

Legal update

Are paternity, maternity and adoption part of the same battle?

April 2017

Employment and labour

In a November 2016 decision¹, Mtre. Denis Gagnon, grievance arbitrator, rejected a union's claim that employees on paternity leave were victims of discrimination based on sex and civil status because they were treated differently from employees on maternity leave or adoption leave.

Context

The case in question involved of 45 grievances of the same type. The union filing the grievances claimed that the employer, by not paying employees on paternity leave the same indemnity as the indemnity paid to employees on maternity leave or adoption leave (i.e. the difference between 95% of the base weekly salary and the weekly benefit provided under the Quebec Parental Insurance Plan (QPIP)), was discriminating against them on the basis of gender (compared to employees on maternity leave) and civil status (compared to employees on adoption leave) within the meaning of Quebec's *Charter of Human Rights and Freedoms* (Quebec Charter).

As the debate mainly revolved around the difference in how biological fathers and adopting parents were treated, the arbitrator had to determine whether the clause in the collective agreement granting unpaid paternity leave was discriminatory in light of the fact that the same agreement provided for an indemnity for adopting parents who decided to take "adoption" leave.

Decision

Unlike some arbitral decisions in favour of the union in similar situations², the arbitrator indicates that, in addition to evidence of a distinction involving one of the grounds set out in the Quebec Charter, the complainant must demonstrate that "[translation] the distinction has the effect of perpetuating a disadvantage or prejudice or of applying a stereotype to individuals belonging to the group affected by the distinction."³

In this case, while the union had established that a distinction based on civil status existed, the arbitrator found that, as there was no evidence that biological fathers were victims of a stereotype of any kind in our society, a stereotype could not be created by granting biological fathers a leave that was different from the leave granted to adopting parents. He drew, in particular, on the *Act respecting labour standards* and the *Act respecting parental leave*, which themselves provide for differences in the conditions put in place for maternity, paternity and type of parenthood (biological or adoptive). He therefore rejected the grievances.

The take-away

In October 2015, we told you about a [decision](#), in a similar dispute to the one in this instance, where an arbitrator found that maternity and paternity cannot be compared in order to conclude that fathers, as a whole or as a group, are stigmatized or discriminated against compared to mothers.⁴

While it is hard to predict how a grievance alleging discriminatory treatment of employees on paternity leave will be dealt with, a certain body of case law, both federal and provincial, is beginning to emerge and seems to hold that the aim of the prohibition against discrimination included in the *Canadian Charter of Rights and Freedoms* and the Quebec Charter is not to create perfect equality in every respect between all groups. Employees on paternity leave, maternity leave and adoption leave do not have to be treated identically if the objectives sought justify the difference in treatment.

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Footnotes

1. *Fraternité des policiers et policières de la Ville de Québec et Ville de Québec*, 2016 QCTA 998.
2. *Association des policiers et policières de Sherbrooke et Ville de Sherbrooke*, 2014 QCTA 263, AZ-51060963, 27 mars 2014, arbitrator Robert Choquette; *Hydro-Québec et Syndicat professionnel des ingénieurs d'Hydro-Québec (SPIHQ)*, AZ-50943538, February 27, 2013, arbitrator André Bergeron;
3. 2016 QCTA 998, para 17
4. In *Alliance de la fonction publique du Canada – Unité des employés administratifs, professionnels et du soutien et Aéroports de Montréal*, 2015 QCTA 679.

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