Case In Point

GM Benefits Plan Language Did Not Allow Reduction After Non-Executives' Retirement; GM Plans Appeal

Date: July 22, 2013

Justice Belobaba of the Ontario Superior Court of Justice has found that General Motors of Canada ("GMCL") breached its contract with certain retired non-unionized salaried employees when it reduced their post-retirement health care and life insurance benefits. On this motion for partial summary judgment, the Court held that, in the reservation of rights ("ROR") clause contained in certain of its benefit plan documents, GMCL had not clearly and unambiguously reserved the right to reduce or eliminate non-executive salaried employees' post-retirement benefits once the employees had retired. Based on different language in the benefit plan documents applicable to executives, the Court held that GMCL had reserved the right to reduce or eliminate the executives' post-retirement benefits.

In the midst of the 2007-2009 financial crisis, GMCL was taking steps to reduce its operating costs in an attempt to stave off insolvency. GMCL announced reductions to its post-retirement benefits program in December 2007, which were to be phased in over three years. For example, in 2009, affected salaried employees were advised that their basic life insurance benefit would be reduced from $100,000 to $20,000. GMCL did not attempt to apply the benefit reductions to employees who had retired prior to 1995 because, prior to that year, benefit communications did not contain an ROR clause reserving GMCL's right to reduce or eliminate post-retirement benefits.

This class action was commenced and certified on consent. The certification order included a settlement agreement, which set out a series of common issues to be decided. The parties had agreed that the common issues were to be decided based on specified benefit plan documents listed in a schedule to the settlement agreement. The approximately 260 documents primarily consisted of brochures, booklets and member communications that collectively comprised the contract between GMCL and the salaried employees and executives with respect to post-retirement benefits.

The Court's ruling was principally based on a contractual analysis and was restricted to the specified documents; specifically, whether GMCL had contracted with the salaried employees and executives to provide post-retirement benefits that vested upon their retirement such that the benefits could not be altered or reduced once the employee had retired. The Court analysed the wording of the ROR clause contained in some, but not all, of the brochures, booklets and other benefits communications distributed by GMCL over the years.

Salaried Employees (Non-Executives)

The ROR clause that appeared in many post-1994 benefit documents applicable to non-executive salaried employees stated:

General Motors reserves the right to amend, modify, suspend or terminate any of its programs (including benefits) and policies by action of its Board of Directors or other committee expressly authorized by the Board to take such action. The Programs, benefits and policies to which a salaried employee is entitled are determined solely by the provisions of the applicable program, benefits or policy. [emphasis added by the Court]

The Court considered whether this language was sufficiently clear and unequivocal to permit GMCL to reduce the salaried employees' health care and life insurance benefits *after their retirement*. The Court held that concerns about "inter-generational equity" between younger and older employees were irrelevant to its contractual analysis. GMCL's genuine need to cut costs to avoid bankruptcy was also found to be irrelevant when interpreting the contractual provisions.

The Court set out five reasons why, in its view, GMCL had not reserved the right to reduce the non-executive salaried

employees' post-retirement benefits once the employee had retired.

First, it was not clear and unambiguous that GMCL had the power to amend, modify, suspend or terminate the benefits program vis-à-vis retirees in addition to active employees who had not yet retired. The Court noted that the ROR clause in a 1996 document contained a broader term ("salaried employee/retiree"), which did not re-appear in the ROR clause until 2009.

Second, the Court cited the *contra proferentem* principle of contractual interpretation, which says that ambiguity in a contractual provision will be interpreted against its drafter. The Court reasoned that the ROR clause should be interpreted to limit GMCL's right to reduce a non-executive salaried employee's post-retirement benefits while he or she is actively employed.

Third, the Court held that employment contracts are unlike "ordinary commercial contracts" in that the contracting parties have unequal bargaining power. According to the Court, employment contracts should be interpreted to protect employees who are "generally vulnerable in the bargaining relationship".

Fourth, the Court held that the contract between the parties with respect to post-retirement benefits "must be interpreted through the lens of good faith". GMCL is presumed to have been acting in good faith when it drafted the ROR clause. The Court implied that GMCL would have been acting in bad faith by touting the importance of its post-retirement benefits program to the wellness and financial security of the employees and their families, having reserved the right to take those benefits away after the employees retire. The Court concluded that the ROR clause cannot have been intended to allow GMCL to reduce non-executive salaried employees' post-retirement benefits after they retired, because, in the Court's view, such an interpretation would be inconsistent with GMCL's "oft-repeated reassurances of retirement security".

Fifth, the Court noted that GMCL modified its standard ROR clause in 2012 as follows:

GMCL reserves the right to amend, modify, suspend or terminate any of its programs covering employees and former employees, including retirees, at any time including after employees' retirements. [emphasis added]

In the Court's view, the 2012 ROR language made it sufficiently clear and unambiguous that post-retirement benefits could be reduced after an employee had retired. The Court reasoned that this modification to the ROR clause to expressly refer to retirees was an indication that retirees had previously been excluded from the ROR clause.

Executives

The Court held that it was sufficiently clear, based on the benefit plan documents pertaining to executives, that post-retirement benefits were not guaranteed and could be reduced or eliminated with the prior approval of the board of directors of GMCL. Furthermore, retiring executives were required to sign an acknowledgement confirming that the executive had read and understood the terms of the Canadian supplemental executive retirement program, including the provision that benefits may be reduced or eliminated. The Court held that the documents were clear that post-retirement benefits were not guaranteed, and that GMCL was contractually entitled to reduce or eliminate those benefits following the executives' retirement from GMCL.

GMCL has publicly stated its intention to appeal this decision as it relates to the non-executive retirees.

We will continue to monitor this case for developments and provide updates as they become available. In the meantime, if you have any questions about making changes to post-retirement benefits in your organization please contact any member of our Pension, Benefits and Executive Compensation Group.

O'Neill v. General Motors of Canada, 2013 ONSC 4654 (CanLII)