

## Unilateral revision of sick pay provisions rejected by B.C. court

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At times, employers may have occasion to revise certain provisions of their benefits policies where these are not set out in a contract of employment. Earlier this year, a British Columbia court considered the limits on an employer's power to unilaterally alter these policies when the changes do not benefit employees.

In *Bartolic v. Canada Safeway Ltd.* (March 3, 1998), the plaintiffs, former non-unionized employees of Safeway's Burnaby warehousing operation, claimed over \$60,000 for accumulated sick time pay. In November 1977, the employer had unilaterally given employees a right to accumulate sick time benefits under the company's Accumulated Sick Time Policy. Under this Policy

"(a) employees who accumulated 30 days sick leave could receive an annual payout of 50% of any unused sick leave they had accumulated in the previous year; and  
(b) employees could receive a payout of any accumulated sick leave up to a maximum of 30 days upon retirement, voluntary termination or permanent layoff."

### ACCUMULATED SICK TIME POLICY REVOKED

In 1988, Safeway published and circulated a benefits manual consisting of some 40 pages. One of these pages contained a statement of the company's "Sick Leave Policy", under which it was stated that "accumulated sick leave is *not* paid out upon termination, death or retirement."  
[Emphasis added]

In 1996, the Burnaby warehousing operation was sold as a going concern to Summit Logistics. None of the plaintiff employees received notice of termination or payment in lieu of notice. All of them were offered employment with Summit on terms substantially similar to those with Safeway, and none suffered any interruption in employment due to the sale of the business. However, Summit did not include the Accumulated Sick Time Policy as a term of the plaintiffs' contracts.

After the sale to Summit, the plaintiff employees, all of whom had accumulated more than 30 sick days, demanded that Safeway pay them 30 days sick pay, in accordance with the Accumulated Sick Time Policy. Safeway refused and the employees went to court, alleging a breach of contract.

At court, Safeway argued that there was an implied term in the employment contract that its sick leave policy was subject to unilateral change at its initiative. It stated that it had given reasonable notice of the change with the publication and distribution of the 1988 benefits manual, which all but three of the plaintiffs recalled having received.

## **UNEQUAL BARGAINING POWER, DETRIMENTAL RELIANCE**

The Court rejected this argument, noting that employees' knowledge of the change did not signify that it had been accepted. There was no principle in contract law, the Court stated, that one party may impose a contractual term without the acceptance of the term by the other party. The principle prohibiting unilateral imposition by one party of a contractual term reflects the fact that the employment relationship is characterized by unequal bargaining power as between employer and employee, according to the Court.

Both Safeway and the employees agreed that the test for determining whether a particular term could be implied into an employment contract was whether, at the time the contract was formed, the parties would have agreed to the term had they thought about the type of situation that would later transpire. Not surprisingly, the parties disagreed as to whether the employees would have agreed in 1977 to Safeway's power to revise the sick pay policy on its own.

The Court stated that, whatever the correct answer to this question was, there was no doubt that the employees' actions in accumulating sick days showed that they did not accept that the employer could revoke the 1977 policy, and that they had relied on its terms:

"I consider it beyond doubt that had the plaintiffs been told that Safeway could unilaterally, and without notice, eliminate the plaintiffs' rights to receive a payout of up to 30 accumulated sick leave credits upon retirement, voluntary termination, or permanent layoff, they would not have accumulated those credits. As a result, if the Court were to find that Safeway could eliminate that benefit at any time without notice, the plaintiffs would have relied upon the Accumulated Sick Time Policy to their detriment."

While Safeway had not been obliged to implement the Accumulated Sick Time Policy in 1977, it could not revoke it once the employees had relied on its terms. The Court noted that this reliance could be seen in the fact that the employees had chosen to accumulate the sick days rather than using up sick time.

In ruling in favour of the employees, the Court also held that, even though they had suffered no loss and had immediately taken up employment with Summit, they had been "permanently laid off" within the meaning of the Policy.

## **IN OUR VIEW**

This case shows the current willingness of courts to address issues of an employer's unequal bargaining power in setting the terms of employment contracts with employees. Particularly where, as here, employees have acted in reliance on a particular policy, courts will not easily assume acceptance of a unilateral contractual change merely because the employee is made aware of it.

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