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Overlooked Claims in Dismissal Litigation: Case Summaries

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OVERLOOKED CLAIMS IN DISMISSAL LITIGATION: CASE LAW SUMMARIES

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OVERLOOKED CLAIMS IN DISMISSAL LITIGATION: CASE LAW SUMMARIES

Daryl Cukierman, Catherine Milne & Tamara Ticoll

I. INTRODUCTION

Below are summaries of cases in which courts determined whether dismissed employees were entitled to (1) stock options, (2) bonuses, (3) long-term incentives and (4) pension benefits, (5) vacation pay, (6) overtime, (7) commissions, (8) fringe benefits, (9) car allowances, (10) RSP matches/contributions, (11) mitigation expenses, (12) reference letters during their reasonable notice periods. As the cases show, each case will depend upon its facts and, in particular, the interpretation of the particular agreement / plan / benefit at issue.

II. CASE SUMMARIES

1. Stock Options

(i) Palumbo v. Research Capital Corp. (2004), 190 O.A.C. 83 (Ont. C.A.)

At issue in *Palumbo v.* Research *Capital Corp.*[1] was the plaintiff's entitlement to broker warrants which the plaintiff sought to exercise after his employment was terminated. Broker warrants are akin to options; they provide the "right to buy a prescribed number of shares of a security at a stipulated price".[2] Prior to the termination of his employment, Mr. Palumbo had been granted the warrants as part of his remuneration.

At trial, MacFarland J. held that Mr. Palumbo had been wrongfully dismissed. She awarded him various heads of damages, including $499,788 for broker warrants allocated to him while he was employed and which were exercised by his employer after he was no longer employed. The Ontario Court of Appeal considered whether the trial judge erred in awarding damages for the broker warrants.

Mr. Palumbo's employment agreement included the following provision:

> Following any termination of the employment of the Executive…the Corporation, in addition to paying Salary and Additional Remuneration to the Executive calculated to the Termination Date, together with such other amounts (if any) as are owing to the Executive, as at the Termination Date, shall pay to the Executive a lump sum amount equal to one year's average Remuneration of the Executive…in lieu of notice of termination and reasonable notice at

[1] *Palumbo v. Research Capital Corp.* (2004), 190 O.A.C. 83 (Ont. C.A.).
[2] *Ibid.* at para. 25.

> common law (Termination Pay). The Executive acknowledges that upon any such termination of his employment, he or his legal personal representatives shall have no claim for the payment of any further or other Salary, Additional Remuneration, compensation or other remuneration whatsoever in respect of such termination.[3] [emphasis added]

The issue before the Court of Appeal was the interpretation of the phrase "calculated to the Termination Date". At the date of termination, the warrants had no value because the price at which they could be exercised was less than the market price of the underlying security. Justice MacFarland nonetheless awarded compensation for warrants exercised after the termination.

Writing for the unanimous Court of Appeal, Laskin J.A. interpreted the clause of the employment agreement "to entitle Palumbo to what the broker warrants allocated to him were calculated to be worth on the Termination Date had they been exercised on that date".[4] The Court reasoned that the purpose of the termination provision was "to finalize the rights and obligations of each party on termination so that neither party would have any on-going rights or obligations".[5] In light of this purpose, there was no language supporting the conclusion that the parties intended for Mr. Palumbo's entitlement to the warrants to survive the termination of his employment. The provision "[did] not say that Palumbo was entitled to the value of his broker warrants when RCC exercised them, even if it did so after his departure. If the trial judge's interpretation were correct, one might reasonably have expected the parties to have included such a provision in the agreement. They did not do so."[6] Accordingly, the Court of Appeal overturned MacFarland J.'s decision.

(ii) Gryba v. Moneta Porcupine Mines Ltd. (2000), 139 O.A.C. 40 (Ont. C.A.)

In *Gryba v. Moneta Porcupine Mines Ltd.*[7] the Ontario Court of Appeal considered a dismissed employee's entitlement to stock options. The plaintiff, Mr. Gryba, had been employed as Director for Moneta Porcupine Mines Ltd. ("Moneta") for 9 years when he was dismissed without cause. At the time of dismissal, Mr. Gryba had 260,000 stock options. The Incentive Stock Option Plan governing the exercise of the options included the following provision:

> If an optionee ceases to be employed by the Corporation otherwise than by reason of death or termination for cause, or if an optionee

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[3] *Ibid.* at para. 28.
[4] *Ibid*. at para. 33.
[5] *Ibid.*
[6] *Ibid.* at para. 34.
[7] *Gryba v. Moneta Porcupine Mines Ltd.* (2000), 139 O.A.C. 40 (Ont. C.A.), leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 92 (S.C.C. August 09, 2001).

> ceases to be a director other than by reason of death, removal or disqualification, any option of unexercised portion thereof held by such optionee at the effective date thereof may be exercised in whole or in part for a period of thirty (30) days thereafter.[8] [emphasis added]

Mr. Gryba did not exercise his outstanding stock options during the thirty-day period after his dismissal because he "saw no financial benefit in doing so".[9] However, when he brought a wrongful dismissal claim against Moneta, he sought, among other things, compensation for the loss of profits on the options.[10] He was successful at trial, and the judge awarded him $62,400 to compensate for the loss of profit on the options.

Maneta appealed. The majority of the Ontario Court of Appeal dismissed the appeal and upheld Swinton J.'s determination that Mr. Gryba was entitled to exercise his stock options during his notice period. In its decision, the majority of the Court considered whether the stock option plan at issue "clearly includes as a triggering event a termination that is in breach of contract."[11] Key to its decision was the plan's reference to the "effective date". Although the majority agreed with the appellant that "the wording of the plan, in essence the terms of the contract, must govern",[12] it concluded that the effective date of termination without cause would include the notice period. In the majority's view, "the stock option plan…can be read as contemplating a lawful notice of termination" and "the effective date of the cessation of employment is the end of the notice period".[13] The majority found further support for its interpretation by "the fact that the stock option clause also provides that in the event of death or dismissal for cause the employee has no right to exercise stock options".[14] Accordingly, the majority held that Mr. Gryba was not required to exercise his options within thirty days of his unlawful termination and was entitled to do so during his notice period.[15]

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[8] *Ibid.* at para. 3.
[9] *Ibid.* at para. 5.
[10] *Ibid*.
[11] *Ibid.* at para. 50.
[12] *Ibid.* at para. 49.
[13] *Ibid.* at para. 51.
[14] *Ibid*.
[15] *Ibid.* at para. 52.

2. Bonuses

(i) Leduc v. Canadian Erectors Ltd., [1996] O.J. No. 897 (Ont. Ct. J. (Gen. Div.))

The Ontario Court of Justice considered a wrongfully-dismissed employee's entitlement to bonus payments in *Leduc v. Canadian Erectors Ltd.*[16] The plaintiff, Mr. Leduc, had worked as an engineer at Canadian Erectors Ltd. ("Canadian Erectors") for six and a half years when his employment was terminated without cause. He was offered a severance package consisting of 5 weeks' pay and 5.5 weeks' statutory severance pay. He refused the severance package and brought a wrongful dismissal action against Canadian Erectors.

At trial, the parties disputed whether the plaintiff was entitled to a bonus during his notice period. The defendant characterized bonuses as discretionary because whether they would be awarded depended upon multiple criteria including the company's profitability, the profitability of the division in which the plaintiff worked, and the performance of various departments and employees. The plaintiff did not contest this characterization.

When considering the plaintiff's entitlement to bonus payments, Quinn J. summarized the principles to consider as follows:

(a) The starting point is always to attempt to determine if there is any evidence of the intention of the parties regarding the entitlement to, and the quantification of, the bonus.

(b) Bonuses probably can be classified into 3 categories:

(i) formula bonuses

(ii) quasi-formula bonuses

(iii) non-formula bonuses.

(c) A formula bonus is one that is determined by means of an arithmetical formula.

(d) A quasi-formula bonus is one that is determined by means of certain factors, some or all of which are subjective in nature.

[16] *Leduc v. Canadian Erectors Ltd.*, [1996] O.J. No. 897 (Ont. Ct. J. (Gen. Div.)).

(e) A non-formula bonus is one that is determined by the employer without the obligation to take into account specified factors or to weigh factors in a specified manner

(f) If, in the case of quasi or non-formula bonuses, they are routinely awarded in a certain amount or in a certain range, they should be included in the assessment of damages, just like any other fringe benefit.

(g) In the case of quasi or non-formula bonuses, which, due to their very nature, require an element of discretion, that discretion must be exercised reasonably and, wherever possible, on the basis of objective criteria.

(h) A bonus scheme that, historically, has become an integral part of an employee's wage or salary structure is a benefit that has a value and should form part of the calculation of the employee's damages.

(i) If the historical conduct of the parties gives rise to a reasonable expectation of a bonus, then the bonus is a benefit that has value and should form part of the calculation of the employee's damages.

(j) A distinction must be made between the entitlement to a bonus and the quantification of the bonus. If the former is established the court will grapple with the latter.[17]

In this case, despite the fact that the plaintiff did not dispute that the bonus was discretionary in nature, Quinn J. concluded that the plaintiff was entitled to a bonus. They key fact underlying this conclusion was that the evidence showed that the "paramount criterion" used to determine if employees of the defendant would receive a bonus was the profitability of the defendant and the employee's division. Accordingly, "[i]f a particular year was sufficiently profitable, a bonus would be paid in January or February of the following year."[18]

Justice Quinn held that, "on a balance of probabilities, the plaintiff, but for his dismissal, would have continued to do work for the defendant…and, as such, would have received a bonus of $2,250 for the year".[19] This conclusion was supported by the fact that, during the past four years, Mr. Leduc had only been denied a bonus in one year. Furthermore, Mr. Leduc had been

[17] *Ibid.* at para. 47.
[18] *Ibid.* at para. 46.
[19] *Ibid.* at para. 51. When quantifying the plaintiff's bonus entitlement, Quinn J. grappled with evidence that was "not as complete as [he] would have liked". He arrived at $2,250 by averaging and pro-rating the lost bonuses the plaintiff had received.

working on a project during his final year of employment that had proved very profitable to the company and, as the defendant's Chief Engineer admitted at trial, the plaintiff's contribution to the profitable project would have been taken into account when awarding bonuses for the year in question.

(ii) Chann v. RBC Dominion Securities Inc., [2004] O.J. No. 5340 (Ont. Sup. Ct.)

The quantum of bonus to which a dismissed employee was entitled was also at issue in *Chann v. RBC Dominion Securities Inc.*[20] In that case, the plaintiff, Mr. Chann, worked as an investment banker for the defendant (and a predecessor employer) from 1992 until 2002. When his employment was terminated without cause, Mr. Chann was a director earning a base salary of $125,000 and a significant bonus which varied annually. In his final three years of employment, Mr. Chann earned a bonus of $416,000, $647,000 and $465,000, respectively. When his employment was terminated, the defendant offered Mr. Chann a $325,000 severance package, of which $125,000 was attributed to his bonus entitlement. Mr. Chann did not accept the offer and commenced an action for wrongful dismissal.

In *Chann*, there was "no question that the plaintiff's employment arrangements contemplated a bonus as a regular and significant component of his annual compensation."[21] Rather, Wilton-Siegel J. had to determine whether the employer's method of calculating the bonus entitlement was fair and reasonable. The defendant's evidence was that it calculated the bonus entitlement to be $250,000; however, it subtracted 50% because Mr. Chann's employment was terminated. When determining this issue, Wilton-Siegel J. noted that, even if bonuses are discretionary, there is an implied provision in an employment agreement that the employer will exercise its discretion in a fair and reasonable manner when determining the amount of bonus payable to an employee.[22]

Justice Wilton-Siegel held that, in order to determine whether the bonus provided by the employer was fair and reasonable, the following questions need to be considered:

1 Were the factors taken into consideration by the defendant appropriate to satisfy the test of a fair and reasonable exercise of the defendant's discretion?

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[20] *Chann v. RBC Dominion Securities Inc.*, [2004] O.J. No. 5340 (Ont. Sup. Ct.).
[21] *Ibid.* at para. 44.
[22] *Ibid*. at para. 71.

2 Was the process adopted by the defendant fair and reasonable in that the defendant took into consideration all factors which it was required to consider in order to satisfy the standard?[23]

On the first issue, the Court held that it was appropriate for the employer to consider the performance of the plaintiff's group and division. However, as noted above, the employer also considered the fact that Mr. Chann was being terminated when it calculated his bonus entitlement. The employer attempted to justify this practice by arguing that one of its reasons for awarding bonuses is retention, as it is "often necessary in the investment banking business to pay an employee a retention bonus to protect the employment relationship".[24] Justice Wilton-Siegel concluded that it was neither fair nor reasonable for the employer to have reduced Mr. Chann's bonus because his employment was being terminated. He based this conclusion on the fact that there was no evidence before the Court that incorporates "such a principle into the contractual agreement between the parties".[25] In addition, as Mr. Chann had worked for almost eleven months of the final year of employment, Wilton-Siegel J. held that "it is not fair and reasonable to reduce the amount that would otherwise be awarded in respect of such contribution by a factor to reflect a decision to terminate the employee made at the end of the period for which the bonus is payable".[26]

On the second issue, the central question was whether the plaintiff's personal contribution to the profitability of the firm was appropriately considered when the employer calculated his bonus entitlement. Justice Wilton-Siegel held that the fact that the employer had decided to terminate Mr. Chann's employment "did not remove the need to approach the process of decision-making in the same manner as in past years" because "[t]he plaintiff was contractually entitled to have his remuneration determined on the same basis as in prior years and for other employees in the same year".[27] Accordingly, he held that the plaintiff's bonus should have been greater to eliminate the reduction that had been applied on account of his dismissal and to reflect his contribution to his group's earnings. The plaintiff argued unsuccessfully that his bonus should be calculated by reference to his average bonus over three years. Acknowledging that this approach "may be appropriate in circumstances where bonuses fluctuate only moderately" Wilton-Siegel J.A. rejected it in this case because it is "not appropriate for the investment banking business in which

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[23] *Ibid.* at para. 65.
[24] *Ibid*. at para. 70.
[25] *Ibid*. at para. 72.
[26] *Ibid*.
[27] *Ibid*. at para. 79.

significant fluctuations occur from year to year".[28] Although there was no "scientific basis" for the adjustment, Wilton-Siegel ultimately concluded that the plaintiff was entitled to a bonus of 18% or $62,713.72 in addition to the $125,000 which the defendant had already paid to Mr. Chann.

3. Long-Term Incentives

(i) Kieran v. Ingram Micro Inc. (2004), 189 O.A.C. 58 (Ont. C.A.)

In *Kieran v. Ingram Micro Inc.*,[29] the Ontario Court of Appeal considered whether an employee was entitled to damages to compensate for stock options granted under the terms of a long-term incentive plan which would have vested during the notice period. The plaintiff, Mr. Kieran, had been employed as the Senior Vice President for Purchasing at the defendant, Ingram Micro Inc. He was entitled to stock options which were governed by three different plans: the Restricted Stock Option Plan, the Equity Incentive Plan and the Rollover Stock Option Plan. After his employment was terminated, Mr. Kieran brought an action seeking, among other things, damages for the loss of his stock options that his employer did not permit him to exercise during his notice period.

Writing for the unanimous Court of Appeal, Lang J.A. noted that, under "Ontario law, Mr. Kieran would be entitled to damages for the loss of the Plans, as they formed part of his compensation, absent contractual terms of the contrary".[30] As such, whether Mr. Kieran was entitled to exercise his stock options during his notice period depended upon the respective plan language. The Court concluded that, under the terms of each plan, Mr. Kieran was not entitled to exercise his stock options during his notice period.

The Restricted Stock Option Plan included the following provision:

> If Participant's employment with Micro or any Affiliate is terminated for any reason other than death, disability…or retirement…Restricted Shares…shall be repurchased by Micro at the lower of (x) the Purchase Price and (y) the Fair Market Value of such Shares on the Repurchase Date.…[A]ny termination of a participant's employment for any reason shall occur on the date Participant ceases to perform services for Micro or any Affiliate without regard to whether Participant continues thereafter to receive any compensatory

[28] *Ibid.* at para. 85.
[29] *Kieran v. Ingram Micro Inc.* (2004), 189 O.A.C. 58 (Ont. C.A.), leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 423 (S.C.C. January 27, 2005).
[30] *Ibid.* at para. 56.

> payments therefrom or is paid salary thereby in lieu of notice of termination.[31] [emphasis added]
>
> The Equity Incentive Plan included the following provision:
>
> Except as the Committee may at any time otherwise provide or as required to comply with applicable law, if the Participant's employment with Micro or its Affiliates is terminated for any reason other than death, disability, or retirement, the Participant's right to exercise any Non-Qualified Stock Option or Stock Appreciation Right shall terminate and such Option or Stock Appreciation Right shall expire, on…the sixtieth day following such termination of employment.[32] [emphasis added]

The Equity Incentive Plan also went on to define the date at which an employee ceased to perform services in a similar manner to the Restricted Stock Option Plan as one made "without regard to whether the employee continues thereafter to receive any compensatory payments therefrom or is paid salary thereby in lieu of notice of termination."[33]

> The Rollover Stock Option Plan included the following provision:
>
> Except as the Committee may at any time otherwise provide or as required to comply with applicable law, if the Participant's employment with the Participant's Employer or any of its Subsidiaries is terminated for any reason other than death, permanent and total disability, retirement, or Cause, the Participant's right to exercise any Non-Qualified Stock Option shall terminate and such Option shall expire on…the 60th day following such termination of employment.[34] [emphasis added]

The Rollover Stock Option Plan also provided that if the employer dismissed an employee, the employer would be "free from any liability or any claim under the Plan or otherwise, unless otherwise expressly provided in the Plan or in any Option Agreement".[35]

Justice Lang held that there was no ambiguity in the Plans at issue. Unlike plans considered by the Court of Appeal in other cases, the Plans at issue did not refer generally to "cessation of employment". Rather, they all differentiated between termination for death, permanent and total disability, retirement, and termination for any other reason. In this case, Mr. Kieran's employment terminated for another reason – he was wrongfully dismissed. The Restricted Stock

[31] *Ibid.* at para. 46.
[32] *Ibid.* at para. 47.
[33] *Ibid.* at para. 48.
[34] *Ibid.* at para. 49.
[35] *Ibid.* at para. 51.

Option Plan and the Equity Incentive Plan expressly provided that Mr. Kieran's employment terminated on the date he ceased to perform services, without regard to whether he received a compensatory payment or salary in lieu of notice. In addition, under the plain language of the Equity Incentive Plan and the Rollover Stock Option Plan, upon termination for "another reason", Mr. Kierian's ability to exercise his stock options terminated. Accordingly, Lang J.A. concluded that Mr. Kieran's right to exercise his stock options was not extended by the period of reasonable notice. He was therefore not entitled to damages with respect to his unexercised stock options.

(ii) Lloyd v. Oracle Corp. Canada Inc., [2004] O.T.C. 363 (Ont. Sup. Ct.)

In *Lloyd v. Oracle Corp. Canada Inc.*,[36] the plaintiff, Mr. Lloyd, had worked for the defendant for almost four years and held the position of regional vice-president when his employment was terminated. As part of his compensation, he had received grants of stock options pursuant to the company's Long-Term Equity Incentive Plan. In his action for wrongful dismissal damages, Mr. Lloyd sought compensation for stock options that would have been exercisable during the notice period.

At issue before Wilton-Siegel J. was the following provision contained in the Plan:

> If the Participant ceases to be employed by the Company…for any reason except death or disability, the Participant's Options may be exercised to the extent (and only to the extent) that they would have been exercisable upon the date of termination of the Participant's employment, within three (3) months after the date of termination (or such shorter time period as may be specified in the Grant), but in any event no later than the expiration date of the Option.[37]

At issue was the proper interpretation of "date of termination". Relying on a prior decision of the Ontario Court of Appeal *Veer v. Dover Corp. (Canada) Ltd. / Société Dover (Canada) Ltée*,[38] Wilton-Siegel J. held that, absent unusual circumstances or wording indicating that that the parties have turned their minds to the issue, "date of termination" should be interpreted to mean "termination according to law".[39] As there was no clear indication that the Plan language was "intended to displace the approach adopted in *Dover Corp.*"[40], Wilton-Siegel J. concluded that the plaintiff would be entitled to the value of all stock options that vested during the notice period. His conclusion was supported by two additional considerations. First, from an employee's perspective,

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[36] *Lloyd v. Oracle Corp. Canada Inc.*, [2004] O.T.C. 363 (Ont. Sup. Ct.).
[37] *Ibid.* at para. 25.
[38] *Veer v. Dover Corp. (Canada) Ltd. / Société Dover (Canada) Ltée*, [1999] O.J. No. 1727 (Ont. C.A).
[39] *Supra* note 36 at para. 83.
[40] *Ibid.* at para. 85.

"the terms and conditions of a stock option plan are not only non-negotiable but also instituted without any employee involvement whatever".[41] As such, its terms would be strictly construed against the employer. Second, the Plan at issue was drafted to comply with securities law in the United States. As the rights and obligations of employees and employers in Canada are different from those in the United States, Wilton-Siegel J. held that, "a Court should be particularly cautious in finding an intention to limit the exercise period on termination in absence of express wording to this effect in the defendant's plan."[42]

4. Pension Benefits

(i) Taggart v. Canada Life Assurance Co., [2006] O.J. No. 310 (Ont. C.A.)

In *Taggart v. Canada Life Assurance Co.*,[43] the Ontario Court of Appeal considered an employee's entitlement to pension benefits upon a dismissal without cause. In that case, the plaintiff, Mr. Taggart, had worked for the defendant for 30 years, reaching the position of Vice-President, Individual Life Insurance. Mr. Taggart participated in a registered pension plan and a supplemental pension plan. When his employment was terminated, Mr. Taggart was offered 24 months' notice, two of which would be working notice. Under the terms of his severance package, only his two months of working notice would be considered pensionable service. Had Mr. Taggart's entire 24 month notice period been included, he would have met the pension plan's threshold of "30 years of pensionable service"[44], entitling him to an unreduced pension at age 60. Mr. Taggart refused the severance package and brought a wrongful dismissal action against his employer. At issue before the Court of Appeal was whether the trial judge erred by awarding Mr. Taggart damages for the loss of pension benefits that would have accrued during the notice period.

The appellant, Canada Life Assurance, submitted that the terms of the pension plans were determinative of Mr. Taggart's rights. The registered pension plan contained the following language:

> 16.01 Employment Rights
>
> The establishment and implementation of the Plan shall not constitute an enlargement of any rights which a Member or Field Management Member may have as an Employee or Field Management Employee apart from the Plan. Membership in the Plan does not confer a right

[41] *Ibid.* at para. 84.
[42] *Ibid.*
[43] *Taggart v. Canada Life Assurance Co.*, [2006] O.J. No. 310 (Ont. C.A.).
[44] *Ibid.* at para. 3.

> on a Member or Field Management Member to require the Company to continue the Member or Field Management Member in its employment, and if the service of the Member or Field Management Member is terminated before the Member's or Field Management Member's Normal Retirement Date, such Member or Field Management Member has only such rights as are provided for under the Plan. The benefits conferred herein shall not be used to increase damages in respect of the dismissal or termination of employment of any Member or Field Management Member.[45]
>
> Similarly, the supplemental pension plan stated:
>
> 10.01 Employment Rights
>
> The establishment and implementation of the Supplemental Plan shall not constitute an enlargement of any rights which a Member may have as an employee apart from the Supplemental Plan. Membership in the Supplemental Plan does not confer a right on a Member to require the Company to continue the Member in its employment, and if the service of the Member terminated before the Member's Normal Retirement Date, such Member has only such rights as are provided for under the Supplemental Plan.[46]

The appellant argued that the pension plans clearly stipulated that pensionable service only accrues during periods of active employment, and absent specific language to the contrary, pensionable service only accrues when an employee is actively employed. As such, Mr. Taggart had no claim to any pension benefits he may have lost during the 22 month notice period.

Writing for the unanimous Court of Appeal, Sharpe J.A. rejected the appellant's proposition that the respondent's rights can be determined solely by the pension plan language. He noted that Mr. Taggart's claim was "not for pension benefits but rather for damages as compensation for the pension benefits he lost as a result of the…termination of his employment."[47] Accordingly, Sharpe J.A. determined that the proper method for analyzing Mr. Taggart's claims was to consider: (1) his common law right to damages for breach of contract; and (2) whether the terms of the pension plans alter or remove that common law right.

The Court noted that, as an employer is liable for breach of contract measured by loss of wages or salary and other benefits that would otherwise have been earned during the notice period, "[i]t follows that a terminated employee is entitled to claim damages for the loss of pension

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[45] *Ibid.* at para. 5.
[46] *Ibid.* at para. 6.
[47] *Ibid*. at para. 11.

benefits that would have accrued had the employee worked until the end of the notice period."[48] After reviewing a number of cases supporting this principle,[49] Sharpe J.A. noted that, "unless there is some contractual term limiting the respondent's right, he is entitled to claim damages for loss of pension benefits."[50] Justice Sharpe held that there was "nothing in the pension plans…capable of depriving the respondent of his common law right to damages for the loss of pension benefits that he would have earned during the notice period."[51] This conclusion was based on a number of factors.

First, the Court rejected the employer's argument that the plans could be read as requiring active service for pension benefits to accrue. Justice Sharpe found this argument "unpersuasive" because it operated to preclude damages as compensation for lost pension benefits. In particular, he found that this argument "ignores the legal nature of the respondent's claim" and the fact that, "by terminating the respondent earlier, the appellant became liable to pay damages that 'place the employee in the position that he or she would have been in had the contract been performed – the proper measure of damages for breach of contract'".[52]

Second, the Court found that the pension plans did not explicitly deny Mr. Taggart the right to damages for lost benefits. As the pension plans were unilateral contracts, the terms of which were imposed by the appellant on the respondent, its clauses excluding or limiting liability were strictly construed against the employer. In Sharpe J.A.'s view, the plans at issue did not state that a dismissed employee is disentitled to damages for the loss of pension benefits that would have accrued during the notice period. Rather, they stated that "the Plan shall not constitute an enlargement of any rights" of the employees and that the "benefits conferred herein shall not be used to increase damages in respect of the dismissal or termination of employment".[53] The Court held that the plan was not being used to increase any damages, as Mr. Taggart was not seeking entitlements beyond his common law damages for the loss of pension benefits that would have accrued during the reasonable notice period.[54] Rather, the employer was attempting to use the plan to limit the employee's common law right to damages, and that the plan language was "at best,

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[48] *Ibid*. at para. 13.
[49] See, e.g., *Durrant v. British Columbia Hydro & Power Authority* (1990), 49 B.C.L.R. (2d) 263 (B.C. C.A.); *Canadian Bechtel Ltd. v. Mollenkopf* (1978), 1 C.C.E.L. 95 (Ont. C.A.); and *Dowling v. Ontario (Workplace Safety & Insurance Board*) (2004), 37 C.C.E.L. (3d) 182 (Ont. C.A.).
[50] *Supra* note 43 at para. 15.
[51] *Ibid*. at para. 16.
[52] *Ibid.*, citing *Wallace v. United Grain Growers Ltd.,* [1997] 3 S.C.R. 701 at para. 115.
[53] *Ibid*. at para. 17.
[54] *Ibid*. at para. 22.

ambiguous"[55] in this regard. As such, the Court found that the trial judge did not err by awarding Mr. Taggart damages for the loss of his pension benefits to which he would have been entitled had he worked during his notice period.

(ii) Doran v. Ontario Power Generation Inc. (2007), 61 C.C.E.L. (3d) 232 (Ont. Sup. Ct.)

In *Doran v. Ontario Power Generation Inc.*[56] the Court considered whether pension benefits earned during a notice period reduce a plaintiff's wrongful dismissal damages award. In that case, Mr. Doran had been constructively dismissed after 30 years of employment. After reviewing expert evidence valuing his pension benefits, the Court concluded that "Mr. Doran received $118,000.00 more in terms of the commuted value of his pension benefits by retiring on July 1, 2004 than he would have received if he had worked through the reasonable notice period of 24 months".[57] In light of this fact, Ontario Power Generation Inc. submitted that the increase in the value of Mr. Doran's pension benefits should reduce the other damages awarded to Mr. Doran as a result of his constructive dismissal.

Relying on a decision from the Ontario Court of Appeal,[58] Forestell J.A. refused to offset the pension benefits from the damages for wrongful dismissal because pension benefits received during the notice period are not payments which mitigate loss of salary. Accordingly, Forestell J. determined that, while Mr. Doran did not experience any pension loss, and in fact "is in a better overall position based on the commuted value of the pension payments", no deduction should be made from the other amounts.[59] The contributions Mr. Doran made to the pension plan during the notice period were, however, deducted.

(iii) Waterman v. IBM Canada Ltd. 2011 BCCA 337

A recent decision from the Court of Appeal for British Columbia may have future implications for an employee's entitlement to pension benefits during the notice period, as the Supreme Court of Canada will hear the appeal of the case on December 14, 2012. In that case, *Waterman v. IBM Canada Ltd.*,[60] the Court of Appeal considered whether the trial judge was correct

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[55] *Ibid.*
[56] *Doran v. Ontario Power Generation Inc.* (2007), 61 C.C.E.L. (3d) 232 (Ont. Sup. Ct.).
[57] *Ibid.* at para. 81.
[58] *Peet v. Babcock & Wilcox Industries Ltd.* (2001), 53 O.R. (3d) 321 (Ont. C.A.).
[59] *Supra* note 56 at para. 87.
[60] *Waterman v. IBM Canada Ltd.* 2011 BCCA 337, leave to appeal to S.C.C. granted, 2012 CarswellBC 950 (S.C.C. April 05, 2012).

when he determined that Mr. Waterman was entitled to receive pension benefits during his notice period in addition to damages for notice of termination.

Mr. Waterman began working for IBM in the United Kingdom in 1967 at the age of 24. He worked for IBM Canada Ltd. ("IBM") from 1969 until his employment as an Advisory Software Service Specialist was terminated without cause on May 22, 2009 on account of the poor economy and the Company's need to reduce spending. IBM provided Mr. Waterman with two months' working notice and offered him a severance package (the terms of which were not discussed in detail in the judgments). Mr. Waterman declined to accept the severance package offered by IBM and brought an action against IBM for wrongful dismissal.

At the time of termination, Mr. Waterman was 65 and eligible to retire on a full pension in accordance with the terms of the company's defined benefit pension plan. As an employee working beyond his normal retirement age, Mr. Waterman's pension benefits were payments immediately payable upon termination. Accordingly, following his termination, Mr. Waterman began receiving full pension benefits of approximately $2,124 per month. One issue before the trial judge was whether the retirement benefits paid during Mr. Waterman's notice period should be deducted from his award of damages for wrongful dismissal. IBM argued that, to find otherwise would result in double recovery.

The pension plan at issue stipulated that an employee was entitled to receive pension income while receiving a salary if the employee is 71 or over; however, it did not explicitly state whether an employee could concurrently receive salary and pension benefit payments before age 71. Following a prior case which established that there is a distinction between disability benefits (which are deductible from damages awards) and retirement benefits, the trial judge concluded that Mr. Waterman's retirement benefits should not be deducted from his damages award.[61] He did so with clear reluctance: "Until higher authority holds otherwise, pension payments are not deductible from a damage award for wrongful dismissal."[62]

Writing for the unanimous Court of Appeal, Prowse J.A. upheld the lower court's decision. In doing so, Prowse J.A. considered the Supreme Court of Canada's determination that disability benefits form part of the overall employment contract.[63] Although she held that this "one contract" approach meant that Mr. Waterman's pension plan was part of his employment contract

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[61] *Ibid*. at paras. 45-51.
[62] *Ibid*. at para. 51.
[63] *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315.

with IBM,[64] Prowse J. held that retirement benefits were distinguishable from disability benefits. She noted that disability benefits are premised on an employee's inability to work and are therefore a substitute for the employee's salary. In contrast, pension benefits are not a salary substitute but are rather compensation for past service.

After canvassing wrongful dismissal and tort cases addressing whether pension benefits should be deducted from damages awards, Prowse J. concluded that pension benefits "were not designed to indemnify the plaintiff against loss of salary",[65] but were rather benefits that belonged to the employee "by virtue of past work".[66] She held that viewing pension benefits as property of the employee was supported by the features of the pension plan at issue: the employer's contributions were put in a fund in the plaintiff's name; the plaintiff could designate a beneficiary of the benefits; and the plaintiff could transfer the benefits to another RRSP or employer.[67] As a benefit belonging to Mr. Waterman as a result of his past service to IBM, Prowse J. concluded that the pension benefits should not be deducted from his damages award.

While payment of the pension benefits would normally not have been triggered until Mr. Waterman retired on his own initiative, Prowse J. held that IBM effectively forced Mr. Waterman into early retirement by terminating his employment, which thereby triggered payment of his pension benefits. Justice Prowse noted that, having effectively compelled Mr. Waterman to take the pension benefits, IBM could not later complain that he was not entitled to retain those benefits.[68] Although not raised by Mr. Waterman, Prowse J. noted as a "practical matter" that a policy argument could be made in support of her conclusion:

> [I]f pension benefits could be deducted from salary in circumstances such as these, the result could be viewed as an invitation to employers facing economic hardship to terminate senior employees with many years of service who have vested pension rights and entitlement to a significant pension, rather than more junior employees without vested rights, since laying off the former would result in a significant offset of pension against salary in estimating damages for wrongful dismissal. A policy argument could be mounted for arguing that the employment contract should be

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[64] *Supra* note 60 at para. 30.
[65] *Ibid*. at para. 40.
[66] *Ibid*. at para. 45.
[67] *Ibid.* at para. 60.
[68] *Ibid*. at para. 63.

> interpreted in such a way to avoid such a result, but no such policy argument was advanced in this case.[69]

It should be noted that a key factor in this decision was the lack of an express provision in the pension plan prohibiting the simultaneous receipt of salary and pension benefits. As such, whether an employee is ultimately entitled to receive pension benefits during his or her notice period upon termination of employment would be determined in accordance with terms of the applicable benefit plan. In addition, whether the distinction drawn by the courts with respect to pension benefits and disability benefits is good law or if the result instead amounts to double recovery will be determined in due course by the Supreme Court of Canada.

5. Overtime

Where overtime is part of the employee's regular compensation, and it is within the reasonable expectations of the parties that the employee would have received overtime pay during the notice period, it is generally recoverable.[70] Eligibility for and quantification of overtime will depend on the circumstances in each case. It may be appropriate to look to the employee's historical overtime earnings and to earnings of other members of the work force during the notice period. [71]

(i) Olivares v. Canac Kitchens, 2012 ONSC 284

The Plaintiff claimed that overtime played an important role in his overall compensation. He argued that his damages should be assessed based on his total average earnings including overtime. Justice Lederman found in his favour, holding that the calculation of damages should be based on the global compensation that the Plaintiff was receiving including overtime.[72]

(ii) Contreras v. Canac, 2010 ONSC 849

At the time of his termination, the Plaintiff was performing modified duties due to an injury. Prior to the injury, the Plaintiff had worked significant overtime hours. The Plaintiff's claim for damages was based on the overtime he would have earned had he not been injured. Justice Pattillo

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[69] *Ibid.* at para. 64.
[70] *Munoz v. Kohler Canada Co.* (2008), 70 C.C.E.L. (3d) 72 at 21 (Ont. Sup. Ct.).
[71] *Ibid.* at 22.
[72] *Olivares v. Canac Kitchens*, 2012 ONSC 284 at paras. 17-19 (Ont. Sup. Ct.).

rejected this approach, holding that the calculation should be based on the amount of overtime the Plaintiff was receiving at the time of his termination.[73]

(iii) Panimondo v. Shorewood Packaging Corp. (2009), 73 C.C.E.L. (3d) 99 (Ont. Sup. Ct.)

The Defendant argued that due to the downturn in its business it was likely that overtime would have been reduced or eliminated had the Plaintiff continued to work through the notice period. Justice Strathy found that it was unlikely that substantial overtime would have been paid. Nevertheless, because overtime was a regular and expected component of the Plaintiff's wages, a modest allowance of $2000 for overtime was allowed.[74]

6. Commissions

Employees who have had portions of their income paid in the form of commissions may also recover damages for any unpaid commissions earned. In these circumstances, the onus is on the plaintiff to establish that he or she is entitled to damages for the failure on the part of the defendant to pay commissions.[75]

An employee can also claim damages for the loss of opportunity to earn commissions over the notice period.[76] The plaintiff will have the onus of proving that there was a reasonable probability that he or she would have received commissions during that time.[77]

(i) Katz v. Canada Mortgage & Lending Corp., 2009 CarswellOnt 1134 (Ont. Sup. Ct.)

The Plaintiff claimed damages of $20,000.00 for the notice period, combining his base salary and an estimate of commissions. Justice Mulligan held that it was difficult to speculate on the exact amount of commission income the Plaintiff would have earned had his employment continued. He was awarded compensation equal to 4 months' of his base salary only, in addition to the value of partially earned commissions that remained owing to him.[78]

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[73] *Contreras v. Canac*, 2010 ONSC 849 at para. 51 (Ont. Sup. Ct.).
[74] *Panimondo v. Shorewood Packaging Corp.* (2009), 73 C.C.E.L. (3d) 99 at paras. 56-57 (Ont. Sup. Ct.)
[75] *D'Aoust v. 1374202 Ontario Inc.* (2003), 32 C.C.E.L. (3d) 281 at para 25. (Ont. Sup. Ct.); *Hobbs v. TDI Canada Ltd.* (2004), 192 O.A.C. 141 at para. 51 (Ont. C.A.).
[76] *Prozak v. Bell Telephone Co. of Canada* (1984), 46 O.R. (2d) 385 at para. 61 (Ont. C.A.) [*Prozak*]; *McIntosh v. C.T.F. Supply Ltd.*, 2001 CarswellOnt 4643 at paras. 42-43 (Ont. Sup. Ct.).
[77] *Prozak*, *ibid*. at para. 66.
[78] *Katz v. Canada Mortgage & Lending Corp.*, 2009 CarswellOnt 1134 at paras. 28-29, 41 (Ont. Sup. Ct.).

(ii) Micallef v. Image Processing Systems Inc. (1999), 46 C.C.E.L. (2d) 9 (Ont. Sup. Ct.)

The Defendant argued that the Plaintiff needed to be in its employ at the time a payment was received in order to be paid the commission related to that payment. That argument was rejected. Such a claim could only be supported if the employer had valid policy stipulating that commissions would only be paid after the related payment was received by the employer. Justice Hoilett's reasons to this effect were as follows:

> . . . To the extent . . . that sales were consummated by the plaintiff, I am of the view that he is entitled to the appropriate commission on those sales. I reject the position taken by the defence, however, that the plaintiff had to be in the employ of the defendant at the time payment was received in order to be paid the commission. Absent some explicit policy to that effect, and there is no evidence to that effect, the distinction must validly be made between the time a commission is earned and the time that it becomes payable. It is perfectly reasonable for an employer to say that a commission will not become payable until the account is paid; it is quite another thing to say that the commission will not be paid simply because an employee was not in its employ at the time the account was paid, notwithstanding the fact the sale was the result of the employee's efforts.[79] (emphasis added)

7. Reference Letters

An employer is under no legal obligation to provide a letter of reference.[80] Terminated employees, however, may wish to request reference letters from their former employers as this can assist in their job search efforts. If the employer fails to provide a reference letter, this may provide grounds to seek an extension of the notice period.

(i) Hoy v. Fag Bearings Limited, 2007 CarswellOnt 8643 (Ont. Sup. Ct.)

Justice Haines found that the employer`s failure to provide an employment letter may not have been the reason the Plaintiff was unsuccessful in finding alternate employment, though it probably played a role. The Defendant should have appreciated that this failure would compromise the Plaintiff's efforts and lengthen the time it would take to find suitable alternative employment. The Plaintiff's notice period was therefore extended from 12 to 14 months.[81]

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[79] *Micallef v. Image Processing Systems Inc.* (1999), 46 C.C.E.L. (2d) 9 at para. 15 (Ont. Sup. Ct.).
[80] *McNevan v. AmeriCredit Corp.*, 2008 ONCA 846 at para 57 (Ont. C.A.).
[81] *Hoy v. FAG Bearings Ltd.*, 2007 CarswellOnt 8643 at para. 12 (Ont. Sup. Ct.).

(ii) Hatch-Stewart v. St. Catharines Museum, 2007 CarswellOnt 7416 (Ont. Sup. Ct.)

A reference letter was provided but the Plaintiff claimed that it was of "no use" in her job search efforts. Justice Lofchik refused to extend the notice period because the Plaintiff provided no evidence that the form of the letter contributed to her inability to obtain alternate employment.[82]

8. Vacation Pay

Pay for accrued vacation accumulated prior to termination is compensable in a wrongful dismissal claim. Ontario courts have also considered whether employees are entitled to compensation for vacation pay *during* the notice period. Compensation on this basis has generally been refused.[83]

Notably, the Court of Appeal, in *Evangelista v. Number 7 Sales Limited*[84], recently confirmed that an employee may be entitled to receive unpaid statutory holiday pay and vacation pay *beyond the limitation period* where the employee was not aware of his entitlement before that time.[85] The Court of Appeal in that case affirmed the trial judge's decision to award the employee holiday and vacation pay going back 8 years.

(i) Munoz v. Kohler Canada Co. (2008), 70 C.C.E.L. (3d) 72 (Ont. Sup. Ct.)

A deduction from the Plaintiff's severance pay which was attributed to vacation pay was added back to the Plaintiff's damages because it could not be explained. Justice Strathy emphasized that employers should take care to carefully and scrupulously calculate any deductions for vacation pay from severance and be prepared to provide a timely and complete explanation of same to an employee:

> The amount paid to an employee at the time of termination, particularly where the employer elects to pay the statutory minimum, should be scrupulously and fairly calculated. This is even more so where deductions are made from the amounts to which the employee is otherwise entitled. Fairness also requires that the employee be given a timely and complete explanation for the deduction. This was not done at the time and it was not done before me. I disallow the deduction, and it should be added back to Mr. Munoz's damages.[86]

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[82] *Hatch-Stewart v. St. Catharines Museum*, 2007 CarswellOnt 7416 at para. 28 (Ont. Sup. Ct.).
[83] *Ibid.* at paras. 38-39; *Cronk v. Canadian General Insurance Co.* (1995), 25 O.R. (3d) 505 at paras. 10-11 (Ont. C.A.); *Supra* note 70 at 28.
[84] *Evangelista v. Number 7 Sales Ltd.*, 2008 ONCA 599 at paras. 45-46 (Ont. C.A.).
[85] *Ibid.* at paras. 43-45.
[86] *Supra* note 70 at 25.

Justice Strathy further held that compensation during the notice period should not allow a component for vacation in the circumstances of the case, as this would amount to double recovery for the Plaintiff:

> The defendant's evidence on this issue, which I accept, is that Mr. Munoz was entitled to four weeks' vacation annually, with pay, and that if he did not take vacation, he was entitled an additional eight per cent of his salary (pro rated over the proportion of the four weeks that he did not use) in lieu of vacation.
>
> I accept the defendant's submission that for at least one month of the period for which I am awarding damages in lieu of notice, and perhaps somewhat more, the plaintiff was on holiday in Chile and was not engaged in mitigating efforts at all. In the particular circumstances of this case, to award compensation in lieu of notice for this period and an allowance for vacation would be double recovery and a windfall for the plaintiff. I therefore make no separate award for loss of vacation. [87]

(ii) Hatch-Stewart v. St. Catharines Museum, 2007 CarswellOnt 7416 (Ont. Sup. Ct.)

Though the Defendant was only required to pay statutory vacation pay at a rate of eight per cent (8%) on the first eight weeks of the Plaintiff's severance period, it paid the Plaintiff the equivalent of the four weeks' vacation she would have earned had she worked for the entire calendar year as part of her severance. The Plaintiff was therefore entitled to no further compensation in respect of vacation pay during the notice period. Justice Lofchik's reasons in this regard were as follows:

> So far as payment of vacation pay during the period of notice beyond 2004 is concerned, I am of the view that to award vacation pay on top of an assessment for reasonable notice would constitute double indemnity. (see *Scott v. Board of School Trustees of District No. 29 (Lillooet)*(1991), 60 B.C.L.R. 273 (C. A.).
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> The Ontario Court of Appeal in ***Cronk v. Canadian General Insurance***, *supra*, has upheld the principle from ***Scott***. In that decision the Court concluded that the only vacation pay an employee is entitled to during the period of reasonable notice is the statutory vacation pay mandated by the ***Employment Standards Act*** (the *"**ESA**"*). The ***ESA*** provides that statutory vacation pay must be provided for the statutory notice period . . . [88]

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[87] *Supra* note 70 at 28.
[88] *Supra* note 82 at paras. 38-39.

The Plaintiff was, however, entitled to 5 days of paid vacation carried over from the previous year.[89]

(iii) Geluch v. Rosedale Golf Assn. (2004), 32 C.C.E.L. (3d) 177 (Ont. Sup. Ct.).

The Plaintiff claimed entitlement to 21 weeks' accrued vacation pay, despite the employer's policy that employees could not accrue vacation days from year to year without managerial approval. As a senior executive himself, the Plaintiff did not believe the policy applied to him. Justice Himel found that this "use it or lose it" vacation policy was prohibited by the *Employment Standards Act,* 1990. Evidence was also led that another employee had been paid for accrued vacation. The Plaintiff was therefore entitled to be compensated for the untaken accrued vacation pay, a value fixed at $50,000.[90]

9. Lost Insurance Benefits

In Ontario, a wrongfully dismissed employee may claim the pecuniary value of lost benefits flowing from his or her dismissal, in addition to lost salary.[91] Lost benefits can include a range of items such as pension, disability, medical and health insurance benefits as well as other fringe benefits (described below).

In the simplest scenario, where evidence to the value of benefits is not disputed between the parties, the lost benefits can be quantified by adding them together and calculating their value on a monthly basis. In situations where the quantification of lost benefits is less clear, however, the Ontario courts have permitted the valuation of benefits in the absence of evidence, though not on summary judgement motions. The Plaintiff has the onus in proving the value of benefits in these scenarios.[92]

(i) Poole v. Whirlpool Corporation, 2011 ONSC 4100

The Plaintiff submitted that a value of 15% of his salary should be awarded for the loss of his group benefits, other than pension benefits. In the absence of evidence, it was not appropriate, on a summary judgment motion, to fix damages on a "rule of thumb" or approximate basis.[93]

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[89] *Ibid.* at para. 40.
[90] *Geluch v. Rosedale Golf Assn.* (2004), 32 C.C.E.L. (3d) 177 at para. 202 (Ont. Sup. Ct.).
[91] *Davidson v. Allelix Inc.* (1991), 7 O.R. (3d) 581 at para. 21 (Ont. C.A.).
[92] *Supra* note 70.
[93] *Poole v. Whirlpool Corporation*, 2011 ONSC 4100 at para. 46 (Ont. Sup. Ct.).

(ii) Toole v. Acres Inc. (2007), 61 C.C.E.L. (3d) 8 (Ont. Sup. Ct.)

Though the evidence was "very scanty" regarding the value of lost benefits, Justice Cumming held that it was reasonable to infer that the Plaintiff had a loss of benefits. The value of lost benefits was fixed at 5% of the plaintiff's gross salary.[94]

(iii) Geluch v. Rosedale Golf Assn. (2004), 32 C.C.E.L. (3d) 177 (Ont. Sup. Ct.)

The value of the plaintiff's health, medical and pension contribution benefits was fixed at 15% of salary. The employer's contribution to the plaintiff's pension was six to seven percent of his base salary but there was no evidence as to the value of health and medical benefits.[95]

(iv) Grossinger v. Olympia Business Machines Canada Ltd., 2001 CarswellOnt 102 (Ont. Sup. Ct.), aff'd 2002 CarswellOnt 2076 (Ont. C.A.)

As the value of collateral benefits was not proved with any degree of precision, those benefits were not taken into account in assessing damages.[96]

10. RRSP Contributions, Matching and Special Damages

Employees are often remunerated by way of set contributions to RRSP plans, or by matching employee contributions to RRSP plans. As with other benefits, RRSP contributions can be compensable in wrongful dismissal actions.

In such cases, the employee's damages can include the value of the RRSP contributions for the duration of the notice period.[97] The value of the RRSP contributions for the duration of the notice period will generally be calculated on a pro-rata basis.

(i) Zorn-Smith v. Bank of Montreal (2003), 31 C.C.E.L. (3d) 267 (Ont. Sup. Ct.)

Justice Aitken awarded special damages of $8,378.57 and $10,382 representing, respectively, income taxes paid on a de-registered RRSP and lost investment opportunities relative to the de-registered RRSP. The Plaintiff had had to de-register the RRSP in order to pay for ongoing living expenses following her termination. Justice Aitken held that the de-registration of the RRSP was a direct and foreseeable result of the Defendant terminating the Plaintiff's employment and

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[94] *Toole v. Acres Inc.* (2007), 61 C.C.E.L. (3d) 8 at para. 40 (Ont. Sup. Ct.).
[95] *Supra* note 90 at para. 206.
[96] *Grossinger v. Olympia Business Machines Canada Ltd.*, 2001 CarswellOnt 102 at para. 10 (Ont. Sup. Ct.), aff'd 2002 CarswellOnt 2076 (Ont. C.A.).
[97] *Egan v. Alcatel Canada Inc.* (2006), 206 O.A.C. 44 at para. 39 (Ont. C.A.).

denying her disability benefits when they were well aware of her personal and financial circumstances:

> It was entirely foreseeable that with Ms. Zorn-Smith not receiving disability benefits, not receiving a salary, and being advised by her doctor not to return to work at the Bank, Ms. Zorn-Smith would be in very difficult financial circumstances, and would have to use whatever resources she had, including registered retirement savings plans, to support herself and her family. This was a direct and foreseeable result of the Bank denying disability benefits to Ms. Zorn-Smith and terminating her employment without cause or notice.[98]

(ii) Halina v. Micro Hydraulics Inc., 2004 CarswellOnt 9865 (Ont. Sup. Ct.)

The Plaintiff was entitled to an annual $3,600.00 contribution to his RRSP. The Defendant stopped making the contributions approximately 8 months prior to his termination. Taking into account both the outstanding RRSP contributions for the time in which the Plaintiff was employed and the 17 month-notice period, the RRSP awarded was calculated pro-rata, based on an agreed amount of $300/month, for a total value of $7,607.14.[99]

(iii) Timm v. Juran Institute (Canada) Ltd., 2004 CarswellOnt 2864 (Ont. Sup. Ct.)

The Plaintiff claimed for RRSP contributions to be prorated to the end of the notice period, calculated at 5% of his salary. Justice Hoilett held that the defendant showed no reason to disentitle the Plaintiff from being awarded that amount and fixed the award based on the Plaintiff's calculation.[100]

11. Other Fringe Benefits

Contracts of employment, particularly in the case of executives, often provide a wide range of benefits beyond salary. These "fringe benefits" can include insurance, pension contributions and bonus plan (as described above), as well as the following (keeping in mind that this list is not exhaustive):

- car allowances/use of a company car/payment of car expenses
- use of a company cellphone/smartphone
- computer and internet expenses

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[98] *Zorn-Smith v. Bank of Montreal (*2003), 31 C.C.E.L. (3d) 267 at para. 163 (Ont. Sup. Ct.).
[99] *Halina v. Micro Hydraulics Inc.*, 2004 CarswellOnt 9865 at para. 17 (Ont. Sup. Ct.).
[100] *Timm v. Juran Institute (Canada) Ltd.*, 2004 CarswellOnt 2864 at para. 15 (Ont. Sup. Ct.).

- club and professional association memberships
- health/fitness allowances
- education expenses (for example, MBA tuition)
- living and moving expenses
- perks such as employee discounts, special rates and privileges

These "other" fringe benefits can also be claimed as part of the compensation awarded for the notice period. As with the benefits described in the sections above, entitlement will be determined on a case by case basis.

(i) Katz v. Canada Mortgage & Lending Corp., 2009 CarswellOnt 1134 (Ont. Sup. Ct.)

The Plaintiff was awarded a gift certificate for a trip to Mexico valued at $5,000.00. There were no limitations to this gift at the time of presentation. The Plaintiff was later told that he was not entitled to the prize due to his termination. Justice Mulligan found that but for the termination of his employment, the Plaintiff would have been fully entitled to take advantage of the trip to Mexico. He was therefore awarded the value of the trip.[101]

(ii) Sundeen v. Polymer Technologies Inc. (2002), 22 C.C.E.L. (3d) 102 (Ont. Sup. Ct.)

The Plaintiff was hired as the President and Chief Operating Officer of the Defendant and required to relocate his family as a result. The employment contract provided reimbursement for accommodation expenses, actual moving expenses and miscellaneous expenses related to same. The Plaintiff was terminated without cause 12 weeks later. Justice Spence found that while the moving expenses were not incurred until after the termination, they were caused by and related to his performance of the contract prior to termination and were reasonably compensable as a result.[102]

(iii) McNamara v. Alexander Centre Industries Ltd. (2000), 2 C.C.E.L. (3d) 310 (Ont. Sup. Ct.)

The Plaintiff reported that he had used the company car for personal use approximately 10% of the time. The Plaintiff explained that much of his personal use had also been mixed with business use. The Plaintiff lost not only the percentage use he calculated for Revenue Canada purposes but also the availability of the vehicle at all times. Justice Hennessy found in his favour, calculating the value of the lost benefit in accordance with the following reasoning:

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[101] *Supra* note 78 at paras. 35-36.
[102] *Sundeen v. Polymer Technologies Inc.* (2002), 22 C.C.E.L. (3d) 102 at paras. 18-20 (Ont. Sup. Ct.).

> The Plaintiff was provided with the use of a leased vehicle, primarily to perform his duties. All expenses were paid by the Defendant. The Plaintiff had the unrestricted use of the vehicle for personal purposes. Throughout this period the Plaintiff reported that the vehicle was used for personal use, approximately 10% of the time. The Plaintiff explained that much of his personal use had also been mixed with business use and therefore reporting was not completely useful for the analysis required for the assessment of the value of the lost benefit. The vehicle had been purchased for $27,000. The annual costs for the car were approximately $300.00 per month exclusive of the lease cost. The Plaintiff lost not only the percentage use he calculated for Revenue Canada purposes but also the availability of the vehicle at all times. I accept the proposal by the Plaintiff that the vehicle be valued at $500.00 per month.[103]

The Plaintiff was also awarded the value of social club and professional association dues.[104]

(iv) Veer v. Dover Corp. (Canada) Ltd. / Société Dover (Canada) Ltée, [1997] O.J. No. 3821 (Ont. Ct. J.)

The Plaintiff was a senior employee, terminated by his employer of 40 years. In addition to being entitled to the pecuniary value of lost benefits, he was awarded the following:

- Out-of-pocket expenses for prescription drugs and dental services
- Financial planning advice
- Preparation of income tax returns
- Annual golf fees
- Car lease payments
- Operating expenses for the car105

12. Mitigation and Retraining Expenses

Dismissed employees may seek compensation for costs incurred in mitigating damages. Expenses which are reasonable and related to the dismissal have been deemed recoverable by the courts. In situations where there is not enough evidence or documentation to support such claims they have been rejected.

Mitigations and retraining expenses may include:

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[103] *McNamara v. Alexander Centre Industries Ltd.* (2000), 2 C.C.E.L. (3d) 310 at para. 35 (Ont. Sup. Ct.).
[104] *Ibid.* para. 31.
[105] *Veer v. Dover Corp. (Canada) Ltd. / Société Dover (Canada) Ltée,* [1997] O.J. No. 3821 at para. 53 (Ont. Ct. J.).

- moving expenses incurred to secure alternate employment
- outplacement and career transition counselling
- retraining expenses
- transportation, travel and parking expenses to attend a job interview or to secure alternate employment

(i) Day v. JCB Excavators Limited, 2011 ONSC 6848 (Ont. Sup. Ct.)

The Plaintiff claimed for reimbursement of expenses related to his home office and car during the period of reasonable notice. The list of expenses included the use of a home fax machine, home/cell phone, internet access at home and away, American Express and U.S. Air Club memberships, office supplies, and a clothing and gratuity allowance. The Plaintiff suggested that some of these expenses related to efforts he made to search for alternative employment but no details were provided. Justice Grace rejected the claims, stating that it would be "pure guesswork to allocate any of the claimed costs to that task". [106]

(ii) Yiu v. Canac Kitchens Ltd. (Kohler Ltd.), 2009 CarswellOnt 1164 (Ont. Sup. Ct.)

The cost of vocational counseling was awarded because the service was reasonably necessary for the Plaintiff to conduct an effective job search. The claim for the value of career counseling (which he had not yet taken or paid for) was rejected because the cost was not incurred during the notice period.[107]

(iii) Geluch v. Rosedale Golf Assn. (2004), 32 C.C.E.L. (3d) 177 (Ont. Sup. Ct.)

The Plaintiff did not find alternate employment until 13 months after his termination. The new position required him to move from Toronto to Vancouver. Justice Himel found that the Plaintiff's expenses such as airfare, costs of transporting a car, licence fee, moving, and telephone connection were related to his dismissal, reasonable and therefore recoverable as mitigation expenses. Expenses related to the sale of his home, however, we not recoverable:

> . . . At trial, [the Plaintiff] submitted a list of expenses which include the cost of real estate commission and legal fees on the sale of his Toronto home, the penalty for prepayment of his mortgage, the cost of an airline ticket to Vancouver, the cost of transporting his car to British Columbia, the cost of a car inspection, moving costs, telephone connection fees in British Columbia, and miscellaneous

[106] *Day v. JCB Excavators Limited*, 2011 ONSC 6848 at paras. 75-77 (Ont. Sup. Ct.).
[107] *Yiu v. Canac Kitchens Ltd. (Kohler Ltd.)*, 2009 CarswellOnt 1164 at para. 24 (Ont. Sup. Ct.).

> expenses for photocopies and courier. Counsel for Rosedale did not dispute the quantum but argued that since Mr. Geluch received a capital gain of $27,500 on the sale of his Toronto house, any mitigation expenses are offset.
>
> In reviewing the expenses claimed, I agree that those expenses related to the sale of his Toronto house should be offset against any capital gains he made in that regard. As those expenses are not consequential upon Mr. Geluch's dismissal and would have been incurred after the reasonable period of notice in any event, they are not recoverable. The remaining expenses . . . are reasonable and should be recoverable. . . .[108]

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This paper is intended for informational purposes only, and may not be applicable to any particular circumstance. The information provided is summary in nature and does not constitute legal advice. An employer or employee should consult with legal counsel in dealing with specific employment-related issues.

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[108] *Supra* note 90 at paras. 203-204.