(1) of the *Charter* set out in *Law* to human rights legislation. The Court disagreed and upheld the award, noting the long history of “cross-fertilization” between human rights statutes and subsection 15(1).

While acknowledging that other arbitration boards had held that the provision of benefits to adoptive parents but not to biological parents was discriminatory, the Court pointed to the evidence before the arbitration board in this case, which showed the particular needs of adoptive parents. There had been no such evidence before the other boards, the Court stated.

The Court went on to observe that the majority of the bargaining unit had conferred this benefit voluntarily on the minority who were adoptive parents. This was another factor indicating that the differential benefit was not discriminatory according to the principles articulated in *Law*:

“In this case, the benefit is targeted to adoptive parents who, according to the evidence accepted by the majority, in general have special child care needs. The provision is not one which disadvantages or stereotypes an already disadvantaged group, ... as biological parents are not a disadvantaged group in Canadian society. Nor does the provision of the benefit only to adoptive parents reflect negatively on the worth of biological parents, nor reflect a stereotype that biological mothers have primary responsibility for child rearing. Moreover, it is noteworthy in this case, that the modest financial benefit in dispute was conferred by the majority upon a distinct minority within the bargaining unit – that is, adoptive parents. Where the majority consensually proposes a benefit for the minority such as this, one can not conclude that the benefit undermines the human dignity of biological parents, who are the majority group. Therefore, I conclude that the arbitration board did not err in finding that there was no discrimination and, therefore, no violation of the *Human Rights Code*.”

Accordingly, the union’s application was dismissed.

In Our View

Employers should be cautious when they are asked by unions to agree to a provision that may be seen as discriminatory. An employer should consider asking the union to provide evidence of the type that proved crucial in this case, to show that the provision is necessary to meet the special needs of the group on whom the benefit is conferred.

For further information, please contact [Raquel Chisholm](#) at (613) 940-2755

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