Perspective patronale en droit de l'emploi et relations de travail
Labour and Employment Law for Employers
Emond Harnden LLP

B.C. arbitrator rules no accommodation possible for pregnant teachers off work due to Fifth Disease

A British Columbia arbitrator has recently had to consider a grievance filed by a teachers' union on behalf of pregnant teachers who were advised to go on sick leave to avoid exposure to Fifth Disease. While Fifth Disease presents no threat to the general population, and results in nothing worse than a rash or malaise-type symptoms, it does increase the risk of miscarriage in pregnant women. It is also more prevalent among children than among adults.

The grievance in *British Columbia Teachers' Federation v. School District No. 33* (February 6, 2006) contended that requiring teachers to go on paid sick leave during an outbreak of Fifth Disease constituted a discriminatory practice. Despite the fact that the Workers' Compensation Board had investigated Fifth Disease in the school district and determined that it did not pose an undue hazard, the union also characterized the absence of the teachers as a "refusal of unsafe work" under the province's health and safety legislation. The union further asserted that the employer had breached its duty under Article D.13 of the collective agreement which provided that:

> "Classes shall be conducted only in facilities that are clean and where temperature, ventilation, lighting, humidity, sound level and other physical conditions are hygienic, safe and conducive to effective learning."

The employer characterized the grievance as "extraordinary". It amounted to a claim for guaranteed wages (as opposed to paid sick leave) for any teacher who stays off work based on medical advice because of a health condition that makes the teacher more susceptible to health problems from contracting a common disease that is generally present in the community.

ARBITRATOR: NO JURISDICTION TO HEAR "FREE-STANDING" HEALTH AND SAFETY CLAIM

In dismissing the grievance, the arbitrator first held that he did not have jurisdiction to rule on whether the existence of Fifth Disease in the school board constituted a workplace hazard under provincial health and safety legislation. He expressed the view that the Workers' Compensation Board, which had already determined there was no workplace hazard from Fifth Disease in the schools, had exclusive jurisdiction over workplace safety matters, and cited its extensive investigative and policy-making functions, as well as its specialized expertise in support of this view.

He rejected the union's reliance on the Supreme Court of Canada's decision in *OPSEU Local 324 v. Parry Sound Welfare Administration Board* for the proposition that provisions of the *Workers Compensation Act* are incorporated into the collective agreement (see "Supreme Court of Canada: arbitration board has jurisdiction over human rights grievance of probationary employee" on our Publications page). That case, the arbitrator stated, held that an arbitrator could enforce a statutory duty that was not expressly incorporated in the collective agreement; it did not support the proposition that an arbitrator could determine a free-standing claim alleging a violation of a statute over which another body had exclusive jurisdiction.

Even if there were jurisdiction to declare a workplace hazard, the arbitrator held that this would not be an appropriate case to exercise that jurisdiction, as the WCB had already investigated and found no workplace hazard.

NO BREACH OF ARTICLE D.13

The arbitrator then considered whether there had been a breach by the employer of its duty to maintain clean and hygienic facilities and held there was none. The language of the provision was restricted to "facilities" and "physical conditions" in the facilities. This was carefully chosen language that did not include threats to teachers' health that arose from contagion emanating from students. In the arbitrator's view, this language was deliberately chosen to limit the employer's obligations to matters under its control.

REQUIREMENT TO TEACH IN SCHOOLS WITH RISK OF FIFTH DISEASE DISCRIMINATORY, BUT NO ACCOMMODATION POSSIBLE

The arbitrator agreed with the union that requiring teachers to attend at school where there was a risk of contracting Fifth Disease did discriminate against pregnant teachers. There was no need to demonstrate any improper motivation on the part of the employer to establish the discriminatory effect. In this case, placing such teachers on paid sick leave impeded their participation in the work force, and was thus discriminatory on the basis of sex. The fact that the teachers received full pay while on sick leave was no answer: they lost limited sick leave credits and thus experienced an adverse effect. The question remained, however, as to whether the employer had discharged its duty to accommodate the teachers.

The arbitrator held that it had. Because the risk of contracting Fifth Disease was greatest where there were concentrations of children, the union had focused on reassigning the teachers to two non-teaching facilities where there were no current vacancies. The union asserted that the time-limited nature of the accommodation required (the duration of the teachers' pregnancies) meant that a broader range of accommodation measures was reasonable, and cited a case in which an employer was ordered to accommodate pregnant grievors where the hazard involved was exposure to lead in the plant where the grievors worked. The arbitrator in that case held that there may be circumstances where the duty to accommodate required the employer to assemble an assortment of duties in a safe location.

The arbitrator disagreed with the union noting that while the case it had cited involved a predictable, constant and stationary risk – exposure to lead in the workplace – that could be safely and temporarily controlled, the risk in this case could hardly be more unpredictable:

> "[Fifth Disease] is a contagious disease whose risk factor varies unpredictably from time to time in a particular location, and from location to location. Further, it cannot even be identified in an individual at the time it is contagious. While I do accept that the risk is increased among children […], the disease is certainly caught by and transmitted among adults as well. I do not find that the reasoning in [the case cited by the Union] – that more extraordinary measures might be appropriate, if they are needed for a "known and temporary" period of time – applies equally to the present facts, where neither the period the accommodation would be needed, nor even the period it would remain viable, could be assessed with nearly as much certainty."

Accordingly, the arbitrator held that there was no accommodation available at the non-teaching centres short of undue hardship. While the arbitrator expressed the view that he did not have to consider whether the provision of paid sick leave was itself a reasonable accommodation, he did state that its decision to extend paid sick leave to the grievors was a reasonable one.

In Our View

The scope of the duty to accommodate is very much a question of fact, and no measure, short of undue hardship, can be ruled out. In this case, the arbitrator was clearly of the view that there was no requirement to create positions for the grievors or remove incumbents on these particular facts, and given the uncertainties involved in the risk of contracting Fifth Disease. For more on the scope of the duty to accommodate see "The duty to accommodate in action" and "Accommodating disability short of undue hardship" on our Publications page.

For further information, please contact Jennifer Birrell at (613) 940- 2740.

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