CITATION: *IBM Canada Limited v. Dario Ceci and Jacinthe Ratelle*, 2024 ONSC 1771
COURT FILE NO.: CV-23-00698308-00CL
DATE: 20240321

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:	)	
IBM CANADA LIMITED	)	*David Andrew Stamp*, for the Applicant
Applicant	)	
AND	)	
DARIO CECI and JACINTHE RATELLE	)	*Ari Kaplan*, for the Representative Respondents
Representative Respondents	)	*Michael Scott*, for the Financial Services Regulatory Authority
	)	
		HEARD: September 14, 2023

OSBORNE J.

REASONS FOR DECISION

Overview and the IBM Plan

[1] This Application was heard and granted on September 14, 2023 with reasons to follow. These are those reasons.

[2] The Application seeks to rectify and correct drafting mistakes in the IBM pension plan relating to how pension benefits are accrued for employees on disability leave.

[3] IBM Canada Limited ("IBM") brings this application in its capacity as sponsor of the IBM Retirement Plan, a pension plan registered with the Financial Services Regulatory Authority of Ontario ("FSRA") pursuant to the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the "*PBA*") and bearing registration number 0342030 (the "IBM Plan"). IBM seeks an order for rectification of the IBM Plan, with effect as at and from January 1, 2014, by deleting the current language of the

following provisions and replacing the language with the corrected language set out in Appendix "A" to the Amended Notice of Application:

a. paragraph (f) of Section 4.03 of Part 1;

b. Section 1.03 of Part 3; and

c. Section 2.03 of Part 4.

[4] IBM relies upon the Affidavit of Jennifer Gilmor sworn October 2, 2020, together with Exhibits thereto; the Affidavit of Karen Kahansky sworn October 2, 2020, together with Exhibits thereto; the Affidavits of Maria Insa sworn October 14, 2020, June 27, 2023 and September 1, 2023 respectively, together with Exhibits to each; the Affidavit of Dario Ceci sworn June 23, 2023, together with Exhibits thereto; and the Affidavit of Jacinthe Ratelle sworn June 23, 2023, together with Exhibits thereto.

[5] This Application first came before me on July 4, 2023, on which date I issued an Endorsement and made an Order on consent of all parties. The effect of that Order was to appoint as Representative Respondents Dario Ceci and Jacinthe Ratelle to represent the Affected Members in this Application, subject to one exception (Mr. Yvon Bourbonnais). That Order also granted leave to amend the Notice of Application to name the Representative Respondents as respondents in this Application and it approved a notice letter to be sent to Affected Members in order that they were aware of this Application and the relief being sought.

[6] On behalf of the Affected Members, the Representative Respondents consent to the relief sought in this Application, in accordance with the settlement agreement dated as of March 6, 2023 (the "Settlement Agreement"). As further discussed below, counsel for the Representative Respondents emphasized that the consent was based on the informed compromise set out in the terms of the Settlement Agreement.

[7] The Financial Services Regulatory Authority ("FSRA") is present in court today as the pension regulator. As it previously advised IBM and the Affected Members, it takes no position on this Application.

[8] For the reasons that follow, I am satisfied that rectification should be granted in this matter.

[9] The background to and context for this Application are fully set out in the Application materials. Defined terms in this Endorsement have the meaning given to them in the Application materials and/or my Endorsement and Order of July 4, 2023, unless otherwise stated.

[10] The Application is brought for rectification to correct certain drafting mistakes (the "Drafting Mistakes") made when the IBM Plan was restated effective January 1, 2014 (the "2014 Restatement"). The Drafting Mistakes affected the language of the IBM Plan relating to the accrual of pension benefits during disability leaves. I accept the submission of IBM (supported by the evidence in the record) that their effect was completely unintended and made in error, as a result of miscommunications between IBM and its service provider Willis Towers Watson ("WTW") in connection with the preparation of the 2014 Restatement.

[11] The IBM Plan has been consistently administered and communicated to members as if the Drafting Mistakes had not been made. IBM amended the IBM plan effective July 1, 2019 to correct the Drafting Mistakes on a go-forward basis in accordance with the requirements of the *PBA*, with the result that this Application seeks rectification of the IBM Plan in effect only for a limited time: the period between January 1, 2014 (i.e., the effective date of the 2014 Restatement) and June 30, 2019, inclusive.

[12] The IBM Plan was established in 1947. Until 1995, it was exclusively a defined-benefit plan, providing pension benefits determined on the basis of a formula that considered the eligible member's "Credited Service" and "Compensation" as defined in the IBM Plan (the "DB Provision").

[13] Effective January 1, 1995, the IBM plan was amended to close the DB Provision to new employees and add a non-contributory defined contribution component (the "Non-Contributory DC Provision").

[14] As a result, employees who joined the IBM Plan in the period between January 1, 1995 and March 1, 2006 participate in the Non-Contributory DC Provision and not the DB Provision, and employees who were members of the DB Provision prior to January 1, 1995 had the option to remain in the DB Plan or to transfer to the Non-Contributory DC Provision.

[15] IBM Plan Members participating in the Non-Contributory DC Provision ("Non-Contributory DC Members") each have an individual retirement account under the IBM Plan into which IBM is required to contribute an amount equal to a percentage of the member's compensation. These employer contributions are only payable while the Non-Contributory DC Member is accruing Credited Service. Generally, if there is an interruption of Credited Service, IBM's contributions to the member's account cease.

[16] The IBM Plan was further amended effective March 1, 2006 (the "2006 IBM Plan Amendment") to close the Non-Contributory DC Provision to new employees and add a new contributory defined contribution component (which is known as the "DC Match Provision"). Each employee electing to join the IBM Plan since March 1, 2006 is therefore participating in the DC Match Provision ("DC Match Member"). In general, a DC Match Member contributes a percentage of their compensation and IBM makes a matching contribution.

Benefit Accruals during Eligible Disability Leaves

[17] The IBM Plan includes rules regarding the accrual of pension benefits during disability leaves of absence. Even though disabled members are not working during their leaves of absence, they can continue to accrue certain pension benefits subject to the conditions and restrictions set out in the IBM Plan, which vary based on the applicable pension provision.

[18] In the IBM Plan restated effective January 1, 2004 (the "2004 IBM Plan Restatement"), Section 11.01 provided that disabled DB Members in receipt of disability benefit payments under an income replacement plan sponsored by IBM or under workers' compensation legislation would "continue to accrue Credited Service until the Member reaches age 55".

[19] Under this provision, a disabled DB Member is essentially deemed to be in service up to age 55 and to receive compensation for pension accrual purposes even though the member is not actively at work. The accrual of Credited Service up to age 55 during an eligible disability leave of absence allows disabled DB Members to receive a greater pension on retirement than they would have without this special benefit accrual rule.

[20] Similarly, Section A-4.03 of the 2004 IBM Plan Restatement provided that disabled Non-Contributory DC Members in receipt of benefits under an income replacement plan sponsored by IBM or under workers' compensation legislation would also "continue to accrue Credited Service until the Member reaches age 55".

[21] Since IBM's obligation under the Non-Contributory DC Provision is to contribute a percentage of the member's Compensation to the member's retirement account while the member is accruing Credited Service, IBM was required under this provision to continue making contributions in respect of disabled Non-Contributory DC Members until age 55.

[22]

[23] Subsequent to the 2004 IBM Plan Restatement, IBM adopted the 2006 IBM Plan Amendment establishing the DC Match Provision effective March 1, 2006, as noted above. This amendment introduced Section B-4.05 in the IBM Plan, providing that if a disabled DC Match Member qualifies for disability benefit payments under an income replacement plan sponsored by IBM or under workers' compensation legislation, the "*Participating Employer contributions shall continue … **to a maximum of two years** from the date the Contributory Member commenced short term disability benefits"* (emphasis added). IBM thus undertook in the 2006 IBM Plan Amendment to continue making contributions in respect of a disabled DC Match Member for two years during an eligible disability leave regardless of the member's age.

The 2014 Restatement Project

[24] During the second half of 2012, a project began to restate the IBM Plan to reflect new legislative requirements and incorporate amendments made since the 2004 IBM Plan Restatement (including the 2006 IBM Plan Amendment). Plan restatements are necessary from time to time to comply with changes to pension and tax legislation and to incorporate all the amendments previously adopted into a single comprehensive plan text. IBM relies on its actuarial consultants to prepare these restatements in the ordinary course of its administration of the IBM Plan.

[25] As IBM's Pension Programs Manager, Jennifer Gilmor was tasked to coordinate the restatement project and prepare a draft restated plan text that would be submitted to the board of directors of IBM for adoption. At the time, Ms. Gilmor worked closely with WTW (which was then known as Towers Watson), a leading pension advisory firm, on various pension administration matters. WTW had been IBM's pension administrator and pension advisor for approximately 20 years. Ms. Gilmor retained the services of WTW on behalf of IBM to prepare a restated plan text and act as a professional advisor to IBM in connection with this restatement project.

[26] As described in her affidavit sworn October 2, 2020 (the "Gilmor Affidavit"), Ms. Gilmor instructed WTW to revise and update the 2004 IBM Plan Restatement only to the extent required to reflect new legislative requirements and incorporate amendments made since January 1, 2004, and she relied on WTW to prepare the IBM Plan Restatement in accordance with those instructions.

[27] Ms. Gilmor reviewed and approved WTW's final draft of the IBM Plan restatement on or about November 20, 2014. A final draft of the restated IBM Plan effective as of January 1, 2014 was then submitted to the board of directors of IBM and it was adopted on December 29, 2014 (the "2014 IBM Plan Restatement").

The Drafting Mistakes

[28] In the course of drafting the 2014 IBM Plan Restatement, the language of the provisions mentioned above relating to the accrual of benefits during disability leaves was revised in error.

[29] The particular Drafting Mistakes were as follows:

a. Section 11.01 and Section A-4.03 of the 2004 IBM Plan Restatement (referred to above) were replaced in the 2014 IBM Plan Restatement by Section 4.03(f) of Part 1 and Section 1.03 of Part 3, respectively. These provisions of the 2014 IBM Plan Restatement state that DB Members and Non-Contributory DC Members in receipt of benefits under an income replacement plan sponsored by IBM or under workers' compensation legislation "continue to accrue Credited Service until the Member reaches age 65" instead of age 55 as provided under the 2004 IBM Plan Restatement; and

b. Section 2.03 of Part 4 of the 2014 IBM Plan Restatement replaced Section B-4.05 (also referred to above). Section 2.03 of Part 4 states that IBM must continue to make contributions in respect of DC Match Members in receipt of benefits under an income replacement plan sponsored by IBM or under workers' compensation legislation "but in no event longer than six months from the date the Eligible Disability Leave commenced" rather than two years as had been the case since the establishment of the DC Match Provision.

[30] The language of the Drafting Mistakes purports to create additional benefits for disabled DB Members and disabled Non-Contributory DC Members. In particular, a disabled DB Member would be able to accrue up to ten additional years of Credited Service after reaching age 55, thereby resulting in a greater pension than would have been the case under the 2004 IBM Plan Restatement; and a disabled Non-Contributory DC Member would be able to continue to receive contributions from IBM for up to ten additional years after reaching age 55, which would also not have been the case under the 2004 IBM Plan Restatement. Such additional benefits would create additional pension liabilities under the IBM Plan that IBM would be responsible to fund according to the funding rules under the IBM Plan and applicable law.

[31] Additionally, the Drafting Mistakes also included a change that would be adverse for disabled DC Match Members, in that their entitlement to receive employer contributions in their retirement account during an eligible disability leave would be reduced from two years to six months. Such change would reduce the benefits payable to disabled DC Match Members, and this would result in a reduction of IBM's funding obligations under the IBM Plan. This type of amendment would have required a notice to affected members had it been intended.

The Drafting Mistakes Were Unintended

[32] As noted above, the objective of the 2014 IBM Plan Restatement was only to document certain administrative practices in the plan text, update certain provisions to conform with new legislative requirements, and consolidate amendments made since 2004. This limited scope of the restatement project was specifically noted in Section 1.02 of Part 1 of the 2014 IBM Plan Restatement.

[33] There were no business reasons or new legislative requirements requiring IBM to change the rules relating to the accrual of benefits during disability leaves as part of the restatement project. It was never IBM's intention (nor Ms. Gilmor's intention) to amend these rules, and no such changes were ever considered nor discussed internally at IBM.

[34] The Drafting Mistakes were completely unintended and made in error as a result of a miscommunication between the WTW consultants and Ms. Gilmor. How the miscommunication occurred is described in detail in Ms. Gilmor's affidavit and in the affidavit of Karen Kahansky of WTW sworn October 2, 2020 (the "Kahansky Affidavit"). In sum:

a. the initial drafts of the restated plan text provided to Ms. Gilmore by WTW properly reflected the existing rules (i.e., Credited Service would cease at age 55 for disabled DB Members, employer contributions would cease in respect of Non-Contributory DC Members at age 55, and disabled DC Match Members would receive employer contributions for up to two years), and Ms. Gilmor did not request any changes to that language; and

b. there was then a discussion between the WTW consultants and Ms. Gilmor about leaves of absence. Unfortunately, this led to a misunderstanding which caused Ms. Kahansky of WTW to erroneously propose changes to the sections of the IBM Plan relating to pension benefit accruals while on disability leave. Both Ms. Gilmor and Ms. Kahansky have given evidence that this resulted from a miscommunication between them, and that such changes were not intended.

The Plan Changes Resulting From The Drafting Mistakes Were Not Authorized

[35] As noted above, the plan restatement was drafted to document certain administrative practices in the plan text, reflect new legislative requirements, and incorporate prior plan amendments made since 2004. It was not intended to incorporate new plan design changes in the restated plan text.

[36] Ms. Gilmor never discussed any changes to the benefit accrual rules during disability leaves with affected stakeholders and never requested their approval, as would have been required in accordance with IBM's pension governance framework. Ms. Gilmor was aware that such approval would have been required, but it was not sought since it was never intended in the first place.

The Drafting Mistakes Were Never Implemented Nor Communicated To Members

[37] Since January 1, 2014, the IBM Plan has been consistently administered as if the Drafting Mistakes had not been made in the 2014 IBM Plan Restatement. In particular:

a. disabled DB Members and disabled Non-Contributory DC Members have continued to accrue pension benefits until age 55 only (rather than until age 65 as indicated in the 2014 IBM Plan Restatement); and

b. disabled DC Match Members have continued to receive employer contributions in their retirement account for two years (rather than only six months as indicated in the 2014 IBM Plan Restatement).

[38] Relatedly, the changes were not communicated to the members (as discussed below), IBM's pension procedures were not changed to align with the Drafting Mistakes, and WTW's actuaries did not instruct IBM to fund the IBM Plan in accordance with the Drafting Mistakes.

[39] The rights and obligations of IBM Plan members are summarized on IBM's Human Resources intranet and are available to all IBM Plan members. There is a summary describing the key features of each of the DB Provision, Non-Contributory DC Provision, and DC Match Provision. The way in which IBM described the benefit accrual rules during disability leaves did not change in any of these summaries before or after the adoption of the 2014 IBM Plan Restatement.

[40] The relevant provision of the summary relating to the DB Provision read as follows in 2013 and remained unchanged following the adoption of the 2014 IBM Plan Restatement:

> **Leaves of Absence**
>
> …
>
> While you are on an approved short-term disability (STD) leave of absence from IBM, your pensionable earnings are deemed (credited) for the duration of your leave at your salary rate or 100% salary equivalent as of the date your leave started. While you are on an approved long-term disability (LTD) leave of absence from IBM, your pensionable earnings are deemed (credited) at your salary rate or 100% salary equivalent as of the date your leave started up to age 55 or 30 years of service, whichever comes first.

[41] The relevant provision of the summary relating to the Non-Contributory DC Provision read as follows in 2013 and remained unchanged following the adoption of the 2014 IBM Plan Restatement:

> **Leaves of Absence**
>
> …
>
> While you are on an approved short-term (STD) leave of absence, your DC contributions will continue based on your deemed pensionable earnings at your salary rate or 100% salary equivalent as of the date your leave started. While you are on an approved long-term disability (LTD) leave of absence from IBM, your DC contributions will continue based on your deemed pensionable earnings at your salary rate or 100% salary rate equivalent as of the date your leave started, until you reach age 55, at which point all contributions will cease, per the terms and conditions of the leave. Any residual payments (i.e., Growth-Driven Profit-Sharing or Commission) paid while you are on STD or LTD will receive a DC contribution.

[42] After six months of disability leave, disabled DB Members and disabled Non-Contributory DC Members also receive a letter advising them that they are no longer covered under IBM's short-term disability program but are eligible for income replacement benefits under the LTD Plan. Following the adoption of the 2014 IBM Plan Restatement, those letters continued to include a paragraph informing members that they will continue to accrue benefits under the IBM Plan until age 55.

[43] There were no communications to DB Members and Non-Contributory DC Members following the adoption of the 2014 IBM Plan Restatement that included information suggesting that they could continue to accrue benefits under the IBM Plan after reaching age 55.

[44] As for DC Match Members, the relevant provision of the summary relating to the DC Match Provision read as follows in 2013 and remained unchanged following the adoption of the 2014 IBM Plan Restatement:

> Leaves of Absence
>
> …
>
> While you are on an approved short-term disability leave of absence from IBM, your DC employee and employer match contributions will continue based on your actual earnings for the duration of your leave. While you are on an approved long-term disability leave of absence from IBM, your employee DC contributions will cease and the DC employer match contributions will continue based on your deemed pensionable earnings at your salary rate or 100% salary rate

> equivalent as of the date your leave started, up to a maximum of 18 months from your first day of long-term disability, per the terms and conditions of the leave. Your contribution rate cannot be changed during your leave.

[45] Since the adoption of the 2014 IBM Plan Restatement, the letter being sent to disabled DC Match Members after six months of disability leave also advises them that employer contributions to the IBM Plan will cease after 18 months of long-term disability.

[46] There were no communications to DC Match Members following the adoption of the 2014 IBM Plan Restatement that included information about the fact that employer contributions would cease after 6 months of disability leave.

[47] IBM is not aware of ever receiving any question or comment from any IBM Plan member regarding the discrepancies between the terms of the 2014 IBM Plan Restatement and IBM's pension administration practices or IBM's communications.

The Drafting Mistakes Have Been Corrected Prospectively

[48] In or about November 2016, a senior legal counsel at IBM noticed a drafting mistake in a draft restatement of the IBM Retirement Plan C, which is another pension plan sponsored by IBM with a non-contributory DC component. This was the same mistake as the one in the Non-Contributory DC Provision (i.e., accrual of credited service up to age 65 instead of age 55). When WTW consultants were instructed to correct that draft and provide an explanation for the drafting error in the IBM Retirement Plan C, the Drafting Mistakes in the IBM Plan came to light.

[49] IBM emailed an inquiry to the Financial Services Commission of Ontario ("FSCO") on August 15, 2018 seeking regulatory guidance upon becoming aware of the Drafting Mistakes. In a responding letter dated August 27, 2018, FSCO advised that in order to fix the Drafting Mistakes, IBM should: (i) amend the IBM Plan prospectively to undo the Drafting Mistakes going forward; and (ii) seek a rectification order from the Court to undo the Drafting Mistakes retroactively.

[50] In accordance with the foregoing guidance received from FSCO:

a. an amendment to the IBM Plan effective July 1, 2019 was filed for registration with the Ontario pension regulator to undo the Drafting Mistakes prospectively; and,

b. on September 19, 2019, IBM commenced this Application seeking rectification of the Drafting Mistakes effective from January 1, 2014, asking the court to make an order undoing the Drafting Mistakes in respect of the period between January 1, 2014 (when the mistakes notionally became effective) and July 1, 2019 (when the mistakes were corrected on a prospective basis).

[51] The DB Provision and Non-Contributory DC Provision now state again that members on eligible disability leaves will continue to accrue benefits up to age 55. The DC Match Provision was amended to state again that members on disability leaves will receive contributions for up to 2 years following the beginning of the leave.

The Specific Relief Being Requested

[52] As noted above, this Application seeks rectification of the IBM Plan language in effect in the period between January 1, 2014 (i.e., the effective date of the 2014 Restatement) and July 1, 2019 (i.e., the effective date of the prospective amendment). The specific corrections being requested are set out in Appendix "A" to the Amended Notice of Application.

Notification to the Affected Members

[53] The Affected Members are 210 current and former employees of IBM participating in either the DB Provision, Non-Contributory DC Provision, or DC Match Provision of the IBM Plan, and who were on an approved long-term disability leave during all or part of the period from January 1, 2014 to June 30, 2019.

[54] Upon commencement of this Application, IBM sent a letter to all of the Affected Members by registered mail (the "2019 Notice Letter"). The 2019 Notice Letter attached a copy of the Notice of Application, and among other things advised the Affected Members that if any Affected Member chose to participate in the Application, IBM would put them in contact with experienced independent legal counsel who may be retained by those members wishing to participate, and that IBM had set aside funds to cover that lawyer's reasonable fees.

[55] IBM kept detailed records of responses to the 2019 Notice Letter and sent appropriate further communications in the few instances where the Affected Member was deceased or where the original letter was returned to IBM undelivered.

[56] In response to the 2019 Notice Letter, nineteen Affected Members advised that they wished to speak with independent legal counsel. IBM provided each of these people with contact information for Ari Kaplan of Kaplan Law, and also provided their names to Mr. Kaplan. Mr. Kaplan is counsel to the Representative Respondents on this Application, in accordance with my earlier Order made in this proceeding.

[57] As a result of the notification process described above, a group of Affected Members, including the Representative Respondents, retained Mr. Kaplan in and around December 2019 as their legal counsel in respect of this Application.

The Settlement Agreement, Representation Order, and Further Notification

[58] Following a lengthy negotiation conducted through legal counsel, the Representative Respondents entered into a settlement agreement with IBM dated as of March 6, 2023 (the "Settlement Agreement"). The Settlement Agreement provides that IBM shall create a settlement fund to be distributed among the Affected Members according to an agreed-upon payment formula, and that the Representative Respondents shall consent to the rectification being sought by IBM in this Application on behalf of the Affected Members.

[59] Pursuant to the Settlement Agreement, IBM brought a motion on consent requesting an Order appointing the Representative Respondents to represent the interests of the Affected Members, as discussed above. Again, that order was granted on July 4, 2023.

[60] Also pursuant to the Settlement Agreement, IBM sent a letter to the Affected Members by registered mail dated May 25, 2023 advising them of the Settlement Agreement and notifying them of the consent motion requesting the Representation Order (the "Notice of Settlement and Representation Motion"). Ten Affected Members contacted Mr. Kaplan in response to that notice. None of those people indicated an intention to oppose the settlement, and some of them indicated they agree with and support the settlement. One of those people, Mr. Yvon Bourbonnais, asked to opt out of the representation but does not oppose the settlement or the rectification contemplated in the settlement and sought on this motion.

[61] On July 17, 2023, IBM mailed a copy of the notice letter attached as Schedule "B" to the Representation Order (the "Notice of Appointment of Representative Respondents") to the Affected Members in accordance with the requirements of paragraph 4 of the Representation Order.

[62] The Notice of Appointment of Representative Respondents notified the Affected Members of the Representation Order and advised that they were entitled to attend the Court Hearing scheduled to be held on September 14, 2023, either to observe or, if they did not agree with the Representative Respondents' intention to consent to the Court Application, to raise an objection to the court.

[63] Representative Counsel received no communications from any Affected Members in response to the Notice of Appointment of Representative Respondents advising of any objection to the appointment of the Representative Respondents or their intention to consent to the Court Application. Thus, no Affected Member has indicated an intention to oppose the settlement and/or the appointment of the Representative Respondents, and no one other than Mr. Bourbonnais (referenced above) has asked to opt out of the settlement.

[64] Under the Settlement Agreement, the parties agreed to request an Order substantially in the form attached as Appendix "C" to the Settlement Agreement. Paragraph 2 of this requested Order includes approval of the terms and conditions of the Settlement Agreement and related relief – which approval is being jointly requested by IBM and the Representative Respondents pursuant to the Settlement Agreement.

Coordination with FSRA - the Pension Regulator

[65] The FSRA assumed the regulatory duties of FSCO effective June 8, 2019. By letter dated September 20, 2019, IBM's counsel advised FSRA of the commencement of this Application in accordance with the guidance provided in FSCO's August 27, 2018 letter referenced above.

[66] Following entry into the Settlement Agreement, IBM's counsel wrote to FSRA on March 8, 2023, describing the Settlement Agreement and outlining the expected next steps in this Application. Mr. Kaplan also wrote to FSRA following entry into the Settlement Agreement. As part of that correspondence, FSRA confirmed that it would take no position in relation to this Application. This is consistent with the position first taken by FSCO, noted above. Similar confirmation was provided again by FSRA's counsel at the July 4, 2023 motion hearing before me.

Rectification

[67] Numerous authorities have established that a court has the equitable jurisdiction to rectify a pension plan.

[68] Counsel for IBM and the Representative Respondents made extensive submissions about the test applicable to the rectification of unilateral instruments, as opposed to bilateral instruments such as most contracts, which result from negotiations between two distinct parties.

[69] Courts in Ontario have repeatedly applied the doctrine of rectification to correct mistakes within the written text of unilateral pension plans. As recognized by Newbould J. of this Court in *Amcor Packaging Canada Inc., Re*, 2012 ONSC 6168, 1 C.C.P.B. (2nd) 179 ("*Amcor*"), at para. 18, despite some unique features to unilateral instruments, the distinction is no impediment to the operation of equity:

> Unlike most cases dealing with rectification, this case does not deal with a contract between two or more persons. It deals with a declaration of trust, in this case an amendment to a pension trust agreement. It is clear from the 2005 Hourly Plan restatement that it is a unilateral trust document not negotiated with any employees. I do not see the fact that it is a unilateral document as being an impediment to the making of an order in a proper case for rectification or to the exercise of the equitable jurisdiction…. Equity should not be so constrained if the conditions for granting relief are present.

[70] Ontario courts recognize rectification as a "flexible equitable remedy". Some cases have therefore held that the strict requirements and test from Supreme Court of Canada authorities "[do not] apply to cases of mistake in a unilateral document". Instead, in the unique context of unilateral instruments, "it is only the intention of the maker that is in issue." Accordingly, the courts consider solely "the singular intention of the maker [of the instrument]": see, for example, *Kraft Canada Inc. v. Pitsadiotis* (2009), 73 C.C.P.B. 209 (Ont. S.C.) ("*Kraft*"), at paras. 21 and 56-60.

[71] To satisfy the evidentiary burden in cases of unilateral instruments, the courts require the person seeking rectification to prove that "his or her intention was objectively manifested": *Kraft*, at para. 28.

[72] Where the maker of the instrument can demonstrate a mistake in the instrument on this standard, the courts recognize that it would be unjust to deny rectification and therefore require a company to fund pension benefits that were never intended, and which members could never have reasonably expected to receive: *Kraft*, at para. 68.

[73] As reasoned by Cameron J. in a similar case, pension plan members are "entitled to a pension in the terms of which they were aware" and do "not acquire rights…if they were not aware of [the terms] and [they were] a mistake." Accordingly, as Cameron J. concluded, it would be

"unfair to allow Plan members to take advantage of a clear mistake in passing [an] Amendment": *MTD Products Ltd. v. Baldin*, 2010 ONSC 1344, 82 C.C.P.B. 239 ("*MTD*"), at paras. 58 and 68.

[74] The following uncontested evidence satisfies me that the IBM Plan and 2014 Restatement are unilateral instruments, subject to the unique rectification test applicable to such instruments:

a. the IBM Plan was established by IBM in 1947, and has subsequently been repeatedly amended and restated by IBM, all without negotiations with members;

b. the 2014 Restatement Project was initiated by IBM. The ultimate conclusion of that Project – the 2014 Restatement of the IBM Plan – was not negotiated with members. It was instead an administrative exercise undertaken by IBM's actuarial consultant/pension advisor, supervised by IBM's Pension Programs Manager, and ultimately unilaterally approved by IBM's Board of Directors; and

c. IBM, in the 2014 Restatement and in earlier versions of the IBM Plan, reserved the right to amend or discontinue the IBM Plan either in whole or in part subject to the requirements of the *PBA*.

[75] Both counsel for IBM and counsel for the Representative Respondents made extensive submissions about whether and the extent to which the test set out by the Supreme Court of Canada in *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 S.C.R. 720 ("*Fairmont*"), applies in this context.

[76] IBM submits that the *Fairmont* test has no application whatsoever since it applies only to a bilateral contract. The Representative Respondents disagree, emphasizing that although the case arose in the context of a bilateral contract, there are numerous references in *Fairmont* itself to rectification of unilateral contracts (see, for example, paras. 15, 36, 38, 56 and 63).

[77] In my view, the applicable test is that set out above and applied to rectify pension plans by the Ontario courts in *Kraft*, *MTD* and *Amcor*, but the test as articulated in these authorities is consistent with the principles set out in *Fairmont* in any event.

[78] The *Fairmont* analysis itself draws heavily from the decision in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678 ("*Performance Industries*"), which was the governing authority when *Kraft*, *Amcor* and *MTD* were decided.

[79] I also observe that in *Fairmont*, the Court further stated (at para. 15) that rectification is available where the claimed mistake is unilateral:

> In *Performance Industries* (at para. 31) and again in *Shafron* (at para. 53), this Court affirmed that rectification is also available where the claimed mistake is *unilateral* – either [1] because the instrument formalizes a unilateral act (such as the creation of a trust), or [2] where (as in *Performance Industries* and *Shafron*) the instrument was intended to record an agreement between parties, but one party says that the instrument does not accurately do so, while the other

> party says it does. In *Performance Industries* (at para. 31), "certain demanding preconditions" were added to rectify a putative unilateral mistake: specifically, that the party resisting rectification knew or ought to have known about the mistake; and that permitting that party to take advantage of the mistake would amount to "fraud or the equivalent of fraud" (para. 38). [Emphasis added.]

[80] The *Fairmont* test as usually articulated must be adapted to apply to unilateral instruments in that, for example, the test requires consideration of both "the knowledge and intentions of the other party", and in the case of unilateral instruments there is no "other party". Although *Fairmont* was decided after the relevant Ontario authorities referred to above, they rejected as inappropriate the application of the test from *Performance Industries* (underpinning *Fairmont*). As described by Lederman J. in *Kraft* at paras. 56-60:

> In [*Performance Industries*], *supra*, the Supreme Court set out four prerequisites for the parties seeking rectification for unilateral mistake in a bilateral contract. One of them is that the other party knew or ought to have known of the mistake and to permit that party to take advantage of the mistake would amount to unfair dealing.
>
> Rectification is a flexible equitable remedy, the prerequisites of which are not cast in stone and must be adapted to meet the particular circumstances.
>
> …
>
> [I]n my view, [the prerequisites in *Performance Industries*] do [not] apply to cases of mistake in a unilateral document.
>
> The 1992 Plan B is essentially a unilateral document. Article 3.04 was not the subject of bilateral negotiation. Therefore, it is only the intention of the maker that is in issue.

The IBM Plan Should be Rectified to Correct the Drafting Mistakes

[81] I am satisfied that applying the above authorities, the IBM Plan to correct the Drafting Mistakes is appropriate and rectification should be granted. Many of the same factors considered and relied upon by the Court in *Kraft* are present here:

a. the unchallenged evidence of those involved in preparing the 2014 Restatement is that they had no intention to change the rules relating to the accrual of benefits during disability leaves;

b. there is no evidence that any members requested or expected a change to such rules;

c. the evidence of the pension consultant who did the drafting work (Ms. Kahansky) is that she introduced the Drafting Mistakes based on a "miscommunication";

d. from and after January 1, 2014, the IBM Plan has been consistently administered as if the Drafting Mistakes had not been made. Relatedly, IBM's pension procedures were not changed to align with the Drafting Mistakes, nor did WTW's actuaries instruct IBM to fund the IBM Plan in accordance with the Drafting Mistakes; and

e. the changes were not communicated to members.

[82] The rectification sought by IBM is also consistent with other leading authorities. For example, the intention in *Amcor* had been to transition the pension plan from a defined benefit plan to a defined contribution plan, but the restatement erroneously amended the benefit formula. Justice Newbould was satisfied that the pension plan should be rectified to correct the mistake based on "looking at the record on an objective basis", including the "contemporaneous documents, the affidavit evidence and the way in which the [pension plan] has been administered since the amendment was made".

[83] As set out above, all of these factors also support rectification in the present case. Further, Newbould J. noted that *Amcor* had conducted a "thorough review of its records", which demonstrated that "[A]t no time was the erroneous amendment authorized…or…even discussed". Likewise in this case, the evidence is clear that changes to the rules relating to the accrual of benefits during disability leaves were never considered nor even discussed internally at IBM.

[84] As explicitly confirmed by Section 1.02 of Part 1 of the 2014 IBM Plan Restatement, the purpose of the 2014 Restatement was solely to reflect new legislation requirements and incorporate amendments made since January 1, 2004.

Retroactive Effect of Order

[85] IBM is seeking a rectification Order retroactive to January 1, 2014, i.e., the date on which the Drafting Mistakes were introduced into the IBM Plan. Such retroactive effect is supported by the authorities. For example, although the judgment in *Kraft* was issued in February 2009, Lederer J.'s order in that case was retroactive to the 1992 effective restatement date on which the mistake had occurred, and the words had been accidentally omitted from Plan B. Justice Lederer explained (at para. 70):

> [A]n order for rectification will go with respect to the written text of the Kraft Canada Inc. 1992 Plan B as registered with the FSCO pursuant to the *PBA* bearing registration number 0259556 with effect as at and from January 1, 1992 by including in Article 3.04 thereof the words "and during which a Member participates in the Plan" immediately after the words "Credited Service of a Member means his period of active Continuous Service with an Employer, calculated in years and parts thereof, for which he receives compensation from the Employer.

Settlement of a Representative Action

[86] As noted at the outset of these reasons, counsel for the Representative Respondents consents to the relief sought in this Application but submits that the relief should be granted pursuant to the terms of the Settlement Agreement.

[87] In my view, it is not necessary for me to make this determination given my reasons above, but had it been necessary to do so, I would have been satisfied that the Settlement Agreement (which includes as a term the rectification sought) should be approved pursuant to r. 10.01(3) of the *Rules of Civil Procedure*, R.R.O 1990, Reg. 194, as amended.

[88] The factual basis for this is as set out above. The legal framework is that set out by Morawetz J. (now Chief Justice) in *MacKinnon v. Ontario Municipal Employees Retirement Board*, 2012 ONSC 4450, 99 C.C.B.P. 321 ("*MacKinnon*"), in which the Court concluded that a settlement in a r. 10 representative action is analogous to the analysis of settlement approval under the *Class Proceedings Act, 1992*, S.O. 1992, c.6.

[89] I am satisfied that as required by r. 10.01(3):

a. the Representative Respondents agree to the settlement;

b. the settlement will be for the benefit of the represented persons; and

c. requiring service on those represented persons would cause undue expense or delay, beyond my earlier Order made in this proceeding.

[90] I am satisfied that the factors set out in *Ironworkers Ontario Pension Fund (Trustees of) v. Research in Motion Ltd.* (2007), 87 O.R. (3d) 721 (S.C.), at para. 16, cited with approval in *MacKinnon*, have been satisfied here for all of the reasons set out above.

Result and Disposition

[91] For all of the above reasons, the Application is allowed and rectification is granted in accordance with the order signed.

[92] Costs were neither sought nor awarded.

Osborne J.