CANADIAN Lawyer

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Former tax lawyer takes feds to court over pension payout

Judge dismisses claims by self-represented retired lawyer

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Shana French of Sherrard Kuzz LLP says that because of the size of the federal government it's a bit different than a situation where a private employer tells an employee to contact the accounting department.

A retired tax lawyer for the federal government sued his former employer because he alleges the government failed to fulfil its duty of care in regard to giving him complete and accurate information about his pension options.

In *McLaughlin v. Canada (Attorney General)*, John McLaughlin, who represented himself at trial, said that, had it not been for the incorrect information he received, he would have not retired at that time and would have sought different pension payout options. He claimed $2.5 million in compensatory damages and $2 million in punitive damages.

His claims, brought under rule 21.01(1)(a), were dismissed Jan. 22 by justice David Stinson of the Ontario Superior Court of Justice. Rule 21 is a tool used to determine and rule out unsuccessful claims prior to trial. In the decision, Stinson states, "Rather, this motion is tantamount to 'litigating in slices,' a practice that runs counter to the established goals of determining disputes in the most expeditious and least expensive fashion."

However, labour and employment lawyers say this is not the last time the federal government will be in court over this case.

“Provided that the advice provided to him was negligent in some way, I think he has a good cause of action,” says Paul Champ, a litigation lawyer from Champ & Associates in Ottawa. “This is just a skirmish in a battle that will go on for a while, obviously.”

McLaughlin and the government had three key factual disputes, as described by the judge:

1. Whether a lump sum payment to settle three grievances, paid to McLaughlin upon termination of his employment, was salary-based and, therefore, pensionable.
2. Whether a response from a senior employee of the Ontario Regional Office of the Department of Justice — after McLaughlin sent an initial email asking for his pension to be calculated — directing McLaughlin to speak with his compensation adviser, amounted to the government telling McLaughlin that he should rely on the information provided by his compensation adviser when making his decision about which pension option to choose.
3. Whether McLaughlin had received enough information to make an informed decision when selecting his pension option, upon his resignation on Oct. 23, 2008.

The dispute over the lump-sum amount is what Adrian Ishak, a member of the labour and employment group at Goodmans LLP in Toronto, calls a “live issue.”

Some information on what the grievances were about is in the decision, says Ishak. To some extent, they were about McLaughlin not being in the correct job. Ishak says it’s unclear what exactly that entails, but he says what’s going to have an impact on the case is to what extent the grievances were about McLaughlin not being in the correct job and if the amount he was paid, as a result of those grievances, is pensionable.

With regards to the disagreement over whether the email from the senior employee relates to the duty of care and fiduciary duty of the government, Toronto labour and employment lawyer Shana French of Sherrard Kuzz LLP says that, because of the size of the federal government, it’s a bit different than a private employer telling an employee to contact the accounting department.

“That’s a little bit more contained,” she says. “But I recognize that an employer does have a duty of care when communicating to an employee about elements of their compensation, whether it’s their base compensation or incentive entitlements, benefits or pension that [the employer] is accurate in the representations they make and that if there is some third party who has administrative control over that plan, that the employee is directed” there.

Champ says that, because the government is the pension plan administrator, it is wholly accountable for its actions when directing someone to speak with a compensation adviser.

“In this special circumstance, it’s not for all governmental decisions or matters, but here it’s about the individual’s pension plan and the government is the pension plan administrator,” he says. “And in those cases, my view is that clearly if the government is telling you go speak to a compensation adviser, as a plan member, you should absolutely have confidence that that compensation adviser is giving you accurate, fulsome information that you can rely on to make your decisions.”

He says that a pension plan administrator should fully disclose any relevant information.

“In my opinion, clearly, if an employee asks a specific question to a pension plan [adviser] to make a certain decision and asks if there are risks, then absolutely a pension plan adviser is to be full and frank and tell them all the information they can and be confident in doing so.”

Ishak says he doesn’t agree that the email exchange should be taken as the government telling the plaintiff he should rely on the information provided by the compensation adviser to make his decision and, if this goes further, he says that the government would contest this point during trial.

“Essentially, what they’re doing is redirecting him to the person who has his information,” he says, “not necessarily committing to the fact that the information will be 100-per-cent detailed enough for him to make a decision.”

When it comes to informed decisions relating to compensation, French says, there’s a standard the employer has to meet when providing employees information related to their compensation or other incentives.

“What’s the standard? Well it’s going to vary depending on circumstances,” she says. “That’s why, if there’s an underlying entitlement, we always encourage employers to be clear that the entitlement will be governed according to the terms and the conditions of the plan and put it on the employee to ensure that they’re pursuing the appropriate resources by contacting the plan provider or their own tax adviser or their professional financial adviser so the employer isn’t held accountable for having made that representation.”

Ishak says employers must be absolutely sure that the information they’re providing employees is accurate.

“You have to give them enough information to make an informed decision,” he says.