

COMMUNIQUÉ

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ONTARIO TRIBUNAL FINDS THAT CONTRACTUAL PENSION INDEXING IS NOT AN ANCILLARY BENEFIT

The November 12, 2014 decision of the Ontario Financial Services Tribunal (FST) concerning the CAMI Automotive pension plan of General Motors could have far reaching effect for defined benefit pension plans with contractual indexing that vests later than the base pension benefit vests. The FST found that the CAMI plan text granted contractual indexing to all plan members, despite plan language suggesting that indexing would only be provided to members who retire from active service. According to that finding, the indexing would vest along with the pension benefit, whether or not the *Pension Benefits Act* (PBA) requires this treatment. Nevertheless, in CAMI the FST explored the characterization of contractual indexing under the PBA.

The Decision

There will likely be some confusion about what the ruling says and means. In an unusual procedural variation, the hearing before the FST was split into two phases. The November 12 decision completed Phase One. It states who is entitled to the contractual indexing based on the CAMI plan provisions and whether contractual indexing is a “pension benefit” as defined in the PBA. Phase Two will determine the resulting remedy. The FST mentions in the Phase One ruling that additional issues may arise in Phase Two about the treatment of indexing as a pension benefit under the PBA.

Entitlement under the plan provisions

The FST’s interpretation of the plan provisions solved a drafting ambiguity. The FST applied the same principle of interpretation that it applies to the PBA – to read the plan text (or PBA) as a whole, seeking meaning that harmonizes the words used and the overall context. In simplified terms, the FST found that the plan provision stating that contractual indexing is only for members who had reached retirement age upon termination of service did not prevail, because another provision for members under retirement age cross referenced the indexing provision. It was held that all plan members were entitled to the indexing in the CAMI plan.

Characterization of contractual indexing

The FST acknowledged that given the entitlement of all plan members based on the plan provisions, it was not necessary to inquire whether the contractual indexing is a pension benefit under the PBA. Nevertheless it heard argument and made a decision on this issue.

The FST held that contractual indexing is not an ancillary benefit because the PBA list of ancillary benefits is closed and does not include indexing. It concluded that contractual indexing must therefore be a pension benefit since there is no third way to characterize it. Arguments that contractual indexing stands in a category of its own by virtue of the historical mandatory indexing provisions of the PBA (never implemented by regulation), or by virtue of the greater benefits rule of the PBA, were rejected.

The FST commented that as a pension benefit, contractual indexing would be treated as an accrued benefit for purposes of the void amendment rule, which means that it cannot be taken away for past service. It also commented that contractual indexing would be subject to the gradual and uniform accrual rule because it is a pension benefit. The FST decision suggests that retirement age vesting for contractual indexing would not be considered compliant with the gradual and uniform accrual rule, but the FST made it clear that it has not decided this issue.

Comment

Restricted to the facts, as found by the FST, the characterization of the contractual indexing in the CAMI plan as a pension benefit is redundant to the plan provisions and unnecessary. The FST itself says as much. Despite this, the question of PBA interpretation was put before the FST and the FST thought it useful to answer the question because it might be relevant in Phase Two. Its findings reveal a previously unexplored source for disputes between plan members and sponsors.

What if the CAMI plan text had been interpreted to provide the indexing only to members who reach retirement age? The FST expressed its viewpoint that this would be non-compliant. However it does not appear from the CAMI decision that the FST really grappled with a counter argument that if contractual indexing is available only to members who have reached retirement age, it fits within the list of permitted ancillary benefits as early retirement benefits in excess of those required. This type of indexing could indeed be an ancillary benefit, despite the non-binding obiter views of the FST.

The FST finding that under the PBA contractual indexing is a pension benefit leads to a place where that indexing vests according to the same rules as the base benefit, unless the gradual and uniform accrual rule allows an exception. That rule permits a variation in accrual if the Superintendent is of the opinion that it is justified in the circumstances of the pension plan and its members.

In his Notice of Intended Decision leading to the CAMI hearing, the Superintendent indicated that he would not exercise his discretion to permit the retirement age vesting in the CAMI plan because in his view the CAMI plan text provided indexation to all members, amendments to remove that were void, the related communications to members were not sufficiently and consistently clear, and he is not aware of any particular circumstances of the plan and its members that justify it.

Needless to say, for plans that have retirement age or other delayed vesting for contractual indexing, the stakes are high for members and for plan costs. The Phase One FST ruling in CAMI doesn't necessarily mean that such a provision is non-compliant, but there is more to come in Phase Two.

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