

# Don't deduct pension benefits from wrongful dismissal damages: Supreme Court

*Contribution by employee and purpose of pension benefits key to determining if they are part of compensation lost*

BY RONALD MINKEN

**AFTER A HARD** fought five-year battle, and in a 7-2 decision, the Supreme Court of Canada has decided an employee can keep his pension benefits as well as the full damages awarded to him for wrongful dismissal.

Richard Waterman was terminated by IBM Canada after 42 years of service and was provided with two months' notice. At the time of termination, Waterman was 65 years old and entitled to a full pension in accordance with IBM's defined benefit pension plan. Over the course of his employment, IBM made all of the contributions to fund the pension plan on Waterman's behalf as part of his annual compensation package. Waterman began receiving his monthly pension following his termination, but commenced legal proceedings against IBM seeking damages for wrongful dismissal.

The trial judge determined Waterman was entitled to a total of 20 months' notice from IBM. IBM took the position that Waterman's pension payments over the notice period should be deducted, as otherwise Waterman would be placed in a greater economic position than he would have been in had he not been terminated. IBM argued this would be contrary to the general rule of contract damages, being the compensation principle. The trial judge disagreed and IBM appealed the decision to the British Columbia Court of Appeal, which dismissed the appeal. IBM appealed again to the Supreme Court of Canada.

The Supreme Court of Canada analyzed the situation and determined that, although the pension was a "collateral benefit" or "compensating advantage," — a gain or advantage flowing to Waterman that was connected to IBM's breach of contract — there are well established exceptions to the general rule of damages where collateral benefits are not deducted from damages awarded and the employee is entitled to both the damages and the collateral benefits. The majority of the Supreme Court of Canada ruled that the pension benefits Waterman received fell into the exception carved out for private insurance and similar benefits and this analysis was in keeping with the decision in *Sylvester v. British Columbia*, despite the fact the

outcome in *Waterman* was the opposite result to that in *Sylvester*.

The court's analysis in *Waterman* to determine whether or not the pension benefits should be deducted from the wrongful dismissal damages was extensive. It considered the following:

- Whether the collateral benefit was sufficiently connected to the defendant's breach
- Whether the collateral benefit would not have accrued to the employee "but for" the employer's breach
- Whether the collateral benefit was intended to indemnify the employee for the loss resulting from the employer's breach.

## The court determined the pension benefits were not intended to be an indemnity for lost wages.

- Whether the plaintiff had contributed, directly or indirectly, to the collateral benefit.

In analyzing the case law, the court established the following general principles:

- Collateral benefits are not deducted if they are not intended to be an indemnity for the loss caused by the breach and the employee has contributed to the collateral benefits
- Collateral benefits are not deducted where the employee has contributed to the indemnity collateral benefits
- Collateral benefits are deducted when they are intended to be an indemnity for the loss caused by the breach and the employee has not contributed to obtain entitlement to the collateral benefits.

The court determined that the pension benefits were not intended by the parties to be an indemnity for lost wages and Waterman had contributed to the acquisition of the pension through his years of service. It acknowledged that pension benefits are different from wages and are not meant to be compensation for the loss of wages, stating that wages are a reward for contemporaneous work but pension benefits are a form of deferred

compensation for the employee's service — a form of savings plan.

The court also noted that in other scenarios, pension benefits are not deducted from wrongful dismissal damages or income earned from another employer. For example, an employee who is terminated prior to being eligible for retirement is entitled to damages for wrongful dismissal plus all entitlements under the pension plan, including the loss of any pension entitlements during the notice period. Similarly, a retired employee is entitled to receive full pension benefits as well as any employment income earned from new employment without any deduction of the pension benefits. Accordingly, the court determined pension benefits should be viewed as analogous to private insurance benefits and should not be deducted from damages for wrongful dismissal. This analysis and result was consistent to the Supreme Court of Canada's analysis in *Sylvester*, where an employee's disability benefits were deducted from damages for wrongful dismissal because the benefits were meant to be an indemnity for loss of wages and where the employee did not contribute to the acquisition of the disability benefits.

The *Waterman* decision demonstrates there are exceptions to the compensation principle — being the general rule regarding damages — which, depending on the facts, can either work in favour of the employee or the employer. The key factors are the nature and purpose of the collateral benefits; specifically, whether they are meant to compensate or be an indemnity for the defendant's breach, and whether the plaintiff has contributed to the acquisition of the collateral benefits.

### For more information see:

- *Waterman v. IBM Canada Limited*, 2013 CarswellBC 3726 (S.C.C.).
- *Sylvester v. British Columbia*, 1997 CarswellBC 1025 (S.C.C.).

*Ronald S. Minken is a senior lawyer and mediator at Minken Employment Lawyers, an employment law boutique located in Markham, Ontario. He can be reached at [www.MinkenEmploymentLawyers.ca](http://www.MinkenEmploymentLawyers.ca). Ron gratefully acknowledges Sara Kauder and Kyle Burgis for their assistance in preparation of this article.*