Brown Mills Klinck Prezioso LLP
Pension, Benefits & Executive Compensation Law

Legal Update

Desjardins Ottawa Continuing Education Day

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Agenda

- Benefits Case Law Update
- Employee Life and Health Trusts
- Changes to Government Paid Benefits

Benefits Case Law Update

Post Age 65 Benefits Update

End of Mandatory Retirement

2006 amendments to the Ontario *Human Rights Code* and *Employment Standards Act, 2000* allow post age 65 distinctions

Focus of Case Law

Post age 65 active employees and their entitlement to benefits

Different Results for Different Types of Plans

Talos v. Grand Erie District School Board, 2018 HRTO 680

Bentley v. Air Canada and Air Canada Pilots Association, 2019 CHRT 37

Post Age 65 Benefits Update

Framework

- Contractual Obligations: Insurance Policies and Collective Agreements
- Human Rights Issues

Toronto Hydro-Electric System Limited v. Power Workers' Union (Arbitration, 2020)

Complaint

- After becoming aware of the Ontario Human Rights Tribunal decision in *Talos, t*he union argued that reducing the post-retirement benefit coverage for employees retiring after December 31, 2020 resulted in "a system of coerced mandatory retirement" that offends the prohibition against age discrimination

Facts

- Under the retirement plan, certain retirees received 100% company-paid medical and dental benefits for life
- In 2000, Toronto Hydro announced that the post-retirement benefit coverage would be reduced for employees retiring after December 31, 2010 (deadline was subsequently extended to December 31, 2020) as the cost was unmanageable
- This change was considered by the union and Toronto Hydro when they bargained in 2002

Dismissed

- The post-retirement benefit deadline is not a form of coercion or mandatory retirement
- While the entitlement to 100% benefit reimbursement provides an incentive to retire, it does not require an employee to actually retire at that time

York University v. York University Faculty Association (Arbitration, 2020)

Complaint

- The Association alleged that the University breached (1) the Collective Agreement, and (2) the Ontario *Human Rights Code* by reducing, at age 65, the life insurance benefit provided under the Collective Agreement, and then terminating that life insurance benefit at age 71

Facts

- At age 65, full-time employees were subject to a reduction in life insurance coverage from 3x annual salary to 1x annual salary
- Upon reaching age 71 or upon mandatory receipt of pension benefits, life insurance coverage ceased
- The life insurance policy was incorporated into the Collective Agreement, and it noted that life insurance benefits ceased on "retirement"
- "Retirement" was not clearly defined in the Collective Agreement or the life insurance policy

Association's Interpretation Prevails

- The arbitrator concluded that full-time professors are entitled to life insurance coverage, irrespective of whether or not they are over the age of 71 and in mandatory receipt of a pension
- There was no evidence to support the view that "full-time professors who work past the age of 71 and are in mandatory receipt of pension are in some sense 'retired'"

Rayonier v. Unifor, Locals 256 and 89 (Arbitration, 2022)

Grievance

- The grievor was an "active employee" of Rayonier when he died at age 66
- After his death, the union filed a grievance in relation to the grievor's life insurance coverage
- At the same time, the arbitrator was asked to consider a policy grievance related to LTD coverage, which terminated at age 65

Issues

- Life Insurance: at issue was whether the grievor's life insurance coverage was equal to 2x his annual salary (as provided for in the Collective Agreement) or $5,000 (as required under the life insurance policy)
- LTD Coverage:
  - the Collective Agreement specifies that LTD benefits cease on the <u>earlier of</u> retirement or age 65
  - The above restriction is permitted under the Ontario *Human Rights Code* and the *Employment Standards Act, 2000* which "carve out" LTD plans from prohibitions against age discrimination
  - The union argued that the "carve out" contravenes section 15 of the *Canadian Charter of Rights and Freedoms*

Rayonier v. Unifor, Locals 256 and 89 (Arbitration, 2022)

Decision

- Life Insurance:
  - The benefit plan was not incorporated by reference in the Collective Agreement
  - The Collective Agreement provided a benefit equal to 2x the annual salary of the deceased employee
  - Per the Collective Agreement, the beneficiary or estate was therefore entitled to 2x the annual salary of the deceased employee
  - The doctrine of estoppel was not applied
- LTD Coverage:
  - The “carve-out” provisions may be *prima facie* discriminatory and contravene s. 15(1) of the *Canadian Charter of Rights and Freedoms*, but they were saved by s. 1 of the *Canadian Charter of Rights and Freedoms*
  - *Talos* does not apply
  - Limiting LTD coverage to those under age 65 “is rationally connected to and consistent with the age at which government pensions are unreduced and it coincides with the age at which this Collective Agreement provides an unreduced pension.”
  - Since the majority of workers retire by age 60, the age restriction impacts few workers

Corporation of the City of Mississauga v. Mississauga Professional Firefighters' Association (Arbitration, 2021)

Complaint

- Is Canadian residency an appropriate or acceptable eligibility requirement with respect to the post-retirement health care spending account?
- The Association argued that residency is <u>not</u> an acceptable eligibility requirement as it is not referenced or included in the Collective Agreement and was not contemplated by the parties
- The City argued that an ASO/insurance contract is contemplated by the Collective Agreement and Canadian residency had, for a lengthy period of time, been an eligibility requirement of the ASO/insurance contract (which the Association was aware of since 2003)

Facts

- The Collective Agreement contemplated the City using an ASO/insurance contract to administer the post-retirement health care spending account, however, the requirement for Canadian residency was not explicitly required under the Collective Agreement

Grievance Allowed

- "The clear language of the Collective Agreement, which does not include residency as an eligibility requirement, prevails over the language of the ASO contract."

Employee Life and Health Trusts

Employee Life and Health Trusts (ELHTs)

Background

- Many employers and unions relied on Health and Welfare Trusts (HWTs) to provide health and welfare benefits to employees (often requested in collective bargaining)
- There are no *Income Tax Act* provisions that govern HWTs – only Canada Revenue Agency guidance
- In 2010, *Income Tax Act* rules were introduced allow for ELHTs as an alternative to HWTs
- Budget 2018 proposed to introduce rules to allow for the conversion of existing HWTs into ELHTs so that only one set of tax rules apply to such arrangements – the deadline for conversion was 2021 (2022 for collectively-bargained HWTs)

Purpose

- The only purpose of an ELHT is the payment of “designated employee benefits” for employees and certain related persons
- “Designated employee benefit” means a benefit from (a) a group sickness or accident insurance plan, (b) group term life insurance policy, (c) private health services plan, (d) certain counselling services (for mental or physical health), and (e) the first $10,000 of a benefit provided on death
- It is often a “defined contribution” approach to funding employee and/or retiree benefits
- ELHTs and HWTs are <u>not</u> the same as the U.S. Voluntary Employees’ Beneficiary Association Plan (VEBA), which allow for pre-funding of benefits on a tax-exempt basis
- Trustees may use insurance policies to fund an ELHT or an ELHT may self-insure the benefits

Why Create an ELHT?

Shift of Responsibility

- With an ELHT, an employer is only responsible for making contributions to the trust; the trustee is responsible for providing the promised benefits
- The trustee engages an insurance provider or ASO provider to adjudicate the claims, not the employer

Tax Benefits

- Employers receive deductions for <u>certain</u> contributions made to an ELHT
- ELHTs are taxable entities, but ELHTs pay less or no income tax than a typical *inter vivos* trust
- ELHTs are not considered retirement compensation arrangements or salary deferral arrangements

Simplicity

- An ELHT allows an employer to have all life and health benefits administered using one vehicle, ensuring common and consistent administration

Security

- Once an employer makes a contribution to an ELHT, it cannot get that money back
- Funds in an ELHT are not subject to the claims of the employer's creditors

Can an LTD benefit plan be held in an ELHT?

Yes, provided the LTD benefit plan qualifies as a "sickness or accident insurance plan"

Key Issues for ELHTs

Key Employee Rules	Surplus	Classes of Beneficiaries

Changes to Government Paid Benefits

National Pharmacare

June 2019

The Advisory Council (helmed by Dr. Eric Hoskins) recommended a national, universal, single-payer pharmacare program

March 2022

The Liberal Party of Canada and the New Democratic Party of Canada reached an agreement to "work towards a universal national pharmacare program"

June 2022

The Canadian Agency for Drugs and Technologies in Health released its final report outlining the principles and features of a potential Canadian formulary and 3-stage approach

Dec 2023

The intent is to pass a Canada Pharmacare Act by the end of 2023

National Pharmacare

- National pharmacare could mean that employees and businesses no longer have to sponsor comprehensive plans to provide prescription drug coverage
- Employers may also choose to maintain some level of Rx drug coverage - as has been the case in other countries with pharmacare, employee plans will likely cover the modest co-payments ($2 or $5 per prescription) of pharmacare, as well as drugs that are not listed on the national formulary
- National pharmacare could also level the playing field for small, medium and large businesses by ensuring all workers have comprehensive drug benefits

Canada Dental Benefit

- In March 2022, the Liberal Party of Canada and the New Democratic Party of Canada reached an agreement to launch a new dental care program for uninsured low-income Canadians
- September 20, 2022, Bill C-31 was introduced for first reading
- Bill C-31 includes a new *Dental Benefit Act*, which provides interim financial support (i.e., upfront tax-free payments) for eligible families to cover dental expenses (retroactive to October 1, 2022)
- A comprehensive national dental care program is targeted for 2025

Canada Dental Benefit

The dental benefit would be provided for children under age 12, where they do not otherwise have dental coverage and their family’s adjusted net income is under $90,000 per year

- $650 per year for each eligible child if the family’s adjusted net income is under $70,000
- $390 per year for each eligible child if the family’s adjusted net income is between $70,000 and $79,999
- $260 per year for each eligible child if the family’s adjusted net income is between $80,000 and $89,999

Canada Dental Benefit

- To access the Canada Dental Benefit, parents or guardians of eligible children would need to apply through the Canada Revenue Agency and attest that:
  - Their child is not insured under a “dental services plan”***** and does not have access to a dental care insurance plan obtained through the employment of the parent or guardian or their spouse
  - Their child has received (or will receive) dental care services in Canada
  - They understand they may be required to provide documentation to verify out of pocket expenses occurred (e.g., show receipts)
- The Canada Dental Benefit would not reduce other federal income-tested benefits such as the Canada Workers Benefit, the Canada Child Benefit, and the Goods and Services Tax Credit
- Watch out for the penalties and offences!

**“dental services plan” means a contract of insurance in respect of dental care services or a dental care insurance plan obtained on the basis of employment or purchased privately*

Ontario Portable Benefits Program

Ontario government intends to expand benefits like health, dental, prescription drug and vision care for "gig workers"

This will be a portable benefits program tied to workers (instead of employers)

The Ontario Workforce Recovery Advisory Committee (OWRAC) was established to provide recommendations

The OWRAC will consider, among other things, costs to employers to ensure Ontario businesses are able to remain economically competitive

Ontario government is seeking public feedback until December 16, 2022 as it moves forward with the portable benefits program

Q&A

Questions and Answers