

ESA Severance Payments to be Deducted from Damage Awards

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The question of whether severance payments under the Ontario *Employment Standards Act* should be deducted from wrongful dismissal damages has kept lawyers and their clients guessing. In *Stevens v. The Globe and Mail*, released on May 8, 1996, the Ontario Court of Appeal has eliminated this source of confusion in employment law.

In 1989, Geoffrey Stevens was advised that he was being removed as managing editor of *The Globe and Mail* newspaper. Stevens sued the paper for wrongful dismissal, and was awarded \$138,902 at trial. He was also awarded \$58,299 in separate proceedings for severance pay under s. 58 of the *ESA*.

Severance pay is one of two forms of pay on termination under the *ESA*, the other being s. 57 termination pay. While trial judges have uniformly ordered the deduction of termination pay from wrongful dismissal damages, their treatment of severance pay has varied. The source of the confusion is s. 58(7), which stipulates that severance pay is "payable to the employee in addition to any other payment under this *Act* or contract of employment without set-off or deduction...". It is unclear how damages awarded for wrongful dismissal fit into this statutory scheme.

At trial, the newspaper argued that the severance pay Stevens had received should be deducted from his damages. The trial judge ruled against the employer, and the newspaper appealed, arguing that the contract contained no express term on the subject of dismissal, and that wrongful dismissal damages could not be considered a "payment under ... [a] contract of employment". Stevens countered that wrongful dismissal should be viewed as the breach of an implied term of the employment contract to give reasonable notice in the event of dismissal without cause.

The Court of Appeal sided with the newspaper, holding that, even if wrongful dismissal was, as Stevens suggested, a breach of an implied contractual term, the damages were not paid *under* the contract, but *for breach of* the contract.

The Court also examined the policy considerations which might justify treating severance and termination pay differently. It found a substantial overlap between the nature and purpose of severance pay and wrongful dismissal damages. Therefore, it held, given the absence of either a clear policy reason for deducting termination pay, but not severance pay, from damages for wrongful dismissal, or a clear legislative direction to do so, severance payments made under s. 58 of the *ESA* should be deducted from wrongful dismissal damages.

Readers should be aware that the issue of deductibility of statutory severance pay would be

affected by the proposed changes to the *Employment Standards Act*, which require that non-unionized employees decide at the outset whether they wish to pursue a claim under the *ESA*, or take the matter to court. They would no longer be able to do both, as was the case in *Stevens*. For the present, although employees currently have access to both the *ESA* and court processes, the regime put in place by the Court of Appeal will prevent employers having to pay damages twice for the same termination.