

Lump Sum or Salary Continuance – Who Decides How Termination Payments Are Structured?



Employees who leave a company often prefer to receive their termination payments all at once in a lump sum. But companies may prefer to pay out the money over time in the form of a salary continuance. Does the employer get to decide the form of payment? The answer depends, in part, on the kind of payments involved. For example, wages in lieu of notice are due upon termination as a lump sum under some provincial employment standards laws. Another relevant consideration is what the contract says—or doesn't say—about the form of termination payment. And even if employees have a right under law or contract to receive the termination payment as a lump sum, they might waive, that is, give up that right voluntarily through their words or actions. Here are two cases illustrating how the interaction of all these factors can lead to different results in seemingly similar situations.

Employee Is Entitled to Lump Sum

Here's a case where a departing employee was found to be entitled to a lump sum termination payment rather than just a salary continuance.

Situation

A British Columbia software company terminates its CEO without cause. Under the employment agreement, the CEO is entitled to one year's salary upon termination and continuation of employee benefits for six months. The agreement stipulates that these amounts are instead of, not in addition to, wages in lieu of notice or other payments due the CEO under the BC Employment Standards Act. The contract also allows the software company to pay all amounts in "bi-weekly installments or in a form to be determined by the employee." The company offers the CEO a salary continuance. The CEO sues demanding a lump sum payment of the nearly \$200,000 he's owed.

Ruling

The BC Supreme Court orders the company to pay the entire owed amount to the CEO in a lump sum.

Explanation

The company argued that the CEO didn't have any right to demand a lump sum. The company interpreted the CEO's right to determine the "form" of payment under the contract as the right to choose payment via cash or shares of stock, rather than the right to be paid in a lump sum. But the court disagreed. Payment in bi-weekly installments or a form determined by the CEO meant that the CEO had the ultimate authority to decide how his payments upon termination would be structured. And since the contract didn't violate any of BC's employment standards laws, the court ruled that it was valid and enforceable.

[McDonnell v. Intrinsyc Software, Inc.](#), 2003 BCSC 1084 (CanLII).

Employee Is Entitled to Salary Continuance

In this case, the departing employee who sought a lump sum termination payment had to settle for a salary continuance.

Situation

An Ontario fixtures manufacturer fires an employee after 17 years of service. His termination package includes eight weeks' wages in lieu of notice, 17 weeks' statutory severance pay, and another 17 weeks of pay for good measure. The Ontario *Employment Standards Act* requires lump sum payments of termination and statutory severance pay. But the manufacturer pays all amounts to the employee in the form of a salary continuance. After receiving the full 42 weeks' worth of wages, the employee sues, arguing that he's entitled to the money in a lump sum.

Ruling

The Ontario Labour Relations Board refuses to require the manufacturer to pay the amount in a lump sum.

Explanation

If you can believe it, the employee in this case actually argued that the manufacturer should pay him twice because it failed to pay him a lump sum the first time around. Although the Board brushed aside the demand for double payment, it did rule that the employee was entitled to be paid a lump sum for wages in lieu of notice and statutory severance pay under the ESA. But the employee still lost the case. Why? Because the Board found that he had waived his right to be paid in a lump sum by accepting the 42 weeks' of salary continuance payments. If the employee insisted on asserting his right to receive a lump sum, he should have sued right away before accepting installment payments, the Board explained.

[Nash v. Pan-Oston Ltd.](#), 2002 CanLII 15925 (ON LRB).