Fraser and Other Notable Case Law Developments In 2020

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Last year saw fewer pension cases rendered by the courts than years prior, likely in part due to the temporary closure of the courts due to COVID-19. Nevertheless, the courts issued a few notable pension decisions that will have ramifications past 2020.

Fraser v. Canada (Attorney General)

In the most prominent case of 2020, the Supreme Court of Canada ruled that a pension plan was in violation of the equal rights section of the Canadian Charter of Rights and Freedoms. In Fraser, three members of the Royal Canadian Mounted Police who took maternity leave in the 1990s experienced difficulty balancing work duties with childcare obligations upon returning to full-time service. In 1997, the RCMP introduced a job-sharing program that allowed members to split the duties and responsibilities of one full-time position, temporarily reducing participants' working hours and pay. The claimants enrolled in the job-sharing program, where most of the participants were women with young children.

As RCMP members, the claimants participated in a defined benefit pension plan. Under that plan, full-time RCMP members returning from an unpaid leave could 'buy back' service missed by making the contributions that both the member and the RCMP would have made had the member been actively employed. The claimants expected that job-sharing would be eligible for full pension credit pursuant to the pension plan's buy-back provisions. However, they were told that the job-sharing program constituted part-time work for which no buy-back was available.

The claimants brought an application arguing that the pension consequences of job-sharing had a discriminatory impact on women contrary to subsection 15(1) of the Charter.

The Federal Court dismissed the application, holding that job-sharing was not disadvantageous when compared to unpaid leave and, in any event, was the result of the claimants' choice, and not their gender or family status. The Federal Court of Appeal upheld that.

The majority of the Supreme Court allowed the appeal and held that the pension plan's treatment of job-sharing participants constituted adverse impact discrimination.

To reach this conclusion, the court applied the two-step approach to the subsection 15(1) analysis.

At the first stage of the test, the court found that the pension plan's use of a temporary reduction in working hours as a basis for imposing less favourable pension consequences had an adverse impact on women. Adverse impact discrimination occurs when a seemingly neutral law has a disproportionate impact on members of a group protected under the charter. The court's finding was based on statistical evidence showing that RCMP members who worked reduced hours in the job-sharing program were predominantly women with young children, as well as evidence on the disadvantages women face as a group in balancing professional and domestic work.

At the second step of analysis, the court found that the pension plan perpetuated a longstanding source of disadvantage to women: gender biases within pension plans, which have historically been designed "for middle and upper income fulltime employees with long service, typically male." The court also noted that differential treatment can be discriminatory even if it was the claimants' "choice" to job-share.

It ruled that the pension plan's buy-back provisions could not be justified under Section 1 of the charter. Section 1 allows a limit on a charter right to be justified if the state identifies a pressing and substantial objective for limiting the charter right. The court found that the federal government did not identify a pressing and substantial policy concern, purpose, or principle that explained why job-sharers should not be granted fulltime pension credit for their service.

As a remedy, the federal government was ordered to develop a methodology for facilitating the buy-back of pension credits that is in accordance with the decision. Notably, the order was given retroactive effect.

While it remains to be seen whether provincial human rights bodies will take on a similar equality analysis for "non-government" plan sponsors and plan administrators, this case creates a number of potential issues for plan sponsors and plan administrators. These include

whether their plans could also have (inadvertent) adverse effect discrimination and the appropriate extent necessary to legally accommodate different work situations, especially with the added layer of the pandemic.

Austin v. Bell Canada

In this case, a long-time employee was the representative plaintiff in a class action brought on behalf of approximately 35,000 pensioners who were beneficiaries of the employer's pension plan. The dispute centered on the proper calculation of the cost-of-living adjustment under the plan text and, in particular, whether the employer was entitled to round the Consumer Price Index used to calculate the cost-of-living adjustment to the nearest two decimal points. The issue turned on the interpretation of the plan's definition of "pension index" which affected the calculation of the cost-of-living adjustment. The plaintiff's interpretation amounted to a higher cost-of-living adjustment than the employer's interpretation, amounting to significant monetary amounts.

The motions judge certified the class action, but dismissed it on summary judgment in favour of the employer. The motions judge reasoned that if the plaintiff's interpretation was applied, it would render another provision within the pension plan meaningless. The motions judge concluded that the pension plan text should be read and interpreted as a whole and adopted the employer's interpretation.

The Ontario Court of Appeal agreed with the motion judge in many aspects of the interpretation of the definition, but found that he made a palpable and overriding error of fact and/or of law in ignoring uncontradicted evidence that gave meaning to the definition in dispute. Ultimately, the Court of Appeal concluded that the plain grammatical interpretation of the definition was reconcilable with other provisions of the plan, and should be adopted. The court therefore set aside the summary judgment dismissing the action and awarded summary judgment to the plaintiff, ultimately awarding the higher cost of living adjustment.

This case emphasizes the importance of carefully and precisely drafted provisions in pension plan documentation, including pension plan texts.

United Steel v. Georgia-Pacific LP

With the pandemic's ongoing effects still being felt, many employers may have questions respecting pension plan entitlements of employees while on layoff. While statutes and regulations have a large role to play, a case involving layoff is of interest.

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The employer in this case placed its employees on indefinite layoff with recall rights following the idling of its plant. Pursuant to an agreement between the employer and the union, the laid off employees could elect at any time either to take their severance pay or to retain their recall rights. Six employees, who were later the subject of the grievances, elected to forgo their recall rights and accept severance pay. As a result, the pension administrator calculated their pensions without including any grow-in benefits as provided for under the Pension Benefits Act (Ontario).

In Ontario, an employee's entitlement to grow-in benefits is triggered by an "activating event," as defined in subsection 74(1) of Ontario's pension legislation, which includes an employer's termination of a plan member's employment. The issue in this case was whether the employer had terminated the six employees so as to trigger the grow-in benefit.

The arbitrator found that the employees had not been terminated within the meaning of Ontario's pension legislation and dismissed the grievances.

On an application for judicial review, the Ontario Divisional Court found that the arbitrator had failed to consider a provision in a regulation made under the Employment Standards Act, 2000 (Ontario). The provision in question provides that, if an employer bound by a collective agreement is or will be laying off an employee for a period that may be longer than a temporary layoff and the employer would be or might be in breach of the collective agreement if the employer advised the employee that his/her employment was to be terminated, the employer may provide the employee with a written notice of indefinite layoff and the employer will be deemed as of the date on which the notice was to have provided the employee with a notice of termination. The court found that the arbitrator's failure to consider that provision rendered his decision unreasonable and set the decision aside. The court remitted the matter to a different arbitrator.

For Ontario employers, this decision may impact whether, on a layoff, employees are entitled to grow-in benefits. Employers who have in place defined benefit pension plans will want to keep an eye on this decision.

2020 has seen fewer pension cases from the courts than years prior. With the courts adapting to COVID-19, including virtual hearings, it is likely an aberration and we will likely see more notable pension cases in 2021. **BPM**

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