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Feature

The Inflexibility of "Flex Days"

Review policies with legal counsel to avoid providing more than you intended

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Employers will often provide different perks to remain competitive in recruiting the best talent, and that means providing more than what is required by the applicable employment standards legislation.

In terms of vacation time, section 34 of the Alberta *Employment Standards Code* ("**ESC**") states, "An employer must provide an annual vacation to an employee of at least (a) 2 weeks after each of the first 4 years of employment, and (b) 3 weeks after 5 consecutive years of employment and each year of employment after that, unless section 35 applies". The key is that this section (and many other sections of the ESC) says "at least", which means employers are free to provide more.

Paid time-off ("**PTO**"), which employers often incorporate vacation entitlements into, is one of the common areas where greater benefits are provided. Some PTOs are a greater benefit, because not all types of PTOs are required by the applicable employment standards legislation. For example, the only PTO that is statutorily required in Alberta is vacation. Some other provinces may also require paid sick days. However, grouping statutory entitlements with greater benefits without clear stipulations in the policy can lead to pitfalls, despite the employer providing more generous entitlements than statutorily required. This is illustrated by a recent appeal decision of the Alberta Labour Relations Board in *Harold Hinz Professional Corporation v Mawji*, 2023 CanLII 67904 ("*Mawji*").

Background of the Mawji Decision

In *Mawji*, the employer provided the employee with "flex days" as paid days off, in addition to her vacation entitlements. For each month of work, the employee accrued two flex days. There was no formal policy in place and no formal mechanism tracking the flex days. The employee simply emailed the employer occasionally with the days she would be taking as flex days.

When the employee resigned from her employment, the employer and employee disagreed over the number of vacation days remaining and the associated vacation pay. The employer argued that the time-off taken was vacation, while the employee argued they were flex days.

The employer argued that flex days had to be used within the month that the employee earned them and could not be banked, so the employee only had two flex days to use and the remaining 10.5 days must have been vacation days. The Appeal Body rejected this argument, because there was no written policy regarding the accrual or use of flex days.

Furthermore, the Appeal Body stated that even if there was a policy setting out these requirements, the argument would still be rejected, because several emails showed that the employer permitted the employee to use flex days after the month in which they were accrued.

Ultimately, the Appeal Body found that the employee used her remaining flex days before using any vacation days. As such, 10 of the time-off days were flex days and the additional 4.5 days of time-off must have been vacation days.

Feature continued

Employer Key Takeaways

While it is great that employers are generous and provide greater benefits to their employees than the statutory requirements, it is important to note the following lessons:

(1) **Clear Policies:** since the specifics of the particular greater benefit are not addressed by the ESC, employers must fill in that gap and set out its own rules clearly, including eligibility requirements, the calculation method, treatment during leave or upon termination, and/or benefit priorities such as whether employees must take their statutory vacation first before using flex days, "use it or lose it" requirements or that the flex days allotment will count towards their statutory entitlement. Ideally, statutory vacation time and vacation pay should always be used first, since they are statutorily required and the rules cannot be altered by the employer. PTO in excess of statutory requirements, on the other hand, provides the employer more flexibility in setting its own rules, such as the requirement that flex days must be used within the month or they will be lost as the employer in *Mawji* argued. However, this must be clearly stated in the policy.

(2) **Consistent Practice:** in conjunction with a clear policy, employers need to be consistent in enforcing its policies. As the Appeal Body in *Mawji* stated, even if there was a policy, the employer's actions demonstrated that it allowed flex days to be banked. Employers must follow its policies consistently in order to rely on them.

(3) **Recordkeeping:** remember that section 14 of the ESC requires employers to keep up-to-date records of vacation pay paid to each employee (which must also be on their pay statements in the relevant pay period) and also the date vacation started and finished and the period of employment in which the vacation was earned. Because of this statutory requirement, courts and the Employment Standards Branch will put the onus on the employer to prove that the entitlements were in fact provided. In this case, the only records available were emails, which made it difficult for the employer to prove the entitlement provided beyond what was stated in the emails.

(4) **Legal Advice:** If employers are considering PTO policies, they should strongly consider discussing with legal counsel to ensure both compliance with the ESC, while also addressing the greater benefit so that employers are not bound to providing even greater benefits than they intended.

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