

Gone but not forgotten

Retirees who are unhappy with their benefits and pensions have legal options. Employers should not forget this.

By Hugh O'Reilly

RETIRES ARE OFTEN FORGOTTEN WHEN IT COMES TO pension and benefits issues. In the future, employers who ignore retirees in their decision-making process may find themselves legally liable for those decisions.

The Supreme Court of Canada's approach to retiree benefits, as laid out in the landmark decision *Dayco (Canada) Ltd. vs. C.A.W.*, is well known. In *Dayco*, the Supreme Court stated that a retired employee's non-pension benefits are conferred to them on the date they retire. These benefits entitlements can, in most circumstances, only be reduced with the consent of the retiree. In the absence of such consent, employers who alter these benefits will be liable for any losses incurred by retirees.

In rare cases, retiree benefits can also be lawfully reduced if the employer expressly reserved the right to reduce the benefits and communicated this fact to the retirees when they were actively employed. In practice, it is highly unlikely to see this type of agreement.

Yet having a legal right, such as vested benefits, can mean little if there is no effective way to enforce it. Employers have dealt with *Dayco* by nibbling away at the edges of retiree benefit entitlements. They have undertaken this through modest cuts, which retirees find hard to counter. After all, how many retirees can afford, say, \$1,000 to bring an action to protect their rights? Retired persons who have found themselves in this situation have had to resort to small claims court to protect their rights. Even then, such a process might not lead to a satisfactory conclusion because the small claims court may lack the expertise to properly adjudicate the claim.

CLASS ACTION

Class action proceedings can offer retirees a more effective means to resolve their grievances. Under a

class proceeding, a representative plaintiff can be appointed to bring an action on behalf of all members of a class. If 1,000 retirees have had their benefits cut by \$1,000, the claim would be for \$1 million instead of \$1,000.

In addition, in a class proceeding, the lawyers are typically only paid if there is a satisfactory result—fees generally come from the damages awarded to the plaintiffs. The fees paid to lawyers are subject to a retainer agreement and are monitored and approved by the courts.

The availability of class actions may bring the unilateral reduction of retiree benefits to an end. Retirees can now protect their vested rights and commence legal actions on behalf of all affected parties. As a result, class proceedings may well have the effect of levelling the playing field between retirees and their former employers.

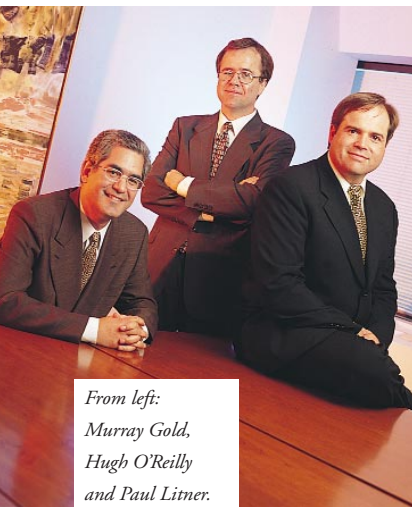
DEFINED BENEFIT PLANS

Another area that will, in my view, be the subject of increasing litigation by retirees is the differential treatment that retirees receive under their defined benefit pension plans. Employers who use surplus in a pension plan to improve the benefits of active employees and do little or nothing for retired employees may be subject to legal scrutiny.

In this type of case, retirees could bring class actions on the basis of a breach of an employer's duty. In its capacity as plan administrator, an employer must treat all members of a pension plan in an even-handed manner. This potential cause of legal action in combination with the ability to make use of class action proceedings may prove to be a powerful combination for retirees seeking better pension benefits.

Retiree rights or grey power may be the next wave of pension and benefits litigation. In allocating resources between active and retired employees, employers will do well to remember those who are no longer in the workplace. **BC**

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