

EMPLOYMENT LAW CONFERENCE – 2003

Important Pension Considerations for Employment Law Practitioners

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IMPORTANT PENSION CONSIDERATIONS FOR EMPLOYMENT LAW PRACTITIONERS

I. Introduction

Pension benefits are of critical importance to a great number of Canadian workers. As our working population ages, those persons who have contributed to a pension plan look closely at the pension payments they can expect to receive on retirement. In the event of termination before normal retirement age, this issue is often critical for dismissed workers.

Pension issues arise for employment lawyers in the context of individual terminations, or perhaps in the context of issues common to all pension plan members, such as entitlement to surplus funds, contribution holidays, and other similar issues.

In this paper, I will discuss the issues that routinely arise in a wrongful dismissal damage assessment, and then, more complicated issues that relate to pension entitlement-where one questions the validity of pension information disseminated by employers to their workers.

II. Pension Issues in a Typical Wrongful Dismissal Case

A. How the Issue Arises

On a daily basis, dismissed employees present at the offices of their preferred employment law practitioner. They have been dismissed without cause, without any or sufficient notice, or payment in lieu thereof. The employee brings in papers, including a pension statement, likely a year or two old. The pension statement includes information about the date of plan entry, the employee's years of eligible service, and the amount of retirement income the employee could expect at normal retirement age (usually age 65). The employee may have brought in payroll records showing the amount of the employer's contribution to the pension plan in the prior year(s). The employee needs advice about his/her damages. Is the employee entitled to any compensation for loss of pension accrual during the notice period, and if so, how much.

B. Types of Pension Plans

The first thing that needs to be understood is the specific nature of the pension plan(s) involved. Pension plans take many forms, the most common of which are:

- (a) **Defined Benefit Pension Plans:** In these plans, contributions are made by pension plan sponsors (employers) and employees in accordance with formulae provide in the pension plan text. Funds are typically impressed with a trust, held by a trustee, and invested. The plan text includes provisions entitling plan members to receive defined monthly benefits on retirement. In these sorts of plans, because of the fact that beneficiaries are only entitled to defined benefits, surpluses can arise. Surpluses would arise in the event that contributions to the fund, plus net gains on investments, generate more than sufficient funds to pay the benefits.
- (b) **Defined Contribution Pension Plans:** In defined contribution pension plans, contributions are made by employees and employers according to formulae provided in pension plan texts, but the plan language typically directs that all of the funds investments, including accumulated gains and losses, are to be paid to plan beneficiaries. Because all of the plan assets are, by definition, to be paid out to beneficiaries, no issues of surplus arise.
- (c) **Hybrid Plans:** There are many different sorts of pension plans in existence, some of which combine aspects of defined contribution and defined benefits plans.

C. General Approach to Damages

In a typical wrongful dismissal case, the dismissed employee is to be placed in the same position he/she would have been in if proper notice had been given.

Southin J.A. in *Nygaard International Limited v. Robinson* (1990), 46 B.C.L.R. (2d) 103, a 1990 decision of the B.C. Court of Appeal, wrote the following passage in her reasons for judgment (at 106):

I approach the matter this way. When a contract is repudiated and the innocent party accepts the repudiation, which in my opinion is what happened here, the contract remains alive for the purpose of assessing the compensation to be paid. That compensation, that is to say, damages for the breach are what the innocent party would have received or earned depending on the nature of the contract had it been performed according to its terms. Here had it been performed according to its terms it would have been terminated within 30 days and thus, in my opinion, the defendant, the respondent in this Court, was entitled to whatever amount he would have earned in that 30 days according to the evidence. In this case that is approximately a month's salary and commission.

The application of this principle to assessment of damages for pensions requires a calculation of the difference between:

- (a) the present value of the future pension benefits the employee enjoys at the time of dismissal; and
- (b) the present value of the future pension benefits the employee would have enjoyed, had proper working notice been given.

If the employee had been given proper working notice, he/she would (presumably) have continued to make contributions to the pension plan during the notice period. The employer would have made contributions as well. The employee who was terminated with due notice would at the time of dismissal have had certain pension rights. Those pension rights could be calculated to a present value at the time of proper dismissal. These pension rights would be more valuable because of the added contributions, added years of service, and possibly growth in the plan due to investment experience.

Other potentially very material events that might have occurred during a proper notice period are "vesting" and achievement of thresholds for reduced "early retirement penalties."

"Vesting" occurs when a member of a defined benefit contribution plan gains the ability to require payment of a deferred pension at normal retirement age. Until vesting occurs, a properly dismissed defined benefit plan member would normally only be able to require return of actual contributions and interest. After vesting, the dismissed member would be able to require payment of a pension, though typically the pension would be payable at normal retirement age, or earlier with a reduction for early retirement.

Many pension plans permit early retirement, but usually with penalties ("Early Retirement Penalties"). These penalties are required to account for the fact that the pension recipient will receive benefits earlier, and thus over a longer period. Often, pension plans mandate certain percentage penalties for early retirement. For example, a plan might define normal retirement to occur at age 65, but permit retirement at age 60 with a 10% reduction, and at age 55 with a 25% reduction.

The employee dismissed without notice has lost the opportunity to see his/her pension benefits grow as a result of longer service, as a result of increased years of service, vesting, or achievement of reduced early retirement penalties.

The difference is a loss compensable in damages.

Although there are some cases, in some Canadian jurisdictions which approach damages on the basis only of the amount the employer would have contributed during a notice period, the settled approach in B.C. follows the *Nygaard* approach. Examples include:

Doyle v. London Life Insurance Co., [1984] B.C.J. No. 1119, appeal reported at (1986), 68 B.C.L.R. 285 (C.A.) where Wood J. wrote:

Exhibit 13A, filed by agreement, shows the extra monthly benefit that would have accrued to the plaintiff at age 65 had the defendant continued making its contribution to his pension throughout the notice period. That amount would appear to be \$21.83.

Without engaging in any sophisticated calculation, it would appear from Exhibit 13A that the present value of that amount per month when the plaintiff reaches age 65 would be approximately \$600. The plaintiff is entitled to that amount as well.

Ansari v. British Columbia Hydro and Power Authority, [1986] B.C.J. No. 3005, also reported at 2 B.C.L.R. (2d) 33 where McEachern C.J.S.C. wrote:

Mr. Collisbird, the well-known actuary, has calculated the difference in Mr. Ansari's pension value between his date of termination and at the expiration of an assumed period of reasonable notice of 2 years at \$10,110. B.C. Hydro's actuary, Mr. Reid does not disagree with Mr. Collisbird's methodology, and it would be fair to allow damages based upon the same formula but reduced because of the lesser notice period I have fixed.

In *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085, the Supreme Court of Canada awarded a successful plaintiff only the return of his personal pension contributions, because his pension had not vested at the time of dismissal, and would not have vested during a reasonable notice period. The clear implication was that, had the proper notice period been such that vesting would have occurred, the plaintiff would have been compensated for the loss of a vested pension.

D. Method of Proof and Assessment of Damages

Clearly the evidence by which pension damages will be proven is essentially a matter of calculation, from the formulae established in governing pension plan language. This would often require expert opinion evidence of an actuary.

This poses practical problems to employees and their advisors, because, often at the time an employee can least afford to pay professional expenses, he/she is faced not only with legal expenses but fees to obtain an actuarial report.

There is no easy answer. Sometimes the client himself is able to make reasonable estimates of the financial impact, in terms of reduced pension rights, of failure to receive reasonable notice. Sometimes the employer offers a website with a "pension calculator" which (hopefully accurately) can be used to estimate pension values in various scenarios.

But, often there is no safe alternative but to engage an expert actuary.

Pension claims should not be taken lightly. Practitioners should not endeavour to evaluate the real value of pension claims based on the magnitude of employer contributions. Pension claims can form a very material component of damages, in certain situations. Key indicators that you are dealing with a substantial pension damage component include:

- the employee's pension would likely vest during the notice period;
- if due notice had been given, the employee would have reached a threshold for lower early retirement penalties;
- the employee has not only a defined benefit pension plan but also a Supplemental Executive Pension Plan.

In the absence of actuarial evidence, there is some authority that in appropriate circumstances the court will do its best to assess the value of the loss.

· *Porter v. Amok Ltd.* (1986), 49 Sask. R. 18 (Q. B.)

E. Care in Preparation of Release

Assuming you have been able to negotiate a suitable settlement of the employee's overall claim, including the pension claim, normally the employer will seek a release. That is of course not unreasonable, but there is an issue relating to the scope of the Release that should be considered.

The release that will normally be sought will include language whereby the employee releases the employer from all claims relating to his/her employment and the termination of such employment. There may be additional language expressly referring to pension rights.

But, the employment law practitioner, particularly those acting for dismissed employees, must be alive to the important considerations discussed below. In a typical wrongful dismissal case, it will not be known if there are any potential claims for the dismissed employee relating to "irregularities" in the historical operation of the pension plan. Suffice it to say, there may be, in some situations potential legitimate claims for remedies relating to:

- pension surplus;
- contribution holidays improperly taken by the employer;
- use of pension funds, inappropriately, to pay pension administration costs;

and the practitioner should be careful not to agree to any release that will foreclose the opportunity for his/her client to share in potential future recovery of that sort.

F. Misrepresentation by Employer

Recent authorities have clarified the obligation of an employer to give full and accurate disclosure of material facts concerning employee's pension entitlement, or risk the consequences.

- In *Smith v. Canadian National Railway Co.*, [2002] N.S.J. No. 262, MacLellan J. of the Nova Scotia Supreme Court granted an award of damages to a surviving common law spouse of a deceased employee, pension plan member. The individual did not actually qualify for survivor benefits, because she had not lived with the employee as common law spouse for a full year before the employee applied for benefits. Recovery was allowed for damages, because the employee, and, therefore, the plaintiff, had been told she did qualify for benefits.
- In *Allison v. Noranda Inc.*, [2001] N.B.J. 241, the New Brunswick Court of Appeal granted judgment to a dismissed employee on the basis of an employer's failure to disclose the significance of accepting a lump sum severance instead of remaining on salary continuance. The evidence disclosed that the dismissed employee chose the lump sum amount, relying on the employer's representation that he would still be able to receive pension benefits at age 55, at a monthly amount indicated in written material given to the employee at the time of dismissal. When the employee sought to obtain benefits at age 55, two years after the dismissal, he learned that the pension amount he would receive was reduced substantially by reason of his acceptance of the lump sum. The Court found (*Queen v. Cognos*, [1993] S.C.R. 57) that while the information given to the employee was technically correct, the employer breached a duty to make available accurate pension information explaining the effect of the election to take a lump sum.

III. Questioning Employer Pension Benefit Statements

A. How the Issue Arises

In every case where an employment law practitioner is faced with an employee who enjoys rights under a pension plan, consideration should be given to the possibility that the annual pension statement the pension plan administrator has provided does not tell the whole story.

Pension benefit statements are regularly provided to employees, in compliance with regulatory reporting requirements.

Two sample Pension Benefits Statements are attached to this paper as Schedule "A."

These statements will include information about the individual's age, historical contributions, with interest, plan entry date, years of credited service, estimated monthly pension on retirement at normal retirement date, early retirement possibilities, early retirement reductions, vesting information, and possibly a pension calculation formula.

All of the information about defined benefits in these statements will be based on the current pension plan text, and will accept as valid the historical plan administration.

HOWEVER, as recent decisions in the pension context have shown, pension benefit statements are not always the whole story. In particular, the rights of employees to share in pension benefits may not be limited to the benefits described.

It is beyond the scope of this paper to review in detail all of the issues which might arise regarding pension plan administration. What I will do is discuss briefly a number of issues that have been considered in recent decisions, and describe how the issues might lead to a challenge of the statement of pension benefits.

B. Surplus Allocation

The pension benefit statement your client produces will probably contain a reference to the value of overall pension assets, and likely a comment on plan solvency, which may or may not include reference to a surplus. If there are no announced plans for the pension plan to be wound down, there will not likely be any indication of disposition of the surplus.

During the continuation of a pension plan, actuarial estimates are made from time to time about the sufficiency of plan assets to fund liabilities, on a going concern basis. Certain assumptions are made about anticipated inflows from contributions and investment returns, and about outflows to pensioners. There may be an actuarial surplus, on a going concern basis, but normally this sort of going concern surplus would not be distributed to anyone. Depending on the plan provisions, a going concern surplus might properly be used to increase defined benefits, to reduce ongoing contributions (to permit "contribution holidays") or to pay plan administration expenses.

Normally, the only way that pension plan members could expect to receive any portion of a pension plan surplus would be if the pension plan is to be wound up.

It is at the stage of pension plan windup that issues of entitlement to surplus normally come to the forefront. On windup, pension plan administrators are required to follow a procedure which requires a windup plan, including a plan for distribution of any existing surplus.

The important points for present purposes are:

- (a) when advising a terminated employee who is a member of a defined benefit pension plan, one needs to be alert to the fact that, aside from the defined benefits to which the individual is entitled, there may also be a contingent future entitlement to a plan surplus;
- b) plan surplus entitlement would only arise after the plan is terminated in whole or in part, potentially an event far in the future;
- c) the client could be entitled to participate in surplus long after termination, if the surplus is attributed to the time he/she was a plan member, so long as there is no effective release of such claims;

1. What Events Can Trigger Surplus Distribution – Partial Windups?

Obviously, in these circumstances, one of the most important preliminary issues is when surplus entitlement is triggered. Surplus entitlement can be triggered on full or partial windup of a pension plan.

Pensions in B.C. are regulated according to the provisions of the *Pension Benefits Standards Act*, R.S.B.C. 1996, c. 352 which provides:

49(1) If an employer has discontinued or is in the process of discontinuing all or an identifiable part of the employer's business operations, the superintendent may declare the plan to be terminated as of the date determined by the superintendent.

Recent court decisions have considered the issue of surplus entitlement on partial windups up of pension plans.

In *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2002] O.J. No. 4407, the Ontario Court of Appeal dealt with a situation where the employer had reorganized its business with a staff reduction and a single plant closure, leading to dismissal of 146 active pension plan members. The employer was faced with s. 70(6) of the Ontario *Pension Benefits Act*, R.S.O. 1990, c. P8 which provided:

On the partial wind up of a pension plan, members, former members and other persons entitled to benefits under the pension plan shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up.

The Court determined that in these circumstances, the Ontario pension regulatory authorities should reject a windup plan that failed to provide for distribution of a portion of existing plan surplus to the dismissed employees.

2. Who Owns the Surplus?

A very useful article summarizing the legal principles governing pension claims, including entitlement to pension surpluses on wind-up, was written by Eileen E. Gillese, then Dean of the Faculty of Law at the University of Western Ontario, now the Honourable Gillese J. of the Ontario Court of Appeal, *Pension Plans and the Law of Trusts* [1996] Vol. 75 CBR at 221.

The leading authority in the area of entitlement to pension plan surpluses on wind-up is the Supreme Court of Canada decision in *Schmidt v. Air Products*, [1994] S.C.J. No. 48. In his analysis leading up to a determination that the plans there under consideration were governed by trust principles, Cory J. wrote for the majority:

Air Products has suggested that the Catalytic pension fund was not subject to an express trust but instead to a trust for a purpose. Relying on dicta of the British Columbia Court of Appeal in *Hockin v. Bank of British Columbia* (1990), 71 D.L.R. (4th) 11, 34 C.C.E.L. 304, 38 E.T.R. 275, the company argues that a trust set up as part of a pension plan constitutes a trust whose sole purpose is to provide defined benefits to members.

Once those benefits have been provided the purpose is fulfilled, the trust expires and the terms of the pension plan alone determine entitlement to any remaining fund surplus. I cannot accept this proposition.

Trusts for a purpose are a rare species. They constitute an exception to the general rule that trusts for a purpose are void (see D.W.M. Waters, *Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1984), at 127-8). The pension trust is much more akin to the classic trust than to the trust for a purpose. I agree with the following comments of the Pension Commission of Ontario in *Arrowhead Metals Ltd. v. Royal Trust Co.* (March 26, 1992) at 13-15, cited by Adams J. in *Bathgate v. National Hockey League Pension Society* (1992), 98 D.L.R. (4th) 326 at 387, 44 C.C.E.L. 1, 11 O.R. (3d) 449 (Gen. Div.):

Purpose trusts are trusts for which there is no beneficiary; that is, they are trusts where no person has an equitable entitlement to the trust funds. Funds are deposited in trust in order to see that a particular purpose is filled; people may benefit, but only indirectly.

People are clearly direct beneficiaries of pension trusts. Pension trusts are established not to effect some purpose, such as building a recreation centre, but to provide money on a regular basis to retired employees. It misconceives both the nature of a purpose trust and of a pension trust to suggest that pensions are for purposes, not persons. It is important to recognize that the characterization of pension trusts as purpose trusts results in the pension text, a contract, taking precedence over the trust agreement. That is, it makes common law principles of contract paramount to the equitable [page 656] principles of trust law. It is trite law that where common law and equity conflict, equity is to prevail. In light of that rule, it seems inappropriate to do indirectly that which could not be done directly.

To repeat, the first step is to determine whether or not the pension fund is in fact a pension trust. This will most often be revealed by the wording of the pension plan itself, but may also be implied from the plan and from the way in which the pension fund is set up. A pension trust is a 'classic' or 'true' trust and not a mere trust for a purpose. If there is no trust created under the pension plan, the wording of the pension plan alone will govern the allocation of any surplus remaining on termination. However, if the fund is subject to a trust, different considerations may govern.

After *Schmidt*, defined benefit pension plans are normally governed primarily by trust rules, though where there are specific provisions contained in originating plan documents which dictate entitlement to surplus, or use of trust monies for various purposes, such as contribution holidays or expenses, those provisions will normally be applied.

Thus, to the question, who owns the surplus, is the answer, it depends on the application of general trust principles, applied to the context of the language of the original pension plan documents.

Frequently, pension plans that were set up prior to the 1980s contained express language directing that in any surplus on plan termination belonged exclusively to the employees. Generally speaking, these early plans were set up at a time when large surpluses had not yet been experienced.

As time went on, pension plan investment experiences were such that, often, large surpluses developed. In these circumstances pension plan sponsors sometimes undertook to amend the surplus entitlement language of pension plans to direct that surpluses belonged to the employer, not the plan beneficiaries. This sometimes arose in the context of employer reorganizations where several pension plans were merged, possible where the constituent plans had different surplus disposition clauses originally.

Whether any particular historical plan amendment effectively redirected surplus from employee to employer depends on a careful analysis of the original plan documents, and the original amending power reserved to the plan sponsor.

In *Schmidt* Cory J. wrote for the Court:

When a pension fund is impressed with a trust, that trust is subject to all applicable trust law principles. . . . the employer will not be able to claim entitlement to funds subject to a trust unless the terms of the trust make the employer a beneficiary, or unless the employer reserved a power of revocation of the trust at the time the trust was originally created. . . .

The settlor of a trust can reserve any power to itself that it wishes provided the reservation is made at the time the trust is created. A settlor may choose to maintain the right to appoint trustees, to change the beneficiaries of the trust, or to withdraw the trust property. Generally, however, the transfer of the trust property to the trustee is absolute. Any power of control of that property will be lost unless the transfer is expressly made subject to it.

The judgment of the B.C. Court of Appeal in *Hockin*, if followed to its logical conclusion, would mean that the presence of an unlimited power of amendment in a trust agreement entitles a settlor to maintain complete control over the administration of the trust and the trust property. That result is inconsistent with the fundamental concept of a trust, and cannot, in my opinion, be sustained without extremely clear and explicit language. A general amending power should not endow a settlor with the ability to revoke the trust. This is especially so when it is remembered that consideration was given by the employee beneficiaries in exchange for the creation of the trust. In the case of pension plans, employees not only contribute to the fund, in addition, they almost invariably agree to accept lower wages and fewer employment benefits in exchange for the employer's agreeing to set up the pension trust in their favour. The wording of the pension plan and trust instrument are usually drawn up by the employer. The employees as a rule must rely upon the good faith of the employer to ensure that the terms of the specific trust arrangement will be fair. It would, I think, be inequitable to accept the proposition that a broad amending power inserted unilaterally by the employer carries with it the right to revoke the trust. The employer who wishes to undertake a restricted transfer of assets must make those restrictions explicit. Moreover, amendment means change, not cancellation, which the word 'revocation' connotes.

As a result I find that, at least in the context of pension trusts, the reservation by the settlor of an unlimited power of amendment does not include a power to revoke the trust. A revocation power must be explicitly reserved in order to be valid.

The significance of this is that when an employment law practitioner considers his/her client's entitlement to share in eventual pension surplus, one needs to view pension benefit statements cautiously. These statements would normally reflect surplus entitlement provisions in current plans, but there might have been invalid plan amendments historically.

A number of decisions have followed *Schmidt* and the courts have found amendments to the plan text purporting to provide the employer with the surplus on wind-up were illegal, and constituted a revocation of the trust.

- *Kent v. Tecsyn International Inc.*, [2000] O.J. No. 1826 (Sup. Ct. Jus.) O'Driscoll J. [Tab 39]
- *Sadler v. Watson Wyatt & Co.*, [2001] B.C.J. No. 289 (S.C.) Low J. [Tab 40]
- *Bathgate v. National Hockey League Pension Society*, [1994] O.J. No. 265 (C.A.) Morden, Holden, and Goodman JJ.A. [Tab 41]

C. Contribution Holidays

When pension plans are established, they include provisions requiring contributions by plan sponsors and sometimes members. Contributory plans require contributions by members, non-contributory plans do not. Contributions are set initially but as actual experience is gained, actuarial estimates are obtained on a yearly basis, as to whether the plan is in surplus, and as to the level of contribution needed to maintain solvency. The phrase “Contribution Holidays” is often used to refer to occasions when, due to actuarial projections, it is deemed appropriate to have a lower level of contributions by the plan sponsor and/or the plan members during a particular period.

Pension benefits statements typically contain some information about whether actuarial surpluses are being used to permit the employer to take contribution holidays.

The plan solvency information in pension benefit statements would ordinarily be based on an assumption that historical contribution holidays were appropriate.

Obviously, if contribution holidays have been taken historically, and were not appropriate according to the rules governing the particular plan in question, the plan surplus would be reduced.

Contribution holidays may or may not be appropriate, depending on the specific plan language and governing laws.

A useful summary of legal decisions surrounding the appropriateness of a pension sponsor taking contribution holidays is contained in the article entitled “Contribution Holidays” written by Eileen Gillese, [1985] *Estates and Trusts Journal*, Vol. 15, at 136.

Other authorities on the subject of when contribution holidays are or are not appropriate include:

- *Hockin v. Bank of British Columbia*, [1995] B.C.J. No. 688 (C.A.) Cumming, Hollinrake, and Finch J.J.A.
- *Buschau v. Rogerscablesystems Inc.*, [2001] B.C.J. No. 50 (C.A.) Newbury J.A.
- *CUPE v. Ontario Hydro*, [1989] O.J. No. 679 (C.A.) Robins J.A.
- *Schmidt, supra*
- *Trent University Faculty Association v. Trent University*, [1997] O.J. No. 3417 (C.A.) Laskin J.A., for majority
- *Bathgate v. National Hockey League*, [1994] 16 O.R. (3d) 771 (C.A.)

D. Administrative Expenses

Pension plans have substantial ongoing administrative expenses. These costs would be for such things as fees for actuarial fees, investment advisors, trustee costs, legal fees, and the like.

There is a considerable body of case law and commentator analysis as to whether it is appropriate for the administration costs for pension funds to be paid from fund assets.

In her article, Dona Campbell poses the question, If the plan documentation includes no provision for the payment of costs, can administrative costs still be charged to the fund? Her answer (at 114) is, no they cannot.

- In *Markle v. City of Toronto*, [2002] O.J. No. 1396 (S.C.J.) [Tab 46], Pepall J. found that an amendment to plan provisions such that the employer could charge administrative expenses to the fund, where no such provisions existed previously, was a partial revocation of the trust and hence a breach of the trust. The Court considered and followed the principles stated in an article

by Dona L. Campbell entitled "Costs and Expenses of Pension Plan Administration" (1997), *Estates, Trusts & Pensions Journal*, Vol. 17, No. 2, at 113:

If the plan documentation includes any such limitation to the use of trust assets for the purposes of payment of administrative costs, then a change to the use of the assets could be considered a partial revocation of trust. If this is the case, the amending power found in the documentation would not provide the necessary authority to permit the change ... Only if the plan documentation included a provision specifically permitting revocation of the trust can a change be made affecting the rights of the beneficiaries.

- *Burke v. Governor and Co. of Adventures of England Trading*, [2002] O.J. No. 2468 (Per Greer J. of the Ontario Superior Court of Justice) is a recent authority where issues relating to use of pension trust monies to pay administration expenses was considered, and it was determined that the appropriateness of this activity was a matter to be determined after full process, and a trial if necessary.

- See also *Hockin, supra*

IV. Pension Class Actions

Other speakers are dealing at length with the question of the suitability of class action procedures to determination of employment law issues.

Class action procedures are uniquely well suited to disposition of pension claims on behalf of classes of pension members.

Recent decisions where pension claims have been (or will be) certified include:

- *Isaacs v. Nortel Networks Corp.*, [2001] O.J. 4851 (Superior Court) Charbonneau J.

- *Peter Gregg v. Freightliner Ltd. (cob Western Star Trucks)*, [2003] B.C.J. No. 345 (S.C.) Bennet J.

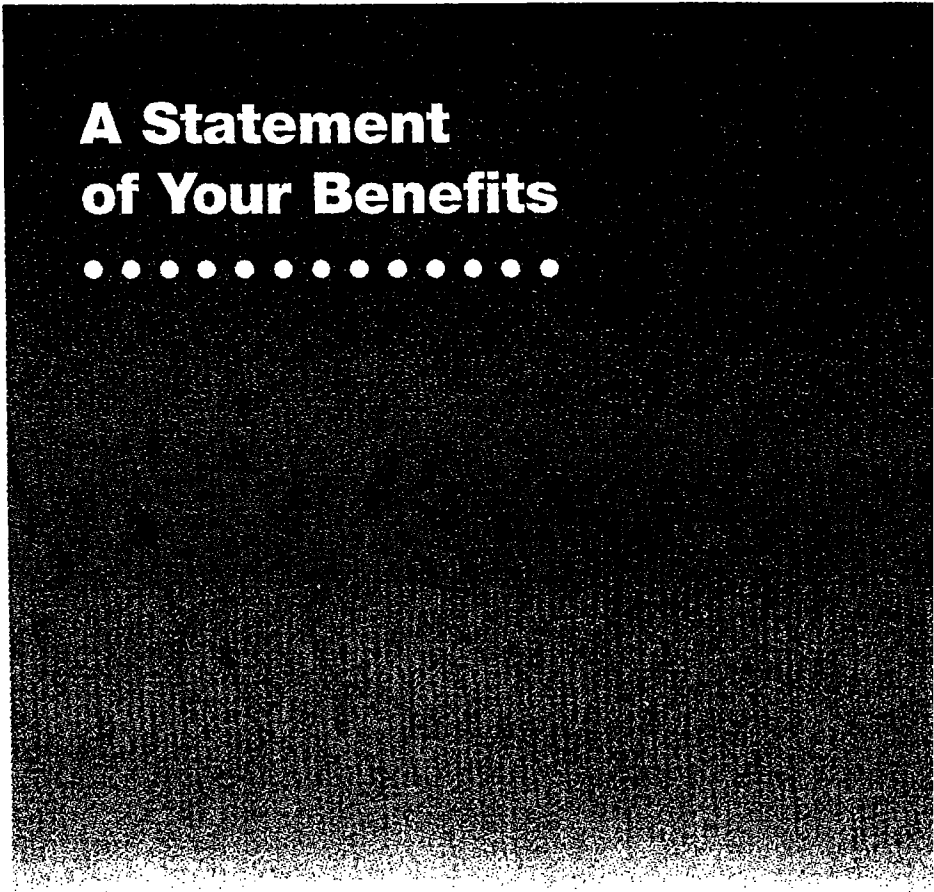
V. Conclusion

It has only been possible in this paper to touch upon a few of the many issues which face employment law practitioners when advising clients about pension issues.

I have tried to provide practical guidance regarding settlements for individuals with pension claims in a typical non cause wrongful dismissal, and more generally, to alert practitioners to the complicated issues which might arise involving pension plan irregularities, issues which are more commonly dealt pursuant to class action procedures or in some instances as representative actions.

Schedule "A"

Sample Pension Benefits Statement No. 1



Personal Information

2

Your statement covers the period ending on **December 31, 2001** and is based on the following information, as shown in our records:

Social Insurance Number:
 Date of Birth: **April 21, 1946**
 Date Employed: **April 14, 1975**
 Pension Membership Date: **November 1st, 1975**
 Annual Salary: **\$102,350**
 Province of Residence: **British Columbia**

Records indicate that you have:

- Elected the Family Coverage(3+), Option II under the Health Plan;
- Elected the Family Coverage(3+), Option II under the Dental Plan;
- Elected the Family Coverage under the Accidental Death and Dismemberment Plan;
- Elected **5.0** times your salary under the Optional Life Insurance;
- Elected the Optional Life Insurance for Dependents in the amounts of \$50,000 spouse / \$25,000 per child;
- Elected the Level III of the Long Term Disability Insurance.

According to our records, your beneficiary for insurance benefits is:

Whenever your family status changes (by birth, death, marriage or divorce), you should review your beneficiary choice to be sure that it reflects your present desires.

You are responsible to notify the Personnel Department if such a change affects the eligibility of your dependents, where individual coverage should be changed to family coverage, or vice versa.

While every effort has been taken to make this statement as accurate as possible, the official texts of the Pension Plan and group insurance policies govern in all cases. Should you have any comments or questions about any aspects of your statement, please discuss them first with your supervisor who will, if necessary, forward your query to the Personnel Department at Head Office.

When You Retire

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If you retire on **May 1st, 2011**, which is when you will reach age 65, your estimated monthly retirement income will be:

● from the Pension Plan of	\$	5,002
● from the Canada/Québec Pension Plan	\$	787
● from the Old Age Security Program	\$	<u>443</u>
Total estimated retirement income from all sources	\$	6,232

- * If you have a spouse when you retire, the law requires that you select a pension option under which your spouse will continue to receive at least 60% of your pension after your death. In this case, your own pension will be reduced to account for this additional protection; UAB shares with you the cost of this protection.

Accumulated Pension

As of the statement date, your service credited for pension purposes is **26.17** years. This includes **12** months of service you have been credited for pension purposes in **2001**.

The pension you have earned as of the statement date is **\$3,740** monthly, payable from **May 1st, 2011**. This accrued pension is fully vested. "Fully vested" means that you will receive a pension from the Pension Plan even if you leave before retirement.

Calculation Formula

Your annual pension is determined with the following formula:

1.3% of your Best Average Earnings, up to the YMPE* Average
plus
2% of your Best Average Earnings in excess of the YMPE* Average
multiplied by
Your years of Credited Service, maximum 40

* 2002 YMPE: \$39,100; 2002 YMPE Average : \$38,333

Early Retirement

You are eligible under the Pension Plan to elect early retirement at the date of your choice. Normally, your accrued pension would be reduced to take the longer payment period into account. The reduction applied is 0.25% for each month you retire before your 63rd birth anniversary date.

Contributions

shares with you the cost of the Pension Plan. You contribute:

3% of your earnings, up to the YMPE*
 PLUS
 5% of your earnings in excess of the YMPE*

UAB makes, when required, the necessary payments to fund the Pension Plan while complying with the funding requirements of all applicable laws.

* \$39,100 in 2002

Your contributions are accumulated as follows:

● Your total required contributions accumulated with interest, to December 31, 2000	\$ 102,907.56
● Your required contributions for 2001	\$ 1,769.78
● Interest credited for 2001	<u>\$ 12,268.25</u>

Your total required contributions accumulated with interest, to December 31, 2001	\$ 116,945.59
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N.B. The interest rate credited on your required contributions for 2001 is **11.82%**.

Rates are reduced to 1.5% and 2.5% since August 1st, 1999.

Financial Status

As at December 31, 1998, date of last valuation, the pension fund was entirely solvent. The fund assets were sufficient to cover all accrued pensions.

In the event of a wind-up or termination of the Pension Plan, any surplus determined at that date would be distributed to all Plan members, retired members, joint annuitants and beneficiaries under an equitable formula. No assets will revert to except the portion of the surplus attributed to a member which would result in a benefit in excess of the maximum permitted by Revenue Canada. Such reversion would be made only if approved under the applicable pension legislation.

Pension Committee

The Pension Plan for Employees of is registered with the Québec Pension Board under number

It is administered by a committee, whose members are:

Representing the participants

Representing

Third party

You may contact the Committee at the following address:

The Committee of the Pension Plan for the Employees
of

Sample Pension Benefits Statement No. 2

PENSION PLAN FOR NON-BARGAINING EMPLOYEES

Annual Benefit Statement for the period of January 1, 2000 to December 31, 2000

Membership Data as at December 31, 2000:	
Prepared for:	
Social Insurance Number:	
Birthdate:	November 16, 1949
Normal Retirement Date:	December 1, 2014
Date Hired:	February 13, 1984
Plan Entry Date:	January 3, 1994
Pre-85 Credited Service:	0.90 years
Pre-85 Counted Service:	0.90 years
Post-84 Contributory Service:	7.00 years
Best Average Pensionable Earnings ¹ :	\$ 52,613.49
Your Required Contributions with Interest:	
Balance at January 1, 2000:	\$ 9,784.46
Contributions made in 2000:	1,528.80
Interest credited during 2000 (5.22%):	550.14
Balance at December 31, 2000:	\$ 11,863.40
Your Flex Contributions with Interest:	
See your personal Canada Trust Statement	
Spouse and Beneficiary:	
Beneficiary/Spouse:	
Spouse's Birthdate:	
Contingent Beneficiary:	
Please review your beneficiary designation information carefully. If you have not designated a beneficiary, or would like to change your designation, then please contact Human Resources	

¹ An estimate of your Best Average Pensionable Earnings, which is the average monthly base salary paid to you during any period of sixty (60) consecutive months in which you received the highest amount within ten (10) years immediately preceding the statement date.

DEFINED BENEFIT PENSION

The monthly pension credited to you on December 31, 2000, payable at your Normal Retirement Date, is \$564.88. On January 3, 1996 you acquire(d) the right to your full accrued pension in respect of your full service. After that date your contributions to the plan cannot be refunded if you terminate your service with the Company. (However, the lump-sum value of your benefit, including your contributions, could be transferred to a locked-in RRSP or other registered pension plan.)

If you remain with the Company until your normal retirement date your total estimated monthly pension will be \$1,632.54. This estimate is based on your total projected service, and your average earnings over the 5 years preceding the statement date (without projection).

Your normal retirement date is the earliest date at which you will be eligible to receive an unreduced pension. However, you may retire as early as December 1, 2004, the date at which you reach age 55. The pension amount payable on your early retirement will be reduced by ⅓% for each month by which your pension commencement date precedes your normal retirement date.

FLEXPENSION PLUS

FlexPension Plus is an added feature designed to provide additional retirement benefits over and above those provided by your Defined Benefit Pension, subject to CCRA (formerly Revenue Canada) maximums. Under this feature, you may make voluntary contributions to your personal Flex account. Upon retirement, you may use your Flex account contributions and investment earnings to purchase enhancements to your current pension benefit.

Contributions to the Flex account can range from ⅓% of pay up to your maximum contribution limit, based on your age and salary. Your decision to participate is voluntary, but if you decide to do so, your contributions will be invested in your choice of the funds currently offered. To obtain your Flex account balance as of December 31, 2000 refer to your 2000 Canada Trust statement. For more information on FlexPension Plus consult your FlexPension Plus employee booklet or contact Human Resources.

GOVERNMENT PENSION

Any benefits you will be entitled to receive from the Canada/Quebec Pension Plan and Old Age Security Act upon retirement are in addition to the benefits you will receive under this Plan. As of January 1, 2001 the maximum monthly pension benefit payable at age 65 under the Canada/Quebec pension Plan is \$775.00. The maximum monthly pension benefit payable at January 1, 2001 under the Old Age Security Act is \$431.36. Note that these amounts do not include your spouse's entitlement, nor do they include any future increases in benefit levels.

PAYMENT OF PENSIONS

The normal retirement pensions quoted in this statement will be payable monthly during your lifetime. However, if you have a spouse at the time you retire you will be required, by law, to take your pension in the form of a reduced joint and survivor pension under which, if you predecease your spouse, 60% of your initial pension will continue to be paid for the remainder of your spouse's lifetime. You can elect the basic or another form of pension payment only if your spouse waives the right to the joint and survivorship form in writing.

DEATH BENEFITS

If you die before you retire, your beneficiary will be entitled to a refund of your pre-1987 contributions (if any) with interest plus the greater of (i) the lump-sum value of your pension earned for service after 1986, or (ii) your own post-1986 contributions with interest plus ½ of the lump-sum value of your pension earned for service after 1986.

If you are survived by a spouse then your spouse must, by law, be your beneficiary unless he/she waives his/her entitlement to their benefit in writing. If you are eligible for early retirement but are still an active employee of the Company when you die, your spouse will be entitled to elect a lifetime monthly benefit calculated as if you had retired just before your death and elected a joint and survivor optional form of pension.

If you die after you retire, the benefit paid to your beneficiary or spouse will depend on the form of pension you had elected.

PLAN SOLVENCY

The most recent actuarial valuation of the Plan was carried out as at December 31, 1997. As part of that valuation it was determined that, should the Plan have terminated on that date, the assets of the Plan would have exceeded the value of accrued benefits.

The Company pays the cost of benefits which are in excess of the amount of employee contributions. Currently, a portion of this cost is being met out of the actuarial surplus as permitted by the terms of the Plan, the *Income Tax Act*, and the *British Columbia Pension Benefits Standards Act*.

The Company intends to maintain the Plan indefinitely. However, in the event that the Plan is terminated and the assets at that time are not sufficient to meet the value of the accrued benefits, the amount of the accrued benefits may be reduced.

In the event of the termination of the Plan, the terms of the Plan provide that any assets remaining after all benefits promised under the terms of the Plan have been provided belong to the Company.

PLAN INVESTMENTS

The assets of the Plan are held by the Canada Trust Company and, as at December 31, 2000, the market value of assets in the Plan Trust Fund was approximately \$23 million. The investment of these assets is in accordance with a Statement of Investment Policies and Procedures adopted by the Retirement Committee, and the approach is one of balanced fund management with a combination of Canadian and foreign equities and fixed income securities. As at December 31, 2000 the market value of the Trust Fund comprised of 44% Canadian equities, 13% foreign equities, 35% fixed income securities, and 8% short term investments. The investment decisions are made by Leith Wheeler Investment Counsel Ltd., an independent professional manager. In addition, certain retirement annuity obligations of the Plan are secured by annuity contracts issued by Industrial Alliance.

Annual Benefit Statement for 2000

Pension Plan for Non-Bargaining Employees

June 13, 2001

OTHER INFORMATION

Your pension plan is currently registered with the Province of British Columbia under registration number _____ and with CCRA under registration number _____

You have the right to examine any of the following documents: any document concerning the conditions of your employment and that contains provisions relating to the Plan, any official documents relating to the Plan, the three most recent annual information returns, the two most recent actuarial valuation reports and the statement of investment policies and procedures filed with the Superintendent of Pensions and the most recent explanation or summary of the Plan. These documents are also available to your spouse or any designated beneficiary or your agent and shall be available without charge upon written request not more than once every twelve months.

If any of the information in this statement is not in accordance with your records, please contact Mrs. _____