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damage judgment, there is no question that the newspaper involved would have difficulty paying this award and those which would probably be awarded in other suits.[32] As a practical matter, however, once the awards were paid, the only effect the decision would have would be to cause the newspapers to refrain from accepting this type of advertising. Editorial policy of the major newspapers would normally preclude any such suit for articles written and published by the newspapers.

The major effect then, would be on the minority groups. If newspapers like the New York Times refused to accept advertisements such as involved here, perhaps the prime source used by minority groups to bring their views before the public would be unavailable. Nowhere could these groups as effectively advocate integration, Free Cuba, bible reading in schools, or any other views not acceptable to the majority.

By reaching the instant decision, the Court has effectively given to these minority groups the protection they need, without specifically stating that that was one of the considerations in the decisions. Thus, the Court has insured that these groups can raise their voices and allow "right conclusions" to be "gathered out of a multitude of tongues."[33]

Michael A. Macchiaroli

PENSION PLANS—SALE OF COMPANY DIVISION TO THIRD PARTY IS NOT A DISCONTINUANCE UNDER PLAN SO AS TO VEST EMPLOYEES' BENEFIT RIGHTS.

Fernekes v. CMP Indus., Inc. (N.Y. 1963)

Plaintiffs, former salaried employees of defendant company, sued to adjudicate their rights under a pension and retirement plan established by the defendant. The plan provided that employees should have no vested rights until they had accumulated five years of service or until the plan itself was discontinued. While none of the plaintiffs had served for five years, they claimed that defendant's sale of the company division[1] in which

official action on the other. The Court there found that the protest was added only to evade the ordinance and thus the instant Court dismissed the argument by saying that "the publication here was not a 'commercial' advertisement in the sense in which the word was used in Chrestensen." 84 S.Ct. 710, 718.

32. In Alabama courts at the time this case was decided there were eleven libel suits pending against the Times seeking $5,600,000 damages.

33. United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (opinion of Judge Learned Hand).

1. The defendant company was composed of the Ticonium and the Transportation Divisions. Each was separate for accounting purposes, as well as for most of the services provided by salaried employees. In connection with the sale of its Transportation Division to Midland-Ross Corporation, CMP further covenanted not to compete in the field with its purchaser for a five year period.

they were employed constituted such a discontinuance as to vest their rights. In a four-to-three decision,[2] the New York Court of Appeals reversed a lower court decision for the plaintiffs,[3] *holding* that there was no "discontinuance" since the plan was still in operation as to those employees working in defendant's remaining division. *Fernekes v. CMP Indus., Inc.*, 13 N.Y.2d 217, 195 N.E.2d 884, 246 N.Y.S.2d 201 (1963).

The technical basis of this case lies in the definition of the term "discontinuance." If there were but one reasonable legal interpretation for the word, the decision of the court here would necessarily stand unchallenged. The majority's analysis of precedent, however, is far from satisfactory. In finding a "sufficient discontinuance," the lower court cited the case of *Longhine v. Bilson*[4] and distinguished the cases of *Schneider v. McKesson & Robbins*[5] and *Bailey v. Rockwell Spring & Axle Co.*[6] The Court of Appeals does just the contrary.

In *Longhine*, a welfare association composed of the employees of three separately incorporated but singly controlled corporations was sued by members employed by one company which was going out of business. While the plan was found to be active as to those members still working, the dismissal of the plaintiffs, who constituted about one-half of the association, was held to be such a discontinuance as would vest plaintiffs' rights. The court concluded that an "en masse separation" for reasons totally beyond the employees' control was not to be included under the "separation without benefits" clause of the association's articles.

While there is a distinction between *Fernekes* and *Longhine*, in that the former involves an employer-imposed plan and the latter a self-sustaining employee organization,[7] on the facts relevant to an interpretation of the term "discontinuance" they are quite similar. *Longhine* involved three companies under basically the same management; *Fernekes*, two separate divisions of the same company.[8] Both involved the lay-off of almost one-half of the eligible members of the plan; both had certain members continuing to receive the usual benefits.

In *Schneider v. McKesson & Robbins*,[9] employees of one of defendant company's many divisions sued to vest their rights under a gratuitous pension plan comparable to that in *Fernekes*. In distinguishing *Longhine*,

2. Foster, J., wrote the majority opinion with Dye, Burke and Scileppi, JJ., concurring, while Van Voorhis, J., dissented with the concurrence of Desmond, C.J., and Fuld, J.

3. Fernekes v. CMP Indus., Inc., 15 App. Div. 2d 128, 222 N.Y.S.2d 582 (1961).

4. 159 Misc. 111, 287 N.Y. Supp. 281 (Sup. Ct. 1936).

5. 254 F.2d 827 (2d Cir. 1958).

6. 13 Misc. 2d 29, 175 N.Y.S.2d 104 (Sup. Ct. 1958).

7. This distinction is much less significant than it would appear to be on its face. For, as will be shown, no matter what the origin or nature of the plan, the employee will be contributing to its maintenance.

8. As was pointed out by the dissent, the plan expressly provided that "the two Divisions shall be considered as though they were separate companies, and the amount contributed on behalf of the employees of each Division shall be limited to the amount which would have been allowable if such Division were a separate company." 13 N.Y.2d 217, 195 N.E.2d 884, 889, 146 N.Y.S.2d 201, 208 (1963) (dissenting opinion).

9. 254 F.2d 827 (2d Cir. 1958).

the court stated that the "opening and closing of sales offices was a normal incident of business. . . . The closing of [plaintiffs'] division did not result in a marked contraction of corporate activity."[10] The very circumstances which prevented the *Schneider* court from granting plaintiffs a remedy are present in *Fernekes*. Moreover, in *Bailey v. Rockwell Spring & Axle Co.*,[11] where the plaintiff employees were again denied a remedy, in addition to stressing the more severe contractual limitations on plaintiffs' rights, the court emphasized as an alternative basis for its decision the fact that only a small percentage of the employees of the corporation had been laid off.

The analytical bases presented by these courts for their decisions therefore devolve into two: (1) the percentage of employees affected and (2) the nature of the corporate business and the substantiality of the effect of the lay-off on it. Using these bases as points of comparison, it is apparent that only *Longhine's* approaches those presented in *Fernekes*. The results arrived at, however, are obviously opposed. *Longhine* favored a liberal interpretation of a contractual term in order to arrive at what it felt to be an equitable result. Thus, in order to place the instant case in its proper perspective, it is necessary to determine just what are the full equities involved, and given the present facts, how they should have been balanced.[12] Before the equities of the court's interpretation may be validly judged, however, the nature of the plan itself must be analyzed. Basically, it is an employer originated, non-negotiated employee benefit plan. This is

10. *Id.* at 830.

11. 13 Misc. 2d 29, 175 N.Y.S.2d 104 (Sup. Ct. 1958).

12. The problem of vested employee rights in pension plans, while relatively new, has come under judicial scrutiny in an appreciable number of cases. The following statistical analysis of eight of the more leading cases in the area indicates the course thus far followed in the *Fernekes* situation:

Case	*Origin of Plan*	*Percentage of Employees Affected*	*Recovery*
FERNEKES	Employer	50	No
LONGHINE	Employee Ass'n	50	Yes
SCHNEIDER	Employer	1.6	No
BAILEY	Employer	5.2	No
GEORGE	Bargained	95	No
LOCAL 2040	Bargained	100	No
GORR	Bargained	87	No
KARCZ	Bargained	100	No

Fernekes v. CMP Indus., Inc., 13 N.Y.2d 217, 195 N.E.2d 884, 246 N.Y.S.2d 201 (1963); Longhine v. Bilson, 159 Misc. 111, 287 N.Y. Supp. 281 (Sup. Ct. 1936); Schneider v. McKesson & Robbins, Inc., 254 F.2d 827 (2d Cir. 1958); Bailey v. Rockwell Spring & Axle Co., 13 Misc. 2d 29, 175 N.Y.S.2d 104 (Sup. Ct. 1958); George v. Haber, 343 Mich. 218, 72 N.W.2d 121 (1955); Local 2040, Int'l Ass'n of Machinists v. Servel, Inc., 268 F.2d 692 (7th Cir. 1959), *cert. denied*, 361 U.S. 884, 80 S.Ct. 155 (1959); Gorr v. Consolidated Foods Corp., 253 Minn. 375, 91 N.W.2d 772 (1958); Karcz v. Luther Mfg. Co., 338 Mass. 313, 155 N.E.2d 441 (1959). While plaintiff employees have obviously had little fortune in pursuing their remedies, the chart is misleading as to the conclusions it presents insofar as it does not indicate where specific contractual terms may have made the result arrived at inevitable. What it does indicate, *inter alia*, is that where the pension is bargained, courts have yet to interpret its terms favorably to employees. The rationale seems to be that since the employees have entered into active negotiation of terms, they will not be given any benefits of interpretation.

not to say that it is strictly gratuitous — in fact to hold so would eliminate much of the reason for liberal construction of its terms. It is a contract.

When pension plans first were initiated, they were considered to be revocable at the employer's will[13] — especially when a clause to that effect was inserted in the plan's provisions.[14] While this power, exercised fully, could have rendered the entire concept of a pension plan meaningless, employers' desire for good will introduced a certain amount of stability into the area. Nevertheless, the courts initially evidenced little sympathy for the employee. Gradually this attitude changed, and a contract concept developed. The existence of an agreement and the meeting of the parties' minds were obvious; the difficulty lay in finding the necessary consideration. If there were consideration on the part of the employees, then there would be an enforceable contract, and the interpretation of its terms would assume substantive meaning.[15]

Basically there are two[16] possible theories through which consideration can be found: (1) the induced longevity of the employee's service[17] and (2) the analysis of the plan itself as a deferred wage. No employer, by hiring his employee, contracts for the latter's continuous service. While he may expect the employee to remain with him for a reasonable, albeit indefinite, time, there is no underlying obligation to do so on the part of the employee. While the establishment of a pension plan certainly does not create such a duty, it does obtain for the employer a certain security that the relationship will be of some duration. The employee on the other hand relies on the benefits to be derived from longevity; it will cause him both to apply himself to his work to guarantee his continued personal employment and to forego other job offers of more immediate value because of the future benefits to be received from his present employer.[18] While the theory possesses much validity, it is not completely satisfactory in the present situation. For where disassociation is effected before eligibility, consideration fails. The employer will not receive his longevity; this is not altered by the fact that the employee is willing to provide it. Furthermore since the employee, in order to gain the benefit of an estoppel, must show substantial injury through reliance, it would seem that the evidentiary problems involved in pressing a suit on this theory could well be insurmountable.[19]

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13. See generally Annot., 42 A.L.R.2d 461, 464-67 (1955).

14. *In re* Missouri Pac. R.R., 49 F. Supp. 405 (E.D. Mo. 1943); Dolan v. Heller Bros. Co., 30 N.J. Super. 440, 104 A.2d 860 (Ch. 1954).

15. If the plan were a mere gratuity, it would be totally subject to employer control, hence rendering meaningless any dispute as to the meaning of particular terms. For, the employer would then be empowered to remove the entire plan, without sanction, and not need to concern himself with precise exculpatory terminology.

16. See AARON, LEGAL STATUS OF EMPLOYEE BENEFIT RIGHTS UNDER PRIVATE PENSION PLANS 4-14 (1961).

17. There are actually two sides to the coin. One is that since the employee is induced to remain in hope of future benefits, an estoppel is raised. The other is that since longevity is something more than the employer is entitled to by the very fact that he is an employer; this in itself constitutes formal contractual consideration: a unilateral contract.

18. See TILOVE, PENSION FUNDS AND ECONOMIC FREEDOM 20, 23 (1959).

19. How many employees, for example, could prove that they had turned down specific job offers elsewhere, that by turning down such a job they suffered "substan-

In view of the problems inherent in the abortion of these voluntary employer plans, it is perhaps not surprising that there has been a recent emphasis on a "deferred wage" theory. Under this theory pension plans are considered as part of an employee's wages — payments due to him for the standard work which he performs, whereby disbursement is delayed until a future date. In effect it makes every plan a contributing one on the part of the employee.

This theory was not fully advanced until the coming of collective bargaining. As soon as courts held that pension plans were proper subjects for collective bargaining,[20] it was inevitable that they should consider them as part of the employer's consideration for the employee's work. In *Inland Steel Co. v. NLRB*,[21] the United States Court of Appeals expressed the view that the company's pledge forms part of the consideration for the work performed. Therefore, an employee should be able to sue under the plan to recover his benefits if the company refused to pay. "In this view, *the pension thus promised would appear to be as much a part of his 'wages' as the money paid him at the time of the rendition of his services.*"[22] (Emphasis added.)

It is significant to note that the plan to which the court refers is voluntary, initiated by the employer as in *Fernekes*.[23] Under this deferred compensation theory, there are no problems created by pre-eligibility disassociation. Since the employee has been "contributing" consistently, there is no failure of consideration on his part. In the period of employment, he has supported his part of the bargain. Admittedly the employee, as a rule, waives his rights under the contract by agreeing to certain forms of eligibility requirements. But that is the point. The employee is waiving a contractual right; he is losing something to which he would have otherwise been entitled. He is not merely failing to recover the benefits of a gratuitous transfer. Since this is a waiver, it is valid only to the extent that it was intended by the parties to the contract themselves. To allow the employee virtually to give away all his rights would not only constitute unjust enrichment, it would come close to destroying the essence of the contract.

Applying this discussion to *Fernekes*, it is evident that there is a valid contract, that the employe(es) had waived certain rights to benefits

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tial" injury? While there are two cases which have held that such an estoppel might be a sufficient basis for holding an employer liable on a plan, it is notable that this was done only alternatively, indicating the probable evidentiary difficulties. See West v. Hunt Foods, Inc., 101 Cal. App. 2d 597, 225 P.2d 978 (1951); Hunter v. Sparling, 87 Cal. App. 2d 711, 197 P.2d 807 (1948). See also Comment, *Consideration for the Employer's Promise of a Voluntary Pension Plan*, 23 U. CHI. L. REV. 96, 99 (1955).

20. Hunter v. Sparling, *supra* note 19. See also 1 CORBIN, CONTRACTS § 153, at 502 n.12 (1950).

21. 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960, 69 S.Ct. 887, *cert. granted on different issue and aff'd*, 339 U.S. 382, 70 S.Ct. 674 (1949).

22. *Id.* at 253.

23. See Bernstein, *Employee Pension Rights When Plants Shut Down — Problems and Some Proposals*, 76 HARV. L. REV. 952, 959-62 (1963).

thereunder in order to make the plan practical, and that there is a term "discontinuance" which must be interpreted.

There is a definite rule of contractual construction that in cases of ambiguity a document is to be construed most strongly against its maker.[24] In frequently ignoring this rule, courts fear that in situations such as *Fernekes* a too liberal vesting of employees' rights will cause pension plans to be either unworkable or prohibitively expensive. While this fear has a very substantial basis, in the instant context it is misplaced.

Pension plans are the highly integrated end products of detailed cost computation. They are stretched on a framework of analytical actuarial tables specifically established for particular situations. These tables weigh the factors of desired benefit amounts with the average rate of plant turnover and compute an estimated cost. The rate of turnover plays the major part in this cost analysis, for each "turnover" is a recontribution to the fund. In other words, the money contributed for one individual goes into the general fund upon that individual's discharge. If a mass division shutdown similar to the one in *Fernekes* can be classified as just an ordinary turnover, then no rights seemingly should accrue to the employee. The credits of the particular employee have been previously allocated. If, however, such a mass separation is considered as something more than an ordinary turnover, that is, as a fundamental change in corporate structure, then preventing the vesting of an employee's rights will unjustly enrich the employer. It gives him the benefit of a turnover totally unforeseen when the original actuarial tables were drawn up.[25] While non-eligibility provisions are reasonable and, in fact, perhaps essential, there are no compelling reasons why the benefits of an unforeseen shutdown should go to the employer instead of the employees discharged. And most assuredly, that is where the benefits will go. For with the extra credits derived from the recontribution of the separated employee's shares, the employer will be relieved of some of his contractual burdens. It is submitted that this is a patently unjustified result.

The plan in *Fernekes,* while spontaneously employer originated was a contract in which ambiguous terms should be construed against the drawer; to rule otherwise is to frustrate the very purpose of such a plan. Furthermore, a decision in favor of the plaintiffs would not adversely affect the interests of those employees still with the employer. For these employees can, in their own right, enforce contract provisions against the employer. The judgment in *Fernekes* should have been affirmed.

Robert L. Berchem

24. 4 WILLISTON, CONTRACTS § 621 (3d ed. 1961). See Sigman v. Rudolph Wurlitzer Co., 57 Ohio App. 4, 11 N.E.2d 878 (1937), for an application of this principle in this area.

25. This is especially true when, as in the instant case, the plan provided that the amounts to be contributed to each division were to be kept separate and limited accordingly.