INHOUSE

Chief Justice dissents, but employee prevails in IBM pension case

Quoting Erin R. Kuzz
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After a five-year battle, a British Columbia man can keep his pension benefits and damages awarded after his former employer, IBM, challenged a lower court decision all the way to the Supreme Court.

On Friday, in a 7-2 decision the Supreme Court of Canada dismissed an appeal brought by IBM Canada in *IBM v Waterman* which looked at whether pension benefits received by Waterman during his wrongful dismissal notice period should be deducted from his damages award.

"This means older workers can breathe a sigh of relief that they won't be summarily dismissed and forced to take their pension," says Clio Godkewitsch, an associate with Koskie Minsky LLP.

"It's the correct decision and it affirms the law at least in Ontario that we have understood forever that pension benefits are a form of deferred compensation," says Godkewitsch. "It shouldn't be such a shocker to employers. This doesn't change anything for employers but it's always good to have the highest court in the land give its nod of approval to the existing law."

Richard Waterman was employed by IBM (U.K.) Ltd. and then IBM Canada Ltd. for more than 40 years as a software services specialist before being terminated at the height of the recession in 2009 — without cause and with two months notice.

When his employment ended, he was 65 and eligible to receive benefits under IBM's employer-funded pension plan. He had no intention of retiring, declined the severance package offered by IBM and sued for wrongful dismissal. Following a summary trial, he was awarded damages in the amount of $93,305.32, based on a reasonable notice period of 20 months.

After termination, he received a pension benefit of $2,124.25 per month as per the company's defined-benefit pension plan. The trial judge held that the appropriate notice period was 20 months and awarded damages based on lack of notice for 18 months. Waterman was paid pension benefits after termination based on a fully vested pension.

The trial judge did not deduct the amount of pension benefits paid during the notice period from the damages award. However, IBM Canada Ltd. appealed, arguing an amount equal to the pension benefits should have been deducted from damages. The Court of Appeal for British Columbia dismissed the appeal and now so has the Supreme Court.

It took the SCC a year to render a decision on a matter many thought was settled in Canadian employment law.

Godkewitsch says she was "surprised" it was appealed to the SCC and that it granted leave.

"It's certainly an issue of national importance but I thought the law was fairly settled in this regard," she says.

Of interest to some in the employment bar was that Chief Justice Beverley McLachlin was one of the two dissenting on the case along with Justice Marshall Rothstein.

"I think the dissent rationale is compelling," says Erin Kuzz of Sherrard Kuzz LLP. "For them it really came down to it being a defined-benefit versus a defined-contribution benefit plan. If you have a defined-benefit plan where at the end of the day you're going to continue to get those benefits for the rest of your life when you retire, it's not like having a bucket of money you're drawing against. So on the minority reasoning why should you get to double dip for the notice period?"

While the decision wasn't a huge surprise it was "kind of disappointing" from the employer side, says Craig Neuman of Neuman Thompson in Edmonton.

"When leave was initially granted on the IBM case there were some — me included — who were hopeful this area might get sorted out in a more rational way than unfortunately the majority of the court has concluded is the appropriate direction," says Neuman.

"Speaking for the majority, Justice [Thomas] Cromwell said the collateral benefits issues in determining damages in figuring out a breach of contract case has seemed to bedevil judges for a long time and seems to be continuing to do that in terms of the decision that came out today."

Neuman was involved in a case in Alberta (*Edwards v. Royal Alexandra Hospitals*) where a similar conclusion was reached involving what to do with pension benefits post termination. The Court of Appeal in Alberta came to the same decision the B.C. Court of Appeal adopted in IBM, which the SCC endorsed.

One thing that concerns Godkewitsch is employers may now amend their pension plans to say an employee can't receive both a pension and wrongful dismissal damages contemporaneously.

"That was one of the facts in this case — there was nothing in the plan that precluded Waterman from taking his pension and receiving damages for that period."

Neuman says theoretically, if an employer has control over the pension plan, there might be things they could contemplate doing.

"I could see some employers if they had opportunity and committed the time and attention to the not-inconsiderable hoops of making amendments to pension plan documents and getting pension regulators to approve those kinds of changes, but it would not be a simple proposition and won't be an option for many employers," he says.

There is an aspect of the majority reasons that may give employer counsel new opportunities to argue in future cases that receipt of disability benefits during the notice period should be deducted from wrongful dismissal damages, says Hendrik Nieuwland of Shields O'Donnell MacKillop LLP, even if the employee contributed to the disability benefits plan.

The Ontario Court of Appeal has relied heavily on employee contribution to disability benefits – no matter how small – to justify its refusal to deduct disability benefits. (*Sills v. Children's Aid Society of the City of Belleville* and *McNamara v. Alexander Centre Industries Ltd.*).

However, in the majority reasons in *Waterman*, Cromwell says there are "strong arguments against giving this consideration [employee contribution] much weight as an explanation of why particular benefits should or should not be deducted."

This is because "whether deducted from damages or not, the plaintiff receives the benefits." In other words, the plaintiff gets what he paid for even if the benefits are deducted from damages.

"In my view, these statements by Justice Cromwell make the Court of Appeal's reasoning in *Sills and McNamara* less persuasive," says Nieuwland.

Waterman increases the importance of the reasoning in the Supreme Court's earlier decision in *Sylvester v. British Columbia*. As noted by the majority in Waterman, the Supreme Court held in Sylvester that the purpose of disability benefits was to replace wages due to an employee's inability to work.

"The majority's analysis in *Waterman* says this factor favours deducting benefits from damages," says Nieuwland.

"The Supreme Court in *Sylvester* said that receipt of wrongful dismissal damages is based on the assumption that an employee can work, but receipt of disability benefits is based on the exact opposite assumption. Therefore it is illogical for an employee to receive both at the same time. In my view, this reasoning holds true whether an employee contributes to the disability benefits plan or not."

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