Court of Queen's Bench of Alberta

Citation: McLean v. Alberta, 2009 ABQB 102

Date:
Docket: 9903 19364
Registry: Edmonton

Between:

Grant McLean

Plaintiff

- and -

Her Majesty the Queen In Right of Alberta as represented by the Minister of Justice and Donna McWilliams

Defendants

Reasons for Judgment of the Honourable Mr. Justice Vital O. Ouellette

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Introduction

[1] Grant McLean is currently employed by Her Majesty the Queen in Right of Alberta and seeks a declaration stating that he is entitled, upon retirement, to a pension that includes his pensionable service previously accumulated with the Department of National Defence ("DND").

Facts

[2] The facts in this case are not in dispute and are contained in the filed document entitled "Admissions, Agreed Statements of Fact and Agreed Exhibits." The Admissions, Agreed Statements of Fact contains 54 paragraphs, 34 Exhibits. In addition to the filed Admissions, Agreed Statement of Facts and Agreed Exhibits, McLean and Lloyd Erickson (McLean's co-worker) testified on behalf of the Plaintiff.

[3] First, I will summarize the evidence as contained in the Admissions and Agreed Statements of Fact and Agreed Exhibits, and then deal with the evidence of McLean and Erickson.

[4] McLean is currently 60 years old and continues to be employed by Her Majesty the Queen in Right of Alberta ("the Crown"). He commenced employment with the Crown in 1982. Prior to 1982 McLean was employed by the Federal Government, with the Department of National Defence, for approximately 14½ years.

[5] In 1982, McLean was interviewed on two occasions for a prospective management position with the Crown. During both interviews, McLean inquired about the status of his DND pension. Specifically, McLean asked whether he could transfer his prior pensionable service with DND to the pension plan that would be applicable to him as an employee of the Crown, and receive credit for his years of service under the Alberta Plan.

[6] During the first interview, Donna McWilliams, who was an employee of the Crown as the Regional Personnel Manager, informed McLean that his DND pension contributions were "portable and that there was a 'reciprocal agreement' between DND and the Alberta Plan." During the second interview, McWilliams and McLean agreed that the issue of pensions "had already been discussed" during the first interview.

[7] Following the second interview, McLean was presented with an offer letter of employment dated February 8, 1982 (Exhibit C), which contained the following paragraph:

> Your Federal Government pension contributions are transferrable to the Alberta Government Management Pension Plan. You may apply to have your pension contributions transferred once you commence employment with us.

[8] McWilliams prepared the offer letter of employment after she did some investigation to confirm whether McLean's DND pension contributions were transferrable to the Alberta Plan. Prior to sending the offer letter to McLean, McWilliams contacted the payroll supervisor and asked whether there was a reciprocal agreement between the DND and the Alberta Plan. McWilliams was told that there was such an agreement, but that she should also confirm this fact by speaking to someone in the Pension Administration Office. McWilliams did contact an individual in the Pension Administration Office and was also told by that employee that there was an agreement (reciprocal agreement). McLean accepted the offer letter of employment by signing and returning the offer letter to McWilliams. McLean then resigned his position with DND.

[9] In fact, there never was and never has been a reciprocal agreement between DND and the Alberta Plan. However, the Crown admits that it is vicariously liable for the acts and omissions of McWilliams, and further admits McWilliams had the authority to bind the Crown to contractual terms regarding McLean's employment.

[10] In approximately February 1983, McLean became aware that there was a problem transferring his DND pension service to the Alberta Plan. In April 1983, McLean was informed by an employee of the Crown that there was no provision for the transfer of pension contributions between DND and the Alberta Plan. McLean was then informed in writing on May 9, 1983, by another employee of the Crown, that he could not transfer his DND service to the Alberta Plan because there was no reciprocal agreement between DND and the Alberta Plan. (Exhibit F)

[11] After McLean became aware in 1983 that the position of the Crown was that his DND pension was not fully transferrable into the Alberta Plan, he considered a number of options, including legal action, purchasing past service, or rolling his returned DND contributions into an RRSP account. He chose to place his DND contributions into an RRSP fund, and that fund remains to this day.

[12] In April 1991, McLean wrote to his supervisor and requested the following:

> I am therefore requesting that I be allowed to deposit the pension monies returned to me by the Armed Forces in 1983 with the Alberta Government Management Pension Plan. I am further requesting that upon the deposit of these monies, that I be credited with 14 years of pensionable service with the Province of Alberta. (Exhibit G)

[13] The response by the Crown to McLean's request was provided in June 1991 as follows:

> Canadian Armed Forces is not recognized as a reciprocal agreement (cannot be transferred), but is recognized as prior service and therefore can be purchased. (Exhibit I)

[14] McLean then sent a follow-up memorandum dated July 2, 1991, requesting that a decision be made in regards to receiving credit for 14 years of pensionable service with the Province of Alberta. (Exhibit J)

[15] The Crown provided a response on July 26, 1991 as follows:

> We have no authority to waive the pension requirements, and as per the attached correspondence, you cannot receive credit for these years of service unless it is purchased back under a prior service agreement. (Exhibit K)

[16] Later in 1991, McLean filed a Notice of Appeal to the Public Service Management Pension Plan Board who eventually stated they had no jurisdiction to allow him to receive credit for his DND pension service.

[17] After a meeting with the Assistant Deputy Minister of Justice in late 1992 or early 1993, and on the advice of the Assistant Deputy Minister of Justice, McLean wrote a memorandum to the Director of Payroll and Pensions. The request was the same as previous requests, and McLean asked who had the authority to grant the full service credits that he had earned under the

Armed Forces Plan and the procedures which had to be followed to obtain that authority. (Exhibit U)

[18] The response from the Director of Payroll and Pensions in January 1993 was that: "Regrettably, your request cannot be granted," and that "statements made by employees of Alberta solicitor General cannot override or supercede the legislation." (Exhibit V)

[19] Following this response from the Director of Payroll and Pensions, McLean sought the assistance of the Ombudsman who in March of 1994 advised that they were unable to be of assistance.

[20] In September of 1995, McLean was summoned to the office of the Assistant Deputy Minister, Hank O'Handley, to discuss his pension situation. After reviewing with McLean his history of attempts to solve his problem within the department, and by adherence to the chain of command, as well as McLean's unsuccessful request that the Ombudsman intervene on his behalf, O'Handley told McLean, "I guess you are just going to have to sue us." McLean sued the Crown in 1999 by way of Statement of Claim, which was amended in 2008 by adding a claim for declaratory relief.

[21] It is also agreed between the parties that if McLean had received credit from the Alberta Pension Plan for his 14½ years of DND pensionable service, he would have been eligible to retire from his employment with the Crown, with a full pension, at age 55 (August 25, 2003), and that it was his intention to retire at age 55.

[22] It is further agreed that because McLean did not have enough prior service to retire with a full pension at age 55, he did not retire and continued to work.

[23] The parties further agree that had McLean retired at age 55 as he intended, he would have needed an additional $664,042.00 to compensate him for his reduced pension as a result of not having his prior service with DND transferred to the Alberta Plan. Further, that if McLean retires at age 60 (date of trial), he will still need an additional $271,625.00 to compensate him for his reduced pension as a result of not having his prior service with DND transferred to the Alberta Plan.

[24] Lastly, the parties have agreed that if the Court finds that McLean is entitled to a declaration, that it should instead award damages in lieu of that remedy.

[25] As stated earlier, McLean testified on his own behalf and I found him to be credible. However, the only new relevant information provided by McLean was to the effect that if he had retired at age 55, he thought that he was quite employable. Further, he stated that sometimes the Crown allows its employees to come back after retirement and work for the Crown on a contract basis. McLean also stated that he was qualified as a Town Manager.

[26] With respect to Lloyd Erickson, I also found him to be credible. Erickson was also employed with the Crown, in Corrections, from 1982 to 2002 when he retired. The only new

information not contained in the Agreed Statement of Facts was that he did retire at age 55 and subsequently purchased an acreage, a few cows, and worked part time as a real estate agent.

Issues

What are the pension terms of the employment agreement between McLean and the Crown?

Does the *Limitations Act*, R.S.A. 200, c. L-12, as amended, bar McLean's claim for declaratory relief?

Did the Crown breach its contract in 2003 when it did not pay McLean full pension benefits, and if yes, what are the damages?

Position of the Plaintiff

[27] It is McLean's position that there is no limitation period applicable to his claim for a declaration of entitlement to future pension benefits. In addition, McLean's position is that he is entitled to damages equal to the amount needed to compensate him as if he had retired at age 55 ($664,042.00). It is his position that although he did not retire at age 55, the Crown breached its contract to pay him a full pension at age 55, when it was evident they were not going to pay him a full pension. Further, that such breach of contract continued periodically as the full pension payments became due.

Position of the Crown

[28] It is the Crown's position that although the Amended Statement of Claim seeks declaratory relief, that in reality, the remedy being sought is remedial in nature. As a result, since the relief sought is a remedial, the provisions of the *Limitations Act*, R.S.A. 2000, c. L-12, as amended, are applicable. It is the position of the Crown that because the Statement of Claim was issued after the coming into force of the new Act on March 1st, 1999, that McLean's claim is limitation-barred, both under s. 2(2)(a) and s. 3(1)(b) of that Act.

Analysis

What are the pension terms of the employment agreement between McLean and the Crown?

[29] The Agreed Facts, (paras. 5, 6, 23, 24, 25, 26, 30 and 31) and Exhibit C, clearly support a finding, which I make, that McWilliams, who was authorized to bind the Crown, employed McLean on the basis that his 14½ years of DND pensionable service would be fully recognized and portable and transferable to the Alberta Plan, one-for-one, as per a reciprocal agreement.

[30] I am also satisfied that the principle outlined by the Supreme Court of Canada in ***Schmidt v. Air Products Canada Ltd.***, [1994] 2 S.C.R. 611 is applicable. The court stated the following:

> It would be unfair or unacceptable if an employer were to attract and retain employees by making representations as to the pension benefits available upon which the employees could be expected to rely and then resile from those representations as being contrary to the actual pension terms. (para. 140)

Does the *Limitations Act*, R.S.A. 200, c. L-12, as amended, bar McLean's claim for declaratory relief?

[31] The Crown argues that the primary issue to be determined is whether McLean's claim is limitation barred. Since McLean's action was commenced after March 1, 1999, the Crown submits that the provisions of the *Limitation Act* apply in determining whether the relief claimed by McLean is remedial or declaratory.

[32] The Crown further argues that the mere inclusion of a claim for declaratory relief in the Prayer for Relief in the Amended Statement of Claim is not determinative of whether the *Limitation Act* applies.

[33] Lastly, the Crown argues that although the relief sought by McLean is characterized as a "declaration," it is, in reality, remedial in nature. In support of this argument, the Crown relies on the Agreed Statement of Facts that if the Court finds that McLean is entitled to a declaration, that it should, instead of granting a declaratory judgment, award damages.

[34] Section 2(1) of the *Limitation Act* provides:

> This Act applies where a claimant seeks a remedial order in a proceeding commenced on or after March 1st, 1999 whether the claim arises before, or after March 1st, 1999.

The Statement of Claim was filed October 18, 1999.

[35] The term "remedial order" is defined in s. 1(g) of the *Limitation Act* as:

> "Remedial order" means a judgment or an order made by a court in a civil proceeding requiring the defendant to comply with a duty or to pay damages for the violation of a right, but excludes
>
> (i) a declaration of rights and duties, legal relations or personal status . . .

[36] Both the Crown and McLean agree that the leading case in Alberta dealing with the issue of whether an order is remedial or declaratory is ***Yellowbird v. Samson Cree Nation No. 44*** (2006), 405 A.R. 333 (Q.B.) aff'd (2008) 433 A.R. 350 (C.A.). Further, both McLean and the Crown rely on para. 35 of the ***Yellowbird*** decision. It states the following:

> The cases show that plaintiffs faced with a limitations problem will sometimes seek a declaration that the defendant has violated a right or owes a duty, in an attempt to avoid openly seeking a remedial order. To date the cases have not identified a satisfactory test

on this issue. In my respectful view, an attempt to define the boundary between remedial orders and declaratory orders by searching for the "thrust of the claim" is unproductive. This test is too vague to be helpful, and will lead to results-oriented jurisprudence. The statutory test is whether the relief requires the defendant to comply with a duty or pay damages for violating a right. The coercive nature of a remedial order is captured in the words "requiring a defendant to comply". A helpful test to determine if the relief is truly declaratory, or only declaratory in form, is:

> If the Court granted the declaration, and the defendant resisted the implementation of the declaration, could the plaintiff "leave the court in peace" and enjoy the benefits of the declaration "without further resort to the judicial process"?

This is the wording used by the Institute, supra, para. 23. If the fruits of the "declaration" cannot be enjoyed without further legal execution or intervention (by garnishee, seizure, appointment of a receiver, or other enforcement mechanism), then the supposed declaratory order is really remedial in nature.

[37] The Crown argues that the meaning of para. 35 (which was affirmed by the Court of Appeal, para. 47), means that although McLean has not sought a coercive element requiring the Crown to comply with the declaration, that in fact he has done so as a result of the Agreed Statement of Facts which provides that in lieu of a declaration there will be an award of damages. As a result, the relief is remedial in nature.

[38] I do not agree. The fact that the Crown and McLean have agreed to an award of damages in the event that a declaration is found by this Court to be appropriate, is not helpful in determining whether the relief sought is declaratory or remedial in nature. The Court was not advised, and has no idea why the parties have agreed to an award of damages in lieu of a declaration. The agreement that the Crown pay damages in lieu of a declaration should not be permitted to be used to meet the statutory test as to whether the relief requires the Crown to comply with a duty or to pay damages for violating Mr. McLean's rights.

[39] In fact, the argument of the Crown that the award of damages in lieu of a declaration is proof that the declaration is truly remedial in nature, would then be contrary to the test proposed by the Court in ***Yellowbird***. As stated earlier, the test suggested in ***Yellowbord*** is: If the Court granted the declaration and the defendant resisted the implementation or the declaration, could the plaintiff leave the Court in peace and enjoy the benefits of the declaration without further resort to the judicial process? In light of the agreement between McLean and the Crown, that damages be paid in lieu of a declaration, then clearly McLean could leave the Court in peace and enjoy the benefits of the declaration without having to resort to any further judicial process. However, it is this Court's view that what the parties have agreed to, will occur after a determination of the Court and should not and will not be a factor in determining whether the relief sought is declaratory or remedial.

[40] I agree with the court in ***Yellowbird*** that, to date, the cases have not identified a satisfactory test on the issue of whether a relief is declaratory or remedial. However, guidance in determining whether a relief is declaratory or remedial can be found in text law, the recommendations of the Alberta Law Reform Institute and similar jurisprudence.

[41] The leading text in the area of declaratory judgments is The Law of Declaratory Judgments, 3rd ed., by Lazar Sarna. The author Sarna defines a declaratory judgment as follows:

> The essence of a declaratory judgment is a declaration, confirmation, pronouncement, recognition, witness and judicial support to the legal relationship between parties without an order of enforcement or execution (p. 3).

[42] Sarna goes on to state the following:

> A party fearing repudiation or breach of a contract may obtain a declaration of the validity of its terms although the court will not intervene unless there is a probability of non-execution (p. 211).
>
> Further, that, " A declaratory judgment may be sought in lieu of specific performance (p. 212).

[43] Further guidance is provided in the report of Alberta Law Reform Institute. The Institute recognized that the use of a declaration could be used to avoid a limitation period, but it still recommended it not be subject to limitation periods. It did so because of what a declaration is designed to do. It stated: "A declaration defines right-duty relationships, clarifies them, and may recognize the existence of a right-duty relationship sufficient to justify granting a remedy." (p. 38)

[44] The Institute also explained the function of a declaration as follows:

> A declaration is excluded because, strictly speaking, it has no creative effect: it does not order anyone to do, or to refrain from doing, anything. Rights and duties, legal relations and personal status exist under the law without any reference to the courts, and persons usually comply with their duties without judicial coercion. A claim for a declaration may be brought where persons have a genuine dispute as to the scope of their respective rights and duties, legal relations or personal status. The interested persons may leave the court in peace and comply with their duties as defined in a declaration without further resort to the judicial process. A declaration simply recognizes and defines rights and duties, legal relations or personal status that already exist. (p. 52)

[45] The Institute distinguished a declaration from a remedial order by stating: "A remedial order is not self-executing." (p. 38)

[46] The Institute went on to define the types of declarations excluded as follows: declaration of rights and duties, declaration of legal relations, and declaration of personal status.

[47] The declaration of rights and duties was defined as follows:

> The Act does not apply where the claimant seeks a declaration of rights and duties based on contract, trust, restitution, property or statute, e.g. the interpretation of a legal document such as a mortgage, a lease, a contract, a will or a trust; or a declaration of the priority of interests in land under the Land Titles Act. Rights and duties based on contract, trust, restitution, property and statute. (p. 52)

[48] Since the *Limitations Act* does exclude a declaration of rights and duties from limitation restrictions, it is mostly because of the recommendations of the Institute.

[49] The suggested test proposed in ***Yellowbird*** should be considered in the context of the Institute Report, as occurred in ***Yellowbird***.

[50] Therefore, it is clear that there can be declarations of rights and duties based on contract, which are not in reality remedial in nature. It is my view that it was the intent of the Court in ***Yellowbird*** to state the test as follows: If further recourse to the judicial process is a "must," not an option, then the relief sought is remedial in nature. The Court in ***Yellowbird*** did not intend that if there was a possibility of a non-compliance with a declaration which could result in future judicial process, that this would automatically make the nature of the relief remedial. If that were the case, then the exclusion provided in s. 1(a) of the *Limitation Act* would be meaningless because there is always a possibility that a party will not follow the terms of a declaration.

[51] At the time that the Court makes a declaration, it is not known whether some future intervention may be necessary. But the fact that at a future date, further legal action may be necessary, cannot automatically mean that the current declaration is remedial in nature.

[52] It is hard to imagine, in light of what is included as declarations of rights and duties as defined by the Institute, situations which would not be potentially exposed to a non-compliance by one of the parties requiring a future judicial process. As a result, the purpose of a declaration is to advise the parties in advance of their rights and duties, with the hope that they will comply with those duties without any future judicial involvement.

[53] At the time the declaration is made, the court does not know whether or not the parties will comply with their duties voluntarily or whether further judicial process may be required.

[54] If the declaratory relief is a stand alone step, not taken as a necessary step or link to a required next step, then the relief is declaratory and not remedial.

[55] If the declaratory relief is only the first step of other(s) to follow which "will" result in an ultimate remedial order, such as an *order nisi* in a foreclosure action, ***Daniels v. Mitchell*** (2005), 371 A.R. 298 (C.A.) at para. 51), then the relief is not declaratory but remedial.

[56] The fact that a declaratory relief "might" result in a future judicial process does not mean the relief is actually remedial. The relief is declaratory because any future judicial process will

only occur if the parties choose not to comply with their duties as set out in the declaration. In such a case, an independent cause of action would arise.

[57] In the case at bar, there is disagreement as to the rights and duties between the parties as it relates to McLean's entitlement to future pension benefits. This issue was dealt with in both Manitoba and Ontario (***Dinney v. Great-West Life Insurance Company*** (2007), 217 Man.R. (2d) at 46 (Q.B.), and ***Misfud v. Owens Corning Canada Inc.*** (204) 41 C.C.P.B. 81 (Ont. S.C.). In both ***Dinney*** and ***Misfud***, the Court held that a declaration of entitlement to future pension benefits was purely declaratory and not subject to a limitation period.

[58] In my view, a determination that McLean is entitled upon retirement to a pension that includes as pensionable service his 14½ years of service with the DND, is a declaration defining the rights and duties between the parties. Such a declaration is not ordering the Crown to do anything or to refrain from doing anything. The facts are that McLean and the Crown have a genuine dispute as to the scope of their respective rights and duties. The declaration sought by McLean is simply to recognize and define the rights and duties between himself and the Crown that already exist.

[59] Whether the parties choose to leave the court in peace and comply with the declaration, without further resort to the judicial process, is a decision to be made by the parties. Put another way, if the declaration is granted as requested, the ball will be in the Crown's court as to whether or not it will honour the declaration when the future pension benefits become due. If the Crown chooses to not comply with their duties as defined in the declaration, then independent proceedings might require remedial relief in the future. However, such future proceedings will only occur if there is a later breach of the Court's declaration which will then give rise to an independent cause of action for a remedial order.

[60] In summary, McLean's request that this Court declare that upon retirement he is entitled to a pension that includes, as pensionable service, his 14½ years of service with DND is declaratory in nature and not remedial. It is declaratory because it is defining the rights and duties of the parties regarding an entitlement to a future benefit. It is not for this Court to guess or speculate as to whether or not the Crown will decide to ignore the Court's declaration when McLean retires.

Did the Crown breach its contract in 2003 when it did not pay McLean full pension benefits, and if yes, what are the damages?

[61] In addition to the declaration sought by McLean, he also seeks damages for a breach of contract. McLean contends that he is entitled to damages equal to the pension he would have received including his 14½ years' service with DND from the first month when he would have been entitled to retire, that is to say, at age 55. Further, that there has been a breach of contract by the Crown for each subsequent month for non-payment of the pension to him until the present date. McLean argues that although he did not retire at age 55 and continued to be employed by the Crown, that he lost forever the opportunity to take early retirement at age 55. Further, that if the Crown had recognized his full pension at age 55, that he could have retired and taken a full

pension, and gone back to work either for the Crown as a contract employee or some other employment. McLean therefore asked the Court to compensate him for his lost 5 years of retirement and lost opportunity.

[62] I do not agree. Although the Agreed Statement of Facts provides that it was McLean's intention to retire at age 55, and that he did not do so because he did not have enough prior service to retire with a full pension, it does not mean that the Crown has breached its contract. The facts are that McLean did not retire at age 55 and continued to be employed with the Crown. McLean had the option to retire at age 55 or some later date, and continued to pursue his legal action. Whether McLean would have retired at age 55 or some later date, had the full pension been available to him, is speculative at best. The evidence before the Court is that McLean believed that he was quite employable and that there were likely jobs available for him upon retirement; however, he did not state, and was never asked, whether he would have sought other employment had he retired with a full pension. Further, there may be good reason why McLean has not yet retired and may not retire even after the granting of the declaration, because for every year of employment, his pension increases by 2 percent. In fact, since McLean's first available retirement date in August of 2003 to the present date, he has acquired an additional 5½ years of pensionable service, which effectively provides him with an increase of 11 percent.

[63] In summary, I am satisfied that there has been no breach of contract or constructive breach of contract by the Crown. Even if I am wrong, I am satisfied that there would be no award of damage because McLean has continued to enjoy a full yearly salary plus a yearly pension increase of 2 percent. Further, it is speculative whether or not he would have in fact obtained other employment had he retired early. In fact, in oral submissions, McLean's counsel would not confirm that McLean would retire immediately if the Court granted the declaration sought, and suggested he may continue his current employment with the Crown.

Decision

[64] I am satisfied that McLean was hired by the Crown on the basis of the representations of McWilliams that his pension contributions with the DND would be portable and transferable to his Alberta Plan, and that McLean relied on these representations, resulting in him resigning from the DND and accepting employment with the Crown.

[65] For all the reasons stated above, I find that the relief sought by McLean of a declaration that he is entitled upon retirement to a pension that includes his 14½ years of pensionable service with the DND is relief that is declaratory and not remedial. As a result, there is no need to review the limitation issue.

[66] Lastly, I am satisfied for the reasons stated earlier that McLean has not proven, on a balance of probabilities, a breach of contract by the Crown commencing in August of 2003.

[67] The Court will respect the agreement between the parties and grant an award of damages in the agreed sum of $271,625.00 in lieu of the declaration.

[68] Costs may be spoken to.

Heard on the 10th and 11th days of February, 2009.
Dated at the City of Edmonton, Alberta this 13th day of February, 2009.

Vital O. Ouellette
J.C.Q.B.A.

Appearances:

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