

34TH ANNUAL ISCEBS
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Symposium

Canadian Legal Update

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Overview

- Introduction
- Human rights issues
- Correcting errors in plan documents
- Issues arising from defined benefit to defined contribution conversion
- Pension division on marriage breakdown
- Members faking their own deaths
- Questions

Human Rights Issues

Johnston v. City of Vancouver (BCHRT, 2015)

- *Question:* Does LTD cut off at age 65 violate the Human Rights Code (HRC)?
- HRC prohibits age based discrimination unless in context of a bona fide group insurance plan
 - Historically HRC permitted age based discrimination age 65 or older, but the age 65 reference was removed
- LTD Plan denied coverage to any employee aged 65 or older
- Other employment based benefits continued past age 65

Human Rights Issues

Johnston v. City of Vancouver (continued)

- Tribunal follows most recent test from the SCC:
 - Is the plan is legitimate?
 - Was the plan adopted to defeat protected rights?
 - Proof of reasonableness not required
 - No piecemeal review of its provisions (do not ask specifically whether LTD claims are in fact higher for those aged 65)
- No evidence of an improper purpose and because the age based limit always existed it was not added to defeat protected rights

Human Rights Issues

Johnston v. City of Vancouver (continued)

- Same issue in *Jones v. Coast Mountain Bus Company* (whether termination of LTD coverage at age 65 contrary to HRC)
- In *Jones*, Tribunal assessed the denial under both tests from SCC and found that the termination of coverage passes both tests
 - Reasonable and bona fide grounds for discrimination AND
 - A legitimate plan that was adopted in good faith and not for the purpose of defeating protected rights

Human Rights Issues

McCarrey v. WCB Superannuation Plan (BCHRT, 2015)

- *Question:* Is it discrimination to require a married member elect a joint and survivor pension?
- Member was married at pension commencement but objected to the mandatory joint and survivor pension
 - Complainant says the ability for the spouse to waive the joint and survivor option is irrelevant—she is denied exercising that option independently
 - Complainant is female so she asserts that the joint and survivor requirement may not favour her actuarially

Human Rights Issues

McCarrey v. WCB Superannuation Plan (continued)

- Tribunal held that a legitimate plan need not be a perfect fit for each member
 - In a pension plan the risks are assessed by the actuary and the risks are pooled among all members
- Tribunal noted that the complainant selected the option, presumably that best fit her circumstances
- Tribunal found that a properly registered pension plan is bona fide for the purposes of the HRC and therefore, even if discrimination existed it would be permitted

Human Rights Issues

VanderLinde v. Corporation of the City of Oshawa
(HRTO, 2014)

- *Question:* Is it discrimination for a benefit plan to deny coverage to a married but separated spouse?
 - Prior carrier had not terminated separated husband's benefit coverage, but asserts the failure to do so was an error
- HRC prohibits discrimination on basis of marital status, which includes the status of being separated
- Complainant asserts that she chose to stay married and should not be denied benefits just because living apart

Human Rights Issues

VanderLinde v. Corporation of the City of Oshawa
(continued)

- The Ontario human rights legislation allows differentiation on the basis of marital status if rooted in the plan text
- The Tribunal found that the legislation permitted the City to define “dependant” and “spouse” in its benefit plan
 - The complainant argued that all references to the “employee’s spouse” in the human rights legislation had to include her married spouse because they had not divorced and those references overrode the terms of the benefit plan

Human Rights Issues

Lessons from human rights cases

- Age 65 restrictions can be justified even after mandatory retirement has been eliminated provided (based on legislative provisions) the plan is legitimate and not created to defeat protected rights
- Be aware of the language of the Code in your jurisdiction—each of these cases had to be considered in relation to the specific statutory language that prohibited or permitted discrimination

Errors in Plan Documents

Weyburn Inland Terminal Ltd. v. Weyburn Inland Terminal Ltd. Employee Pension Plan (SKQB, 2014)

- *Question:* Can a sponsor retroactively amend a pension text to correct an error?
- Plan established in 1979 and always required contributions to be made on earnings excluding overtime and bonuses
- New text adopted in 1997 with new administrator and earnings mistakenly defined to include overtime and bonuses

Errors in Plan Documents

Weyburn Inland Terminal Ltd. (continued)

- Application made for rectification
- Evidence was clear that the earnings definition did not reflect the employer's intention and employer's behaviour was consistent with its intent (contributions not based on overtime/bonuses)
- Employer moved quickly to deal with the error
- Employer gave ample notice to all affected and no employees objected
- Retroactive amendment ordered

Errors in Plan Documents

Lessons from *Weyburn*

- Review restatements and amendments carefully
 - Inadvertent changes can happen easily
- If an error is discovered
 - Make sure you continue to administer in accordance with the expected/intended terms
 - Take steps to address the error quickly
- Have comfort that the court *may* resolve the error in the right circumstances

DB to DC Conversion

NCR Canada Ltd. v. International Brotherhood of Electrical Workers Local 213 (BC Lab. Arb., 2014)

- *Question:* When may an employer be prohibited from converting employees to its DC plan?
- NCR sponsored a DB plan
- In 2002, implemented a DC plan for new employees, existing employees given a one-time choice to convert
 - 19 members chose to stay in DB plan
- In 2012, announced all DB members would be switched to DC plan
- Union grieved forced conversion, arguing “estoppel

DB to DC Conversion

NCR Canada Ltd. v. International Brotherhood of Electrical Workers Local 213 (continued)

- Estoppel requires
 1. Existing legal relationship
 - Collective agreement and bargaining relationship
 2. Unequivocal representation by first party
 - Enrollment form: “Choice will remain in effect for as long as you are actively employed by NCR”
 - Reservation of rights language in transition guide was insufficient
 3. Detrimental reliance on representation by second party
 - Evidence that members based retirement planning on continuation of DB Plan entitlement

DB to DC Conversion

NCR Canada Ltd. v. International Brotherhood of Electrical Workers Local 213 (continued)

- Arbitrator found for the Union and all affected members entitled to remain in the DB Plan
- Remedy was that the employees were permitted to remain in the DB Plan, not an assessment of monetary damages
- BCCA quashed the appeal by NCR on the basis that it was within the arbitrator's jurisdiction

DB to DC Conversion

Lessons from *NCR*

- For any conversion, communication with members will be critical
- If an employer commits to maintain DB eligibility and does so in a way that reasonably allows members to rely on the commitment, it will be required to maintain the DB plan for the affected members

Division of Pension— Marital Breakdown

Dundas v. Schafer (MBCA, 2014)

- *Question*: Can a prenuptial agreement preclude a spouse from pension division entitlements?
- Before marriage the couple agreed to a prenuptial agreement
 - Including a clause that the *Pension Benefits Act* and the *Pension Benefits Division Act* would not apply
- Spouse understood the member was reluctant to share his university pension when the agreement was signed (due to his prior divorce and division)
- Parties separated 8 years later

Division of Pension— Marital Breakdown

Dundas v. Schafer (continued)

- Spouse argued that the agreement was void because it was contrary to the applicable statutes—the *Pension Benefits Act* contemplates a post-separation agreement that can limit a spouse's rights to the pension
 - She argued that a pre-marriage agreement could not be relied upon because until separation the spouse would not know the commuted value of the pension being waived
 - The *Pension Benefits Act* prohibits contracting out of the statute unless permitted by that statute

Division of Pension— Marital Breakdown

Dundas v. Schafer (continued)

– Court finds:

- Finds that pre-nuptial agreements substitute the parties' intention for the statutory scheme
- They substitute the parties' agreement *before* the rights vest
- No entitlement arose because the spouse waived it in advance
- While spousal rights are worthy of protection it is post-separation agreements that create a fear of "bad bargains made in the chaos of separation"
- Pre-nuptial agreements are treated more like regular contracts
- Spouse could still challenge the pre-nuptial agreement on the basis of coercion if appropriate on the facts (not in this case)

Division of Pension— Marital Breakdown

Fricker v. Fricker (BCSC, 2014)

- *Question:* If a spouse does not have a separation agreement, does not become a limited member and member remarries then dies before pension commencement, does first spouse have an interest?
- Pension Corporation was named as a respondent as it took the position that the death benefit was payable to the second (legal) spouse
- No separation agreement was ever signed, first spouse never applied to become a limited member

Division of Pension— Marital Breakdown

Fricker v. Fricker (continued)

- Second spouse was legally married to the member at his death before pension commencement
- Court relies on section 65 of the PBSA which puts the onus on the person claiming an entitlement to prove the entitlement
- Absent a separation agreement and the spouse becoming a limited member, plan was required to pay pre-retirement death benefit to the second spouse

Division of Pension— Marital Breakdown

Lessons from *Dundas* and *Fricke*

- Spouses will be held to the agreements they make despite the high level of protection afforded to spousal rights under a pension plan
- Spouses will be expected to take the steps required by legislation to protect/perfect their interests and administrators will be able to rely on clear statutory provisions to administer the plan when the spouse does not take those steps

Member Fakes Own Death?

Trustees of the International Brotherhood v. Shojaei et al
(ONSC, 2014)

- Defendant spouse applied for pre-retirement death benefit upon purported death of husband (member)
- Member and defendant spouse found to be alive, extradited back to Canada and prosecuted for criminal offences (life insurance)
- Trustees alleged fraud, deceit, fraudulent misrepresentation, conspiracy, conversion, unjust enrichment

Member Fakes Own Death?

Trustees of the International Brotherhood v. Shojaei et al
(continued)

- Trustees also sought an order that they need not pay out anything else to the defendants until the debt is repaid (death benefit), punitive damages given the nature of the conduct and costs on an indemnity basis
 - All granted including an order that no further amounts need be paid from the Plans until the debt is repaid (and offsets may be applied if funds become due)

Questions?

Key Takeaways

- Many of the cases discussed today involved Canadian courts having to consider the purpose of the pension and benefit plans and to consider the needs of the whole over the needs of the individual
- Human rights legislation will not generally require proof of reasonableness of a term of an otherwise legitimate pension or health and welfare plan to permit that plan to distinguish on prohibited grounds
- Where there is proof of a true error in plan documents the court will correct the error

Key Takeaways

- When a spouse fails to take the required steps to claim an interest in the member's pension plan, the administrator will be justified in following the payment scheme set out in the statute
- Defined benefit to defined contribution conversions must be communicated and undertaken carefully and must be consistent with any promises made to the affected employees
- Members may go to extraordinary lengths to claim pre-retirement death benefits