MERCER

31 July 2013

COMMUNIQUÉ

REDUCTION OF POST-RETIREMENT BENEFITS – THE GM CASE

In 2007, General Motors (GM) informed its salaried retirees that it was reducing their post-retirement health care benefits over the next three years. In 2009 they were informed that their post-retirement life insurance coverage was curtailed. A class action was commenced in 2010 by former salaried and executive employees and certified on consent.

A motion was made for summary judgment on common issues. The motion was greatly simplified by the fact that the parties framed the issues for decision by the Ontario Superior Court of Justice.[1] The parties agreed that the Court should consider some 260 documents, including benefit booklets, company letters and various announcements, to determine whether the contract between the employer and the employees permitted the reduction of the post-retirement benefits after retirement.

Reservation of rights clause and benefits documents

For purposes of analysis, the Court focused on the reservation of rights (ROR) clause, holding that the 1994 version was dominant and should be used. The relevant portion of the ROR clause indicated that "General Motors reserves the right to amend, modify, suspend or terminate any of its programs (including benefits) ... The Programs, benefits and policies to which a salaried employee is entitled are determined solely by the provisions of the applicable program, benefits or policy".

In 1996, the ROR clause had been amended by referring to "salaried employee/retiree", instead of "salaried employee" alone, in the second sentence quoted above. Counsel for GM argued, however, that this change was not relevant because he submitted that only the first sentence of the ROR clause was determinative. GM counsel had argued that the inclusion of the words "at any time" in some other ROR clauses ("reserves the right to amend, suspend or terminate ... *at any time*") conferred a power to amend after retirement. The Court disagreed, holding that the inclusion of the words "at any time" was irregular and sporadic; it also found the words essentially redundant.

[1] *O'Neill v. General Motors of Canada*, 2013 ONSC 4654.

The Court examined what it called the "benefit documents", namely the 260 documents read without reference to the ROR clause, if any, in those documents. The Court concluded that, based on the benefit documents, salaried employees could reasonably expect that "a core" of health care and life insurance benefits would continue for life. Emphasis was placed by the Court on language such as "[y]our health care coverage will be provided at GM's expense for your lifetime" and "your basic life insurance will be continued for you for your lifetime".

ROR clause ambiguous

The matter was further refined when the parties agreed that it was to be resolved using contractual principles alone. The plaintiffs had conceded that the employer could reduce benefits after retirement if the contractual right to do so was clear and unambiguous. It was also agreed that the Court should assume that each document was received and read by the retiree on or about the time that the document was dated. With the dispute so refined and with the above key findings of fact by the Court, the analysis proceeded as follows:

1. The ROR clause was not clear and unambiguous with respect to the right to amend post-retirement benefits after retirement. It did allow, however, changes to post-retirement benefits for active employees.
2. All versions of the ROR clause, save one, were not clear and unambiguous with respect to changes after retirement. The 2012 ROR clause was clear enough. It provided the employer the right to amend, modify, suspend or terminate "any of its programs (including benefits) and policies covering employees **and former employees, including retirees, at any time, including after employees' retirements**".[2]
3. ROR clauses should be interpreted restrictively and doubt must be resolved against the employer.
4. In the absence of clear language to the contrary, employment contracts are to be interpreted to protect employees.
5. Unilateral powers conferred on an employer under an employment contract should be exercised in good faith.
6. The 2012 ROR clause, which was drafted after commencement of the litigation, can be considered in determining whether the 1994 ROR clause was clear and unambiguous. The 2012 ROR clause demonstrates that the employer knows how to draft a clear and unambiguous clause.

The Court concluded that the employer could not amend post-retirement benefits, including life insurance, after retirement. Prior to retirement, however, the employer could amend post-retirement benefits, even for employees who were eligible for retirement.

Early retirees

Several employees had accepted early retirement packages that contained the following clause:

> *I understand the General Motors Canadian Retirement Program for Salaried Employees and the other General Motors benefits programs provide that the Company reserves the right to amend, modify, and suspend or terminate each program.*

[2] Emphasis added by Court.

The employer argued that this clause was clear. For early retirees, the only time that the benefit program could be changed was after retirement. The Court viewed the clause as an acknowledgment of, and subsidiary to, the ROR clause that did not broaden the scope or reach of the latter. Accordingly, the Court held that the ROR clause had the same application to early retirees as it had to other retirees.

The executives

Executive retirees participated in a retirement program that provided supplemental pension, liability insurance and life insurance benefits. In 2009, the employer announced that it was reducing or eliminating that program. The Court found that the executives knew from the outset based on clear language that benefits thereunder could be reduced or eliminated, even after retirement. Accordingly, the employer was not in breach of its obligations in reducing those benefits.

Comment

The GM case represents a high water mark of strict construction. GM has stated that it plans to appeal.

This case is consistent with recent case law in strictly interpreting the power of an employer to amend or reduce post-retirement benefits. Contrary to what appears to be the law in the US, the presumption in Canada is that post-retirement benefits cannot be changed after retirement. That presumption can only be displaced by clear and unequivocal language.

While the case could have been decided simply on the basis that the documents were inconsistent and their language unclear, the Court did invoke the general concepts of the protective interpretation of employment contracts and good faith application of unilateral powers. Unanchored to specific facts, those concepts could be used to restrain the power of an employer to amend an employment contract. The Court also used a later, stronger, version of the ROR clause to restrictively read the earlier versions. In this way, changes perhaps intended to be clarifying were considered substantive. It is also troubling to see changes made after the commencement of litigation used in the litigation itself. This has disturbing implications for parties seeking to mitigate their damages after litigation.

It was unnecessary for the Court to consider the possible impact of a change to the ROR clause during the currency of the employment contract. Is an active employee bound by an employer's substitution of clear language for unclear language? That raises the question of the power of unilateral amendment, considered recently by the Ontario Court of Appeal in the *Wronko* case.[3]

The concessions made by counsel and the factual matrix decided by the Court resulted in very cut and dry rules. An active employee who retired one day before the effective day of the benefit change would not see his benefits reduced; an employee who retired one day after the effective day of the benefit change would. Counsel and courts in other cases might not be so reductive.

[3] In *Wronko* the Ontario Court of Appeal held that a unilateral employer amendment of an employment contract cannot be made effective simply by giving advance notice.

What to do

Employers who want to reduce post-retirement benefits are well advised to review all relevant documentation and communications with employees and evaluate the risk of potential litigation and available risk management options. It may be that the relevant ROR clause is clear and unambiguous. If the ROR clause is not sufficiently robust, employers may consider substituting a more definitive clause although it is not clear that such a substitution would be effective.

For more information, contact your Mercer consultant or the following Mercer consultants:

Marcel Théroux
416 868 2158
marcel.theroux@mercer.com

Leigh Ann Bastien
416 868-2568
leighann.bastien@mercer.com

Thais Pinto
514 841 7819
thais.pinto@mercer.com

Mercer Offices:

Calgary
403 269 4945

Edmonton
780 483 5288

Halifax
902 429 7050

London
519 672 9310

Montréal
514 285 1802

Ottawa
613 230 9348

Québec City
418 658 3435

Regina
306 791 4558

Saskatoon
306 683 6950

Toronto
416 868 2000

Vancouver
604 683 6761

Winnipeg
204 947 0055

Mercer Website: **www.mercer.ca**