



Employer liable for failing to disclose pension consequences of severance election

January 1, 2002

A major Canadian employer has been held liable for failing to disclose to an employee material information about the consequences of choosing one form of separation pay over another. The ruling by the New Brunswick Court of Appeal was made despite the fact that the employee had been advised to secure independent advice before making the election, and had signed a release in favour of the employer.

The case, *Allison v. Noranda Inc.* (June 22, 2001) arose from the termination without cause of a 53-year old employee in 1990. Allison, the employee, was given the option of receiving his severance in a lump sum or in 16 monthly installments. Although the amount of the severance was the same in each case, the pension consequences were greatly different.

By choosing the installment option, Allison would have retained his status as an employee (but without the obligation to work) until he reached age 55. At that time, he would have been eligible for early retirement and a monthly pension of \$887. Under the lump sum option, his employment ended at age 53, resulting in a pension of \$302.

However, this crucial difference was not pointed out to Allison in the letter advising him of his options. While he was advised that he would be eligible for early retirement at the end of the 16-month period, he was not specifically told that early retirement was available only under the installment option, or that his pension entitlement would be significantly affected by accepting the lump sum option.

In response to the company's caution that he seek independent advice, Allison went to a sales representative of a life insurance company, who also sold mutual funds. He was advised that there was no real difference between the two options, and that he might as well accept the lump sum and invest it in mutual funds. Allison took this advice and signed the release. On discovering the pension consequences of his decision, Allison sued Noranda for negligent misrepresentation for failing to disclose this crucial information.

TRIAL JUDGE: NO MISREPRESENTATION

Allison lost at trial. The trial judge found that Noranda's letter to Allison accurately reflected the two available options, and that it did not fail to disclose important information. The trial judge also pointed out that Allison had been advised to seek out independent advice and that he had executed the release. Accordingly, he rejected the claim of negligent misrepresentation.



COURT OF APPEAL: EMPLOYER UNDER A DUTY OF CARE TO DISCLOSE MATERIAL FACTS

The Court of Appeal took a different view, holding Noranda liable for negligently misrepresenting the choices before Allison. While noting that there is “no general and overriding obligation on an employer to make ‘full disclosure’”, the Court stated that the question to be answered in this case was whether Noranda, as the employer and pension plan administrator, was under a legal duty of care to disclose to the employee material information relating not only to the separation pay options, but also to the pension consequences of the choice.

In the Court’s view, Noranda did have this duty of care, and the letter written to Allison did not discharge this duty. It characterized the letter as ambiguous and misleading in terms of information that was not mentioned, and held that Allison should have been informed of the impact on his pension:

“Surely, an employer is under an obligation to make sufficient disclosure to enable an employee to make an informed decision in cases where the employer asks an employee to make an election with respect to separation pay options that impact significantly on pension benefits. I say this because pension information is of a specialized nature and within the control of Noranda as administrator of the pension scheme. As well, the pension information was not of a speculative nature, nor subject to differing or divergent interpretations. Finally, Noranda must be deemed to have known that the information would be of overriding significance when Mr. Allison was making his election in the context of settling his dismissal without cause claim against Noranda.”

CAUTION, RELEASE DON'T HELP EMPLOYER

With respect to the caution to seek independent advice, the Court stated that, as Noranda was the repository of the information necessary to make an informed decision, it could not use the caution to negate its obligation to disclose that information.

Turning to the release signed by Allison, the Court noted that, in determining whether a contract limits one’s right to sue for the tort of negligent misrepresentation, the issue is whether the misrepresentation becomes an express term of the contract. Here, there was no mention of the pension issue in the release. Rather, the release merely limited Allison’s right to sue for wrongful dismissal, but did not hinder his claim of negligent misrepresentation.

In Our View

One of the prerequisites for finding a party liable for the tort of negligent misrepresentation is that there be a “special relationship” between the person making the representation and the person receiving it. Courts have held that there is this special relationship between employers and employees. This means that employers, when they have information necessary for an employee to



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make an informed decision about a termination package, may effectively be under an obligation to clearly disclose that information. This despite the fact that the Court in this case stated that there is no general obligation on an employer to make full disclosure.

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