ISSUE 42- MAY 2014

WL UPDATE

WHITTEN & LUBLIN
Employment Lawyers

Whitten & Lublin is a team of legal experts who provide practical advice and advocacy for workplace issues.

DOUBLE-DIPPING ON PENSION AND SEVERANCE

Employers are rarely happy when they need to make a large payment to a terminated employee in lieu of notice. For long service employees, reasonable notice often approaches 24 months. It is even worse though, when the employer has to pay the employee twice: once through pay in lieu of notice, and once through pension for the same period. IBM experienced this unhappy situation recently, when it terminated Richard Waterman.

Mr. Waterman was 65 years old when he was terminated, and had worked for IBM for 42 years. After he was terminated by IBM, Mr. Waterman began to draw his pension benefits under IBM's defined benefit pension plan. He was fully entitled to do this, and in fact IBM insisted that he start drawing his pension benefits. IBM then claimed that payment of pension benefits meant it did not need to provide Mr. Waterman with any pay in lieu of notice. IBM was wrong, which was confirmed by the trial judge, the Court of Appeal, and eventually the Supreme Court of Canada.

It is easy to sympathize with IBM. Mr. Waterman got a windfall, 'double-dipping' on both a severance and a pension. This sense of grievance may explain why IBM kept appealing, to finish 0 for 3, losing at all three courts. Normally, double-dipping is not permitted. Employees are only supposed to receive the money they would have earned if they have been given working notice. If Mr. Waterman had been given lengthy working notice instead of being quickly terminated, he would not have been able to draw his pension until that finished. Why was he allowed to keep the pension and get severance for the same time? Pension benefits fall into what is called the "private insurance exception". Mr. Waterman contributed toward the pension (through his time and service) and the pension benefits were not intended as protection against income loss from termination. There were also other reasons why the courts were not inclined to let IBM deduct Mr. Waterman's pension benefits, one of them being that it would encourage employers to get rid of employees who were eligible for pension. The Supreme Court made it very clear that IBM had only itself to blame. If Mr. Waterman's employment contract had said that he wasn't allowed to double-dip on his pension and severance, that would have been the end of things.

The workforce is aging and mandatory retirement has been eliminated in most parts of the country. There will be more and more employees with a chance to double-dip, collecting both pension and severance. There are simple solutions though, many of which will also save employers money in general:

- Use well-written employment contracts that limit employees' entitlement to pay in lieu of notice. In Ontario, this tool is especially powerful when terminating an employee who is eligible for an unreduced pension, because the Employment Standards Act will not require statutory severance pay;
- Consider amending the terms of the pension plan to expressly exclude double-dipping;
- Use working notice. Employees normally cannot collect a pension while they are still working for the employer. If the employee asks to instead receive pay in lieu of notice, offer to pay only the difference between the pension payments and full regular salary, instead of both.

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LATEST NEWS

Daniel Lublin appeared on CTV CanadaAM where he was interviewed on the of subject whether employees can be fired for offensive comments they made in private. His interview can be watched here.

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David Whitten appeared on the Lang & O'Leary Exchange discussing unpaid overtime and who would be eligible for it. His interview can be watched here.

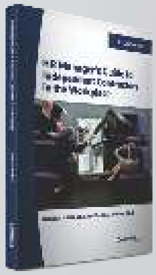
LAW BLOG

Read more at http://blog.toronto-employmentlawyer.com/

PUBLICATION

HR MANAGER'S GUIDE TO INDEPENDENT CONTRACTORS IN THE WORKPLACE

Available for purchase from Carswell's store.



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