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Pension plans, the charter and disparity in treatment clauses the Court of Appeal issues its judgment in the *Groupe Pages Jaunes* case

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The financial burden and the risks inherent in defined benefit supplemental pension plans sometimes weigh heavily on employers. In the last few years, many employers have taken measures and made changes in order to lower the costs related to these plans. Some employers have also decided to make certain changes to other pension benefits offered to their employees.

In this respect, some employers have decided, among other things:

- to implement a defined contribution plan for their new employees[1] (with current employees, for their part, continuing to accumulate rights in a defined benefit plan); and/or
- not to offer other benefits to their new employees upon retirement or to provide them with less generous benefits.

In the *Groupe Pages Jaunes Cie* case, the Syndicat des employées et employés professionnels et de bureau, section locale 574, SEPB, CTC-FTQ (the "**Union**") argued that these changes violated:

1. section 87.1 of the Act Respecting Labour Standards (the "ARLS"), which prohibits disparities in treatment based solely on one's date of hire;
2. sections 10, 16 and 19 of the *Charter of Human Rights and Freedoms* (the "Charter"), which among other things, provide that no one may practise discrimination in the determination of a person's conditions of employment or in the establishment of categories or classes of employment (section 16) and that an employer must, without discrimination, provide equal salary or wages for equivalent work (section 19).

In April 2011, Arbitrator Harvey Frumkin, faced with two grievances filed by the Union, concluded that such changes did not violate these legislative provisions. In December 2012, the Superior Court of Quebec dismissed the Union's motion for judicial review. On May 27, 2015, the Court of Appeal of

Quebec dismissed the Union's appeal.[2].

THE FACTS

In November 2002, Groupe Pages Jaunes Cie (the "**Employer**"), which until then was a subsidiary of Bell Canada, became an independent public corporation. At the time the transaction took place, the 200 employees represented by the Union were participating in a defined benefit pension plan as well as a benefit program in which the employees of Bell Canada also participated.

It was then agreed that the employees of the Employer would continue to receive these benefits until July 1, 2005, at the latest, at which time the Employer would be required to have implemented its own benefit plans.

The Employer and the Union signed a first collective agreement on May 28, 2004, which was in effect from January 1, 2003 to June 30, 2005. One of the letters of agreement included in this first collective agreement provided for an undertaking that the Employer maintain the benefits set out in some specifically listed plans, including the pension plan and the health insurance plan, for the duration of the collective agreement. This letter of agreement also stipulated that the Employer would not modify the benefits provided under these plans without the consent of the Union, who could not refuse to provide such consent without a valid reason (the "**Letter of Agreement**").

In March 2005, the Employer met with the Union to present both the benefit programs and the pension plan it intended to implement beginning on July 1, 2005. Among the main modifications proposed by the Employer to the Union were the following:

1. Employees hired on or after July 1, 2005 will no longer receive benefits upon retirement;
2. Employees hired on or after January 1, 2006 will be enrolled in a defined contribution pension plan rather than a defined benefit plan (hereinafter referred to as the "**Modifications**").

Following the Union's refusal to accept the Modifications, the Employer decided nevertheless to move forward with its plans. The Union subsequently filed two grievances, which were dealt with by Arbitrator Frumkin.

THE DECISION OF ARBITRATOR FRUMKIN

Arbitrator Frumkin concluded that the Union had no "valid reason" to oppose the Modifications.

According to him, the new employees covered by the Modifications did not benefit from the protection of the Letter of Agreement. For the arbitrator, the meaning and scope of the Letter of Agreement were clear: the purpose was to ensure that the benefits that the employees had, up until that point, been entitled to under the plans specifically listed would not be modified to their detriment. He added that in light of the context in which the Letter of Agreement was signed, the Employer's undertaking to preserve the status quo had to be interpreted restrictively. Given the Employer's situation and the circumstances that preceded that situation, the Union could not reasonably expect that the Employer's undertaking could be interpreted as also protecting future employees, that is, those hired after the expiry of the first collective agreement. Accordingly, Arbitrator Frumkin was of the view that Employer's undertaking only applied to employees already employed at the time the collective agreement was signed in May of 2004 and those hired during the term of the collective agreement, that is, prior to July 1, 2005.

The arbitrator also dismissed the Union's argument that, contrary to section 87.1 of the ARLS, this amounted to a disparity of treatment solely based on hiring date. According to the Union, an employee's pension plan and benefits are included in the concept of "salary". Section 87.1 ARLS prohibits any disparity of treatment in respect of an employee's salary which is based solely on one's hiring date.

The first paragraph of section 87.1 ARLS reads as follows:

> 87.1. No agreement or decree may, with respect to a matter covered by a labour standard that is prescribed by Divisions I to V.1, VI and VII of this chapter and is applicable to an employee, operate to apply to the employee, solely on the basis of the employee's hiring date, a condition of employment less advantageous than that which is applicable to other employees performing the same tasks in the same establishment. (Emphasis added)

Arbitrator Frumkin concluded that the notion of "salary" set out at section 87.1 ARLS only includes the "salary paid in cash" and not all benefits with a monetary value, such as benefits and pension plans. These benefits and pension plans form part of one's "remuneration", but are not encompassed by the definition set out at Section I of Chapter IV (which is entitled "Wages").

Finally, the arbitrator summarily dismissed the Union's argument based on sections 10, 16 and 19 of the Charter as he was of the view that granting more benefits in an insurance plan to employees with more years of service on the basis of that service did not constitute illegal discrimination under the Charter.

THE DECISION OF THE SUPERIOR COURT ON JUDICIAL REVIEW

Before the Superior Court sitting in judicial review, the parties raised the same arguments they had made before the arbitrator. Moreover, the Union also argued that the arbitrator had violated the rules of natural justice in holding that the protection granted by the Letter of Agreement was limited to employees hired prior to July 1, 2005 despite the fact that neither of the parties had proposed such an interpretation in their arguments.

The Superior Court dismissed this additional argument raised by the Union and concluded that the arbitrator had not violated the rules of natural justice. The Court also expressed the view that the arbitrator's decision was reasoned, transparent, intelligible and rational and therefore did not justify judicial review.

THE DECISION OF THE COURT OF APPEAL

Madam Justice Savard, writing for the Court, dismissed all of the Union's arguments on appeal.

Regarding the Union's argument based on the application of section 87.1 ARLS, the Court of Appeal held that the Superior Court Justice was justified in not interfering with the arbitrator's conclusion that section 87.1 did not apply to working conditions such as benefit and pension plan entitlements. According to the Court, this conclusion of the arbitrator was reasonable.

The Court of Appeal noted that, given the fact that in different contexts, the ARLS distinguishes between wages and benefits, Arbitrator Frumkin could reasonably conclude that the same principle applies for the purposes of section 87.1, which refers even more restrictively to Section I of Chapter IV. The Court also made reference to the parliamentary debates, which demonstrate a desire not to extend the protection granted in section 87.1 to pension plans and other benefits.

With respect to the Union's argument that the Modifications violated sections 10, 16 and 19 of the Charter, the Court of Appeal also held that the arbitrator's decision to dismiss that argument was reasonable both in fact and in law. In particular, the Court held as follows:

> [TRANSLATION]
> [77] In the present case, the Union alleges that there is disparity of treatment based on age. In support of this argument, it refers to the report prepared by the Employer's expert, in which we find the following passage:
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> > 096. Finally, with r espect to the evolution of the employer's contributions, by introducing the

> plan only in respect of the new employees who are generally younger, the Corporation does create no harm to current employees who are older. Moreover, as mentioned by the Union, the employees who leave the Corporation prior to retirement will generally benefit from the DC plan. A significant advantage when one considers the fact that a very small percentage of current employees will spend their entire career with the same employer. […]
>
> [78] The Union's evidence regarding the existence of discrimination ends there. In my opinion, such evidence is insufficient. The Employer's report, prepared in March 2006, does not contain any data regarding the age of the employees, whether they were hired prior to or after either July 1, 2005 or even January 1, 2006. The expert expresses himself in general terms, without it being possible to identify the basis of his remarks. The file on appeal does not contain the transcript of the testimonies given before the arbitrator; as a result, I do not know whether he elaborated further on this subject. The fact that new employees may be younger does not conclusively establish the existence of discrimination based on age.
>
> [79] Therefore, since the evidence does not allow us to conclude that the differential treatment is the result of a form of discrimination set out in section 10, the arbitrator could reasonably conclude that there was no violation of the Charter.

COMMENTS

In light of these decisions, it would appear that pension plans and other benefits do not constitute "wages" for the purposes of section 87.1 ARLS and that an employer may therefore offer different programs/plans (including a defined contribution plan) to its new employees hired after a given date.

With respect to the Union's Charter argument, the arbitrator indicated that he was of the view that the distinction made between current and new employees was based on years of service and not on age and that there was no illegal discrimination. For its part, the Court of Appeal's decision was largely based on the fact that the Union failed to prove the alleged discrimination. It remains to be seen whether, in the future, such evidence could be provided.

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[1] Some employers decided instead to add a defined contribution section to their defined benefit pension plans.

[2] *Syndicat des employées et employés professionnels et de bureau, section locale 574, SEPB, CTC-FTQ* c. *Groupe Pages Jaunes Cie*, 2015 QCCA 918.