

PENSION CLARITY FOR EMPLOYERS

Millions of Canadians' retirement hopes rest on the fiscal health of the private pension plan to which they've contributed during their career. Understandably, that makes them sensitive to how the employer administers the pension plan fund.

Disputes have arisen, over time, relating to employers' administration of the plan funds. Such things as expenses paid out of the fund, and so-called contribution holidays taken by the employer are, not surprisingly, viewed by some employees as diminishing the funds available to eventually pay out pension benefits.

In short, plan members (employees) want to see as much money as possible going into the pension plan fund and as little money as possible being taken out or otherwise consumed.

These issues sometimes boil over to the point of litigation and that is when courts get involved to provide guidance. Surprisingly, some of these key disputes – over what the employer can and cannot do with pension plan funds – have only recently been resolved.

In a recent decision, the Supreme Court of Canada was called upon to adjudicate between the competing desires of the employer and the concerns of employees. The case originated in Ontario and involved the pension plan of Kerry (Canada) Inc.

Kerry took over a defined benefit pension plan as part of an asset purchase of DCA Canada Inc. in 1994. The pension plan had been in existence since 1954 and had been amended from time to time. In 2000, the plan was amended to include a defined contribution component.

Along the way, Kerry paid various administration expenses out of the pension plan funds. It also took contribution holidays (periods during which contributions to the plan were not made) as a result of the existence of surplus assets in the plan fund.

Certain members of the plan took exception to those practices and commenced legal proceedings. They sought orders compelling Kerry to reimburse the pension plan fund for the expenses and contribution holidays. Eventually, the dispute made its way up the ladder to the Supreme Court of Canada.

The Supreme Court ruled that, if the plan document does not expressly require the plan sponsor (the employer) to pay administrative expenses out of its own pocket, it may do so out of the plan funds. In Kerry's case, the plan documents contained no obligation for the employer to pay administrative expenses itself.

The Supreme Court also ruled that, if the plan is appropriately structured, the plan sponsor may rely on an asset surplus to take contribution holidays. And, the surplus assets of a defined benefit component can be used to fund a contribution holiday for both the defined benefit and defined contribution aspects.

In a significant additional aspect of its award, the Supreme Court stated that pension litigants (such as the plan members in the Kerry case) cannot presume that their legal costs will be paid out of the pension plan fund. That uncertainty creates much risk for persons wishing to challenge the employer's administration of the plan and should serve to reduce the frequency of such litigation.

It is critical to remember that the obligations of the plan sponsor in administering the pension will always be dictated, primarily, by the text and context of the pension plan documentation. Care must be taken to ensure that guidance on disputed issues of plan administration is taken, first and foremost, from the plan itself rather than from general statements of law.

In sum, the Supreme Court of Canada's decision in the Kerry (Canada) Inc. case brings a degree of certainty to pension administration which, of late, has been missing. Plan sponsors and employees alike should be gratified by this development.

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