

# BRIEFING

Page 1 of 2

City Manager's Office Briefing to  
Combined Meeting of Council  
2020 January 13

ISC: UNRESTRICTED  
C2020-0092

## Summary of Legal Advice – Retirement Allowance

---

### PURPOSE OF BRIEFING

In connection with Item 7.16 December 16, 2019 Council Agenda, Council requested a written summary of the external legal opinion regarding termination of the Retirement Allowance for inclusion in the public record.

### SUPPORTING INFORMATION

The following is a high-level summary of the external legal opinion provided to Council regarding the termination of the Retirement Allowance. As I advised Council during its discussion on December 17, 2019, in my opinion, failure to follow the legal advice will generate a high risk of a successful legal challenge.

### Background

Details of the longstanding Retirement Allowance ("RA") are as described in Item 7.16 of Council's December 16, 2019 Agenda (PFC2019-1503) and as discussed with Council on December 17, 2019.

Termination of the existing RA requires different legal considerations and approaches for union and management exempt staff.

### Analysis – Union Employees

Leaving aside the IAFF collective agreement, the collective agreements do not contain a specific reference to the RA. As such, the RA is not a term of employment, but a gratuitous benefit provided by The City under its management rights.

A union could seek to delay the elimination of the RA through a grievance based on an estoppel argument. In short, a union may successfully argue that The City's representation (through silence) of no change to the RA, coupled with The City's continued payment of the RA, was relied upon to the union's detriment, and the union would have sought to include the RA in the collective agreement if The City had ever indicated an intention of eliminating it.

There is extensive judicial consideration of the principle of estoppel in the context of collective agreements. Although there is conflicting authority regarding the potential success, an analysis based on a recent (2011) decision of the Supreme Court of Canada suggests that the argument may be successful. Specifically, an arbitrator might be convinced that given the long history of the RA, it is unfair to permit The City to unilaterally alter or eliminate it until each union has had the opportunity to bargain the issue at the next round of negotiations.

# BRIEFING

Page 2 of 2

The IAFF is in a different position than the other City unions, as there is a provision in its collective agreement about the RA. Based on both contract interpretation and the principle of estoppel, the RA must be eliminated through the collective bargaining process.

Failure to eliminate the RA through collective bargaining for any union may result in allegations of unfair process, grievances and the possibility of successful court applications against The City.

To terminate the RA for union employees, notice must be given to each union outside of the freeze period (i.e. during the term of a collective agreement and before collective bargaining begins for the renewal of the collective agreement). To end the RA as soon as possible, notice would be given effective on the first day of a new collective agreement. As such, effective dates may vary between unions, due to different collective bargaining time frames.

## **Analysis – Management Exempt Employees**

With respect to Management Exempt employees, the issue is whether the termination would constitute constructive dismissal at common law.

The Supreme Court of Canada has examined this issue and held that when an employer decides to unilaterally make substantial changes to the essential terms of an employee's contract of employment, and the employee does not agree to the changes and leaves his or her job, the employee has not resigned but has been dismissed. Since the employer has not formally dismissed the employee, this is referred to as "constructive dismissal". By unilaterally seeking to make substantial changes to the essential terms of the employment contract, the employer is ceasing to meet its obligations, and is therefore terminating the contract. The employee can then treat the contract as resiliated for breach and can leave. In such circumstances, the employees are entitled to compensation in lieu of notice and, where appropriate, damages.

To reach the conclusion that an employee has been constructively dismissed, the Court must determine whether the unilateral changes imposed by the employer substantially altered the essential terms of the employee's contract of employment. Not all changes in compensation amount to constructive dismissal. The RA could be considered a term of employment for exempt employees as it represents a significant amount paid on retirement, up to six weeks of salary. Whether the benefit is significant enough such that elimination amounts to constructive dismissal depends upon the time to each employee's eligibility for the RA.

Since the common law permits an employment contract to be amended by sufficient notice, the risk of constructive dismissal for exempt employees can be reduced to virtually zero by providing sufficient notice in advance of the change. The recommended notice period is 24 months (December 31, 2021).

Yours Truly,

Jill S. Floen  
Acting City Solicitor and General Counsel