

## **CALCULATING LOSS OF PENSION BENEFITS IN WRONGFUL DISMISSAL**

*Peet v. Babcock & Wilson Industries Ltd.* (2001), 53 O.R. (3d) 321 (Ont. C.A.)

### **Facts**

The Plaintiff was employed as a mechanical engineer with the Defendant for thirty-one years. His employment was terminated without cause, when he was fifty-three years old.

At the time his employment was terminated, the Plaintiff applied for, and began to receive, early retirement benefits under the Defendant's pension plan.

The Plaintiff brought an action for wrongful dismissal. He also claimed damages for loss of pension benefits because, had he worked the notice period, his monthly pension benefits would ultimately have been higher.

The Defendant argued that the Plaintiff failed to mitigate his damages by refusing to move to Ohio to join another division of the company and by establishing a new consulting business which did not initially generate income.

### **Trial Decision**

The Trial Court awarded a notice period of eighteen-months and found that the Plaintiff had not failed to mitigate his damages.

In respect of the damages for loss of pension benefits, the trial judge accepted the Plaintiff's submission that he should receive damages in the amount of the difference between the pension benefits he elected to accept effective the date of his termination and the benefits he would have received had he waited until the end of the notice period. The trial judge reached this finding despite the Defendant's expert evidence that the immediate commencement of the lower pension resulted in a higher present value than the pension would have been worth had it been paid out following the notice period.

### **Court of Appeal**

The Defendant appealed the trial judge's decision with respect to pension benefits and mitigation. No appeal was filed with respect to the length of the notice period.

The appeal was denied in respect of the issue of mitigation. The appeal was allowed in respect of pension benefits.

The Court of Appeal found that when assessing the difference in the value of a pension between the actual date of termination and the date on which employment could have been terminated after proper notice, the Court must take into account pension benefits received during the notice period. When pension benefits received during the notice period are taken into account, an

employee's overall pension package may be better off than had the employee waited to claim his pension benefits after the reasonable notice period. If this is the case, awarding damages for loss of pension benefits would put the employee in a better position than he would have been in if his employment was not terminated.

The Court of Appeal found that the trial judge erred in ignoring expert evidence that by electing to accept the commencement of his pension benefits on the date of his termination, the Plaintiff had increased the present value of his pension. Specifically, the Plaintiff's pension benefits would have been approximately \$110.00 more per month if he had worked the eighteen-month notice period. However, he earned over \$2000.00 per month during the eighteen-month notice period to which he would not have been entitled had he worked during those months. Accordingly, the present value of the benefits he actually received was higher than the present value of the benefits he would have received had he worked during the notice period.