

Navigating the Complexities of Benefits and Pension Issues During Downsizing and Restructuring

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Presented at The Canadian Institute Conference, "Workforce Restructuring: Practical Guidelines and Legal Strategies for Reducing Employer Liability in Difficult Times," July 9-10, 2009

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Introduction

In the current economic climate, downsizing and/or restructuring may be necessary courses of action for many companies. Companies embarking on downsizing or restructuring pension plans will need to consider the following issues:¹

- how long benefits and pension plan contributions must continue once notice is given;
- what benefits must be paid during the notice period;
- whether the extent of downsizing requires a partial windup of the pension plan;
- whether the provisions of the *Wage Earner Protection Program Act*² and the recent amendments to the *Bankruptcy and Insolvency Act*³ apply to employees;
- how to make and communicate any changes to existing pension plans as a result of the restructuring or downsizing; and
- how to deal with pension funding challenges following a restructuring.

Continuation of Benefits and Pension Plan Contributions During the Notice Period

One significant issue that a company must consider on termination of an employee's employment is the continuation of benefits and pension plan contributions during the notice period. An employer may terminate an individual's employment without cause as long as he or she is given appropriate notice of termination or payment in lieu thereof.⁴ In Ontario, the employer is obligated to provide notice of termination of employment without cause under the *Employment Standards Act, 2000*⁵ and common law. The *ESA* sets out the minimum notice periods, which are calculated on the basis of the employee's years of service with the employer.⁶ Unless the parties have entered into a contract limiting the employee's entitlement to the notice provisions in the *ESA*, an employee is also entitled to common law "reasonable" notice. The *ESA* and common law require the employer to pay all aspects of compensation during the notice period, including cash compensation such as salary, and group health and pension benefits.

ESA Notice Period

Section 60(1)(c) of the *ESA* requires the employer to continue to make all benefit plan contributions necessary to maintain the employee's benefits until the end of the statutory notice period. Section 61(1) permits an employer to pay the amount of wages the employee would have received in lieu of providing working notice as long as all benefit contributions are paid until the end of the period. If the employer fails to make these contributions, the *ESA* permits the amount that would have been contributed by the employer on the employee's behalf to be treated as unpaid wages for the purposes of enforcement and collection.⁷ The *ESA* further protects employees by deeming them to be actively employed during the

¹ This paper considers pension and benefits issues arising for employers considering restructuring and downsizing in Ontario.

² S.C. 2005, c. 47, s. 1 [*WEPPA*].

³ R.S.C. 1985, c. B-3 [*BIA*].

⁴ An employer's ability to dismiss an employee without cause is more constrained with respect to employees covered by collective agreements and with respect to federally regulated employees covered by the unjust dismissal provisions of the *Canada Labour Code*, R.S.C. 1985, c. L-2. This section of the paper does not deal with those employees, but rather focuses on the issues surrounding pension and benefits losses in the context of dismissed employees in Ontario who are not covered by a collective agreement.

⁵ S.O. 2000, c. 41, s. 54 [*ESA*].

⁶ *Ibid.*, s. 57.

⁷ *Ibid.*, s. 60(3).

notice period if they receive pay in lieu of notice.⁸ This is important in the context of pension plans as they require employees to be actively employed in order to be eligible for plan membership. Further, if an employee's pension vests between the date of termination and the last day of the statutory notice period, he or she is treated like any other employee who leaves the plan with a vested pension.⁹

Common Law

On termination of employment without cause, the employee is entitled to reasonable notice at common law, or payment in lieu of notice. Unlike the notice period under the *ESA*, there is no deemed active employment during a common law notice period. Accordingly, once the *ESA* notice period has expired, the employer is not obligated to continue pension contributions or benefit premium payments on behalf of the employee or require the plan administrator to continue the employee's membership in either the benefit or pension plan during the notice period. However, the employer may permit continued participation in the benefit plan or pension plan, allow pensionable service to accrue and continue contributions to the pension plan or pay benefit plan premiums on the employee's behalf, provided that the pension or benefit plan does not prohibit the continued membership of "inactive" employees.¹⁰ If the employer does not continue pension or benefit plan participation, the employee may seek damages for failure to maintain all aspects of compensation during the notice period. The damages sought could include the value of all components of the employee's remuneration, including pension benefits and group health benefits. These losses are significant and would therefore become a key issue in settlement discussions between a former employee and employer. If the matter is not resolved in settlement discussions, the matter may proceed to litigation.

Paying Benefits During the Notice Period

If employees are terminated and cease to be members of a pension plan, the employer (who is often the pension plan administrator) must meet obligations under the *Pension Benefits Act*¹¹ and Regulation 909 of the *PBA*,¹² the *Guidelines for Capital Accumulation Plans*¹³ and the common law.

PBA and Regulations

The *PBA* requires a pension plan administrator to be appointed before a pension plan can be registered. Although the formal administrator is usually the employer, many companies delegate these complex duties to third-party administrators. One of the central responsibilities of a plan administrator is to communicate relevant information to the plan members.¹⁴ When an employee ceases to be a member of a pension plan because his or her employment has been terminated, the administrator must outline the employee's rights and obligations in writing within 30 days of the termination date.¹⁵ This document must include

- the name and registration number of the plan;
- the name and birthdate of the member;
- the date of enrollment and years of credited service under the plan;
- the normal retirement date;

⁸ *Supra* note 5, s.62(1).

⁹ Ari N. Kaplan, *Pension Law*, Toronto: Irwin Law Inc., 2006 at 230.

¹⁰ *Ibid.*

¹¹ R.S.O. 1990, c. P.8 [*PBA*].

¹² R.R.O. 1990, Regulation 909 [*Regulations*].

¹³ Canadian Association of Pension Supervisory Authorities, *Guideline No. 3: Guidelines for Capital Accumulation Plans*, May 28, 2004 [*CAP Guidelines*].

¹⁴ Canadian Employment Benefits and Pension Guide Reports, North York: CCH Canadian Limited, 2008, s. 3371.

¹⁵ *Supra* note 11, s. 28.

- all available options and relevant dates regarding the pension and other benefits to which the member is entitled;
- the names of the member's spouse and designated beneficiary;
- the benefits to be provided on death;
- the formula for integrating a deferred pension with Canada Pension Plan or Old Age Security benefits;
- the duration of any bridging or special allowance to be paid;
- the indexation provisions applicable to a deferred pension;
- any options to transfer and the transfer value of a deferred pension;
- any deadlines for exercising options; and
- the amount of any refund to which the member is entitled.¹⁶ The administrator must provide a refund to an eligible member within 60 days of receiving his or her direction.¹⁷

Importantly, the *PBA* deals with the portability of an employee's pension upon termination. Members with vested pensions whose employment has been terminated must be given the option to (i) transfer the commuted value of their pensions to another plan or a locked-in retirement savings fund; (ii) purchase a deferred life annuity in the amount of the pension; or (iii) leave their contributions in the employer's plan as a deferred pension payable at the age of retirement.¹⁸ An employee who is dismissed before vesting is entitled to a refund of contributions but not to transfer his or her pension to another fund.¹⁹ Further, an employee who is eligible to receive an unreduced pension, regardless of whether he or she wishes to begin payments, does not have portability rights unless they are explicitly provided in the plan text.²⁰

CAP Guidelines

The Canadian Association of Pension Supervisory Authorities adopted the CAP Guidelines to create best practices for defined contribution pension plans, since the *PBA* does not touch on best practices for defined contribution plans.²¹ The CAP Guidelines emphasize the importance of communicating pertinent information to members because, unlike defined benefit plans, employees bear the risks of poor pension fund performance under defined contribution plans.²² The CAP Guidelines apply not only to defined contribution pension plans, but also to group registered retirement savings plans, group registered educational savings plans and deferred profit-sharing schemes. Upon termination of an employee's membership, CAP Guideline 7.2.1 requires a plan sponsor to inform the employee of the available options and applicable defaults; any required action and deadlines; and the impact of termination on the individual's investment options, including tax consequences, any market value adjustments, early withdrawal penalties or associated fees.²³

Common Law

The importance of an administrator's duty of communication on termination of an employee's membership in a pension plan is also dealt with in the jurisprudence. An administrator must not only provide relevant information to a departing employee but also ensure that the employee understands the

¹⁶ *Regulations*, *supra* note 12, ss. 41–44.

¹⁷ *Ibid.*, s. 42(4).

¹⁸ *Supra* note 11, s. 42.

¹⁹ *Ibid.*, s. 63(3).

²⁰ *Wright v. Kimberley-Clark Canada Inc.* [1995] O.J. No. 1566 at para. 246.

²¹ In May 2004, the Joint Forum of Financial Market Regulators, formed in 1999 by the Canadian Association of Pension Supervisory Authorities and other Canadian regulatory authorities, released the Guidelines for Capital Accumulation Plans, which were adopted as CAPSA *Guideline No. 3, Guidelines for Capital Accumulation Plans*

²² *Ibid.* at 106.

²³ CAP Guidelines, *supra* note 13.

content and effect of the information.²⁴ In *Deraps v. Labourer's Pension Fund of Canada and Eastern Canada*,²⁵ the plaintiff and his wife met with a union pension counsellor, who was acting as an agent for the administrator, to discuss the employee's pension options upon dismissal. The Ontario Court of Appeal held that the counsellor possessed specialized skills, knowledge and expertise, and therefore had a duty to advise members about the nature of the available options. Although the counsellor did not misstate the required information, his failure to advise the employee about his pension options constituted a misleading representation for which the administrator was liable. The obligation to advise plan members extends to providing competent and thorough advice to employees regardless of whether they request it.²⁶

In *Allison v. Noranda Inc.*,²⁷ Allison was asked to choose between two severance packages: (i) a lump sum payment with employment ending on the termination date; or (ii) a series of installments with employment terminating after the last payment, by which time he would be 55 years old. Noranda, the employer and plan administrator, advised Allison to get independent advice but did not inform him that his pension payments under the first package would be one-third of those available under the second package. After receiving advice from a life insurance agent, Allison elected the first option and signed a release in favour of the employer. When Allison applied for his pension at age 55, he discovered the immense reduction in his entitlement and sued Noranda for negligent misrepresentation. The trial judge dismissed the action on the basis that Allison had not established a misrepresentation. Further, Allison had executed a release of claims against Noranda.

The New Brunswick Court of Appeal applied the test enunciated for negligent misrepresentation in *Queen v. Cognos*:

- a duty of care based on a special relationship between the parties;
- an untrue, inaccurate or misleading representation;
- negligence in making the misrepresentation;
- reliance on the negligent misrepresentation; and
- damage to the representee.²⁸

In examining the third factor, the Court noted that the requisite standard of care is the exercise of such reasonable care as the circumstances require to ensure that representations are accurate and not misleading. Although this encompasses the obligation to disclose highly relevant information, there is no general, overriding obligation to make full disclosure of items such as plan changes that are merely under consideration.²⁹ Echoing the *Deraps* approach, the Court held that the administrator had control over specialized information that was not subject to multiple interpretations, and thus had a responsibility to help Allison make an informed decision. The employer knew the pension consequences of both severance packages and failed to disclose them, constituting negligence.³⁰ Further, the Court ruled that the release limited Noranda's liability for wrongful dismissal claims but not for negligent misrepresentation.³¹ Pension plan administrators must ensure that employees are able to make informed decisions about their pensions upon termination because the courts are unlikely accept that the administrator met the minimum statutory requirements if the employee has been disadvantaged by its conduct.

²⁴ *Supra* note 20, s. 3378a.

²⁵ (1999), 21 C.C.P.B. 304 (Ont. C.A.) [*Deraps*].

²⁶ *Spinks v. Canada* (1996), 134 D.L.R. (4th) 223 (F.C.A.).

²⁷ 2001 NBCA 67.

²⁸ *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at 110.

²⁹ *Hembruff v. Ontario Municipal Employees Retirement Board*, 2005 C.B.P.G. 8170 (Ont. C.A.).

³⁰ *Ahmad v. R.*, [2002] 4 C.T.C. 2497 (T.C.C.) at para. 30.

³¹ *Ibid.* at para. 42.

When Does Downsizing Require a Partial Windup of the Plan?

Pension Legislation

A pension plan is wound up when it is terminated and its assets are distributed. The windup of a pension plan is governed primarily by (i) the terms of the plan documents, including the pension plan text and amendments, the funding agreement and any employee booklets, statements or other communications; and (ii) the applicable pension standards legislation.

Section 69(1) of the *PBA* provides, in part, as follows:

The Superintendent by order may require the wind up of a pension plan in whole or in part if, ... (d) a significant number of members of the pension plan cease to be employed by the employer as a result of the discontinuance of all or part of the business of the employer or as a result of the reorganization of the business of the employer; (e) all or a significant portion of the business carried on by the employer at a specific location is discontinued; ...

When a restructuring or downsizing results in (d) above, the question becomes whether the termination of a certain number of members constitutes a “significant” number of members of the pension plan, and whether the cause of termination constitutes a reorganization of the business that qualifies as a partial windup under section 69(1)(d) of the *PBA*.

Historically, case law has indicated that a “significant” number of members has been between 10% and 20% of plan membership; however, a recent decision has made the issue less clear. In *Hydro One Inc. v. Representatives of certain and other former management members of the Hydro One Pension Plan*,³² the same issue was examined – namely, whether the termination of a small percentage of a pension plan’s active membership was significant enough for the purposes of section 69(1)(d) of the *PBA* to constitute a partial plan windup. The Ontario Divisional Court held that it was proper to interpret “significant” as connoting import rather than size, and to consider that it could include the perspective of the terminated employees (and not simply that of the employer). The Court ultimately dismissed Hydro One’s appeal and upheld the order for a partial windup. Generally, the Court indicated that the legislature employed the term “significant” because it does not lend itself to a precise quantitative threshold of job losses. The Court concluded:

- The number of terminated employees can be significant as an absolute number – it is not necessary to introduce proportions to the analysis;
- When proportions are considered, the numerator might be the number of terminated employees and the denominator the total number of active members in the plan;
- Alternatively, the numerator might be the number of terminated employees in a subgroup and the denominator might be the total number of members in that subgroup; and
- Other factors may be considered as the above list of factors is not exhaustive.

When the Financial Services Tribunal initially heard the case, it indicated that “reorganization” involves a major change in the way in which the employer carries on its business, and indicated that to establish a single reorganization, there must be a master plan with sufficient links between separate initiatives.³³

³² (2008), 67 C.C.P.B. 86 (Ont. S.C.J. (Div. Ct.)).

³³ *Marino v. Ontario (Superintendent of Financial Services)* (2007), 67 C.C.P.B. 51 at paras. 26-34 (F.S. Trib.).

When a restructuring or downsizing results in (e) in the quote above, the question then becomes whether discontinuing a certain portion of the employer's business at a location constitutes a significant portion of the business and thus qualifies as a partial windup under section 69(1)(e) of the *PBA*.

Although the limited case law on section 69 of the *PBA* usually deals with sections 69(1)(d) and (e) together, two cases provide some guidance on section 69(1)(e) alone. In *Maynard v. Ontario (Superintendent of Pensions) and McDonnell Douglas Canada Ltd.*,³⁴ the Superintendent found that the sheer number of McDonnell's employment terminations, more than 50% of the plan membership, indicated that at least a portion of its business was discontinued. It was not clear, however, whether the shrinking business constituted a discontinuance of part of the business under section 69(1)(e) of the *PBA*. Furthermore, although it was found that *one or more of* sections 69(1)(d) and (e) of the *PBA* were satisfied, the Superintendent did not specifically discuss what would constitute a "significant portion" of the business in order to qualify under section 69(1)(e).

In *Hawker Siddeley Canada Inc. v. Nova Scotia (Superintendent of Pensions)*,³⁵ the Nova Scotia Supreme Court found that under section 74(1)(e) of the *Nova Scotia Pension Benefits Act*,³⁶ a significant portion of the business carried on by the employer was discontinued when Hawker Siddeley sold a division of the company. The size of the division relative to the entire company was unclear. Although the Superintendent did not specifically rely on section 74(1)(e), he was mindful of it as he chose the date of the sale as the date of the final windup of the plan.

Plan Administrator's Options

When a plan administrator believes a partial windup may have been triggered by a restructuring or downsizing, the plan administrator has three choices. First, the administrator can voluntarily declare a partial windup and thereby define the partial windup group. The advantage of this option is that the administrator can determine the timing of the partial windup. However, the disadvantage of voluntarily declaring a partial windup is that it is uncertain whether or not the regulator, the Superintendent of Financial Services (the Superintendent), would declare a partial windup. Second, the administrator can carry on and wait to see if the Superintendent declares a partial windup. The advantage of this option is that if the regulator decides not to deem the termination a partial windup, the administrator would not have needlessly and voluntarily declared one. Third, the administrator can proactively consult with the Superintendent and obtain its view on whether the situation discussed above would require a partial windup of the pension plan.

Pension Implications of the *Wage Earner Protection Program Act* and Amendments to the *Bankruptcy and Insolvency Act*

On July 7, 2008, specific provisions of the *Insolvency Reform Act, 2005*³⁷ and the *Insolvency Reform Act, 2007*³⁸ came into force. As a result, *WEPPA* and certain complementary/related amendments to the *BIA* came into effect. *WEPPA* and the amendments to the *BIA* establish a new regime protecting employees by enabling claims for unpaid wages and pension contributions in the event of a bankruptcy or receivership (court- or privately appointed) of the employer. Such claims will outrank the claims of existing secured creditors in bankruptcies and receiverships occurring on or after July 1, 2008.

³⁴ (May 19, 1999), PCO Decision XDEC-44, online: <<http://www.fSCO.gov.on.ca/ENGLISH/pensions/pco-decisions/19990604-reasons.asp>>.

³⁵ (1993), 19 Admin. L.R. (2d) 284 (N.S.S.C).

³⁶ R.S.N.S. 1989, c. 340. Section 74(1)(e) of the Nova Scotia *PBA* is identical to s. 69(1)(e) of the Ontario *PBA*.

³⁷ *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47.

³⁸ *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36.

Wage Earner Protection Program

WEPPA establishes the Wage Earner Protection Program (WEPP), a new federal government–funded and –administered program. Under the WEPP, each employee whose employer has declared bankruptcy or entered into receivership on or after July 1, 2008 is entitled to be reimbursed for unpaid wages earned in the six-month period immediately prior to the date the employer entered bankruptcy or became subject to a receivership. The amount an employee is entitled to claim may not exceed the greater of \$3,000 and four times the maximum weekly insurable earnings under the *Employment Insurance Act*.³⁹ Under the WEPP, “wages” includes salary, vacation pay, commission, and other compensation for services rendered and does not include termination or severance pay. Payments are reduced by applicable income taxes and other deductions. Officers, directors and employees who made binding financial decisions for the employer and non-arm’s-length parties are not entitled to reimbursement of unpaid wages under the WEPP.

A key feature of the WEPP is that eligible employees can recover unpaid wages from the federal government (with reimbursements paid out of the Consolidated Revenue Fund), which then assumes the employee’s position in respect of unpaid wages against the employer as creditor in the bankruptcy or receivership of the employer. Another feature is that trustees and receivers are obligated to help administer the WEPP by identifying employees who are owed wages, notifying employees of their entitlements and providing the WEPP administrators with information pertaining to wage arrears owed to employees.

Amendments to the *BIA*

The amendments to the *BIA* provide employees with further protection regarding unpaid wages and pension contributions. First, the amendments to the *BIA* create a limited super-priority charge for unpaid wages, salary, commission and other compensation owing to an employee for the six months immediately preceding the employer’s date of bankruptcy or receivership, up to a maximum of \$2,000, and up to a maximum of \$1,000 in respect of disbursements owing to travelling salespeople incurred in the same time period. “Compensation” includes vacation pay but not severance or termination pay. This amount is now a statutorily secured claim on all “current assets” (cash and cash equivalents) of the bankrupt employer or the employer in receivership, which ranks in priority to other claims. Unpaid employee wage claims that exceed this threshold amount would be recoverable as preferred claims, ranking after claims of secured creditors but ahead of unsecured creditors.

The amendments to the *BIA* create a further super-priority for unpaid pension contributions and unremitted employee pension deductions (although not deficiencies in pension plan assets). The *BIA* provides that when an employer declares bankruptcy or enters into receivership, the following payments that remain outstanding to the registered pension plan are granted a super-priority charge over all the assets of the employer:

- employee pension contributions that have been deducted from an employee’s pay;
- employer and employee contributions that were required to be made to a defined contribution pension plan; and
- employer contributions to a defined benefit pension that were required to be made in respect of current service.

The priority does not extend to unfunded deficits arising upon a windup of a defined benefit plan and should not include scheduled catch-up or special payments an employer was required to make because of the existence of a solvency deficiency. There is no maximum amount for this priority and these claims have priority over all secured creditors in bankruptcies and receiverships. The only exceptions to the newly created super-priority charges in a bankruptcy are the special rights that currently exist for

³⁹ S.C. 1996, c. 23.

suppliers, farmers and fishermen, and the pre-existing governmental deemed trusts for employment source deductions. In a receivership, the super-priorities are treated similarly but are not subordinate to existing governmental deemed trusts for source deductions. The ranking of various super-priority charges is as follows: (i) unpaid 30-day goods suppliers; (ii) special charge for unpaid farmers and fishermen; (iii) employee remuneration charge; (iv) any claims related to amounts deducted from employee paycheques for income tax, employment insurance and CPP (and similar provincial deductions); and (v) pension charge.

Implications

Prior to the introduction of the WEPP, in many cases of employer insolvency, employees recovered only a portion of their wage claims. Furthermore, employees could recover their claims only at the conclusion of the bankruptcy proceedings. The introduction of the WEPP creates a government program that provides protection for employees in employer insolvencies where protection was previously lacking.

The amendments to the *BIA* have altered bankruptcy law in a significant way by subordinating secured creditors to unpaid employee wage claims. Previously, all wage claims constituted only preferred claims in bankruptcy, and insolvency legislation did not contain provisions that gave priority to pension contributions deducted but not remitted to the pension plan (even those deducted from employees themselves). The *BIA* now grants a super-priority charge for outstanding pension plan contributions that ranks immediately below the employee remuneration super-priority charge.

Best Practices: Making Changes to Existing Pension Plans as a Result of Restructuring or Downsizing

As part of a restructuring or downsizing process, an employer may want to make changes to its pension plan – for example, converting the plan from a defined benefit plan to a defined contribution plan, or amending the plan text to permit contribution holidays, the payment of plan expenses from the pension fund, or reducing or increasing the pension benefit for some or all members. When making such changes, employers must pay careful attention to pension legislation, pension policies and the common law.

Pension Legislation and Policies

Typically, the pension plan text reserves the right to the plan administrator (usually the employer) to amend the plan text. However, pension plans registered with the Financial Services Commission of Ontario (FSCO) must comply with requirements for amending pension plans set out in the *PBA* and the *Regulations*.

Generally, the *PBA* requires that the plan administrator apply to the Superintendent of Financial Services for registration of the amendment, by paying the fee associated with amending the pension plan and filing a certified copy of each document that changes the documents that created and supported the pension plan or pension fund.⁴⁰ An amendment to a pension plan is not effective until the administrator of the plan files an application for registration of the amendment, which must be done within 60 days of the date on which the pension plan is amended, and the application meets the requirements of section 12 of the *PBA*.⁴¹ The Superintendent will issue a notice of registration for each amendment to a pension plan registered under the *PBA*.⁴² However, depending on the type of amendment contemplated by the plan administrator, the amendment may be considered an “adverse amendment,” in which case the *PBA* sets out additional procedures for registering amendments.⁴³

⁴⁰ *Supra* note 11, s. 12.

⁴¹ *Ibid.*, s. 13(1).

⁴² *Ibid.*, s. 17.

⁴³ Section 14 of the *PBA* also provides that amendments that purport to reduce accrued benefits are void.

Section 26 of the *PBA* provides the following regarding adverse amendments:

- (1) If the administrator of a pension plan applies for registration of an amendment to the pension plan that would result in a reduction of pension benefits accruing subsequent to the effective date of the amendment or that would otherwise adversely affect the rights or obligations of a member or former member or of any other person entitled to payment from the pension fund, the Superintendent shall require the administrator to transmit to such persons as the Superintendent may specify a written notice containing an explanation of the amendment and inviting comments to be submitted to the administrator and the Superintendent, and the administrator shall provide to the Superintendent a copy of the notice and shall certify to the Superintendent the date on which the last such notice was transmitted.
- (2) If the Superintendent has required the administrator to transmit notices under subsection (1), the Superintendent shall not register an amendment mentioned in that subsection before the expiration of forty-five days after the date certified to the Superintendent under that subsection, but after the expiration of the forty-five day period the Superintendent may register the amendment with such changes as are requested in writing by the administrator.
- (3) Within the prescribed period of time after an amendment to a pension plan is registered, the administrator shall transmit notice and a written explanation of the amendment to each member, former member or other person entitled to payment from the pension fund who is affected by the amendment.

Although the *PBA* does not list which amendments are considered adverse amendments, several FSCO policies do. For example, FSCO Policy C200-101, titled “Conversion of a Plan from Defined Benefit to Defined Contribution,” states that the conversion of a defined benefit plan to a defined contribution plan alters the fundamental pension agreement between the employer and the plan members and is thus an adverse amendment. Similarly, FSCO Policy A200-201, titled “Administrative Expenses,” indicates that amendments changing a pension plan’s policy on payment of administrative expenses from the pension fund would be an adverse amendment; and FSCO Policy B100-251, titled “Benefits,” states that an amendment that provides benefit improvements for only specified persons or classes of members of a pension plan may be considered an adverse amendment.

Accordingly, for each of these types of amendments, the Administrator must give notice of the amendment before implementation, and the effective date of the plan amendment cannot be earlier than the date of the notice. Further, FSCO Policy A400-200, titled “Challenge To An Adverse Amendment,” provides that an administrator proposing to register an adverse amendment to a pension plan must provide notice of the proposed amendment to members, former members and any other person entitled to payment from the pension fund. If the notice is given, the Superintendent has the power to register the amendment whether the members agree or not. The policy also provides that plan members always have the right to challenge the amendment by way of appropriate legal action.

Under the *PBA*, the effective date of the amendment can be as early as, but not earlier than, the date first notice is provided to the affected individuals; there is no minimum notice period under the *PBA* for changes to a pension plan. However, since the pension promise is a term of the employment relationship, pension plan members could potentially claim constructive dismissal if an adverse amendment is registered.

Common Law Principles on Constructive Dismissal

The common law principles regarding constructive dismissal have been summarized as follows:

In the absence of cause, any fundamental breach by the employer of a major term of the employment relationship allows the employee to take the position that a constructive dismissal has occurred ...

However, it must be a fundamental, rather than just a minor or incidental term of the employment relationship which is breached in order for constructive dismissal to exist and it must be a fundamental breach of such a fundamental term of employment.⁴⁴

Whether a breach constitutes a repudiation of the employment relationship depends on the nature and degree of seriousness of the breach, the intention of the parties and the prevailing circumstances. Not all breaches of the employment relationship are material adverse changes that are serious enough to constitute a constructive dismissal. Furthermore, to claim constructive dismissal, an employee must treat himself or herself as dismissed.

Since pension benefits are typically considered part of an employee's total compensation, the courts' treatment of compensation changes under common law is instructive. The common law provides that an employer's unilateral changes of an employee's compensation can create a potential constructive dismissal.⁴⁵ A court typically looks at the net remuneration an employee receives before and after a proposed change.⁴⁶ In one case, the removal of a bonus equivalent to 30% of an employee's salary together with, among other things, changes to job responsibilities clearly constituted a constructive dismissal.⁴⁷ Several other cases have also held that changing the percentage of commission constitutes constructive dismissal. In addition, and more similar to the situation at hand, the removal of a company car perk, together with other changes, amounted to a fundamental breach of contract of employment and therefore constituted a constructive dismissal.⁴⁸ However, minor changes in compensation are not generally regarded as a fundamental breach of the employment contract.⁴⁹ For example, an employer's decision not to pay a bonus that was a relatively minor portion of the consideration to be paid for services to be performed over a long period of time was held not to constitute a constructive dismissal.⁵⁰

Changes to pension benefits as a result of the restructuring or downsizing may or may not be significant enough to change the terms of employment to constitute a material adverse change. For example, amending the pension plan to provide for the payment of plan expenses from the fund would be unlikely constitute a material adverse change because it is not changing the overall compensation to a plan member/employee. On the other hand, converting an employee's participation in the pension plan from defined benefit to defined contribution may represent a sufficiently significant change that it constitutes a material adverse change. This is because the pension benefit to each member of pension plan would not only be different but also difficult to calculate. In addition, as mentioned above, FSCO Policy C200-101, "Conversion of a Plan from Defined Benefit to Defined Contribution," provides that the conversion of a defined benefit plan to a defined contribution plan alters the fundamental pension agreement between the employer and the plan members and is thus an adverse amendment. Accordingly, conversion of an individual's participation in a pension plan from defined benefit to defined contribution may also be considered an adverse amendment. In any event, when changes to the pension plan represent a major adverse change, affected pension plan members/employees may treat the changes as the basis for a constructive dismissal claim. This risk can, however, be reduced if reasonable notice of the change is provided.

⁴⁴ Howard A. Levitt, *The Law of Dismissal in Canada* (2nd ed.) at 81.

⁴⁵ *Farber v. Royal Trust*, [1997] 1 S.C.R. 846.

⁴⁶ *Weselan v. Totten Sims Hubicki Associates (1997) Ltd.* (2001), 16 C.C.E.L. (3d) 184 (Ont. C.A.).

⁴⁷ *Ashton v. Perle Systems Ltd.* (1994), 2 C.C.E.L. (2d) 243 (Ont. Ct. (Gen. Div.)), at 273.

⁴⁸ *Schwann v. Husky Oil Operations Ltd.* (1989), 27 C.C.E.L. 103 at 107.

⁴⁹ *Poole v. Tomenson Saunders Whitehead Ltd.* (1987), 43 D.L.R. (4th) 56.

⁵⁰ *Ibid.*

There is little treatment in the case law on the length of the notice period required for changes to terms of employment. Accordingly, cases specifying the period of notice required for termination of employment are generally relied on. There is no precise method of determining the period of reasonable notice required for termination of employment, and the most applied guideline states:

There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.⁵¹

The criteria set out above for calculating reasonable notice have been adopted and applied in all common law jurisdictions in Canada. However, in most of these jurisdictions, the courts have generally observed a 24-month maximum notice period. The Ontario Court of Appeal has held that only in exceptional circumstances will it support a notice period exceeding 24 months, but has refused to specify a cap to the amount of notice that can be awarded.⁵² Accordingly, a pension plan administrator making a change to the pension plan that may be considered a material adverse change would ideally provide current plan members with 24 months' notice of changes to the pension.⁵³ That being said, if the proposed change is less material than termination of employment, a shorter notice period is unlikely to significantly increase the risk of constructive dismissal claims.

For the notice of the proposed changes to be effective, it “must be clear and unambiguous”⁵⁴ and “clearly communicated to the employee.”⁵⁵

Overcoming Pension Funding Challenges Following Restructuring

Funding Requirements Under the *PBA*

The central feature of the regulatory scheme established by the *PBA* is that a registered pension plan must be pre-funded.⁵⁶ Benefits cannot be paid out of the employer's general revenues as they come due. This requirement of pre-funding is what sets registered pension plans apart from other forms of retirement compensation arrangements that are not required to be pre-funded. Pre-funding is intended to ensure that contributions to pension plans are made regularly and invested prudently so that the pension fund will be sufficient to pay out pension benefits as they come due. The *PBA*'s funding rules serve to protect employees. Without these rules, receipt of the employee's pension would depend on the liquidity of the employer at the time the pension is payable.

Since a defined contribution pension plan is fully funded once the employer remits its normal contributions to the pension plan, statutory solvency funding requirements are most relevant to defined benefit pension plans. For defined benefit pension plans, the plan's actuary generally determines the employer's required contribution. The *PBA* requires that the pension plan set out the method of calculating the contributions required by the plan.⁵⁷ A pension plan is not eligible for registration if the

⁵¹ *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 at 145.

⁵² *Lowndes v. Summit Ford Sales Ltd.* (2006), 47 C.C.E.L. (3d) 198.

⁵³ Although 24 months of advance notice is ideal, the Ontario Court of Appeal held in *Wronko v. Western Inventory Service Ltd.*, [2008] O.J. No. 1589 (Ont. C.A.), that even when an employee is given reasonable notice of a change, he or she may still refuse the change, and elect to resign and claim constructive dismissal damages.

⁵⁴ *Almad v. Procter & Gamble Inc.* (1991), 77 D.L.R. (4th) 515 at 521.

⁵⁵ *Yeager v. R.J. Hastings Agencies Ltd.* (1984), 5 C.C.E.L. 266 at 276.

⁵⁶ *PBA*, *supra* note 11, ss. 55-62. Pension plans must also be funded in accordance with the requirements of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended [*ITA*].

⁵⁷ *PBA*, *ibid.*, s. 10(1)(6).

formula for calculating the employer's contributions to the pension fund is variable at the discretion of the employer,⁵⁸ or if it does not provide for sufficient funding to provide the benefits promised and payable under the plan.⁵⁹

The pension legislation sets out strict rules for remitting employer contributions, requiring that contributions for the normal cost of funding the pension benefits be remitted within 30 days after the month for which contributions are payable.⁶⁰ Employer contributions accumulate interest on a daily basis starting from the date they become due until they are remitted to the fund.⁶¹

For a defined benefit pension plan, the actuarial valuation report is the key to determining the employer's required contributions for the normal cost for funding benefits, as well as any special payments required to fund an unfunded liability or solvency deficiency. Generally, the actuary must prepare and certify a valuation every three years.⁶² This frequency of reporting provides regular snapshots of the life of a fund, while also putting the pension regulator on notice if there is an unfunded liability or solvency deficiency. Most jurisdictions also give the regulator the power to specifically request preparation of a valuation.⁶³ Some jurisdictions even require the actuary to prepare and file valuation reports annually if the most recent report disclosed a solvency deficiency of a certain threshold or magnitude.⁶⁴ All jurisdictions set out minimum required content for valuation reports in an ongoing pension plan,⁶⁵ and actuaries must use methods and assumptions consistent with accepted actuarial practice.⁶⁶ In addition, when an amendment to the pension plan affects the funding requirements, a solvency deficiency or a going-concern unfunded liability, an actuarial valuation must be prepared and filed.⁶⁷

Under the *PBA*, an employer must make all contributions associated with the normal cost of the pension fund, plus any special payments required to fund an unfunded liability or solvency deficiency.⁶⁸ Special payments associated with liquidating a solvency deficiency generally may be amortized over a five-year period with interest accumulating on the sum. Remittances are required monthly, in equal installments.⁶⁹

Similarly, an employer must also pay off any going-concern unfunded liability. These special payments may be amortized over a fifteen-year period, with interest accumulating on the sum. Again, these contributions must begin on the valuation date of the report that discloses the liability, and remittances must be made at least monthly in equal installments.⁷⁰

⁵⁸ *Ibid.*, s. 11(2).

⁵⁹ *Ibid.*, s. 55(1).

⁶⁰ R.R.O. 1990, Reg. 909, s. 4(4)(3).

⁶¹ *PBA*, *supra* note 11, s. 58(1), (2) and *Toronto-Dominion Bank v. Usarco Ltd.* (1991), 42 E.T.R. 235 (Ont. Ct. Gen. Div.).

⁶² *Supra* note 60, s. 14(1).

⁶³ See, for example, *ibid.*, s. 4(6)(b).

⁶⁴ *Ibid.*, ss. 14(2)-(6).

⁶⁵ *Ibid.*, ss. 14(7), (9) and 16.

⁶⁶ *Ibid.*, s. 16.

⁶⁷ *Ibid.*, ss. 3(1) and (2).

⁶⁸ *Ibid.*, ss. 4(2)(b) and (c).

⁶⁹ *Ibid.*, ss. 4(2)(c), 4(4)(5.) and 5(1)(e).

⁷⁰ *Ibid.*, ss. 4(2)(c), 4(4)(5.) and 5(1)(b).

Underfunded Plans: Proposals for Reform

Given that these requirements can be quite onerous if an employer is on the verge of insolvency, some jurisdictions are considering relaxing the five-year solvency-funding requirement. For instance, the federal government enacted regulations under the *Pension Benefits Standards Act, 1985*⁷¹ to permit lower funding requirements for Air Canada for 10 years, conditional on Air Canada meeting certain disclosure requirements and contribution remittance targets.⁷²

The Ontario budget, released on March 29, 2009, contains a number of proposals for funding relief for defined benefit pension plans. Amendments to the *PBA* provide that the following reforms will be introduced through regulations, retroactive to September 30, 2008: a new five-year payment schedule created by consolidating the solvency amortization schedules provided under previous valuation reports; deferral of funding on a new solvency deficiency for one year; and the option to extend the amortization period for funding new solvency deficiencies, subject to member and former member consent.

The New Commuted Value Standard, while not an explicit funding relief measure, will result in lower costs for defined benefit plans.⁷³ It will reduce both individual commuted value transfers and the solvency liabilities used to calculate an employer's solvency funding obligations. In Ontario, the New Commuted Value Standard has been approved for the purpose of solvency valuations dated December 12, 2008 or later.

Three expert panels on pensions have released reports with some recommendations for reform: the Ontario Expert Commission on Pensions (OECF),⁷⁴ the Alberta/B.C. Joint Expert Panel on Pension Standards (JEPPS)⁷⁵ and the Nova Scotia Review Panel (NSRP).⁷⁶ A key recommendation of the OECF report is that funding rules should be tailored to the plan in issue. For instance, it suggested that in contrast to multi-employer pension plans (MEPPs) and jointly sponsored pension plans (JSPPs), single employer pension plans (SEPPs) should continue to be funded on both a going-concern and solvency basis, since they are more vulnerable to fluctuations in the plan sponsor's fortune and to the risk of the sponsor becoming insolvent.⁷⁷ Given its view that SEPPs are more vulnerable, the OECF suggested requiring a security margin or provision for adverse deviation (PfAd) under a solvency valuation, and maintaining the current five-year amortization period for solvency deficiencies for plans funded below

⁷¹ R.S.C. 1985, c. 32 (2nd Supp.).

⁷² These amendments were applicable only to Air Canada, given its estimated aggregate solvency deficiency of \$1.24 billion.

⁷³ The most significant changes between the New Commuted Value Standard and the previous standard are as follows: (i) the mortality table has been updated from UP-94 at 2015 (Uninsured Pensioner 1994 table projected to 2015 using mortality projection scale AA) to UP-94 at 2020 (Uninsured Pensioner 1994 table projected to 2020 using mortality projection scale AA); (ii) the discount rates for non-indexed and indexed pensions have been increased, before rounding, by 40 basis points (100 basis points equals 1%); and (iii) discount rates will now be rounded to the nearest 10 basis points rather than the current 25 basis points. As a result of this new standard, most commuted values paid from pension plans will be lower than under the current standard.

⁷⁴ Ontario, Expert Commission on Pensions. *A Fine Balance: Safe Pensions, Affordable Plans, Fair Rules*. Toronto: Expert Commission on Pensions, 2008, <online: Expert Commission on Pensions http://www.pensionreview.on.ca/english/report/Pensions_Report_Eng_web.pdf> [OECF report].

⁷⁵ Joint Expert Panel on Pension Standards. *Getting Our Acts Together: Pension Reform in Alberta and British Columbia. Report of the Joint Expert Panel on Pension Standards* (Edmonton): Alberta/British-Columbia Pension Standards Review, 2008, <online: Alberta-British Columbia Joint Expert Panel on Pension Standards http://www.finance.alberta.ca/publications/pensions/pdf/2008_1125_jepps_final_report.pdf> [JEPPS report].

⁷⁶ Nova Scotia, Dept. of Labour and Workforce Development, Pension Review Panel. *Promises to Keep: Pension Review Panel* (Halifax: Dept. of Labour and Workforce Development), 2009, <online: Nova Scotia Pension Review Panel <https://www.gov.ns.ca/lwd/pensionreview/docs/PensionReviewPanelFinal.pdf>>.

⁷⁷ OECF report, *supra* note 74, Recommendations 4.8, 4.13, and p. 67.

95%.⁷⁸ The OECF also recommended permitting the use of letters of credit, and investigating the use of asset pledges as security for a proportion of contributions.⁷⁹

The JEPPS report recommends the continuation of both solvency and going-concern valuation requirements, amortization of solvency deficiencies over five years, and the use of letters of credit or assets.⁸⁰ Although JEPPS did not recommend requiring a PfAd, it did recommend changes to solvency funding requirements.⁸¹ The report also suggested that employers be allowed to establish separate “pension security funds” to hold contributions required to meet solvency obligations over and above the going-concern obligations, and which would be subject to different withdrawal rules and could be returned to the employer on plan windup.⁸²

The NSRP report proposed the “Accrued Benefit Basis”⁸³ as a new method of valuation, which includes consideration of all promises, but uses actuarial assumptions for going-concern valuations. The Accrued Benefit Basis would apply to all plans and would be the only regulatory requirement for minimum funding. The NSRP also proposed extending the amortization period for deficits to 10 years for all plans.⁸⁴

Conclusion

The decision to restructure or downsize is never an easy one to make, but given today's economic situation, some companies may find it necessary. Employers must plan carefully during restructuring to avoid running afoul of the protections in place for employees affected by the restructuring. In particular, employers must ensure that (i) they continue benefit and pension plan contributions during the *ESA* notice period and consider continuing to contribute during the common law notice period; (ii) they meet their obligations under the applicable pension legislation and policy and the common law when employees cease to be members of the employer-sponsored pension plan; (iii) they consider whether the restructuring has triggered a partial windup of their pension plan and what course of action they will take if there is a partial windup; (iv) if they enter bankruptcy or receivership, they are aware whether or not their employees will make claims under the WEPP and the amendments to the BIA and thus affect the priority of other creditors; (v) if they decide to amend their pension plans, they comply with the applicable pension legislation and they give employees sufficient notice to avoid triggering constructive dismissal claims; and (vi) they are aware of and make use of all potential avenues for funding relief with respect to their pension plans. Employers who consider the above issues and thus embark on restructuring plans with their eyes open will likely find that the process runs more smoothly and that there will be fewer surprises at the conclusion of the process.

⁷⁸ *Ibid.*, Recommendations 4-14 and 4-15.

⁷⁹ *Ibid.*, Recommendation 4-22.

⁸⁰ JEPPS report, *supra* note 75 at 122-3.

⁸¹ *Ibid.* at 123.

⁸² *Ibid.* at 131-2.

⁸³ JEPPS report, *supra* note 75 at 21.

⁸⁴ *Ibid.* at 22.