

Loss of Pension Value in Wrongful Dismissal

In his article on wrongful dismissal (the *Verdict*, Issue 100) Timothy Delaney notes that the employee dismissed with insufficient notice is entitled to damages consisting of salary lost during the appropriate notice period. As economists we have assisted in several wrongful dismissal actions where a reduction in the pension owed to the dismissed employee represents a loss of well over \$100,000, *in addition to* the salary loss over the notice period. It is unfortunate that it is so easy to overlook this head of loss, given the effort that may be expended in achieving a successful result on the determination of wrongful dismissal.

The situation most likely to result in a large pension loss from wrongful dismissal is that of an employee nearing his earliest possible retirement age who is working under a “defined benefit” (“DB”) pension. Under a typical DB plan contributions do not determine the pension the employee ultimately receives. Instead, an employee is awarded a pension based on years of service and salary just before retirement.

There are many private sector DB plans, and in the B.C. public sector (including the major regulated utilities, health care and education) DB plans are the norm.

DB plans typically favor employees with long service and those who work for the employer up to retirement (as opposed to those who move to another employer before retirement). The pensions of these favored employees are subsidized by the contributions of employees who have moved to other jobs in mid-career or who have joined the plan later in life and cannot afford to retire early. This favorable treatment of long-service employees normally takes the form of a right to begin to draw a full pension earlier than 65, in many cases as early as 55. Less favored employees may be faced with the choice of either waiting to 65 to collect a full pension or of accepting a pension beginning earlier, but with monthly payments that are much reduced for life.

Since to qualify to retire early usually requires remaining with the employer to a certain age or length of service, if it should happen that the wrongful termination has prevented an employee from qualifying, the loss may be large. We dealt with a B.C. government pension plan holder who was terminated shortly before reaching age 55, and thus was subject to a much heavier reduction of pension than if he had worked to his 55th birthday. The appropriate (in his view) period of notice would have carried him past his 55th birthday. Added to a

reduction in the length of his pensionable service equal to the notice period, his pension value was reduced by about \$125,000, even after deducting the contributions he would have had to make during his additional period of employment over the notice period.

Since DB plans also subsidize those whose earnings have been higher in the 5 years before they retire, at the expense of those whose earnings have been stable, if a terminated employee has had (or would have had) a recent salary increase, or has wrongfully been denied one, his loss of pension is likely to increase disproportionately.

Obtaining Information

Information on the public sector pension plans is generally freely available, but for a plaintiff fired by a private sector company information may not be available except from pension officials employed by the defendant. Although the employee is often aware of the general outline of the pension plan, often the more precise information that is needed to quantify the loss is filtered through personnel and legal staff who may not be familiar with technical details of the plan and with pension plan terminology.

We were initially misled, for example, in a case where counsel for the defendant employer provided us with the employee's pension amounts at various retirement dates and indicated unequivocally (in our opinion) that the dismissed employee had suffered no loss of pension benefits. We accepted this assurance and advised that there had been no loss, but the terminated employee insisted he had indeed suffered a loss. Further inquiries finally revealed that the figures supplied to us were for pensions available to the employee *at the age of 65*. Had he still been employed the employee was entitled to the indicated pension amounts beginning at his age 60, or if he preferred, at age 55, reduced by 18 percent. However, since he had been terminated before his 55th birthday the employee was now entitled at age 55 to the amounts reduced by no less than 45 percent. The client had in fact lost an early retirement right worth (our calculations showed) over \$100,000.

Obviously serious miscommunication is possible when information is "filtered" through those not familiar with pension valuation. Counsel for the defendant had probably been told by pension administration staff that "*if the terminated employee waits to 65 to draw his pension he will enjoy the entire monthly benefit he has earned*", and had mistranslated this into a general statement that the terminated employee has suffered no pension loss, unaware that any

pension professional would interpret this statement in a way that would make it untrue. Waiting to 65 to begin to draw a pension would have been costly, irrational, and perhaps financially impossible for a person dismissed from employment in his mid-50s. Beginning to take the pension before 65, though, would have resulted in punitively reduced pension benefits for the terminated employee. In failing to disclose that he was providing amounts for pensions starting at age 65, defence counsel omitted the most important factor that affected the employee's loss of pension.

Company Permission to Retire

Incomplete information from the defendant employer is even more likely to be forthcoming where, as under some private company plans, a provision requires the employer to approve an individual's right to retire with an "unreduced" pension at any date before his 65th birthday. Only if a pensioner is prepared to wait to 65 is he guaranteed to receive the full pension by right. Thus we assisted in a case where the client, retiring on the day of his 55th birthday, would have been entitled (if "determined to be eligible" for retirement) to a pension beginning the following day of about \$28,000 per year for the remainder of his lifetime. The same person terminated on the day *before* his 55th birthday would be entitled to a lifetime pension beginning two days later of about \$19,000 per year. For a high-paid pension earner contemplating retirement at 55, having in hand a letter from his boss granting him permission to retire can easily increase the discounted lump sum or "actuarial" value of the pension by over \$100,000, and the loss of the opportunity to obtain such a letter may be a significant impact of the employee's termination.

In a dispute over damages it is clearly in the company's interest to indicate that the terminated employee has suffered no loss of pension benefits, relying on the assumption that company would not have given approval to his earlier retirement. The company may well not feel the need to explain the assumption they are relying on, or even to indicate the existence of the provision in the plan, even though it may rarely have withheld permission to retire early. Certainly it is easy to imagine circumstances where it is necessary to prove as a matter of fact what the defendant company's usual practice with regard to "permission to retire" has been.

Incidentally, those representing spouses of such employees in marriage breakdowns should also be alert to the situation where the pension-earning spouse,

with the tacit concurrence of the employer, understates the true value of the family asset pension by ignoring the value of the anticipated “permission to retire early” letter.

The Pension May *Reduce* the Loss

Those involved in wrongful dismissal actions should also be aware that while a pension loss may add to the financial loss from wrongful dismissal for some employees, DB plans may much *reduce* the loss suffered by dismissed employees if they have already qualified for early retirement. An employee eligible to begin receiving an unreduced pension as soon as he is terminated will suffer a net income loss that is much less than his gross salary loss, and the reduction of his future pension benefits may be small. Should we see the end of mandatory retirement ages, so that dismissal of older employees on the grounds of declining abilities becomes common, this kind of defense may become usual.

Conclusion

Alertness is needed on the part of those representing the wrongfully dismissed, informed by knowledge of the pension plan and of the financial implications of obscure provisions. In seeking information from the defendant it is vital that questions be posed in such a way that there can be no possible ambiguity in the response and all of the relevant information will be provided.

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