Hicks Morley

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LAW AND ADVOCACY

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Hicks Morley Pension, Benefits and Executive Compensation Group 2015 Case Law Update

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Dear Friends:

We are pleased to present you with our 2015 Case Law Update, which summarizes significant decisions from 2014 in pension, benefits and executive compensation law of particular interest to employers and administrators.

In this update, we examine select pension, benefits and executive compensation cases in a number of areas, including member communications, elimination of contractual pension indexing, rectification of plan terms, integration with government pension plans, entitlements of pension beneficiaries and spouses, and overpayment of disability benefits, amongst others. For each case, we identify the key legal implications and provide practical guidance for human resources professionals.

We hope that our 2015 Case Law Update provides you with a source of timely and helpful information. Please contact any one of us with any questions that you may have arising out of the cases discussed, or if you require further information.

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Elizabeth Brown, a Partner in the firm and member of the firm's Executive Committee responsible for Client Growth and Development, is the head of the firm's Pension, Benefits and Executive Compensation Practice Group. Named in the 2007, 2009-2013 *Canadian Legal Lexpert Directory®* as "…repeatedly recommended" and in the 2014 *Canadian Legal Lexpert Directory®* as "consistently recommended" in the area of pensions and benefits. Elizabeth was named among the "Leaders in their Field" in Chambers Global 2009 – 2014 as an Employment, Labour and Pensions Lawyer (Canada, Pensions & Benefits) and as a leading management labour and employment lawyer in *Who's Who Legal: Canada 2012-2014*. She was also named in *The Best Lawyers in Canada* (2014 and 2015) in the practice of Employee Benefits Law. Recognized as a Top 500 ICFM Leading Lawyer by *InterContinental Finance Magazine*, 2013 and named in the 2014 edition of *Expert Guides* in the practice area of Labour and Employment, Canada. Noted in *The Legal 500 Canada 2015* guide.

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Lisa Mills is a Partner in the firm's Pension, Benefits and Executive Compensation Practice Group. Lisa has an Honours degree in Commerce from McMaster University and a Bachelor of Laws degree from the University of Toronto. Lisa has completed the Canadian Institute of Chartered Accountants In-Depth Tax Course, and routinely provides employers with employment-related tax and executive compensation advice. Lisa provides pension plan design and administration advice to single-employer plans and jointly-sponsored pension plans. She has taught the Pensions and the Law course at Queen's University Faculty of Law since 2009, and has co-authored the Public Pensions title of the *Canadian Encyclopedic Digest* since 2013. Lisa has appeared before the Financial Services Tribunal, the Ontario Superior Court and the Court of Appeal for Ontario.

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Terra Klinck is a Partner in the firm's Pension, Benefits and Executive Compensation Practice Group. She advises both private and public sector employers and plan administrators on all legal issues relating to pension and benefit plans, including: plan conversions and plan redesign initiatives, plan terminations and wind ups, structuring of investments, as well as fiduciary, governance and compliance issues. She has a great deal of experience in advising employers on pension and benefit matters in the context of corporate transactions and insolvencies. Terra also has a wealth of expertise relating to the design and drafting of all types of equity-based compensation plans, other long-term incentive and compensation plans and supplemental pension plans.

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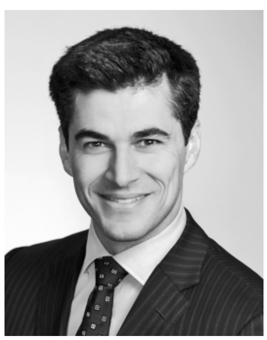

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John Prezioso is a Partner in the firm's Toronto office, practising exclusively in the area of pensions, employee benefits and executive compensation. John advises a range of private and public sector clients on matters relating to pension plan governance, compliance and administration, including issues relating to benefit entitlement, communications, pension investment, conversions and wind ups. He also advises employers with respect to the administration and modification of group benefit plans, including retiree benefit plans. John regularly drafts and provides employment and tax advice in relation to equity-based and other incentive compensation plans. John received his Bachelor of Science from the University of Toronto, and his *Juris Doctor* degree from Osgoode Hall Law School. Prior to joining Hicks Morley, John practised pensions and benefits law at a full-service national law firm, before serving as senior policy advisor to two provincial cabinet ministers.

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Frank is Chair of the firm's Litigation group. He has significant courtroom experience representing clients in civil litigation and regulatory proceedings. Frank has particular expertise in administrative law and judicial review, appeals, restrictive covenant litigation, class actions, employment litigation, pension litigation, shareholder litigation and injunctions. Frank has represented clients in trials, commercial arbitrations, hearings and appeals. He has appeared as counsel before tribunals, in all levels of court in Ontario, in the Federal Court of Appeal and the Supreme Court of Canada. Frank clerked at the Court of Appeal for Ontario.

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KEY DEVELOPMENTS IN PENSION LAW

A number of key court decisions were released in 2014 that clarify the rights and duties of pension plan sponsors, administrators and employees. We have selected a number of leading pension cases dealing with, among other things, member communications in the context of a plan conversion, elimination of contractual indexing, rectification of plan terms, integration with government pension plans, and entitlements of beneficiaries and spouses. These cases may assist employers and administrators when planning for future changes to pension plans, and with day-to-day administration practices.

Member Communications

***NCR Canada Ltd. v. International Brotherhood of Electrical Workers, Local 213,* [2014] BCLRBD No. 152**

The Arbitrator in this case found that the employer was estopped from requiring a group of employees participating in defined benefit ("DB") plan to join an employer-sponsored defined contribution ("DC") plan for future service due to past communications. This decision was upheld by the British Columbia Labour Board (2014 CanLII 48802).

Facts

NCR historically sponsored a Canada-wide DB pension plan. Effective January 1, 2002, it implemented a DC plan for all new employees. At the time, existing employees were given a one-time choice to either remain in the DB plan or switch to the DC plan. Within the Company's British Columbia bargaining unit, 19 members chose to remain in the DB plan.

In 2012, NCR announced that all employees who remained in the DB plan would be switched to the DC plan as of January 1, 2013. The union grieved the requirement to switch to the new DC plan, arguing that NCR was estopped from requiring the switch.

Decisions

<u>The Arbitration Award</u>

The three elements of estoppel are: (1) an existing legal relationship; (2) an unequivocal representation by the first party; and (3) detrimental reliance on that representation by a second party. Arbitrator Jackson found all three elements existed in this case.

First, the collective agreement and collective bargaining relationship was evidence of the parties' legal relationship.

Second, NCR was found to have made an unequivocal representation to the employees that they could remain in the DB plan. Two communications were given to employees in 2002 in conjunction with the option to convert: (1) a Transition Guide, and (2) an Enrollment Form. The Enrollment Form, in which the employees made their election, stated "Your choice will remain in effect as long as you are actively employed by NCR." Based on this communication, the Arbitrator found that NCR had explicitly advised employees that their decision to remain in the DB plan would be in effect for the remainder of their employment. The Transition Guide expressly provided that NCR had reserved the right to amend the pension plan, but the Arbitrator did not allow NCR to rely upon this clause to later force the remaining DB members to switch to the DC plan in light of the information included in the Enrollment Form.

Third, the Arbitrator determined that detrimental reliance was established, based on the evidence of two bargaining unit members. These employees gave evidence that they had understood that the DB plan would continue for the duration of their employment at NCR when they conducted their financial planning for retirement.

<u>Labour Board Decision</u>

The arbitration award was appealed. As a preliminary matter, the Labour Board found that it had jurisdiction to review the arbitration award, not the Court of Appeal, because the Labour Board has jurisdiction to review an arbitrator's application of the principles of estoppel.

The Labour Board went on to uphold the Arbitrator's award. The Labour Board held that deference should be given to arbitral decisions applying the doctrine of estoppel. So long as there is some evidentiary basis to apply to the correct legal test, the Labour Board should not interfere with the result. In this case, the Labour Board concluded that the Arbitrator's decision had an appropriate evidentiary foundation, and her conclusion was open to her on this basis.

Implications

Prior to this case, there were a handful of negligent misrepresentation cases in Canada with respect to pension plan conversions. To date, these claims have primarily related to losses due to purported misinformation provided about the DC option (see *McLaughlin v. Falconbridge Ltd.*, [1999] O.J. No.

2403 (S.C.J.); *Dawson v. Tolko Industries Ltd.*, 2010 BCSC 346 (CanLII); and *Weldon v. Teck Metals Ltd.*, 2013 BCCA 358).

This case is interesting because a different legal argument was successfully raised by employees to prevent an employer's attempt to require their participation in a DC rather than a DB arrangement (i.e. estoppel, as opposed to negligent misrepresentation). Moreover, the employees were not only able to delay their employer's ability to change their pension arrangement from DB to DC, they were able to prevent the employer from forcing DC participation at any time in the remainder of their employment with the employer.

Finally, this case serves as an important reminder of how critical clear and accurate communications are with respect to a pension plan conversion.

Elimination of Contractual Indexing

***General Motors of Canada Limited v. Ontario (Superintendent of Financial Services),* 2014 ONFST 11**

This decision of the Financial Services Tribunal of Ontario ("FST") resulted from an employer's attempt to amend the provisions of its defined benefit ("DB") pension plan with respect to contractual indexing of benefits.

Facts

CAMI Automotive Inc. ("CAMI") was a company established in connection with a joint venture between General Motors of Canada Limited ("GM") and Suzuki Motor Corporation. Effective January 1, 1988, CAMI established a registered pension plan for its salaried employees ("Plan"). CAMI unilaterally drafted the Plan and administered its terms. Effective January 1, 1995, CAMI added a DB component to the Plan.

Section 6.4 of the Plan text provided contractual indexing of DB benefits. It stated as follows:

> The annual pension payable in accordance with Section 6.1 or 6.2 to or on account of any Pensioner *who retired from active employment with the Company* shall be increased each January 1st following the Pensioner's actual retirement date plus one year… [emphasis added]

Initially, the Plan's termination section described a deferred pension in accordance with various provisions, including section 6.4 "as applicable." However, this section was amended in 2003, retroactive to 1995, to delete the reference to the indexing provision ("2003 Amendment").

From the time the DB provision was added in 1995, CAMI applied contractual indexing only to members who retired from active employment, to the exclusion of members who otherwise terminated membership in the Plan (i.e. prior to eligibility for early retirement) and were entitled to a deferred pension.

GM became the sponsor and administrator of the Plan in late 2009 in connection with its acquisition of 100% of the shares of CAMI. Effective June 30, 2011, GM amended the Plan to freeze the accrual of DB benefits ("2011 Amendment"). The 2011 Amendment also amended the Plan to confirm that contractual indexing did not apply except for active employees who had already become retirement-eligible on June 30, 2011. The 2011 Amendment was challenged by certain employees.

As a result of the employees' challenge, the Superintendent of Financial Services ("Superintendent") issued a notice of intended decision ("NOID") to declare the 2011 Amendment void on the grounds that it reduced an accrued pension benefit – namely, contractual indexing – contrary to subsection 14(1) of the *Pension Benefits Act* (Ontario) ("PBA"). The Superintendent's NOID, which is discussed in our 2014 Case Law Update, proposed to compel GM to administer the indexing provision of the Plan so as to apply to all years of credited service up to the amendment date regardless of whether the member retired from active employment.

GM requested a hearing before the FST to challenge the NOID. The Superintendent and a group of employees were respondents in the FST proceedings. The FST hearing was split into two phases – phase one dealing with entitlement to contractual indexing under the Plan and whether contractual indexing is a "pension benefit" under the PBA, and phase two addressing the appropriate remedies. This November 12, 2014 decision of the FST relates to phase one.

Decision

The FST upheld the intended decision of the Superintendent.

Interpretation of the Plan Terms

GM had argued that the Plan must be interpreted as providing indexing only for members who retire from active employment, not members who terminate employment having a vested entitlement to a deferred pension. The termination benefits provision of the Plan entitled vested members to a deferred pension. More specifically, the termination benefit provisions stated that that the deferred pension must be determined in accordance with the normal retirement or early retirement provision of the Plan and the bridging benefit and indexing provisions of the Plan, "as applicable." GM argued that, since the indexing provision expressly applied only to pensioners who "retired from active employment with the Company," vested members who terminate employment prior to retirement are not entitled to have their deferred pension indexed. This is the manner in which the Plan had been consistently administered.

The FST rejected this argument. It observed that the normal and early retirement provisions of the Plan apply only to members who retire from active employment. If the deferred pension to which a terminated employee is entitled must be determined in accordance with the normal or early retirement provisions, terminated employees would receive nothing under those provisions unless one is prepared to "read out" their requirement that the member must "retire" from active service. Likewise, the FST had no difficulty "reading out" the same requirement from the indexing provision. The FST held that all Plan members were entitled to contractual indexing based on the language of CAMI's Plan, not only those who retired/terminated after reaching retirement age. The FST held that CAMI's past administration practices were not relevant.

Analysis Under the PBA

The FST also held that contractual indexing could not be taken away for past service because contractual indexing is a "pension benefit" for the purpose of the PBA. The FST noted that the PBA affords a higher degree of protection to pension benefits than "ancillary benefits." Under the PBA, pension benefits must accrue on a gradual and uniform basis. The PBA renders void any plan amendment that purports to reduce the amount or commuted value of a pension benefit accrued with respect to service prior to the amendment's effective date. By contrast, ancillary benefits "cliff vest" on the date a member has met all eligibility requirements necessary to exercise the right to receive the ancillary benefit. Therefore, ancillary benefits can be reduced or eliminated in respect of any member who on the effective date of the amendment has not met all eligibility requirements necessary to receive the ancillary benefit.

The FST accepted the Superintendent's argument that the category of ancillary benefits must be closed-ended in order to ensure that the PBA's minimum standards are not avoided simply by declaring a benefit to be an ancillary benefit. The FST held that the only ancillary benefits that can be provided to Ontario members are those listed in subsection 40(1) of the PBA (e.g. disability benefits, pre-retirement death benefits in excess of the minimum statutory requirements, bridging benefits, etc.). Since indexing is not a listed ancillary benefit, the FST reasoned that it must be a "pension benefit" and, as such, it must accrue in a gradual and uniform manner. On the FST's reasoning, since contractual indexing is accrued incrementally, it could not be eliminated for past service, even under a plan where contractual indexing was intended to vest later than the base pension benefit vests.

Implications

Phase two of this proceeding is still pending. The outcome of this case, including a potential appeal to the Ontario Divisional Court, will be of interest to employers who may be considering an amendment to their pension plan to limit contractual indexing.

If it stands, the FST's decision suggests that there is limited scope to design a pension plan under which contractual indexing vests later than the corresponding base pension benefit vests in respect of Ontario members. If contractual indexing must vest incrementally as base benefits accrue, under a single-employer pension plan such indexing could not be reduced or eliminated for an Ontario member for past service.

It is noteworthy that, in other Canadian jurisdictions, courts have held that pension indexing does not vest until retirement (see, for example, *Quinn v. New Brunswick (Finance and Human Resources)*, 2011 NBQB 182).

Under subsection 14.1(4) of the PBA, the Superintendent can exercise his discretion to permit the accrual of pension benefits[1] other than on a gradual and uniform basis where the Superintendent is of the opinion that doing so is justified in the circumstances. In the case of CAMI's plan, the Superintendent indicated that he would not exercise such discretion to permit contractual indexing to vest at retirement age. It remains to be seen whether the Superintendent might be prepared to exercise such discretion in relation to a different plan or in different circumstances.

It remains open to an employer to eliminate indexing for future service accruals.

[1] Which, on the basis of the FST decision in phase one, would include contractual indexing.

Rectification of Plan Terms

***Weyburn Inland Terminal Ltd. v. Weyburn Inland Terminal Ltd. Employee Pension Plan,* 2014 SKQB 13**

Facts

Weyburn Inland Terminal ("WIT") brought an application seeking an order for rectification of the definition of "earnings" in the Weyburn Inland Terminal Ltd. Employee Pension Plan ("Plan").

WIT first established a Plan for its employees in 1979. In 1987, the Plan was amended to require members to contribute a percentage of their "earnings" (which was chosen by each member), excluding overtime and bonuses. WIT was required to contribute an amount equal to the contribution made by the members.

WIT amended the Plan again in 1997 to allow the pension funds to be invested in equities. This required an amendment to the pension text, the creation of a trust and the replacement of the investment advisor. The new Plan text was formally adopted in 1997.

In September 2013, WIT discovered that the definition of "earnings" under the 1997 Plan was not consistent with WIT's intention, nor with how it had been administering the Plan. Specifically, the definition of "earnings" under the Plan included overtime, bonuses, commission and any other form of remuneration, whereas the Plan had been administered to exclude overtime and bonuses from the pensionable earnings upon which contributions were permitted to be made.

WIT asked the Court to grant an order for rectification to accurately record the definition of "earnings" in the 1997 Plan in accordance with WIT's intention.

Decision

The Court ordered that the 1997 Plan be rectified to define "earnings" as excluding overtime, bonuses and commissions.

The Court found that there was convincing proof of a mistake in the definition of "earnings." It was clear that WIT's intention in 1997 was to only expand the pension money investment options available under the Plan. WIT did not intend, nor was there any evidence of an intention, to expand the definition of "earnings." WIT's conduct following the adoption of the Plan reflect WIT's intention to continue to exclude overtime and bonuses from the definition of earnings.

The Court further noted that rectification is available where, by mistake, a written instrument does not accord with the true agreement between the parties. Equity has the power to rectify that instrument so as to make it accord with the true agreement.

The Court found that the 1997 Plan was a unilateral instrument. Since it was clear that the intention of WIT, the settlor of the pension trust, was not accurately reflected, rectification was justified. The Court found that there was no reason not to exercise its discretion to order rectification of the Plan text. Affected Plan members would not be prejudiced by the order, and there was no evidence to show that they had been misled.

Implications

This case is a further illustration of how the rectification remedy can be used by an employer to correct an inadvertent error in a pension document so that it accords with the employer's intention and the manner in which the plan has been administered. Rectification was granted by the Ontario Superior Court of Justice in the 2010 case, *MTD Products Limited v. Baldin*, 2010 ONSC 1344 (CanLII). Hicks Morley lawyers Jordan Fremont and Ian Dick successfully represented the employer in that case.

Rectification is a remedy available where a legal document does not reflect the clear intention of the parties at the time the document was executed. It is not intended to provide parties with a "second kick at the can" to avoid undesirable outcomes of which they were not aware at the time the document was created. For this reason, a court will only grant rectification if it is satisfied that there is clear evidence that the document contains an error. The Court's willingness to grant rectification in this case was likely due in large part to the fact that a number of Plan members were respondents in the proceedings and, in effect, supported the employer's application for rectification. The Court specifically noted that the Plan members provided no evidence suggesting that the employer had ever intended or represented to them that their overtime and bonuses would be treated as pensionable for the purposes of the Plan.

Given the high cost of contested court proceedings, rectification may be an economically viable option where there is a high degree of consensus among affected employees that a pension document contains a clear error.

Integration with Government Pension Plans

***University of British Columbia v. Faculty Association of the University of British Columbia,* 2013 CanLII 82543 (BC LA)**

This arbitration award resulted from a policy grievance commenced by the Faculty Association ("Association") relating to the interpretation of the pension contribution provisions of its collective agreement with the University. On the University's interpretation of the relevant language, in respect of all faculty members, its contributions to the faculty pension plan were subject to an offset, the amount of which happened to be calculated with reference to certain Canada Pension Plan ("CPP")-related concepts. By contrast, the Association interpreted the contribution offset language as not applying to faculty who had ceased participating in the CPP. By applying the offset to faculty who had opted out of the CPP, the Association alleged that the University had shortchanged those faculty members a portion of their compensation.

Facts

Starting in 1948, faculty members participated in a multi-employer defined contribution ("DC") pension plan under which faculty contributed 5% of their base salary and the University contributed 10% of the faculty member's base salary. Effective January 1, 1966, the federal government established the CPP. At the time of its inception, the CPP required each employee and his/her employer to contribute 1.8% of the employee's pensionable earnings. Pensionable earnings below a certain amount ("year's basic exemption," or "YBE") and above a certain amount ("year's maximum pensionable earnings," or "YMPE") are exempt from CPP contributions.[2]

Implementation of the CPP prompted the University to consider the additional costs it would incur in relation to faculty members' pension benefits. These deliberations lead to the establishment of new pension plans for faculty effective April 1, 1967, including a DC registered pension plan (the Faculty Pension Plan, or "FPP") and an unregistered DC supplemental arrangement ("SA"). At the time of its inception, the FPP's contribution formula was CPP-integrated. Specifically, under the FPP, faculty contributed 5% of their base salary *less the contributions required to be made by the member to the CPP*. The University contributed 10% of a faculty member's base salary to the FPP *less the contributions required to be made by the University to the CPP in respect of the faculty member*. Under the SA, the University makes a

[2] At the time of the CPP's inception the YBE was $600 and the YMPE was $5,000.

contribution in respect of faculty members for whom contributions to the FPP have reached income tax limits.

The CPP contribution rate remained at 1.8% from 1966 to 1986 but was increased by 0.1% in each of 1987, 1988 and 1989. As a result, faculty contributions to the FPP decreased by 0.1% in each of these years.

This erosion of contributions to the FPP was of concern to the Association and its members and the issue was raised in the course of the 1988-89 round of bargaining between the Association and the University.[3] The parties were unable to resolve all bargaining issues between them and interest arbitration proceedings were conducted. The resulting interest arbitration award replaced the collective agreement language pertaining to pension with the following:

> II. BENEFITS
>
> A. Pension Plan and Canada Pension Plan Contributions
>
> Effective January 1, 1989, and subject to any ratifications that may be required by the provisions of the relevant Pension Plan documents,
>
> (1) Each member of the bargaining unit who is also a member of the Pension Plan for Academic Staff and Academic Executive Staff shall make required contributions monthly to the Pension Fund, by means of payroll deductions, equal to five per cent (5%) of his or her basic salary *less an amount equal to one point eight per cent (1.8%) of the difference between the basic exemption and the yearly maximum pensionable earnings under the Canada Pension Plan.*
>
> (2) The University shall make regular contributions monthly to the Pension Fund in the amount that is equal to ten per cent (10%) of the basic salary of each member of the bargaining unit who is also a member of the Pension Plan, *less an amount equal to one point eight per cent (1.8%) of the difference between the basic exemption and the maximum yearly pensionable earnings under the Canada Pension Plan.*
>
> (3) The University and each member of the bargaining unit shall each contribute to the Canada Pension Plan the amounts that each is required by law to contribute. [emphasis added]

[3] The employer and employee CPP contribution rate did indeed continue to rise, reaching 4.95% in 2003, where it has remained.

In early 1987, the CPP had been amended to allow employees to stop making CPP contributions when they reached 60 years of age. In 2008, the Association was notified of a faculty member's concern over the University's application of the pension contribution offset to faculty members who had opted out of CPP. The Association commenced a grievance.

The grievance alleged that, in respect of faculty members who had opted out of the CPP, the University had essentially been withholding 1.8% of the faculty member's base salary between the YBE and YMPE and "pocketing" this amount. In so doing, the grievance alleged that the University breached its common law fiduciary duty to faculty members regarding the administration of their contributions. Furthermore, the Association alleged that the University had committed the tort of negligent misrepresentation by failing to advise faculty who were considering opting out of the CPP that, if they did, the University would not remit the offset amount to the CPP. The Association requested that those members be made whole by retroactive monetary compensation.

The University took the position that the grievance should be dismissed both on procedural grounds and on its merits. With respect to the former, the University argued that the Association had acquiesced to the University's longstanding, open practice. Furthermore, the University argued that the grievance should be dismissed based on the time limit under the collective agreement and/or for unreasonable delay. On the merits, the University argued that the pension contribution offset provided for under the collective agreement was not conditional upon the faculty member contributing to the CPP.

Decision

The Arbitrator dismissed the grievance both due to delay and on its merits.

The collective agreement required grievances to be brought within 28 days of the relevant occurrence. The Arbitrator held that, if the University had failed to remit the full amount of its required contributions to the FPP in respect faculty members who had opted out of the CPP, the University would have committed a fresh breach of the collective agreement each pay period. On this basis, the Arbitrator rejected the University's argument that, because its practice had continued unchallenged for more than 20 years, the Association's grievance must be dismissed for delay under the collective agreement's time limit.

Nevertheless, based on the equitable doctrine of laches and section 89(f) of the British Columbia *Labour Relations Code*, the Arbitrator held that the grievance should be dismissed. In this regard, the Arbitrator held that the

Association had unreasonably delayed the commencement of the grievance and that allowing the grievance to proceed would unduly prejudice the University's interests.

Since the FPP was jointly trusteed by University and Association officials, the Association had access to all the information it would have needed to ascertain that the offset provision was being applied to faculty members who had opted out of the CPP. On this basis, the Arbitrator held that the Association's 20-year delay was unreasonable. Furthermore, the Arbitrator held that allowing the Association's grievance would prejudice the University on several grounds, including: loss of evidence and institutional memory due to the passage of time; potential costs associated with changes to administrative systems necessary to implement the Association's interpretation; the fact that the University could have addressed the added costs over the years at the bargaining table, and would be deprived of that opportunity if the grievance was allowed; and the fact that the University voluntarily established the SA in 1992 based on the premise that the Association accepted its interpretation of the 1989 collective agreement, but may not have done so had this grievance been commenced.

Even if the grievance were allowed to proceed, the Arbitrator held that it should be dismissed on its merits. The Arbitrator held that the 1989 collective agreement clearly reflected the parties' intention to de-integrate FPP contributions from CPP contributions. To that end, she observed that the paragraph dealing with CPP contributions was separated from the paragraph dealing with employee FPP contributions and the paragraph dealing with University FPP contributions.

Rather, the Arbitrator held that the 1989 collective agreement simply reflected the parties' intention to prevent further erosion of FPP contributions by freezing the FPP contribution offset at a specific amount (i.e. 1.8% of faculty members' earnings between the YBE and YMPE). The paragraphs dealing with FPP contributions did not indicate that the offset amount represents "deductions for" or "contributions to" the CPP. Accordingly, the University properly applied the offset to faculty members who had opted out of the CPP, and it was under no obligation to remit such amount to the CPP or FPP.

Implications

The payment of contributions to a pension plan generally occurs periodically. This decision implies that systematic under-contributions give rise to a fresh breach each time a contribution was due to be paid, which may prevent an employer from arguing that contractual or statutory time limits bar recovery of the unremitted contributions. A similar argument may work against a plan administrator where benefits have been underpaid from a pension plan. Nevertheless, this decision implies that a continuing breach due to systematically underpaid contributions or benefits can still be barred based on the equitable doctrine of laches, or a similar statutory provision, if the party against which the proceeding is commenced can establish that the party seeking relief unreasonably delayed commencement of the proceeding to its detriment.

The Ontario government has announced its intention to introduce the Ontario Retirement Pension Plan ("ORPP") in 2017. Over the coming months, technical details regarding the design and operation of the ORPP will continue to emerge. The ORPP is intended to pay a defined benefit ("DB") type of pension, similar to the type paid by the CPP, and is expected to require equal contributions by covered employers and employees of 1.9% of pensionable earnings each. Employee covered by a "comparable" private workplace pension plan will be exempt from participating in the ORPP. Hicks Morley will continue to review details regarding the ORPP as they become available and provide our updates and commentary. As these technical details emerge, employers seeking to manage additional costs that may be incurred in connection with implementation of the ORPP should closely monitor developments with a view to ensuring that necessary changes to employment contracts, collective agreements and private workplace pension plans are implemented with a view to ensuring that the benefits to be delivered to employees via the employer's private workplace pension plan, if any, and government programs such as the CPP and ORPP align with the intended "pension promise."

As this decision illustrates, careful planning and clear drafting of collective agreements and other contracts and communications can help to avoid potential disputes regarding the overall benefits intended to be delivered from private and government-administered retirement plans.

Entitlements of Beneficiaries and Spouses

***Snell v. McGregor,* 2014 SKQB 108**

Facts

Mr. Snell was a member of the Saskatchewan Healthcare Employees' Pension Plan ("SHEPP"). On February 8, 2000, Mr. Snell designated his daughter, Meghann Snell ("Meghann"), as beneficiary of his SHEPP pre-retirement death benefit. However, in 2008, Mr. Snell and Meghann ceased contact with each other entirely.

On June 26, 2009, Mr. Snell completed a SHEPP Designation of Beneficiary form (“Form”), intending to remove Meghann as beneficiary for the pre-retirement death benefit and to designate four new beneficiaries (“Four Beneficiaries”). The Form was signed, dated, witnessed by Mr. Snell’s co-worker and submitted to the SHEPP administrator (“Administrator”). However, the Administrator subsequently returned the Form to Mr. Snell because, contrary to the Administrator’s policy, the Form failed to include his relationship to the Four Beneficiaries, and failed to put the information for the fourth beneficiary on a second page rather than the first page. Mr. Snell was apparently angered by the rejection of his Form and, despite being contacted by the Administrator on two subsequent occasions, he did not resubmit the Form.

Mr. Snell subsequently died prior to retirement. He did not have a spouse at the time of his death. The Administrator took the position that Meghann was the rightful beneficiary of Mr. Snell’s pre-retirement death benefit on the basis that the Form designating the Four Beneficiaries had not been filled out by Mr. Snell in accordance with its policy. The Four Beneficiaries, however, argued that the Form submitted by Mr. Snell clearly expressed his wishes and should not have been rejected by the Administrator.

Decision

The Saskatchewan Court of Queen’s Bench found that the Form should have been accepted by the Administrator and that the Four Beneficiaries were the valid beneficiaries for Mr. Snell’s pre-retirement death benefit. Relying on the Saskatchewan *Pensions Benefits Act, 1992* and the SHEPP plan text, the Court found that the primary purpose of the Form was to determine the wishes of the member with respect to the designation of beneficiaries. According to the Court, Mr. Snell’s wishes were clear from the Form he submitted to the Administrator. The Administrator’s grounds for refusing to administer the Form submitted by Mr. Snell did not affect the validity, clarity or reliability of Mr. Snell’s wishes.

Implications

Although a plan administrator’s internal forms are helpful tools to assist with various aspects of plan operation (such as enrolment, beneficiary designation, member elections, etc.), plan administrators should exercise good judgment in administering those forms. As this case illustrates, where a plan administrator has created a form to facilitate its administrative duties, slavish adherence to technical requirements may result in a successful challenge if an administrator refuses to act on the clear intentions of the person who completed the form. That said, it may well be justifiable for a plan administrator to exercise a higher degree of scrutiny where the technical requirements of a form are prescribed by legislation or regulation. As always, where the intention of the person who completed a form is not clear, or where a form is incomplete or contains a material defect (e.g. the form is not signed or witnessed), the administrator should follow up with the person as soon as practicable to correct the defect and, where appropriate, seek the advice of legal counsel if the validity of a form could potentially be challenged.

Elliston v. Elliston, **2014 BCSC 1958**

Facts

Mr. Elliston had a Canadian Armed Forces pension. He and Ms. Elliston cohabited in a conjugal relationship for 16 years (1992 to 2008) and were then married for 3.5 years (2008 to 2012). The issue in this case was the appropriate division of Mr. Elliston's pension benefits in light of the unmarried cohabitation and marriage phases of their relationship, and the relevant legislation.

Throughout the relationship, Mr. Elliston repeatedly took different jobs with the military, which required moving to different parts of Canada. Ms. Elliston moved with him from Ontario to British Columbia and later to Newfoundland. They eventually returned to British Columbia. After each relocation, Ms. Elliston looked for and eventually found work, which varied based on what was available.

The pension plan for members of the Canadian Armed Forces (including Mr. Elliston) is governed by federal legislation, including the federal *Pension Benefits Division Act* ("PBDA"). Under the PBDA, the pension accrued by Mr. Elliston during the entire 19.5-year period of the relationship is subject to division. However, under the British Columbia *Family Relations Act* and the *Division of Pensions Regulation* made under it (collectively, "BC FRA"),[4] only the pension accrued by Mr. Elliston during the 3-year period of the marriage is subject to division. The first issue was whether the federal PBDA applied to the division of Mr. Elliston's pension (as was argued by Ms. Elliston) or whether the BC FRA applied (as was argued by Mr. Elliston). The second issue was whether the court should exercise its discretion to reapportion the

[4] The BC FRA was replaced by the British Columbia *Family Law Act* in 2013.

division of Mr. Elliston's pension on fairness grounds, as had been permitted under the BC FRA.

Decision

According to the division of powers between the provinces and the federal government under Canada's constitution, the provinces have jurisdiction over property and civil rights. Pension assets are property; "civil rights" include a former spouse's right to a share of a pension asset upon marriage breakdown.

Based on previous case law, Mr. Elliston had argued that the PBDA does not govern property rights between former spouses, which falls within provincial jurisdiction. The Court rejected this view and reconciled the apparent overlapping jurisdictions of the federal and provincial governments. It held that applicable provincial legislation governs the rights of spouses to a particular share, whereas the PBDA provides a mechanism for dividing certain types of pensions, such as military and certain other federally-regulated pensions.

Consistent with the constitutional division of powers, Ms. Elliston's right to a share of Mr. Elliston's pension arose under the applicable provincial property legislation, namely the BC FRA. The BC FRA set out the mechanism for dividing pension benefits on relationship breakdown. However, the BC FRA contained an express provision excluding its application to "extraprovincial plans," which included military pensions such as Mr. Elliston's pension. On this basis, the Court held that the Canadian Armed Forces pension accrued by Mr. Elliston during the entire period of his relationship with Ms. Elliston was subject to division under the PBDA.

The Court then considered Mr. Elliston's argument that it would be unfair to him to divide his pension based on the entire period of the relationship such that the Court should exercise its discretion under the BC FRA to reapportion the former spouses' shares of his pension. Under the reapportionment provision of the BC FRA, the relevant factors included the duration of the marriage, the needs of each spouse to become or remain economically self-sufficient and any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of the property (here, the pension asset).

The Court rejected Mr. Elliston's argument that it would be unfair to divide his pension based on the entire period of the relationship and refused his request for reapportionment. The Court held that the relatively short duration of the Elliston's marriage (3 years) was not a justification to reapportion the pension division; rather, the fact that the couple lived together in a conjugal relationship for nearly 20 years supported equal division of Mr. Elliston's pension.

The Court also rejected Mr. Elliston's argument that it would be unfair to divide his pension equally with Ms. Elliston based on the entire period of the relationship because he alone contributed to accrual of his pension. In this regard, Mr. Elliston distinguished between certain matrimonial property, like real estate, where one spouse may contribute financially and otherwise to the acquisition and maintenance of property to which the other spouse holds title. While the Court accepted that Mr. Elliston provided the employment which resulted in the accrual of his pension, it held that Ms. Elliston had made numerous contributions and sacrifices to support Mr. Elliston in his career, which gave rise to his accrued pension.

On this basis, the Court refused Mr. Elliston's request that the division of his pension based on the entire period of his relationship with Ms. Elliston be reapportioned.

Implications

The division of family property, including pension assets, falls within the jurisdiction of the provinces to regulate property and civil rights. A non-member spouse's right to receive a share of a member spouse's pension is therefore derived from provincial property legislation. However, the mechanism by which a member's pension benefit may be divided at source is governed by the jurisdiction in which the member's pension benefits were earned (for example, the PBDA with respect to federal public sector employees, such as federal public servants, the Canadian Armed Forces or the RCMP).

Where a pension is accrued by a federal public sector employee, the PBDA will govern the manner of dividing the pension asset. Where a pension is accrued in respect of federally-regulated private sector employment (for example, employment with banks, airlines or broadcasters), the pension is governed by the *Pension Benefits Standards Act, 1985*, which defers, in part, to provincial property law with respect to the valuation and distribution of the pension benefit.

***Trustees of the International Brotherhood v. Shojaei et al.,* 2014 ONSC 3656**

Facts

The defendant, Mr. Shojaei ("Husband"), participated in a pension plan ("Pension Plan"), health and welfare plan ("H&W Plan") and group life insurance policy arranged through his union. The defendant, Ms. Shojaei ("Wife"), was the spouse of the member participant. Wife falsely claimed that Husband had died of heart failure while in Iran.

Wife presented forged documents to the Trustees of the Pension Plan and H&W Plan, and to the insurer under the group life insurance policy. The Trustees of the Pension Plan paid Husband's $31,000 pre-retirement pension death benefit to Wife. The Husband's eligible dependants (including Wife and the couple's two sons) were paid approximately $17,000 in benefits claimed by them under the H&W Plan in the five-year period following Husband's alleged death. Wife had also submitted claims for $3.525 million in death benefits under several life insurance policies unrelated to these proceedings, receiving approximately $1.01 million in payouts.

The plaintiffs, the Trustees of the International Brotherhood of Electrical Workers, Local 353 Trust Funds ("the Trustees"), brought a claim for the amounts improperly paid to the defendants from the Pension Plan and H&W Plan, as well as punitive and exemplary damages. The Trustees also sought declarations that: (1) there would be no requirement to pay any further benefits to the defendants from the Pension Plan or the H&W Plan, unless and until all debts owing to the plans were reimbursed; and (2) alternatively, any damage awards granted could be used to set-off or be applied to any future benefits payable.

The defendants were convicted of fraud and other offenses in prior *Criminal Code of Canada* proceedings. In this subsequent civil proceeding, the defendants were noted in default (in other words, they did not defend the claim). As a result, they were deemed to admit the facts set forth in the plaintiff Trustees' statement of claim.

Decision

The Ontario Superior Court of Justice ("the Court") found that the plaintiffs had established that the defendants were liable for fraud, deceit and fraudulent misrepresentation, as well as for conspiracy, conversion and unjust enrichment. As a result, the Court awarded damages in the amount claimed ($47,835.70) in respect of pre-retirement pension death benefits and health and welfare benefits improperly paid under the respective plans.

The Court awarded punitive and exemplary damages in the amount of $50,000 against each of the defendants to censure their high-handed and deliberate conduct as well as to deter others from perpetrating similar frauds. Costs in the amount of $24,294.58 were also awarded to the plaintiffs.

The Court also awarded the requested declaratory relief: no further benefits are payable from the plans to the defendants until their debts owing to the plans are paid in full.

Implications

It is not uncommon for a pension plan administrator to uncover that excess amounts have been paid from a registered pension plan to a beneficiary. This case provides authority for the proposition that the equitable principles of set-off can be applied to effectively recoup overpayments made from a registered pension plan and a health and welfare benefit plan trust.

Pension Disputes in the Unionized Context

***Ontario Nurses' Association v. Rouge Valley Health System,* 2014 ONSC 1590**

This decision results from an application by the Ontario Nurses' Association ("ONA" or the "Union") for judicial review of a decision by Arbitrator Stout, in which he dismissed four grievances alleging that the employer hospital had failed to remit the proper contributions to the Healthcare of Ontario Pension Plan ("HOOPP"). Hicks Morley lawyers Frank Cesario and Jacqueline Luksha successfully argued for the employer, Rouge Valley Health System ("Hospital").

Facts

Certain terms and conditions of ONA members' employment are bargained centrally between ONA and the Ontario Hospital Association. More than 130 hospitals, including the Hospital, participate in the central bargaining process. Other terms and conditions of ONA members' employment are bargained locally between the local union and the relevant hospital.

For the hospitals that participate in central bargaining, HOOPP participation is one of the centrally-bargained terms. The relevant provision of the central agreement simply provides for eligible nurses to participate in HOOPP in accordance with HOOPP's terms and conditions.

The Union brought four grievances alleging that the Hospital had failed to make the appropriate pension contributions to HOOPP on certain compensation. Arbitrator Stout dismissed the grievances on the basis that he lacked jurisdiction to hear them. The Arbitrator referred to two prior arbitral decisions dealing with grievances relating to HOOPP contributions.[5] In the prior cases the arbitrators found that the terms of HOOPP were not incorporated into the relevant collective agreement. As such, the disputes regarding HOOPP contributions did not arise from the interpretation or administration of the collective agreement, but rather related to the administration of HOOPP and, as such, must be decided by HOOPP's administrator. Both of the prior grievances were therefore dismissed.

The Union applied for judicial review of Arbitrator Stout's award.

Decision

The parties agreed that the appropriate standard of review was reasonableness. The Court upheld Arbitrator Stout's decision as reasonable, observing that the written reasons for his decision were justified, transparent and intelligible. The Court took note of the fact that Union counsel had acknowledged that, as HOOPP members, individual nurses could directly raise with the administrator of HOOPP concerns they had with respect to the contributions being made on their behalf to HOOPP, as could the Union.

Implications

Where participation in an industry multi-employer pension plan is collectively bargained, disputes with respect to pension participation may not be arbitrable if the terms of the pension plan are not incorporated by reference into the collective agreement. Where the collective agreement merely provides for participation in accordance with the terms and conditions of the pension plan, disputes with respect to such participation – that is, disputes arising from the interpretation or administration of the pension plan's terms – may not be arbitrable, particularly where the member, participating employer or other interested party can address its concerns directly with the plan administrator.

***University of Windsor v. Faculty Assn. of the University of Windsor*, 2014 ONSC 3247**

Facts

In 2011, the Faculty Association of the University of Windsor ("WUFA") brought a policy grievance against the University of Windsor ("University")

[5] *West Parry Sound Health Centre and Ontario Nurses' Association*, 2008 CanLII 66136 (ON LA) (Parmar) (December 15, 2008); and *Grand River Hospital Corp. and Ontario Nurses' Association* (2010), 200 L.A.C. (4th) 363 (Howe) (November 15, 2010).

relating to the University-sponsored pension plan ("Plan"). WUFA alleged that the University breached the Plan (and the collective agreement, which incorporated the Plan by reference), by using Mercer Canada ("Mercer") in dual capacities: (1) in its role as the designated actuary under the Plan; and (2) as the University's independent advisor for matters relating to the Plan during, among other things, the 2011 collective bargaining negotiations with WUFA. According to WUFA, this use of Mercer undermined the neutrality of the firm in the Plan's provision of actuarial services and advice to the Plan. The Plan text required that the actuary be "independent of the University."

The University eventually conceded that, since it had engaged Mercer to provide collective bargaining advice to the University regarding the Plan, while Mercer concurrently acted as the actuary under the Plan, Mercer lacked the requisite "independence" anticipated in the Plan's definition of "actuary." The University represented that it would no longer use Mercer for the purpose of obtaining its own advice regarding the Plan. However, WUFA continued to maintain that, in order to remedy the effect of this Plan and collective agreement breach, WUFA should be privy to any information or advice that the University received from Mercer regarding the Plan during the period Mercer served both roles, including information the University received during the 2011 collective bargaining process.

Decision

At arbitration, Arbitrator Pamela Picher held that the documents of which WUFA sought disclosure were arguably relevant, particularly to the issue of the remedy to the University's admitted breach. She further held that those documents are not covered by confidentiality protection. Therefore, the University was directed to release to WUFA the information and documents it received from Mercer, including documents concerning the 2011 collective bargaining process.

With respect to whether the documents were "arguably relevant," Arbitrator Picher held that, in order to remedy the University's breach, WUFA should receive the same information and advice the University improperly received from Mercer, to "level the playing field and to determine the extent of the damage or misconduct, if any" that may have occurred.

With respect to whether the documents should be precluded from disclosure on the basis of confidentiality, the Arbitrator held that, among other reasons, to preclude disclosure would be to protect a relationship (between the University and Mercer) that runs directly counter to the collective agreement and the Plan. The Arbitrator concluded that, had the University engaged its own actuarial advice from an actuary that was separate and independent from Mercer, it would have assured for itself all the confidentiality of communications that it would rightly expect from its own independent actuary.

Arbitrator Picher's decision was upheld by the Ontario Superior Court of Justice.

Implications

This decision can be read narrowly as being a result of the particular language of the pension plan text, which required that the plan actuary be independent of the plan sponsor. Absent such language in a plan text or other legal document, it is not clear that a decision-maker would or could order disclosure to employees or a union of actuarial information and advice supplied to a plan sponsor in the context of collective bargaining or plan design deliberations. Nevertheless, this case is a further reminder that, where an organization wears "two hats" in relation to its pension plan (employer and plan sponsor), care must be taken to compartmentalize those separate roles. For example, it may be necessary or desirable for an organization to pay the cost of certain types of professional advice out of its own pocket (rather than out of the pension fund) in order to preserve the confidentiality and legal privilege of that advice.

Notable Cases from the U.S. Courts

***Tussey v. ABB Inc*., 746 F. Supp. 3d 327 (March 19, 2014)**

This case is an appeal of a decision summarized in our 2013 Case Law Update, *Tussey v. ABB Inc.,* 2012 U.S. Dist. LEXIS 45240 (W.D. Mo. Mar. 31, 2012). The central issue in this case was a pension plan administrator's fiduciary duty to prudently select and monitor investments, service providers and related fees.

Facts

ABB Inc. ("ABB") sponsored two 401(k) plans ("Plans") – one for non-union employees and another for union employees. The Plans had assets totalling over $1 billion.

The Plans were defined contribution arrangements under which Plan members directed the investment of their account balance among a menu of investment options selected by the Plan administrator. A committee of ABB representatives was the named administrator of the Plans and was required to select and monitor the Plans' investment options. These investment options included mutual funds offered by Fidelity Investments. Fidelity

Management Trust Company and Fidelity Management & Research Company served as the Plans' investment advisor and record keeper, respectively. The fees for these services were paid mainly through "revenue sharing" arrangements, a practice whereby investment funds pay a portion of their fees to the record keeper.

In 2006, current and former employees of ABB brought a class action against the ABB fiduciaries,[6] Fidelity Management Trust Company and Fidelity Management & Research Company alleging various fiduciary breaches and prohibited transactions regarding the administration of the Plans.

At trial, the United States District Court for the Western District of Missouri ("District Court") found that the ABB fiduciaries and Fidelity breached the fiduciary duties that they owed to the Plans. Specifically, the District Court found that the ABB fiduciaries violated their duties to the Plan by:

- failing to monitor Fidelity's recordkeeping fees;
- failing to negotiate rebates for the Plan from either Fidelity or other investment managers whose funds were made available to Plan members;
- agreeing to pay to Fidelity an amount that exceeded market costs for Plan services in order to subsidize certain services provided by Fidelity to ABB itself rather than the Plans;
- selecting more expensive funds when less expensive funds were available; and
- improperly removing the Vanguard Wellington Fund from the Plan's investment options, replacing it with Fidelity's Freedom Funds and mapping Plan members' investments in the former fund to the latter funds absent another investment election for affected members.

The District Court also found that Fidelity breached its fiduciary duties to the Plan by:

- failing to distribute "float income" solely for the interest of the Plan; and
- transferring "float income" to the Plan's investment options instead of the Plan.

[6] The ABB fiduciaries were: (1) ABB, the Plan sponsor; (2) ABB's Pension Review Committee ("PRC"), a named fiduciary responsible for selecting and monitoring the Plan's investment options; (3) ABB's Pension and Thrift Management Group (PTMG), which acts as the staff of the PRC; (4) John Cutler, Jr., ABB's director of the PTMG since 1999; and (5) ABB's Employee Benefits Committee (EBC), a three-member committee appointed by ABB's board to oversee ABB's benefit program and to serve as Plan administrator.

Float income is interest earned on deposits and redemptions in process ("float") while the float is in Fidelity's possession pending investment in an investment fund (in the case of deposits) or distribution to the Plan member (in the case of redemptions).

The District Court held the ABB fiduciaries jointly and severally liable in damages for their fiduciary breaches in the amount of $35.2 million. Specifically, the District Court awarded $13.4 million for failing to control recordkeeping costs and $21.8 million for losses the District Court found the Plan suffered as a result of the improper removal of the Vanguard Wellington Fund. The District Court also awarded $1.7 million against Fidelity for lost float income. Finally, the District Court held the ABB fiduciaries and Fidelity jointly and severally liable for more than $13.4 million in attorney fees and costs.

The ABB fiduciaries and Fidelity appealed the decision to United States Court of Appeals, Eighth Circuit ("Appeals Court").

Decision

The Appeals Court affirmed, reversed and vacated in part different aspects of the District Court's judgment.

Standard of Review

The Appeals Court noted that the District Court failed to identify a standard of review with respect to the decisions of plan administrators. Relying on the United States Supreme Court's decision in *Firestone Tire & Rubber Co. v. Bruch* (489 U.S. 101 (1989)), the Appeals Court found that, where a plan document gives a plan administrator the discretion to interpret the plan (as ABB's Plans did), the administrator's exercise of that discretion is entitled to deference. This "*Firestone* deference" standard requires a court to uphold an administrator's interpretation, so long as it is reasonable and not an abuse of discretion. The Appeals Court rejected the employees' attempt to limit *Firestone* deference to benefits determinations, holding instead that a court should accord deference to a fiduciary whenever it exercises its discretionary authority.

Recordkeeping Damages Upheld

Despite finding that the actions of the ABB fiduciaries were subject to deference, the Appeals Court upheld the District Court's finding that the ABB fiduciaries failed to control the recordkeeping costs paid by the Plan.

The Appeals Court rejected the ABB fiduciaries' argument that a claim of unreasonable recordkeeping fees was barred because the Plan offered a wide range of investment options from which participants could select low-priced funds. The Appeals Court held that, while there was some judicial support for this notion, there were significant allegations of wrongdoing against the ABB fiduciaries which distinguished this case. Those allegations included allegations that ABB used revenue sharing to benefit ABB and Fidelity at the Plans' expense. The Appeals Court found that there was "ample support in the record" that ABB had failed to calculate recordkeeping fees paid to Fidelity, assess whether the fees were reasonable, negotiate lower fees, or prevent the use of Plan assets to subsidize corporate fees unrelated to the administration of the Plan. On this basis, despite finding that the decisions of the ABB fiduciaries were owed deference, the Appeals Court upheld the $13.4 million award against ABB arising from the recordkeeping claim.

Damages for Removal of Vanguard Wellington Fund Vacated

The Appeals Court reversed the District Court's finding of a breach of fiduciary duties in respect of the selection of the Fidelity Freedom Funds in place of the Vanguard Wellington Fund.

The ABB fiduciaries argued that the Plaintiffs' claim was untimely because it was not brought within six years of last action which constituted a breach, as required by statute. They submitted that the limitations period began running in November 2000, when the decision to switch to the Fidelity Freedom Funds from the Wellington Vanguard Fund was made.

The Appeals Court disagreed and found that the last fiduciary acts constituting a breach – the amending of the trust agreements, removing the Wellington Vanguard Fund as a investment option and mapping Plan assets to the Fidelity Freedom Funds – all occurred during and after March 2001. It therefore held that the claim was made well within the six-year time limit.

While the Appeals Court found that the Plaintiffs' claim was timely, it went on to hold that the failure of the District Court to apply the proper standard of review was a significant error. The Appeals Court agreed with ABB's contention that the District Court had improperly relied on hindsight to assess the prudence of the investment selection. It held that a plan administrator deserves discretion to the extent its decisions were reasonable given what it knew at the time. The Appeals Court found that it was not manifest that the District Court accorded any deference to the Plan administrator and held that, had it done so, the District Court may have very well reached a different conclusion.

As such, the Appeals Court vacated the $21.8 million damages award and remanded it back to the District Court to decide the issue using the proper standard of review (i.e. *Firestone* deference).

Damages Against Fidelity Vacated

The Appeals Court also vacated the damages awarded against Fidelity relating to its use of float income. The Appeals Court held that the Plaintiffs failed to show that the forms of float at issue were, in fact, Plan assets. The investment options, rather than the Plans, owned the float and bore the risk of losses to it. As such, the investment funds were entitled to the benefits of the floats, including the float income.

Judge Bye dissented in part, and found that Fidelity had in fact breached its fiduciary duty of loyalty by retaining float income for its benefit and by using it to pay Plan expenses without openly negotiating to do so.

Attorneys' Fees and Costs Award Vacated

In light of the above, the Appeals Court vacated the District Court's award of $13.4 million in attorneys' fees and costs and directed the District Court to reconsider the fee award on remand.

Implications

This case highlights the risk to plan administrators associated with failing to regularly monitor plan investments and fees in order to ensure that investment funds are performing adequately and that fees are reasonable based on market prices for similar services. More generally, the *Tussey* case illustrates the importance of developing and implementing a rigorous governance system.

Although not binding on Canadian courts, the Appeals Court's decision supports the proposition that the decisions of plan fiduciaries in exercising their discretionary authority are owed a degree of deference. However, a decision-maker may be reluctant to accord such deference to a plan administrator absent documented evidence that, in exercising its fiduciary discretion, the plan administrator considered a range of reasonable options, sought expert advice where appropriate, and selected from among the available options with a view to the best interests of plan beneficiaries.

A well-developed and rigorous governance system will assist a plan administrator in satisfying its oversight obligation and in demonstrating the defensibility of its decisions. To be effective, however, governance-related processes and procedures must be put into action. Otherwise, rather than act as a "shield" for the plan administrator, failure to follow established governance policies and procedures could potentially be used by plan beneficiaries as a "sword" to demonstrate that the plan administrator has breached its fiduciary duties to them.

On May 20, 2014, the Appeals Court denied petitions by both the Plaintiffs and the ABB fiduciaries to rehear this case. On November 10, 2014, the United States Supreme Court declined to hear an appeal in this case. This case is remanded to the District Court to decide the breach of fiduciary duty issues relating to replacement of the Vanguard Wellington Fund with the Fidelity Freedom Funds based on the "*Firestone* deference" standard of review, and any remaining issues relating to the award of attorney fees.

Spiewacki v. Ford Motor Company-UAW Retirement Board of Administration et al., **18 F. Supp. 3d 902 (May 1, 2014)**

Facts

Mr. Spiewacki was an employee of Ford Motor Company ("Ford") in the U.S. His employment with Ford was governed by a collective agreement between Ford and the United Auto Workers ("Union"). In respect of his Ford employment Mr. Spiewacki accrued a defined benefit pension under the Ford Motor Company UAW Retirement Plan ("Plan"). The Plan was administered by the Ford Motor Company-UAW Retirement Board of Administration ("Administrator").

In 2011, Ford closed the plant where Mr. Spiewacki worked and he was laid off. The collective agreement between Ford and the Union allowed Mr. Spiewacki either to retire or to work at a different Ford facility. Mr. Spiewacki requested information regarding his early retirement benefits and options.

He was sent a package of materials containing information regarding his accrued pension and retirement options under the Plan. The package of materials contained three statements to the effect that the benefits quoted were only estimates, including the following disclaimer:

> The benefits amount in this package are estimates only and are based on the information you provided and the Company record at the time this package was prepared. They represent an estimate of the amounts that may be payable at your Benefit Commencement Date (BCD) under the payment methods available. The actual benefit amounts will depend on such factors as your age, the Company record, pension plan formulas and the payment method you select. Initially, your benefit payments will be made based on this estimate. Then, approximately 90 days

> after your BCD, your benefit will be recalculated to reflect your final employment data and you will receive a Payment Adjustment Letter reflecting any changes to your benefit payments.

The package advised Mr. Spiewacki that, under the form of pension he ultimately elected (single life), he would receive $2,769.34 per month until April 2018 and $1,422.65 per month thereafter. Mr. Spiewacki chose to retire effective November 1, 2011.

After his retirement, it was discovered that the pension estimates provided to Mr. Spiewacki were overstated because the Administrator's third party service provider had used an incorrect credited service figure to calculate his pension (26.2 years instead of 22.8 years). The correct amount payable to Mr. Spiewacki until April 2018 was approximately $350 less than he had been told; the correct amount payable to him thereafter was approximately $180 less than he had been told.

The Administrator decided that Mr. Spiewacki should be paid the lower (i.e. correct) amount. Mr. Spiewacki challenged the Administrator's decision through the Administrator's internal appeals process but was denied. He then filed a claim against the Administrator, the Plan and Ford asserting his entitlement to the higher amount on the basis of promissory and equitable estoppel, negligence by a fiduciary and unjust enrichment.

Decision

The Court noted that, for an estoppel claim to be proven, the following essential elements must be established: (1) conduct or language amounting to a representation of material fact; (2) that the party to be estopped is aware of the true facts; (3) that the party to be estopped intended for its representation to be acted upon, or the party asserting the estoppel must reasonably believe that the party to be estopped so intended; (4) the party asserting the estoppel must be unaware of the true facts; and (5) the party asserting estoppel must reasonably or justifiably rely on the representation to its detriment.

The Court rejected Mr. Spiewacki's estoppel claim on the basis that he had failed to satisfy three of the five essential elements of estoppel. First, the Court held that Mr. Spiewacki had failed to prove that the Defendants were aware of the true facts (i.e. the correct amount of his pension). In this regard, the Court held Mr. Spiewacki to a relatively high burden of proof. Specifically, it held that Mr. Spiewacki had not proven that the Defendants were aware that the credited service figure used to calculate Mr. Spiewacki's estimated pension was incorrect.

Second, the Court held that Mr. Spiewacki had not established that the Defendants intended for him to retire based on the benefits package provided to him. Again, the Court held Mr. Spiewacki to a relatively high burden of proof. In this regard, the Court's reasons suggest that Mr. Spiewacki was required to produce evidence that the Defendants wanted Mr. Spiewacki to retire, or would have benefited from his retirement, in order to establish that the Defendants intended for him to retire based on the benefits package he received.

Third, and perhaps most significantly, the Court held that Mr. Spiewacki's reliance upon the benefits package was unreasonable. In this regard, the Court noted that the benefits package stated three times that the benefits quoted were only estimates. The package expressly stated that the final benefits would depend on factors such as the Company record and pension plan formulas, and that benefits would be recalculated *after* Mr. Spiewacki's retirement to reflect his final employment data. Elsewhere, the benefits package expressly stated that "calculations are subject to corrections for errors in your record or otherwise." In light of these disclaimers, the Court held that Mr. Spiewacki could not reasonably rely on the estimates being correct. The Court distinguished a line of estoppel cases relied upon by Mr. Spiewacki on the basis that, in those cases, the incorrect higher amount had been paid to the plaintiff for a number of years. In Mr. Spiewacki's case, the error was discovered and corrected before the incorrect higher amount was ever paid to him.

The Court also dismissed Mr. Spiewacki's claims grounded in negligence and unjust enrichment.

Implications

Although not binding on Canadian courts, this case illustrates that clear, conspicuous and appropriately repeated disclaimers can assist a plan administrator in defending against claims in the event an inadvertent error is made. Furthermore, this case demonstrates the importance of taking prompt corrective action when an error is discovered. In the case of an overpayment, in order to defend against potential claims premised on the notion that the recipient reasonably relied on representations to the effect that he/she would receive the incorrect, higher amount, it is generally prudent for a plan administrator to advise the recipient of the overpayment as soon as practicable and to take the appropriate corrective action.

KEY DEVELOPMENTS IN BENEFITS LAW

Overpayments

***Industrial Alliance Insurance and Financial Services Inc. v. Brine,* 2014 NSSC 219**

Facts

Mr. Brine was a police officer employed by Ports Canada, an agency of the federal government ("Employer"). In connection with his employment, Mr. Brine was provided with long-term disability ("LTD") insurance coverage insured by National Life and its successor, Industrial Alliance Insurance and Financial Services Inc. ("Insurer").

After experiencing significant mental distress in the course of his employment, Mr. Brine was diagnosed with depression, which rendered him totally disabled within the meaning of the LTD policy. Mr. Brine commenced receiving LTD benefits from the Insurer in August 1995. In December 1995, the Insurer assessed Mr. Brine's circumstances and determined that the services of a rehabilitation counsellor may be of assistance to him. Each year, the Insurer issued a T4 slip to Mr. Brine on which the LTD benefits he received during the year were reported as taxable income.

In March 1996, Mr. Brine filed a human rights complaint with the Canadian Human Rights Commission in relation to treatment he had received during his employment with the Employer.

Under the terms of the LTD policy, certain amounts received by a disabled employee reduce the amount of benefits payable under the LTD policy, including amounts received under the Canada Pension Plan ("CPP") or the Employer's pension plan. In October 1998, the Insurer ceased the payment of LTD benefits to Mr. Brine because he received a lump sum payment of retroactive benefits under both the CPP and the Employer's pension plan. The retroactive payment of benefits under CPP and the Employer's pension plan resulted in an overpayment of LTD benefits under the policy in the amount of approximately $100,000. In order to draw down this overpayment, the Insurer reduced Mr. Brine's monthly LTD benefits to nil until the overpayment was fully recovered.

The Insurer unilaterally discontinued Mr. Brine's rehabilitation services in June 1998.

Mr. Brine declared bankruptcy in July 1999.

In September 2001, the Insurer commenced an action against Mr. Brine seeking repayment of the overpayment that resulted from Mr. Brine's receipt of the lump sum payments from CPP and the Employer's pension plan. By the time the Insurer commenced the action, the original overpayment of approximately $100,000 had been reduced to approximately $41,000 as a result of the Insurer having reduced Mr. Brine's monthly LTD benefits to nil. It argued that the overpayment survived Mr. Brine's bankruptcy because Mr. Brine stood in a fiduciary capacity to the Insurer, and his failure to disclose the amounts he received from CPP and the Employer's pension plan constituted a misappropriation of funds by a person acting in a fiduciary capacity. The Insurer further claimed that it was entitled under the subrogation provisions of the LTD policy to the loss of income damages Mr. Brine received under the settlement of his human rights complaint.

Mr. Brine counterclaimed against the Insurer, seeking damages for the amount of the overpayment that was repaid to the Insurer but ought to have been extinguished by his bankruptcy. Mr. Brine further sought damages for breach of the LTD policy and bad faith conduct by the Insurer. Specifically, Mr. Brine argued that he suffered losses due to the Insurer's repeated and erroneous characterization of his LTD benefits as taxable, despite court decisions to the contrary; its improper discontinuation of his LTD benefits in 1998 and failure to reinstate his benefits upon his bankruptcy in 1999; its improper discontinuation of his rehabilitation services in 1998; and its improper allegations of fraudulent activity and misappropriation of funds.

Decision

The Supreme Court of Nova Scotia held that, pursuant to its contractual right of subrogation under the LTD policy, the Insurer was entitled to the $210,000 in loss of income damages that Mr. Brine had received from his Employer under the settlement of his human rights complaint. However, this amount was far exceeded by the damages the Court ordered the Insurer to pay Mr. Brine, as described below.

The Court held that the Insurer had improperly attempted to recoup the overpayment by a total upfront clawback of Mr. Brine's monthly LTD benefits, thereby reducing his benefits to $0. The LTD policy provided that lump sum payments must be apportioned equally over the period from the date of payment to the disabled employee's 65th birthday and recovered in installments over that period. The Court rejected the Insurer's evidence that the apportionment method had never been applied to retroactive lump sum payments, suggesting that the apportionment provision was intended to apply to lump sum payments for future losses of income. The Court noted that the Insurer subsequently amended the LTD policy to reflect the interpretation argued at trial.

The Court rejected the Insurer's argument that Mr. Brine was a fiduciary who had misappropriated funds by failing to report the amounts he received. The Court held that Mr. Brine would still have owed $62,000 of the overpayment to the Insurer at the time of his bankruptcy, had the overpayment been prorated and recovered over the period ending when Mr. Brine turned 65 as required by the LTD policy. It ordered the Insurer to repay this amount to Mr. Brine.

The Court awarded Mr. Brine $30,000 in general damages for mental distress and $150,000 in aggravated damages. In this regard, the Court held that the Insurer had breached its duty to Mr. Brine to act with the utmost good faith in administering the LTD policy, which caused Mr. Brine distress and worsened his depression. Among other things, the Court noted that, although the LTD policy did not require the Insurer to make rehabilitation services available to Mr. Brine, once it did so it was obliged to manage the services in good faith. Among other things, the Court noted that the Insurer acted in bad faith in discontinuing Mr. Brine's rehabilitation benefits without notice and relying upon outdated medical information in failing to reinstate those benefits.

In addition, the Court awarded $500,000 to Mr. Brine in punitive damages. The Court found that several aspects of the Insurer's conduct warranted censure beyond the aggravated damages it awarded. The conduct warranting censure included the Insurer's mismanagement of Mr. Brine's rehabilitation services, its withholding of the results of an independent medical examination until the eve of trial, and its reporting of Mr. Brine's LTD benefits as taxable after their reinstatement in 2006 despite knowledge of a tax court judgment obtained by Mr. Brine that the LTD benefits are not taxable, and despite having been advised by Mr. Brine that its treatment of his benefits as taxable is a continuous stressor and financial burden for him which worsens his depression.

Implications

Overpayments can arise in a number of circumstances both within and outside the insurance context. Those circumstances include the payment of remuneration by an employer to an employee or the payment of benefits from a pension or benefit plan administrator to a participant. Depending on the context in which an overpayment/clawback arises, different legal regimes will apply. Therefore, care should be taken when applying the principles and rules followed in this case outside of the context of insured LTD benefits.

That said, irrespective of the context, the recovery of overpayments can cause financial hardship to the individual from whom the overpayment is being recouped. As this case illustrates, courts and other decision-makers will make every effort to protect vulnerable individuals, which may include disabled employees, retirees and others. Given the high standard of care to which employers/plan administrators are held in their dealings with employees/beneficiaries and the potential for financial and other hardship, the administration of clawbacks will be closely scrutinized by decision-makers. Unreasonable or bad faith conduct can exacerbate financial hardship or medical conditions and attract aggravated and punitive damages.

A decision-maker will typically interpret any ambiguity in clawback provisions in favour of the employee/beneficiary and against the employer or plan administrator. Clawback provisions in pension, incentive, wage-loss replacement and other compensation and benefits programs should be carefully drafted and reviewed by internal or external counsel to ensure clarity and compliance with applicable legislation, and to mitigate the risk that a court will refuse to enforce the provision on the grounds that the result would be unreasonable or unconscionable.

***Garneau v. Industrial Alliance,* 2014 ONSC 1495**

Facts

Ms. Garneau was employed by the federal government ("Employer"). She became disabled in 1996 and commenced receipt of long-term disability ("LTD") benefits under a policy arranged by the Employer. Industrial Alliance Insurance and Financial Services Inc. acquired National Life and succeeded the latter as insurer of the LTD benefits ("Insurer"). Under the terms of the LTD policy, the benefits payable are reduced by certain amounts received by a disabled employee, including benefits payable under the Employer's pension plan and Canada Pension Plan ("CPP") retirement and disability benefits.

In September 2002, Ms. Garneau retired and began to collect a disability pension under the Employer's pension plan. However, the Insurer did not initially reduce Ms. Garneau's LTD benefits to reflect her receipt of a disability pension under the Employer's pension plan or CPP disability benefits. The Insurer alleged that its failure to reduce Ms. Garneau's LTD benefits was due to the fact that it was not notified of her retirement.

The Insurer became aware of Ms. Garneau's retirement in September 2007. By that time, the Insurer had overpaid Ms. Garneau's LTD benefits by approximately $115,000 in the aggregate. To recoup its overpayment, the Insurer initially stopped payment of Ms. Garneau's LTD benefits altogether. In so doing, the Insurer relied upon a provision of the LTD policy that authorized deductions in the event of benefit overpayments, including those due to clerical error. Three months later, the Insurer re-instated 50% of the benefits properly payable to Ms. Garneau under the LTD policy (i.e. factoring in the appropriate offsets), keeping the remaining 50% to draw down the overpayment.

Ms. Garneau commenced an action against the Insurer seeking a declaration that she does not owe the approximately $115,000 overpayment. Alternatively, Ms. Garneau argued that the Insurer was statute-barred from recovering the portion of the overpayment that arose more than 2 years prior to the Insurer's discovery over the overpayment (under Ontario's *Limitations Act, 2002,* the basic limitation period is two years from the date the claim is discovered or was discoverable through the exercise of reasonable diligence). Ms. Garneau also asked the court for an order that, if she is required to repay any amount to the Insurer, that repayment be made by way of a mere 20% reduction to her monthly LTD benefits. Ms. Garneau further sought damages for the Insurer's alleged breach of its fiduciary duty to her, or its duty to deal with her with the utmost good faith. In addition, Ms. Garneau claimed aggravated, exemplary and punitive damages totalling $200,000 and an unspecified amount of special damages, as well as compensation for injury to dignity, feelings and self-respect due to discriminatory conduct under the Ontario *Human Rights Code.*

The Insurer brought a motion for summary judgment seeking to have Ms. Garneau's claims dismissed.

Decision

The Ontario Superior Court of Justice granted the Insurer's motion for summary judgment and dismissed Ms. Garneau's claims in their entirety.

Prior to this summary judgment motion, Ms. Garneau argued that the Insurer's reduction of her LTD benefits by 50% was causing her serious financial hardship and, in turn, distress and anxiety which was exacerbating her medical condition. On this basis she brought a preliminary motion challenging the rate at which the Insurer was recovering its overpayment pending trial. That preliminary motion was rejected. On the basis of the prior motions judge's ruling that the overpayment was a debt owed by Ms. Garneau to the Insurer, which ruling was not appealed by Ms. Garneau, the

Court in the summary judgment motion rejected Ms. Garneau's claim that she did not owe the approximately $115,000 overpayment (2009 CanLII 26923 (ON SC)).

Relying upon the Ontario Superior Court of Justice's decision in *Ruffolo and Lepage* v. *Sun Life Assurance Co. of Canada* ([2007] 64 C.C.P.B. 277), the Court affirmed that an LTD insurer who discovers that it has overpaid an insured is entitled to the self-help remedy of withholding future LTD payments until it has repaid itself. In *Ruffolo*, the Court held that it is generally not unreasonable, unconscionable, unexpected, illegal or contrary to public policy for an LTD insurer to do so. (The Court in *Ruffolo* also held that the insurer in that case was not entitled to charge interest on the overpayment of LTD benefits. The Insurer in this case did not charge interest to Ms. Garneau on the overpayment.)

The Court in this case held that the Insurer was entitled to exercise the self-help remedy by recouping a portion of its overpayment each month by reducing Ms. Garneau's LTD benefits. The Court held that the Insurer properly exercised the self-help remedy by applying a 50% reduction, which amounted to slightly less than the general 20% limit on the garnishment of wages under Ontario's *Wages Act* (LTD benefits are "wages" for this purpose).

Having found that the overpayment is a debt owing from Ms. Garneau to the Insurer, the Court rejected Ms. Garneau's argument that the Insurer's ability to recoup the overpayment is limited to the two-year period prior to the Insurer's discovery of the overpayment in September 2007. In this regard, the Court held that the Insurer's recovery of the overpayment was governed by the terms of the LTD policy rather than by Ontario's *Limitations Act, 2002*. The LTD policy did not contractually limit the insurer's ability to recover overpayments.

The Court also held that the Insurer was not a fiduciary in relation to Ms. Garneau. Rather, the contractual relationship between the Insurer and Ms. Garneau (insurer-insured) gave rise to a duty of utmost good faith, which was not breached when the Insurer overpaid Ms. Garneau or when it unilaterally exercised its self-help remedy by reducing her LTD benefits.

Having found that the Insurer properly exercised its self-help remedy, the Court summarily dismissed Ms. Garneau's claims for aggravated, exemplary, punitive, special damages and compensation for discrimination prohibited by human rights legislation.

Implications

The outcome in this case directly contrasts with the outcome in an unrelated 2014 case involving the same insurer, *Industrial Alliance Insurance and Financial Services Inc. v. Brine*, 2014 NSSC 219 (summarized above).

As noted in relation to *Brine*, overpayments can arise in a number of circumstances both within and outside the insurance context. Care should be taken when applying the principles and rules followed in this case outside of the context of insured LTD benefits. That said, this case illustrates that the administration of clawbacks will be closely scrutinized by decision-makers. Unreasonable or bad faith conduct can exacerbate financial hardship or medical conditions and attract aggravated and punitive damages. Clawback provisions in pension, incentive, wage-loss replacement and other compensation and benefits programs should be carefully drafted and reviewed by internal or external counsel to ensure clarity and compliance with applicable legislation, and to mitigate the risk that a court will refuse to enforce the provision on the grounds that the result would be unreasonable or unconscionable. Having acted in good faith in exercising its self-help remedy to recoup the overpayment (including by complying with the garnishment limit set out under Ontario's *Wages Act*), the insurer in this case defeated the plaintiff's claims for aggravated, exemplary, punitive, special damages and compensation for discrimination prohibited by human rights legislation.

Offsets from Disability Benefits

North Bay Regional Health Centre v. OPSEU, Local 662, 2014 CanLII 37462

Facts

The grievor was an employee of the North Bay Regional Health Centre ("Employer") and a member of the OPSEU bargaining unit. Under the collective agreement between the Employer and OPSEU ("Union"), the Employer was required to pay 75% of the premiums toward long-term disability ("LTD") coverage under the Hospitals of Ontario Disability Income Plan ("HOODIP") or an "equivalent" plan. The Employer provided LTD coverage through a plan insured by Desjardins Financial Security ("Insurer"). A separate provision of the collective agreement provided that any dispute concerning an employee's entitlement to short-term disability or LTD benefits "under HOODIP" was subject to grievance and arbitration.

The grievor became disabled and commenced receipt of LTD benefits. In respect of her employment with the Employer, the grievor was accruing pension benefits under the Healthcare of Ontario Pension Plan ("HOOPP"). Under HOOPP, eligible disabled employees can commence receipt of a disability pension based on the credited service they have already accrued. Alternatively, disabled employees can choose to not receive a disability pension and, instead, continue to build their pension by accruing additional credited service ("free accrual"). In the latter case, accrual of further credited service is free, because employer and employee contributions are waived.

After the grievor commenced receipt of LTD benefits she applied to the Canada Pension Plan ("CPP") to commence receipt of her CPP retirement pension (not CPP disability benefits). She was approved and commenced receiving that benefit.

Under the LTD insurance policy, the amount of LTD benefits payable to the grievor was reduced by certain amounts paid or payable to her. For this reason, the Insurer asked the grievor to apply for the HOOPP disability pension and CPP disability benefits. The grievor applied for but was denied CPP disability benefits because she was already in receipt of CPP retirement benefits.

The grievor refused to apply for her HOOPP disability pension because she wished to continue to enjoy free accrual of additional credited service under HOOPP. Nevertheless, the Insurer proceeded to deduct from the grievor's LTD benefits both the amount of CPP retirement benefits she was receiving and a deemed amount in respect of HOOPP disability pension (which she was not actually receiving).

The grievor filed two grievances under the collective agreement in relation to the deductions applied by the Insurer to her LTD benefits. The first grievance alleged that the Employer breached the collective agreement by deducting a deemed amount for HOOPP disability pension benefits that she was not actually receiving. The second grievance alleged that the Employer breached the collective agreement and the Ontario *Human Rights Code* ("*Code*") by deducting CPP retirement benefits from her LTD benefits.

Decision

The Arbitrator rejected the Employer's argument that the matter was not arbitrable because the collective agreement provided that disputes concerning LTD benefits "under HOODIP" are subject to grievance and arbitration, but the Employer had chosen to provide LTD coverage through a privately-insured plan. The Arbitrator found that the grievances were arbitrable because the offsets applied by the Insurer to the grievor's LTD benefits raised the question of whether the Employer had satisfied its collective agreement obligation to provide a HOODIP-equivalent LTD plan.

The Arbitrator considered whether the deemed amount in respect of HOOPP disability pension benefits (which the grievor was not actually receiving) constituted a “disability or retirement pension receivable from the Employer’s pension plan” (i.e. HOOPP). If so, the deemed amount would be a proper offset under HOODIP such that the Insurer’s action of applying this offset would not cause the Employer to breach its collective agreement obligation to provide a HOODIP-equivalent LTD plan.

The Arbitrator allowed the first grievance on the basis that HOOPP disability pension benefits were not “receivable” by the grievor and therefore could not be deducted from her LTD benefits.

Since the collective agreement required the Employer to provide a “HOODIP-equivalent” LTD plan, the Arbitrator considered what amounts are offset from LTD benefits under HOODIP. The HOODIP brochure stated that the LTD benefits to be received by a disabled employee would be reduced by: (1) earnings received from [the Employer]; (2) disability benefits payable under any other disability income plan toward which [the Employer] made contributions; (3) any disability or retirement pension receivable from [the Employer]’s pension plan; and (4) benefits the employee is entitled to from any government plan such as Workplace Safety and Insurance Board (“WSIB”), CPP, the Quebec Pension Plan (“QPP”) and Old Age Security (“OAS”).

Arbitrator Parmar interpreted “receivable” to mean “capable of being acquired.” The Arbitrator rejected the Employer’s argument that the HOOPP disability pension was “receivable” by the grievor because the terms of HOOPP permitted her to cease free accrual and commence receipt of a HOOPP disability pension. The Arbitrator noted that, at any given time, the grievor had two options under HOOPP as a disabled employee: continue free accrual or commence a disability pension. These options are mutually exclusive. The grievor was not capable of receiving a HOOPP disability pension at any time while her free accrual continued. To accept the Employer’s argument would imply that, in accessing her benefits under the Insurer’s LTD policy, the grievor had given up her right to free accrual under HOOPP.

The Arbitrator then considered whether the deduction of CPP retirement benefits from the grievor’s LTD benefits constituted a breach of the collective agreement. The Arbitrator found that the LTD policy expressly identified CPP benefits as one of the government benefits that would be deducted from the

LTD benefit, and that a contrary interpretation would require "a leap from the clear wording used by the parties." The deduction of CPP benefits did not violate the terms of the collective agreement.

The Arbitrator also rejected the union's argument that the deduction of CPP retirement benefits from the grievor's LTD benefits constituted a breach of the *Code* because the grievor was "effectively" being denied her CPP benefit. The Arbitrator held that, in this case, the distinction was not being made on the basis of the grievor's disability, but rather because she receives CPP retirement benefits. There is no prohibition in the *Code* with respect to the quantum of privately negotiated insurance on the basis of other sources of income. The grievor had not been prevented from applying for and receiving CPP retirement benefits in the same way as non-disabled employees can, as evidenced by the fact that she was receiving her CPP retirement benefits.

Implications

The terms of a private disability plan typically provide that certain employment, pension, disability, social security and other income received by the disabled employee from other sources shall reduce the disability benefits payable under the plan. In order to encourage the disabled employee to take the steps necessary to avail him/herself of other available income supports (effectively making the disability insurer the payer of last resort), private disability insurance policies generally offset not only amounts actually received by the disabled employee, but also amounts "receivable by" (or "payable to") the disabled employee.

For the purpose of determining whether an amount "receivable by" (or "payable to") a disabled employee, the disabled employee must have an unqualified entitlement to receive the amount. For this purpose, this decision supports the notion that a disabled employee will not be held to have an "unqualified" entitlement to receive an amount where such entitlement is contingent on the disabled employee choosing between that amount and another option to which the employee has a contractual or statutory right. In that event, a decision-maker is unlikely to hold that the employee must be deemed to forego the other contractual or statutory right, which may be of significant value to the disabled employee.

This decision also confirms that offsets under private disability plans that effectively clawback amounts received or receivable by a disabled employee from other sources such as WSIB, CPP/QPP and OAS are generally not discriminatory on human rights grounds. These offsets do not discriminate against disabled employees; rather, they distinguish between two groups of disabled employees – those who are eligible for these payments and those who aren't.

Finally, this case illustrates that, even where benefits are fully insured and adjudicated by an insurer, an arbitrator may assume jurisdiction over a grievance where the collective agreement prescribes a specific level of coverage and there is a question as to whether that coverage is delivered by the insurance policy arranged by the employer.

Dependant Benefits Coverage for Spouses: Human Rights Issues

VanderLinde v. Corporation of the City of Oshawa, **2014 HRTO 342 (CanLII)**

In this decision, the Human Rights Tribunal of Ontario ("Tribunal") held that it is not discriminatory for an employer to require that an employee's legally married spouse be living with the employee as a condition of the spouse's eligibility for dependant coverage under the employer's group health and dental plan.

Facts

The City of Oshawa ("Employer") offered eligible employees, including Ms. VanderLinde, a group health and dental benefit plan ("Benefit Plan"). The Benefit Plan required that, to be eligible for dependant coverage as an employee's spouse, a person must be married to, and not living separate and apart from, the employee, or be the employee's common law spouse who has been continuously living in a conjugal relationship with the employee for at least one year.

In 2012, the Employer provided advance notice that, as a result of a change in service provider effective January 2013, Benefit Plan members were required to provide up-to-date information about themselves and their dependents. Through this process, the Employer discovered that Ms. VanderLinde's husband no longer qualified as her "spouse" under the Benefit Plan because, despite remaining legally married, the couple had separated in 2009.

Ms. VanderLinde brought a human rights complaint against the Employer. She argued that the dependant coverage that her estranged husband enjoyed under the Benefit Plan prior to the couple's separation had "vested" and should not be taken away. She noted that she and her estranged husband could have divorced (but didn't), and argued that the Employer's refusal to allow her to claim her husband as a dependant under the Benefit Plan was discrimination based on marital status contrary to s. 5 of the Ontario *Human Rights Code* ("*Code*").

Decision

Section 25 of the *Code* permits differential treatment on the basis of marital status in group insurance contracts, as long as that differential treatment complies with the Ontario *Employment Standards Act, 2000* ("ESA") and its related regulations. The *Code*'s definition of "marital status" includes the state of being separated.

Section 44(1) of the ESA sets out a general prohibition on differential treatment of employees and dependants in a benefit plan based on marital status, but allows the ESA regulations to prescribe exceptions to this general prohibition. Regulation 286/01 under the ESA ("ESA Benefit Plans Regulation") contains various exemptions to the general prohibition on differential treatment under a benefit plan, including on the basis of marital status. The exceptions did not apply in this case.

Nevertheless, the Tribunal held that the Employer's Benefit Plan was not discriminatory on the basis of marital status. The Tribunal noted that the ESA Benefit Plans Regulation defines "spouse" to mean a spouse *as defined in the relevant benefit plan*. The ESA Benefit Plans Regulation allows the Employer latitude to define "spouse" in the benefit plan.

In this case, the Employer chose to stipulate that married couples must live together in order to be considered "spouses" for purposes of dependant coverage under the Benefit Plan. As a result, Ms. VanderLinde's husband was ineligible for dependant coverage under the Benefit Plan because he was not an employee's "spouse." The Tribunal held that Ms. VanderLinde's estranged husband was wholly excluded from the definition of "spouse" under the Benefit Plan, and was excluded from the scope of the Benefit Plan.

On the basis that it did not have jurisdiction to do so, the Tribunal refused to address the question of whether the dependant coverage enjoyed by Ms. VanderLinde's estranged husband under the Benefit Plan had vested.

Implications

This decision confirms that an employer has scope to define a spouse or a dependant under a benefit plan. The decision also confirms that it would not be contrary to the *Code* or the ESA for a benefit plan definition of "spouse" to require that the spouse (including a married spouse) be living with the member in order to qualify for benefits. The Employer in this case was successfully represented by Hicks Morley lawyer Amanda Hunter.

Treatment of Disabled Employees Under Compensation Plans: Human Rights Issues

***Labatt Breweries Ontario Canada Division of Labatt Brewing Company Limited v. SEIU Local 2 on (Branch Local 1),* 2014 CanLII 50369 (ON LA)**

Facts

In 2008, the Union and the Employer negotiated a one-time Voluntary Severance Program ("VSP") under which eligible employees could elect to voluntarily "retire" in exchange for a one-time lump sum incentive payment ("buyout"). Employees who were at least 55 years of age and whose age plus service amounted to at least 85 "points" were eligible to elect to take a buyout under the VSP, regardless of whether they were actively reporting to work at the time of acceptance. The purposes of the VSP were to shrink the bargaining unit by voluntary attrition, to reduce the possibility or impact of involuntary layoffs, and to eliminate some high wage-earning senior employees who could be replaced, as needed, by lower cost workers.

In total, 70 employees accepted a buyout under the VSP. Of those 70 employees, 62 were actively at work at the time of acceptance. The other 8 employees – the claimants in this grievance – were off work as a result of disability and were receiving either long-term disability or statutory workplace safety insurance benefits. The 8 claimants had been off work for a number of years (in one case, since 1985) and there was no evidence before the Arbitrator to suggest that any of them was likely to ever return to work.

Under the VSP, the amount of the buyout payment was equal to 800 hours' pay at the employee's base hourly rate on his/her last day of work. Since all of the claimants had been off work for an extended period of time, wages had risen over the years, and the amount of the buyout was based on the employee's base hourly rate on his/her last day of work, the amount of the 8 claimants' buyouts was less than what an active employee with the same job title would have been eligible to receive under the VSP.

In late 2011 the Union asserted, for the first time, that the VSP buyout formula agreed to by the Union and the Employer in 2008 was contrary to the Ontario *Human Rights Code* ("*Code*") because it treated the long-inactive disabled employees differently from their actively-employed counterparts in the same position. The Union grieved, seeking an order requiring the Employer to pay the claimants an incentive based on the current, not historic, wage rate for their respective positions.

Decision

Arbitrator MacDowell dismissed the grievance. The award was issued based upon the agreed upon facts submitted by the parties. Subsequently, facts came to light regarding the buyout received by a particular employee (not one of the 8 claimants), which the Union asserted required reconsideration of the original June 30, 2014 award. On August 8, 2014, Arbitrator MacDowell issued an addendum ("Addendum") to the June 30, 2014 award, in which he confirmed his June 30, 2014 decision to dismiss the grievance.

In coming to this conclusion, Arbitrator MacDowell relied upon the reasoning of the Ontario Court of Appeal in its 1999 decision *Ontario Nurses Association v. Orillia Soldiers Hospital et al.* (1999 CanLII 3687 (ON CA)) ("*Orillia Soldiers*") and the cases that follow it. In *Orillia Soldiers*, the Ontario Court of Appeal recognized that the fundamental nature of the employment relationship is an exchange of the employee's work for the employer's remuneration. *Orillia Soldiers* stands for the proposition that it is not prohibited discrimination to distinguish for the purposes of compensation between active employees who are providing services and disabled employees who are not.

Arbitrator MacDowell held that it was not inherently illegal to link the buyout amount to the value of the work performed by the employee, as the parties had done by distinguishing between employees at different pay rates and by basing the buyout amount on the employee's last pay rate.

The Arbitrator held that, to the extent the treatment of the claimants must be measured in relation to a comparator, the appropriate comparator group is other inactive employees (i.e. those on a non-disability-related leave) rather than active employees. In this regard, Arbitrator MacDowell noted the example of Mr. Redmond, an able-bodied employee who had taken a long leave of absence to serve as a Union official (but who maintained his status as an employee of the Employer). It was believed that, like the 8 claimants, the buyout accepted by Mr. Redmond was based on his past earnings.

Furthermore, Arbitrator MacDowell emphasized the distinctions between the "real-life" circumstances of the 8 disabled claimants and those of active employees. The 8 claimants had not worked in a number of years and were unlikely to ever return to work. Arbitrator MacDowell found that they had not really done anything to "earn" the additional buyout amount that their actively-employed counterparts were to receive.

The exchange between the Employer and the active employees was different in nature and value than the exchange between the Employer and the disabled employees. What the active employees were giving up was more valuable to them than what the disabled claimants were giving up, because it was unlikely that any of the disabled claimants would ever return to work (i.e. the future earned income and group benefits to be surrendered by the active employees were more valuable than the LTD and other benefits to be surrendered by the claimants). Likewise, what the Employer was receiving in return for the active employees' buyouts was more valuable to the Employer than the disabled employees' buyouts.

Subsequent to issuance of Arbitrator MacDowell's June 30, 2014 decision, facts came to light regarding Mr. Redmond, the employee who took a leave of absence to serve as a Union official and who later accepted a buyout under the VSP. As it turned out, Mr. Redmond's buyout was linked to the current collective agreement rather than his historical pay rate.

Arbitrator MacDowell confirmed his prior decision, noting that details regarding the treatment of Mr. Redmond and other buyout recipients under the VSP were "sketchy." Mr. Redmond's treatment was likely the result of a mistake in administering the VSP, of which the Arbitrator noted there were many. Arbitrator MacDowell emphasized the importance of achieving substantive equality in the treatment of the disabled employees, and de-emphasized the importance of selecting an appropriate comparator group. In this case, the disabled claimants received a smaller buyout because what they had given up was less valuable than what their actively-employed counterparts had given up.

Implications

This decision supports the proposition expressed in *Orillia Soldiers* that it is not prohibited discrimination to distinguish for the purposes of compensation between active employees who are providing services and disabled employees who are not. Accordingly, an appropriate comparator group for disabled employees' treatment under a compensation program will often be other inactive employees, such as those on non-disability-related leaves.

When administering a compensation program, the treatment of inactive disabled employees should also be measured against their active counterparts to further mitigate the risk of a successful human rights challenge. Specifically, it will be helpful to an employer not only to demonstrate similarity between the treatment of disabled employees and other inactive groups, but also to be prepared to explain differences between the treatment of disabled employees and their actively-employed counterparts under the program in terms of differences between the wage/work relationship of each group with the organization.

The Employer in this case was successfully represented by Hicks Morley lawyer Martin Addario.

KEY DEVELOPMENTS IN EXECUTIVE COMPENSATION LAW

Unique Broadband Systems, Inc. (Re), **2014 ONCA 538**

In this Ontario Court of Appeal decision, the Court denied certain incentive compensation to a former CEO, which it found to be excessive. The Court also denied the former CEO an enhanced severance payment provided for under his management agreement on the basis that his involvement in awarding the excessive incentive compensation to himself and others was a serious breach of fiduciary duty that could have caused material injury to the corporation had the compensation been paid.

Facts

Unique Broadband Systems Inc. ("UBS") was a public company listed on the TSX Venture Exchange. UBS was essentially a holding company for Look Communications Inc. ("Look"). Look's primary asset was a license to use a band of the telecommunications spectrum.

UBS engaged Gerald McGoey ("McGoey") as its CEO through a management services agreement with McGoey's personal services corporation ("Management Services Agreement"). The Management Services Agreement provided McGoey with enhanced severance equal to 300% of his compensation if he was terminated without cause, as defined in the Management Services Agreement (a so-called "golden parachute").

In 2006, UBS implemented a share appreciation rights incentive compensation plan ("SAR Plan"). Under the SAR Plan, a participant receives a cash payment equal to the appreciation, if any, in the price of a SAR unit between the grant date and the date the unit vests. The value of a SAR unit tracks the value of a company share.

In 2009, UBS caused Look to sell its band of the spectrum for $80 million through a court-supervised plan of arrangement. The sale proceeds were significantly lower than had been anticipated. Following the sale, the Compensation Committee of UBS's board of directors began reviewing the SAR Plan. The Compensation Committee was comprised of McGoey and two other directors of UBS. Each member of the Compensation Committee had been awarded a large number of units under the SAR Plan.

In June 2009, the UBS board of directors approved the establishment of a SAR cancellation payment pool of $2.3 million, from which holders of SAR units would be paid a SAR cancellation award, contingent upon Look receiving the $80 million proceeds from the spectrum sale and the SAR unit holders relinquishing their rights under the SAR Plan. The proposed SAR cancellation awards were based upon a unit price of $0.40, even though UBS shares were trading in the range of $0.15 at the time.

The UBS board of directors also approved the payment of bonuses to certain personnel, including McGoey. Although McGoey sought the establishment of a bonus pool of $7 million, the UBS board of directors approved a bonus pool of $3.4 million.

McGoey was slated to receive $600,000 from the SAR cancellation payment pool and $1.2 million from the bonus pool. In addition to these amounts, McGoey and the directors of Look also established a SAR cancellation payment pool and bonus pool for that company.

Disclosure of these compensation arrangements to shareholders precipitated the calling of a special shareholders' meeting and an ensuing proxy battle. In the face of this shareholder resistance McGoey caused UBS to advance $200,000 to him for the payment of his anticipated legal fees.

In July 2010, the special shareholders' meeting was held, at which McGoey and the other UBS directors were removed as directors. McGoey resigned as CEO of UBS, taking the position that his removal as a director constituted termination without cause within the meaning of his Management Services Agreement. On this basis he claimed that he was entitled to his golden parachute payment.

In 2011, UBS became insolvent and was granted protection under the *Companies' Creditors Arrangement Act* ("CCAA"). McGoey filed a $10 million claim as a creditor of UBS under the CCAA proceeding but his claim was denied. He sought to reverse this decision and the matter proceeded to trial. The trial court held that McGoey had breached his fiduciary duties to UBS and was therefore not entitled to the SAR cancellation award or bonus award. It further held that, in participating in the approval of the excessive compensation to himself and others, McGoey had not acted honestly and in good faith with a view to UBS's best interests and therefore he was disqualified from indemnification. However, the trial court held that McGoey had been terminated without cause as defined in his Management Services Agreement and was therefore entitled to his golden parachute.

Decision

The Ontario Court of Appeal sided with UBS and against McGoey on all counts.

The Court of Appeal upheld the decision of the Ontario Superior Court of Justice that McGoey had breached his fiduciary duty to UBS by participating in the board's decision to approve the excessive SAR cancellation payment pool and bonus pool.

The UBS board had no credible analysis to justify the fairness and reasonableness of the SAR cancellation payments, even though they represented a significant percentage of UBS's market capitalization. Establishment of the SAR cancellation payment pool based on a unit price of $0.40 was unjustified and unrealistic given that UBS shares never achieved this level following the spectrum sale. Under the SAR Plan, McGoey would have been entitled to a payment of $75,000, whereas his SAR cancellation payment was $600,000. For these and other reasons, the Court of Appeal found that the trial judge had quite rightly concluded that UBS's decision to approve the SAR cancellation payments was motivated by self-interest.

Similarly, with respect to the bonus pool, the Court of Appeal observed that the UBS board of directors did not seek or receive any expert advice on the appropriateness of the bonus amounts. The board did not present any market data demonstrating the bonus pool's reasonableness. As a member of the board and its Compensation Committee, McGoey's participation in the approval of the excessive compensation was a serious breach of his fiduciary duty to act in UBS's best interests.

The Court of Appeal rejected McGoey's argument that the UBS board of directors' decision to approve the SAR cancellation payment pool and bonus pool was protected by the "business judgment rule." It held that there was ample evidence to rebut the presumption that the UBS board had acted on an informed basis, in good faith with a view to UBS's best interests when it approved the SAR cancellation payment pool and bonus pool.

The Court of Appeal upheld the trial court's decision to deny McGoey indemnification of his legal fees and other expenses under the *Ontario Business Corporations Act* ("OBCA") The Court of Appeal noted that the trial court had ample evidence to conclude that McGoey had not acted honestly and in good faith and should be denied indemnification on this basis.

Finally, the Court of Appeal reversed the trial court's ruling that McGoey was entitled to enhanced severance under the Management Services Agreement. Under the Management Services Agreement, McGoey was entitled to enhanced severance if UBS terminated his employment absent a "default" event (essentially, termination without cause). A default occurred if McGoey committed an act materially injurious to UBS which gave rise to termination for cause, UBS provided him with notice of the default and McGoey failed to cure the default. Since UBS had not notified McGoey that his participation in the approval of the excessive compensation arrangements was a default event, and had not provided him a reasonable opportunity to correct that default, the trial court ordered UBS to pay the enhanced severance to McGoey.

In the Court of Appeal's view, McGoey's participation in the approval of the excessive compensation arrangements was a serious breach of fiduciary duty that could have caused material injury to UBS had the amounts been paid. The OBCA contains an express provision which essentially prohibits "contracting out" of its requirements. The Court of Appeal held that to allow McGoey to receive the golden parachute provided for under his Management Services Agreement would be a commercially absurd result and an impermissible contracting out of his OBCA duty to act honestly, in good faith and with a view to UBS's best interests.

Implications

Directors and senior officers of a corporation are subject to a fiduciary standard of care, which compels them to act honestly and in good faith with a view to the corporation's best interests. This fiduciary standard of care requires directors and senior executives to avoid conflicts of interest and to not abuse their position for personal gain. Participation by directors and officers in the approval of excessive compensation arrangements – particularly where the decision-makers stand to gain from those arrangements – will be seen to be a serious breach of fiduciary duty.

Where a director or officer will be a participant in the proposed compensation arrangement, simply declaring a conflict of interest (but continuing to participate in the approval process) will not cure the conflict. Although the business judgment rule protects directors' and officers' informed decisions from being second-guessed by courts, it will not immunize a decision where there is evidence that the decision maker acted dishonestly or in bad faith, or was motivated by self-interest. Third party, independent market data supporting the reasonableness of an executive compensation arrangement can enhance its defensibility in the event of a challenge. To that end, boards of directors and management should consider retaining a qualified compensation consultant to provide market data and independent, objective analysis as to the reasonableness of a proposed incentive compensation arrangement.

Employers and executives cannot contract out of the requirements of the OBCA, which – along with other corporations statutes – require directors and officers to act honestly, in good faith and with a view to the best interests of the corporation. Accordingly, dishonest or bad faith conduct may constitute grounds for denial of severance or other contractual payments, since contracting out of these statutes is generally prohibited.