NEGOTIATING PENSIONS AND BENEFITS: AVOIDING THE PITFALLS

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OVERVIEW

Negotiations are very different from negotiations at other times, especially prior to the last recession. The days of 5% or better salary increases (in the eighties as much as 10%) have been over for some time. Last year average negotiated increases for private sector unionized employees was in the range of two percent or even less. In some cases the increases were zero or negative.

In this economic climate it is doubly important to control the cost of negotiated benefits.

For many employers the cost of benefits is very difficult to control. If short term and/or long term disability are part of your benefit package, the cost of benefits can increase sharply because of the experience rating of the bargaining unit covered. Often insurance companies will offer an attractive rate in order to write the business. After one or two years, the experience rating will take effect and benefit costs can increase substantially. I have seen cases where the increase in costs of premiums can amount to significantly more than two percent of total payroll cost.

Employees generally are not aware of the cost of benefits. When the cost of your benefit package increases because of your employees usage, you are unlikely to get any "credit" for this increase at the bargaining table.

The cost of benefits in terms of the overall compensation cost can be as high as fifteen or twenty percent. Once benefits have been introduced it is very difficult to get rid of them. There are strategies however that every employer can use to reduce the cost of benefits.

CONTROLLING BENEFIT COSTS

Controlling the cost of benefits requires a number of related strategies.

First, the benefits that are negotiated in the first instance are important. Some types of benefit plans are much more costly than others. Co-payment options are very effective in reducing unnecessary usage thus effectively controlling premium costs. Dental benefits need not pay on the most current ODA schedule. Most dentists will accept a one, two or even three year old schedule as full payment. When negotiating short term disability coverage be sure you understand the plan you are getting and its ramifications. I have seen companies adopt a first day accident, hospitalization and sickness short term disability plan without realizing until too late the significance in cost of the last digit.

Second, there are other parts of the collective agreement that need to be in place to help you control benefit costs. Before you agree to any disability plan, insist on the right in the collective agreement to have an employee examined by a company appointed Doctor in appropriate cases. This is especially true if the STD is self-insured as many are. This right is important, not only for the control of disability costs, but also as a deterrent to other inappropriate uses of sick leave. However, you must also be aware of the privacy requirements with respect to medical records and for this reason, many employers hire an external agency to administer their STD and other benefits if they self-insure.

Most insurance companies sick benefit plans contain provisions which require employees to be seen by a Doctor appointed by the insurance company. Some carriers are less vigilant than others in using this right. If you have questions about the legitimacy of an employee absence, you should discuss this with your carrier. If you are not happy with the response you get, consider changing carriers. Let the insurance company know you are considering the change. In the best circumstances, insurance companies work with the employer, not only to control abuses, but also to insure that employees get the benefits to which they are legitimately entitled.

A consistent absenteeism policy can go a long way to reduce the costs of benefits. When a company becomes lazy about absenteeism, the hard working employees are the most affected. When you tolerate clear abuse from some employees, the hard workers come to resent the Company, not the abusers. This not only increases absenteeism generally, it also decreases the commitment and motivation of your other employees. An effective absenteeism policy will not only decrease benefit usage, it will also improve employee morale and commitment.

Problems which arise during the currency of the contract can create real problems at the bargaining table at renewal. I have seen several instances where the actions of a carrier during the term of a collective agreement created almost insurmountable problems at the bargaining table. Management should monitor benefit administration by the carrier in order to be aware of issues before they become problems in bargaining.

BARGAINING BENEFITS

The time to consider benefits is before you start. Costing proposals and options is time consuming. Unless you are a very large employer, there are only certain options available for you from the various carriers. Some insurance companies provide packages that are not offered by others. All too often management goes into bargaining ill prepared to deal with these issues.

I would suggest obtaining the services of a recognized, experienced broker who is familiar with group plans from a number of carriers. Discuss the options available before you start bargaining. If you have existing benefits, ask your broker for suggestions on how costs can be reduced. In one negotiation in which I was involved a change in carrier coupled with the introduction of a modest deductible was able to cut the cost of the benefits in half. This allowed the Company to offer a modest, but in the end acceptable wage increase without any increase in overall cost.

In these days of aging workers and low salary increases, many bargaining agents are increasingly stressing benefits, including pensions. Examine the collective agreements recently negotiated by the Union. Determine, if you can, the priorities in bargaining in other recent sets with other employers. This will give you a fair idea of what you can expect at the bargaining table. Obtain quotes and options from your broker <u>before you start</u>. Consider taking the initiative in proposing changes especially where they save you money.

GIVING INFORMATION TO THE UNION

For reasons which will be dealt with later, the information you give the union about your benefits may be extremely important to the Company, not only during the currency of the immediate agreement, but potentially for years to come.

Under the labour relations act you have a duty to bargain in good faith. As interpreted by the OLRB, that duty includes the duty to provide the union with the information they require to bargain rationally about any topic. Clearly you are required to provide complete information about the benefit plans you currently provide. In my view the union is entitled to a copy of the terms of the contract between the employer and the carrier (As we will see later, it is to your advantage that the union be given this). Make sure you provide the union with complete information about the benefits you are proposing especially if there is a change.

In my view the Union is not entitled to know the cost of the benefits you provide. However, it may be in your interest to tell them, if not in absolute dollars at least in terms of the percentage of overall compensation their proposals represent. I almost always give the union the company's costing of their benefit requests in percentage terms at the onset of bargaining the monetary issues. In almost every instance the cost of the benefits is not appreciated by the members of the bargaining team.

It is usually the union representative and not the employee representatives that will push for increases in benefits at the expense of increases in the wage package. Consider bargaining these together indicating that it all comes from the same pie and increases granted in one place mean they will not be granted in another.

Where appropriate, link benefit issues with other issues in negotiations, such as Medical leaves, absenteeism etc. Be very careful in the drafting of Benefit and Pension benefits language. This area, perhaps more than any other can produce very significant problems when drafting is ambiguous.

Let me now turn to some specific areas to discuss some of the issues which can arise.

BARGAINING PENSIONS

A major question which arises when bargaining for pension benefits is where to memorialize the agreement. Many collective agreements incorporate the plan into the collective agreement. This of course makes disputes which may arise under the plan subject to the grievance and arbitration provisions of the collective agreement. In my view the pension plan should be treated as a separate document. If it is referenced in the collective agreement, which is not necessary, the agreement should provide that the pension plan document and not the collective agreement govern, and further that any disputes are to be dealt with pursuant to the plan document and not the collective agreement.

Sometimes an employer will simply make contributions to an existing union pension fund or other multi-employer plan. In such cases the collective agreement should set out the contributions to be made and then specify that the sole obligation of the employer is to make the contributions as set out in the collective agreement. Before agreeing to contribute to a particular plan insure that it is a properly registered plan. Find out who administers the plan and whether or not trustees are involved. A little time spent investigating a proposed plan at the front end can save significant difficulties later.

SURPLUSES

As indicated earlier, surpluses often arise when a plan is wound up, or partially wound up and the assets of the plan are greater than required to provide the benefits specified for the existing members. [Having said this, this issue is not as common as it was some years ago. Today many pension plans are in deficit and very different factors are involved if the plan is wound up.]

The present act was amended in 1987, largely as a result of Conrad Black's attempt to obtain the very large surplus he created by purchasing Dominion Stores, and then selling its assets and terminating a large number of employees. The pension plan in question had a very large surplus. The common law rule up to that point had been that the surplus reverted to the "settlor" unless the plan otherwise provided.

The legislation now requires the consent of the Pension Benefits Commission before any payment of surplus can be made to the employer. There are provisions insuring that there is indeed a surplus and requiring retention of some surplus in the plan after any pay out. To be eligible for return of any surplus, the plan must specifically provide for payment of any surplus to the employer on wind up. If the plan does not so provide, the Act deems that any surpluses accruing after December 31st, 1986 be distributed among members and former members of the plan. There are provisions for notice to be provided to members, former members, unions, other persons receiving payments and any advisory committee established under the Act. All of these persons have the right to make written submissions to the Commission within thirty days of receiving such notice.

PROVIDING BENEFITS TO RETIREES

Many collective agreements, especially in the Automotive Sector, have provisions which provide some benefits to retirees. In most cases these provisions date back to a time when benefits were considerably cheaper, and when the number of retirees was low. In the U.S. where there is no public health care, the existence of these provisions makes considerable difference to the employees and retirees concerned. In Canada, provisions of this type received little or no attention until the Dayco decision.

In 1984 Allen Industries, a subsidiary of Dayco at the time closed its plant in Hamilton and moved to Mexico. The collective agreement contained a provision which stated "... Retirees to receive negotiated benefits." On final wind up a close out agreement was negotiated which provided that all employees would receive benefit continuance for six months following the plant closure. The Company also continued benefit coverage for retirees during the same period. The Collective Agreement expired, the Company asked for conciliation and at conciliation requested a "no board". The no Board was granted. Some time later the benefits for active and retired employees were terminated.

The CAW grieved the termination of retirees benefits. The Company argued that since no violation of the Collective Agreement had occurred during the currency of any agreement, whatever rights the retirees had were individual rights and an arbitrator had no jurisdiction to determine them. The Company also argued that they had specifically dealt with retirees benefits in the close out agreement and that they had complied with what had been agreed.

The issue of jurisdiction was determined separately. The matter went all the way to the Supreme Court. There it was determined that such benefits could be provided for in a collective agreement and that they could, depending on the language of the agreement, "vest". If they were vested in the agreement, an arbitrator would have jurisdiction to enforce them. The matter was remitted to a new arbitrator to determine if they had vested in the instant case. The matter proceeded before the new arbitrator for several days of hearings and finally settled. Whether or not the language in question did create vested rights was thus never determined.

In the Dayco case the issue of retirees benefits was specifically addressed during negotiation of the close out agreement and yet the ambiguity of language in the collective agreement, negotiated more than ten years previously created the possibility that vesting was intended. Extraneous evidence of the negotiations conducted more than twenty years earlier thus became not only relevant, but crucial during the rehearing which took place after the Supreme Court decision.

The crucial difference between Canadian and American law is that in Canada, all matters that are put on the table must be negotiated in good faith. In the U.S. only that class of issues referred to as mandatory issues must be negotiated. Retirees benefits are considered not mandatory, but permissive, thus the union cannot use the threat of strike to force the company to negotiate benefits for retirees.

The decision of the Supreme Court thus places employers in Canada in a very real quandary. The Union can force them to negotiate with respect to benefits for retirees. Unless great care is taken, such benefits can vest. In the Dayco case, once the underlying large group of active employees was gone, no insurance company was prepared to provide the benefits in question except on an administration of cost basis.

If you are going to provide benefits for retirees you should insist that the language in the collective agreement state that such benefits are to be provided only during the currency of the agreement and that such benefits are not to be considered as having vested.

Once you have decided what benefits are going to be provided to the bargaining unit, it is absolutely crucial that the language in the collective agreement be unambiguous. Ambiguities can arise with respect to benefits perhaps more easily than in other areas of the collective agreement.

Most collective agreements do not provide details with respect to the precise benefits which are provided. Often unions will claim that statements were made at the bargaining table representing that certain benefits were available. If the language in the agreement is ambiguous, then these assertions can give rise to the introduction of extrinsic evidence.

There are many examples in the reported cases where unions have alleged that certain benefits were included or that ambiguous language in the collective agreement must be interpreted in light of promises made at the bargaining table or other representations made by representatives of the employer. Inevitably, these hearings become costly and the results difficult to predict. Sometimes statements made as much as ten or even more years previously will be crucial to the determination if the language in the collective agreement is ambiguous.

THE ARBITRAL JURISPRUDENCE

Most employers provide benefits through an insurance carrier. Over the years, the various methods by which benefits are provided have been categorized by arbitrators dealing with disputes concerning such benefits. Many arbitrators have said with respect to this issue (as with others) that parties are presumed to be aware of the arbitral jurisprudence when negotiating their collective agreement. Thus, the actions that you take in your negotiations will be interpreted as if you were aware of the four categories as described in the jurisprudence whether or not you were so aware.

1. *Benefits Completely Outside the Collective Agreement*

There is no requirement that benefits be negotiated and included in a collective agreement. It is possible for an employer to discuss with the union what benefits are to be provided and then to simply provide them by purchasing insurance. Where the employer uses this approach, the traditional arbitral view is that these benefits are provided outside of the collective agreement and are therefore not properly the subject of a grievance or arbitration. Arbitrators therefore have stated that they have no jurisdiction to deal with any disputes which arise concerning benefit which are provided outside the collective agreement. Not surprisingly, unions are reluctant to adopt this approach. It becomes very difficult for a union to enforce rights it has negotiated unless those rights are specified in the collective agreement. Thus, although this approach might be the best from the point of view of the employer, it is probably unachievable in most circumstances.

2. *The Collective Agreement Provides Specified Benefits*

Many collective agreements simply state that the following benefits will be provided to the employees and then list briefly those benefits. <u>It is this kind of collective agreement which can cause the greatest difficulties</u>. Often, such an agreement will merely list benefits, without specifying what they are. Extended health plans, drug plans, dental health plans, and short and long term disability plans have great variations from one carrier to another. Some are capped, some are not; some have co-payment options, some have deductibles; some provide benefits which are not provided by others. Where the collective agreement merely provides that the company will give certain benefits to employees, in the event of a dispute it is almost inevitable that extensive extrinsic evidence will be required to resolve the dispute. Evidence about what was said at the bargaining table, evidence about benefits that have been provided in the past, evidence about representations made to individual employees, all become relevant and material.

For obvious reasons, I do not recommend this approach.

3. *The Collective Agreement Incorporates the Provisions of the Insurance Plan*

While this is not the best approach from the view of the employer, it is significantly better than the approach set out in paragraph 2. Here, a specific insurance plan is identified and then incorporated by reference into the Collective Agreement. This eliminates any ambiguity concerning the benefits to be provided (assuming the insurance plan is itself clear), but places a number of significant restrictions on the employer. First, once a particular plan is specified, it is extremely difficult for the company to change carriers. Such a change would of course require the consent of the union. In addition, any disputes concerning whether or not an individual employee is entitled to a particular benefit would be subject to the grievance and arbitration provisions of the collective agreement. Where an employer engages an insurance company to provide particular benefits, and the insurance company determines that an employee is not eligible for those benefits pursuant to the agreement between the insurance company and the employer, it would appear the employer takes the risk in the event an arbitrator disagrees with the insurance company's determination.

4. *The Collective Agreement Provides for Payment of Premiums for a Benefit Plan Supplied by an Insurance Company*

This is the most common approach used by employers who are aware of the arbitral jurisprudence. Appropriate contractual language will first of all outline briefly the types of benefit plans to be provided by the company. The agreement will then go on to say that the company's sole obligation under the collective agreement is to attempt in good faith to obtain coverage for the specified benefits for substantially similar benefits and to pay the required premiums. The agreements most typically go on to provide that the particular benefits provided are as set out in the insurance plan and further that any dispute as to whether or not a particular employee is entitled to receive such benefits is a matter between such employee and the insurance company, and therefore NOT subject to the grievance and arbitration provisions of the collective agreement.

Arbitrators have consistently taken the position to date that the inclusion of language of this sort into the collective agreement restricts their jurisdiction in dealing with the specific benefits provided or the eligibility of a given employee to obtain them. So long as the employer can demonstrate that they have paid premiums in order to provide benefits substantially similar to the benefits as listed in the agreement, arbitrators have indicated that they have no further jurisdiction to make orders concerning whether or not individual employees are or are not eligible.

RECENT CASE LAW

A 1995 decision of the Supreme Court challenged the traditional approach. In *Weber v. Ontario Hydro* (1995) 95 C.L.L.C. 210-027, the Supreme Court dealt with a court action commenced by an employee of Ontario Hydro covered by a collective agreement. The court action had been brought after filing a grievance through the union. The court action alleged tort damages and breaches of the employee's rights under the Canadian Charter of Rights and Freedoms. In that case, the court found that where the difference between the parties arises from the collective agreement, the claimant must proceed by way of arbitration. The court went on to find it had no power to entertain an action in respect of a dispute which arose from a collective agreement. The court found that Section 45 of the *Ontario Labour Relations Act* (now Section 48) required all such disputes to be dealt with through the arbitration procedure. The court found that the jurisdiction of the arbitrator was an exclusive jurisdiction and covered disputes which arise either expressly or inferentially from the collective agreement.

Applying this approach it could be argued that any dispute concerning benefits that are referred to in a collective agreement arises at least inferentially from the agreement and therefore must be dealt with through the arbitration process. However, the court in Weber indicates:

> "It might occur that a remedy is required which the arbitrator is not empowered to grant. In such a case the courts of inherent jurisdiction in each province may take jurisdiction."

In the last few years we have had several court decisions dealing with this exact issue. First, in a case decided by the Ontario Court of Appeal [*Pilon v. International Minerals and Chemical Corp. (Canada)* (1996), 141 D.L.R. (4^{th}) 72], the court applied this reasoning to find a unionized employee not entitled to bring a suit against an insurance carrier for LTD benefits. The LTD plan was not incorporated into the collective agreement, but notwithstanding the long standing arbitral jurisprudence to the contrary, the Court of Appeal held that an arbitrator had exclusive jurisdiction to deal with the dispute.

A more recent decision of this same court appears to reverse this conclusion. After *Pilon* a number of arbitrators ruled in similar fashion, others refused to follow *Pilon* depending on the principal that where the sole obligation was to pay premiums, an arbitrator had no jurisdiction to determine whether benefits were available in individual cases. The matter came back before the Court of Appeal in *Canadian Broadcasting Corporation v. Burkett* (1997), 1555 D.L.R. (4^{th}), 159. In that decision the Court determined that the courts are the appropriate forum for resolution where the sole obligation of the employer was to pay premiums.

Several more recent decisions have made a distinction between those cases where the Insurance Company is the mere administrator of the plan, and those where the carrier makes the ultimate decisions and receives a premium from the employer. In the former, arbitrators have taken jurisdiction, in the later, they have not.

In my view, it will still be available for the employer to argue in appropriate cases that the arbitrator does not have jurisdiction to provide the appropriate remedy. The insurance company is not a party to the collective agreement, and since the collective agreement specifies that any disputes concerning eligibility for benefits is between the employee and the insurance company pursuant to the contract of insurance, arbitrators should lack jurisdiction to deal with the matter notwithstanding the *Weber* decision.

CHANGING CARRIERS

Often it is advantageous for an employer to change carriers during the currency of a collective agreement. This may be because new benefits become available at reduced rates or because the company becomes dissatisfied with the service being provided by the current carrier, or because the current carrier increases premiums during the currency of the collective agreement.

Whether or not the employer on its own initiative has the ability to unilaterally change carriers will depend upon the language of the specific collective agreement. If you adopt language as set out in paragraph 4 above, you probably have the right to change carriers unless you have made a representation to the union that you will not do so.

The ability to change carriers can be extremely effective in reducing the cost of negotiated benefits. If you are going to change carriers, however, you must ensure that the benefits being provided by the new carrier meet the requirements of your collective agreement.

If you have the right to change carriers under your collective agreement, I would advise you nevertheless to inform the union well in advance of the fact you are changing carriers. One way to antagonize unions and create problems which otherwise need not exist is to exercise rights you have in a manner which embarrasses the union.

CONCLUSIONS

1. Benefit negotiations can be expensive. It is crucial to be prepared before commencing.

2. Employers should review the various plans available and consider co-payment, deductible and even premium ceilings in order to properly take account of increases in premiums caused by greater than predicted employee usage. Paying a percentage of the premium cost instead of all of it will provide some incentive for the union to also be concerned about accelerating costs.

3. The negotiated language of benefit and pension provisions can create significant differences in potential liability. Employers are encouraged to insure they are current on the most recent court and arbitral jurisprudence in this area.

This paper is an attempt to outline some of the typical issues which can arise from negotiation of benefits, including pension benefits in a collective agreement. It should not be considered a definitive or exhaustive treatise. Benefit issues can be extremely complicated and often involve multiple parties, even in cases where the insurance provider is not a party to the collective agreement. Often the only way to solve them is by an alternate dispute approach which allows the insurance provider to be involved, even though not a ‘party’.