



Pensions and Benefits

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Beware of Hidden Pension Liabilities in Corporate Transactions

In a recent court case in British Columbia, employees who transferred employment as part of a corporate transaction were awarded monetary damages on account of lost pension benefits: *Kerfoot v. Weyerhaeuser Company* 2012 BCSC 640.

Weyerhaeuser Company (“Weyerhaeuser”) sold its interest in a pulp mill in Kamloops, British Columbia, to Domtar Corporation (“Domtar”). A full six-and-a-half months prior to the sale, Weyerhaeuser provided notice to its employees of the pending deal. As part of the sale, Weyerhaeuser’s employees would be provided with offers of employment by Domtar. The salary of the employees was to remain unchanged, however, the pension benefits provided by Domtar were not as generous as those provided by Weyerhaeuser.

The plaintiffs were two employees of Weyerhaeuser. Their employment was terminated by Weyerhaeuser as part of the sale of the business. They claimed damages for wrongful dismissal. The only issue was the amount of damages in respect of the loss of pension benefits. Both plaintiffs accepted offers of employment from Domtar, with the less generous pension benefits.

The court awarded damages to both employees based upon the difference in value between the pension benefits that the employees would have earned at Weyerhaeuser during a reasonable notice period and what they actually earned at Domtar. The amount of damages for the two employees totaled over C\$90,000. This decision forms a dangerous precedent.

Typically, the employment terms of an asset purchase agreement stipulate that employees who transfer employment to the purchaser will be hired on terms that, in the aggregate, are substantially similar to those of the seller. The “substantially similar” proviso is intended to account for the fact that two employers rarely have identical compensation and benefit plans.

Where the employment offers are not on substantially similar terms, there may be indemnities between the seller and purchaser written into the purchase and sale agreement in respect of the potential wrongful dismissal damages. Unfortunately, the court’s decision did not discuss the commercial terms of the transaction.

Some would argue that the terms of a purchase and sale agreement between a buyer and seller of a business are not relevant to employment law cases or to the determination of wrongful dismissal damages. However, the strict application of employment law principles to commercial transactions can have the effect of imposing commercially unreasonable requirements on the parties in order to avoid the prospect of liability.

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In this case, in order for Weyerhaeuser to avoid an assessment of damages, it would have to have done one or more of the following:

- Provided additional compensation to the affected employees for the amount of anticipated “pension loss”. In order to do so, it would have required detailed information concerning Domtar’s pension plan, enabling it to perform the necessary calculations, comparing the amount of pension benefits the employees would have earned under Weyerhaeuser’s pension plan during a reasonable notice period and what they would have earned under Domtar’s pension plan. This is clearly not practical in the context of a commercial transaction.
- Provided sufficient advance notice of the sale of the business. Typically, the negotiation of a sale of business is kept confidential up until very close to the closing date. In this case, which is not the norm, Weyerhaeuser gave the employees six-and-a-half months’ notice of the transaction. However, the court held that the notice was not effective, because the date was not certain. Advance notice might not be effective in any event, in respect of those who do not agree to the new terms, following the reasoning of *Wronko v. Western Inventory Services* 2008 ONCA 327.
- Required the purchaser to provide identical pension benefits or to provide a “wrap-around” benefit to ensure that transferred employees suffer no pension loss. Typically, sellers of businesses are not in the position to dictate to potential buyers the terms of a pension plan that they must provide to employees who accept employment. This is particularly the case where the seller maintains a defined benefit pension plan and the purchaser does not.
- Required the purchaser to indemnify the seller for damages for pension losses of the sort that arose in this case. This is not often feasible in a commercial transaction.

While one can understand the court’s reasoning and its analysis in order to quantify the difference between the pension values as between Weyerhaeuser and Domtar during a reasonable notice period, the impact of this decision will be to impair the efficiency of commercial transactions. In any purchase and sale transaction, there will be winners and losers among an employee group, depending upon an employee’s specific circumstances.

In cases in which employees’ aggregate compensation with the purchaser is substantially similar to that with the seller, each employee has a choice to accept or reject the offer by the purchaser. If an employee accepts the offer, the court should not interfere with the deal and should not award damages simply on the basis that one benefit is less generous than another for a particular employee.

The implications of this decision should be considered in the negotiation of purchase and sale agreements in which employees will be transferring employment from the seller to the purchaser.

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