

**MODIFYING EMPLOYEE RETIREMENT BENEFITS  
— THE LESSONS OF DAYCO FROM  
A UNION PERSPECTIVE**

**ETHAN POSKANZER**  
*Sack Goldblatt Mitchell*

Modifying Employee Retirement Benefits - the Lessons of  
Dayco from a Union Perspective

INTRODUCTION

It is fitting that the legal issues pre-occupying pension and benefit lawyers should in some sense mirror the larger economic issues confronting their clients in day-to-day bargaining. Thus, in the 1980's the pension surplus cases tended to mirror the economic tenor of the times. Those cases, which involved the issue of who should be entitled to control and share in the allocation of surplus contained in pension plans resulting from inflationary increases, mirrored general preoccupations regarding the division of wealth between unions and management in inflationary times.<sup>1</sup>

Similarly, questions related to the vesting of retirement benefits echo more general concerns as to whether or how reductions in the provision of benefits should be shared among employers, employees and the retired in a recessionary period. Further, one is struck by the extent to which the Dayco case itself raises the issue of how a present generation of employers should honour the commitments made to a previous generation of employees, questions which are now being addressed by society as a whole.

---

<sup>1</sup>. see for example, Re Stearns Catalytic Pension Plans, (1994) 168 N.R. 80, Ontario Hydro 33 O.A.C. 63; 68 O.R. 92d) 620 (C.A.); Askin et al v. Ontario Hospital Association et al (1991), 46 O.A.C. 278; 2 O.R. (3d) 641.

For a trade unionist, the idea that benefits for all employees, especially retirement benefits, could be anything but vested is to some extent a foreign one. The role of a trade union is to improve the terms and conditions of employment. The notion that negotiated retirement benefits may be reduced, either for retirees or current employees, denotes embracing concepts of concessionary bargaining and a denial of the rightful role of the trade union.

These more philosophical considerations are raised not solely to situate the legal problems in a particular economic or ideological context, but also to suggest why collective agreements, in certain circumstances, failed to explicitly address or anticipate the possibility of a reduction in benefits to retirees, thus requiring the courts to answer what are essentially policy issues. Legislative measures have, to a large extent, resolved questions respecting the vesting of pension benefits. However, the issue as to whether other retirement benefits were meant to vest and, as a result, be immune from reduction in the future, was often not specifically addressed by the parties. This occurred, in part at least, because the paradigm in which the parties operated may not have been one in which the necessity of a subsequent reduction in benefits was contemplated.

Thus, the courts are forced to utilize policy tools in order to discern the intention of the parties even where such intention may have been specifically absent.

Below I review the Dayco<sup>2</sup> decision from a union perspective, to describe what it appears to have decided and, equally important, what it has left open to be determined by future decision-makers.

#### Dayco as an Administrative Law Case

The Dayco decision is important not only to pension and benefits lawyers but also to those who practise in the field of administrative law. Without dealing at length with the Court's decision in this latter respect, the Dayco decision formed part of a line of emerging jurisprudence by the Supreme Court of Canada which loosened the deference which supervising courts paid to statutory tribunals, particularly boards of arbitration. In this respect, the Court implicitly stated that issues related to whether legal obligations survived the expiry of a collective agreement, and indeed the right of the parties to bargain away vested benefits contained in previous collective agreements, were too important to be left to boards of arbitration. Explicitly, the Court held that the issue of the survival of collective agreement obligations upon

---

<sup>2</sup>. Re Dayco (Canada) and National Automobile, Aerospace and Agricultural Implement Workers' Union of Canada (1993), 102 D.L.R. (4th) 609 (S.C.C.).

expiry of the agreement was not an issue within the particular expertise or exclusive competence of a board of arbitration and that, as a result, the Court was entitled to review on a standard of correctness the determination made by the board of arbitration.<sup>3</sup>

**What Dayco Decided about Retiree Benefits**

For those concerned with the issue of negotiating retirement benefits, the Court raised and answered a number of important and previously unresolved labour relations questions. In this respect, the Court specifically held that a trade union was entitled to bargain retirement benefits on behalf of the retirees.

In this connection, the Court stated that, even if a trade union cannot be considered the bargaining agent of retired employees, since upon retirement retirees cease to be members of a bargaining unit, nonetheless, under its general mandate to bargain with respect to terms and conditions of employment, a trade union may bargain benefits both with respect to retirees and current employees.<sup>4</sup> This conclusion had previously been reached by the Ontario Divisional Court in Re Ontario Liquor Board and Liquor Board Employees' Union<sup>5</sup>, where the Court held a trade union could

---

<sup>3</sup>. supra at p. 619-34.

<sup>4</sup>. supra at p. 648.

<sup>5</sup>. Re Ontario Liquor Board and Liquor Board Employees' Union  
29 O.R. (2d) 705 Ont. Div. Ct.

bargain to the point of impasse and strike on issues related to retiree benefits, since there was a sufficient nexus between those retirees and the employment relationship for such terms to fall within terms and conditions of employment.

As a result, while an employer is not obligated to provide retiree benefits through the process of collective bargaining, the employer is required to bargain in good faith with respect to any proposal made by a trade union in this regard and a trade union is entitled to invoke economic sanctions in order to obtain such benefits for retired employees.

Second, the Court held that a trade union could seek the enforcement of promises made under a collective agreement even after its expiry and even where the failure to honour the commitment occurred after the expiry of the collective agreement, if the right accrued during the currency of the collective agreement.<sup>6</sup>

Most importantly for the purposes under discussion, the Court held that, where a trade union and employer intended to vest benefits in persons covered by the collective agreement, such entitlement could crystallize into a vested right such that the

---

<sup>6</sup>. Dayco, supra at pp. 638-42.

parties themselves were prevented from subsequently reducing or interfering with such vested right.

In coming to this conclusion, the Supreme Court of Canada, to some extent, modified the general understanding of the model of collective bargaining under the Labour Relations Act. Under the Labour Relations Act and other labour relations legislation, the model adopted by Canadian legislatures has been the establishment of a collective bargaining regime whereby collective bargaining agreements are negotiated for a specific term and then re-negotiated. During the interregnum between collective agreements, labour relations boards, to some extent with the approval of the Supreme Court of Canada, have held that the parties, or in certain circumstances employers unilaterally, are free to alter existing terms and conditions of employment. The response of employers and trade unions, where modifications are proposed that are unacceptable, is to exercise economic sanctions in the form of strike or lockout. This model is one which contemplates everything being "up for grabs" during the negotiating process with economic sanctions determining the outcome in the event of a disagreement respecting the ultimate terms and conditions of employment under subsequent agreements.

Thus, the Supreme Court of Canada held in Paccar<sup>7</sup> that, while upon expiry of the collective agreement the provisions of the collective agreement ordinarily continue in the individual contract of employment, an employer is free to alter terms and conditions of employment where the collective agreement and statutory freeze have expired, subject to the duty to bargain in good faith. In that case, the Court specifically approved the reasoning of CPR Co. v. Zambri to the effect that "when a collective agreement has expired, it is difficult to see how there can be anything left to govern the employer-employee relationship".<sup>8</sup>

Mr. Justice LaForest, in his judgment in Dayco, does not reject the common understanding respecting the nature of the collective bargaining relationship but, rather, appears to establish a limited exception for certain accrued or vested rights. In this respect, LaForest J. distinguishes the Paccar case from the situation in Dayco on the basis that the parties are free through collective bargaining to govern their current employment relationship in any way they choose:

"The employer is free to disregard the terms of previous collective agreements and set new terms of employment. As such, it is certainly true that in the vacuum that may arise between

---

<sup>7</sup>. Paccar of Canada Ltd. v. Canadian Association of Industrial, Mechanical Allied Workers Local 114 et al (1981) 62 D.L.R. (4th) 437.

<sup>8</sup>. (1960) 34 D.L.R. (2d) 654 at 666.

collective agreements, workers have no subsisting rights from the collective agreement that govern their current employment relationship. However, the old collective agreement is not rendered a nullity. Rights that have accrued under that agreement remain enforceable".<sup>9</sup>

It is important to note that Mr. Justice LaForest's judgment appears to distinguish between accrued and vested rights. At certain points in his Reasons, Mr. Justice LaForest discusses the enforceability of accrued rights under previous collective agreements, suggesting that any right accrued under a collective agreement survives its expiry and cannot be altered. It appears, however, from the judgment as a whole that this form of accrued rights is a "weak form of vesting", so that certain accrued rights, which arise under previous collective agreements, remain enforceable after their expiry, but still may be modified or altered by the parties through subsequent collective bargaining.

It appears that it is only those vested rights which crystallize at a particular point in time, as a result of the withdrawal of the employee from the working relationship, which cannot be the subject of modification or alteration by the parties subsequent to this crystallization:

---

<sup>9</sup>. Dayco, supra, at p. 637.

"While an employee continues to be part of the bargaining unit, he or she is of necessity subject to the vicissitudes of the collective bargaining process. However, on retirement a worker withdraws from that relationship and at that point his or her accrued employment right crystallize into some form of "vested" retirement right.<sup>10</sup>

It is the act of withdrawal from the workforce which appears to give such vested rights their invioable nature. This conclusion, which is discussed more fully below, is somewhat troubling. What is the real difference between a forty-year employee who is still in the workforce and a fifteen-year employee who has just retired? Why should the benefits of one be unalterable and the other subject to the "vicissitudes of the collective bargaining"?.

The Supreme Court was cognizant of the harshness of the distinction it had created. Mr. Justice LaForest noted:

"I have highlighted the distinction between active and retired workers, and this would appear to go to the heart of the Court's decision. Under American law, it seems the focus the analysis is on the date of retirement. Before this time, the active employee is completely at the mercy of the collective bargaining process. He or she might work a lifetime on the premise that retirement benefits might be forthcoming yet be deprived of those rights if they are bargained away in reaching the collective agreement and in which he or she retires.

---

<sup>10</sup>. Ibid at p.637.

This may seem harsh, but it is the essence of the collective bargaining process."<sup>11</sup>

Having identified this harsh duality, Mr. Justice LaForest attempts to explain the policy reason requiring it:

"As a member of the bargaining unit, the employee is in a position to influence the course of bargaining, and thus ensures that the bargaining agent does not consent to the expropriation of a lifetime of foregone income which has been sacrificed in return for the promise of retirement benefits".<sup>12</sup>

The policy reason advanced for this differential treatment is not, however, particularly compelling given the harshness of the results. The rationale that a bargaining unit member will have input into the bargaining process and may influence the course of bargaining appears to be overstated. In a bargaining unit where the vast majority of employees are younger workers, the effect which an elderly employee will have on bargaining decisions may, in fact, be as negligible as that of the retired employee. Further, in situations of business closure or economic crisis, which are the most likely events to trigger a downward reduction in benefits, the ability of the bargaining unit as a whole, let alone a particular individual, to influence the course of bargaining is severely limited.

---

<sup>11</sup>. supra at pp. 647-48.

<sup>12</sup>. supra at pp. 648.

While there is real difficulty in erecting an edifice of vested rights based solely on the distinction of whether employees are active or retired, this is not to say that any concept of vesting is at odds with the collective bargaining process and should be discarded or that an inference of vesting should not arise more easily on the basis of the retired status of the employee.

One of the weaknesses of the model of collective bargaining described above, which views obligations under collective agreements as expiring upon the agreement's termination and which are then subject to complete modification during the course of collective bargaining, is that it makes it impossible for the parties to establish long-term commitments which can extend past the normal collective bargaining periods. It may be in the interests of both the union and management to be able to enter into commitments which would span the period encompassed by several collective agreements. In particular, commitments with respect to long-term job security and retirement benefits may make little sense where they are really a finite promise which disappears at the conclusion of a collective agreement. Why should employees give up wage increases and other short-term benefits for long-term benefits of improved retirement income and long-term job security if these commitments are really illusory?

Trade union negotiators have long wrestled with these issues. Ultimately, the advice given to clients is that there can be no guarantee that a commitment, even if intended to survive the expiry of a collective agreement cannot be the subject of modification during the collective bargaining process. Indeed, the decision of the Court in Dayco, while still leaving open the possibility of creating other vested rights, appears to require this advice except in the case of crystallized benefits for retirees. This fundamental labour relations reality cannot help but impede the ability of the parties to enter into mature long-term commitments with certainty of legal enforceability.

This is not to say, however, that there are no legal mechanisms available to ensure that a party does not seek to modify a long-term commitment made during previous rounds of collective bargaining. It is possible, for example, that, in the context of a two-year collective agreement, where a party commits in bargaining to provide for job security for a five-year period, that party would be found guilty of bargaining in bad faith should it seek to alter that promise in a subsequent round of collective bargaining.

In light of the above considerations, it would appear important to develop a legal model which provides for the vesting of rights other than the crystallization of rights only upon retirement. The determination as to whether or not to consider a

right to be vested and therefore to survive the expiry of a collective agreement, and not be subject to subsequent alteration, should be dependent upon the intention of the parties and not simply whether a particular employee is or is not a member of the workforce at a particular time. In this respect, it would be much easier to infer an intention that an employer and union sought to confer vested rights on employees who had retired and who had made all required contributions than in the case of existing employees. This, however, should be a question of inference and evidence rather than an absolute rule which distinguishes solely upon the basis of employment status.

In this connection, it is worth noting that U.S. Courts to which the Supreme Court, in coming to the conclusion that certain benefits may vest, have had regard not only to the fact that retirees have no voice in respect of subsequent bargaining decisions, but have also relied upon the nature or status of the benefits themselves. Thus, the nature of retiree benefits supports the inference that such benefits are intended to remain in place so long as the prerequisites for initial entitlement are maintained.

<sup>13</sup> The question remains whether the deferred form which this compensation takes should also permit the inference in respect of existing employees, where appropriate in the circumstances.

---

<sup>13</sup>. supra at p. 630.

What Dayco Didn't Decide

Up to this point we have discussed what Dayco decided. However, a number of important issues have remained unanswered as a result of the decision in Dayco. The Court holds that whether a vested right has been conferred by the parties, which crystallizes upon retirement, is dependent upon the intention of the parties. The Court did not accept that there was an automatic inference that, where a right was conferred on a retired employee, it was intended to vest and as a result could not be altered. Rather, the Court appeared to accept the compromise position set out by the Fifth Circuit of Appeal in the United States in United Paperworkers v. Champion International Union Incorporation.<sup>14</sup> That decision held that whether or not the parties intended to vest a right for retirees is a question of evidence to be determined on a case-by-case basis. In this respect, the fact that the benefit was negotiated in a context where employees recognize that in the future, as retirees, they would have no voice in negotiating a new collective bargaining agreement is only "some evidence of intent" that the agreement is intended to vest. Thus, the courts have left open to subsequent determinations, the considerations to be taken into account in determining whether the parties in particular circumstances intended to vest benefits for retirees.

---

<sup>14</sup>. 908 F.2d 1252 (Stn. Cir. 1990)

While, in general, the case-by-case approach adopted by the Court appears to make sense, this approach appears to undercut the rationale discussed above for distinguishing between active and retired employees. Input into collective bargaining, as the Court stated, is only one of the factors which the Court will take into account in determining the parties' intent. If this is the case surely a number of other factors may be relevant in which little distinction exists between active employees and retirees.

The decision of the Supreme Court of Canada, by focussing on the intention of the parties, appears to contemplate the possibility that the parties may, at the time at which they confer benefits on retirees, make clear that such benefits are subject to alteration in subsequent rounds of collective bargaining. Presumably, in such a case, since the test for inferring vested rights is a flexible one based on the intention of the parties, such benefits would not be deemed to be vested. The difficulty with this result is that it appears to create two classes of employees: those employees with retiree benefits negotiated without addressing future contingencies and those where future contingencies respecting the benefits are specifically addressed. As such, existing retirees may have a significantly stronger claim that their benefits vested than those employees who bargain in a post-Dayco climate.

Finally, the Court appears to have left open the question of the manner in which vested rights may be enforced. In this respect, the Supreme Court of Canada frankly conceded that, while it had conferred a right on retirees, they might "well find themselves in possession of a right without a remedy". In this respect, the Court, without conclusively deciding the issue, raised the possibility of (1) enforcement through the unfair representation provisions of labour relations legislation, (2) bringing civil actions for a breach of the collective agreement, as an exception to the general rule that rights under a collective agreement must be enforced by arbitration; and (3) bringing an action based on breach of fiduciary obligation by the bargaining agent.

#### Duty of Fair Representation

With respect to the prospects of success of duty of fair representation complaints, the Court itself appears to recognize that there are significant obstacles in making a claim under existing legislation. The Court observes that, in Ontario, for example, the language of the legislation appears to be limited to current members of the bargaining unit. There is, in fact, support for this proposition in an unreported decision of the Ontario Labour Relations Board issued in 1993 Ball Packaging.<sup>15</sup>

---

<sup>15</sup>. Ball Packaging [1993] O.L.R.B. No. 79, File No. 1585-92-U.

In Ball Packaging, decided before Dayco, the Labour Relations Board dismissed, on a preliminary basis, a complaint made by a retiree association respecting the negotiation of changes to retiree benefits which eliminated the spousal survivorship benefit and increased premiums payable by retirees. The retirees made two arguments. In the first place, the retirees made the novel argument that the right was a vested right and that, as a result, the employer and union had violated s.51 of the Labour Relations Act which provides that a collective agreement is binding upon the employer and a trade union. In the past, allegations that s.51 had been violated related largely to situations where an employer and union had completely repudiated the binding nature of a collective agreement and refused to abide by its terms. Secondly, the retirees argued that the union had breached its duty of fair representation under s.69 of the Labour Relations Act.

The Board concluded that s.51 was not applicable in the instant case. In part, it did so on the basis that it was neither obvious nor apparent that the complainants' claim to a continuing right to vested benefits, which could not be altered, could be made out. In this respect, the Board's decision was made before the Court in Dayco clarified that the retirees were in fact correct that such vested rights could exist. However, more importantly, the Board dismissed the application under s.51 on the basis that the conduct by the employer and trade union did not amount in the

circumstances to the total repudiation of the collective agreement so as to trigger the application of s.51:

"There is no doubt in our minds that the union had the authority to negotiate retiree benefits of the type in question. These are clearly terms and conditions of employment (see for example the decision of the Divisional Court in Re Liquor Control Board of Ontario and Ontario Liquor Board Employees' Union et al (1980), 29 O.R. (2d) 705. The employer and union are at liberty to negotiate those terms and conditions of employment under the collective bargaining scheme. While the results of those negotiations may benefit or disadvantage such certain persons this is hardly surprising. Even if the complainants' theory of vested rights has some validity we cannot see how the respondents' conduct can amount to a violation of s.51."<sup>16</sup>

With respect to the duty of fair representation complaint, the Board noted that:

"it appears to have been conceded by the complainants that s.69 did not extend the union's duty of fair representation to retirees who are former bargaining unit employees and that there was no statutory duty on the union to represent retirees."

While this issue will likely be revisited by the Labour Relations Board in light of the statements of the Supreme Court of Canada in Dayco, there is some real doubt that an unfair representation action would be available, particularly given the

---

<sup>16</sup>. supra, p.20.

<sup>17</sup>. supra, at p. 14.

Supreme Court's own reliance on the fact that retirees are not members of the bargaining unit as a reason for finding that benefits vested.

The Supreme Court appeared to be more sanguine about the possibility that retirees could sue in court on the basis of breach of collective agreement promises. In this connection, Mr. Justice LaForest noted that:

"It seems to me that such a remedial vacuum, arising because the retirees are not party to the agreement procedures guaranteed by the Act, may possibly be justification for allowing a court action to proceed."<sup>18</sup>

However, in light of the earlier ruling of the Court in Dayco that a trade union is entitled to proceed with grievances to enforce the right of retirees under the collective agreement, it is difficult to see how the position of a retiree differs from that of any other bargaining unit member who cannot require a trade union to proceed to arbitration provided the union acts in good faith. Indeed, if one were to open up the door to suing on a collective agreement on the basis suggested by the Court in Dayco, it is difficult to see how one would close it for disaffected employees who are not satisfied with a trade union's disposition of a particular grievance. Further, in a recent decision Weber v.

---

<sup>18</sup>. Dayco, supra, at p. 659.

Ontario Hydro<sup>19</sup> the Court appears to strengthen the exclusive jurisdiction of Boards of Arbitration to determine differences which arise under a collective agreement.

Finally, as noted above, the Supreme Court in Dayco suggests that there is a possibility that the relationship between retired members of a bargaining unit and the bargaining agent is fiduciary in nature and that an action based on breach of fiduciary duty could be brought against the union.<sup>20</sup> However, an examination of the requirements for establishing a fiduciary relationship, recently canvassed in the Confederation Life Insurance<sup>21</sup> decision, raises serious questions as to whether the relationship between a trade union and its members or retirees is fiduciary in nature.

In Frame v. Smith<sup>22</sup> the Supreme Court indicated that a fiduciary obligation may be found to exist where three criteria are present: (1) the fiduciary has scope for the exercise of some discretionary power (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests and (3) the beneficiary is peculiarly

---

<sup>19</sup>. (1995) 183 N.R. 240 (S.C.C.)

<sup>20</sup>. Ibid.

<sup>21</sup>. Confederation Life Insurance Company, Ontario Court of Justice unreported decision dated July 4, 1995.

<sup>22</sup>. [1987] 2 S.C.R. 99.

vulnerable to or at the mercy of the fiduciary holding the discretionary power. Clearly, a trade union negotiating retiree benefits may fall within this test.

However, in Hodgkinson v. Simms<sup>23</sup> LaForest J., speaking for the majority, held that, in determining whether a fiduciary relationship exists it is necessary to ask "given all the surrounding circumstances, could one party reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue." This position was adopted by the Court in Confederation Life Insurance.<sup>24</sup> In this respect, the Court specifically approved academic commentary to the effect that, in order for a fiduciary relationship to be shown, "the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests and for the purpose of the relationship".<sup>25</sup>

While an action based on fiduciary relationship is not entirely precluded, it would certainly be strongly arguable that an individual represented by a trade union realizes and understands that a trade union does not act on behalf of particular individuals or groups but, rather, for the good of its constituency as a whole

---

<sup>23</sup>. [1994] 2 S.C.R. 377 at p.409.

<sup>24</sup>. Confederation Life, ibid p. 57.

<sup>25</sup>. supra at p.61.

and that, as a result, an individual member cannot expect a trade union to act in the interests of particular bargaining unit or former bargaining unit members so as to create a fiduciary relationship. This issue will, however, no doubt be subject to further legal examination in the future.

### Conclusion

Having reviewed both the answered and unanswered questions in Dayco, there cannot be anything other than a certain dissatisfaction with the existing state of the law. Employers may be of the view that it is dangerous to commit to providing retiree benefits where they may be under a future obligation to maintain them even where economic circumstances change. Trade unions, on the other hand, will be resistant to the notion that retirement benefits, which are deferred forms of compensation, can be negotiated in a legal climate where commitments made can evaporate upon the expiry of a collective agreement.

Further, the general principle which appears to flow from the Dayco case, that only retired employees in fact enjoy vested rights, while active employees can be deprived of them, may create the potential for conflict among employers, the employed and the retired.

As noted above, it may be preferable that our collective bargaining regime be flexible enough to recognize and enforce commitments that span more than one collective agreement such that, in the appropriate circumstances, active employees also obtain the benefit of such commitments. However, it would certainly be more satisfactory if both parties consciously enter into such obligations, knowing the attendant consequences, rather than requiring courts and adjudicators in an ex post facto manner to infer an intention which may never have existed.