
Recent Developments in Employee Benefits Law

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Introduction / Overview

1. Insurance Contracts
 - a. Overpayments
 - b. Limitation periods
2. Discrimination
3. Post-Retirement Benefits
4. Mandatory Insurance of LTD Plans

Garneau v. Industrial Alliance

- Insurance Policy said that LTD benefits would be reduced by superannuation benefits.
- Through no fault of her own, appellant's government employer did not send particulars of her retirement benefits to insurer until 5 years past her retirement date.
- Led to a \$114,000 overpayment, which insurer was recovering through 50% reduction to current LTD payments - appellant objected.

Garneau (cont.)

- The Ontario Court of Appeal found for the insurer:
- i. no *ad hoc* fiduciary duty in the circumstances (contractual relationship only);
 - ii. “payable” could not be interpreted as distinct from “paid or payable” in order to prevent recovery of past overpayments;
 - iii. unnecessary to express a rate of reduction precisely as a percentage;
 - iv. the *Wages Act* was inapplicable so could not argue the 50% reduction exceeded the permissible reduction under that Act.

Kassburg v. Sun Life

- Kassburg submitted a claim for LTD benefits in 2008
- Insurer denied the claim for insufficient medical information
- Final appeal denied in February 2011
- In February 2012, Kassburg started a lawsuit
- Insurer argued that the limitation period had expired

Kassburg (cont.)

- The insurance policy provided a limitation period of one year
- Ontario's *Limitations Act, 2002* prevents parties from contracting out of the statutory two year period, subject to exceptions
- The motions judge held that the “business agreement” exception applied

Kassburg (cont.)

- However, the motions judge found that the policy's limitation clause was unclear, and thus ineffective
 - While the policy booklet provided that no action could be brought more than one year after the claimant's forms were received by the insurer, the policy document provided that no action could be brought after "the end of the time period in which proof of the claim is required."
- The statutory limitation period began to run when the final appeal was denied, so the lawsuit was started in time

Kassburg (cont.)

- The Court of Appeal:
 - affirmed the reasons of the motions judge; and
 - held that an LTD policy could not be a “business agreement” for the purposes of the *Limitations Act*. The parties to a business agreement must not include individuals and the contract cannot be for personal, family or household purposes.
- Alberta *Limitations Act* does not have a similar exception regarding “business agreements”

Lessons from *Garneau* and *Kassburg*

- Group benefit contracts are legal documents and will be subject to judicial interpretation accordingly
- Although these two cases involved actions by individuals, keep in mind that your organization and the insurer are entering into these arrangements,
 - ensure that an appropriate level of due diligence is applied

Jones v. Coast Mountain Bus Company

- LTD plan for transit employees administered by board of trustees
- Benefits determined through collective bargaining, set out in collective agreement and mirrored in plan text
- LTD coverage terminates at age 65
 - Employee funded
 - Unreduced pension available at age 65
- Jones claimed this was a breach of the BC Human Rights Code
- Definition of age amended in 2008 to remove reference to age 65, and prohibit mandatory retirement

Jones (cont.)

- Exception for pension and benefit plans (s. 13(3)(b))
 - Restriction on discrimination in employment does not apply to “to the operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan, whether or not the plan is the subject of a contract of insurance between an insurer and an employer”
- Defendants argued LTD plan fell within exception
- Tribunal found there was prima facie discrimination but plan exempted as a *bona fide* plan contemplated under s. 13(3)(b) exception

Jones (cont.)

- Applied 2 tests
 - *Zurich* insurance test – “reasonable and bona fide grounds” for discrimination within an insurance policy
 - LTD plan based on sound and accepted insurance practice and no practical alternative
 - *Potash* test – “legitimate plan that was adopted in good faith and not for the purpose of defeating protected rights”
- Passed both tests – complaint not accepted

Johnston obo others v City of Vancouver (No 2)

- Complaint on behalf of employees of City over age 65 that age 65 cut-off for LTD coverage discriminates based on age.
- Premiums shared between ER/EE.
- Specifically considered which “*bona fide*” plan test applies.

Johnston (cont.)

- Held:
 - *Potash* test governs, not *Zurich*.
 - No suggestion that plan was illegitimate. It was adopted in good faith through collective bargaining.
 - Plan passed *Potash* test – it must be a legitimate plan adopted in good faith and not for the purpose of defeating protected rights under the Code.
- Similar wording in s. 7(2) of *Alberta Human Rights Act*

Lessons from *Jones and Johnston*

- Age 65 restrictions in employee funded LTD plans work
- A benefit plan restriction based on age adopted in good faith and not for the purpose of defeating protected rights is exempt from prohibition against employment discrimination on basis of age

Post-Retirement Benefits (PRBs)

- *Lacey v. Weyerhaeuser Company Limited:*
 - Plaintiffs were non-unionized retirees participating in a health benefit program inherited by the Company from its predecessor
 - Predecessor communicated program to employees and retirees via various benefit brochures and letters
 - Company froze its contributions and advised retirees that they would bear future premium increases

Post-Retirement Benefits (cont.)

- *Lacey v. Weyerhaeuser Company Limited* cont.
- BCCA upheld lower court decision in favour of retired plaintiffs
 - The PRBs constituted a form of deferred compensation
 - The promise made the Company contractually bound to continue the benefits for the full duration of the retirees' retirement
 - Company could make changes to PRBs during employment, but not after an employee retired
 - SCC denied leave to appeal decision

Post-Retirement Benefits (cont.)

- *O’Neill v. General Motors of Canada Limited*
 - GM announced it would reduce retirees' post-retirement healthcare benefits and life insurance benefits.
 - OSC considered whether unilateral changes made to PRBs after employees had retired constituted breach of contract.
 - Repeated promises regarding PRBs
 - = salaried employees had a reasonable expectation that a core of PRBs would continue unchanged for the rest of their lives
 - = the benefits became contractually enforceable and constituted deferred compensation for services rendered

Post-Retirement Benefits (cont.)

- *O'Neill v. General Motors of Canada Limited* cont.
 - There had been a reservation of rights clause in all PRB documentation since 1994
 - The Court found that this clause reserved the right of GM to change PRBs in respect of an active salaried employee but not a retired employee
 - GM was not in breach of contract re reducing the PRBs of executive retirees
 - foundational document made it clear that the program was not guaranteed
 - executive retirees knew from the outset and should reasonably have understood that their benefits were not guaranteed
 - Case was ultimately settled

Lessons from *Lacey* and *O'Neill*

- *O'Neill* and *Lacey* show that PRB decisions are highly fact driven
- Reservation of rights clauses will be respected by the Courts, but they should appear consistently throughout the plan documentation and they should be drafted to specifically contemplate changes to post-retirement benefits after retirement

Insurance of LTD Plans

- Many employer sponsored and most trustee LTD plans are self insured
 - Greater control
 - Lower cost
- If employer or plan insolvent, LTD claimants have no recourse
 - Massey Combines (1988)
 - Eaton's (1999)
 - Nortel (now)

Insurance of LTD Plans

- Effective July 1, 2014, *Canada Labour Code* requires all federally regulated employers who provide LTD benefits to do so via insured arrangement
- Also applies to trustee benefit plans providing LTD benefits to federally regulated employees

Insurance of LTD Plans

- New rules apply on a go-forward basis as of July 1, 2014
 - Don't have to insure LTD benefits for employees who prior to July 1, 2014 were receiving LTD benefits or had submitted applications for LTD benefits
 - New penalty provisions under the Code- \$250,000 maximum fine (previously \$5000)
- *Canada Labour Code* contemplates exemption by regulation

Insurance of LTD Plans

Provincial Developments

- Ontario *Insurance Act* amended in July 2014 to require insurance of LTD – not in force yet
 - Regulations out for comment, including exemptions
 - Asking for feedback on who should be exempted from requirement
- AB, BC and MB require sponsors of self insured LTD plans to notify members that benefits not insured
 - These and other provinces may yet follow federal and Ontario lead

Conclusions

- It has been relatively quiet on the legal front when it comes to group benefits
- However, don't forget that the common law imposes a duty of care on benefit administrators to:
 - Competently administer the plan; and
 - Provide beneficiaries with material and sufficient information with respect to insurance policies (e.g., options, timelines, consequences of failing to meet timelines, etc.)

Information must be clear, complete, accurate and sufficient to allow beneficiaries to make informed decisions on coverage

Questions?

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