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Pension and Benefits

THE SUPERIOR COURT ORDERS THE RÉGIE DES RENTES DU QUÉBEC TO REGISTER ADVERSE AMENDMENTS

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ON SEPTEMBER 9, 2011, THE QUEBEC SUPERIOR COURT ALLOWED AN APPLICATION FOR JUDICIAL REVIEW OF SYNERTECH MOULDED PRODUCTS, DIVISION OF OLD CASTLE BUILDING ("SYNERTECH") AND QUASHED TWO JUDGMENTS RENDERED BY THE ECONOMIC AFFAIRS SECTION OF THE TRIBUNAL ADMINISTRATIF DU QUÉBEC (QUEBEC ADMINISTRATIVE TRIBUNAL) (THE "TAQ")¹.

THE FACTS

In January 2001, Synertech established two individual pension plans for two of its executives, that is the individual pension plan for Mr. François Bérard (the "**Bérard Plan**") and the individual pension plan for Mr. Michael Pons (the "**Pons Plan**"). In November 2008, Synertech amended these two pension plans, effective as of January 1, 2001. More precisely, the amendments were aimed mainly at:

- ▶ replacing the pension formula of 2% provided for in the Bérard Plan by a formula of 1.21% for all the years of credited service;
- ▶ replacing the pension formula of 2% provided for in the Pons Plan by a formula of 1.53% for all the years of credited service.

(hereinafter collectively referred to as the "**Amendments**")

The purpose of the Amendments was essentially to eliminate the deficits accumulated in these two plans over the years, in order to be able to subsequently terminate them. The only two members of the plans, Messrs. Bérard and Pons, expressly consented to the Amendments.

In 2009, the Régie des rentes du Québec (the "**Régie**") refused to register and authorize the Amendments on the grounds that they significantly and retroactively reduced the vested rights of plan members Bérard and Pons in such a manner as to eliminate any deficit under the Bérard Plan and Pons Plan. In the opinion of the Régie, the Amendments contravened the objectives of the *Supplemental Pension Plans Act*² (the "**SPPA**") relating to the protection of pension plan

members' rights (protection sanctioned in particular in section 228 of the SPPA). Synertech challenged the Régie's decisions before the TAQ.

On July 28, 2010, the TAQ confirmed the decisions rendered by the Régie. After analyzing section 20 of the SPPA, which sets out the rules governing adverse amendments³, as well as section 28 of the SPPA⁴, the TAQ ruled that the Régie has, by virtue of these two sections, a discretionary power to refuse the registration of an amendment where it finds that it does not comply with the spirit and the purpose of the SPPA, even if the members affected by such amendment gave their consent to it. The TAQ added that the Régie had, in this case, validly exercised this discretionary power by refusing to register the Amendments.

Dissatisfied, Synertech filed an application for judicial review of the TAQ's decisions.

THE SUPERIOR COURT'S JUDGMENT

First, the Court concluded that the applicable standard of review is that of reasonableness.

Secondly, after examining the TAQ's decisions, the Court stated that the TAQ was correct in law when it concluded that:

- ▶ sections 20 and 28 of the SPPA grant discretionary power to the Régie to authorize or not retroactive adverse amendments;
- ▶ the Régie was not obliged to authorize the Amendments solely due to the fact that the plan members consented to them;⁵
- ▶ the Régie could refuse to authorize the Amendments if it was of the view that they were irreconcilable with the SPPA.

¹ *Synertech Moulded Products v. Tribunal administratif du Québec*, 2011 QCCS 4770. We refer you to our bulletin published in October 2010 and summarizing the decision previously rendered by the TAQ.

² R.S.Q., c. R-15.1.

³ That is, amendments which cancel refunds or pension benefits, limit eligibility thereto or reduce the amount or value of the benefits of members.

⁴ Which states that the Régie may refuse to register an amendment that does not comply in its view with the SPPA.

⁵ According to the Court, the Régie is not bound by the consent of the plan members affected by an adverse amendment, but it had to take into account such consents when analyzing the compliance of the proposed amendments.

The Superior Court added, however, that the TAQ should have proceeded to a more detailed analysis of the reasons for which the Régie had refused to authorize the Amendments before deciding whether it was reasonable to conclude that they were irreconcilable with the SPPA. According to the Court, the TAQ did not proceed to such a detailed analysis.

The Court then proceeded to the detailed analysis of the two reasons for which the Régie concluded that the Amendments were irreconcilable with the SPPA, that is:

- 1- they significantly reduced the rights of the plan members Bérard and Pons; and
- 2- their purpose was essentially to eliminate any deficit in the Bérard Plan and the Pons Plan before they were terminated and thus to avoid the application of section 228 of the SPPA.

It should be emphasized that section 228 of the SPPA provides that if, at the termination date, a pension plan has a deficit, the amount to be funded in order to make up for such deficit constitutes a debt of the employer, which must be paid by the employer into the pension fund upon the determination of that amount.

The first reason: the significant reduction

According to the evidence submitted before the TAQ, the decision to authorize or not a retroactive adverse amendment is left to the discretion of the Régie, who decides if, in a given case, it is appropriate or not to authorize the amendment. The Régie's internal practice, although there is no specific standard to this effect, is to refuse amendments which reduce plan members' rights by more than 5%, which the Régie considers to be a significant reduction.

The Court stated that the Régie cannot arbitrarily decide that some adverse amendments are significant and others are not, and that some adverse amendments may take effect retroactively and others may not.

Clarifying its thinking, the Court added:

[Translation]

"It is up to the legislature to specify that adverse amendments cannot take effect retroactively. No such thing is provided for in the act or the regulations.

Moreover, when can a reduction be characterized as significant? According to the evidence submitted to the TAQ, no objective standard exists concerning this point and it is the Régie that decides what is significant and what is not. There is no policy or guideline on this subject that would enable constituents to know their rights and to anticipate decisions of the Régie.

The Régie's discretionary power is not absolute, it must be exercised fairly, reasonably and equitably. Its decisions must be reasoned and they must not be based on considerations that are foreign to the text or the spirit of the act."

The second reason: to avoid the application of section 228 of the SPPA

Basing itself on the judgment of the Quebec Court of Appeal in the *Multi-marques*⁶ case, the Court ruled that, contrary to the position expressed by the Régie, the Amendments did not have the effect of preventing the application of section 228 of the SPPA.

According to the Court, the purpose of the Amendments was clearly to make the Bérard and Pons Plans solvent prior to their termination. Even if the Amendments had consequences on the obligations of Synertech as regards these two plans, that did not render section 228 of the SPPA inapplicable. In other words, the Amendments were not irreconcilable with the SPPA.

The Superior Court therefore quashed the decisions rendered on July 28, 2010, allowed the contestations filed by Synertech with the TAQ and ordered the Régie to proceed with the registration of the Amendments.

COMMENTS

In light of this judgment, it appears that the Régie indeed has a discretionary power to authorize or not retroactive adverse amendments. However, the Court limited this discretionary power by stating that it must be based on an objective standard and by ruling that the Régie cannot refuse to register an adverse amendment if it is not irreconcilable with the SPPA. This judgment has not been appealed and it will be interesting to see if the Régie will adopt standards or directives covering this type of amendments.

⁶ *Multi-marques Distribution inc. v. Régie des rentes du Québec*, 2008 QCCA 597.

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