Pensions and the Employment Relationship

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Employment Relationship

• Common law: Negligent misrepresentation
  • Elements of negligent misrepresentation
  • Review of case law applicable to pension plans

• Statutory provisions
  • General application of employment standards legislation in the pension context
  • Ontario ESA rules
Negligent Misrepresentation

Elements of negligent misrepresentation – the *Cognos* test

- Duty of care
- An untrue, inaccurate or misleading statement
  - An omission can be a misrepresentation
- Misrepresentation was made negligently
- Reasonable reliance on the misrepresentation
- Damages are suffered as a result of the reliance
Negligent Misrepresentation

In the pension context, negligent misrepresentation claims can arise:

- in the course of day-to-day (ordinary) plan administration
- in conjunction with plan changes, e.g. conversions
Negligent Misrepresentation

**Gauthier v. Canada**

- Gauthier was employed by the RCMP for 21 years; before that he spent 5 years with RCAF
- Gauthier sought advice from RCMP Compensation Branch regarding his pension if he left the RCMP
- RCMP calculations overestimated Gauthier’s pension
- Gauthier retired from RCMP, took lower paying job with CRA
- When overpayment discovered, RCMP decreased pension and sought repayment of overpayments
Negligent Misrepresentation

_Gauthier v. Canada – CA Decision_

✓ Duty of care
✓ An untrue, inaccurate or misleading statement
✓ Misrepresentation was made negligently
Negligent Misrepresentation

Gauthier v. Canada – CA Decision

✓ Reasonable reliance on the misrepresentation
  • RCMP bore the burden of proving Gauthier would not have waited to retire on an unreduced pension
  • RCMP failed to prove this
  • Gauthier retired when he did in reliance upon erroneous calculations provided by RCMP

✓ Damages are suffered as a result of the reliance
  • RCMP liable to compensate Gauthier $78,000 for his loss (difference between the unreduced and reduced pension)
Negligent Misrepresentation

*Allison v. Noranda*

- Allison terminated without cause at age 53
- Lump sum option:
  - Receive lump sum retiring allowance
  - Not eligible for early retirement, only deferred pension
- Instalment option:
  - Employment would continue for 16 months
  - At that time, Allison would be eligible for early retirement
- Allison selected the lump sum option
Negligent Misrepresentation

Allison v. Noranda – CA Decision

- Duty of care
- An untrue, inaccurate or misleading statement
  - Omission was misleading
  - Allison should have been made aware of the consequences of the options
  - Although Noranda cautioned Allison to seek independent advice, this does not negate the administrator’s duty to disclose relevant information
Negligent Misrepresentation

*Allison v. Noranda – CA Decision*

- Misrepresentation was made negligently
- Reasonable reliance on the misrepresentation
- Damages are suffered as a result of the reliance
  - Difference between $302/month (lump sum option) and $887/month (instalment option)
Negligent Misrepresentation

*Deraps v. Labourers*

- Plan administrator presented Mr. and Mrs. Deraps with forms containing two options:
  - J&S: Mr. Deraps receives smaller pension, and Mrs. Deraps receives 60% of that amount after his death
  - Waiver of J&S: Mr. Deraps receives a larger pension for his lifetime only
- Mr. Deraps died less than a year later; Mrs. Deraps sought benefits under the plan and was denied
Negligent Misrepresentation

Deraps v. Labourers’ – CA Decision

✓ Duty of care

• Focus on whether plan administrator owed a duty of care to Mrs. Deraps as beneficiary

• The plan administrator’s specialized knowledge and skill attracted a duty of care:
  • must provide complete and accurate pension information to beneficiaries, and
  • must clearly explain to Mrs. Deraps that she would receive no pension benefits if she signed the waiver
Negligent Misrepresentation

Deraps v. Labourers’ – CA Decision

✓ An untrue, inaccurate or misleading statement
  • **Omission** was misleading

✓ Misrepresentation was made negligently

✓ Reasonable reliance on the misrepresentation

✓ Damages are suffered as a result of the reliance
  • Damages equal to the pension she would have received had she not signed the spousal waiver
Negligent Misrepresentation

Deraps v. Labourers’ – Importance

• Fiduciary duty to provide clear, complete and accurate information to plan beneficiaries, particularly if the information is complex or technical

• Important to carefully document oral discussions

• Follow up with a letter confirming the discussion and any decisions made

• Archive such notes and letters to create a clear, complete record which can withstand the passage of time and staff turnover
Negligent Misrepresentation

Smith v. Casco

- Mr. Smith chooses a guaranteed pension for five years which pays more upon retirement, but without a J&S pension; wife signs waiver of spousal survivor pension without reading it
- Mrs. Smith sues for negligent misrepresentation when the pension ends 2 years after Mr. Smith’s death (the end of the guaranteed five years)
Negligent Misrepresentation

Smith v. Casco

- Decision at trial:
  - Negligent misrepresentation by employer for failing to advise Mrs. Smith of the consequences of signing the waiver

- Decision of the majority at Court of Appeal:
  - Upheld trial judge’s decision, but on different basis:
    - S. 46(1) mandates that a waiver of spousal survivor benefits is only effective when it is a written waiver “in the form approved by the Superintendent”
    - Form was substantially different than the form approved by the Superintendent
Negligent Misrepresentation

*Beaulieu v. Abitibi*

- Employer created a DC plan
- Employees informed that existing DB plan would not be improved in the future and the DB plan would be closed altogether
- 25 DB plan members enrolled in the DC plan despite higher employee contributions
- DB plan was never wound up and was in fact amended to improve benefits
- Employees who converted to the DC plan sued
Negligent Misrepresentation

*Beaulieu v. Abitibi* – Decision

- Duty of care
- An untrue, inaccurate or misleading statement
- Misrepresentation was made negligently
  - Abitibi knew or ought to have known that the improvements made to the DB plan would prejudice the employees who elected to convert to the DC plan
  - Abitibi did not have to improve the DB plan
Negligent Misrepresentation

*Beaulieu v. Abitibi* – Decision

- Reasonable reliance on the misrepresentation
- Damages are suffered as a result of the reliance

  - Employees were awarded almost $4.4 million in damages; individual employees received amounts ranging from $81,000 to $320,000
Negligent Misrepresentation

Beaulieu v. Abitibi – Importance

- Plan administrators must be accurate in describing future pension benefits
  - Particularly when members are being asked to make an irrevocable decision or election
- Given the inherent uncertainty about the future, be careful about making comments or offering predictions about future changes to a pension plan
Negligent Misrepresentation

*Dawson v. Tolko Industries Ltd.*

- Plan conversion from DB to DC
- Employees offered cash amount for deposit into DC plan; in exchange, they relinquished all DB plan entitlements
- All employees in lawsuit accepted the offer and converted to the DC plan
- Employees allege that the value of the DC plan is much less than value under DB plan contrary to employer “promises”
- No decision on the merits of the claim have been released
Negligent Misrepresentation

_Hembruff v. OMERS_

- Police officers retired while province considering process to address excess surplus in OMERS plan
- Amendments would have benefited employees
- Plaintiffs argued OMERS Board was negligent in failing to inform them of imminent adoption of plan amendments
Negligent Misrepresentation

_Hembruff v. OMERS – CA Decision_

- Duty of care

- An untrue, inaccurate or misleading statement
  - OMERS had a duty to disclose “highly relevant information” – information about possible plan amendments or events is “a forecast as to the future, it is speculative in nature and therefore, not information on which it would be reasonable to reply”
  - “… there is no legal authority for the imposition of a disclosure obligation in respect of pension plan changes that are under consideration. Moreover, there are significant reasons why such an obligation should not be imposed.”
Negligent Misrepresentation

Conclusions

• Statutory (PBA) and common law disclosure duties are imposed on plan administrators
• Changes to a pension plan require communication to members and/or former members
• Liability can arise if the communication is incorrect and a beneficiary relies on this communication to his or her financial detriment
• Caution must be exercised when preparing all employee communications
Statutory Provisions

• General application of employment standards legislation in pension context

• Ontario ESA rules
  1. Leaves of absence (also WSIA)
  2. Termination of employment
  3. No discrimination
  4. Consent to deductions
Ontario ESA Rules

1. Leaves of absence (ss. 46 – 50.2)
   - Pregnancy and parental leave
   - Family medical leave
   - Organ donor leave
   - Personal emergency leave
   - Declared emergency leave
   - Reservist leave
Ontario ESA Rules

• Pregnancy leave (ss. 46 – 47)
  • Duration: 17 weeks
  • Eligibility: due date 13 weeks after employment commenced

• Parental leave (ss. 48 – 49)
  • Duration: 35 weeks (if employee also took pregnancy leave, otherwise 37 weeks)
  • Eligibility: birth of child 13 weeks after employment commenced
Ontario ESA Rules

• Family medical leave (s. 49.1)
  • Duration: 8 weeks
  • Eligibility: not specified
  • Reason for leave: to provide care or support to a specified individual who has a serious medical condition with a significant risk of death occurring within a period of 26 weeks
  • Referred to as compassionate care leave in Canada Labour Code
Ontario ESA Rules

- Organ donor leave (s. 49.2)
  - Duration: 13 weeks (ability to extend for an additional 13 weeks)
  - Eligibility: employed for at least 13 weeks
  - Reason for leave: to undergo surgery for the purpose of organ donation

- Only available in ON and MA
Ontario ESA Rules

• Personal emergency leave (s. 50)
  • Duration: 10 days
  • Eligibility: employer regularly employs 50 or more employees
  • Reason for leave: illness, injury or medical emergency of employee or specified individual

• Referred to as sick leave in Canada Labour Code
Ontario ESA Rules

- Declared emergency leave (s. 50.1)
  - Duration: as long as employee is not performing duties of position because of a declared emergency
  - Eligibility: not specified
  - Reason for leave: employee cannot perform duties of position because of an emergency declared under the Emergency Management and Civil Protection Act

- Only available in ON and NS
Ontario ESA Rules

• Reservist leave (s. 50.2)
  • Duration: as long as there continues to be a reason for the leave
  • Eligibility: employed for at least six months
  • Reason for leave: participation in pre-deployment or post-deployment activities required by the Canadian Forces
Ontario ESA Rules

General provisions concerning all ESA leaves (except reservist leave)

- Service continuation (s. 52(1))
  - Period of employee’s leave must be included in calculating length of service
  - Relevant to determining “service” under a pension plan (eligibility, vesting, certain benefit entitlements)

- Participation in pension plans (ss. 51(1) – (4))
  - Employee continues to participate (accrete benefits) in pension plan unless employee does not make employee contributions (if any)
WSIA

WSIA (s. 25(1))

- Time limited pension accrual
- One (1) year provided employee pays employee contributions
Ontario ESA Rules

Conclusion regarding Leaves

• All pension plans must comply with these ESA rules regarding leaves of absence
  • References in plan texts and employee communications
  • In the daily administration of the plan

• These rules are effective minimum standards pension rules, although they are based in the ESA

* ITA places restrictions on accruals during leaves
Ontario ESA Rules

2. Termination of employment – statutory notice period

• Notice of termination must be given (s. 54)
• Employer must continue to make contributions during period of:
  • Working notice (s. 60(1)(c)), or
  • Pay in lieu of notice (s. 61(1)(b))
Ontario ESA Rules

3. No discrimination
   - General prohibition against discrimination in relation to pension plans (s. 44(1))
   - Examples of exceptions set-out in Regulations (O.Reg. 286/01)
     - Differentiation based on marital status if purpose is to provide for a joint and survivor pension
     - Differentiation that is made on an actuarial basis because of age that relates to rates of contributions
Ontario ESA Rules

4. Consent to deductions (s. 13(3) and (5))

- Employers cannot make deductions from employees’ wages for employee pension contributions unless written authorization from the employee is obtained:
  - Must refer to a specific amount; or
  - Provide a formula from which a specific amount can be calculated
Ontario ESA Rules

Contraventions of the ESA (s. 123(a),(b) and (c))

- Individual – fine of up to $50,000 and/or imprisonment for no more than 12 months
- Corporation – fine of up to $100,000, $250,000 or $500,000 depending on number of previous convictions