Confusion over arbitrability of employee benefit claims resolved - maybe

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Where must a unionized employee claiming an entitlement to benefits pursue the claim - at arbitration or in court? The reverberations caused by the Ontario Court of Appeal's decision on this issue in *Pilon v. International Minerals & Chemical Corporation and London Life Insurance Co.* (November 19, 1996), reported in the July 1997 issue of *FOCUS* (see "Ontario Court of Appeal decides arbitrability of employee benefit claims" on our Publications page), have been felt by numerous arbitrators since that judgment was released. Now, a decision of the Ontario Divisional Court may possibly have put an end to the uncertainty, and in the process restored the pre-*Pilon* status quo.

Under the traditional arbitral approach, before *Pilon*, the language of the collective agreement determined the issue. If the agreement showed the employer intended to assume responsibility for providing benefits, the employee could pursue the claim at arbitration. If the agreement was silent about benefits, or if the employer undertook merely to pay the plan premiums, the employee had to sue the insurer.

The Court in *Pilon*, ignoring the arbitral case law, held that if the employee's entitlement to benefits arose under a collective agreement, the matter had to be settled at arbitration. Because Pilon had no benefit entitlement in the absence of the group insurance scheme established by the collective agreement, he could not proceed against the insurer in court.

ARBITRATORS: DISAGREEMENT ABOUT APPROACH

In the wake of *Pilon*, arbitrators diverged in their approach to jurisdiction over benefit claims. In one case, *Re Honeywell Ltd and CAW - Canada* (August 28, 1997 and November 20, 1997), where the collective agreement merely made a benefits plan available to employees who were responsible for paying their own premiums, the arbitrator stated that *Pilon* meant that the issue had to be decided at arbitration. The test for who had jurisdiction was now a simple one: "[B]ut for the provision of LTD benefits negotiated by the Union into the collective agreement here, would [the grievor] have had any claim for LTD benefits to pursue?"

Answering "no" to this question, the arbitrator declared he had jurisdiction over the dispute, and permitted the union to name the insurer as a "defendant" in the proceedings.

Other arbitrators, however, remained with the traditional arbitral approach, and distinguished *Pilon* on its facts. This was not difficult to do, given that the collective agreement in *Pilon* incorporated the

insurance policy into its terms, which traditionally had meant that a benefits claim could be arbitrated. The problem was that the Court in *Pilon* had not relied on this fact in making its decision. Rather, its jurisdictional criteria had sounded a good deal more like the "but for" test set out by the arbitrator in the *Honeywell* case.

***CBC v. NABET*: NO CLARIFICATION**

The Court of Appeal revisited the issue in *CBC v. NABET* (December 16, 1997), in which it quashed an arbitrator's award that ordered the employer to pay life insurance benefits to an employee's estate. In its decision, the Court referred to the pre-*Pilon* case law, and noted that the collective agreement required only that the employer pay insurance premiums. The Court ruled that, in ordering the employer to pay benefits following the insurer's refusal to do so, the arbitrator had ignored the evidence of the extent of the employer's obligations, and had made an order that was patently unreasonable. The Court made no mention in its reasons of *Pilon*, which apparently was not cited by either party in its arguments.

***DUBREUIL*: *PILON*'S EFFECT NARROWED**

The *Re Dubreuil Forest Products Ltd. and IWA - Canada* (September 25, 1998) case arose out of a grievance arbitration under a collective agreement that obliged the employer only to pay premiums to London Life. Under the arbitral case law, this would have made the claim inarbitrable.

This is what the employer claimed, but the arbitrator, asserting he was bound by *Pilon*, took jurisdiction. Noting, however, that it could not have been the intention of the *Pilon* court to make employers liable for payment of benefits in such circumstances, the arbitrator held that he had the power to issue an award that would determine the insurer's liability. He ordered that London Life be notified of this decision.

The Divisional Court quashed the award, stating that *Pilon* had to be viewed in context, and was not a departure from the traditional arbitral approach: "[T]here is no indication in *Pilon* that the Court of Appeal intended to bring about a fundamental change to the jurisdiction of arbitrators. While no reference was made to the [traditional arbitral approach] in *Pilon*, the Court of Appeal found that the collective agreement incorporated by reference the terms of the benefits handbook. ... The result in that case is, therefore, in accord with the settled principles for determining the jurisdiction of arbitrators in this area."

In Our View

The Court that quashed the award in *Dubreuil* also quashed the *Honeywell* award on the same day. Moreover, it held that arbitrators lack the jurisdiction to add a third party defendant who is not a party to the collective agreement, without the third party's consent.

The Court in *Dubreuil* seems to be saying that *Pilon* is a case that is limited to situations where the benefits plan is incorporated into the collective agreement. The traditional arbitral approach appears to have won out for the moment. (For more recent developments, see "Ontario Court of Appeal revisits arbitrability of employee benefit claims" on our Publications page.)

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