

Pensions and Benefits

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O'Neill v. General Motors: Court Rules that Retiree Benefits May be Reduced

The Ontario Superior Court of Justice ruled last week that retiree benefits may be changed even after an employee retires: *O'Neill v. General Motors of Canada Limited*, 2013 ONSC 4654. In other words, an employee's right to retiree benefits does not irrevocably vest in the employee upon retirement. Nor does the right to such benefits vest in an active employee upon the employee satisfying the age and service criteria that may be established by an employer for entitlement to the benefits.

However, in this case the court decided against the employer, General Motors of Canada Limited ("GM"), because GM did not adequately reserve to itself the right to make changes to its retiree benefits program. The result in this case is the same as that reached last year by the British Columbia Supreme Court in *Lacey v. Weyerhaeuser Company Limited*, 2012 BCSC 353.¹ We understand that GM will be appealing the decision to the Ontario court of appeal.

This was a judgment of agreed-upon common issues in a class action commenced by a retiree, Joseph O'Neill who retired in 2002. The class action was certified in October 2011 and Mr. O'Neill passed away in 2012. Lynn McCullough, who retired in 2008, succeeded Joseph O'Neill as the representative plaintiff. The class of retirees was comprised of 3,297 members, including surviving spouses, and 67 of whom were retired executives.

GM made an announcement at the end of 2007 that certain post-retirement benefits would be reduced over the ensuing three-year period. Most of the reductions seem to be quite minor, such as the availability of semi-private hospital coverage, the right to add new dependants for coverage, availability of out-of-province coverage and the level of co-payments on prescription drugs. The other change, announced in 2009, which was more significant, was a reduction in life insurance from, in many cases, C\$100,000, to C\$20,000.

The above changes affected only former salaried employees who had retired after January 1, 1995. The reason why the reductions in coverage applied only to those who retired after that date was because since 1994 GM had, in its view, consistently reserved its right to terminate and make changes to its post-retirement benefits. The court was faced with reviewing a total of 260 different communications, comprised of booklets, brochures, letters and other announcements.

¹Please see our Pension Pulse dated March 16, 2012

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Based on the documentation and an analysis of relevant caselaw, the court made the following determinations:

- The salaried employees had a reasonable expectation that they could plan for and rely upon a core of health care and life insurance benefits upon retirement and for life. The court stated: "It is often said the law of contracts protects the reasonable expectations of the parties, or more specifically, the expectations 'induced by others' conduct."
- The retiree benefits constituted a form of deferred compensation. The benefits were not given to the retirees gratuitously, namely, as a gift. The retiree benefits were an integral part of the salaried employees' total compensation. This concept, according to the court, was confirmed in several GM communications. The court stated: "In any event, courts have repeatedly held that employee benefits, even those that were voluntarily introduced by an employer, are enforceable as a matter of contract."
- GM's reservation of rights ("ROR") clauses in its communications were not sufficient to permit GM to exercise a right to reduce or eliminate its retiree benefits. GM's ROR wording generally reserved to GM the right to amend, modify, suspend or terminate any of its benefit programs at any time. Interestingly, after the law suit was commenced, GM modified the wording in its ROR clause to include retirees, and later to include a reference to making amendments after retirement. The court held that the revised wording was clear and unambiguous, but the prior wording was not.
- Whether an employer has the right to modify benefits after retirement is a matter of contractual interpretation. An employer will have a right to make changes if and only if the contractual language is clear and unambiguous. To be clear and unambiguous, the ROR wording must refer to making changes to the benefits of retirees and it must refer to making those changes during retirement years.
- Where there is ambiguity in the wording regarding benefits or the employer's reservation of its rights, or if the wording is capable of more than one interpretation, the wording will be interpreted by the courts in favour of the employee. This is partly because the company is the party that drafted the communications and because there is unequal bargaining power between an employer and an employee. Note, a different result could result in a collective bargaining context.
- The conditions surrounding the provision of retiree benefits formed part of the "employment contracts" with employees. The court noted that because of the need to protect employees who are generally vulnerable in the bargaining relationship, employment contracts are unlike ordinary commercial contracts. As a result, employment contracts are to be interpreted so as to protect employees.
- There is an implied duty of good faith on the part of the employer in exercising its rights under an employment contract. The court, in examining the 260 documents pertaining to retiree benefits, interpreted them "through the lens of good faith". GM must be presumed to have acted in good faith when it drafted the ROR clauses, specifically respecting the fact that the benefits were provided as compensation for services performed and that the employees were assured of retirement security.
- GM's subsequent conduct was important in determining the meaning of its ROR clauses at the time it made its announcements in 2007 and 2009. The court confirmed that GM knew how to draft and communicate a clear and unambiguous ROR clause, given that it did so in 2012: "The fact that this revision was drafted and included in the benefit documents so easily and so quickly is relevant to the task of contractual interpretation."

There were a couple of other side-issues dealt with, one concerning employees who, although they had met the eligibility requirements to be entitled to retiree benefits, had not yet retired, and the other concerned a group of retirees who were executive employees prior to retirement. With regard to the former, the court held that the ROR wording extended to them, because they had not yet retired. Therefore, benefits that would be provided in retirement could be reduced before an employee retires. With regard to the latter, benefits could be reduced for this group on account of separate communications which, in the court's view, were clearer with respect to the right to GM to make changes after an employee's retirement.

Pension and benefit communications can be complex at the best of times. In addition, the courts have a special solicitude toward retirees, given their lack of bargaining power, the fact that the work they have performed for their compensation has been given and the fact that they are on fixed incomes and have limited means of recouping any diminution of their pension or benefits. For these reasons, among others, communications in this area must be absolutely clear and unambiguous in order to achieve the desired results. The review of employee and retiree communications should accordingly be included in an employer's regular governance process.

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