MATHEWS DINSDALE

Employer's Advisor

A NEWSLETTER FROM MATHEWS, DINSDALE & CLARK LLP

APRIL 2010

Arbitrator Finds That Employer can Unilaterally Convert Defined Benefit Pension Plan to a Defined Contribution Plan

In a recent decision, Mathews Dinsdale's Steve Bernardo successfully argued that under the terms of the Collective Agreement, the Company was entitled to unilaterally convert its employee pension plan (the "Plan") from a defined benefit ("DB") plan to a defined contribution ("DC") plan.

Under a DB plan, a retiree is guaranteed a set level of income at retirement (i.e. a "defined benefit"), regardless of how well the plan's investments perform. If the plan falls short, the employer is liable to the retirees for the deficit. By contrast, under a DC plan the employer's responsibility is restricted to making a certain (i.e. "defined") contribution to the pension plan. If the plan performs poorly, the employer is not liable for any shortfall so long as it has made the requisite contributions. In short, under a DC plan, the investment risk and interest rate risk lies with the employees and not the employer.

A DB plan had been in effect at the Company since 1967. While bargaining for a renewal of the Collective Agreement in mid-2008, the Company advised the Union of its intention to convert the DB pension plan to a DC plan effective January, 2009. The Company and the Union had expressly incorporated the Plan into their Collective Agreement. The Plan text provided: "The Company intends to maintain the Plan indefinitely, but reserves the right to amend or discontinue the Plan either in whole or in part at any time."

The arbitrator rejected the Union's argument that by incorporating the Plan into the Collective Agreement, the Company gave the Union a say over any changes made to the Plan. The arbitrator noted that the Union had tried and failed to secure the continuance of the DB plan during the latest round of collective bargaining, and that the Union could not now attempt to achieve through arbitration what it had failed to obtain through negotiations.

The arbitrator accepted the Company's argument that it would be an excess of jurisdiction to read out the clause providing the Company with the unilateral right to amend the Plan. He accepted that the change in the Plan would create financial savings for the Company while imposing some level of hardship on the employees, but concluded that he could not ignore the Company's express right to unilaterally amend the Plan.

This is one of the first decisions to directly address the issue of whether an employer may unilaterally convert from a DB to a DC plan. As such, this decision will be a significant precedent

INSIDE

for any unionized employer that sponsors a DB plan and is considering a conversion to a DC plan. Employers who are considering such an amendment should examine their collective agreements and their pension plan documents and seek the appropriate legal advice in order to determine whether such an amendment is permitted under their Pension Plan.

Are You Ready to Comply with Bill 168? – Workplace Violence and Harassment

Incidents of workplace violence, have seen a rise in profile for a number of years. Such incidents can seriously compromise the work environment resulting in harmful and costly consequences. Consequences can include injuries suffered by victims; workers finding themselves no longer feeling safe and comfortable in the workplace leading to lost productivity and decreased work performance; reductions in worker morale; higher turnover rates and increased absenteeism. According to Statistics Canada, nearly 20% of all incidents of violent victimization now occur in the victim's workplace.

In response to growing concerns over workplace violence, Bill 168, which amends the *Occupational Health and Safety Act (*the *"OHSA")*, received Royal Assent on December 15, 2009. Bill 168's amendments will play a significant role in shaping how employers address violence and harassment in the workplace. Bill 168 imposes obligations on employers to develop and implement policies, programs, measures and procedures to prevent such occurrences. The amendments will come into force on June 15, 2010. Bill 168 includes the following definitions:

- "workplace harassment" means engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome.
- "workplace violence" means:
  (a) the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker;
  (b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker;
  (c) a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker."

Employers should carefully note that the definition of workplace violence includes the threat of physical force that could cause physical injury to a worker. The amendments make the threat of physical violence the same as actual physical violence for the purposes of the *OHSA*.

In order to comply with Bill 168, employers must conduct an assessment of the workplace in order to identify any potential risks of workplace violence. This assessment must take into account the risk of violence that may arise from the nature of the workplace, the type of work or the conditions of work. Bill 168 also mandates that the risk assessment consider circumstances that would be common to similar workplaces, as well as circumstances specific to the workplace itself. Once completed, the results of the risk assessment must be provided to the employer's health and safety committee or representative or, in the alternative, directly to the workers where no committee or representative exists. Reassessments are required as often as is necessary to ensure that workers are protected from workplace violence.

Employers will also be required to prepare written policies relating to workplace violence and harassment. These policies must be reviewed as often as is necessary but not less than on an annual basis. For employers who employ 6 or more employees, the policies must be in writing and must be posted at a conspicuous location in the workplace. Employers are required to provide workers with information and instruction on the contents of these policies.

Next, employers must develop programs to implement the workplace violence and workplace

harassment policies. It is mandatory that a workplace violence program include:

- Measures and procedures to control the risks of workplace violence identified in the risk assessment;
- Measures and procedures for summoning immediate assistance when workplace violence occurs, or is likely to occur;
- Measures and procedures for workers to report incidents of workplace violence; and,
- Procedures setting out how the employer will investigate and deal with incidents or complaints of workplace violence.

The program for the implementation of the workplace harassment policy must include measures and procedures for workers to report incidents of harassment. It must also set out how the employer will investigate and deal with incidents and complaints of harassments.

It should be noted that by attempting to address domestic violence in the workplace under Bill 168, the Ontario government has extended an employer's obligations beyond that of employers in other jurisdictions. In particular, employers will now be required to *"take every reasonable precaution in the circumstances for the protection of the worker"* if the employer becomes aware, or ought reasonably be aware that domestic violence may occur in the workplace.

Possibly the most controversial part of Bill 168 is the requirement for employers to disclose information, including personal information, related to a risk of workplace violence from a person with a history of violent behaviour if a worker can be expected to encounter that person in the course of his/her work and the risk of workplace violence is likely to expose the worker to physical injury.

This disclosure is, however, limited to only that information that is reasonably necessary to protect the worker. Employers are thus expected to carefully balance an individual's right to privacy with their health and safety obligations to protect other workers. Subject to exceptions for certain occupations, the Bill also expands the right of a worker to refuse unsafe work in situations where the worker has reason to believe that workplace violence is likely to endanger the worker.

Bill 168 imposes significant administrative obligations upon employers and those who fail to comply with its requirements risk facing prosecution and significant fines under the *OHSA*. As the clock continues to move forward towards June 15, 2010, prudent employers would therefore do well to seek the proper advice and to actively identify and assess the risks of potential violence with a view to developing, maintaining and communicating effective policies and programs designed to eliminate such occurrences in the workplace.

In order to assist you in understanding and meeting your legal obligations, in creating policies, conducting workplace risk assessments and training, Mathews Dinsdale has assembled a Workplace Risk Assessment Practice Group. Please contact the lawyer you regularly deal with or one of the following members of the Practice Group:

Paula M. Rusak
prusak@mathewsdinsdale.com
Mark D. Mills
mmills@mathewsdinsdale.com
M. Elizabeth Keenan
ekeenan@mathewsdinsdale.com

Provincial Government to Freeze Wages in the Public Sector

When the Ontario provincial government brought forward its budget in March of 2010, it announced new legislation freezing the compensation structures of non-unionized public sector employees for a planned period of two years. The legislation, entitled the *Public Sector Compensation Restraint to Protect Public Services Act,* (the *"Act"*) applies to the broader public sector, meaning that its provisions will affect not only non-unionized workers directly employed in the Ontario public service, but also non-unionized workers at hospitals, boards of health, schools, colleges, universities, Hydro One, Ontario Power Generation, as well as a number of other

provincial agencies and boards. The *Act* applies to both managerial and non-managerial personnel.

The main aspect of the *Act* will be to freeze the "compensation plans" of those covered by the *Act* as they stood on March 24, 2010. The freeze will last until March 31, 2012.

All aspects of an employee's compensation plan will be frozen, including wages, merit pay, vacation time, and health and other benefits. There are three exceptions to this general rule. An employee's rate of pay or benefits may be increased if there is an established pay range, the increase keeps the rate of pay within its previously established pay range for the position and the increase is in recognition of one of: 1) the employee's length of service; 2) an assessment of performance; or 3) the completion of a program or course of professional or technical education.

Accordingly, while the *Act* will allow employees to receive raises as they proceed along a "wage grid" that provides increases in recognition of length of service, employers cannot move the grid by instituting across-the-board increases to the wages provided at each step of the grid. Thus, the greatest impact is likely to be felt by those at the top of any established wage grid.

While the *Act* has not been officially passed into law as of yet, it is part of the majority government's budget bill, making it highly unlikely that it will be removed or substantially amended.

Accordingly, employers affected by the *Act* must be careful not to promise any raises or other compensation increases to employees that would constitute a violation of the *Act*. Affected employers should ensure their employees are aware, as soon as possible, of the impending legislation and the effect it will have on their compensation plans. Employers should also be sure to retain any and all documentation which confirms what their compensation structures were on March 24, 2010, so that they are able to prove, if necessary, that they have not instituted unlawful wage increases after that date. The *Act* contains provisions which allow the Ministry of Finance to require employers to provide "Compliance Reports" establishing their adherence to the requirements of the *Act*.

It is noteworthy that the *Act* specifically exempts all collective bargaining relationships. While the provincial government has stated that existing collective agreements (including increases contained therein) will be honoured, it has also stated that when the various public sector collective agreements expire, the government will work closely with bargaining agents to seek new collective agreements of at least two years' duration that do not include any net compensation increases.

Mathews, Dinsdale & Clark LLP Barristers and Solicitors

Toronto
One Queen Street East,
25th Floor, Toronto,
Ontario M5C 2Z1
Tel (416) 862.8280
1.800.411.2900
Fax (416) 862.8247

Sarnia
201 Front Street North,
Suite 501, Sarnia,
Ontario N7T 7T9
Tel (519) 336.5447
Fax (519) 336.9181

Sault Ste. Marie
65 Willow Avenue
2nd Floor, Sault Ste. Marie,
Ontario P6B 5B1
Tel (705) 253.3711
Fax (705) 253.1102

www.mathewsdinsdale.com

Seminars and Presentations:

March

On March 1st and 2nd a number of Mathews Dinsdale lawyers spoke to the Police Association of Ontario Conference. ***Elizabeth Keenan*** spoke on *"Investigating Workplace Harassment"*; ***David Cowling*** spoke about *"Charges for Unsatisfactory Work Performance Under the Police Services Act"*; and ***Rick Baldwin*** spoke about *"The Impact of McNeil Related Production Issues on the Employment Relationship"*.

On March 8th, ***Bill Phelps*** made a presentation to the supervisors of a social service agency client in Toronto on the subject of "*Managing Under a Collective Agreement"*.

April

On April 8th, ***Stephen Bernardo*** was a guest speaker at the Merit Open Shop Contractors Association's Annual General Meeting.

On April 16th, ***Mark Mills*** and ***Matthew Carroll*** spoke to the Heavy Construction Association of Toronto on the subject of *"Workplace Violence and Harassment under Bill 168"*.

On April 19th, ***Paula Rusak*** spoke at a Lancaster House Workshop in Toronto on "*Investigating Human Rights Violations in the Workplace, Cleansing a Poisoned Work Environment*".

On April 21st, ***Paula Rusak*** spoke at the Lancaster House Human Rights Law Conference in Toronto, providing a "*Major Case Law and Legislative Update: A Review of Significant Updates"*.