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## Communicating benefits? Be cautious

*Simply handing out information isn't enough – employees must understand benefits*

**E**mployment benefits and rewards programs are a common and effective way of recruiting and retaining employees, but employers must be cautious. There are legal pitfalls that can come up for employers explaining what they offer if an employee doesn't grasp the details.

The Supreme Court of Canada has said the employment relationship is a "special relationship," characterized by a power imbalance in which the employer has the upper hand. Judges have often applied that principle and held employers liable when employees have not fully understood the terms of their benefit programs.

Employer liability has been found even when the employer has given accurate information or urged employees to seek independent advice. That's not enough, the judges say, in this "special relationship."

### Recent cases highlight grey areas

In *Deraps v. Labourer's Pension Fund of Central & Eastern Canada (Trustees of)*, the Ontario Court of Appeal said the employer had a legal duty to try harder than it did to ensure a benefits document was understood.

Gabriel Deraps went on disability leave after being diagnosed with a terminal illness. He and his wife met with the employer's benefits counsellor, who explained to the couple the option of the wife waiving her spousal survivor pension. The counsellor explained if Deraps' wife signed the waiver, Deraps would receive a higher monthly pension amount and Mrs. Deraps would receive nothing when he died. The couple agreed and Mrs. Deraps signed the waiver.

After her husband died, Mrs. Deraps sued, saying she didn't un-



### ON LAW

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derstand what she signed. The employer's representative couldn't remember what she had said to Mrs. Deraps, though she did say Mrs. Deraps hadn't asked any questions. The court found the employer couldn't rely on the widow's waiver because the employer "hadn't gone far enough" to ensure she knew what she was signing.

In *Spinks v. R.*, the employer, Canada's Atomic Energy Commission, was liable for failing to explain the pensionable service buy-back option in its pension plan. The commission described the main features of the pension plan at a standard benefits information session given to Spinks when he was hired. The employer didn't point out the buy-back feature of the plan in which employees could purchase pension credit for service with a previous employer.

Spinks, who worked for 20 years with the Australian Energy Commission, said he would have been interested in it had he known about it. When the employee has a need for specialized information, an employer has a "duty of reasonable disclosure," said the court, and employees cannot be expected to read the text of a pension plan. Also, the employee cannot be expected to

ask questions, said the court. It's up to the employer to point out aspects of the benefit plan that may be of interest to the employee.

In *Allison v. Noranda Inc.*, the employer's severance package gave a terminated employee the option of a lump sum versus salary continuance. The letter didn't spell out the amount of the difference in the pension benefit under the two options but did advise the individual to obtain independent legal advice in considering the offer.

The terminated employee picked one option, but later claimed he wouldn't have done so if he had been aware of the impact on his pension entitlement. The New Brunswick Court of Appeal agreed Noranda was liable for failing to disclose the difference.

"A caution to seek independent advice cannot override an obligation to make full disclosure," the court said.

### Tips for employers

These cases make sense, but they also can cause some discomfort to employers. What are employers supposed to do when describing benefit plans?

Here are a few suggestions:

- Have an experienced benefits provider, consultant or lawyer confirm the employee booklet is accurate and discloses all of the options employees should be made aware of. Date and keep all versions of the booklet on file.
- Create a written list of issues, Q&As and facts communicated to employees at benefits information sessions for existing employees and new employees. Create a written summary of everything that's said at benefit lunch-and-learns or similar sessions and keep it on file forever. Make sure, if there's ever

a lawsuit where an employee complains he didn't understand the features of a benefit plan, someone from HR can say that even if he doesn't remember what was specifically said to the employee, every time an employee information session was conducted, everything was communicated and employees were asked if they had any questions. Ensure every employee understands what's been communicated at every benefits meeting.

• Know the benefits service provider is the representative of the employer. If the provider gives incomplete or inaccurate information to employees, the employer is legally liable for it. Be aware if there's a limit on the provider's liability to the employer as sometimes there are clauses in the legal contracts saying the service provider's liability is limited to six months or one year's fees. Ensure the service provider commits to a high level of service standards in all employee communications.

Courts expect employers and their service provider representatives to act reasonably to ensure employees understand their benefits and rewards programs.

### For more information see:

- *Deraps v. Labourer's Pension Fund of Central & Eastern Canada (Trustees of)*, 1999 CarswellOnt 2896 (Ont. C.A.).
- *Spinks v. R.*, 1996 CarswellNat 326 (F.C.A.).
- *Allison v. Noranda Inc.*, 2001 CarswellNB 233 (N.B. C.A.).

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