The Prodigal Pension Plan Member

It's one of those pension administration nightmares – someone of pensionable age shows up at your door claiming he was an employee 20 years ago and asks for his pension. There is some evidence of employment, but no record of a pension entitlement. As a fiduciary you cannot pay out benefits unless someone is clearly entitled, so you ask the person for some proof of the pension entitlement. At this point the person may give up; but your sense of relief is overshadowed by concerns that your record keeping did not allow you to be as certain as you might have been in disposing of the claim. On the other hand, if he doesn't give up, it will likely be an even more costly, time-consuming and frustrating exercise.

The *Hunte* case, which was heard recently by the Superintendent of Financial Services (Tribunal) and the Ontario Superior Court, is a case in point.[1] The employer prevailed in this case because it had some records and a document retention and destruction policy that it could prove it consistently followed, and the former employee's claims had some significant logical flaws. Nonetheless, the administrator still went to a great deal of time, effort and expense that might have been avoided with a more robust record retention policy.

The Facts

The facts are quite long and convoluted, but boil down to the following.

Mr. Hunte claimed that he was owed a pension under the Crown Life pension plan, now administered by Canada Life, which acquired the business formerly conducted by Crown Life. Mr. Hunte did not present any documentary proof to support his claim. Although Canada Life did have a sparse documentary record pertaining to Mr. Hunte, it is obvious that it spent a great deal of time and effort looking into his claim.

Part of Canada Life's problem stemmed from Crown Life's document retention policy. If a member did not vest or was paid out a commuted value, the member's pension record was destroyed after seven years. If, however, a member retained entitlement to an immediate or deferred pension, a separate file was created and kept until the pension was fully paid out. Although the policy was consistently followed, there was absolutely no indication of Mr. Hunte or the amount of pension earned; there were no facts to support the calculation and no indication of how any entitlement had been discharged.

The uncontested facts are few:

- Mr. Hunte was first hired by Crown Life in 1970 as a policy examiner.
- He left in 1975 to work for Transamerica but was rehired soon thereafter by Crown Life (on September 2, 1975).
- He left Crown Life for the last time on October 29, 1982. He was then 37 years old.
- When he left, section VIII(a)[Q: excerpt checked against decision, which calls it section VIII-A, not VIII(a)] of the Crown Life pension plan provided that:

In the event that the member has attained 45 years of age and has completed a continuous period of 10 years in the service of the Employer or has been a member of this plan and the previous plan for 10 years, whichever event shall first occur, all retirement benefits accredited to the member in accordance with the plans shall be fully vested in respect of any such service and the contributions the member has been required to make in accordance with the terms of the plans may not be withdrawn by such member.

The parties disagreed about everything else:

- Mr. Hunte claimed that he became a member of the Crown Life pension plan when he was first hired. Canada Life disagreed, based on a review of microfiche records created in the 1980s containing Mr. Hunte's employment history and showing that he was hired on September 2, 1975, and terminated on October 29, 1982, and had prior service from 1970 to 1975, a pension entry date of September 2, 1975, and a pension certificate number consistent with those issued in 1975 and not 1970.
- Mr. Hunte claimed that, from 1970 until his departure for Transamerica, he made basic pension contributions of 3.5% of salary and additional voluntary contributions (AVCs) starting in 1972, total contributions amounting to $25 and later $50 biweekly on a salary of $85 per week to $10,000 per annum by 1975. He testified that he did not receive any refund of the AVCs on his departure in 1975, nor did he make any inquiries. The Tribunal expressed its disbelief at these claims, given the magnitude of the contributions versus his salary and the fact that someone employed in the financial services industry would not be likely to be so careless about financial matters.
- Mr. Hunte testified that, upon his return to Crown Life, his supervisor advised that he would be "grandfathered" into the pension plan, and that someone at human resources whose name he could not remember advised that his reinstatement had been approved. He also testified that he was told that the three months spent at Transamerica would be credited. His supervisor, who was one of seven witnesses called to testify on Mr. Hunte's behalf, denied that he would have had the authority to negotiate pension issues. Canada Life also put in evidence a memorandum dated April 18, 1980, authored by Crown Life's senior group vice-president, describing Crown Life's policy of not bridging or combining periods of service.
- Mr. Hunte testified that he made AVCs during his second period of employment with Crown Life, from 1977 until 1979, when the plan was amended to do away with them. Canada Life argued that Mr. Hunte's AVCs were transferred out of the pension plan in 1980 to an account set up for him in a group RRSP established to receive AVCs out of the pension plan, and that Mr. Hunte withdrew those amounts from the group RRSP in 1981. Mr. Hunte denied this even when Canada Life produced a tax summary for 1981, obtained by Canada Life from the Canada Revenue Agency (CRA), showing that, in 1981, Mr. Hunte had received income identified as "other income" in the amount of $1,817.
- Mr. Hunte also testified that, when he left in 1982, he was not given a pension package outlining his options under the plan, nor asked to sign anything, but was handed a $2,400 cheque. Canada Life argued that this amount, which coincides with information on a 1982 tax summary also obtained by Canada Life from CRA and

showing an amount of $2,615 characterized as “other pension income,” was a “cash refund benefit” that would have been paid to Mr. Hunte since he was not entitled to a deferred vested pension.

The Meaning of the Plan

As is clear from the facts, Mr. Hunte believed that he had 12 years of pension plan service in 1982. Canada Life believed that he had 7 years. As part of his claim, Mr. Hunte argued that section VIII(a) of the Crown Life pension plan should be interpreted as meaning that locking-in occurred either if a member had attained age 45 and 10 years of service with Crown Life or if a member had 10 years of Crown Life pension plan membership. By virtue of this interpretation, Mr. Hunte’s 12 years of plan membership, as calculated by him, would mean that his entitlement would be locked-in and he would be entitled to a deferred vested pension. He also argued that, if section VIII(a) were found to be ambiguous, the *contra proferentem* rule should be applied and that provision should therefore be interpreted in his favour.

Canada Life objected to this interpretation on the basis that there would be no logical reason why Crown Life should wish to impose an extra locking-in condition on people with 10 years of service but not on people with 10 years of plan membership. Both the Tribunal and the Superior Court agreed that Mr. Hunte’s interpretation was not reasonable.

The Burden of Proof

What is most striking about this case is what was said about the burden of proof. Both the Tribunal and the Superior Court agreed that the claimant in a case like this bears the burden of proving a valid claim. It is only if the claimant’s evidence raises a prima facie case that the evidentiary burden will shift to the respondent. The Tribunal remarked that, given Mr. Hunte’s failure to shift the evidentiary burden, “we draw no inference from Canada Life’s failure to produce complete records from the 1970s and 1980s.” It went on to say that Crown Life’s record-keeping policies did not raise fiduciary concerns as they were reasonable “in light of its legal obligations in the 1970s and 1980s.”

This implies that, had Mr. Hunte’s case been more credible (and had Canada Life not gone to such lengths researching Mr. Hunte’s claim), Canada Life might not have been able to refute his claim even though it might not have been without doubt. But how many employers can lay their hands on employment records that are now decades old?

What Now?

This case raises questions about what records an administrator should keep.

The legal obligation to maintain records is a fiduciary obligation. The essential elements are set out in section 22 of the*Pension Benefits Act* of Ontario (PBA) – to exercise the care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another person. If the administrator has special skill, then this basic standard is upgraded to one that requires the administrator to use all relevant knowledge and skill that the administrator possesses or, by reason of the administrator’s profession, business or calling, ought to possess. But in either case, the core of fiduciary duty is the obligation of loyalty to the beneficiaries. Accordingly, while competence and prudence are required, mere competence or prudence may not be enough.

Fortunately the Financial Services Commission of Ontario (FSCO) has spent some time thinking about record keeping. Pension plan administrators would be well advised to

familiarize themselves with policy A300-200, called “Management and Retention of Pension Plan Records,” issued on June 30, 2010, and available on FSCO’s website. That policy may very well become the benchmark by which record keeping is assessed. In addition, it is expected that the new requirement under the PBA that former members and retirees be provided with periodic statements[2] will be enacted shortly. Administrators ought to be prepared for this development, which itself will help to reduce disputes over pension entitlements.

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