Case In Point

Arbitrator Considers Employer's Ability to Collectively Bargain Changes to Retiree Benefits

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In *TRW Canada Ltd. and Thompson Products Employees' Assn. (Retiree Benefits) (Re)*, collectively bargained changes to vested retiree benefits were found to have been made without lawful authority.

The changes had been proposed by the employees' association ("Association"), following a particularly hard round of collective bargaining, and after the employer threatened to close one of its plants if it did not obtain a "competitive labour agreement". The changes included the elimination of retiree semi-private coverage, the elimination of retiree life insurance, and the introduction of a retiree co-pay obligation. However, from the outset of collective bargaining, the Association asserted that it did not believe that the employer had the legal right or ability to reduce or eliminate the retiree benefits listed in the collective agreement. The Association later filed two grievances on behalf of an individual retiree and on behalf of all other retirees of the employer disputing the retiree benefit changes.

At arbitration, Arbitrator William Kaplan ("Arbitrator Kaplan") allowed the grievance, noting that although the parties had agreed to the retiree benefit changes, the Association had only done so in the context of the imminent shut-down of the plant. Arbitrator Kaplan also noted that the Association had from the beginning of the negotiations raised concerns about the lawfulness of the steps the parties were jointly taking. Therefore, the Association in this case was not in agreement from the start that it could "bargain" for the retirees.

Significantly, Arbitrator Kaplan found that, if the parties to a collective agreement wish to reserve the right to reduce, eliminate or otherwise change retiree benefits for retired employees, it is open to them to do so provided they use clear and unequivocal language. However, for the following reasons, Arbitrator Kaplan found that such rights had not been reserved in the current situation:

- the collective agreement expressly required that the employer pay for all retiree benefits set out in the agreement, and introducing a co-pay was inconsistent with this obligation to pay the entire amount of benefits; and
- although the collective agreement provided that the parties could amend the benefit plans to decrease benefits with mutual agreement, it did not provide for the complete elimination (as opposed to reduction) of the semi-private hospital coverage and retiree life insurance.

Arbitrator Kaplan's decision was subsequently upheld by the Ontario Divisional Court on judicial review. The Divisional Court applied a reasonableness standard of review, and found that Arbitrator Kaplan's decision was "within the range of reasonable outcomes." (*TRW Canada Ltd. v. Thompson Products Employees' Assn*., [2012] O.J. No. 6211).

The *TRW* case was clearly decided in the context of very specific facts, including particular collective agreement language. Most importantly, the negotiated "agreement" between the Association and the employer was reached in spite of the Association's very clear objection and its stated concerns about its ability to make the deal on behalf of the retirees. It is also unclear from the decision whether the changes that were made to retirees' benefits (who would not have had a voice in the ratification of the collective agreement) were equally imposed on the active members (who ratified the agreement). In any event, it is important to take all steps necessary to ensure the enforceability of any agreement that is being negotiated with a union, to ensure union acknowledgement that the retirees' benefits are subject to change in all the circumstances of the case, as well as the union's ability to agree to the changes.