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Employer Update

Disputed Termination of Employment

In *Employer Update* No. 15, titled, "Administering Grievance Awards and Settlements", OPTrust cautioned employers that OPTrust must respect the terms of the OPSEU Pension Plan (Plan), the (Ontario) *Pension Benefits Act* and the *Income Tax Act* (Canada), at all times, when administering the Plan. Failure to do so could result in the Plan being revocable.

In this *Employer Update* we outline a number of considerations that the parties must keep in mind when attempting to replace a termination of employment that has been grieved. If there is a desire to ensure that all or a part of the period, following the disputed termination, be considered to be "employment" and credited under the Plan, it is only possible if certain conditions are met and agreed to by both parties of the dispute.

Put simply, under the terms of the Plan, an individual must first be an "employee", of a participating employer in a designated bargaining unit, before he or she can be considered eligible to become a "member" of the Plan. The employment relationship is significant because, while it is possible to be an "employee" and a "member" – one cannot be a "member" without also being an "employee". So, when the employment relationship ends, so too does Plan membership.

Termination of Employment

When a participating employer terminates the employment of a "member" either with or without cause, he or she becomes a "former member" of the Plan. The participating employer is responsible for

the determination of any and all notice and severance requirements and providing the OPTrust with the recorded employment termination date, on the related OPTrust termination documents.

From a Plan administration perspective, OPTrust's obligations are to determine and provide the "former member" with a summary of his or her pension entitlements, up to and including the termination date. Once the entitlement election form is fully completed and returned, OPTrust proceeds with the appropriate payment(s).

Dispute

A "former member", whose employment was terminated, may choose to dispute that termination. From time-to-time, regardless of the forum used, the employer may agree to or be compelled to set aside and replace the termination of employment. Essentially, the remedy can only be either: 1) reinstatement of employment, or 2) substitution of alternative discipline.

Resumes Employment

If it is agreed and the "former member" actually returns to his or her former position, under the same conditions as before, then "salary" resumes to be paid and mandatory current service pension contributions are deducted from the member's "salary." The "former member" is, once again, both an "employee" and a Plan "member".

Employment Deemed to be Continuous

Mandatory current service pension contributions will be deducted from the reinstated employee's retro-active salary in the usual manner if:

- the agreement is that the termination of employment is to be replaced by a continuous



period of employment, from the termination date to the return to work date, and

- the “employee” is paid his or her full “salary”, less usual deductions.

Contributions must be paid by both the “employee” and employer. The employer cannot pay “member” contributions on behalf of the “employee”.

The Employer is responsible for issuing an (amended) T4 income tax information slip for each taxation year involved, reporting a) the employee’s share of pension contributions remitted and b) the corresponding “Pension Adjustment” amount.

In this case, the OPTrust would assess and require payment of interest on both the employee’s and employer’s retro-active pension contributions. The demand for the late payment interest, from both parties, is sent to the participating employer requesting prompt payment, to avoid the accrual of additional interest. Depending on the arrangement, either or both parties may be responsible for the interest payment.

Member’s Election Required – If Refunded Service

To fully restore pension credit to the “member”, he or she must notify OPTrust, in writing, of that request. Pre-termination pension credit can be restored only after any and all applicable entitlements, plus interest, which were paid to the “member” and/or transferred from the Plan, are returned to OPTrust.

As part of the processing, the OPTrust would re-calculate and report an amended “Pension Adjustment Reversal” (PAR), if applicable. OPTrust would also amend any T4A income tax information slips, originally issued in conjunction with the termination.

Period of Suspension

From time-to-time, the employment termination may be replaced by a less severe “suspension”. If it is a “suspension” with pay, and the “employee” is paid his or her full “salary”, less usual deductions, then mandatory current service pension contributions are to be deducted from his or her retro-active “salary”, in the usual manner.

However, if the “suspension” is without pay, it is **not** possible to purchase current or past service credit for the period of “suspension” in the Plan. Under the federal tax regulations this cannot be regarded as an eligible period.

“Unpaid” Leave of Absence

With the exception of the period of “suspension”, the participating employer may agree to classify any remaining “unpaid” portion of “employment”, as an employer-approved, **unpaid** leave of absence, e.g., a “Special” leave of absence.

From a Plan administration perspective, both the individual and the actual period of the employer-approved leave of absence must be deemed “eligible” by OPTrust, in order for the “member” to purchase past service credit for the period in the Plan.

1. During the time covered by the leave of absence, the individual must be deemed to have been both an “employee” and a “member” of the Plan.

Under the Plan, purchases of past service credit for post-1990 leaves of absence are subject to a maximum of five years. Leaves of absence related to pregnancy and the adoption of a child may increase that limit by no more than an additional three years. If the LOA is purchased after the leave has ended, the 5 + 3 rules do not apply since only those LOAs with an associated PA fall under that rule.

2. OPTrust must tally all of the past service credit purchases, for post-1990 periods of leaves of absence, already made by the “member.”



The maximum amount of credit that may be purchased is the lesser of either

- a. the period of the leave of absence, and
- b. the remaining balance permissible, (once any previous post-1990 periods of leaves of absence have been deducted from the prescribed maximum).

Employer's Responsibilities

The leave of absence should be recorded on an *Application to Contribute During An Unpaid Leave of Absence* (OPTRUST1025) form. The fully completed form should be sent to the OPTrust.

N.B. The participating employer **cannot** pay the current or past service contributions on behalf of the "member" for the leave of absence period.

[Under the terms of the Plan, periods when the "member" is eligible to receive LTIP are the only exception when it is permissible and mandatory for the employer to remit both the employee's and employer's shares of current service pension contributions – commonly called "LTIP accruals."]

OPTrust's Responsibilities

OPTrust calculates the cost for the "unpaid" leave of absence and provides the "member" with a purchase agreement. Whether or not the "member" agrees to purchase past service credit, for all or a part of the period, is at his or her discretion. However, any payments received must be made by the "member" – and, not the participating employer.

If the "member" elects to purchase past service credit, if applicable,

- OPTrust seeks the requisite approval from the Canada Revenue Agency (CRA); there is no need to amend the PA if the PSPA is certified

- requests that the participating employer amend the previous year's Pension Adjustment
- processes the payment(s), and
- issues the appropriate receipts, for income tax purposes, at year end.

Receiving An OPTrust Pension

The scenarios, discussed to this point, have assumed that the "former member" received a deferred pension entitlement, at the time of the disputed termination of employment.

If eligible, it is possible that the "former member" may have elected to start an immediate OPTrust pension, following the disputed termination of employment. It is important to understand that it is **not** possible to contribute to the Plan while receiving an OPTrust pension.

If a "former member" resumes full-time employment and contributes to the Plan, then the OPTrust pension is suspended immediately, until he or she terminates. The Plan's post-retirement re-employment provisions permit the accrual of additional pension credit during the period the pension is suspended, and re-calculation of the pension amount once the period of post-retirement re-employment has ended.

In this case, the period of time between the termination of employment date and the start of the post-retirement re-employment is also a period when the "former member" was in receipt of an OPTrust pension. Therefore, he or she cannot accrue pension credit for this same period.

Repayment of Periodic Payments

It is possible that the parties might wish to "unwind" the "former member's" retirement, as if it had never occurred. OPTrust regards the decision to start receiving an OPTrust pension as firm and final. Doing otherwise becomes very complicated because of both pension entitlement issues and income tax consequences.



Structuring the Agreement

When structuring an agreement to replace a disputed termination of employment, it is imperative that the parties are aware that OPTrust can only implement steps that are legally permissible and in accordance with the terms of the Plan and governing legislation.

Lump Sum Payments

Often an agreement may require the Employer to pay a lump sum amount to the "employee", as compensation for any "damages". It is important to note that these amounts are not considered to be "pensionable" earnings. The only payments acceptable to OPTrust are those representing "salary" and related to a period of "employment".

To determine the amount of "damages" and to arrive at the dollar amount, often the parties use

comparative "commuted values", based on different scenarios. OPTrust does not provide those actuarial based calculations to the "member", his or her bargaining agent or employer.

OPTrust Review

In advance of signing any draft agreement OPTrust would be pleased to review, the portion related to the OPSEU Pension Plan, to ensure that the proposed terms of the settlement can, in fact, be administered by OPTrust. Any such request should be, marked "Confidential", and directed to the Vice-President, Policy and Communications.

Accompanying the request, OPTrust requires the member to complete an Authorization for the Release of Personal Information (OPTRUST3004) form. OPTrust will attempt to respond to each request as quickly as possible.

OPSEU Pension Trust EmployerUpdate

This employer update is intended to provide participating employers with news and information about the OPSEU Pension Plan. It does not create any rights to benefits not provided for in the actual terms of the Plan. In the event of any conflict or omission, the legal documents of the OPSEU Pension Plan will govern in all cases. Members who have questions about their pension benefits should contact OPTrust directly.

For more information, please contact OPTrust.

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