

## WRONGFUL DISMISSAL

## Wrongful Dismissal Damages: Loss of Pension Benefits

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To what extent is a dismissed employee entitled to receive damages for lost pension benefits that would have accrued during the employee's notice period following termination of employment?

A recent decision of the Court of Appeal for Ontario, *Taggart v. Canada Life Assurance Co.*,<sup>1</sup> addresses this issue as well as the impact of express pension plan or contract provisions.

### The Facts

Mr. Taggart was a long-service executive of Canada Life, working within the organization for 30 years, ultimately rising to the position of Vice-President, Individual Life Insurance. Mr. Taggart was enrolled in his employer's registered pension plan as well as in a supplemental pension plan available to senior executives. Both pension plans were defined benefit plans under which a participant's pension benefits would be determined on the basis of a formula incorporating years of service and earnings.

As a result of a corporate consolidation and consequent downsizing, Mr. Taggart was advised by Canada Life that his employment would be terminated. The employer's severance offer provided for a total 24-month notice period, comprising of 2-months' working notice plus a severance payment in lieu of 22-months' notice.

Mr. Taggart's pensionable service and pension credits were continued by Canada Life only for the 2-month working notice period; his employer refused to provide any compensation for the loss of pension benefits that would have accrued during the 22-month period it offered to pay in lieu of notice. The loss of 22-months' pensionable service made a

significant difference to Mr. Taggart's pension benefits. Credit for this entire period would have given Mr. Taggart in excess of 30 years of pensionable service, a threshold that would have entitled him to an unreduced pension at age 60. As a result of his early termination, however, Mr. Taggart was left with only 28.3 years of pensionable service (he did not participate in the pension plans during his first 2 years of employment) and a correspondingly reduced pension. The present value of Mr. Taggart's foregone pension benefits was \$333,526. Even with Mr. Taggart's participation in a partial wind-up of the pension plan and his exercise of certain statutory "grow in" rights, Mr. Taggart's pension would still be reduced from what it would have been had he worked through the notice period, calculated at a present value loss of \$135,506.

Mr. Taggart refused to accept his former employer's severance package, commencing a lawsuit instead. The parties resolved all severance issues except those relating to the pension claims.

### The Text of the Pension Plans

Canada Life relied on the text of the pension plans in support of its decision not to continue Mr. Taggart's pensionable service following the date of termination of employment:

#### Registered Pension Plan

##### 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 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 any Member or Field Management Member.* [emphasis added]

<sup>1</sup> [2006] O.J. No. 310 (C.A.).

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### Supplemental Pension Plan

#### 10.01 Employment Rights

The establishment and implementation of the Supplemental Plan shall not constitute an enlargement of any of the 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.

Canada Life's position was that the language of the pension plans expressly dealt with terminated employees and their pension entitlements, and that the content of the pension plans was, therefore, conclusive of Mr. Taggart's rights. Essentially, Canada Life's position was that the pension plans stipulated that pensionable service accrued only during periods of active employment without any provision for continuation thereafter. Consequently, Mr. Taggart, having ceased active employment on the date of his termination, could not accrue further pensionable service after such date and could have no claim to any pension benefits that he might have lost after such date, even during his notice/severance period.

#### The Decision

The Court rejected Canada Life's position.

The Court noted that Mr. Taggart's claim was not for additional pensionable service accrual after the date of termination or for additional pension benefits under the pension plans. Rather, Mr. Taggart sought damages as compensation for the pension benefits that he otherwise would have enjoyed but which were lost as a result of the termination of his employment contract.

The Court determined that the proper way to analyze a wrongful dismissal claim for lost pension benefits is to consider two factors:

1. the plaintiff's common law right to damages for breach of contract; and
2. whether the terms of the pension plans alter or remove a common law right.<sup>2</sup>

<sup>2</sup> *Taggart*, *ibid.* at paragraph 12.

In addressing the first factor, the Court confirmed the relevant common law principles as follows:

Where an employer terminates an employee without just cause, the employee is entitled to receive reasonable notice of dismissal; if the employee does not receive such notice, then he or she will be awarded damages for breach of contract in lieu of notice.<sup>3</sup>

In accordance with the general rule of damages in breach of contract actions, the objective is to put the dismissed employee in the same position as if the employment contract had been properly performed – that is, as if reasonable notice had been provided.<sup>4</sup>

Damages for breach of contract is measured by the loss of salary and other benefits that would have been earned by the employee during the reasonable notice period; such damages include the loss of pension benefits that would have accrued had the employee worked until the end of the notice period.<sup>5</sup>

Damages for lost pension benefits are properly awardable in a wrongful dismissal lawsuit even if the applicable pension plan is "collateral" to the contract of employment.<sup>6</sup>

In summary, the Court determined that Mr. Taggart was entitled to claim damages for the loss of his pension benefits throughout the applicable notice period at common law, subject, however, to any contractual provision limiting such entitlement.

The Court then addressed the second factor, that is, whether Canada Life's pension plans' written terms altered or removed Mr. Taggart's common law rights.

Upon review of the text of the pension plans, the Court determined that there was no express exclusion of damages as compensation for lost pension benefits. Even if the

<sup>3</sup> *Taggart*, *ibid.* at paragraph 13; see, also, Mole, *Wrongful Dismissal Practice Manual* (2nd ed.), at section 9.1.

<sup>4</sup> *Wallace v. United Green Growers Ltd.*, [1997] 3 S.C.R. 701, at paragraph 115; see, also, *Wrongful Dismissal Practice Manual*, *supra* note 3 at section 9.3.

<sup>5</sup> *Taggart*, *supra* note 1 at paragraph 14.

<sup>6</sup> *Taggart*, *ibid.*

pension plans were to be interpreted as a requiring "active" service or employment as a prerequisite for the accrual of pension benefits, such language did not preclude an award of common law contract damages as compensation for the pension benefits that a dismissed employee would have earned had the employee not been wrongfully dismissed.

As the Court stated:

The contract does not say that a dismissed employee is disentitled to damages as compensation for the loss of pension benefits that would have accrued during the notice period. The first sentence of s. 16.01 states that the plan shall not "constitute an enlargement" of the rights the employee has apart from the plan and the last sentence states that the plan benefits shall not be used "to increase damages". The [employee] is already entitled at common law to be compensated in damages for the pension benefits he lost by virtue of the [employer's] breach of the contract of employment. He is not using the plan to enlarge his rights, nor is he using "the benefits conferred" by the pension plan "to increase damages" beyond what he is entitled to at common law. Rather the [employer] is attempting to use the language of the pension plan to limit the [employee's] common law right to damages. I find the language of s. 16.01 to be, at best, ambiguous in this regard ....<sup>7</sup>

Put another way, Mr. Taggart, the dismissed employee, had the contractual right to work and to be paid his compensation and to receive all benefits throughout the entire notice period – which was agreed in his case to be 24 months. It was the employer's choice to terminate Mr. Taggart's employment after two months and to pay him damages rather than allow him to work through the remainder of the 22-month notice period. Had Mr. Taggart's contractual right not been breached, he would have earned his full pension; the employer became responsible to compensate Mr. Taggart in full for this loss.

### Implications

The *Taggart* decision is significant in clarifying a dismissed employee's entitlement to lost pension benefits as a component of severance/wrongful dismissal damages as well

as in providing guidance to employers in drafting their pension plans and employment contracts.

Some notes:

*Taggart* leaves no doubt that damages for loss of pension benefits and pension accrual may be properly awarded in a wrongful dismissal lawsuit and that such damages will be measured based on the full notice/severance period. In the case of long-service employees or supplemental pension plans, an employer's liability could be significant. The Court's decision in this regard is consistent with recent case law awarding damages for other employee entitlements during the notice period such as stock options<sup>8</sup> or disability benefits<sup>9</sup> – all subject, of course, to any express contractual limitation.

*Taggart* confirms that, notwithstanding its potential common law liability for damages for loss of pension benefits, an employer may limit its liability by means of express and unambiguous wording in its pension plans or employment contracts. In this regard, the Court quoted favourably from the Supreme Court of Canada's decision, *Vorvis v. Insurance Corp. of British Columbia*,<sup>10</sup> for the proposition, amongst other things, that, in assessing damages for wrongful dismissal the express provisions of a pension plan or employment contract govern.

To the extent that an employer's intention in establishing a pension plan is that an employee not participate after cessation of employment – that is, not including any notice/severance period – *Taggart* provides useful drafting guidance. It is insufficient simply to provide that pension accrual or pension credit terminates upon dismissal; the contract should expressly provide that a dismissed employee is disentitled to damages as compensation for any pension benefits that would have accrued during the notice period.<sup>11</sup>

<sup>7</sup> *Taggart*, *ibid.* at paragraph 22.

<sup>8</sup> *Gryba v. Moneta Porcupine Mines Ltd.* (2000), 5 C.C.E.L. 43 (Ont. C.A.); *Veer v. Dover Corp.* (1999), 45 C.C.E.L. (2d) 183 (Ont. C.A.).

<sup>9</sup> *Egan v. Alcatel Canada Inc.* (2006), 47 C.C.E.L. (3d) 87 (Ont. C.A.).

<sup>10</sup> [1989] 1 S.C.R. 1085, at 1096-1097.

<sup>11</sup> *Taggart*, *supra* note 1 at paragraph 22.

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Further, a pension plan that purports to terminate pension entitlement on the "date of termination" is not clear and unambiguous. Absent other contractual wording, the law will imply a "lawful" dismissal – that is, by including the advance notice of termination or payment in lieu of notice that ought to have been provided – so that the "date of termination" may not necessarily coincide with the date the employee ceases active employment. Therefore, consistent with the Court's previous decisions in the stock option context, in determining when an employee's pension accrual or pension credit terminates, the pension plan or employment contract should clearly specify that the termination of an employee's employment for any reason, including for just cause, occurs on the date that the employee ceases to perform services for the employer without regard to notice of termination, severance, termination pay, damages, or whether the employee is entitled to receive any payments in connection with the foregoing.<sup>12</sup>

In order to enhance enforceability of any limitation of an employee's pension benefits, an employer should ensure that its employees are fully informed of key terms and conditions of its pension plans, including any post-employment restrictions. This is best done by

providing the affected employees with a copy of the pension plan documents on a timely basis and ensuring agreement thereto as part of their employment contracts.

Recognize that the administration of pension plans is subject to regulatory oversight and governed by statutory requirements that cannot be contracted out of. For example, under the *Employment Standards Act, 2000*, in the event of a dismissal without just cause, the employee is deemed to have been actively employed for the minimum statutory notice period (in Ontario, up to eight weeks) and the employer is obliged to maintain all required contributions for at least this period of time regardless of any contract.

In preparing severance packages, it is important for employers to review carefully the pension plan documents and any employment contract in order to account fully for a dismissed employee's pension entitlements, and to obtain a proper release.

The precise wording of pension plans is vital to ensure legal compliance. As the law is subject to rapid change, pension plans and employment contracts should be vetted regularly for legal compliance.

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<sup>12</sup> *Kieran v. Ingram Micro Inc.* (2004), 33 C.C.E.L. (3rd) 157 (Ont. C.A.).