

CITATION: Revios Canada Ltd. v. Creber, 2011 ONCA 338
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COURT OF APPEAL FOR ONTARIO

Goudge, Gillese and Watt JJ.A.

BETWEEN

Revios Canada Ltd.

Plaintiff (Respondent)

and

Gordon Creber

Defendant (Appellant)

David Whitten, for the appellant

Jeffrey B. Simpson, for the respondent

Heard: April 19, 2011

On appeal from the judgment of Justice Andra Pollak of the Superior Court of Justice,
dated September 23, 2010.

Gillese J.A.:

[1] The question to be decided on this appeal is whether Gordon Creber is entitled to an unreduced pension at age 62. The answer to that question lies in interpreting the terms of the registered pension plan of which he was a member and the executive supplementary pension agreement to which he was a party.

BACKGROUND

[2] Mr. Creber began working for Revios Canada Ltd. on October 1, 1998, as Vice President, Corporate Actuarial. He worked for Revios until February 28, 2006, when his employment was terminated. At the time of termination, he held the position of Senior Vice President and Chief Financial Officer. He was 52 years old.

[3] While employed by Revios, Mr. Creber was a member of its registered pension plan (the Plan). He also entered into an Executive Supplementary Pension Agreement (ESPA). Because the Plan is limited by the provisions of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1, in terms of the quantum of benefits it can pay to members, the ESPA is designed to “top up” benefits on retirement. That is, its principal purpose is to provide for pension benefits supplementary to, and in excess of, the benefits provided by the Plan.

[4] Revios started an action in which it sought a declaration that Mr. Creber was not entitled to an unreduced pension at age 62 under either the Plan or the ESPA. Mr. Creber defended the action and counterclaimed against Revios.

[5] Mr. Creber brought a motion for summary judgment. Since there were no material facts in dispute, with the parties' agreement, the motion judge disposed not only of the motion but also the core question raised in the action. By judgment dated September 23, 2010, Pollack J. dismissed the motion for summary judgment and declared that Mr. Creber is not entitled to an unreduced pension at age 62 under either the Plan or the ESPA.

[6] Mr. Creber appeals. He contends that the Plan and ESPA, when properly interpreted, give him the right to an unreduced pension at age 62. His submission hinges on art. 2.1(A.2) of the ESPA and s. 8.04 of the Plan, both of which are set out below, along with the other relevant provisions in the two documents. He argues that "early retirement" is not defined in either the Plan or the ESPA and, therefore, the reference in art. 2.1(A.2) of the ESPA to "early retirement" can be linked to s. 8.04 of the Plan, with the result that he is entitled to receive an unreduced pension at age 62.

[7] Initially, Mr. Creber also claimed entitlement to enhanced early retirement benefits if he began receiving his pension at age 55. However, at the oral hearing of the appeal, counsel for Mr. Creber conceded that Mr. Creber did not meet the eligibility conditions for such benefits and so abandoned that part of his claim.

[8] For the reasons that follow, I would dismiss the appeal.

THE ISSUE

[9] On the motion judge's interpretation of the pension documents, Mr. Creber is not entitled to an unreduced pension at age 62. The issue on appeal is whether the motion judge erred in that interpretation.

THE RELEVANT PLAN AND ESPA PROVISIONS

The Relevant Plan Provisions

[10] The relevant parts of ss. 5, 6 and 8 of the Plan read as follows.

Section 5 - Retirement Dates

5.01 Normal Retirement Dates

For Members who terminated employment prior to December 30, 1995 or whose Normal Retirement Date under the terms of the Group Annuity Policy was prior to December 31, 1997, Normal Retirement Date shall continue to have the same meaning as in the Group Annuity Policy, which is the January 1st nearest their 65th birthday.

For all other Members, Normal Retirement Date means the first day of the month coincident with or next following a Member's attainment of age 65.

5.02 Early Retirement Date

If the Continuous Service of a Member terminates within the 10-year period prior to his Normal Retirement Date the Member is considered to have retired on his early retirement date. His early retirement date is the first day of the calendar month coincident with or next following the date on which the Member's Continuous Service terminates.

...

Section 6 - Retirement Benefits

6.01 Normal Retirement Pension

A Member whose Continuous Service terminates on his Normal Retirement Date is entitled to receive an annual pension, payable in equal monthly instalments commencing on his Normal Retirement Date, in an amount equal to the sum of:

- (1) 2% of his Final Average Earnings as of his Normal Retirement Date multiplied by his Credited Service after 1973; and
- (2) The annual pension earned prior to 1974 set out in Schedule A.

6.02 Early Retirement Pension

A Member who retires early pursuant to Section 5.02 is entitled to receive a deferred pension payable in equal monthly instalments commencing on his Normal Retirement Date, calculated according to the formula in Section 6.01. The Member may elect to have the pension commence before his Normal Retirement Date, on the first day of any calendar month on or following his early retirement date. If the pension commencement date is on or following the first day of the month coincident with or next following the Member's attainment of age 62, the pension will not be reduced for early commencement. Otherwise, the pension will be reduced by one-third of one per cent for each month that the pension commencement date precedes the first day of the month coincident with or next following the Member's attainment of age 62, provided however that in no event shall the reduction of the pension be less than the most favourable early retirement reduction permitted under the Income Tax Act.

In lieu of the pension payable under this Section 6.02, a Member who was entitled to benefits under the Group

Annuity Policies at December 29, 1995 may elect to receive a lump sum amount, as determined under Section 8.05, and have that sum paid in accordance with the provisions of Section 8.05.

...

Section 8 – Termination Benefits

Except as expressly provided by Section 6.02 or Section 6.04, the provisions of this Section 8 shall apply to Members whose Continuous Service terminates for any reason other than death, and prior to the date they become eligible to retire under Section 5.

8.01 Termination Benefits for Post-1995 Service

(1) Termination Before 24 Months Membership

A member whose Continuous Service terminates for any reason other than death before he has completed 24 months of Continuous Service while a Member, and who is not eligible to retire under Section 5, is entitled to receive a lump sum refund of his required contributions made on and after January 1, 1996, plus Credited Interest.

(2) Termination After 24 Months Service

A Member whose Continuous Service terminates prior to his Normal Retirement Date for any reason other than death after he has completed 24 months of Continuous Service while a Member, and who is not eligible to retire under Section 5, is entitled to receive a deferred pension, commencing at his Normal Retirement Date, in the amount accrued or granted to him under Section 6.01 for Credited Service on and after January 1, 1996.

...

8.04 Early Commencement of Deferred Pension

A Member who Continuous Service terminates, who is not eligible to retire under Section 5, and who is entitled to receive a deferred pension under Section 8 may elect to commence receiving this pension on the first day of any calendar month coincident with or following the attainment of age 55 and prior to his Normal Retirement Date. The amount of this pension will be the Actuarial Equivalent of the deferred pension that would otherwise have commenced on his Normal Retirement Date, provided that in no event shall the reduction in a Member's pension hereunder be less than the most favourable early retirement reduction permitted under the Income Tax Act.

The Relevant ESPA Provisions

[11] In the ESPA, Mr. Creber is referred to as the "Executive". At the time that he entered into the ESPA, Revios was Gerling Global Life Insurance Company. Thus, in the ESPA, Revios is referred to as Gerling Global Life Insurance Company or as the "Company".

[12] The preambles, art. 1.1 and art. 2.1 of the ESPA are relevant to this appeal. They read as follows:

WHEREAS the Company has established the Salaried Pension Plan for Employees of Gerling Global Life Insurance Company (hereinafter called the "Pension Plan");

AND WHEREAS the Executive is a member of the Pension Plan;

AND WHEREAS the Company and the Executive have agreed to enter into this Agreement to set out the terms and conditions relating to pension benefits to be provided to the Executive in excess of the benefits provided under the Pension Plan;

NOW THEREFORE, in consideration of the services to be performed by the Executive and of the execution of this Agreement by the Executive and by the Company, this Agreement witnesses and it is mutually covenanted and agreed by and between the parties hereto as follows:

ARTICLE I

INTERPRETATION

- 1.1** In this Agreement, the following terms have the following meanings respectively:
- (a) “***Beneficiary’s Pension Benefits***” shall mean the benefits payable to a Spouse or Beneficiary, as the case may be, of the Executive pursuant to the Pension Plan;
 - (b) “***Commuted Value***” means the lump sum value which is the actuarial present value of an Executive’s entitlement under this Agreement determined using the assumptions adopted by the Company including those contained in this Agreement.
 - (c) “***Final Average Earnings***” means final average earnings as defined in the Pension Plan but with the inclusion of bonus payments made to the Executive as outlined in Article 2.1A.1.
 - (d) “***Pension Plan Benefits***” shall mean the pension benefits payable to the Employee pursuant to the Pension Plan.
 - (e) “***Spouse***” means spouse as defined in the Pension Plan.
 - (f) “***Supplementary Benefit***” shall mean the benefit outlined in Article II of this Agreement.
- 1.2** All other terms in this Agreement shall have the meaning ascribed thereto in the Pension Plan.

ARTICLE II

PAYMENT OF BENEFITS

2.1 The Executive, or his Spouse or Beneficiary is entitled to receive a Supplementary Benefit from the Company equal to:

(A.1) the benefit that would be payable to the Executive, his Spouse or his Beneficiary pursuant to the terms of the Pension Plan without reference to the limits imposed on the benefits under the Income Tax Act (Canada) or Regulations thereunder, with the following adjustments to the determination of such benefits ...

(A.2) the pension benefit will be payable in full at age 62 with a reduction of 1/4% for each month by which the Executive's early retirement date precedes age 62;

minus

(B) the benefit payable from the Pension Plan with no special enhancements but including the provisions related to benefit limits imposed by the Income Tax Act (Canada) and the Regulations.

ANALYSIS

[13] The principles governing the interpretation of contracts are well known. The overriding goal is to give effect to the intention to the parties, as expressed in the written agreements: see *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12, at para. 9 (*BG Checo*). Absent ambiguity, the words in the documents are to be given their plain meaning: see *Eli Lilly & Co. v. Novopharm Ltd.*; *Eli Lilly & Co. v. Apotex Inc.*, [1998] 2 S.C.R. 129, at para. 55. And, the various provisions

are not to be interpreted in isolation. Rather, they are to be interpreted in a manner that takes the entire agreement into account: see *BG Checo*, at para. 9.

[14] With these principles in mind, it is clear that in determining Mr. Creber's entitlement, the court must begin by considering the Plan provisions. Contrary to the submission of counsel for the appellant, the ESPA and the Plan are not "stand alone" documents. Rather, the ESPA is supplementary to the Plan as is evident from its title as a "supplementary" pension agreement and the third recital, which states that its purpose is to set out the terms and conditions relating to pension benefits "in excess of the benefits provided under the [Plan]". The fact that the ESPA is supplementary to the Plan is reinforced by art.1.1 of the ESPA, which defines the terms used in the ESPA by reference to the Plan. For example, art. 1.1(d) of the ESPA defines "Pension Plan Benefits" as the pension benefits payable to the Employee pursuant to the Plan and art. 1.2 stipulates that "[a]ll other terms used in [the ESPA] shall have the meaning ascribed thereto in the [Plan]".

[15] I begin, therefore, with the Plan provisions.

[16] The Plan is structured with normal retirement to take place at age 65 (s. 5.01) and early retirement to occur when a Plan member's employment ends within ten years of his or her normal retirement date – that is, when the Plan member is between the ages of 55 and 65 (s. 5.02).

[17] In general, entitlement on normal retirement is 2% of final average earnings multiplied by credited service (s. 6.01).

[18] A person who takes early retirement is entitled to a deferred pension commencing at age 65 (s. 6.02). Alternatively, he or she may elect to have the deferred pension commence prior to age 65. If the deferred pension commences at age 62, the pension will not be reduced, otherwise if he or she commences taking the deferred pension before age 62, it will be reduced by $\frac{1}{3}$ of 1% for each month that the commencement date precedes the member's attainment of age 62 (s. 6.02).

[19] Mr. Creber's entitlement to benefits under the Plan is governed by s. 8.01(2) because: (1) he accrued benefits for post-1995 service; (2) his employment was terminated after more than 24 months of continuous service while a member of the Plan; and (3) he was not eligible to retire under s. 5 of the Plan. Mr. Creber was not eligible to retire under s. 5 of the Plan because s. 5 governs normal and early retirement, as we have seen. Because Mr. Creber was only 52 when his employment with Revios ended, he did not meet the early retirement age requirement (between the ages of 55 and 65) nor did he meet the normal retirement age requirement (age 65).

[20] Pursuant to s. 8.01(2), Mr. Creber was entitled to a deferred pension, commencing at his "Normal Retirement Date" (i.e. when he turned 65).

[21] However, s. 8.04 enables Mr. Creber to begin to receive his deferred pension early. Because he is entitled to receive a deferred pension pursuant to s. 8 of the Plan, he

could elect to begin receiving his pension at age 55 (or later) but the amount of the pension would be the actuarial equivalent of that which he would have received had he waited until Normal Retirement Date to begin collecting his pension.

[22] It will be recalled that Mr. Creber argues that art. 2.1 (A.2) of the ESPA gives him the right to receive an unreduced pension at age 62. He contends that the words “early retirement” in art. 2.1(A.2) can refer to s. 8.04 of the Plan. Because s. 8.04 gives Mr. Creber the right to begin receiving his deferred pension earlier than age 65 (but not earlier than age 55), he says that s. 8.04 creates another early retirement date. Thus, he says, art. 2.1(A.2) and s. 8.04 can be read together to give him the right to receive an unreduced pension beginning at age 62.

[23] I cannot read art. 2.1(A.2) in that fashion.

[24] The intent of art. 2.1(A.2) of the ESPA is to give the Executive the right to receive his or her pension earlier than age 62, with a reduction of $\frac{1}{4}$ of 1% for each month by which the Executive’s early retirement date preceded age 62. That is, it applies if the Executive took early retirement. As we have seen, s. 5.02 of the Plan defines early retirement date as the 10-year period prior to “Normal Retirement Date” and “Normal Retirement Date” is defined as age 65 (s. 5.01). Therefore, art. 2.1(A.2) applies if the Executive was between the ages of 55 and 65 when his or her employment with Revios ended.

[25] This interpretation of art. 2.1(A.2) is harmonious with the Plan because the words “early retirement” are given the same meaning in both documents. Furthermore, this interpretation is consistent with the intention of the ESPA, which was to provide benefits supplemental to, or in excess of, those given by the Plan. Art. 2.1(A.2) provides a benefit that is in excess of that provided by the Plan because, as we have seen, s. 6.02 of the Plan permits a member taking early retirement to begin to receive his or her pension earlier than age 62 with a reduction of $\frac{1}{3}$ of 1% for each month by which the member’s early retirement date preceded age 62. A reduction of $\frac{1}{3}$ of 1% is greater than a reduction of $\frac{1}{4}$ of 1%, which is the reduction provided by art. 2.1(A.2).

[26] Because Mr. Creber’s employment with Revios ended when he was age 52, he does not qualify to receive early retirement benefits. Although early retirement is not defined in the definition section of the Plan, it is defined in s. 5.02 and its meaning is clear and unambiguous – it occurs when a Plan member’s employment ends and the Plan member is between the ages of 55 and 65. Section 8.04 of the Plan does not assist the appellant because it does not create an early retirement date. Section 8.04 gives the person entitled to a s. 8 deferred pension the right to begin receiving that pension before he or she reaches age 65 but after he or she attains the age of 55. The fact that the member can choose to begin receiving his or her pension early is not the same thing as early retirement.

[27] Furthermore, to interpret the ESPA as the appellant contends would be to provide a new right for an executive who had not reached the age of 55 at the time his or her

employment ended. On the interpretation argued for by the appellant, the executive would receive a benefit that had been designated for those taking early retirement even though the executive did not qualify for early retirement under the Plan. This is contrary to the principles governing the interpretation of contracts. The ESPA is to be read in conjunction with the Plan, with the Plan in this case being the principal pension document. The ESPA was not intended to create a substantive right that is at odds with the conditions for entitlement created by the Plan.

DISPOSITION

[28] Accordingly, I would dismiss the appeal with costs to the respondent fixed at \$10,000, inclusive of disbursements and applicable taxes.

RELEASED: MAY 03 2011 (“E.E.G.”)

“E. E. Gillese J.A.”

“I agree. S. T. Goudge J.A.”

“I agree. David Watt J.A.”