



## Pension & Benefit Law

### Full Report and Decision

# Employees entitled to \$23.5 million after employer unlawfully withdrew bridging benefit from pension scheme, court holds

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The Quebec Superior Court held that a group of IBM employees was entitled to a bridging benefit that paid up to \$6,925 annually to those who took early retirement. Although IBM had an express contractual right to amend the terms and conditions of its defined benefit pension plan, the company had circulated plan documents to employees that included references to the bridging benefit, and did not mention the possibility that IBM might terminate that benefit in the future. Further, those documents were published at a time when employees were asked to choose, irrevocably, between remaining in the defined benefit plan and transferring to a new defined contribution plan. The Court held that, having required the employees to make an irrevocable choice on the basis of certain information, including the ongoing availability of the bridging benefit, it was abusive for IBM to subsequently exercise its power to withdraw that benefit unilaterally and the exercise of such power was therefore invalid, pursuant to s.1437 of the Quebec *Civil Code*. However, it also ruled that the company was not prevented from withdrawing retiree health benefits, as it had made no comparable representation in relation to those benefits.

#### The Facts:

After an employer introduced changes to its pension scheme, eliminating a bridging benefit and curtailing retirees' access to medical benefits, a group of employees brought class proceedings challenging the employer's right to make such changes.

IBM Canada Ltd. operated a factory in Bromont, Quebec, where it employed several hundred non-unionized employees. The company espoused a philosophy of paying its employees a somewhat modest salary, but provided generous benefits, including membership in a defined benefit pension scheme, the IBM Retirement Plan. One of the terms of the pension scheme, introduced in 1998, was a bridging benefit, under which employees who took early retirement after reaching either the age of 55 or, if sooner, 30 years' service, were to receive an annual payment of \$277 per year of service, up to a maximum of 25 years' service, from the employee's date of retirement until his or her 65th birthday. The bridging benefit was worth up to \$6,925 per annum.

Effective January 1, 1995, IBM introduced a defined contribution pension scheme, and offered its employees the choice of joining the new scheme or remaining in the defined benefit scheme. To encourage employees to join the new scheme, it offered to increase the value of the accrued pension rights by 40 percent on transfer from the defined benefit scheme into the defined contribution scheme. In a guide circulated to employees in September 1994, IBM stated that this increase was "aimed at compensating for certain differences between the two regimes, such as ... the bridging benefit (payable to those who take retirement before the age of 65)." The circular also indicated that the choice facing IBM employees at that time was "irrevocable" and that employees would not be permitted to move between the schemes in the future.

IBM also provided employees with a computer program called Choicemaker, which provided financial projections and modelling that purported to assist employees in choosing between the two schemes. The Choicemaker program included the bridging benefit in calculations relating to the defined benefit scheme. The bridging benefit was also included in the calculations set out in the annual pension statements sent out to employees.

None of the materials provided to employees at the time they were to make the choice between the two schemes mentioned the possibility that IBM might remove the bridging benefit in the future. Such a warning did not appear in annual pension statements until 2006.

As well, on January 1, 2001, IBM introduced a flexible health benefit plan, which provided retirees with a health care spending account of up to \$2,100 annually, and supplemental health care insurance coverage. Retirees who were hired before April 17, 2000 could use the amount in the health care spending account to pay for eligible health care expenses, such as the cost of medical care or insurance.

While the defined benefit scheme's rules permitted IBM to make unilateral changes to the scheme, clause 15.02 of the rules prohibited amendments that adversely affected any vested or accrued pension rights. On January 1, 2006, IBM announced certain modifications to the defined benefit scheme, including abolishing the bridging benefit for employees who retired after December 31, 2007, and discontinuing the flexible retiree health benefit plan, including the health care spending accounts, after the age of 65 for employees retiring on or after January 1, 2008.

Jean Samoisette, had joined IBM in June 1978, and was a participant in IBM's defined benefit pension scheme. When presented with the option of transferring into the defined contribution scheme in 1994, Samoisette opted to remain in the defined benefit scheme, relying on the statements made in the guide circulated by IBM in September 1994. Samoisette was unable to take retirement before January 1, 2008, and was therefore no longer entitled to the bridging benefit in the event that he retired early, nor was he eligible for a health care spending account past the age of 65, pursuant to the 2006 changes.

In December 2008, Samoisette brought class proceedings on behalf of himself and 400 to 500 persons who were similarly affected by the changes to the defined benefit pension scheme announced in 2006, alleging that IBM was not entitled to make these changes. In a September 10, 2010 decision, 2010 QCCS 4312 (CanLII), Quebec Superior Court judge Robert Castiglio rejected Samoisette's application to certify the class proceedings. However, in a decision dated May 18, 2012, 2012 QCCA 946 (CanLII), the Quebec Court of Appeal unanimously allowed Samoisette's appeal and granted him status as the representative of a group consisting of IBM's employees at Bromont who were participants in the defined benefit pension scheme on January 1, 1995, and who were eligible for early retirement after December 31, 2007. The Supreme Court of Canada denied IBM leave to appeal on November 8, 2012, 2012 CanLII 68762 (SCC).

Section 1437 of the *Quebec Civil Code* provides:

An abusive clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced.

An abusive clause is a clause which is excessively and unreasonably detrimental to the consumer or the adhering party and is therefore contrary to the requirements of good faith; in particular, a clause which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract is an abusive clause.

The *Quebec Supplemental Pension Plans Act (SPPA)* imposes a number of obligations relating to the amendment of occupational pension plans. Under s.24, the pension committee, which administers the pension plan as trustee, must register such amendments with *Retraite Quebec*, the provincial pension agency. Further, s.26 of the Act stipulates that, before registering an amendment that reduces the value of retirement benefits, the pension committee must send notice of the amendment to each pension scheme member.

#### **The Arguments:**

The employees argued that the unilateral amendments to the defined benefit scheme made in 2006 were unlawful, notwithstanding IBM's power to make unilateral changes under the scheme's rules. They contended that the bridging benefit was an accrued right, and could not be withdrawn under the scheme's rules and that IBM's exercise of its right to amend the pension plan was abusive in the circumstances, and therefore null pursuant to s.1437 of the *Civil Code*, as the members, whose average length of service was 27.2 years, were close to the age at which they were able to retire and access the bridging benefit. Regarding IBM's argument that the appropriate course of action for aggrieved employees was to resign and bring a claim for constructive dismissal, the employees maintained that IBM's actions amounted to breach of contract and that, by remaining in employment, the employees had not waived that breach.

IBM argued that its amendments to the pension plan were permitted under the plan itself and applicable legislation. It maintained that the bridging benefit was not an accrued right at the time of the amendments, as none of the members of the class were entitled to draw the benefit at that time. It further argued that the guide circulated to employees in 1994 did not amount to an undertaking that IBM would not exercise its discretion to withdraw the bridging benefit, contending that the long-term nature of an employment relationship meant that the employer was entitled to retain a discretion to amend the employment contract, which must be permitted to evolve over time. It also maintained that the benefit could not be said to be an essential element of the employment contract as it did not exist when the members of the group were hired by IBM. Submitting that the requirements of the *SPPA* superseded the *Civil Code*, IBM argued that it was permitted to make amendments to its pension scheme provided it adhered to the *SPPA*. Finally, IBM maintained that the employees had waived any breach of contract by continuing in employment for nearly two years between the announcement of the amendments and the filing of the claim.

The parties raised essentially the same arguments in respect of the retiree health benefits.

#### **The Decision:**

Quebec Superior Court judge François Duprat allowed the action in part, ruling that IBM's withdrawal of the bridging benefit was unlawful in light of the statements made to employees in 1994 but that the curtailment of health benefits for retirees was not.

Duprat commenced his analysis by noting that pension schemes are a component of remuneration under a contract of employment, citing the Quebec Court of Appeal's decision in *Association provinciale des retraités d'Hydro-Québec v. Hydro-Québec*, 2005 QCCA 304 (CanLII) (reported in Lancaster's *Pension & Benefit Law*, December 8, 2005, eAlert No. 30). Duprat therefore accepted that the aspects of the pension scheme amended by IBM in 2006 formed part of its employees' terms and conditions of employment, and identified the central issue in this case as whether IBM was able to effect those amendments in the circumstances.

Dealing first with the bridging benefit, Duprat quoted the following passage from the Supreme Court of Canada's decision in *Schmidt v. Air Products Canada Ltd.*, 1994 CanLII 104 (SCC), as indicating that pension plan documents, such as handbooks, which are expressed not to be legally binding may nevertheless confer rights on employees in certain circumstances:

Documents not normally considered to have legal effect may nonetheless form part of the legal matrix within which the rights of employers and employees participating in a pension plan must be determined. Whether they do so will depend upon the wording of the documents, the circumstances in which they were produced, and the effect which they had on the parties, particularly the employees.

Foisy J. explained why courts will in specified circumstances bind an employer to the terms of a pension brochure in *Harris v. Robert Simpson Co.*, 1984 CanLII 1236 (AB QB), [1985] 1 W.W.R. 319, at p. 327:

If it were otherwise then an employer could provide the employee with a brochure claiming to represent the significant and material terms in the company's pension plan. Yet the "true" plan could vary significantly from this representation without the employee's knowledge. In such a case it cannot be said that the "true" agreement prevails, as to do so would leave the door open to mischief.

In other words it would be unfair or unacceptable if an employer were to attract and retain employees by making representations as to the pension benefits available upon which the employees could be expected to rely and then resile from those representations as being contrary to the actual pension terms.

On the facts before him, specifically that the pension guide circulated to employees in 1994 was published at a time when employees were required to make an irrevocable choice between transferring to the defined contribution scheme and receiving a substantial increase in the value of their accumulated benefits, and remaining in the defined benefit scheme, Duprat found that Samoisette and the other members of the class relied on the 1994 guide, which explicitly referred to the bridging benefit and did not mention IBM's right to withdraw that benefit, in choosing to remain in the defined benefit plan. Consequently, he held that it was appropriate in the circumstances to give legal effect to the representations made by IBM in that document, reasoning:

In this context, how could an employee deciding between the two pension plans understand that the bridging benefit was an ephemeral benefit, likely to disappear?

... It is plain from the evidence that the plaintiff was encouraged to remain in the defined benefit scheme because of the financial security that it offered, as well as the bridging benefit. Now, this choice, once made, was irrevocable for the employee.

The Court cannot accept, in the circumstances of this case, that the employer may withdraw the bridging benefit unilaterally from the plan. The explanations given in 1994 and, to be clear, the assurance that the bridging benefit would be received, came to modify the employment contract that existed at that time.

Further, noting that the Quebec Court of Appeal held in *TSCO of Canada Ltd. v. Chateaufort*, 1995 CanLII 5271 (QC CA), that a pension plan is a type of adhesion contract, and that, in interpreting pension plan documents, ambiguities are to be construed in favour of the employee, Duprat also observed that an abusive clause in a pension scheme document will not be enforced pursuant to s.1437 of the *Civil Code*. Based on these principles, Duprat held that, in light of the representations made by IBM in 1994, the use of its amendment power to withdraw the bridging benefit was abusive. In his view:

The amendment clause is abusive because it grants IBM the ability to modify, retrospectively, an essential condition of the employment contract, namely the bridging benefit contemplated in the pension plan.

If one accepts, as does this Court, that in 1994, IBM committed to providing the bridging benefit, a clause that permits the unilateral withdrawal of that benefit in the future is clearly abusive. There is nothing that casts doubt over the employees' good faith in making the choice to remain in the defined benefit scheme. That choice, irrevocable once made, was a function of the information provided by IBM, information given without restriction or warning.

In addition, Duprat held that compliance with the *SPPA* did not render lawful an otherwise abusive exercise of the amendment clause, ruling that the Act did not displace the general law of contracts set out in the *Civil Code* and that the Court was obliged to interpret both laws in a manner that permitted their co-existence.

Duprat also rejected IBM's argument that the appropriate course of action for employees in this case would have been to resign and claim constructive dismissal, finding nothing in the evidence suggesting that IBM wished to end the employment relationship, or that the employees viewed IBM's actions as having that effect.

However, Duprat came to a different conclusion with respect to IBM's curtailment of retiree health benefits, given that, in contrast to the bridging benefit, the evidence did not indicate that IBM had made a commitment to maintain the health care spending accounts. Noting that the mere fact that the changes to those benefits took the employees by surprise was not sufficient to render those changes abusive, Duprat also held that the employees' entitlement to the accounts had not vested at the time IBM implemented its amendments to the pension plan, as none of them had retired at that time. Finally, he determined that the fact that the changes were introduced in order to reduce IBM's costs and increase its profits did not mean that IBM's motive in making the changes was illegitimate, or that they were made in bad faith.

In the result, Justice Duprat held that, although IBM was entitled to amend the health care benefits, it had breached the employees' contracts by unilaterally amending the pension plan so as to withdraw the bridging benefit, entitling retirees to compensatory damages. The total amount recoverable by class members was \$23,519,000.

*Commentary is provided by [Tina Hobday of Langlois](#) and by [Steven Rogers of Victory Square Law Office LLP](#).*

#### **Comment:**

**Tina Hobday:** Even though this judgment is under appeal, the following important lessons for employers can be drawn from it:

- In several respects this decision has not dramatically altered the state of the law applicable to pension plans and health care benefit plans. This decision essentially confirms the state of Quebec law, including the basic legal principles in pension and benefit matters.
- In order to reduce litigation risks, employers should be very careful what they say when communicating with members of the company pension plan or health care benefits plan. Given the complexity of pension plans in particular, it may be difficult to communicate that information in such a way that the plan participants fully understand it, but all necessary efforts must be made to achieve that end without overly simplifying matters or making firm commitments if the employer does not intend to be bound by them indefinitely. This is particularly true when plan members are called upon to make important choices, such as when there is a change or conversion from a DB to a DC plan.
- In litigation involving pension and benefit plans, it is frequently the case that documentation, facts and events from several decades ago (more than 20 years in this instance) must be filed in evidence before the Court. Employers must be able to justify decisions made long ago – so keeping adequate records is essential.

**Steven Rogers:** This case is consistent with a line of cases following the Supreme Court of Canada's decision in *Buschau v. Rogers Communications Inc.*, in confirming that pension and post-retirement health benefits form an important part of workers' overall compensation package. Employers often advertise the terms of these plans in order to recruit prospective employees, and to retain existing employees, and will sometimes rely on these benefit packages in defending lower salaries. Thus, the terms contained in a defined benefit plan or post-retirement health and welfare plan will usually form part of the employee's employment contract.

The Court also confirmed that, in certain circumstances, representations made by employers to their employees in benefit booklets can be legally binding, despite clear expressions to the contrary in the booklets. Given the power dynamic between employers and employees, especially in the non-unionized workplace, employees can generally simply rely upon broad representations made by employers about benefits, in booklets or other communications.

In my view, it would be in the interests of an employer and its employees if the employer made greater efforts to clearly and honestly explain the specific terms of its pension and benefit plans, including any right the employer may claim to unilaterally change those terms in the future. Such communication certainly would have helped IBM in this case.

***Samoisette v. IBM Canada Itée***  
**Quebec**  
**Quebec Superior Court**  
**Justice François Duprat**  
**June 13, 2016**

**Full text:**  
[\*Samoisette v. IBM Canada Itée\*](#)

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