Heenan Blaikie LLP

Pensions & Benefits

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Pension *Pulse*

PENSIONS & BENEFITS E-BLAST

Federal Government and Actuary Liable in Pension Scheme

The Ontario Court of Appeal released its decision in *Ault v. Canada (Attorney General)* 2011 ONCA 147 on February 28, 2011. This case concerned an actuarial get-rich-quick scheme under which federal government employees would resign from employment and be hired by a company set up by an actuary, in order to be entitled to a higher pension transfer value from the federal Public Service Superannuation Plan. The employees would resign from the other company as soon as the pension transfer was completed.

In order to reap these supposed benefits, the actuary set up a reciprocal transfer agreement between the federal government and the other company. Under this sort of agreement, the transfer value payable upon termination of employment from the federal government is greater than it otherwise would be. The federal government had concerns about the scheme, as did the Canada Revenue Agency. The CRA eventually revoked the registration of the pension plan set up by the actuary. This decision was upheld by the Federal Court of Appeal.

As a result of the revocation of the pension plan, the pension transfers were not permitted. Consequently, the employees who had resigned their positions with the federal government were left without employment and without the amount of pension monies they expected to receive, on the basis of advice from both the federal government and the actuary. The employees brought an action against both parties, to recover their losses. They claimed damages flowing from negligent misrepresentation and breach of fiduciary duties.

The lower court decided in favour of the employees and apportioned liability 80% on the part of the federal government and 20% on the part of the actuary. The court of appeal agreed with the findings of the lower court, but changed the apportionment of liability to 60% on the part of the federal government and 40% on the part of the actuary. The decision provides some useful comments on negligent misrepresentation and fiduciary duties.

The court held that as an employer and a pension plan administrator, the federal government had a duty of care toward the employees. Specifically,

> *"there is a special relationship between the administrator of a pension plan and the members of the plan and, as a result, the administrator has an obligation to be mindful of the members' interests when administering the plan".*

The court held that the federal government had misrepresented the availability of the reciprocal transfer as a legitimate option. The government had knowledge that there were problems with this vehicle and specifically in respect of the CRA. Senior administrators within the government had not communicated these concerns to the lower level administrators who were the ones dealing directly with the employees. The court also held that the employees relied on these representations by the government.

The court then concluded that the negligent misrepresentations caused the damages suffered by the employees. The court used the "but for" test in reaching this conclusion. Namely, but for the negligent misrepresentation by the government, the damages would not have been incurred by the employees. Had the government advised the employees about the significant risks involved in the pension transfers that they would not be accepted by the CRA, the employees would not have resigned from government service.

The court also held that the actuary owed fiduciary duties to the employees, even before the employees terminated employment with the federal government. There were the required elements of trust, reliance, confidence and vulnerability in the relationship between the actuary and the employees while they were employed with the federal government. The court confirmed that:

> *"Fiduciary law focuses on relationships. It is the nature of the relationship at issue as well as the surrounding circumstances that give rise to fiduciary duties."*

The court also confirmed that a duty of loyalty is "inherent to any professional relationship", including that of an actuary and his or her client. The court referred to the Rules of Professional Conduct of the Canadian Institute of Actuaries, specifically the prohibition against making misrepresentations and the duty of full and fair disclosure of all direct and indirect compensation to be received in respect of a professional services assignment.

Having concluded that the actuary was acting in a fiduciary capacity toward the employees, the court held that the actuary breached those duties when the actuary put its personal and financial interests ahead of those of the employees:

> *"This conduct is antithetical to the duties of a fiduciary."*

While the facts of this case are unusual, the reasoning of the court concerning negligent misrepresentations and the nature of the fiduciary responsibilities of both pension plan administrators toward plan members and actuaries toward their clients have far-reaching implications.■

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