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SETTLEMENT OF EMPLOYEE CLAIMS AND STRUCTURING THE SETTLEMENT

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SETTLEMENT OF EMPLOYEE CLAIMS

1. EMPLOYEE ENTITLEMENT

If employment is terminated without reasonable notice of the termination, the employee is entitled to what he or she would have earned had reasonable notice of the termination of employment been given. [1] Before negotiating a settlement of an employee's claim it is essential to understand the entitlement of an employee to payment for various components of compensation.

(a) Salary

Damages for loss of salary is among the more straightforward wrongful dismissal damages. The usual measure of damages for this component of remuneration is based on the salary that the employee was earning at the time of termination of employment.

However there may be an issue relating to salary changes during the notice period. An employee will be awarded damages for any increase in salary that was an explicit term of the contract of employment. In the case of salary increases that are not written into the contract of employment (the majority of cases) the courts frequently find an implied term that the employer will treat the employee in a fair and reasonable manner in determining salary increases. Employees are awarded damages for increases in salary if they would likely have received an increase if they had remained employed during the notice period and the employer had acted reasonably. Cases will be fact specific. If salary increases had been given to the employee each year as a matter of

[1] *Lawson v. Dominion Securities Corp.*, [1977] 2 A.C.W.S. 259 (Ont. C.A.)

course[2] or if the employer gave salary increases to its remaining employees after the termination of employment, especially the terminated employee's successor, damages based upon a salary increase will likely be ordered.[3]

Although the employer may have formal discretion over salary increases, if the employer has never exercised that discretion against an employee, the employer will likely be unsuccessful in raising the defence of "discretion" with respect to a claim for damages based upon a salary increase.

Of course, where there is reason to believe that, contrary to past practice, the employee would not have received a salary increase, none will be awarded. For example, where the employee has received increases almost every year, as have the other employees, but the employer is suddenly performing poorly financially and no one is receiving an increased salary, the dismissed employee will not be awarded damages based on an increase in salary.[4]

(b) Commissions

Employees are entitled to be paid the amount of commissions that they likely would have earned during the reasonable period of notice.[5] The courts strive to reach the best commission estimate.

Where the commission income earned varied from year to year, courts will generally use a historical average of the few years preceding the date of termination to calculate an employee's likely commission earnings in the notice period.[6] If there are abnormal years where very high or

[2] *Turner v. Canadian Admiral Corp.* (1980), 1 C.C.E.L. 130 (Ont. H.C.J.)
[3] *Brown v. Waterloo Regional Board of Commissioners of Police* (1983), 43 O.R. 2d 113 (C.A.)
[4] *Veer v. Dover Corp. (Canada) Ltd.* (1997), 31 C.C.E.L. (2d) 119 (Ont. Gen Div.)
[5] *Prozak v. Bell Telephone Co. of Canada* (1984), 10 D.L.R. 4th 382, 4 C.C.E.L. 202 (Ont. C.A.)
[6] *Belton v. Liberty Insurance Co. of Canada* (2004), 72 O.R. (3d) 81 (C.A.) and *Serrao v. National Bank Financial Inc.,* [2004] O.J. 2821 (Ont. S.C.J.)

very low commissions were generated and such aberrations were not attributable to normal fluctuations of the business, the courts will likely exclude those years in calculating the average earnings, basing its calculation on a representative sample of years.[7]

However historical averages are not always used. If the employer adduces evidence to demonstrate that a market turndown occurred or that previously favourable business conditions changed during the period of notice, or that normal cyclical fluctuations in commission revenue would apply to the notice period, the court will take that into account in calculating the damages for loss of commissions.[8] Similarly where the employee can adduce evidence that his commission earnings were on an increasing trend each year the historical average will not be applied.

In some cases an employee will adduce evidence (often obtained from the examination for discovery process in the action) of commissions that he/she would have earned during the notice period to demonstrate that commissions that would have been earned during the notice period were higher than the historical average. This evidence could include specific information about actual earnings by the employee's replacement. It could include specific large deals that closed during the period of notice.[9]

[7] *Serrao v. National Bank Financial Inc.,* supra
[8] *MacDonald v. Richardson Greenshields of Canada Ltd.* (1985), 12 C.C.E.L. 22 (B.C.S.C.) and *Farmer v. Foxbridge Homes Ltd.* (1992), 45 C.C.E.L. 144 (Q.B.)
[9] *Prozak v. Bell Telephone Co. of Canada*, supra

(c) Bonuses

If payment of a bonus is an explicit term of the contract of employment, it will be presumed to be compensable as a part of the employee's remuneration during the reasonable period of notice.[10] Where there is no explicit contractual right to a bonus, an employee will be entitled to damages for loss of a bonus during the notice period, if the employee can demonstrate that the payment of a bonus was an integral part of the employee's remuneration structure.[11]

A bonus becomes integral to an employee's compensation structure when it is paid consistently. However, a bonus does not need to be paid every year in order to become integral.[12] As few as two consecutive years of bonus payment have been held to be sufficient to make a bonus integral.[13] If the company's financial performance is poor some years and the bonus is withheld for that reason, that has not prevented a finding that it had become integral. Even if a bonus is not distributed in the year preceding termination it can still be integral.

If a bonus has become an integral part of an employee's remuneration, the employer cannot deny the employee the bonus on arbitrary grounds.[14] Even if the bonus is discretionary, once the employee is entitled to a bonus, the employer must exercise its discretion reasonably and, wherever possible, on the basis of objective criteria.[15] The amount to be paid will be determined (in the absence of a formula basis) by the test of what the employer acting reasonably, would have granted the employee if employment had continued. If, for example, other similarly-

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[10] *Chann v. RBC Dominion Securities Inc.* (2004), 34 C.C.E.L. (3d) 244 (Ont. S.C.J.) and *Lloyd v. Oracle Corp. Canada,* [2004] O.J. No. 1806 (Ont. S.C.J.)
[11] *Veer v. Dover Corp. (Canada) Ltd.* (1997), 31 C.C.E.L. (2d) 119 (Ont. Gen. Div.) affd. (1999), 45 C.C.E.L. (2d) 183 (Ont. C.A.) and *Leduc v. Canadian Erectors Ltd.* (1996), 18 C.C.E.L. (2d) 216 (Ont. Gen. Div.)
[12] *Brock v. Matheson Group Limited et al.* (1991), 34 C.C.E.L. 50 (Ont. C.A.)
[13] *Stea v. Kulhawy* (1996), 18 C.C.E.L. (2d) 246 (Alta. Q.B.)
[14] *Brock v. Matheson Group Limited et al.*, supra
[15] *Leduc v. Canadian Erectors Ltd.* (1996), 18 C.C.E.L. (2d) 216 (Ont. Gen. Div.)

situated employees received a bonus during the notice period, the court, will likely award damages to the employee based on a bonus of similar value.[16] However it is open to the employer to show that by reason of economic circumstances a bonus would not have been paid to its employees[17] or that as a result of the employee's job performance no bonus would have been paid.

The courts will also consider the purpose of a bonus.[18] To the extent the bonus is a reward for past performance, it will be recoverable. To the extent that a bonus is intended as an incentive for future performance, that portion of the bonus is not recoverable during the notice period as that purpose would have disappeared. Using this analysis a court may award a dismissed employee only a certain percentage of the bonus he or she would otherwise have received.

If a notice period ends prior to the end of a fiscal year, the court will normally award a prorated bonus.[19]

Employment contracts or bonus plans often contain a provision that requires an employee to be employed at the company's year end to be eligible for bonuses or to be employed at the time bonuses are paid in order to receive payment for a bonus. If the employer has never communicated this restrictive provision to the employee, it will not be able to rely on the restriction.[20] Where the restriction has been communicated to the employee, its impact will depend on its wording.

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[16] *Veer v. Dover Corp. (Canada) Ltd.*, supra and *Brock v. Matheson Group Limited et al.*, supra
[17] *Wilson v. Crown Trust Co.* (1992), 44 C.C.E.L. 123 (Ont. Gen. Div.)
[18] *Brock v. Matheson Group Limited et al.*, supra
[19] *Lloyd v. Imperial Parking Ltd.,* [1996] A.J. No. 1087 (Q.B.)
[20] *Grace v. Reader's Digest Assn. (Canada) Ltd.* (1995), 14 C.C.E.L.(2d) 109 (Ont. Gen. Div.) and *Daniels v. Canadian Tire Corp.* (1991), 5 O.R. (3d) 773 (Ont. Gen. Div.)

A clause that states that an employee is not entitled to a bonus after "termination" or "after ceasing to be an employee" or "after involuntary termination" is often not of assistance to the employer. It will be interpreted to mean after lawful termination of employment and therefore the end of the reasonable period of notice.

The Ontario Court of Appeal, in one case, held that a restrictive provision using the words "terminated for any reason" other than death, retirement or incapacity, "whether such termination be voluntary or involuntary" meant the end of the reasonable notice period.[21]

Another decision, affirmed by the Ontario Court of Appeal rejected a termination clause that insisted "recipients must be actively employed by the Bank at the time the award is paid to be eligible for payment".[22] The court stated that it was unfair to allow the employer, by breaching the employment contract, to deprive the employee of his bonus.

However, if after adding the period of reasonable notice to the termination date, the employee is still not able to meet the requirement of the bonus plan (whether it be employed at year end or employed at the time the bonus is paid) the employee will not be entitled to payment of a bonus.[23]

The courts demand clear contractual language to oust an employee's entitlement to bonus during the reasonable period of notice based on a termination without cause or notice. The Ontario Court of Appeal upheld the use of a restrictive clause to preclude a bonus in one agreement that defined the employment termination as follows:

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[21] *Veer v. Dover Corp. (Canada) Ltd.*, supra
[22] *Schumacher v. Toronto-Dominion Bank* (1997), 29 C.C.E.L. (2d) 96 (Ont. Gen. Div.) affd. [1999] O.J. No. 1772 (Ont. C.A.)
[23] *Larry v. Triple M Metal Inc.,* [2006] O.J. No. 4129 (Ont. S.C.J.)

> "termination of [an employee's] employment for any reason shall occur on the date [the employee] ceases to perform services for [the employer] 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.[24]

(d) Stock Options

Stock option plans often form a major component of employee remuneration, or have the potential to do so. Stock option plans typically require that employees exercise them within a short time after they cease to be employees, or else that they immediately expire. Where the shares rise in value during the notice period, making stock options more valuable, the wrongfully dismissed employee may have lost the chance to exercise the options when there is a greater difference between the exercise price of the options and the market value of the shares. To be entitled to damages for stock options lost as a result of a termination of employment without reasonable notice an employee must overcome three hurdles.

Firstly, the options in question must be vested at the time of termination of employment or alternatively would have vested during the notice period.[25]

Secondly, the employee must prove that he or she likely would have taken advantage of the options. If the employee had never taken advantage of the stock option plan before, a court is likely to dismiss the claim for damages for loss of the opportunity to exercise stock options.[26]

Thirdly the employee usually needs to overcome a termination clause in the stock option agreement. This is the clause which aims to force an employee to exercise stock options within a

[24] *Kieran v. Ingram Micro Inc.* (2004), 33 C.C.E.L. (3d) 157 (Ont. C.A.)
[25] *Gillis v. Goldman Sachs Canada Inc.*, [2001] B.C.C.A. 683
[26] *McCallion v. Canadian Manoir Industries Ltd.* (1991), 39 C.C.E.L. 269 (Ont. Gen. Div.)

short time after the termination of employment. There is often a 30, 60 or 90 day period for the exercise of the options.

Decisions interpreting these restrictive clauses are conflicting. However, in general courts have tended to take a liberal approach in interpreting these clauses. In one case, the Ontario Court of Appeal examined the following clause:

> "5.2 **If an optionee ceases to be employed ... by the Corporation otherwise than by reason of death or termination for cause** ... any option ... held by such optionee at the effective date may be exercised in whole or in part for a period of thirty (30) days thereafter."[27] [Emphasis added]

The court concluded that the clause only referred to a lawful termination. If there was no cause for dismissal, the employee does not cease to be employed until the end the reasonable notice period.

In another decision the Ontario Court of Appeal reached the same conclusion when it considered this clause:

> "**If the option holder's employment with the corporation and/or a subsidiary, as the case may be, is terminated for any reason other than set forth in paragraphs 6, 7 or 8 above [death, retirement or incapacity], whether such termination be voluntary or involuntary**, without his having fully exercised his option, the option shall be cancelled and he shall have no further rights to exercise his option or any part thereof and all of his rights hereunder shall terminate as of the effective date of such termination."[28] [Emphasis added]

[27] *Gryba v. Moneta Porcupine Mines Ltd.* (2000), 5 C.C.E.L. (3d) 43 (Ont. C.A.)
[28] *Veer v. Dover Corp.* supra

The effective date of termination was interpreted to mean a lawful termination of employment, thus incorporating the reasonable period of notice.

However two other Ontario Court of Appeal cases came to different conclusions. In one case, the following clause was held to refer to the date of dismissal, not the date at the end of the period of reasonable notice:

> "**If Participant's employment with Micro or any Affiliate is terminated for any reason other than death, disability ... or retirement** ... prior to the time when all Shares have become Unrestricted Shares ..., 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 payments therefrom or is paid salary thereby in lieu of notice of termination**.[29] [Emphasis added]

In the second case the following clause was also held to refer to the date of actual dismissal as being the date for determining option rights:

> "Upon the occurrence of any event specified [of the Employee ceasing to be an employee…except the death of the Employee]…the option hereby granted shall forthwith cease and terminate and shall be of no further force or effect whatsoever as to such of the optioned Shares in respect of which such option has not been previously exercised; provided that where the Employee is dismissed by the Corporation, **the Employee shall have 15 days from the date notice of dismissal is given in which to exercise the option** hereby granted in respect of

[29] *Kieran v. Ingram Micro Inc.*, supra

> the optioned shares available as of October 31 of the Year preceding such dismissal [30] [Emphasis added]

When an employee is found entitled to damages for loss of stock options, damages are assessed based on the difference between option price and the trading price on the date that the court determines the employee would have sold the shares, multiplied by the number of shares the employee would have sold .[31]

The Employer may be able to successfully raise a defence of failure to mitigate if the employee has failed to purchase the shares in the open market. If the employee had the resources to purchase the shares and failed to do so, if the shares would not have cost a significant amount and the risk was not great, the argument would have a reasonable chance of success.

(e) Automobile Allowance and Loss of Use of Automobile

In principle, an employee is to be compensated in damages for that part of an automobile allowance or use of a company leased automobile that was intended as a personal benefit, rather than strictly for loss of use of the automobile allowance or the automobile itself.

In the typical case, an employee is paid a fixed amount each month by the employer to compensate for the use of the employee's automobile or is provided with a leased vehicle. The court will usually analyze what proportion of the employee's use of the automobile was for business purposes, and compensate the employee for the remaining proportion of the car allowance or automobile lease.[32] For example, if 75% of the employee's use of the car is in fact

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[30] *Brock v. Matheson Group Limited et al.*, supra
[31] *Gryba v. Moneta Porcupine Mines Ltd.,* supra
[32] *Larson v. Galvanic Applied Sciences Inc.*, [2005] A.B.Q.B. 238 and *Neely v. State Group Ltd.,* [1995] O.J. 2135 (Ont. Gen. Div.)

for work, the employee will be entitled to compensation for 25% of the car allowance over the notice period.

The court will often examine the declaration of personal use of automobile on a T4 as a reasonable indication of the percentage of personal use of an automobile allowance or automobile.

On the other hand, where there is no evidence about the amount of use that was personal vs. business, or where the court is of the view that the amount of the allowance or the provision of a leased automobile was really in the nature of remuneration or a benefit, the employee is routinely awarded the entire amount of the allowance or loss of the company leased automobile.[33]

(f) Medical and Dental Benefits

An employee is entitled to the pecuniary value of lost benefits that were meant to be a part of his or her remuneration. Group insurance benefits such as medical and dental insurance benefits fall under this category. In Ontario, the employee does not need to actually incur any expenses, such as medical or dental bills, in order to be compensated for the loss of benefits.[34] Instead, the courts compensate the employee for the loss of coverage.

When calculating the amount that coverage is worth, the courts generally will award the employee the equivalent of the cost to the employer of offering the benefits.[35] In principle, this

[33] *Veer v. Dover Corp. (Canada) Ltd.* supra and *Ashdown v. Jumbo Video,* [1993] O.J. No. 1169 (Ont. Gen. Div.)
[34] *Davidson v. Allelix Inc.* (1991), 7 O.R. (3d) 581 (C.A.) and *Garcia v. Newmar Windows Manufacturing* (1996), 25 C.C.E.L. (2d) 114 (Ont. Gen. Div.)
[35] *Hayward v. 331265 Ontario Ltd.,* [2005] O.J. No. 1513 (S.C.J.), *Connolly v. General Motors of Canada Ltd.,* [1993] O.J. No. 2811 (Ont. Gen. Div.) and *Alpert v. Les Carreaux Ramca Ltée* (1992), 9 O.R. (3d) 207 (Ont. Gen. Div.)

cost is simply the amount of the premium cost that the employer would have had to pay to maintain the benefits during the reasonable period of notice.

However if the employee has actually obtained replacement benefits, and puts the cost of those benefits into evidence, a court will award the cost of the replacement benefits to the employee.[36]

However, where the employee claims specific losses that were incurred as a result of not having the benefits, courts will often compensate those instead of compensating the lost coverage.[37] In practice this tends to mean that in court, the employer will be liable for the cost of the benefits or the employee's actual losses from not having benefits, whichever is larger.

(g) Disability Benefits

(i) becoming a self insurer

At law, an employee is entitled to the salary and other benefits that form part of the remuneration package during the reasonable period of notice that follows termination of employment, unless the employer and the employee have agreed otherwise.

One area of difficulty is the extension of short and long term disability benefits subsequent to the termination of employment. Under Ontario's *Employment Standards Act* (the "ESA") benefit plans must be maintained during the statutory notice period provided in the ESA, which varies between 1 and 8 weeks, depending upon the length of employment. This requirement cannot be waived and disability insurers will therefore extend this coverage during the statutory period of notice.

[36] *Konop v. Brazilian Canadian Coffee Co.* [2004] O.J. No. 2784 (S.C.J.)
[37] *Konop v. Brazilian Canadian Coffee Co.*, supra

However, disability insurers in the Province of Ontario rarely permit an employer to extend this coverage beyond the statutory period of notice. This can expose the employer to the substantial risk of becoming a self insurer.

This risk was demonstrated in one British Columbia case.[38] In January, 1983, after 17 years of employment, the plaintiff's employment was terminated. He rejected the severance package. In July, 1983, the plaintiff became totally disabled as a result of a motor vehicle accident. He made a claim for damages for wrongful dismissal and also claimed entitlement to long-term disability benefits under the employer's long-term disability income plan. The trial judge found that the plaintiff was entitled to damages for wrongful dismissal and also entitled to receive the benefits provided under the long-term disability plan.

The long-term disability insurance was one of self-insurance. The policy manual distributed to employees stated that the long-term disability benefits would cease on the termination of employment.

The British Columbia Court of Appeal interpreted the words "termination of employment" in the policy manual to mean "lawful termination of employment". Since the disability occurred during the period of reasonable notice found by the trial judge, the plaintiff was entitled to the award of long-term disability benefits.

Fortunately for employers, a 2000 Ontario decision has restricted the application of this principle.[39] The employer terminated the employment of the employee on July 29, 1997. The employee had been an employee for 19 years. In the letter notifying him of termination he was

[38] *Prince v. T. Eatons Co* (1992), 41 C.C.E.L. 72 (B.C.C.A.)
[39] *Pioro v. Calian Technology Services Ltd.* (2000), 48 O.R. (3d) 275 (S.C.J.)

offered 30 weeks' salary, which included 8 weeks' termination pay and 19 weeks severance pay under the ESA. The letter indicated that:

> "Your current employee benefits will continue until the end of your notice period. All benefits cease on September 23, 1997 and as of that date, the onus will be on you to obtain replacement coverage if you so choose."[40]

The employee did not accept the severance offer and by April 1998, had become totally disabled. He commenced an action for damages for wrongful dismissal and also for long-term disability benefits.

The trial judge awarded the employee damages based upon 22 months' notice. However, his claim for long-term disability benefits was denied. The trial judge noted that the employee handbook stated that "your insurance will terminate on the date you would cease to be eligible to become insured except as required by law."[41] The judge also noted that at trial the employer adduced expert evidence that the long-term disability ("LTD") insurance policy was an average employer/employee benefits contract, not dissimilar to many seen in the industry and was consistent with industry standards in not allowing for conversion of LTD benefits after termination of employment. The trial judge found that the employer's LTD policy, which did not provide for conversion of benefits, was in accordance with industry standards. The trial judge concluded that if the insurance policy itself did not provide coverage beyond September, 1997, the employee could have no claim against the employer if he became disabled subsequent to that time, but during the period of reasonable notice.

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[40] Id. p. 280
[41] Id. at p. 285

The judge also rejected the argument that there was an obligation on the employer to provide alternative coverage to the employee at the date of termination of his employment. In his view, the obligation on the employer, in accordance with the employment contract, was to provide LTD benefits which were within industry standards.

(ii) double recovery

When the employment of an employee is terminated without reasonable notice and then becomes disabled during the notice period a question arises as to whether disability benefits and damages for wrongful dismissal can be set off against one another.

Prior to 1997, the law in Ontario was clear. Disability payments could not be set off against wrongful dismissal damages.[42] Disability benefits were said to cover a time and a circumstance in which the employee could not look for work. An interval of disability interrupted the notice period, putting it on hold but not replacing it. Since disability benefits and wrongful dismissal damages had different sources and different purposes, they could not be set off against each other.

In 1997, the Supreme Court held that where the disability contributions were entirely employer-funded, and the employer, not an insurer, paid benefits under the plan, the parties could not have intended that an employee would be able to receive both salary and disability benefits.[43] The Court indicated that the terms of the employer's disability plans demonstrated that disability benefits were intended as a substitute for regular salary and that an employee who received such benefits would not receive a salary. Secondly, the court stated that a simultaneous payment of

[42] *McKay v. Camco* (1986), 53 O.R. (2d) 257 (C.A.)
[43] *Sylvester v. British Columbia,* [1997] 2 SCR 315

disability benefits and damages for wrongful dismissal was not consistent with the terms of the employment contract. The Court did, however, enunciate exceptions. The court stated that parties to an employment contract could agree, or there may be cases where an intention could be inferred, that the employee is to receive both damages for wrongful dismissal and disability benefits. Further employees could also obtain both where the employee had provided consideration for benefits from a private insurance plan.

A few years later, in 2001, in two cases the Ontario Court of Appeal restricted the application of the Supreme Court's decision by accepting that an employee could contribute to a disability benefit plan by trading off lower compensation in other areas.[44] The court also emphasized that the Supreme Court decision did not apply to disability plans where third party private insurers paid out the benefits.[45] The court stated that where the employee has paid for the disability benefit plan, it is reasonable to assume the employee would have refused to agree that the employer could avoid wrongful dismissal damages because of the disability plan. These decisions appeared to make double recovery the default presumption.[46]

However last year, the Court of Appeal again considered a case of overlapping disability benefits and wrongful dismissal damages and denied double recovery to the plaintiff who had become disabled during the notice period. [47] The trial judge had concluded that it could not be inferred in this case that the parties had agreed that the employee was entitled to receive both damages for disability insurance benefits and damages for wrongful dismissal. He awarded damages based upon full salary for 9 months notice, even though the employee was disabled for the last six of

[44] *Sills v. Children's Aid Society of the City of Belleville* (2001), 53 O.R. (3d) 577 (C.A.) and *McNamara v. Alexander Centre Industries Ltd.* (2001), 53 O.R. (3d) 481 (C.A.)
[45] *McNamara v. Alexander Centre Industries Ltd,.* supra
[46] *Sills v. Children's Aid Society of the City of Belleville*, supra, *McNamara v. Alexander Centre Industries Ltd.* supra, and *Fedorowicz v. Pace Marathon Motor Lines Inc.,* [2006] O.J. No. 344 (Ont. S.C.J.)
[47] *Egan v. Alcatel Canada Inc.,* [2006] O.J. No. 34 (Ont. C.A.)

those months and then awarded nothing for her disability which continued for another six months beyond. The Court of Appeal did not set aside the trial judge's conclusion that it could not be inferred in this case that the parties had agreed that the employee was entitled to receive both damages for wrongful dismissal benefits and damages for wrongful dismissal and therefore agreed that there should be no double recovery. However it changed the award by requiring the employer to pay salary for the three months the employee was able to work and to pay disability benefits for the 12 month disability period.

The case also highlights that, at the very least, an employer risks becoming a self insurer for long term disability benefits if long term disability insurance ceases after the termination of employment and the employee becomes disabled during the reasonable period of notice.

(h) Vacation Pay

Although the ESA requires vacation pay to be paid during the notice period required by the Act, an employee is not, at common law, entitled to vacation pay for the reasonable period of notice.[48]

(i) Club memberships and Perks

Employers frequently provide employees with a wide assortment of fringe benefits and perquisites, ranging from paying their dues for membership in golf clubs and professional associations to providing employee discounts. Where the perquisite is clearly meant for the

[48] *Scott v. Board of School Trustees* (1991), 5 B.C.A.C. 295, *Cronk v. Canadian General Insurance Company* (1995), 25 OR (3d) 505 (C.A.) and *Dunning v. Royal Bank of Canada* (1996), 23 C.C.E.L. (2d) 71 (Ont. Gen. Div.) and *McEwan v. Nabisco Ltd.,* [2002] O.J. No. 5239 (Ont. S.C.J.)

benefit of the employee, such as an employee discount, there is usually little question that courts will compensate the employee for its loss.[49]

Professional fees and the cost of memberships in professional associations, where these memberships benefit the employee, will be recoverable as damages.

There are cases where courts have not compensated the employee for the loss of club memberships whose "main purpose" was the benefit of the employer, or have not compensated the employee for club memberships which were not renewed by the employee during the notice period or have only compensated the employee for the personal value of the membership. In recent years though, courts have generally compensated employees for the loss of club memberships if there would have been a personal benefit to the employee.

(j) Pension

Where the employee's pension has not vested and would not have vested during the period of reasonable notice, the employee is not entitled to damages since no loss has been suffered.[50]

On the other hand, where the pension would have vested, or where the employee would have been entitled to a larger pension had working notice been given, the employee is entitled to compensation for the loss of pension benefits.[51] The damages are calculated on a commuted

[49] *MacDonald v. Woodward Stores Ltd.* (1991), 39 C.C.E.L. 58 (B.C.S.C.) and *Harris v. Robert Simpson Co.* (1984), 56 A.R. 201 (Alta. Q.B.)
[50] *Rusello v. Jannock Ltd.,* [1985] O.J. 1192 (Ont. H.C.J.), and *Vanderzander v. Mattabi Mines,* [1984] O.J. 201 (Ont. H.C.J.)
[51] *Taggart v. Canada Life Assurance Co.,* [2006] O.J. No. 310 (Ont. CA) and *Peet v. Babcock & Wilcox Industries Ltd.* (2001), 197 D.L.R. (4th) 633 (Ont. C.A.)

value methodology which determines the present value of the difference between the value of the pension at the time of termination and the value at the end of the period of reasonable notice.[52]

At times, after the termination of employment, the terminated employee begins to receive pension benefits, which he/she would not otherwise have received during a period of working notice. The law is clear that these pension benefits received are not deductible from wrongful dismissal damages for lost salary.[53]

Pension benefits received during the notice period, however, must be taken into account in calculating the damages for any pension loss as a result of the failure to have provided reasonable notice of the termination of employment.[54]

2. STRUCTURING THE SETTLEMENT

Once employee entitlement is understood, obtaining the settlement becomes possible. To obtain and structure a settlement itself, however, requires a consideration of the following:

1. Structuring the settlement based upon a lump sum payment or periodic payments;

2. Taking into account the obligation of the employee to mitigate damages and the prospects of alternate employment or self employment, including:

    (a) A percentage reduction in the lump-sum payment offered in anticipation of the securing of alternate employment; and

    (b) The use of percentage reductions in periodic payment situations;

[52] *Peet v. Babcock & Wilcox Industries Ltd.*, supra
[53] *Chandler v. Ball Packaging Products Canada Ltd.,* [1992] O.J. No. 3114, affd. [1993] O.J .No. 4362 (Div. Ct.)
[54] *Peet v. Babcock & Wilcox Industries Ltd.*, supra

3. The initial offer of settlement and subsequent negotiating strategy, including;

   (a) An individual termination of employment versus a larger restructuring situation;

   (b) Anticipating a difference of views in the applicable notice period or in various compensation "entitlements", including;

      (i) Going in with an offer in the higher part or the lower part of the range of reasonable notice;

      (ii) Offering full entitlements at the beginning of the negotiating process or initially holding back some entitlements for later negotiation;

   (c) Taking into account the termination and severance payments required under the ESA; and

   (d) The use of litigation in the negotiating process;

4. The treatment of the lump sum payment as a "retiring allowance" under the Income Tax Act;

5. Payment of a portion of the settlement into an RRSP including:

   (a) Pre 1996 employment; and

   (b) Unused contribution room; and

6. The allocation of the settlement towards legal fees, including;

   (a) The tax treatment of legal fees; and

(b) The use of legal fee allocation to obtain a settlement.