

# Labour Board looks at emergency leave provisions of ESA

Date : August 1, 2005

A recent decision of the Ontario Labour Relations Board in *Elkay Canada Ltd.* (November 12, 2004) may help employers interpret the parameters of the emergency leave provisions in the *Employment Standards Act, 2000 (ESA)*. Those provisions allow employees in workplaces that regularly employ 50 or more employees to take up to 10 days of unpaid leave a year to deal with urgent matters relating to specified family members (see ["Emergency leave and agreements under the ESA 2000: new variables in the workplace mix"](#) and ["Parental leave, overtime rules among major changes in new Employment Standards Act"](#) on our Publications Page.)

The *Elkay* case involved a probationary employee who was dismissed after taking a day off that he later claimed fell within the emergency leave provisions of the *ESA*.

During the first two months after the employee had been hired in September 2003, he accumulated a number of unexplained late arrivals and absences. There also had been concerns about his performance. On November 3, 2003, the employee missed part of the day to take his pregnant girlfriend to a doctor's appointment. The next day, he reported that he could not attend work because his girlfriend was in labour. On November 5, he did not attend work because his girlfriend had given birth early that morning. On November 6, he called in to say he would be unable to report for his 3:00 p.m shift.

When the employee reported for his next shift, the employer asked him to explain why he had not reported for work on November 6 but was given no satisfactory explanation. When the issue of the employee's performance was raised, the employee became upset and the meeting rapidly deteriorated. At this point, he was advised that his probationary employment was terminated.

Some months later, the employee filed an Employment Standards Claim alleging that he had informed the employer that he needed to take November 6 off to care for his girlfriend's two other children while she was in hospital. Based on this information, the Employment Standards Officer ruled that he had been entitled to emergency leave on that day, and that his dismissal was in contravention of the Act. The employer then applied to the Board to have the decision reviewed.

## **BOARD: NO ENTITLEMENT TO EMERGENCY LEAVE**

The Board allowed the employer's application. The Board noted that, while the Act does not require that an employee specifically ask for "emergency leave" or invoke the relevant provision of the Act, the employee must advise the employer of the reasons why leave is necessary. The urgency should be clear from the reasons given for the request. In this case, the Board found that

there was no evidence that the employee had advised the employer that he needed the day off to care for his girlfriend's children.

Moreover, the Board found that the employer had, at its meeting with the employee, attempted to elicit reasonable evidence that the employee was entitled to take emergency leave, but that no such evidence had been provided. Accordingly, the Board accepted that the only information that the employer had as to why the employee had not reported to work on November 6 was that his girlfriend had given birth the previous day.

The Board then considered whether, for the purposes of the Act, the birth of the child on the morning of November 5 was an "urgent matter" that entitled the employee to refuse to report for a 3:00 p.m. shift on November 6, and held that it was not.

Based on these findings, the Board held that, because the employee was not entitled to emergency leave on November 6, his termination was not in violation of the Act.

### **In Our View**

This decision establishes that it is the information that an employer has at the time an employee requests emergency leave that is relevant. Even though an employee has valid reasons for requesting emergency leave, if those reasons are not brought to the employer's attention before, or as soon as possible after, the employee takes the leave, the employer is entitled to refuse to grant it. Nonetheless, before taking disciplinary action, employers are advised to inquire into an employee's reasons for being absent if there is a possibility that the emergency leave provisions of the Act may be at issue.

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