Research Advisory

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Hewitt

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Does Your Plan Text Ensure Maximum Interpretive Flexibility? Helpful Guidance Is Provided by the Manitoba Court of Appeal in *Dinney v. Great-West Life Assurance Co.*

Highlights

In addressing the scope of the plan sponsor's powers under an indexation clause, the Manitoba Court of Appeal has provided general guidelines to ensure pension plan texts afford plan sponsors sufficient interpretive flexibility.

BACKGROUND

In recognizing the plan sponsor's discretion to select an appropriate indexing formula, the Manitoba Court of Appeal has enunciated important principles of contractual interpretation in relation to pension plans, and has also provided guidance on how possibly to avoid costly litigation.

While not binding on courts outside Manitoba, this case is persuasive in other provinces, especially as it addresses common law principles that are similar across jurisdictions. Leave to Appeal to the Supreme Court of Canada was not sought, and hence the Court of Appeal decision is final.

FACTS

In 1973, to address the rising impact of inflation, the Great-West Life Assurance Co. (Great-West) amended its pension plan to add an indexing provision pursuant to which retirees received increments to their defined benefits otherwise payable under the plan, which "shall be as the Company may from time to time determine and will be related to the investment performance of the ... Fund". Eventually, it amended the plan text to provide instead that indexation would be tied to Statistics Canada's reported annual cost-of-living (CPI) increase.

Former employees objected to this change, because they felt it resulted in significantly lower levels of indexation than would have been the case had the original formula been maintained and, in previous litigation, it was determined that Great-West had to retroactively calculate pension increments in a manner that was related to the Fund's investment performance. Disputes concerning how to achieve this outcome arose, and new litigation was commenced that resulted in the present decision.

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DECISION

In *Dinney v. Great-West Life Assurance Co. et al.*, the Manitoba Court of Appeal allowed the employer's appeal, in part,
upholding the lower court's decision that the indexing provision in the pension plan afforded Great-West considerable discretion in selecting the method used to determine increment amounts, and that it could adopt or substitute new methods or formulae so long as they maintained a reasonable relationship to the investment performance of the Fund.

In addition it was confirmed that, when applying contractual principles and rules of interpretation to the determination of rights under a pension plan, courts should adopt "a practical and purposive approach". For example, wherever possible, such provisions should be construed to give reasonable and practical effect to the scheme, mindful that:
(1) it will operate over a lengthy period of time and against a constantly changing commercial background;
(2) the plan is being operated for the benefit of all retired employees; and
(3) an interpretation that provides a windfall for some might negatively impact the financial interests of others.

Finally, despite owing a duty of good faith to beneficiaries of the fund, the plan sponsor does not stand in a fiduciary relationship to them and "is entitled to consider its own interests" in the decisions it makes.

In the result, the indexation forumla mandated by the trial judge was set aside and the matter of the proper indexation formula to use was referred back to Great-West for determination in accordance with the plan's original provision.

Hewitt Comment:
The* Dinney *decision is important for plan sponsors because it:
(1) demonstrates a willingness to adopt a commercially pragmatic approach to interpreting pension plan documents that can balance the interests of all stakeholders;
(2) confirms the central role of plan sponsors in applying such documentation, as reflected in the Court of Appeal's rejection of an indexation formula that was opposed by Great-West; and
(3) clearly enunciates that plan sponsors are not bound by fiduciary obligations toward members, and can lawfully consider their own positions and interests in the selection and future application of pension plan provisions, so long as they act in good faith.

It should also be noted that the Court's comments in (3) above do not apply to employers in their role as plan administrator, in which case they clearly stand in a fiduciary relationship with plan members.

The Court's Interpretive Approach:
*In its discussion of how to interpret pension plan documents, the Court of Appeal laid out a process for plan sponsors to follow that could help insulate them from protracted litigation, or at least provide a better chance of success. Very important comments were made in relation to what is called the "*contra proferentum *rule", which stands for the proposition that, when ambiguity exists, contractual provisions are interpreted against the interests of the party who drafted them (ie, the plan sponsor): "As a last resort, the* contra proferentum *rule may be resorted to, but only after the*

ordinary interpretative guides have been exhausted and if there remain two or more reasonable interpretations of the language in question".

Another imperative stressed by the Court is that "a pension scheme should be interpreted as a whole [and that] the meaning of a particular clause should be considered in conjunction with other relevant clauses." As a result, the combined operation of these principles helped convince the Court that, because the pension plan text contained a provision giving Great-West the authority to interpret plan provisions, it was entitled to determine the appropriate amount of indexation in relation to Fund performance.

Finally, in concluding that the retiree's vested right was to receive indexing according to the plan's investment-related provision, the Court of Appeal appears to be saying that there was no way of changing the formula for future indexing adjustments. The plan's amendment provision specifically reserved the plan sponsor's right to amend the plan, so long as "benefits accrued to the credit of an employee" to the date of amendment were not reduced. Since the Court did not comment on the amendment provision in this context, we do not know whether it concluded that a contractual obligation to future indexation is part of an employee's accrued benefits. If so, query whether it would have made a difference to the decision if:
(1) the plan's indexation provision itself had allowed for changes to be made to the formula, irrespective of plan performance; or
(2) the formula for indexation was to be determined on a periodic (e.g., yearly) basis.
The fact that the Court of Appeal did not comment on the amendment provision from this perspective is an unfortunate aspect of the decision for practitioners who are often asked what constitutes a retiree's vested rights.

What Plan Sponsors Should Do:
In light of this case, plan sponsors should consider reviewing their plan texts and related member communications to ensure they provide the authority to interpret plan provisions.

Your Hewitt consultant can provide guidance:
(1) on whether or not such a provision exists in your plan text; and
(2) if such a provision does not exist, or is inadequate, in drafting an appropriate provision in light of the principles set out in the Dinney *case.*

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