

## Supreme Court of Canada refuses to reduce wrongful dismissal damages by employee's pension benefits

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In [IBM Canada Limited v. Waterman](#) (December, 2013) the Supreme Court of Canada upheld a decision by the British Columbia Court of Appeal and refused to reduce wrongful dismissal damages by an amount equal to the pension benefits received by the employee following his dismissal and during the common law reasonable notice period. Although Ontario courts have generally refused to deduct pension benefits from wrongful dismissal damages, the decision provides clarity in terms of the proper judicial approach to determining what collateral benefits received during the notice period are deductible.

Mr. Waterman was 65 years old when his employment was terminated after more than 40 years of service as a software specialist. His dismissal was without cause and he was provided with two months notice, after which IBM considered him retired. Following the dismissal, Mr. Waterman began to receive benefits under the employer sponsored defined benefit pension plan. Mr. Waterman had no intention of retiring at the time of his termination and sued IBM for wrongful dismissal. At trial, he was awarded damages based on an additional 18 months notice with no reduction for the amount of pension benefits received during the notice period. This award was upheld by the British Columbia Court of Appeal, and IBM appealed to the Supreme Court of Canada. IBM's position was that by not deducting the pension benefits that the employee received, the employee was being placed in a better position than he would have been had the employment continued and he had only received his regular salary. This result was argued to be contrary to the law of contract damages, which generally attempts to put an injured party in the position they would have been in had the contract been performed.

A 7-2 majority of the Supreme Court upheld the lower court decision and dismissed IBM's appeal. The majority's analysis focused on whether there was a "collateral" benefit or a "compensating advantage" that should be deducted from the wrongful dismissal damages. A "compensating advantage" is described as compensation that a plaintiff receives from a source other than the defendant, but that nevertheless ameliorates the damages arising from the defendant's breach. Although there is no strict rule for determining when a compensating advantage should be deducted from damages payable by the defendant, the majority set out the following factors that should be considered:

- the connection between the compensating advantage and the type of loss caused by the defendant's breach;
- the nature and purpose of the compensating advantage and in particular whether it is an indemnity for the type of loss suffered by the defendant's breach;
- whether the plaintiff has made contributions in order to obtain the compensating advantage;

and

- other policy considerations, such as the desirability of equal treatment for those in similar situations, providing incentives for socially desirable conduct, and the need for clear rules that are easy to apply.

In the case at hand, the majority found that these factors supported the lower courts' decisions that the pension benefits should not be deducted from the wrongful dismissal damages. Although the pension benefits arose as a result of Mr. Waterman's dismissal, they were not an indemnity for wage loss, but instead a form of retirement savings. Furthermore, while the employer made all the contributions to fund the plan, Mr. Waterman earned his entitlement to benefits through his years of service. In terms of the broader policy considerations, the majority stated that the law should not provide an economic incentive to dismiss pensionable employees rather than other employees by allowing for the deduction of pension benefits from wrongful dismissal damages.

In making its decision, the majority discussed its earlier decision in *Sylvester v. British Columbia* (1997), in which it ruled that disability benefits should be deducted from wrongful dismissal damages where the employee did not contribute to the disability plan. In *Sylvester*, the employee was terminated while he was on sick leave and receiving disability benefits. The Supreme Court distinguished *Sylvester* on the basis that the disability benefits at issue in that case were intended to indemnify the employee from the inability to work. In addition, the employment contract in *Sylvester* did not contemplate the receipt of both salary and disability benefits by the employee. By way of contrast, in *Waterman* the pension benefits were clearly not an indemnity for loss of salary and instead more akin to a property right which accrue over time for the employee's benefit. Furthermore, the employment contract in *Waterman* was silent on whether pension benefits would be deducted from wrongful dismissal damages. The majority of the Supreme Court proceeded to dismiss IBM's appeal.

## **In Our View**

Ontario courts have generally refused to deduct pension benefits and even disability benefits from wrongful dismissal damages where the employee has made a contribution to the plan, regardless of how small. Nevertheless, the decision in *Waterman* clarifies the judicial approach to determining whether benefits received by an employee during the notice period are deductible from wrongful dismissal damages. Employers can provide additional certainty by making express provisions for the deductibility of benefits in their employment contracts.

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