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Sex Discrimination in Pension Plans

David Brown

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I. *Introduction*

Legal problems involved in pension plans and the statutory regulation of pensions have been the subject of two recent articles in the Dalhousie Law Journal; *Pensions: A Primer for Lawyers* by Joel Fichaud¹ and Anne Malick's comment, *Private Pensions — A Legislative Response — Nova Scotia Pension Benefits Act.*² Sex discrimination in employment has also been well canvassed in this Journal in Elizabeth Lennon's article, *Sex Discrimination in Employment: The Nova Scotia Human Rights Act.*³ The purpose of this note is to examine an issue at the nexus of these two subjects: sex discrimination in pension plans, principally that arising from actuarial differences in benefits and contributions for male and female employees. What forms does discrimination in pension plans take, is it unlawful or undesirable and if so, how is it to be remedied in Nova Scotia?

Canada's solution to providing at least a floor income for all Canadians upon retirement has been called the three-tier system: old age pensions, the Canada Pension Plan and private employer-employee pension plans. The federal government through the *Old Age Security Act*⁴ provides a pension to all persons aged sixty-five or over. The basic monthly pension is the same for all regardless of employment status or sex. In addition those eligible may receive the guaranteed income supplement, the amount of which depends on the pensioner's income and marital status. This plan provides the basic income floor for all Canadians aged sixty-five years or older. The *Canada Pension Plan*⁵ has been in operation since 1966. It provides a guaranteed pension to all employees in Canada, regardless of occupation, through compulsory contributions by employer and employee, collected by the federal government. Contributions of 1.8% of the employees' salaries are matched by the

*LL.B. Dalhousie University, 1977

1. (1975) 2 *Dal. L.J.* 369

2. (1976) 3 *Dal. L.J.* 703

3. (1976) 3 *Dal. L.J.* 593

4. R.S.C. 1970 c. O-6

5. R.S.C. 1970 c. C-5

employer up to the yearly maximum pensionable earnings level (YMPE) which in 1974 was \$7,400. The plan does not discriminate between male and female: both groups pay equal contributions and receive equal benefits according to their income. There are, however, two points about the Canada Pension Plan that must be made. First, the pensions are calculated to give a pension of 25% of average earnings, so women in general, being on the average lower income earners, will receive lower pensions. Second, the pensions are for employed persons only with no recognition for the contribution of a woman at home to the family unit. The third "tier" of social security for the aged is private employer-employee pension plans⁶ and it is at this level that women are most clearly discriminated against.

The problem of sex discrimination in pension plans cannot be seen only through actual discrepancies in particular plans. As with the Canada Pension Plan much of the problem stems from women's inferior status in the workforce. Women earn, on the average, thirty per cent less than men and therefore their pensions are going to be less than those of men. They are often on the fringe of the job market and are, statistics show, more susceptible to layoff and termination of employment than men.⁷ More women, therefore, do not get the opportunity to pay into pensions or do not stay long enough to be entitled to the benefit of the employer's contributions. In the male-oriented work world it is the husband who is transferred. Usually this means he keeps his pension with the same employer but the wife must change employers and she will lose her pension "credits" under her previous employer unless she has a vested right to those credits. The fact that most pensions are not portable thus hits women harder than men.

Lack of portability supports the traditional view that the husband as the primary earner needs a pension; for women it is not important. Discrimination in favour of "head of household" and related criteria ignore the contribution married women make to their families' income; a contribution the family cannot be expected to do without when retirement age arrives. In 1974, 51.9% of all single women and 36.7% of all married women were participating in the workforce. Ignored by these statistics are the many women who are divorced, separated or widowed by the time they reach retirement

6. Pension Plans In Canada, 1970 Statistics Canada Table B, p. 12

7. *Women in the Workforce, 1975 Facts and Figures*, Information Canada, Table 3

age and who must provide income from only one source, their own. It is no longer acceptable for pension plans in general to ignore the role of working women in the economy.

What are the more specific forms of discrimination against women found in pension plans?

II. *Eligibility or Access*

In 1970 there were 2,690,000 females and 5,640,000 males in the workforce but only 735,490 females were covered by a pension plan compared with 2,086,000 male employees in Canada.⁸ What are the reasons for this disproportionate coverage? In that year 3.4% of the pension plans in effect in Canada were not available to women.⁹ More commonly plans make it compulsory for men to join but optional for women. Also, eligibility requirements vary and those based on the period of employment in a company often discriminate against a class of employee which has a higher proportion of women, such as clerical workers. Union plans in many companies cover the industrial workforce but not the clerical or administrative staff.

III. *Contributions and Benefits*

Contributions and benefits are the two areas in which discrimination has had its most serious effect and where any movement for equality has met its toughest resistance. To understand the impact of discrimination in this area one must look at the different types of pensions available and how those pensions are calculated. Because pension plans are generally regarded by pension experts to be only properly funded if based on actuarial assumptions, the insurance industry argues on an actuarial basis that discrimination must be allowed.

An actuarially sound plan is one in which the employer knows the future cost potential and arranges to meet it through an orderly program of funding under which, should the plan terminate at any time, present pensioners and those with vested rights would be secure in their pensions. In determining future cost, actuaries use mortality tables which show that women on the average live seven years longer than men.¹⁰ Thus it is argued that in order for a plan to

8. Ibid.

9. Ibid.

10. "Mortality tables consist of two separate tables, one for each sex, reflecting

be actuarially sound, either pension benefits must be in smaller monthly amounts for women or the contributions from women must be higher. The same argument is used to justify actuarially discounted widow benefit options in plans. But because the insurance industry regards plans which discriminate on an actuarial basis to be justified does not mean that all (or any) such plans are acceptable in today's society. This is clearer if one examines the basic types of pension plans available in Canada today.

Statistics Canada divides pension types by benefits into: (1) unit benefit, (2) money-purchase, (3) profit-sharing and (4) flat benefit.

Unit benefit plans are by far the most popular in terms of membership (75% of all members in Canadian plans). They include career average earnings, average best earnings, final earnings and final average earnings plans. The benefits are calculated by multiplying a specified percentage by the number of years of service under the plan by the employee's average earnings (career, best or final). Contribution rates are estimated actuarially to provide adequate pensions when properly invested.

Under money-purchase plans the employer takes all contributions made to the credit of an employee and purchases an annuity from an insurance company. The insurer will provide a monthly pension based on the actuarial risk: hence women will receive a lower monthly annuity than men because of the "risk" to the insurance company.

Profit sharing plans are essentially money-purchase plans except that employer contributions are related to profits. The employer's contributions are not fixed but a minimum annual contribution is usually required whether a profit is earned or not.

Flat benefit plans express the benefit as a fixed dollar amount independent of earnings (e.g. \$5 per month for each year of service). In some plans the benefit is simply a fixed dollar amount independent of service (e.g. pension of \$100 per month). Unions have in the past preferred this type of pension.

the fact that women as a group have a different mortality experience than men as a group. There is considerable controversy over the reasons why women live longer than men. Some attribute it to basic genetic and physiological differences. Others say the difference is attributed to different degrees of stress to which men and women are subjected. This argument is based on the assumption that men tend to have more high-pressure jobs than women do. However, insurance companies are not concerned with the reasons for mortality differential; they are only concerned with the fact that it exists." From *Sex Discrimination and Sex-Based Mortality Tables* (1973) 53 Boston U. Law Rev. 624.

In Ontario Part X of the *Employment Standards Act* and regulations prohibit unequal benefits or contributions by sex in unit benefit and flat-benefit plans.¹¹ The Act does allow discrepancies in money-purchase and profit-sharing plans which are underwritten by the insurance industry. Statistics show that prior to the enactment of such legislation in fact 17.9% of all membership in plans had variable contributions by sex but only 0.2% of unit benefit plans had variable rates by sex.¹²

IV. *Survivor's Death Benefits*

Some plans provide for survivor's benefits either as a return of contributions or, as with 50% of the membership, a widow's¹³ pension¹⁴ either before or after retirement. Invariably this pension to the widow (in some instances it is provided to the widower) is 50% of the normal pension (60% in the Canada Pension Plan). Again we see a double standard in providing widow or widower benefits. Many plans do not see the propriety of granting widower annuities. If they do the surviving spouse often has to pass a disability or dependency test. Many plans provide an optional form of annuity payable for life and guaranteed for five, ten or fifteen years instead of a pension. Others offer a joint and survivorship annuity on the member's life and that of the spouse. In all cases these options are actuarially discounted: either the cost is higher or the benefits lower, or both, for the female employee.

V. *Retirement Age*

Traditionally the normal retirement age, that is the earliest age at which the pension plan member can retire on full pension, has been lower for women than for men, usually sixty-five for men and sixty for women. Today's emphasis on best or final earnings plans means that many women thus retiring earlier receive smaller pensions than their male counterparts who work longer. However, the difference in normal retirement age appears to be becoming smaller.

11. (Part X) S.O. 1974 c. 112 proclaimed in force Nov. 1, 1975 and O. Reg. 654/75 as amended O. Reg. 884/75 effective Nov. 1, 1975.

12. *Pension Plans In Canada* 1970, Tables F, G

13. *Ibid.* Statistics Canada tables do not provide figures for 'widower' benefits. It would be interesting to discover what percentage provided death benefits to either spouse.

14. *Ibid.* Table 28

VI. *Vesting*

Vesting is the ensuring of the employee's right to all or part of the employer contributions paid on his or her behalf on termination of employment before retirement, usually in the form of a deferred pension payable at normal retirement age. While 6.7% of members in Canadian pension plans enjoyed a right of immediate vesting, the vast majority of plans have age, service and participation requirements that must be fulfilled.¹⁵ There are examples of discrimination in all of these requirements but most plans have equal vesting periods for men and women. The problems arise where the employee leaves the labor force or leaves the employer. It is estimated by Ralph Nader, American consumer advocate, that as high as 80% of employees in any given plan in the United States never see a penny of their employer's contributions because of the mobility of the labor force, lay-offs, plant closure, bankruptcy and misadministration of funds.¹⁶ The concentration of women in short-term employment makes them, as a group, particularly vulnerable to non-vesting for the first two of these reasons.

The new Nova Scotia Pension Benefits Act¹⁷ "locks in" vested pension credits after a statutory vesting period of 10 years of service and 45 years of age,¹⁸ but this does not lessen the different impact of vesting requirements on women as a group.

VII. *Accountability*

A related problem with pension plans, but one which does not necessarily relate to discrimination is access to information and the accountability of the trustees of pension plans. Trustees are usually the officers of the employer. Major investment and administrative decisions are made without consultation with the "beneficiaries" of the plan. The new Pension Benefits Act is silent even as to requirements of information to employees. The trustees may thus have a free hand in the development of policy, even one which discriminates on the basis of sex.

VIII. *Curing Discrimination in Pension Plans in Nova Scotia*

15. *Ibid.* Table 21

16. *You and Your Pensions* (1973) Ralph Nader and Kate Blackwell, Grossman Publishers, New York

17. S.N.S. 1975, c. 14; proclaimed in effect Jan. 1, 1977

18. *Ibid.* section 17

In 1972 an amendment to the Human Rights Act prohibited discrimination based on sex:

Sec. 11(a)(1) No person shall deny to, or discriminate against an individual, or class of individuals because of the sex of the individual or class of individuals, in providing or refusing to provide any of the following:

(d) employment, *conditions of employment*, or continuing employment or the use of application forms or advertising for employment, unless there is a bona fide occupational qualification based on sex.¹⁹

“Conditions of employment” has been interpreted by the New Brunswick Human Rights Commission as including pension plans. The Ontario *Employment Standards Act, Part X*²⁰ specifically deals with pension plans. There have been no complaints to the Nova Scotia Human Rights Commission regarding pension plans and the Commission has not yet set any guidelines for discrimination in pension plans. Since any contract or term of employment which offends the Human Rights Act is void it would be helpful if the Commission established guidelines, especially for the benefit of the Superintendent of Pensions under the new Pensions Benefits Act.

The Pension Benefits Act regulates through registration all private pension plans in the province. Section 7 of the Act sets out the functions of the Superintendent:

Sec. 7(1) The Superintendent shall (a) promote the establishment, extension and improvement of pension plans throughout Nova Scotia; (b) accept for registration all pension plans required to be registered or filed for registration with the Superintendent under the Act and reject any plan that does not qualify for registration.

Presumably these powers would allow the Superintendent to refuse to register any plan which offends the Human Rights Act or the Labour Standards Code.²¹ The Nova Scotia Act, borrowing largely from a similar enactment in Ontario anticipates the acceptance of plans for registration after the proper vesting, funding and solvency requirements are met. A reading of the regulations suggests that a plan which is actuarially sound meets the requirements of a fully funded plan. Without further guidelines, a pension plan that provides actuarial differences for men and women

19. S.N.S. 1969, c. 11 as amended S.N.S. 1972 c. 65

20. *Supra*, footnote 11

21. S.N.S. 1972, c. 10

in benefits and contributions would be acceptable to the Superintendent under the present Act and regulations. Section 24 of the Act gives the Governor-in-Council the power to make regulations for among other things:

Sec. 24(o) respecting any matter necessary or advisable to carry out effectively, the intent and purpose of the Act.

There would be nothing therefore stopping the Superintendent from applying, as a condition of registration, the guidelines of the Human Rights Commission, if and when they are established.

The question, then, is what should those guidelines be? Ontario has provided a solution through Part X (Benefit Plans) of the *Employment Standards Act*. Section 34(2) of that Act provides:

Sec. 34(2) Except as provided in the regulations, no employer or person acting directly on behalf of an employer shall provide, furnish or offer any fund, plan, arrangement or benefit that differentiates or makes any distinction, exclusion or preference between his employees or a class or classes of his employees or their beneficiaries, survivors or dependents because of the age, sex or marital status of his employees.

The regulations allow differentiation only on an actuarial basis. In money purchase, profit-sharing or composite plans the benefits can vary on an actuarial basis. The employer's contribution rates shall only vary to achieve equal benefits for male and female employees on an actuarial basis. The Act and regulations do, however, prohibit the "head of household" criterion and discrimination in regards to vesting, access, retirement age or survivor's death benefits. Apparently the Act and its regulations work well. Prior consultation and the work of a task force prior to legislation has resulted in few problems of non-compliance with the law. The insurance industry has not had to make major changes to meet the requirements of the Act.

The Nova Scotia Human Rights Commission is well aware of the Ontario guidelines but is reluctant to adopt similar guidelines because of the acceptance of discrimination on an actuarial basis. The issue is whether the employer should be allowed to have his choice of purchase formulae and in so doing provide unequal benefits to male and female employees. More specifically should Nova Scotia adopt the Ontario guidelines?

Recent American cases on the U.S. federal human rights legislation in this area, the *Equal Pay Act*²² and Title VII of the

22. 29 U.S.C. 206 (d) (1970)

*Civil Rights Act*²³ do not provide clear support for the Ontario approach. The Wage and Hour Administrator, charged with enforcement of the *Equal Pay Act* says the employer has a choice: it can either have equal benefits or equal contributions. On the other hand the Equal Employment Opportunity Commission (EEOC) which issues guidelines under Title VII of the *Civil Rights Act* has ruled that the employer must provide equal benefits, the logical conclusion being that unequal benefits, although based on mortality tables, would be illegal. The difference in opinion depends on how one applies the terms "pay and compensation" in these two statutes to pension plans. If the terms are interpreted as referring to contributions then benefits can be unequal as long as the employer's contributions are equal. If they are interpreted to include benefits then regardless of the costs of contributions and even where an insurance company underwrites the program, the employer must provide equal benefits. Some commentators have suggested that providing equal benefits is more in line with the purpose of the two American statutes²⁴ but at least one, with some support from the courts, has suggested that on a literal reading the legislation requires equal benefits and contributions.²⁵ Consequently, the argument against applying the Ontario guidelines is strengthened by the American position.

One solution to the dilemma of actuarial tables has been suggested by various commentators to be the unisex mortality table.²⁶ A unisex table is one in which the life expectancies of male and female lives would be merged with no distinction based on sex.

23. 42 U.S.C. para. 2000 (3) et seq. (1970)

24. See: "Sex Discrimination and Sex Based Mortality Tables" (1973) 53 *Bos. U.L. Rev.* 624; "Title VII and the Problem of Sex Classifications in Pension Programs" (1974) 74 *Col. L. Rev.* 1203; "Mortality Tables and the Sex-Stereotype Doctrine: Inherent Discrimination in Pension Annuities" (1975) 51 *Notre Dame Lawyer*.

25. *Notre Dame Lawyer*, supra and see *Manhart v. City of Los Angeles* 387 F. Supp. 980 (C.D. Cal. 1975) in which a city department required female employees to contribute larger monthly contributions so as to get equal benefits in accordance with EEOC guidelines. The court held this constituted sexual discrimination. After examining the statutes and case law the court found:

. . . "sexual discrimination under [Title VII] exists whenever general fact characteristics of a sex-defined class are automatically applied to an individual within that class . . ."

The court rejected the city's submission that differentiation was justified by actuarial tables.

26. *Bos. U. Law Rev.* and *Col. L. Rev.*, supra

Indeed, if the individual insurance contract can be considered discriminatory these new tables might be the only non-discriminatory form of mortality table. The implications for the insurance industry of such far-reaching application of human rights legislation have only been hinted at and it is too early in the development of human rights law to predict its ultimate effect.²⁷ However, there are strong arguments for the unisex mortality table. Social justice demands that female pensioners receive the same benefit as male pensioners:

An elderly woman does not have less expensive needs than an elderly man; she merely has less money in the form of pension benefits with which to accommodate those needs. The survivors who receive a man's life insurance benefits when he dies have the same need as the survivors of a woman, but there is less money for those needs. Mutual subsidization through a unisex mortality table is one way of providing equally for these individuals.²⁸

One human rights officer suggested that differences in benefits because the recipients were black, or Indian, would not be tolerated although, he pointed out, a few years ago insurance companies did have different, actuarially justified, rates for blacks and Indians because both groups tend to die earlier than whites.

The insurance industry suggests that the unisex mortality table would add 15% to the cost of money purchase plans. The industry argues that sex-based groups are more in line with "individual equity" because the rates are then more in proportion to the risk of the individual contribution. It has been suggested on behalf of the Human Rights Commission, however, that since the mid-sixties money purchase plans are decreasing in popularity. These plans now constitute only 5% of the membership in Canadian pension plans so that considerations peculiar to such plans should not figure seriously in the controversy of whether the unisex mortality table is to be required by statute.

Beyond the Human Rights Act there are a number of statutes that bear on the problem of discrimination in pension plans. The Pension Benefits Act, as mentioned, directs the Superintendent of Pensions to refuse to register any plan which does not conform to the regulations and presumably to refuse any plan which does not conform with the law.

27. On insurance see Sydlaske, V. "Gender Classification in the Insurance Industry" (1975) 75 *Col. L. Rev.* 1381

28. 53 *Bos. U. Law Rev.* *supra* at p. 653

Under the Labour Standards Code the Director of Labour Standards and the Labour Standards Tribunal could become involved through the application of the equal pay requirements of section 55(1):

Sec. 55(1) An employer and any person acting on his behalf shall not pay a female employee at a rate of *wages* less than the rate of wages paid to a male employee employed by him for substantially the same work performed in the same establishment, the performance of which requires substantially equal skill, effort and responsibility, and which is performed under similar working conditions.

The issue is whether “wages” under s.55(1) can be defined to include pension benefits. There have been no cases in Nova Scotia which define the scope of s. 55(1) and it has been noted in *Hodgson v. Brookhaven General Hospital*,²⁹ a leading American case that:

it is far from clear that the standard types of fringe benefits are eligible for inclusion in “equal pay” determinations.³⁰

It might also be argued that the Trade Union Act³¹ nullifies a collective agreement that discriminates sexually. Section 24(7) provides:

Sec. 24(7) Notwithstanding anything contained in this Act, no trade union, the administration, management, or policy of which is, in the opinion of the Board, dominated or influenced by an employer so that its fitness to represent employees for the purposes of collective bargaining is impaired or which discriminates against any person because of sex, race, creed, color, nationality, ancestry or place of origin, shall be certified as that bargaining agent of the employees, nor shall an agreement entered into between that trade union and that employer be deemed to be a collective agreement.

The best available avenue of redress against a pension plan that discriminates in its contributions and benefits remains with the complaint and inquiry procedure under the Human Rights Act. The Human Rights Commission’s approach of low-key conciliation is inexpensive and may achieve results if the Commission accepts the suggestion that there is in fact a breach of the Human Rights Act involved in unequal benefits and contributions. If the pension is part of a collective agreement there might be recourse to the Labour Relations Board under s.24 of the Trade Union Act and a complaint

29. 436 F. 2d 719 (5th Cir. 1970)

30. S.N.S. 1972, c. 19

to the Director of Labour Standards under the Labour Standards Code is still a possibility.

IX. *Conclusion*

There is probably no solution to inequalities in the impact of pension plans which arise in a work world which continues to be male-oriented. For the narrower problem of unequal benefits and contributions the guidelines of the Ontario Employment Standards Act simply do not go far enough. The only real solution is the statutory rejection of actuarial tables based on sex. Certainly there can be no excuse for the failure of Nova Scotia to tackle the problem at least to the extent of the Ontario legislature. This could be done by bringing pension benefits clearly within the scope of s. 55(1) of the Labour Standards Code, with exceptions, if necessary, by regulation. Alternatively the application of the Nova Scotia Human Rights Act could be clarified. Until this can be accomplished there remain no effective remedies in Nova Scotia against discrimination in pension plans.