

## **Post Retirement Benefits**

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The ever-increasing costs of post-retirement medical benefits has caused many employers to seek ways of reducing those costs. There is a concern that it is difficult to increase member contribution levels and/or reduce health and welfare coverage for retirees unless the right to alter or eliminate such benefits was been clearly communicated to the plan members before their retirement.

The November 1, 2009 decision of the British Columbia Supreme Court in *Bennett v. British Columbia* would make it easier for employers to alter such coverage. In that case, the B.C. Government sought to increase member-paid premiums and reduce retiree benefits to retired civil servants, employees of Crown corporations and their dependents. The retiree benefits were provided pursuant to legislation that gave the Lieutenant-Governor discretion to set premiums in respect of such benefits.

The Court held that the post-retirement benefits were not part of the initial contract of employment, nor was there fresh consideration to form a contractual basis for a claim to such benefits upon retirement. The governing legislation always clearly contemplated amendments to the premiums which funded the benefits. Information given to members in plan booklets and upon retirement was descriptive, and not promissory in nature.

Moreover, the Government could not be said to have a fiduciary duty to provide the benefits. A fiduciary duty implies that there is a reasonable expectation that one party will act in the other party's best interests. Governments by their nature have obligations to many stakeholders that they must balance in the public interest. Employees could not have had a reasonable expectation that the government would act only in their interests, potentially at the expense of others. Nor was there a breach of fiduciary duty in failing to inform the members that the benefits might be reduced; the Government fulfilled its duty in describing the existing benefits.

In an earlier 2006 decision, *B.C. Nurses' Union v. Municipal Pension Board of Trustees*, the B.C. Supreme Court also analyzed the governing legislation and concluded that post-retirement health and welfare benefits were not vested. The Court gave a number of useful indicia for that conclusion:

- Absence of contractual entitlement
- Particular statutory framework (if benefits were conferred by statute)

- Lack of statutory protection (unlike pension benefits)
- Lack of clear and express intention to vest
- Significant cost fluctuations being inconsistent with intention to vest

Both courts distinguished The Supreme Court of Canada's decision in *Dayco (Canada) Ltd. v. C.A.W. – Canada* on the basis that there was in that case a collective agreement from which the parties' intention that the post-retirement benefits survive the agreement could be inferred.

In both the *Bennett* and *Nurses' Union* decisions, the statutory regime was important. It is interesting that a claim by Ontario retired public servants as to the continuation of post-retirement health and welfare benefits in 2003 was settled and did not go to court. For private sector employers with collective agreements, those agreements may be determinative. For other private sector employers, a long history of providing post-retirement benefits, along with member communication materials, might lead the court to a different conclusion than in either of the B.C. cases referred to above.

It will be interesting to see how the courts deal with the fiduciary duty issue for private sector employers. Can private-sector employers could successfully disclaim a fiduciary duty to maintain benefits for retirees, not having the broader public interest to assert? If there is no contractual obligation to continue to provide post-retirement health and welfare benefits, because of the lack of consideration, is there a duty to so advise members before they retire that the benefits may be reduced or eliminated? The distinction between promising and describing a benefit seems rather fine. We await further judicial decisions.

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