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Are Pension Benefits Deductible from Wrongful Dismissal Damages?

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Introduction

The general measure of damages in a wrongful dismissal case is the amount that an employee would have earned had he or she been given proper working notice. In assessing damages, a court will take into account the salary and other benefits that the employee has lost as a result of a termination with insufficient notice, but will also deduct any income that the employee received from other employment during the reasonable notice period. This is on the principle that it would be double recovery to earn income from two different employers at the same time, and double recovery is to be avoided (***Ratych v. Bloomer***, [1990] 1 S.C.R. 940).

This exercise is less straightforward when considering other payments made to an employee during the reasonable notice period that are not typical "income". For example, a dismissed employee may receive unemployment insurance, disability benefits, or pension benefits. A court must consider whether these benefits are to be deducted from wrongful dismissal damages just as salary income would be deducted.

Each type of benefit payment has its own unique characteristics. This article will focus on the treatment of pension benefits.

General Principle: Pension Benefits are Not Deductible

In Ontario, and generally throughout the common law provinces of Canada, the current consensus is that pension benefits received during the notice period are **not** to be deducted from wrongful dismissal damages. This is true whether or not the plan is fully funded by the employer (***Emery v. Royal Oak Mines Inc.*** (1995), 24 O.R. (3d) 302 (Gen. Div.); ***Jardine v. Gloucester (City)***, (1999) 19 C.C.P.B. 248 (Ont. Gen. Div.)). This is subject to one important exception, described further below.

The rationale for the general principle is two-fold.

First, it has been held that pensions are akin to insurance policies (***Guy v. Trizec Equities Ltd.*** (1979), 99 D.L.R. (3d) 243 (S.C.C.); reaffirmed in the context of employment insurance benefits in ***Jack Cewe Ltd. v. Jorgenson*** (1980), 111 D.L.R. (3d) 577 (S.C.C.)). Pension benefits are "collateral" to the main employment contract, i.e., they are related to the employment but are payable under a separate contract. In ***Girling v. Crown Cork & Seal Canada Inc.*** (1995), 127 D.L.R. (4th) 448 (B.C.C.A.), the court stated (at para. 10):

pension benefits of the employment contract are collateral benefits of the employment contract which should not be considered income and should not be deducted from damages which are income in lieu of notice. The damages (pay in lieu of notice) flow from breach of the employment contract and the collateral pension benefits are payable pursuant to the contractual arrangements therefore. They are not to be modified by the appearance of duplication.

The view is that it would be unjust and unfair for the defendant employer to receive the benefit of the contractual insurance arrangements that the employee had in place prior to the termination (***Girling v. Crown Cork & Seal Canada Inc.*** (1995), 127 D.L.R. (4th) 448 (B.C.C.A.); ***Ratych v. Bloomer***, [1990] 1 S.C.R. 940).

Second, pension benefits are considered non-deductible because they form part and parcel of the employee's expected compensation for long service. The benefits are a "perk" that can attract an employee to a job. The employee is entitled to the benefits separate and apart from whether or not he or she is terminated. They have been consistently characterized as a "reward" or "payment" for past services (***Chandler v. Ball Packaging Products Canada Ltd.*** (1993), 2 C.C.P.B. 99 (Ont. Div. Ct.); ***Emery v. Royal Oak Mines Inc.*** (1995), 24 O.R. (3d) 302 (Gen. Div.); ***Girling v. Crown Cork & Seal Canada Inc.*** (1995), 127 D.L.R. (4th) 448 (B.C.C.A.); ***Edwards v. Royal Alexandra Hospitals*** (1994), 5 C.C.E.L. (2d) 196 (Alta. Q.B.)). Therefore, the employee should not be penalized on termination by having this "reward" applied to reduce his or her damages. There is no basis in principle for deducting these benefits when the employee is entitled to them in any event.

The Exception: Gratuitous Pension Enhancements

There is one important exception to the general non-deductibility principle. Where an employer makes gratuitous payments to enhance the pension benefits as part of the severance package, then that enhancement will be taken into account in reducing the damages. The reasoning is that gratuitous payments are not part of the employee's contractual pension arrangements, nor are they part of expected compensation. Rather, they are expressly tied to the severance arrangements.

For example, in ***Tedford v. Woodward Stores Ltd.*** (1990), 31 C.C.E.L. 1 (B.C.C.A.), the employee was nine months short of normal retirement age, and the employer gratuitously extended enhanced pension benefits as part of the termination package. The court found that " some account should be taken of the pension enhancement. Because it is linked so closely to the severance, it is a proper consideration in deciding the damages." However, the court did not deduct 100% of the value of the pension benefits because they are paid over time and therefore not an immediate economic benefit like termination pay/damages. The court deducted 50% of the value.

This principle was followed in ***Regan v. Commercial Union Assurance Co. of Canada*** (1993), 48 C.C.E.L. 208 (B.C.S.C.), where the employer made amendments to the pension plan to compensate employees who would be terminated during a certain period due to company reorganization. Because the enhancements were not available to all employees, the court found they were "linked so closely to the severance" that they were taken into account in assessing damages. The court also depreciated the value, but only to 75%.

Another approach is to deduct the amount of the gratuitous payment. For example, where an employer paid to maintain an unreduced pension for 27 months until the employee reached age 65 to prevent loss of benefits, and paid to purchase a bridge pension to cover the period before age 65, the court deducted 100% of the amounts paid by the employer (***Sicard v. Timminco Ltd.*** (1994), 3 C.C.E.L. (2d) 50 (Ont. Gen. Div.)). Similarly, where an employer purchased a gratuitous annuity to ensure a guaranteed salary to employees being forced to retire early, the cost of the annuity was deducted, but not the value of the benefits (***Horodynski v. Electrohome Ltd.***, [1990] O.J. No. 2088 (Gen. Div.)).

Using Pension Benefits to Calculate Pension Loss

Finally, there is an important distinction between taking into account pension payments during the notice period for purposes of reducing the salary award (which is not permitted) and using them to determine the commuted value of the pension to determine the amount of pension lost. It has been found that the latter is proper and should be done (***Peet v. Babcock & Wilcox Industries Ltd.*** (2001), 53 O.R. (3d) 321 (C.A.)). If the employee is better off because he or she received early payments, which happens on occasion, then he or she should not be awarded damages for loss of pension (***Doran v. Ontario Power Generation Inc.*** (2007), 61 C.C.E.L. (3d)

232 (Ont. Sup. Ct.)).

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