

Canadian Legal Update

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Symposium

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International Society
of Certified Employee Benefit Specialists

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OF EMPLOYEE BENEFIT PLANS



Overview

1. Negligent misrepresentation related to benefit coverage
2. Recovery of pension overpayments–
Missing member
3. Restrictions on employer's amendment power
4. Death benefit dispute
5. Human rights disputes

Negligent Misrepresentation Related to Benefit Coverage

Benefit Plan Misrepresentation

- *Feldstein v. 364 Northern Development Corporation* (2016 BCSC 108)
 - Defendant was in process of hiring claimant
 - Claimant suffered from cystic fibrosis
 - Court accepted that during pre-employment discussions:
 - Claimant asked about long term disability benefit coverage
 - Defendant explained that the “proof of good health” requirement was tied to a successful completion of a 3 month probationary period
 - Defendant did not advise the claimant that to receive more than the no-evidence maximum amount of LTD, a medical claim form had to be completed at hiring
 - Claimant took position with Defendant

Benefit Plan Misrepresentation

- *Feldstein v. 364 Northern Development Corp.*
 - Claimant made claim for LTD benefits (after 3 months of employment)
 - Insurer only accepted no-evidence maximum for LTD benefits because medical claim form had not been completed as required
 - Claimant alleged loss because of his reliance on a misrepresentation of the LTD benefits
 - Court held:
 - When describing benefit entitlement duty of care: take “such reasonable care as the circumstances required in order to ensure that the representations . . . were accurate and not misleading”
 - Defendant knew claimant would likely rely on its description of the benefit plan, but took no steps to verify the accuracy of the description

Benefit Plan Misrepresentation

- *Feldstein v. 364 Northern Development Corp.*
 - Claimant did not make unwarranted assumptions
 - No reason for Claimant to think he had to make further inquiries
 - Coverage as described mirrored coverage from existing job
 - Given Claimant's health, the issue would have been present in his mind and so would have been motivated to verify if he was not given confident answers about coverage requirements
 - Claimant awarded \$83,336.80 as compensation for 40 months of lost LTD benefits, and \$10,000 for aggravated damages

Lessons from *Feldstein*

- Care has to be taken when explaining benefit promises
 - Particularly during hiring process when the candidate has options
- Try to avoid summarizing benefit promise and instead rely on benefit brochures and approved descriptions
- Verify with carrier if prospective/active employee has questions

Recovery of Pension Overpayments—Missing Member

Pension Overpayment Recovery

- *Carleton University v. Threlfall* (2016 QCCS 406)
 - Member retired and chose single life pension
 - Member suffered from Alzheimer's, disappeared in 2007
 - Spouse did not report disappearance, pension continues
 - University learned of disappearance one year later and sought to stop pension, spouse objected
 - Quebec Civil Code presumes missing person to be alive for 7 years unless death is proved before
 - In 2013 member's remains are found (within 7 year period) and death determined to have occurred in 2007

Pension Overpayment Recovery

- *Carleton University v. Threlfall*
 - University sought repayment of pensions paid after death
 - Court held
 - Presumption of life does not have the effect of making the pension obligation more onerous than it should be
 - University had made its position known to spouse and never abandoned its position that pension payments should not continue
 - All amounts paid since determined date of death had to be repaid—Death determined to have occurred within 7 years so actual date of death determines entitlement

Lessons from *Threlfall*

- Do you have a process to confirm continued existence of retirees?
- If appropriate, communicate Plan's position to the survivor
 - In *Threlfall* a significant fact was that the University communicated to surviving spouse that pension should be stopped
- Seek advice to determine if an order can be obtained

Lessons from *Threlfall*

- Be familiar with the rules that apply in your situation
 - BC (for example)
 - *Presumption of Death Act*
 - allows an “interested person” to apply to court for an order declaring the person has died
 - Ontario
 - *Declarations of Death Act*
 - Also allows “interested person” to apply for an order declaring death, with date of death depending on whether individual went missing in “circumstances of peril”

Restrictions on Employer's Amendment Power

Plan Amendment Restrictions

- *Samoisette v. IBM Canada Limited* (June 13, 2016, Q.S.C.)
 - Defendant sponsored defined benefit pension plan with bridge benefit
 - Representative plaintiff and others participated in DB Plan
 - Defendant creates defined contribution plan
 - Defendant encouraged DB members to move to DC Plan
 - Members given financial incentive to move to DC Plan
 - Financial incentive described as compensation for differences between the DB and DC Plans, including the bridge in the DB Plan

Plan Amendment Restrictions

- *Samoisette v. IBM Canada Limited*
 - Plaintiff remained in DB Plan
 - Some years later defendant amends DB Plan to remove bridge benefit
 - IBM argues
 - Bridge benefit had not always been part of DB Plan so could not be essential to employment contract
 - The choice to remain in the DB Plan did not alter employer's right to amend Plan as it saw fit
 - Bridge not vested right that could not be amended

Plan Amendment Restrictions

- *Samoisette v. IBM Canada Limited*
 - Plaintiff argues
 - Bridge benefit is essential element of employment contract and could not be changed unilaterally
 - IBM committed to the bridge benefit when plaintiff and others were determining whether to move to DC Plan or stay in DB Plan
 - Plaintiff and others relied on the bridge benefit being part of the DB Plan

Plan Amendment Restrictions

- *Samoisette v. IBM Canada Limited*
 - Court finds
 - Plaintiff incited to stay with DB Plan by financial security it offered including bridge benefit
 - The discussions of the DB Plan and the bridge in 1994 effectively changed the employment contract
 - The amendment clause is abusive to the extent that it permits the defendant to amend the text to deny a benefit that had been promised

Plan Amendment Restrictions

- *Samoisette v. IBM Canada Limited*
 - Court finds
 - Removal of the bridge benefit also did not amount to constructive dismissal—Plaintiff did not tacitly accept the amendment by staying at his job

Lessons from *Samoisette*

- Employer's power to amend its pension plan is not absolute
 - If plan term is communicated by the employer in such a way that it becomes a term of the employment agreement it may limit the employer's right to amend unilaterally
 - Reliance is critical—In 1994 the defendant did not communicate that the DB Plan terms were always subject to the employer's right to amend

Death Benefit Dispute

- *Holmes v Boreen*, 2015 SKQB 333
 - Member separated from married spouse for over 10 years
 - Member remained legally married and family property entitlements never settled
 - Member in common law relationship with member at time of death
 - Member designated common law spouse as beneficiary under pension plan
 - Member's will left pension benefit to married spouse
 - Member dies

Death Benefit Dispute

- *Holmes v Boreen*
 - HR employee swore affidavit that member understood that married spouse would receive benefit on death unless a divorce occurred or married spouse waived entitlement
 - Pension Benefits Act defines spouse as:
 - (i) A person who is married to a member or former member; or
 - (ii) If a member or former member is not married, a person with whom the member or former member is cohabiting as spouses at the relevant time and who has been cohabiting continuously with the member or former member as his or her spouse for at least one year prior to the relevant time.

Death Benefit Dispute

- *Holmes v Boreen*
 - In a previous case the priority given to the married spouse by the statute was challenged under the Charter
 - Court held that the statutory priority denied the common law spouse the pension benefits that accumulated during their cohabitation
 - That case settled before the Charter issue could ultimately be determined, so the decision did not have to be followed in *Holmes*
 - Here, common law spouse did not bring formal constitutional challenge

Death Benefit Dispute

- *Holmes v Boreen*
 - Court also acknowledges factual differences
 - Member knew that married spouse would receive death benefit
 - Member's will confirmed his intention
 - Member's marriage to first spouse was long so payment to the married spouse did not "evoke the same sense of patent unfairness"
 - Absent a constitutional challenge the legislation is clear on its face—Death benefit paid to married spouse

Lessons from *Holmes*

- Consider your beneficiary designation forms—
Is it clear that member is declaring a spouse
AND designating a beneficiary?
- Be aware of the rules that apply to your
member's situation
 - Do not presume that the spousal definition rules
are the same in each province

Human Rights Disputes

- *Rein v. Alberta (Human Rights Commission)* (2016 ABQB 386)
 - Another challenge to benefits terminating at age 65 despite elimination of mandatory retirement
 - Despite collective agreement obligation to maintain group insurance for employees, her coverage terminated at age 65
 - Age discrimination permitted in bona fide benefit plan and evidence was that the plan was adopted in good faith and that the purpose of the plan's adoption was not to defeat protected rights

Human Rights Disputes

- *Duncan v. Trustees of the Retail Wholesale Union Pension Plan* (2016 BCHRT 22)
 - Duncan alleged discrimination on the basis of marital status
 - Duncan was single and he argued that a more valuable benefit was provided to married members
 - Human Rights Code permits discrimination on the basis of marital status in bona fide pension plan

Lessons from Duncan and Rein

- Provided the plan satisfies the bona fide test, discrimination on prohibited grounds may be acceptable
- Watch this litigation as many of the decisions are at the human rights commission level and further guidance from courts may be coming

Questions?