Mediating Wrongful Dismissal Actions:

Inside Tips for Masters

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Introduction :

The purpose of this paper to provide some tips to the Masters of the Ontario Superior Court of Justice about how to more effectively mediate wrongful dismissal actions. I have incorporated the actual text from various Interpretation Bulletins into the paper so that the reader will have an easily assessable reference that can be quoted from or referred to by the Master as they conduct pre-trials or settlement conferences.

The major difference between the type of cases that you pre-try and I mediate is one of timing. I generally mediate these types of disputes between 4 and 8 months after the dismissal. In over 90% of the cases that I mediate no discoveries have been conducted and in a majority of the cases, the parties have not even exchanged Affidavits of Documents. Generally speaking, the parties have exchanged no serious offers of settlement prior to the mediation.

In your world, the pre-trial is being held many months or years after the termination, the parties have conducted discoveries or waived them and hopefully they have had settlement discussions, as in all of the cases that you pre-try the case was already mediated.

These differences can have an important affect on the process used in a early mediation as compared to a late pre-trial:

a) Legal fees would normally be higher at the pre-trial stage than the mediation stage, thus each side has more sunk costs to deal with.
b) Creative ideas like reinstatement and job search assistance are much less likely at a pre-trial
c) The actual trial date is now fixed and in the near future. This will usually bring parties to the table, as the trial is not some far off and vague future event.

The Myth of Tax Free Damages:

One of the most common myths of wrongful dismissal damages is that it is easy to characterize them in such a fashion so as to make them tax-free. This is simply not so.

CRA Interpretation Bulletin IT -337R4 (consolidated) sets out the position of the CRA towards these matters as follows:

Types of Receipts

Damages

¶ 9. Generally, compensation received by an individual from the individual's employer or former employer on account of damages may be employment income, a retiring allowance, non-taxable damages, or a combination thereof. Such a determination is a question of fact, which requires a review of all relevant facts and documentation of each particular case.

¶ 10. Special damages, such as those received for lost (unearned) wages or employee benefits, are taxable as employment income if the employee retains his or her employment or is reinstated.

¶ 11. The definition of a retiring allowance includes an amount received in respect of a loss of office or employment of a taxpayer, whether or not received as, on account or in lieu of payment of, damages or pursuant to an order or judgment of a competent tribunal. As discussed in ¶ 5, the words "in respect of" denote a connection between the loss of employment and the subsequent receipt**. Accordingly, where an individual receives compensation on account of damages as a result of a loss of employment, the amount received will be taxed as a retiring allowance. This applies to both special damages, as well as general damages received for loss of self-respect, humiliation, mental anguish, hurt feelings, etc.**

¶ 12. Where personal injuries have been sustained before or after the loss of employment (for example, in situations of harassment during employment, or defamation after dismissal), the general damages received in respect of these injuries may be viewed as unrelated to the loss of employment and therefore non-taxable. In order to claim that damages received upon loss of employment are for personal injuries unrelated to the loss of employment, it must be clearly demonstrated that the damages relate to events or actions separate from the loss of employment. In making such a determination, the amount of severance that the employee would reasonably be entitled to will be taken into consideration.

Similarly, general damages relating to human rights violations can be considered unrelated to a loss of employment, despite the fact that the loss of employment is often a direct result of a human rights violations complaint. If a

human rights tribunal awards a taxpayer an amount for general damages, the amount is normally not required to be included in income. When a loss of employment involves a human rights violation and is settled out of court, a reasonable amount in respect of general damages can be excluded from income. The determination of what is reasonable is influenced by the maximum amount that can be awarded under the applicable human rights legislation and the evidence presented in the case. Any excess will be taxed as a retiring allowance

In other words, for a damage claim to be classified as tax free, it must exist independently of the dismissal. Thus anything that flows from the dismissal, (i.e. Wallace damages, probably punitive and aggravated damages, compensation for failing to reinstate etc) are taxable , as , but for the dismissal , the damages would not have occurred. Remember that the essence of Wallace damages is that the Court found that there was a duty of good faith in the **manner** of the dismissal. Therefore, from a CRA point of view, these damages are ' in respect of" the dismissal and therefore constitute a retiring allowance, that is , they are taxable.

The key therefore is to find a cause of action unrelated to the dismissal. This could include:

1) Pre dismissal harassment, either human rights based or generalized
2) Defamation
3) Intentional or negligent infliction of mental suffering, if the stated goal is not to get the plaintiff to quit.
4) Harassment under Bill 168 (Occupational Health and Safety Act) or pursuant to a harassment policy
5) Assault
6) Intentional interference in contractual relations
7) Inducing breach of contract, as in this case the defendant is not the employer.

Very few lawyers know how strict CRA is on this issue, or if they do know they and their clients do not seem to care very much. However as Masters of the Superior Court , you should be very careful not to endorse or suggest questionable tax characterizations in a pretrial.

Actual legal fees incurred by the plaintiff in the course of his or her wrongful dismissal lawsuit are not taxed as income as long as the payment is made directly by the defendant to the plaintiff's lawyer.

Prejudgment interest is taxable as interest income, but the employer need not withhold income tax at source.

Once in a while someone is fired before they even start work ,. In this case the damages from flow from that anticipatory breach of contract are not taxable,. (see Schwartz v Canada , [1996] 1 SCR 254.

Legal Costs:

Nothing irritates plaintiffs' more than having to pay their own lawyer. However, defendants also dislike paying the plaintiff's lawyer, let alone their own. Both sides often treat this topic with great emotion, often completely out of proportion to the amount involved.

The parties often have to be reminded of two fundamental aspects of our costs regime: The loser pays part of the winners' fees and the winner pays the balance.

Payment of a portion of the plaintiff's legal fees is the grease in the settlement. The best use of defendant's money is often to help pay the plaintiff's lawyer.

As to how much is usually contributed in a settlement, obviously the amount varies considerably based on numerous factors. I would say that in the majority of the mediations that I am involved with, the mid range of contribution to costs is between $3,500 and $7,500 for a case that did not go to discoveries or have any motions.

EI repayment Issues

The withholding and remittance obligation arises from the following sections of the Employment Insurance Act

Return of benefits by claimant

45. If a claimant receives benefits for a period and, under a labour arbitration award or court judgment, or for any other reason, an employer, a trustee in bankruptcy or any other person subsequently becomes liable to pay earnings, including damages for wrongful dismissal or proceeds realized from the property of a bankrupt, to the claimant for the same period and pays the earnings, the claimant shall pay to the Receiver General as repayment of an overpayment of benefits an amount equal to the benefits that would not have been paid if the earnings had been paid or payable at the time the benefits were paid.

Return of benefits by employer or other person

46. (1) If under a labour arbitration award or court judgment, or for any other reason, an employer, a trustee in bankruptcy or any other person becomes liable to pay earnings, including damages for wrongful dismissal or proceeds realized from the property of a bankrupt, to a claimant for a period and has reason to believe that benefits have been paid to the claimant for that period, the employer or other person shall ascertain whether an amount would be repayable under section 45 if the earnings were paid to the claimant and if so shall deduct the amount from the earnings payable to the claimant and remit it to the Receiver General as repayment of an overpayment of benefits.

Return of benefits by employer

(2) If a claimant receives benefits for a period and under a labour arbitration award or court judgment, or for any other reason, the liability of an employer to pay the claimant earnings, including damages for wrongful dismissal, for the same period is or was reduced by the amount of the benefits or by a portion of them, the employer shall remit the amount or portion to the Receiver General as repayment of an overpayment of benefits.

These sections create a mandatory obligation on the plaintiff to reimburse EI for any EI benefits that he or she received for the same period covered by the settlement. Moreover, no matter what the parties say in their settlement agreement, the settlement monies are

considered by EI to cover the period directly after the loss of employment. Therefore if the plaintiff was fired on January 1, got EI for 6 months, but the settled in July for a payment purporting to cover the time from July 1 to December 1, EI would ignore that clause and claw back 6 months of EI benefits.

The defendant is liable to repay EI if it " has reason to believe that benefits have been paid to the claimant for that period." Sometimes defendants do not ask and do not want to know if the plaintiff is on EI, for if they have no reason to believe then they have no obligation to inquire and withhold.

The test that EI uses to determine if the settlement is earnings for the purpose of EI repayment is different from the test that CRA uses to determine if the payment is taxable. The following is an extract from a publication put out by Service Canada entitled " Digest of Benefit Entitlement Principles " found at
http://www.servicecanada.gc.ca/eng/ei/digest/

required and the compensation exceeds the receipts, the balance would be considered *income* and allocated. Likewise, when the expenditure did not actually occur, the Commission may conclude from the evidence that the money was intended to compensate for the loss of wages and would allocate the entire amount as earnings[7].

When the amount of the expense or cost incurred exceeds the amount that was given in the agreement for a specific purpose, only that portion of a termination payment which was specifically intended to reimburse that expense or cost can be excluded as *income*. In other words, the costs that exceed the amount given by the employer for this specific purpose cannot be claimed to reduce other moneys that are earnings, such as severance pay and vacation pay.

In summary, EI will not treat as earnings, that part of the settlement that is fairly shown to be:

1} Legal fees5.12.11.2 Compensation Other than for the Loss of Income from Employment

Damages for wrongful dismissal are presumed to be compensation for the loss of income from employment, and are therefore earnings arising out of employment, unless it can reasonably be concluded that the money does not represent lost wages or lost employment-related benefits[1]. The Commission

may presume that awards do not usually contain monetary compensation for intangibles, such as, loss of prestige, injury to reputation and emotional upset, unless there is clear evidence to the contrary[2].

Any part of an award for damages, which is not related to the direct and tangible advantages enjoyed by the claimant during employment, is not earnings. Wages and employment-related benefits, such as, premiums paid by the employer for insurance-type benefits can be considered tangible advantages of employment. Therefore an award to compensate for the loss of those wages or employment-related benefits enjoyed during employment is earnings. An award for an intangible, such as mental distress, is not earnings because compensation for the loss of one's health is not compensation for lost wages, nor is it compensation for loss of an employment-related benefit[3]. An award not related to the advantages of employment is not earnings for benefit purposes[4]. The treatment of expenses, such as, legal, relocation and retraining expenses, which may form part of an award, is covered in another section[5].

Frequently claimants will allege that a settlement was not for lost wages, or for other advantages related to employment[6] but to buy peace and avoid a trial[7]; or as a compromise to terminate controversy[8]; or for damages for a loss of career[9] or a change in status[10]. These arguments were unsuccessful for two reasons. First, the name given to a payment does not necessarily define its true nature. Second, the claimants were unable to show that the award was not intended to compensate for the loss of wages and other employment-related benefits enjoyed during employment[11].

5.12.11.3 The EI Process and Damages

When a case proceeds to court or labour arbitration, and the text of the judgement allocates the amounts awarded to various categories, the judgement can usually be relied upon to contain an accurate representation of what the award actually represents[1]. Such clearly worded judgements should not be questioned even if all or part of the award compensates the claimant for damages unrelated to the loss of wages or employment-related benefits. Any moneys paid for the loss of wages and employment-related benefits are earnings. It should be noted that a Consent Order is not a decision of the court made after a hearing but rather it is a ruling confirming agreement reached by the two parties.

When the text of the court or labour arbitration judgement is not specific and simply awards a lump sum, the Commission may assume that the entire award is earnings arising out of employment and the entire lump sum awarded by the court or tribunal, less any applicable expenses expended to obtain the award,[2] such as, legal expenses, is allocated.

When the matter does not proceed to a court or labour arbitration tribunal, and an out-of-court settlement is concluded, the memorandum of settlement and final release may be very general and assign only a final total dollar value for the damages sought. When the memorandum of settlement or final release

is worded in general terms, the entire amount of the out-of-court settlement, less any applicable legal expenses, is considered earnings arising out of employment and allocated.

The final agreement may also be very specific. Memorandums of settlement are written by lawyers. It is their job to respond to the needs of their clients. To benefit their clients they may indicate in the documents that all or most of the money paid by the employer is not for lost income from employment. Keeping in mind that the courts usually restrict themselves to awarding damages for tangibles related to benefits enjoyed during employment, any out-of-court settlement which claims to have little or no concern with lost employment income must be carefully examined.

If the claimant claims that an out-of-court settlement is not for compensation for the loss of wages or other employment-related benefits, the jurisprudence requires that the claimant must show that either the money was paid for some other reason, such as, unpaid wages, moving expenses or retraining expenses or for the relinquishment of the right to be reinstated[3]. This means that the onus is on the claimant to prove that the settlement, or any portion of it, was not paid for lost income from employment. Claims and allegations made in a Statement of Claim are never proof that the employer has agreed to compensate the claimant for anything other than loss of wages.

To exclude money from the category of earnings paid to compensate for the loss of employment income, the claimant must establish that the payment was requested for other reasons and that the employer agreed to compensate the claimant for the injury, damage or expense. Proof may be found in the final release or in the correspondence between lawyers[4]. In addition, the claimant must show that the injury, damage or expense claimed actually occurred and that the payment and the amount were reasonable in light of the injury, damage or expense. For example, if mental distress is claimed, the Commission may reasonably expect that the claimant sought professional help to deal with the distress. If this were not done, the claimant's allegation would be less credible. Receipts for expenses, which the employer agreed in the wrongful dismissal suit to pay for, are adequate proof that the money was not paid to compensate for the loss of employment income and benefits.

The employer must also confirm that the payment was for something other than for lost employment income. A straightforward, clear and uncontradicted statement is only questioned if the employer's confirmation appears to arise out of collusion with the employee, and the intent is to circumvent the purpose of the EI Act. Likewise if the employer's statement appears to be motivated by a desire to accommodate the employee, the out-of-court settlement would be questionable.

Only rarely is any portion of a generally worded out-of-court settlement not considered earnings. These very rare cases happen only when the evidence

clearly demonstrates that the settlement is not for lost employment-related income[5].

5.12.11.4 Legal Costs

The claimant may be awarded or given an amount of money to reimburse the cost of taking legal action in order to obtain termination moneys or to become reinstated. Legal costs or expenses include lawyer's fees, as well as court costs; disbursements and other legitimate expenses directly related to the legal action. As long as the claimant actually had expenses in connection with taking the action against his or her employer, that portion of a payment is not be considered earnings. Money paid by the employer specifically to reimburse legal expenses is not income because it is not intended to pay for lost wages or lost employment-related benefits.

Sometimes the amount awarded may not be sufficient to cover actual legal costs, or no special amount is awarded. The amount of the legal costs, which exceeds an actual award for legal costs, or the entire amount of the legal costs where none was awarded, is deducted from the settlement. These types of expenses or costs are deducted from income because they were incurred for the direct purpose of earning that income[1]. However, if a sum of money is recovered which includes both income replacement and other sums which are not considered earnings due to their nature, the total amount of legal fees paid may not be deducted. Only the amount of the legal fees paid to recover the income replacement portion can be deducted as the legal costs. This amount is obtained using the percentage that the income replacement portion is of the total award amount received. This may be adjusted if the claimant can establish that the amount paid to recover the income replacement portion was higher than the calculated proportional amount[2].

The claimant cannot include the value of their own time or personal expenses, expended to resolve a suit for wrongful dismissal[3]. Costs related to other legal matters such as pursuing an appeal to the Board of Referees are not valid deductions[4].

5.12.13 Moneys paid for the Relinquishment of Reinstatement Rights

Following an award resulting from a grievance or complaint due to his/her dismissal, an employee can obtain a reinstatement order. The right to a reinstatement results either from the federal law (Canada Labour Code), provincial or territorial legislation or from the statutes of a collective agreement. A settlement may then be reached between the parties that the employee gives up the right to be reinstated. The monies paid for the purpose of the relinquishment of reinstatement rights – acquired either through legislation or the terms of the collective agreement – are excluded from earnings[1]. It is not necessary to determine if it is the worker or the employer who initiated the relinquishment process.

Contrary to monies paid in compensation for wrongful dismissal – which are paid to cover the period that the individual would have worked had he/she

not been dismissed, – monies paid for the express purpose of the relinquishment of reinstatement rights are excluded from earnings because these monies cannot be said to be «earned by labour» or «given in return for work done».

It is essential that a right to reinstatement under the federal legislation (Canada Labour Code), a provincial or territorial legislation, or under a contract or collective agreement exist and it must clearly be established that the payment was made to compensate for the relinquishment of that right. However, in cases where the employee does not have the right to ask for reinstatement through either of these recourses, but pursues wrongful dismissal actions through the courts, the damages granted by the Court[2] constitute earnings for wrongful dismissal. A court does not have the authority to issue a reinstatement order where there is no right to reinstatement under a federal, provincial or territorial law or, alternatively, under a contract or collective agreement.

To support a finding that the monies were paid in exchange for the relinquishment of reinstatement rights, the claimant must prove that the following requirements have been met:

- **The right to reinstatement existed;**
- **The employee sought reinstatement;**
- **The reinstatement was obtained and**
- **The monies were paid to compensate the renunciation of that right to reinstatement.**

Compensation obtained through a settlement when no right to reinstatement exist will be considered as a compensation for loss of wages and will be allocated as separation earnings pursuant to Regulation 35 and 36 except where it is demonstrated that parts of the settlement – or the whole of it – was paid due to special circumstances such as reimbursement of legal fees, relocation, retraining costs, job search expenses and damages for pain and suffering[3]. If the right to reinstatement does not exist or if the employee has not acquired reinstatement rights, he/she then cannot be compensated for relinquishing something he/she does not have.

5.12.2.1 Expenses, Costs, and Allowances Paid or Payable by Reason of a Lay-off or Separation

When employment ceases, an employer may make payments in addition to pay in lieu of notice or severance pay[1]. These additional payments may be called expenses, costs or allowances, for example, moving expenses, moving costs, or moving allowances. Although claimants and employers may use the terms allowances, expenses and costs interchangeably, an allowance differs slightly from a straight reimbursement of an actual expense or cost. An allowance is a set amount that is designed to reimburse an anticipated expense or cost associated with employment, or a set amount intended to mitigate the loss of employment[2]. Nevertheless, the same general principles apply whether the expenses are paid during employment or on termination.

The payment of job-related allowances and the reimbursement of job-related expenses and costs are excluded as income when the moneys do not represent a gain or a benefit. On termination of employment, the definition of job-related expenses is expanded to include payments related to the loss of employment. Relocation costs associated with a move to another community, or tuition and text book costs associated with retraining, as well as other moneys specifically paid to reimburse actual expenses related to job loss and re-employment, are intended to mitigate the employment loss and are not income.

Moneys provided as a living allowance while attending a course, cannot be treated in the same way as those provided to cover the direct, specific and actual costs or expenses associated with the termination, such as tuition fees or books, which are associated with the taking of a course. A living allowance is more like a wage or income replacement or income support allowance, and is intended to permit the individual to survive while attending the course. As such, a living allowance paid by an employer is considered earnings paid by reason of a lay-off or separation[3].

The claimant cannot claim an expense for which money was not provided by the employer expressly for that purpose. For instance, a decision to move to another location or to go to school does not entitle the claimant to claim the expense of the move or the cost of the tuition and books if the employer did not expressly intend to reimburse the claimant for these costs. The exception to this rule would be any expenses directly incurred to obtain the termination moneys, such as legal fees, court costs and other legitimate expenses directly related to the legal action[4].

The best way for the claimant to prove that moneys are intended to compensate for an expense is to show that the employer either pays a third party directly for the expense, such as paying a moving company or university, or only reimburses the claimant the actual amount of the cost or expense when bona fide receipts are presented. The employer's statement to this effect is generally sufficient and receipts are not required.

When the employer gives the employee a lump sum that is specifically intended to reimburse an expense or cost, the claimant must demonstrate that the cost or expense actually occurred by providing receipts. An exception to providing receipts would be for a relocation. Receipts are not required when the move, which the employer intended to compensate, actually occurred and the allowance paid by the employer is reasonable under the circumstances. Even when the claimant is able to save by reducing the expense or cost, the payment is not considered income. For example, the employer may calculate a moving allowance based on hiring a moving company, but the employee may rent a truck to move, and pocket the difference. As long as the employer based the payment on a reasonable estimate of the expense or cost, the difference is not considered to be a gain or a benefit. However, in the situation where the claimant moves to a closer location than that which the employer intended to

reimburse, only the actual cost of the move can be considered; the balance is considered income. If the claimant does not move at all, then a benefit has accrued to the claimant because there was no expenditure. The entire amount would therefore be considered earnings paid or payable by reason of the lay-off or separation and allocated[5].

There may be situations where payments are made for job search and job training expenses or costs which have not yet been incurred because the claimant did not have the funds to incur these expenses prior to receiving the moneys from the employer. In these situations, the claimant must demonstrate that there is a genuine intent to spend the moneys for the purpose for which they were paid in order that these moneys not be considered as earnings paid or payable by reason of the lay-off or separation[6].

If the amount paid by the employer appears excessive in relation to the intended expense, or there is reason to doubt the validity of the payment, receipts would be required as proof of the expenditure. Excessive means exceeding the usual, proper, or normal and implies an amount too great to be reasonable or acceptable. When receipts are required and the compensation exceeds the receipts, the balance would be considered income and allocated. Likewise, when the expenditure did not actually occur, the Commission may conclude from the evidence that the money was intended to compensate for the loss of wages and would allocate the entire amount as earnings[7].

When the amount of the expense or cost incurred exceeds the amount that was given in the agreement for a specific purpose, only that portion of a termination payment which was specifically intended to reimburse that expense or cost can be excluded as income. In other words, the costs that exceed the amount given by the employer for this specific purpose cannot be claimed to reduce other moneys that are earnings, such as severance pay and vacation pay.

In summary, EI will not treat as earnings, that part of the settlement that is fairly shown to be:

1} Legal fees
2) Mental distress or pain and suffering if accompanied by evidence of medical care
3) Reimbursement of job search, relocation or retraining expenses
4) Damages for loss of dignity, self worth and reputation
5) Paid in lieu of an existing right to reinstatement of employment

Elements of compensation or what is a month worth:

When it is all said and done , 90% of the money in a wrongful dismissal action relates to the notice period. One extremely important element of the notice period is determining what one month of notice is worth. After that number is determined, you simply multiply it by the number of months of notice .

I always try to first get an agreement on what one month of notice is worth before I even talk of the notice period, because otherwise you run the risk that you think you have a deal on 7 months notice, only to find that the parties are way apart on what they each believe one month is worth.

There are several troubling and difficult aspects of compensation that come up in wrongful dismissal cases. Here are some of the ways that I deal with this .

1) Use of T4: Many compensation arrangements have a myriad of compensation items, most of which show up on a T4.:salary, bonuses, overtime , shift differentials, commissions, car allowances , employer paid STD, vacation pay, value of some benefits etc.

   Averaging the last 2 or 3 years T4's can be a useful way of determining an income over the notice period, if neither party is arguing that there would have been some dramatic change in the income over the notice period. However when using a T4 average you must be careful not to double count , that is to say add the amount of commissions to the T4 amount when it is already included.

   Having said that there are elements of compensation not included in the T4, these items should be added to the T4 amount to come up with a proper amount for calculation wrongful dismissal damages. This would include most health and welfare benefits, vested but unexercised stock options, club memberships and professional fees.

2) Parties often allege that past historical compensation figures are not helpful because the employee would have either made much

more of much less over the notice period because of different economic conditions. It is perfectly legitimate to calculate damages in this fashion, if the information is available and not mere speculation (see Chann v RBC Dominion Securities 2004 CarswellOnt 3341) This case further stands for the proposition that the fact of the termination itself cannot be used as a factor in lowering a bonus, even where the bonus plan itself refers to retention as one of the reason for the plan . In that case the defendant presented evidence to show that the overall bonus pool had shrunk by a certain percentage in the year after the termination. The judge reduced the notice period bonus by the same percentage and rejected the plaintiffs' argument for a backward 3 year average.

At mediation we often do not know what the bonuses will be in the future as the mediation may be held within 3 to 6 months of the termination,. A way to avoid speculating on this is to negotiate a " ride- along " clause, which says that the plaintiff will get his or her bonus at the same time as the other employees on an agreed level, (based on his or her performance being rated as satisfactory or based on the average of his or her agreed peer group).

Don't forget what I call the " stub period". If the bonus year is 2011 and the notice period is 12 months, then the calculation for the bonus payout is 16 months: the stub period , which the employee actually worked at the defendant , from January 1, 2011 to May 1 2011 and the notice period from May 1 2011 to April 30, 2012.

3) Commissions :

Calculating commissions over a notice period can be a tricky matter.

Assume the plaintiff has a salary of $50,000 and a commission of 5% on sales that he or she makes, payable once the client pays invoice. However, once the deal is closed, the salesman's job is complete, as he has no involvement with the customer after the order is accepted. In the last 4 calendar years his or her total income was between

$75,000 and $80,000. Assume also that the notice period is 12 months and that during that 12 months the commissions earned would have been $55,000 because you are able to track the sales were made by the plaintiff's replacement to the same group of clients.

One approach, presumably put forward by the employer, is that we can only look at the plaintiff's historical average, which is $77,500. You cannot look at the $55,000 because that represented the sales by the plaintiff's replacement, who has superior selling skills. In fact the reason the plaintiff was fired was because he was getting lazy and not going after new sales to existing clients, while that is exactly what his replacement did.

The plaintiff will say no way. I worked hard for 4 years to build sales and it only after I left that the company vastly improved the warranty on the product, and that is why sales went up through the roof. In fact if I had been there, because of my long standing relationship with my clients , I would done even better than my replacement. Therefore I want $85,000 for commissions that I would have made had I worked another year. Furthermore, I would have sold hard to the last day and there would have been at least another $50,000 in sales in the pipeline , which I would have received over the next 9 months following my notice period as clients paid their invoices.

There is legitimacy to all these arguments, depending on the facts. If sales went up after the termination, and they would have done so even if the employee had remained on the job, then he should get the recognition over the notice period. Of course, if sales actually went down during the notice period then the parties will exchange arguments.

From a mediation point of view, especially when neither side has any convincing proof as what would have happened if the plaintiff had been permitted to work during the notice period, using a historical average is often the answer.

However this still leaves the issue of the pipeline. In the above example , there is an important difference between when a commission is earned and when it is paid. In the above example, as the salesman's' job is done once the order is taken, one could say he

has earned his commission, but he is not entitled to sue for the payment until the order has been shipped and paid for .Therefore at the time of the order being taken, the defendant has a contingent liability to the salesman with respect to the commission.

So if the employee had been permitted to work out his notice period, on his last day of work there would probably be commissions which he has earned (as the order had been received by the company prior to the last day of the notice period) but for which he is not entitled to be paid for until the order has been filled and the invoice paid.. These are post notice period pipeline commissions, to which he the ex-employee is also entitled to, even though he had nothing to do with the sale. (See Prozak v Bell Telephone Company , 1984 CarswellOnt 752 , Ontario Court of Appeal)

If the salespersons' duties went beyond the actual obtaining of the order. (sales follow-up, delivery, post delivery issues,) then pipeline income should be reduced by virtue of the fact that he could not have done these other tasks after the expiry of the notice period and because the company presumably paid another employee to do these duties. Note that this sharing of the commissions does not apply to after sales follow-up that occurred within the notice period as these tasks would have been preformed by the plaintiff if he or she had been able to work out the period of reasonable notice .

4) Benefits : In Davidson v Allelix (1991) 39 CCEL 184, the Ontario Court of Appeal made it clear that in Ontario the rule is that benefits are valued at the cost to the employer, not the expense incurred or not incurred by the plaintiff to replace those benefits. There should be some evidence to determine this value as some judges will dismiss the claim altogether where there is no evidence of the cost, even though everybody must know that these benefits are not free. As this evidence e in solely in the possession of the defendant, it seems somewhat harsh to punish the plaintiff for not providing the Court with information under the control of the defendant .

In mediations I usually find that a skinny benefits package usually is claimed by the employer to cost between $150 and $350 per month, whereas a better package usually comes in at about 10% of base

where that base salary is less than $100,000. This 10% usually includes some sort of pension benefit. Plaintiffs always ask for 15% but usually are quite happy with 10%.

Determining Reasonable Notice .

As we all know there is no Rule of Thumb that says you get one month of notice for every year of employment. In one of many papers on this topic I reviewed what correlation there was.

In my article entitled Revisiting Reasonable Notice Periods in Wrongful Dismissal Cases, 2006 Edition 53 C.C.E.L. (3d) 60, I determined that when we just look at length of service, the cases show the following relationship between reasonable notice and length of service:

- How many Months per Years of Service

Years of Service	Months per Year of Service
.6 to 2.5	2.6
2.6 to 5	1.4
6 to 10	1.1
11 to 15	0.9
16 to 20	0.8
21 and 25	0.7
26 and 30	0.6
31 and 35	0.6
36 and 40	0.6

In other words, the average 10 year employee would get a reasonable notice period of 11 months (10 years x.9 months per year of service) and the average 28 year employee would get a notice period of 16.8 months (28 years x.6 months per year of service.

In a ground breaking case from our Court of Appeal called Di Tomaso v Crown Metal Packaging Canada LP, 2011 CarswellOnt 5356, Mr Justice MacPherson said as follows:

27 Crown Metal would emphasize the importance of the character of the appellant's employment to minimize the reasonable notice to which he is entitled. I do not agree with that approach. Indeed, there

is recent jurisprudence suggesting that, if anything, it is today a factor of declining relative importance: see Bramble v. Medis Health & Pharmaceutical Services Inc. (1999), 175 D.L.R. (4th) 385 (N.B. C.A.) ("Bramble") and Paulin c. Vibert (2008), 291 D.L.R. (4th) 302 (N.B. C.A.).

28 This is particularly so if an employer attempts to use character of employment to say that low level unskilled employees deserve less notice because they have an easier time finding alternative employment. The empirical validity of that proposition cannot simply be taken for granted, particularly in today's world. In Bramble, Drapeau J.A. put it this way, at para. 64:

> The proposition that junior employees have an easier time finding suitable alternate employment is no longer, if it ever was, a matter of common knowledge. Indeed, it is an empirically challenged proposition that cannot be confirmed by resort to sources of indisputable accuracy.

Unfortunately the Court did not go as far as Bramble did , which said that the Court must have empirical evidence before it on the actual period of time that a certain class of employees will normally remain employed before this Bardal factor can be considered. In the Bramble world, character of employment is virtually irrelevant. At least now in Ontario it should not be used to lessen the notice period for lower wage employees.

As the law now stands after DiTomaso, I submit that length of service is the most important factor, age secound and character of employment a distant third. Some Courts give lip service to the other Bardal factor of 'the availability of comparable employment in the market." However I rarely see anybody present actual evidence on this issue. To do in any convincing manner would require the introduction of expert evidence. There is rarely enough money in a wrongful dismissal case to pay the lawyers, let alone experts. In any event what more convincing and relevant evidence could there be of " market conditions" than the actual time a diligent plaintiff took to find comparable employment. How ever we all know that the one thing the Court never actually considers is the actual period of time this actual plaintiff took to find a job. Rather we create the illusion of what a reasonable period of time that it should

take for such a person to find a job, based not on any actual empirical or scientific evidence , but rather on a serious of largely subjective assumptions that have never actually been tested to se if they are accurate.

For a further rant on my personal pet peeve , see
A New & Improved Theory of Reasonable Notice for Wrongful Dismissal after Honda Canada Ltd. v. Keays

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On the other hand our same Court of Appeal tells us that for senior executives with short service it is important not to overemphasize the short service and undervalue the level of employment . So in Love v Acuity, 2011 CarwellOnt 1060, our Court of Appeal increased the 5 month notice period awarded at the trial to Mr Love (50 years old, Vice President , two years and seven months service) to an alarming 9 months notice . Here is the rationale.

18 In my opinion, the trial judge's determination of the appropriate period of reasonable notice reflects error in principle in three respects.

19 First, it overemphasizes the appellant's short length of service. While short service is undoubtedly a factor tending to reduce the appropriate length of notice, reference to case law in a search for length of service comparables must be done with great care. The risk is that while lengths of service can readily be compared with mathematical precision that is not so easily done with other relevant factors that go into the determination of notice in each case. Dissimilar cases may be treated as requiring similar notice periods just because the lengths of the service are similar. The risk is that length of service will take on a disproportionate weight.

20 In my view, that appears to have happened here. The two cases from which the trial judge drew guidance in awarding 5 months were cases in which the length of service was comparable to the appellant's and the notice period was assessed at 4 and 5 months respectively. However these cases can provide very little guidance if one looks at other important factors. They were not cases involving a senior executive reporting to the chief executive officer. In neither case was

the employee an owner of the business. In both cases, the employee's average annual compensation was a small fraction of the appellant's. The fact that these employees were awarded 4 and 5 months' notice is of little help in deciding what was appropriate for the appellant.

21 The second error is the under-emphasis on the character of the appellant's employment. To describe it as a senior vice president holding a senior level sales position but not supervising others ignores a number of relevant aspects of the appellant's employment. He was one of only two senior vice presidents. He reported directly to the chief executive officer. He was responsible for an important part of the respondent's operation, namely the investments of its institutional clients. He received significant average annual compensation and was one of nine owners of the company. He was clearly a high level employee, something that this court has said favours a longer notice period: see Cronk v. Canadian General Insurance Co. (1995), 25 O.R. (3d) 505 (Ont. C.A.).

22 Third, the trial judge gives no consideration at all to one of the Bardal factors, the availability of similar employment. Both his substantial average annual compensation and the possibility of equity participation in his employer were important aspects of the appellant's employment. Both are relevant in assessing similar employment opportunities: see Belzberg v. Pollock (2003), 10 B.C.L.R. (4th) 255 (B.C. C.A.) for an example of the relevance of equity ownership in this assessment. Here both considerations suggest that obtaining similar employment would be harder rather than easier. This Bardal factor therefore clearly points to a longer period of reasonable notice.

23 Taking these errors together, I conclude that the trial judge's assessment of five months is the product of error in principle. Moreover, the award is sufficiently wanting that this court is warranted in substituting its own figure. Considerably more than tinkering is required to adequately reflect the factors under-emphasized or ignored.

24 In my view, the character of the appellant's employment, viewed fully, and the challenge of finding similar employment both require a

> significantly longer period of notice. Giving appropriate weight to these factors, and keeping in mind the appellant's age and short service I would set aside the 5 months awarded at trial and substitute a period of 9 months.

Now you have a good idea why we all spend so much time and effort trying to guess what a judge might award as reasonable notice. The best one can do is look at all the relevant cases and try to get the parties to agree on something like the average.

Punitive ,Aggravated, Wallace and other Types of Non Pecuniary Damages

Since Keays v Honda this is pretty well a dead subject in mediations. Plaintiff's don't waste a lot of time on this because the SCC has virtually made it impossible to actually get these damages. First you have to show that the conduct was so outside the pale that it is deserving of extra damages. That is not the big problem. Our Court of Appeal however virtually requires that you also have medical evidence to support the damage claim as all of these claims seemed to have morphed into a mental distress , personal injury type of claim . However, you do not get general damages for the mere fact of the dismissal itself, raher it must be tied to the manner of the dismissal.

How do ever get a doctor in an expert report to opine on whether the mental distress that the plaintiff suffered following his dismissal flowed from the actual loss of employment or from the manner of the dismissal?.

Picture this first scenario. Sam is a 30 year foreman making $50,000 a year, with a spouse who works part-time at Wal-Mart and has two kids in school. Sam is fired and given his ESA minimums, which in this case are only 8 weeks because he unfortunately worked for an employer who has a payroll of less than 2.5 million dollars in Ontario. At the termination meeting the boss says that he is letting Sam go because he knows, but he can't prove, that Sam stole a wrench last year. Sam goes home , tells the wife and kids, and then faces bankruptcy and depression because he were living paycheque to paycheque and will lose his house in 3 months.

Change only one fact. In scenerio 2. The boss says, “Sorry Sam , Head Office said I had to let one foreman go and since you make the most money, we chose you. It is nothing personal , that’s business. Good luck. Say hello to Marge and kids for me and tell them how sorry I am “

Does anyone honestly believe that Sam in scenario two is going to suffer less mental distress than in scenario one?

Clearly the distress is being caused by the fact of the dismissal and the fact that he is not getting anything close to his proper severance so that he now faces immediate ruin. If the employer had up front paid him his proper common law entitlement, then Sam would undoubtedly be less distressed. However, the Courts have traditionally not found that refusing to pay a dismissed employee his or her common law entitlements at the time of dismissal to be conduct warranting damages for mental distress. Not paying someone what he or she is legally owed is par for the course, however sending the termination letter home in a cab or firing someone just before Christmas is outside the pale.

Personally I would rather get the proper severance money sent to my home in a cab on Yom Kippur than have to sit in some office and listen to a 20 something HR type tell me how sorry the Company is that they have to let me go because the factory is being moved to the a country where they can pay $1.00 per hour to a grateful workforce.

If you want to see the devastation that can flow from a “properly handled “ termination watch George Clooney in “ Up in the Air “.

As a closing note, one of the most difficult situations in a mediation is when the parties are criticizing what they see as the unfairness or illogic of certain areas of employment law. I often agree with tem but retreat to the line that “I do not make the law, I am only here to help you get a settlement within the law as it exists. “

It usually works, but it doesn’t always feel good saying it.